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**IN THE SUPREME COURT  
STATE OF ARIZONA**

PETITION TO AMEND RULE  
55(b)(1)(A), ARIZONA RULES OF  
CIVIL PROCEDURE

Supreme Court No. R–

**Petition to Amend Rule 55(b)(1)(A),  
Arizona Rules of Civil Procedure**

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the undersigned attorney (Petitioner) respectfully petitions this Court to amend Rule 55(b)(1)(A) of the Arizona Rules of Civil Procedure (default judgment by motion). The proposed amendment to Arizona Rule of Civil Procedure (“Rule”) 55(b)(1)(A) seeks to (1) clarify an ambiguity that has resulted from the 2017 restyling of the rules and the elimination of a prior amendment to Rule 55(b)(1)(A), and (2) make clear that notice and a default judgment hearing is not required in a case seeking a “sum certain” in which the defendant has been defaulted for failing to plead or otherwise defend, even if the defendant enters an appearance prior to the entry of a default judgment.

A redline version of proposed amended Rule 55(b) identifying additions and deletions is attached at Appendix "A," and a "clean" version of proposed amended

Rule 55(b) is attached at Appendix "B." A previous petition from 2013 by the State Bar of Arizona addressing this issue is attached to this Petition at Appendix "C."

### **I. THE NEED FOR AMENDING RULE 55(B)(1)(A).**

Rule 55 has undergone several amendments in recent years that has created ambiguity about when a default judgment hearing is required. The petition first presents the three iterations of the Rule and then explains the procedural history of how these changes occurred.

#### **THE EVOLUTION OF RULE 55(B)**

In 2012, Rule 55 provided that:

“When the plaintiff’s claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the Court upon motion of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been **defaulted for failure to appear** and is not an infant or incompetent person.”

Ariz. R. Civ. P. 55(b)(1) (2012) (emphasis added).

In 2016, after a petition from the State Bar of Arizona, Rule 55 provided that:

“When the plaintiff’s claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the Court upon motion of the plaintiff and upon affidavit of the amount due and without a hearing, shall enter judgment for that amount and costs against the defendant, if the defendant has been **defaulted for failure to plead or otherwise defend** and is not an infant or incompetent person.”

Ariz. R. Civ. P. 55(b)(1) (2016) (emphasis added).

As of 2022, after the restyling of the Rules in 2017, Rule 55 provides that:

“If the plaintiff’s claim is for a sum certain or a sum that can be made certain by computation, the court--on the plaintiff’s motion, with an

affidavit showing the amount due and without a hearing--may enter judgment for that amount and costs against a defendant who has been **defaulted for not appearing** and who is neither a minor nor an incompetent person.”

Ariz. R. Civ. P. 55(b)(1)(A) (2022) (emphasis added).

## PROCEDURAL HISTORY

In 2012, a panel of the Arizona Court of Appeals held that Rule 55 always requires a default judgment hearing when there is an appearing defendant regardless of the damages sought. *BYS Inc. v. Smoudi*, 228 Ariz. 573, 578, ¶ 20 (App. 2012) (“Once a defendant has appeared, a default judgment can be obtained only after a hearing by the court upon three days’ written notice.”); *see also Estate of Lewis v. Lewis*, 229 Ariz. 316, 327, ¶ 34 (App. 2012) (same); *Advanced Prop. Tax Liens, Inc. v. Gladden*, 1 CA-CV 14-0478, 2015 WL 8929394, at \*2, ¶ 8 (Ariz. App. Dec. 15, 2015) (mem. decision) (same).

But just a few months later, a divided panel of the court issued a contrary opinion in *Searchtoppers.com, LLC v. TrustCash LLC*, 231 Ariz. 236 (App. 2012). In a “factually analogous case,” the majority explicitly declined to follow the decision in *BYS Inc.*, reasoning that the Rules permit the superior court to issue a default judgment under Rule 55(b)(1) against an appearing party *without* a hearing when the damages are for a sum certain. *TrustCash*, 231 Ariz. at 239–40, ¶ 12–14. The judge that authored the *BYS Inc.* opinion dissented for the reasons stated in that opinion. *See id.* at 242, ¶ 25 (Orozco, J., dissenting). *See also* Julie A. Wilson-

McNerney, *Appearances Can Be Deceiving: Default Judgments by Motion or Hearing Under Rule 55(b) of the Arizona Rules of Civil Procedure*, 55 Ariz. L. Rev. 235 (2013) (discussing *BYS Inc.* and *TrustCash*).

In 2013, the State Bar of Arizona petitioned to amend Rule 55 to resolve this split in favor of the analysis in *TrustCash*. (Appendix C). Specifically, the proposed amendment provided that notice is not required for a party that enters an appearance after default if damages are for a sum certain. The Arizona Supreme Court adopted the amendment in 2015 with the following comment:

This amendment clarifies when a defendant has a right to notice and a hearing if the plaintiff's claim is for a sum certain or for a sum that can be made certain by computation. Under the amendment, a defendant who has been defaulted on such a claim under Rule 55(b)(1), but who makes a post-default appearance, is not entitled to notice and a hearing before judgment may be entered.

Ariz. Sup. Ct. Order R-13-0053 (Sept. 2, 2014). The comment remains with the Rules today. *See* Ariz. R. Civ. P. 55(b) (2022).

In 2016, the Task Force on the Arizona Rules of Civil Procedure submitted a complete restyling of the Rules, adopting “many stylistic changes that were made to the federal rules in 2007.” *See* Petition, Ariz. Sup. Ct. No. R-16-0010, \*2 (Jan. 2016). The petition also included substantive changes, but did not identify substantive changes to Rule 55. *Id.* at \*8–9. After receiving initial comments, the Task Force’s amended petition proposed two changes to Rule 55; regarding the clerk’s “entry” of default and the contents of the required notice of a default

judgment hearing. *See* Amended Petition, Ariz. Sup. Ct. No. R-16-0010, \*10–12 (May 13, 2016).

Without noting any change, the 2016 Petition also reverted the language added by the 2015 amendment. *Compare* Ariz. R. Civ. P. 55(b)(1)(A) (2015) (“defaulted for failure to plead or otherwise defend”), *with* Ariz. R. Civ. P. 55(b)(1)(A) (2022) (“defaulted for not appearing”). Notwithstanding the reversal of the 2015 amendment, the comment to the 2015 amendment was left unchanged. The Arizona Supreme Court adopted the amendments. Ariz. Sup. Ct. Order R-16-0010 (Sept. 2, 2016).

### **THE RULE IS NOW AMBIGUOUS**

A conflict currently exists between the text of Rule 55(b), which, under the majority interpretation, requires notice and a default judgment hearing for a party who has appeared but otherwise failed to plead or defend, and the Comment to Rule 55(b), which states that late-appearing defendants are “not entitled to notice and a hearing before judgment may be entered.”

The Prefatory Comment to the 2017 Amendments notes that if “no good reason exists to depart from the newly restyled language of a federal rule, these amendments adopt the restyled federal wording verbatim.” Ariz. Sup. Ct. Order R-16-0010, \*34 (Sept. 2, 2016). The post-2017 Rule 55 mirrors the corresponding federal rule. *See* Fed. R. Civ. P. 55(B)(1). But this is an area where Arizona’s Rule

meaningfully deviated from the corresponding federal rule. *See* Wilson-McNerney, *supra*, at 245–46.

The court in *BYS Inc.* cited to an Arizona Supreme Court decision *Rogers v. Tapo*, which held: “An appearance does not prevent a party from being in default for failure to plead or otherwise defend” but a default judgment requires notice and a hearing. 72 Ariz. 53, 57 (1951). *Rogers*, in turn, relied on federal authority for its interpretation that an appearing party is entitled to notice and a hearing under Rule 55. 72 Ariz. at 57 (citing *Hoffman v. New Jersey Fed’n*, 106 F.2d 204 (3rd Cir. 1939) and *Commercial Casualty Ins. Co. v. White Line Transfer & Storage Co.*, 114 F.2d 946, 947 (8th Cir. 1940)).

The holding in *BYS, Inc.* is consistent with the current federal rule; indeed many federal circuits requiring Rule 55(b)(2) procedures even when the defaulted party did not formally “appear.” *See* Wright, Miller & Kane, *Federal Practice and Procedure* § 2684 (4th ed. 2022) (noting hearing is required under Fed. R. Civ. P. 55(B)(2) if party has “appeared”); Annotation, *What Constitutes "Appearance" Under Rule 55(b)(2) of Federal Rules of Civil Procedure, . . .*, 139 A.L.R. Fed. 603 (1997) (noting that “notice of a default judgment hearing is required only if the defaulting party has made an appearance”); *H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C. Cir. 1970) (holding that notice is required for parties that formally appeared *or* “have otherwise indicated

to the moving party a clear purpose to defend the suit”); *In re Roxford Foods, Inc.*, 12 F.3d 875, 881 (9th Cir. 1993) (trustee’s communications regarding attempts to secure counsel constituted an “appearance” that “trigger[ed] the requirement of Rule 55(b)(2) notice”); *22QCentral v. Pharm E., Inc.*, CV-11-86-PHX-ROS, 2012 WL 13018739, at \*2 (D. Ariz. Jan. 17, 2012) (applying *In re Roxford Foods*); *Citizens Bank v. Parnes*, 376 Fed. Appx. 496, 506 (6th Cir. 2010) (phone call and letter to court required Rule 55(b)(2) notice); *Rogers v. Hartford Life & Acc. Ins. Co.*, 167 F.3d 933, 936 (5th Cir. 1999) (“We have taken an expansive view as to what constitutes an appearance under Rule 55(b)(2).”).

Thus, the 2017 change to the text of Rule 55(b) to match the federal rule was an, undisclosed, substantive change to the Rule; reverting the 2015 amendment that sought to align the Rule with the holding in *TrustCash*.

Petitioner’s proposed amendments, which essentially mirrors the State Bar’s 2013 proposed amendment, will make clear that Arizona courts can issue default judgments in cases with a “sum certain” without the need for a default judgment hearing, even if the party has appeared in the action.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully asks this Court to amend Rule 55(b)(1) as set forth in the Appendices.

Respectfully submitted,

/s/\_\_\_\_\_

Kevin M. Morrow Esq.

AZ SBN 034697

## APPENDIX A

(Please note: deletions are reflected by strikethrough and additions are reflected by underline and all caps.)

Rule 55. Default; Default Judgment

**(a) [No Change]**

**(b) Default Judgment.**

(1) Default Judgment by Motion Without Hearing.

(A) Generally. If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the court--on the plaintiff's motion, with an affidavit showing the amount due and without a hearing--may enter judgment for that amount and costs against a defendant who has been defaulted ~~for not appearing~~ FOR FAILURE TO PLEAD OR OTHERWISE DEFEND and who is not a minor, an incapacitated person, or an adult in need of protection.

(B) Fee Award--Specific Amount Stated. A default judgment entered under Rule 55(b)(1) may include an award of reasonable attorney's fees if the claim states a specific sum of attorney's fees that will be sought if judgment is rendered by default, and:

- (i) the amount of the award is supported by affidavit;
- (ii) the award is allowed by law; and
- (iii) the award does not exceed the amount demanded in the claim.

(C) Fee Award--No Specific Amount Stated. If the claim requests an award of attorney's fees, but does not specify the amount of fees that will be sought if judgment is rendered by default, a default judgment entered under Rule 55(b)(1) may include an award of reasonable attorney's fees only if:

- (i) an affidavit establishes the reasonable amount of the fee award;
- (ii) the defendant has not entered an appearance in the action; and
- (iii) the award is allowed by law.

**(c)–(e) [No Change]**

## APPENDIX B

### Rule 55. Default; Default Judgment

**(a) [No Change]**

**(b) Default Judgment.**

(1) Default Judgment by Motion Without Hearing.

(A) Generally. If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the court--on the plaintiff's motion, with an affidavit showing the amount due and without a hearing--may enter judgment for that amount and costs against a defendant who has been defaulted for failure to plead or otherwise defend and who is not a minor, an incapacitated person, or an adult in need of protection.

(B) Fee Award--Specific Amount Stated. A default judgment entered under Rule 55(b)(1) may include an award of reasonable attorney's fees if the claim states a specific sum of attorney's fees that will be sought if judgment is rendered by default, and:

- (i) the amount of the award is supported by affidavit;
- (ii) the award is allowed by law; and
- (iii) the award does not exceed the amount demanded in the claim.

(C) Fee Award--No Specific Amount Stated. If the claim requests an award of attorney's fees, but does not specify the amount of fees that will be sought if judgment is rendered by default, a default judgment entered under Rule 55(b)(1) may include an award of reasonable attorney's fees only if:

- (i) an affidavit establishes the reasonable amount of the fee award;
- (ii) the defendant has not entered an appearance in the action; and
- (iii) the award is allowed by law.

**(c)–(e) [No Change]**

## APPENDIX C

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### 6 IN THE SUPREME COURT STATE OF ARIZONA

7 PETITION TO AMEND RULE  
8 55(b)(1), ARIZONA RULES OF CIVIL  
9 PROCEDURE AND ADOPT  
10 EXPLANATORY COMMENT

Supreme Court No. R-

**Petition to Amend Rule 55(b)(1),  
Arizona Rules of Civil Procedure and  
Adopt Explanatory Comment**

11  
12 Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the State Bar  
13 of Arizona (the "State Bar") respectively petitions this Court to amend Rule 55(b)(1)  
14 of the Arizona Rules of Civil Procedure (default judgment by motion) and adopt a  
15 comment to explain the amendment. The proposed amendment to Rule 55(b)(1)  
16 seeks to (1) clarify a perceived ambiguity in the Rule that has resulted in a conflict in  
17 interpretation in Division One of the Court of Appeals, and (2) make clear that prior  
18 notice and a hearing *is not* required in a case seeking a sum certain or a sum which  
19 can by computation be made certain in which the defendant has been defaulted for  
20 failing to plead or otherwise defend, even if the defendant enters an appearance prior  
21 to the entry of a default judgment.

22 A redline version of proposed amended Rule 55(b) ("Proposed Rule 55(b)")  
23 identifying additions and deletions is attached to this Petition at **Exhibit "A,"** and a  
24 "clean" version of Proposed Rule 55(b) is attached to this Petition at **Exhibit "B."**  
25 The proposed comment is attached to this Petition at **Exhibit "C."**

1 I. THE NEED FOR AMENDING RULE 55(b)(1)

2 The need to amend Rule 55(b)(1) is predicated on the following fact pattern:  
3 Plaintiff sues defendant for liquidated damages and defendant is properly served.  
4 Defendant fails to answer or otherwise respond to the complaint and plaintiff files an  
5 application for entry of default. The default becomes effective under Rule 55(a)(2).  
6 After the effective date of the default, but before the entry of a default judgment, the  
7 defaulted defendant enters an appearance. The question thus becomes whether the  
8 plaintiff under these circumstances may proceed to reduce its liquidated claim (a  
9 claim for a sum certain or a sum which can by computation be made certain) to  
10 judgment by motion without a hearing or whether the plaintiff is required to proceed  
11 to a noticed damages hearing before a judgment may be entered.

12 In March 2012, one panel of Division One of the Court of Appeals determined  
13 that, under the above-stated circumstances, the plaintiff was required to give notice to  
14 the defaulted but later-appearing defendant and proceed to a damages hearing before  
15 the plaintiff could reduce its claim to judgment. *BYS Inc. v. Smoudi*, 228 Ariz. 573,  
16 269 P.3d 1197 (App. 2012). The *BYS* Court held that, under Rule 55(b)(2), “[o]nce a  
17 defendant has appeared, a default judgment can be obtained *only* after a hearing by  
18 the court upon three days’ written notice.” *Id.* at 578, ¶ 20, 269 P.3d at 1202  
19 (emphasis added). More specifically, the *BYS* Court stated:

20 Rule 55(b)(2) requires a noticed hearing on an application  
21 for judgment when a party has: (1) appeared, regardless  
22 of whether the damages are liquidated or unliquidated;  
23 and (2) when a party has not appeared, and the damages  
24 are unliquidated.

25 *Id.* Because the defendant in *BYS* was not given prior notice and the record did not  
demonstrate that a hearing had been held on the plaintiff’s liquidated damages claim,  
the Court of Appeals vacated the default judgment and instructed the trial court to

1 hold a hearing on the plaintiff's liquidated damages claim. *Id.* at 579, ¶ 25, 269 P.3d  
2 at 1203.

3         Nine months later, and under virtually identical circumstances, another panel  
4 of Division One of the Court of Appeals came to the opposite conclusion in a two-to-  
5 one decision. *Searchtoppers.com, L.L.C. v. TrustCash, L.L.C.*, 231 Ariz. 236, 293  
6 P.23d 512 (App. 2012). That panel concluded that *BYS* was incorrectly decided. *Id.*  
7 at 233-35, ¶¶ 13-16, 293 P.3d at 515-17.

8                 The nature of the claims is what distinguishes Rule  
9 55(b)(1) (which does not require notice) from Rule  
10 55(b)(2) (which does require notice). Rule 55(b)(1) is  
11 limited to claims "for a sum certain or for a sum which  
12 can by computation be made certain." Ariz. R. Civ. P.  
13 55(b)(1). For such a liquidated claim, there is no  
discretion in calculating the amount owed. Such a claim  
does not require a hearing for calculation and,  
accordingly, no notice for a hearing is required.

14 *Id.* at 234-35, ¶ 17, 293 P.2d at 516-17 (emphasis added). *Searchtoppers.com*  
15 therefore held that the defendant "was not entitled to the three-day notice and an  
16 opportunity for an evidentiary hearing provided by Rule 55(b)(2) to a defaulted party  
17 who appears in the action." *Id.* at 235, ¶ 18, 293 P.3d at 517.

18         Believing that *BYS* was correctly decided and every defaulted defendant who  
19 makes an appearance prior to the entry of judgment is entitled to a noticed hearing  
20 regardless of the nature of the case, the dissent in *Searchtoppers.com*<sup>1</sup> drew a  
21 distinction between the necessary predicate for the entry of default—that is, the  
22 defendant's failure "to plead or otherwise defend" as stated in Rule 55(a)—and the  
23 type of default required to reduce a liquidated claim to default judgment by motion as  
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<sup>1</sup> The dissenting judge in *Searchtoppers.com* was the authoring judge of the *BYS* decision.

1 set forth in Rule 55(b)(1)—“if the defendant has been defaulted for failure to  
2 appear.”

3 While the rule does provide that when damages are  
4 liquidated “the Court . . . shall enter judgment for that  
5 amount and costs against the defendant,” it specifically  
6 qualifies that the court shall do so “if the defendant has  
7 been defaulted for *failure to appear*.” Ariz. R. Civ. P.  
8 55(b)(1) (emphasis added). “In all other cases,” which I  
9 take to mean cases in which the defendant has been  
10 defaulted for failing to *plead or otherwise defend* as set  
11 forth in Rule 55(a), the applicable procedure for obtaining  
12 a default judgment is found in Rule 55(b)(2).

13 *Id.* at 243, ¶ 29, 293 P.3d at 519.

14 The dissent’s analysis in *Searchtoppers.com* draws a distinction without a  
15 substantive difference and would frustrate the purpose of the 1975 amendments to  
16 Rule 55(b), which were adopted to eliminate needless damages hearings in liquidated  
17 damages cases. If a defendant has failed to appear in an action, the defendant  
18 certainly has not pleaded or otherwise defended. Further, even if a defendant were to  
19 enter a notice of appearance but then fail to plead or otherwise defend, the entry of  
20 default would nonetheless be appropriate. Rule 55(a). In other words, no scenario  
21 can be conceived where a defendant would be defaulted for “failure to appear” in the  
22 absence of the defendant also failing “to plead or defend.”

23 In addition, courts are well-equipped to determine whether a claim is actually  
24 liquidated. If the complaint does not adequately demonstrate that the claim is for “a  
25 sum certain or for a sum which can be by computation made certain,” a Rule 55(b)(2)  
hearing may be set, and notice given if the defendant has entered an appearance.

A current conflict exists, however, between *Searchtoppers.com* and *BYS*,  
leading to uncertainty among the bench, the bar, and the public. It also appears that  
the merits of this conflict are likely to evade review in this Court for a significant

1 period of time.<sup>2</sup> In order to resolve the conflict, the State Bar petitions this Court to  
2 amend Rule 55(b)(1) and adopt the proposed explanatory comment as set forth  
3 below.

4 **II. PROPOSED AMENDMENT TO RULE 55(b)(1) OF THE ARIZONA**  
5 **RULES OF CIVIL PROCEDURE**

6 To address the dissent's distinction in *Searchtoppers.com* between "failure to  
7 appear" in Rule 55(b)(1), and failure "to plead or otherwise defend" in Rule 55(a),  
8 the State Bar proposes replacing the phrase "failure to appear" in Rule 55(b)(1) with  
9 the language found in Rule 55(a)—that is, failure "to plead or otherwise defend."  
10 And to make the intended effect of that amendment obvious, it is also proposed that  
11 the phrase "and without a hearing" be added to the rule. Thus, if adopted, Proposed  
12 Rule 55(b)(1) would read, in pertinent part:

13 When the plaintiff's claim against a defendant is for a  
14 sum certain or for a sum which can by computation be  
15 made certain, the Court upon motion of the plaintiff and  
16 upon affidavit of the amount due, and without a hearing,  
shall enter judgment for that amount and costs against the  
defendant, if the defendant has been defaulted for failure  
to appear plead or otherwise defend . . . .

17 This minor amendment to Rule 55(b)(1) will make it clear that the failure to plead or  
18 otherwise defend permits the entry of a default judgment in a liquidated damages  
19 case, even if the defendant has appeared before or after the effective date of a default.

20 **III. PROPOSED EXPLANATORY COMMENT**

21 The State Bar also proposes the following comment to explain the purpose of  
22 the amendment to Rule 55(b)(1).  
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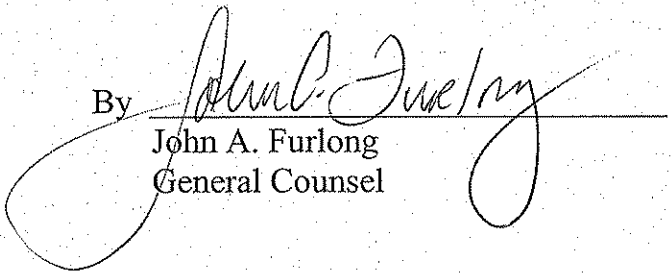
25 <sup>2</sup> A petition for review in this Court was not filed in either *Searchtoppers.com* or  
*BYS* and, absent a rule change, the conflict between the decisions will linger  
indefinitely.

1 The amendment to Rule 55(b)(1) is intended to resolve  
2 the conflict between *BYS Inc. v. Smoudi*, 228 Ariz. 573,  
3 269 P.3d 1197 (App. 2012) and *Searchtoppers.com,*  
4 *L.L.C. v. TrustCash, L.L.C.*, 231 Ariz. 236, 293 P.3d 512  
5 (App. 2012), by clarifying the Rule consistent with the  
6 interpretation in the latter case, which held that a  
7 defendant who has been defaulted for failure to appear in  
8 a case that claims a sum certain, but who makes a post-  
9 default appearance, is not entitled to notice and a hearing  
10 before judgment may be entered.

11 **IV. CONCLUSION**

12 For the foregoing reasons, the State Bar respectfully petitions this Court to  
13 amend Rule 55(b)(1) of the Arizona Rules of Civil Procedure and adopt the  
14 explanatory comment as set forth in Exhibits "B" and "C" to this Petition.

15 RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of December,  
16 2013.

17 By   
18 John A. Furlong  
19 General Counsel

20 Electronic copy filed with the Clerk  
21 of the Supreme Court of Arizona this  
22 13<sup>th</sup> day of December, 2013.

23 By: Kathleen A. Lundgren  
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## Exhibit "A"

### Proposed Ariz. R. Civ. P. 55(b)

(Additions are underlined; deletions shown in ~~strikethrough~~)

Judgment by default may be entered as follows:

1. *By motion.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the Court upon motion of the plaintiff and upon affidavit of the amount due, and without a hearing, shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to ~~appear~~ plead or otherwise defend and is not an infant or incompetent person. If the claim states a specific sum of attorneys' fees which will be sought in the event judgment is rendered by default, and if such award is allowed by law and is supported by the affidavit, the judgment may include an award of reasonable attorneys' fees not to exceed the amount of the demand therefor. If the claim requests an award of attorneys' fees, but fails to specify the amount of such fees that will be sought in the event judgment is rendered by default, the judgment may include an award of attorneys' fees, if such an award is allowed by law and the reasonable amount therefor is established by affidavit, where the defendant has not entered an appearance in the action.

2. *By hearing.* --NO CHANGE--

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## Exhibit "B"

**Proposed Ariz. R. Civ. P. 55(b)**

("Clean" version)

Judgment by default may be entered as follows:

1. *By motion.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the Court upon motion of the plaintiff and upon affidavit of the amount due, and without a hearing, shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to plead or otherwise defend and is not an infant or incompetent person. If the claim states a specific sum of attorneys' fees which will be sought in the event judgment is rendered by default, and if such award is allowed by law and is supported by the affidavit, the judgment may include an award of reasonable attorneys' fees not to exceed the amount of the demand therefor. If the claim requests an award of attorneys' fees, but fails to specify the amount of such fees that will be sought in the event judgment is rendered by default, the judgment may include an award of attorneys' fees, if such an award is allowed by law and the reasonable amount therefor is established by affidavit, where the defendant has not entered an appearance in the action.

2. *By hearing.* --NO CHANGE--

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## Exhibit "C"

### Proposed Comment Ariz. R. Civ. P. 55(b)

#### State Bar Committee Note

The amendment to Rule 55(b)(1) is intended to resolve the conflict between *BYS Inc. v. Smoudi*, 228 Ariz. 573, 269 P.3d 1197 (App. 2012) and *Searchtoppers.com, L.L.C. v. TrustCash, L.L.C.*, 231 Ariz. 236, 293 P.3d 512 (App. 2012), by clarifying the Rule consistent with the interpretation in the latter case, which held that a defendant who has been defaulted for failure to appear in a case that claims a sum certain, but who makes a post-default appearance, is not entitled to notice and a hearing before judgment may be entered.