Testimony of

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"The U.S. Intellectual Property System and the Impact of Litigation Financed by Third-Party Investors and Foreign Entities"

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Chairman Issa, Ranking Member Johnson, and Distinguished Members of the Subcommittee:

Thank you for this opportunity to provide testimony today on "The U.S. Intellectual Property System and the Impact of Litigation Financed by Third-Party Investors and Foreign Entities."

My name is Donald Kochan, and I am a Professor of Law and the Executive Director of the Law & Economics Center at George Mason University's Antonin Scalia Law School in Arlington, Virginia. Across my now 22 years in academia, I have researched, studied, and written scholarly analysis of our tort system, including the incentives surrounding litigation and the operation of our civil justice system, among other topics. I have also studied and taught courses on a variety of topics, including most relevant for today's discussion courses on Federal Civil Procedure, Federal Courts, and State Constitutional Law (including the operation and authority of state courts). My research and teaching in law and economics also contribute to my understanding of the incentives involved in third party litigation financing to be discussed below. Finally, in my role over the past four years as Deputy Executive Director and now as Executive Director of the Law & Economics Center—a non-profit educational institution that provides judicial education to an average of more than 650 state and federal judicial attendees every year—I have been in a privileged and unique position to learn the practicalities of court operations and absorb judicial insights, including as it relates to today's topic, through my regular interactions with these judges.

My testimony today represents my personal opinions and not those of George Mason University, the Antonin Scalia Law School, the Law & Economics Center, or any other organization with which I am affiliated.

To summarize, in this testimony, I will: (1) provide a brief introduction to the scope of third party litigation financing ("TPLF") in today's civil justice system; (2) highlight a few of the most important concerns associated with this developing channel of investment, including a brief analysis of the overall lack of disclosure creating far too many known unknowns and unknown unknowns about the impact of TPLF, as well as a brief discussion of the risks of undue and

dangerous disruption of our civil justice system through foreign influence; (3) explain why the traditional arguments supporting a market for developing innovative investment vehicles do not obtain when investing in outcomes generated by courts for financial speculation or for other strategic purposes rather than to right wrongs; and (4) offer insights from the field of law and economics on why TPLF financiers have an incentive to not just invest in particular cases but also to fund rule-changing litigation that expands tort liability (i.e., increases the scope and number of available vehicles for payouts from TPLF investments) for private profit rather than for public good.

We have the finest court system in the world. And that system is designed to help facilitate market transactions by adhering to the rule of law and creating forums for the peaceful and just resolution of disputes. There is a direct correlation between investors willingness to invest in a country and the confidence and trust they can have in the court system of that country being fair and accessible. Thus, (5) the final part of this written testimony will examine how the new TPLF threatens the ability for our court system to offer those attributes by converting the civil justice system into a speculative market and by flooding the courts with cases gambling on potential payouts. **If the conclusion of my testimony could be summarized in one sentence, it would be this:** ***We need to maintain a civil justice system outside the market if we are to preserve the civil justice system as a predictable, neutral, and accessible system that serves the market.*** **Put another way,** ***in order to preserve the effectiveness of our nation's courts to serve as necessary and neutral forums that facilitate the market, the court system must be insulated from market forces.***

Introduction

Third party litigation financing ("TPLF") has become a major force in the litigation system.[1] While early forms of TPLF emerged to provide funding to help those who could not afford to file claims in court—in other words where direct support was provided in a consumer market for a type of loan—the current TPLF market typically involves sophisticated funders with goals quite distinct from those origins.[2] What has emerged and is growing at dramatic speed is a major commercial market with funding as a vehicle for investment or as a means of achieving other strategic goals of the funder separate and apart from concerns about providing aid to individual litigants seeking access to justice. Nonetheless, the current TPLF funders of every type seek to deploy that powerful "access to justice" narrative to defend TPLF of all types.

Seeing past that mask to reveal the true features of TPLF should be one goal of this Subcommittee and of the public education that emerges alongside it. That narrative is used to cast TPLF in a very public interested way and meant to diffuse further inquiry into its potential to serve the strategic interests of private individuals at the expense of the public and the civil justice system. Indeed, I have regularly heard from judges and others with whom I have spoken on this matter, in one form or another, a refrain of "isn't this just an access to justice issue?" And, I have regularly heard responses of shock from these same sophisticated legal players after responding to that question by providing a fuller picture of the market to these audiences through

[1] See, e.g., U.S. Government Accountability Office, GAO-23-105210, Third-Party Litigation Financing: Market Characteristics, Data, and Trends 11-12 (Dec. 2022).
[2] See, e.g., Leslie Stahl, Litigation Funding: A Multibillion-dollar Industry for Investments in Lawsuits with Little Oversight, CBS'S "60 MINUTES" (Dec. 18, 2022);

lectures and panel presentations that explain the profit-seeking TPLF investment games being played within their own court system.

The Scope of the TPLF Machine Today

The TPLF ecosystem grew from the consumer loan market to business-to-business transfers. It then moved into areas of litigation where funders found ways to achieve financial or strategic gains in specific areas of law, with intellectual property—particularly patent disputes and patent troll litigation—being one of the first big playing fields. Modern TPLF has moved fast from simply providing loans to consumers to major investments in cases of mass torts, products liability, environmental contamination, securities fraud, data breaches, false advertising, consumer deception, intellectual property, and more.

In TPLF, just like when investors place their money in stocks or commodities, funders see litigation, with the potential for large monetary judgments or settlements, as an investment vehicle. In modern TPLF, the typical third party bankrolling litigation expects a return on their investment by getting a cut of any award or settlement received by their funded plaintiff. In this way, TPLF functions much like contingency fee arrangements with attorneys who take on a case in return for a cut of the ultimate award. But with TPLF, the resources to bring the lawsuits are made by, and the percentage payouts are going to, sophisticated non-attorney investors who are typically in it just for financial gain. And, these funders develop diverse portfolios of litigation, assess and spread risk, and have an interest in asserting hard or soft controls during the litigation to maximize the return on their investments. At times, funders may be separately interested in supporting the litigation for competitive purposes—whether commercial or geopolitical in nature.

TPLF funders include hedge funds, specialty investment firms, pension funds, and other financiers. The funders themselves have investors in their business plan as well, drawn from a wide range of individuals looking to make money or exploit the judicial system for some other kind of strategic gain. Critical to the scope of this hearing, there is wide agreement that sovereign wealth funds are involved, with the extent of that involvement clouded by the lack of a disclosure regime. For foreign adversaries, the payout might involve something more nefarious than financial returns on investments. Indeed, as discussed in more detail below, TPLF can be a conduit for weaponizing the courts for foreign strategic goals.

The biggest finance companies involved in TPLF each self-report that they are investing hundreds of millions of dollars in pursuit of profits from litigation outcomes.[3] They do not disclose the cases which they fund. They also do not disclose the investors in their funds that then fund the litigation.

Increasingly, too, we see law firms accepting financing from TPLF funders to offset costs of running their law firms. The funders take a stake in specific cases, categories of cases, or even larger firm-wide case portfolios.

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[3] *See, e.g.*, Sara Randazzo, *Litigation Financing Attracts New Set of Investors: Pension funds, others invest in portfolios of commercial lawsuits*, WALL ST. J., May 15, 2016, available at https://www.wsj.com/articles/litigation-financing-attracts-new-set-of-investors-1463348262.

While the full extent of the industry is neither known nor knowable given the lack of a disclosure regime, it is widely accepted that the litigation funding industry is a multi-billion dollar one, with at least $15 billion worth of investments in commercial litigation in the United States.[4]

We know all of this at a matter of generality, but truthfully the investment market for TPLF is still a pretty dark black box. There are many known unknowns—things we know we do not know about this market. For example, we know we do not know all of the cases within which TPLF is present. We know we do not know in any particular case whether TPLF is present unless the parties are in one of the very few jurisdictions that requires disclosure. Even when we know a particular funding entity is present, we then usually know we do not know who the investors are that fund most of the funders.

As an academic researcher, it is indeed almost impossible to do any serious empirical research on the scope or impacts of TPLF on the civil justice system because the absence of disclosure means a complete absence of data from which to evaluate the impacts. I have often quipped that some scholar should write a law review article about why they are not able to write an empirical law review article about TPLF.

Because of the lack of transparency, I fear there are also many unknown unknowns—things that we do not know we do not know. And that should scare us. This is an increasingly important market capable of having and potentially already having profound impacts on the civil justice system. Yet it operates in the shadows. But we needn't walk in the dark. A robust system of disclosure can transform these known unknowns and some unknown unknowns into known knowns. That transparency goal should guide the first stages of TPLF reform.

A Lack of Transparency

TPLF firms are not regulated in any way at the state or federal level that requires the funders to reveal their investors or the cases in which they invest.[5] Nor are the funders required to disclose the terms of the contracts that they enter into with the private litigants who they finance, leaving us knowing little about what level of control these funders are demanding they be empowered to assert during litigation or in settlement negotiations.[6] Because the world cannot examine these contracts, we also do not know the extent to which funders (or their investors, including foreign investors) are demanding access to discovery documents that the litigants they are funding might be entitled to see in any particular piece of litigation. Even more concerning is that, in this darkness, the adversaries in such litigation—who do not presently have an enforceable right to know whether financing is present for their opponent nor the conditions on it—may not even know the risks of third-party eyes on their documents or third-party interference in settlement negotiations. Judges, who also remain oblivious if this all occurs in

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[4] *See, e.g.*, U.S. Chamber Institute for Legal Reform, What You Need to Know About Third Party Litigation Funding (Feb. 2023).
[5] David H. Levitt with Francis H. Brown III, Third Party Litigation Funding: Civil Justice and the Need for Transparency, DRI CTR. FOR L. & PUB. POL'Y, THIRD PARTY LITIGATION FUNDING WORKING GROUP (2018).
[6] *See, e.g.*, Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C DAVIS L. REV. 1073 (2019).

the shadows, might also react differently if they knew financing was present in their cases. For example, they might issue protective orders alongside discovery to ensure third parties cannot see sensitive documents. Or, they might evaluate proportionality of discovery costs differently if they had a true sense of the respective parties' resources. They might manage settlement negotiations differently too if they could call all the parties who are true decisonmakers for purposes of settlement into the courtroom. But they cannot demand TPLF funders with control powers into the courtroom if they do even know that these ghosts exist in the case.

Because disclosure of TPLF activity is nether required nor a norm generally, information about the presence or details of TPLF in particular cases just never materializes in most court proceedings. While an argument can be made those portions of the Federal Rules of Civil Procedure, and state corollaries to those rules, empower judges to demand disclosure or make inquiries about the presence of TPLF in cases before them, there are no specific rules directly governing TPLF applicable to the federal courts and in most state court systems. Consequently, in most state and federal courts, there is no mandatory disclosure requirement for parties to reveal whether they are backed by third party litigating financing. A very few courts have created standing orders, a few have issued local rules, and some judges have inquired whether financing exists in particular cases. These courts have read the rules of procedure or their inherent authority to manage their courtrooms as empowering them to make those inquiries.

On the legislative front, a very few states—like Montana, Louisiana, Indiana, and West Virginia—have made legislative strides, with varying success, to require the disclosure of TPLF in some or all cases in their state courts. And, as this Subcommittee knows, a few bills have been introduced in the U.S. Congress designed to force disclosure of some or all types of TPLF in federal cases, although no legislation has passed.

But beyond these presently isolated circumstances where judges or legislatures have created TPLF disclosure obligations, quite often, judges simply never think to ask. Or, even when judges might know about TPLF in a case, they sometimes nevertheless remain of the belief that it is not relevant to ask whether financing is present. No matter what judges decide to do with the knowledge, it is imperative that they be better educated about the TPLF ecosystem—including to better understand all the reasons the presence of TPLF *is* relevant to the cases on their docket. Judges can only make an informed decision on how to respond to the TPLF market or the presence of funding in their cases if they are fully informed about the TPLF ecosystem. Judicial education in this space if critical to overcome judicial ignorance of this sophisticated financial game being played in the background of their proceedings and to overcome judicial disbelief that TPLF may pose problems, a response sometimes precipitated by the "access to justice" mask or failure to appreciate the nature of the financing occurring.

This written testimony does not fully develop the need for disclosure or the types of disclosure mandates that would be most appropriate. But, reforming state and federal laws, and developing court rules, to make litigants disclose whether they are receiving funding should be pursued as important legislative and judicial priorities in order to preserve the civil justice system from the abuses or perversions that financing may allow.

Nonetheless, I think there are two very important categories of caution that should be considered. First, disclosure requirements must be carefully crafted so as to only require disclosure of those arrangements where litigation is an investment vehicle for financial gain. Funding of impact litigation or amicus briefs, for example, are quite different in kind and

purpose and thus require distinction. Second, legislative and judicial drafters must be cognizant of the ingenuity of the human mind and the incentives to evade any regulations one dislikes. In other words, drafters must be ever mindful that clever financiers and litigants, and the investors behind the financiers, will try to circumvent disclosure requirements in any way possible. This includes, for example, foreign investors channeling their money through shells or financiers using the fungibility of funds to frustrate the effectiveness of transparency efforts.

Selected General Areas of Concern

In addition to the lack of disclosure being a transparency problem in and of itself, there are several specific issues regarding the operation of the legal system and the direct impacts on litigation that are implicated by TPLF. While there are far too many of these to discuss in this brief testimony, I will flag a few here to plant the seeds for further discussion and investigation.

In addition to the potential for financial gain, litigation can also be a strategic tool or weapon, and litigation financiers and their investors understand this too. As mentioned, few of these financing arrangements get exposed. But, we learn a little more each time one does.

For example, TPLF financiers have for years claimed that their contracts with the litigants that they fund do not include control provisions that allow the funders to control the litigation or settlement negotiations. Because these same funders also refuse to share the contracts they use, we've been asked to just trust them. One crack in any trust came when one of the largest litigation funders, Burford Capital, was exposed for interfering with and seeking to prevent a settlement that the actual litigant it funded, Sysco, preferred.[7]

We also learn something about the incentives involved each time we are able to see a little behind the TPLF curtain. Peter Tiel, for example, was revealed as the secret funder behind Hulk Hogan's lawsuit against Gawker—making that case less about the plaintiff than about the funder imposing a cost on the funders' competitor or market adversary.[8] Third party financing has been the fuel supporting patent lawsuits against U.S. firms in industries critical to national security brought by foreign funded shell companies operating what are called nonpracticing entities, or NPEs.[9] These foreign competitors seek access to their competitors' trade secrets and other intellectual property through the backdoor of discovery as well as seeing lawsuits as a way of artificially acquiring market advantages by increasing costs on their competitors by forcing those competitors to spend money defending lawsuits.

The existence of portfolio funding encourages funding low-merit or even frivolous claims as part of the speculative market that TPLF is creating inside the litigation system, with the

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[7] *See The Litigation Finance Snare,* WALL ST. J., Mar. 21, 2023, available at https://www.wsj.com/articles/burford-capital-litigation-financing-sysco-lawsuit-boies-schiller-a4b593fb.

[8] Rolfe Winkler & Steven Perlberg, *Billionaire Says He Helped Finance Hulk Hogan Suit Against Gawker,* WALL ST. J.*, May 26, 2016,* available at https://www.wsj.com/articles/gawker-seeks-reduction-in-judgment-after-reports-say-billionaire-backed-plaintiff-hulk-hogan-1464185082?mod=article_inline.

[9] See Michael B. Mukasey, *Patent Litigation Is a Matter of National Security Foreign investors fund shell companies that harass American innovators*, WALL ST. J., Sept. 11, 2022, available at https://www.wsj.com/articles/patent-litigation-is-a-matter-of-national-security-chips-and-science-act-intellectual-property-theft-lawsuit-technology-scammers-manufacturing-11662912581?mod=Searchresults_pos1&page=2.

normal disincentives of low probabilities of return becoming weaker as low probability but high reward claims transform from too-risky-to-fund into rationally-funded parts of a funder's overall diversified litigation asset portfolio. For similar reasons, settlement dynamics change. Funders have an incentive to push litigants to press on beyond what the parties without their influence might have agreed was a good settlement point. Indeed, there should be a concern on the part of judges who have a duty to protect the litigants in their courts. When litigation decisions become controlled by funders, the interests of the individual litigants may suffer for the benefit of the financial interests of the funders or the lawyers who have made deals with such funders.

Without disclosure, judges may have no idea whether conflicts of interest are present between the judge and the funder or the funder's investors who have a stake in the litigation. Judges cannot oversee their ethical obligations without such information.

Furthermore, judges cannot implement their duties under the Federal Rules of Civil Procedure if they do not know whether funders are present in a case or what level of control is being exerted by such funders if they are present. For example, Federal Rule of Civil Procedure 23(b)(1) states that judges—when conducting a proportionality review in discovery or in other cost-based decisions—must, to ensure fair imposition of burdens, consider "the resources of the parties" when deciding whether to order a particular discovery request, and most states have similar rules. Judges simply cannot carry out this duty if they have an incomplete picture of the parties respective resources because they've not gathered a full list of the available resources. Similarly, to appropriately allocate costs under Federal Rule of Civil Procedure 26(c)(1)(B) and impose sanctions under Rule 37, a judge is required to have knowledge of who is making decisions and the financial situation of the parties. Once again, fulfilling this duty is impossible if funding is unknown or capable of being hidden.

Moreover, hidden TPLF makes it impossible to know the identity of all persons whose participation in settlement discussions regarding the dispute may be useful; to understand who may be receiving documents in the case, including those that are subject to protective orders or other court orders; or to become aware of potential financial incentives for witnesses who themselves could have an interest in the outcome of the case yet no one knows to probe that issue because the funder is not revealed. These are just some of the ways that litigation funding, especially if not disclosed—can make the fair, efficient, and impartial resolution of disputes far more difficult.

The Special Concerns Over Foreign Investors in TPLF

If an entity can gain something from funding litigation, then an economist would answer we should expect they will. The lack of any mandatory disclosure means that researchers are not able to examine the confidential funder contracts to analyze exactly what kinds of direct or indirect control is included or exercised or by whom – domestic or foreign—in the funding entity or from the investors in the funding entity. One big problem then is, again, we don't know what we don't know, because there is no transparency or requirement to disclose. Hence, the scale of foreign adversary influence in this market is yet hidden because researchers are largely unable to evaluate the full extent of foreign investment in TPLF firms or specific cases.

But again, the logic of incentives tells us that it must exist and likely exists at a large scale. And, a few examples demonstrate foreign investment is indeed present in United States

litigation.[10] The presence of sovereign wealth funds as investors in some large TPLF funding companies has been gleaned from annual reports, but without much detail. Earlier this year, *Bloomberg Law* reported that Russians oligarchs have used litigation financing as a way to shield their money from sanctions.[11] These kinds of anecdotal confirmation of the presence of foreign money in United States courts through TPLF trickle in, but a fuller disclosure regime is needed to most accurately assess the level of the activity and the intensity of the risk.

Aside from foreign entities motivated by the prospect of financial gain, foreign entitles may want to use TPLF for broader strategic reasons.[12] These include to impose costs on U.S. companies that increase operating costs and thereby give the foreign entities a competitive advantage. Another is for the foreign funder to attempt to get access to U.S. competitor records, IP, and trade secrets. And most troubling, foreign adversaries may simply use TPLF as a chaos agent that can diminish the effectiveness of the U.S. civil justice system. Indeed, given that we see analogous foreign state investments in other weak spots in our political system, economy and culture in social media and elsewhere, this too gives us reason to believe that adversaries will embrace TPLF as a mechanism for engendering disorder.

On the last point of motivation to disrupt, there are many possible ways this could work.[13] Foreign adversaries can fund frivolous litigation to seek to overwhelm our courts. They can target key industries like those that support military infrastructure and increase operating costs in those industries. There, the adversaries can become comparatively stronger by making the bang for our defense spending buck comparatively weaker due to the diversion of resources to litigation. Similarly, enemy funders might push theories or use litigation filings and publicity as part of the well-documented disinformation campaigns that foreign adversaries have already deployed through social media.

Many of these concerns are highlighted in an important November 2022 report by the U.S. Chamber of Commerce Institute for Legal Reform (ILR) titled *A New Threat: The National Security Risk of Third Party Litigation Funding*.[14] That report raises an alarm that foreign adversaries may see this opaque third party funding mechanism as an exploitable fissure in the U.S. legal system, through which they can further weaken and gain strategic advantages over the United States. The report explains why creating disclosure and transparency requirements to reveal the existence of foreign funders would at least help us better assess the threat. And, disclosure is an important prerequisite to consider within a comprehensive policy for regulating TPLF, something which is best crafted with the information gained from disclosure.

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[10] U.S. Chamber Institute for Legal Reform, Tackling Foreign Manipulation: The Urgent Need for Reform in Third Party Litigation Funding, April 1. 2024.

[11] Emily R. Siegel & John Holland, *Putin's Billionaires Dodge Sanctions by Financing Lawsuits,* Bloomberg Law, Mar. 28, 2024, available at https://news.bloomberglaw.com/litigation-finance/putins-billionaires-sidestep-sanctions-by-financing-lawsuits.

[12] Donald J. Kochan, *Keep Foreign Cash Out of U.S. Courts,* WALL ST. J. , (Nov. 25, 2022)*;* Donald J. Kochan, *Foreign state sponsors of litigation should lose sovereign immunity from being sued*, THE HILL, Dec. 1, 2022.

[13] Donald J. Kochan, *Foreign state sponsors of litigation should lose sovereign immunity from being sued*, THE HILL, Dec. 1, 2022.

[14] To view the report, see https://instituteforlegalreform.com/research/ilr-briefly-a-new-threat-the-national-security-risk-of-third-party-litigation-funding/.

Strategic Investment in Expanding Tort Liability

If you are concerned about the litigiousness of society, the flood of cases already overwhelming the resources of courts, and the impacts that excessive regulation-by-litigation have on innovation, investment, and economic growth, the there is an additional side effect of TPLF with which you should be concerned. If TPLF investors can gain from the civil justice system by expanding the size, scope, and frequency of tort liability, then they will. Those with a TPLF long view will want to strategically invest in growing the litigation machine.

The study of law and economics includes the study of political economy, or how institutions can be affected by the incentives at play within them. We should assume that institutional players are self-interested and seek to maximize gains available, subject to constraints, within the structure of an institution. Changes in the constraints and changes in the operation of an institution can therefore affect how people behave in relation to it.

TPLF that is easy and cheap (i.e. subject to few requirements or hurdles like disclosure or regulations) alters the courts as institutions. The barriers to entering the newly emerging "courts' market" for investment through litigation funding are presently quite low.

On the demand side, investors in litigation financing are seeking court judgments that will bring a return on their investment financially or in the advancement of some other strategic goal (like harming a competitor or a foreign entity disrupting the U.S. system of civil justice). Courts operate on the supply side. But the supply side is constrained by the number of plaintiffs and even more so by the state of the law. Courts can only supply those judgments when injured persons as defined by presently-accepted theories of harm and liability appear as plaintiffs. Third party litigation investors, however, can increase their payouts if there are more payors—i.e. more legally liable parties. Again, that pool is constrained by the scope of accepted theories of liability.

Thus, as a long-term strategy, it is in the interest of third party litigation funders to not just invest in cases that have a good shot at winning under accepted theories of liability. If they are playing the long game, we should expect that they will also invest in envelope-pushing litigation for the sole purpose of changing the law. They have an incentive to invest in loosening constraints on the supply of favorable judgments. Consequently, there is a high risk that these investment dynamics could lead to law "reform" that is quite artificial and driven by private interests. In other words, the new standards will not be the result of an evolution in acceptable legal theories flowing organically only from evolved reasoning based on traditional understanding of foundational legal principles. They will emerge because they were orchestrated to increase the number of tables at which the TPLF gamblers can play.

Rational investors playing the long game should be expected to fund not just liability expanding litigation but they should also be expected to campaign to increase the pool of judges at the state and federal level receptive to loosening the supply constraints, i.e. increasing the scope of liability by changing the law. They will also be interested in funding advertising and other efforts that have already been identified for decades as major drivers of the court dockets flooded with MDLs, class actions, and other tort cases.

There's really no incentive for TPLF funders to invest in liability reduction, because liability reduction reduces the overall number of vehicles that are available for investment and

returns. Instead, if courts are available to produce profit vehicles, there will be an incentive to increase the number of potential vehicles in which that investment can be placed, rather than investing in just or fair rules for defendants. There is near zero upside for litigation funders to invest in curtailing liability or in making process changes that better filter out less meritorious cases.

This is a one-way ratchet for them, with all the gains to be made by increasing the pool of available plaintiffs and the likelihood of plaintiff victories. And, this will be occurring not because of reason and wisdom, but because of the profit motives that are embraced when the system acquiesces to easy access for TPLF into it. This further expansion of the number and scope of viable cases will only exacerbate the problems identified above by further contributing to the flood of cases and consequently decreasing the accessibility of the already resource-strapped state and federal courts.

The Need to Insulate the Courts from Market Forces

Finally, let me turn to a question we should be asking ourselves when we evaluate the court system and the drivers within it: are courts just manufacturing plants for liability products in which you can invest in the value of the products that are produced? Or, are courts something different? And if they are something different, sui generis in fact, then do they need to be treated different than other markets? Whether or not there's historical evidence of TPLF-like investment occurring through smaller-scale mechanisms in the past, is there still a reason to insulate courts to keep them special, and to keep something different about them distinct from markets?

One reason that we might need to insulate courts from becoming simply an investors' betting market is in recognition of the role that courts play as market facilitating devices. A neutral, predictable rule of law-based court system is necessary for traditional markets (outside courts) to operate. Traditional market participants need to know the courts will be there to fairly resolve disputes and support private ordering.

There are good reasons to keep courts insulated from normal market forces such that courts will be saved from, and available for, the rest of the market to use in a reliable way. This is why the traditional defenses of markets from free-market oriented individuals who favor innovations in finance and discourage limitations on vehicles for investment do not hold in the "courts as a market" narrative that TPLF encourages.

TPLF is not a traditional investment. It does not produce anything. It just generates litigation. It takes bets on the outcome of litigation, with the investors counting odds. The investors have incentives to hedge their bets by diversifying their risk by investing in lots of different pieces of litigation. They can afford to go all in on every hand (i.e. prolong litigation, reject reasonable settlements, etc.), because that's the only way to win big. And a big win on one hand offsets the losses from going all in on others.

This kind of influence fundamentally changes traditional dynamics in the litigation system. It is the casino-ification of our civil justice system. And, as Chief Judge Colm Connolly of the U.S. District Court for the District of Delaware put it at a conference in March this year: "I don't believe our courts are casinos where people should just go to profit . . . I think that's bad

for the system and I think it undermines the importance of our courts."[15] Judge Connolly is one of the judges most active in calling out the dangers of TPLF, including from foreign sources,[16] and he is a leader in demanding disclosure in his courtroom.[17]

The courts are special. Stable courts help maintain stable markets and stable societies. When they are open for legal purposes and the resolution of legal disputes, they serve the market. Market participants know that the courts will be there if deals are broken, property rights need resolution, or traditional wrongs in tort need remedies. This confidence fuels and incentivizes private investments that lead to economic growth. The courts should be in the business of being courts. When litigants, or the investors propping them up, can start using the court decisions as investment vehicles rather than for their traditional role in investment preservation through the enforcement of rights, we convert courts into something they are not intended to be, necessarily diluting their ability to serve their traditional role.

Courts should not become just a playground for investment and gambling. *We need to maintain a civil justice system outside the market if we are to preserve the civil justice system as a predictable, neutral, and accessible system that serves the market.* Put another way, *in order to preserve the effectiveness of our nation's courts to serve as necessary and neutral forums that facilitate the market, the court system must be insulated from market forces.*

Conclusion

Thank you again for the opportunity to present this testimony. I look forward to your questions.

[15] *See* Michael Shapiro, *Courts Not a Casino, Says Judge Seeking Third-Party Transparency*, BLOOMBERG LAW, March 28, 2024, available at https://news.bloomberglaw.com/ip-law/courts-not-a-casino-says-judge-seeking-third-party-transparency.
[16] *See* Nimitz Technologies LLC v. Imagine Learning, Inc., No. 21-1855, Memorandum Opinion (D. Del. Nov. 27, 2023).
[17] *See Standing Order Regarding Third-Party Litigation Funding Arrangements*, DE.D.R.1. (Apr. 18, 2022).