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

9 In the Matter of:

Supreme Court No. R-23-0030

10 **PETITION TO AMEND RULE**
11 **55(b)(1)(A), ARIZONA RULES OF**
12 **CIVIL PROCEDURE**

COMMENT

13 The State Bar of Arizona (the “State Bar”) submits its Comment on the above-
14 captioned Petition. The Petition proposes to amend Rule 55(b)(1)(A) of the Arizona
15 Rules of Civil Procedure to revert to the 2016 version of the rule. The State Bar
16 supports the proposed amendment.
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18 **I. INTRODUCTION**

19 The Petition identifies and proposes a useful amendment to resolve a conflict
20 between the current Rule 55(b)(1)(A) and a comment to that Rule that creates
21 confusion as to when a defaulted party may be entitled to notice and a hearing before
22 a court enters certain types of default judgments.
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1 The State Bar supports that amendment, but on the narrow grounds that the
2 current wording of Rule 55(b)(1)(A) (which was adopted in 2017 and reversed an
3 amendment a year earlier that was correct) is incorrect and should be fixed to be
4 consistent with the comment to that Rule, which corresponded to the 2016
5 amendment. The 2016 amendment and the comment both correctly stated that a
6 party is defaulted for failing to defend, not for failing to appear. The 2017 rule
7 amendment inexplicably reverted to the prior language and provided that a party is
8 defaulted for failing to appear. The Petition would correct that error and thereby
9 bring the rule-language back into harmony with the comment.
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12 The State Bar does not take a position on the issues the Petition discusses as
13 to when a defaulted party is entitled to notice because this Court need not reach those
14 issues to make the necessary correction to Rule 55(b)(1)(A).
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16 **II. RULE 55(b)(1)(A) AND THE PETITION’S PROPOSED** 17 **CHANGE**

18 Rule 55(b)(1) addresses when a party is entitled to notice and a hearing for
19 entry of default judgment on a claim for a sum certain. The Petition explains how
20 this Rule amended referring to a defendant who “has been defaulted for failure to
21 appear” in 2012, to a defendant “defaulted for failure to plead or otherwise defend”
22 in 2016 (along with a corresponding comment that amplified this point). A year later,
23 the Rule was amended back to the language in which a defendant “defaulted for not
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1 appearing,” an amendment that, among other things, did not amend the
2 corresponding comment and, thus, was inconsistent with it.

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4 The Petition discusses various appellate decisions reaching different
5 conclusions concerning whether a defendant who has been defaulted – but who has
6 made an appearance – is entitled to notice and a hearing when default judgment is
7 sought for a sum certain. The Petition notes that the current version of Rule 55(b)(2)
8 matches the current version of its federal counterpart, Fed. R. Civ. P. 55(b)(1), and
9 under federal law, a defaulted party who has made an “appearance”—even an
10 informal one—is entitled to notice and a hearing.
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12 The Petition then requests that this Court amend Rule 55(b)(1)(A) to revert to
13 the 2016 version of the rule that referenced a defendant who was “defaulted for
14 failure to plead or otherwise defend,” which was a change from the earlier version
15 and its federal counterpart. The Petition seeks this change to “make clear that
16 Arizona courts can issue default judgments in cases with a ‘sum certain’ without the
17 need for a default judgment hearing, even if the party has appeared in the action.”
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20 **III. RULE 55(B)(1)(A) SHOULD BE AMENDED AS THE PETITION**
21 **REQUESTS, BUT ON THE NARROW GROUNDS THAT THE**
22 **CURRENT RULE MISSTATES WHEN A PARTY IS IN**
DEFAULT

23 The State Bar understands and agrees with the general preference for adopting
24 the language of parallel federal rules of civil procedure, absent a good reason for
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1 departure. This is what perhaps led to the adoption in 2017 of the current version of
2 Rule 55(b)(1)(A), a matter that the 2016 amendment had handled correctly. But in
3 this case, the rule does not now accurately reflect when a party is defaulted.
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5 Rule 55(a)(1) correctly states that a party is defaulted when it “has failed to
6 plead or otherwise defend.” Accordingly, the reference in Rule 55(b)(1)(A) (and in
7 Fed. R. Civ. P. 55(b)(1)) to obtaining a default judgment on a claim for a sum certain
8 without a hearing against a party “who has been defaulted for not appearing” is
9 simply incorrect. Parties are defaulted for failing to “plead or otherwise defend,” not
10 for failing to appear. The reference in Rule 55(b)(1)(A) should be corrected (as it
11 was in 2016) to refer to a party who has been defaulted for failing to plead or
12 otherwise defend. This contrasts with other types of default, including when a
13 responsive pleading is stricken as a discovery or other sanction.
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16 There is a separate issue lurking here: If Rule 55(b)(1)(A) is corrected to revert
17 to its 2016 formulation, should it also state that parties who have been defaulted but
18 who *have* appeared are entitled to notice and/or a hearing before a default judgment
19 for a sum certain is entered? If so, the Rule could be further amended (beyond its
20 reversion to the 2016 language) to state this unambiguously. The State Bar does not
21 take a position on this issue because it is beyond the scope of the limited, albeit
22 important, language change sought by the Petition. Regardless, the Petition’s
23 proposed change would be a helpful first step in clarifying this issue because it
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1 removes an incorrect definition of when default is entered and restores the correct
2 definition.

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4 **IV. CONCLUSION**

5 For the above-stated reasons, the State Bar respectfully requests this Court
6 amend Rule 55(b)(1)(A) as the Petition seeks.
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9 RESPECTFULLY SUBMITTED this 1st day of May 2023.
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11 */s/ Lisa M. Panahi*

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Lisa M. Panahi
13 General Counsel

14 Electronic copy filed with the
15 Clerk of the Supreme Court of Arizona
16 this 1st day of May 2023.

17 by: PSeguin
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