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8 **IN THE SUPREME COURT**
9 **STATE OF ARIZONA**

10 PETITION TO AMEND RULE
11 55(b)(1), ARIZONA RULES OF CIVIL
12 PROCEDURE AND ADOPT
13 EXPLANATORY COMMENT

Supreme Court No. R-

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

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

24 A redline version of proposed amended Rule 55(b) ("Proposed Rule 55(b)")
25 identifying additions and deletions is attached to this Petition at **Exhibit "A,"** and a
"clean" version of Proposed Rule 55(b) is attached to this Petition at **Exhibit "B."**
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*¹ 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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25 ¹ 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.² 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 ² 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 13th 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 13th 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.