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IN THE SUPREME COURT

STATE OF ARIZONA

In the Matter of:	Supreme Court No. R-20-0012
PETITION TO PERMANENTLY ADOPTE RULES FOR THE FAST TRIAL AND ALTERNATIVE RESOLUTION PROGRAM (FASTAR)	**COMMENT IN RESPONSE TO AUGUST 25, 2021 ORDER CIRCULATING FOR COMMENT AMENDMENTS TO THE PIMA COUNTY RULES FOR THE FAST TRIAL AND ALTERNATIVE RESOLUTION ("FASTAR") PILOT PROGRAM**

Pursuant to the Arizona Supreme Court's August 25, 2021 Order Circulating for Comment Amendments to the Pima County Rules for the Fast Trial and Alternative Resolution ("FASTAR") Pilot Program, the undersigned hereby submits the following comment to the above-captioned Petition. I limit this comment to discussing the Supreme Court's proposed changes only and do not opine on the merits of extending the duration of the FASTAR pilot program, expanding it to additional counties on an experimental basis, or adopting it as a permanent replacement or alternative to the compulsory arbitration rules, which I believe are more appropriate for consideration by a separate task force.

I. The Supreme Court Should Adopt the Proposed Changes Clarifying Whether The Parties Must Engage In An Early Meeting And File A Joint Report And Proposed Scheduling Order.

The proposed changes add a new Rule 108(a) and eliminate current Rule 111(d) to clarify that parties in all FASTAR cases must engage in a Rule 16(b) early meeting but do not

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have to file a joint report and proposed scheduling order as required by Rule 16(c). Current Rule 111(d) specifies that parties proceeding in the Fast Trial Track do not need to file a joint report and proposed scheduling order, but it is silent about whether they must still engage in an early meeting under Rule 16(b). The current rules for the Alternative Resolution Track do not mention Rule 16 at all.

The current rules may give parties the impression they need only comply with the FASTAR rules and any other rule explicitly identified in the FASTAR rules. There likely are many attorneys confused about whether they need to have an early meeting and file a joint report and proposed scheduling order under either track in the FASTAR program. The current rules likely confuse pro se litigants even more. The proposed changes minimize any confusion and still require parties to meet early to plan the upcoming litigation, but they eliminate the joint report and proposed scheduling order, which reduces effort and costs associated with filing a formal report covering numerous topics that rarely arise in FASTAR cases.

II. The Supreme Court Should Adopt the Proposed Change Extending The Parties' Deadline To Exchange Initial Disclosures In The Fast Trial Track To Thirty Days After The Defendant Files An Answer.

The proposed change to Rule 112(a) extends the deadline for exchanging initial Rule 26.1 disclosure statements in the Fast Trial Track from the current 20 days after the first defendant files an answer to 30 days. I recommend adopting this change to reduce attorney confusion by aligning the disclosure deadline with the 30-day deadlines applicable to the Alternative Resolution Track and to non-FASTAR cases. Although the longer period risks compacting the time period to complete discovery, which parties presumptively must complete within 120 days of the filing of the defendant's answer, concerned parties may still commence discovery earlier by voluntarily providing their initial disclosure statements before the deadline.

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III. The Supreme Court Should Not Adopt the Proposed Change Creating A Presumption Of Reasonableness For Medical Bills, But It Should Make Medical Bills Admissible In Fast Trials Without Requiring Further Foundation Or Authentication.

Current FASTAR Rule 117(d)(1) allows judges to admit medical bills during Fast Trials provided the party requesting admission establishes a foundation that both the amount of the bill is reasonable and the treatment described in the bill was medically necessary. An opposing party may still object to admission of a medical bill if the opposing party includes a specific legal objection in the joint pretrial statement. The proposed change to this rule eliminates the requirement for the party seeking admission to establish a foundation that the amount of the medical bill is reasonable, and it creates a rebuttable presumption of reasonableness.

Many plaintiffs' personal injury attorneys dislike the current Fast Trial Track rule and feel they are forced to choose the Alternative Resolution Track because it is too difficult and costly to bring medical providers into trials to establish the necessary foundation to admit medical bills into evidence. I understand this concern but feel the proposed changes go too far and effect a substantive legal change to the burden of proof in personal injury cases that should be handled via legislation or statewide change to evidence rules. In reality, disputes over the reasonableness of medical bills or of the medical necessity for underlying medical treatment arise infrequently in FASTAR cases. To the extent those issues come up, the parties should identify their disputes in the joint pretrial statement so the other side can be prepared to present disputing evidence and arguments in a pretrial hearing or at trial.

Rule 123(d) for the Alternative Resolution Track and its Rule 75(c) counterpart in compulsory arbitration cases outside of Pima County already allow parties to admit medical bills into evidence without further proof if they bear normal indicia of authenticity and connection to specific treatment such as dates of treatment, itemized charges, and official letterhead. Those rules reduce expenses normally incurred when attempting to admit medical

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bills into evidence yet still assure that parties are not submitting opaque block bills without itemized charges. An opposing party still retains the right to challenge the reasonableness of the bills, the necessity of the underlying medical treatment, or the causal link between the alleged injury and the defendant's conduct. Although Rule 123(d) does not require further foundational proof of the reasonableness of the bill or the medical necessity of the underlying treatment before admitting a medical bill, it also does not create any presumption of reasonableness or medical necessity. I believe the arbitration evidence rule for medical bills should apply in Fast Trials. Arbitrators have successfully managed arbitration hearings for years under these rules, and Fast Trial juries—supported by trial judges who can still screen out unfairly prejudicial evidence as necessary if the parties preserve their disputes in the joint pretrial statement—can successfully weigh evidence of reasonableness and medical necessity.

To this end, I propose alternative language for Rule 117(d)(1) as shown in Appendix 1.

IV. The Supreme Court Should Adopt the Proposed Changes Shifting Discovery Disputes From Arbitrators To Judges, But It Should Eliminate Additional Rules These Changes Make Obsolete.

The proposed changes to Rules 108(b) and 121(b)(1) strip arbitrators in the Alternative Resolution Track of the power to rule on motions concerning disclosure and discovery and gives the assigned judge exclusive authority to rule on those disputes. The current rules substantively parallel arbitrator authority in compulsory arbitration cases as set forth in Rule 74(d). I agree with the proposed changes because moving disclosure and discovery motions to judges is more likely to assure consistency in those rulings than if untrained arbitrators continue to resolve them. Although this change will increase burdens on judges, the increased burdens should be manageable because there are relatively few discovery disputes in FASTAR cases, and parties will still have to comply with Rule 26(d)'s expedited discovery dispute procedures. If transitioning disclosure and discovery disputes back to judges does prove problematic to expeditious handling of judicial case-loads, it may be possible for pro tem judges to resolve

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FASTAR discovery disputes on an as-needed basis.

If the Supreme Court does adopt these changes, however, it should also eliminate Rules 121(b)(3) and (4). Those rules (a) instruct arbitrators to consider the objectives of the FASTAR program and limit discovery when appropriate, and (b) establish a procedure for interlocutory appeal of an arbitrator's disclosure and discovery rulings to the assigned judge. If arbitrators no longer will be ruling on disclosure and discovery motions, then these rules serve no further purpose and should be eliminated.

V. The Proposed Change To Discovery Limits In The Alternative Resolution Track Is Not Likely To Effect Most Cases.

Proposed Rule 122(f) states that the discovery limits for cases in the Fast Trial Track, stated in Rule 112(b), will apply to cases in the Alternative Resolution Track. Currently, there are no explicit discovery limits for cases in the Alternative Resolution Track, thus the normal Tier 1 discovery limits from Rule 26.2(f) apply. The applicable discovery limits for either option are substantively similar. Both presumptively allow each side 5 Rule 33 interrogatories, 5 Rule 34 requests for production, and 10 Rule 36 requests for admission, and both set a presumptive 120-day limit for completing discovery.

The only differences between each option are the permitted maximum hours of deposition time and limits on Rule 35 examinations. Presently, litigants proceeding in the Alternative Resolution Track have five hours of fact witness deposition time per side and four hours of expert witness deposition time per expert, and there is no presumptive limit on Rule 35 examinations. In the Fast Trial Track, each party—not side—currently has a total number of deposition hours equal to the number of witnesses the party is entitled to depose under Rule 30(a)(1), namely other parties, testifying experts, treating physicians, and document custodians, multiplied by two hours, and each side is limited to a maximum of one hour for any deposition of a medical provider or expert witness. Each side in the Fast Trial Track gets only one Rule 35

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examination.

Practically, however, neither option is likely to change the volume of discovery involved because the extensive use of depositions, experts, and Rule 35 examinations is uncommon in FASTAR cases. Each of those discovery tools are cost-prohibitive where the amount in controversy is under $50,000.00, and some attorneys using FASTAR already express concern about the comparatively small burdens imposed by AZTurboCourt filing fees. It appears unlikely that either option of discovery limits significantly burdens any side more than the other. For this reason, I do not take a position on this proposed change.

VI. The Supreme Court Should Adopt All Other Proposed Amendments To The FASTAR Rules.

The remaining amendments all appear to be either corrections for clarity and style or minor and seemingly uncontroversial changes. For example, the change to Rule 101(b) allows either the court administrator or the Clerk to assign cases to the FASTAR program. This is an administrative task, and I concur that the superior court should have flexibility to move this responsibility between the court administrator or the Clerk as it believes works best. Similarly, the change to Rule 102(a) helps clarify that no cases in which the plaintiff seeks any form of relief in addition to money damages qualify for the FASTAR program. I view the other proposed changes to the FASTAR rules, as stated in the Court's August 25, 2021 Order, as generally helpful and recommend the Supreme Court adopt them all.

RESPECTFULLY SUBMITTED this 15th day of October 2021.

/s/ *Robert A. Bernheim*
Robert A. Bernheim

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Electronic copy submitted to the
Arizona Court Rules Forum
this 15th day of October, 2021.

/s/ *Robert A. Bernheim*