

## 4 Ways To Preserve Confidentiality Of Litigation Funding Docs

By **Stewart Ackerly** (March 15, 2022)

Recent decisions from the U.S. District Courts for the District of Massachusetts and the Northern District of Illinois are the latest in a string of rulings denying discovery into litigation funding documents.

The Massachusetts case, *Neural Magic Inc. v. Facebook Inc.*, involves claims for trade secret misappropriation brought by a startup, Neural Magic, against social media giant Facebook, now called Meta Platforms Inc.

Facebook sought discovery of documents regarding Neural Magic's litigation funding arrangements. On Dec. 21, 2021, the court denied Facebook's request in its entirety.[1]



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As a threshold matter, the court determined that the requested documents were largely irrelevant, including as to the identity of the funder and other potential funders, as well as when the funding commenced.

The court noted the "plethora of authority" provided by Neural Magic that funding documents are irrelevant and thus not discoverable pursuant to Federal Rule of Civil Procedure 26(b)(1).

Next, to the extent that some of the requested documents may have been relevant to Neural Magic's damages, the court still denied discovery. The court concluded that the relevance of this subset of documents was "not proportional to the needs of the case" for purposes of Rule 26(b)(1).

This ruling stemmed, at least in part, from the "substantial amount of related discovery produced to date" in the case on the subject of damages.

Given the documents already available to Facebook regarding Neural Magic's damages, there simply was no need for discovery of funding documents related to that issue.

Finally, the court noted that privilege issues may also preclude production of funding-related documents, but it declined to broach this issue because it had already denied discovery on the basis of relevance and proportionality.

The Northern District of Illinois case, *Kove IO Inc. v. Amazon Web Services Inc.*, involves claims for patent infringement.

Amazon sought discovery about Kove's attempts to obtain third-party litigation funding. Here again, the court denied Amazon's requests in their entirety.

Although Kove never finalized an agreement for funding, Amazon nevertheless claimed funding-related documents would "shed light on the actual value of [Kove's] patents."

The court disagreed, concluding in a Jan. 26 ruling that "materials regarding litigation funding negotiations are minimally relevant, at best." [2]

The court further concluded that funding-related documents were protected work product.

Specifically, the court stated, quoting prior precedent, that funding-related documents are "self-evidently created 'because of the prospect of litigation,'" and therefore qualify for work-product protection.

In addition, Amazon could not overcome work-product protection because it made no showing of substantial need or undue hardship. In other words, Amazon failed to show that facts directly reflecting the value of the patents were not reasonably available through other means.[3]

These two decisions add to a large and growing body of case law denying discovery into litigation funding arrangements. Most courts deny requests for funding-related materials as (1) irrelevant to any parties' claims or defenses in the lawsuit, and (2) as protected work product.

A recent white paper published by Westfleet Advisors LLC surveyed relevant case law nationwide and confirmed the clear trend that confidential information shared with funders is not subject to disclosure, provided certain conditions are met.[4]

Courts look to the existence of a signed nondisclosure agreement, the type of information requested, and the funder's role in the litigation. Key findings include the following:

- Since 2014, courts have denied discovery requests for confidential information shared with funders nearly 90% of the time. In 39 of 44 decisions from 2014 to present, courts allowed no significant discovery of confidential information shared with a funder.
- Courts have allowed significant discovery of information from a funder on a nonredacted basis in only five cases since 2014. These cases generally involved a failure by counsel to assert work-product protection or other unusual facts. Furthermore, these five cases have not been followed by other courts.
- The most frequent basis for denying discovery of information shared with a funder is work-product protection, followed by a lack of relevance. Where a work-product protection argument is made, courts overwhelmingly deny discovery requests.

The strong trend against disclosure of confidential information is encouraging and well reasoned.

Responsible funders are passive financial partners and do not control the litigation. The terms on which a party finances its operations — including legal costs — have no relevance to the issues in the overwhelming majority of lawsuits.

And, so long as confidentiality is protected pursuant to an NDA, information prepared in anticipation of litigation can be shared with the funder so that they can underwrite the risk and value of the litigation's outcome, without risk of waiver.

Nevertheless, prudence necessitates that confidentiality can never be taken for granted. That is why lawyers, clients and funders should follow best practices to help ensure that communications with funders are not discoverable by an opposing party.

### **1. Nondisclosure Agreement**

Sign an NDA at the beginning of an engagement. This is critical to preserving work-product protection.

Most funders will have a standard NDA. It should be noncontroversial and straightforward.

The NDA should provide for the confidential treatment and limited use of nonpublic, proprietary information to ensure there is no likelihood that an adversary or potential adversary will receive the information. Otherwise, work-product protection may be waived or inapplicable.

The NDA can be entered into by the client or law firm — ideally both.

### **2. Work Product Only**

In providing documents to a funder, only share materials prepared in anticipation of litigation, or documents that are or will be in evidence.

Do not share with a funder material that is only attorney-client privileged. Although some courts have held the common interest exception applies to a funder, that principal is not universally established.

Relatedly, do not include funders in attorney-client communications.

A few examples of materials commonly shared with a funder are: pleadings or other public filings; key evidentiary documents; litigation budget; expert reports and other damages analysis; counsel's strategy memoranda and case analysis.

### **3. No Funder Control**

Expressly disclaim a funder's control over the litigation and settlement in the funding documents. This includes provisions that may require the funder's consent for settlements of a certain size.

Giving a funder control over litigation or settlement could implicate common law doctrines of champerty and maintenance, as well as raise issues of standing and the real party in interest — in addition to ethical issues around a lawyer's independence.

### **4. Know Your Jurisdiction**

Know and comply with rules specific to your case regarding confidentiality and the sharing of documents with third parties like a funder.

This could relate to requirements in a protective order, relevant arbitration rules or other jurisdiction-specific rules.

For example, in an arbitration, in addition to an NDA, a funder may need to sign a

confidentiality acknowledgement to receive arbitration-related materials.

## **Conclusion**

As with any case, the last thing you want to do is commit a discovery-related foot fault that gives an adversary fodder for making your case more difficult.

By following these simple steps, parties can go a long way to thwart efforts to obtain discovery of communications with a litigation funder and avoid unnecessary discovery battles.

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*Stewart Ackerly is the director and head of originations at Statera Capital. He formerly served in various roles at the Office of the U.S. Trade Representative and U.S. International Development Finance Corporation.*

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[1] Neural Magic, Inc. v. Facebook Inc., No. 20-cv-10444 (D. Mass.), ECF No. 224.

[2] Kove IO, Inc. v. Amazon Web Services, Inc., No. 1:18-cv-8175 (N.D. Ill.), ECF No. 497 at 20-21.

[3] Id. At 22-24.

[4] "Litigation Funding and Confidentiality: A Comprehensive Analysis of Current Case Law" (August 2021) available at <https://www.westfleetadvisors.com/publications/confidentiality-white-paper/>.