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8 **IN THE SUPREME COURT**

9 **STATE OF ARIZONA**

10 In the Matter of

11 AMENDED PETITION TO AMEND
12 RULE 23, ARIZONA RULES OF CIVIL
13 PROCEDURE

Supreme Court No. R-15-007

Comment in Support of Petition

14 This petition hopes to carrying out the recommendations of the State Bar of
15 Arizona's Access to Justice Task Force, which in its final report identified the use of *cy*
16 *pres* awards to distribute class action residual funds to access to justice initiatives as a
17 way to increase financial support for legal services. The petition represents a
18 compromise from the initial proposal of mandatory disbursement of such funds to
19 allowing for the discretionary disbursement. With the need for legal aid rising and
20 interest rates on the IOLTA accounts remaining at all-time lows, a solution like that
21 proposed by this rule change is necessary.

22 **A. This Source of Funds Is a Rational Source for the Problem at Hand**

23 In class action lawsuits there may be settlement funds that for a variety of reasons
24 cannot be paid to class members. The class members may not be located or do not
25 respond to correspondence or the amounts at issue are too small to warrant sending out
26 class correspondence. These remaining funds are called residual funds.

27 Adoption of this petition would directly address the needs identified in the creation of
28 the Arizona Supreme Court's Arizona Commission on Access to Justice because it would
facilitate access to justice for individuals who cannot afford legal counsel. By supporting
programs already in place and operated in conjunction with the Arizona Bar Foundation,

1 the funds at issue will go to help those who otherwise lack access to justice. Residual
2 funds are an appropriate source of support for legal services programs because class
3 action cases and legal service programs serve similar purposes – they give access to
4 justice and the courts for those who otherwise would not have access.

5 **B. This Solution Has Been Used Elsewhere**

6 The concept has been used elsewhere. Seventeen other states have enacted rules of
7 procedure or passed legislation to mandate or allow for the distribution of residual funds
8 to legal services and access to justice programs. Many of these states use the Bar
9 Foundation as the administrator for these funds.

10 Also, Arizona courts have allowed the use of the *cy pres* doctrine to class action
11 cases. One such case is *Charles I. Friedman v. Microsoft Corp.*, 213 Ariz. 344,348, n.7,
12 141 P.3d 824,828 (App. 2006). This rule change is not a fundamental change in the law.
13 It is an incremental change that is consistent with practices in Arizona and elsewhere.

14 **C. This Is a Pragmatic Step**

15 This change would give courts an option regarding what to do with residual funds. By
16 allowing the courts to make this procedural change, our justice system is strengthened
17 overall. The petition is modeled after other state rules and allows for – but does not
18 mandate – that the court distribute residual funds to the Foundation to support legal
19 services and access to justice programs for low income Arizonans. Thus, it is a smaller
20 step than the earlier petition, but enables Arizona to become familiar with the program in
21 practice.
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23 Furthermore, the Arizona Bar Foundation is an excellent choice to manage the pass-
24 through funds. The organization has successfully administered and distributed \$41
25 million in IOLTA funds for over 30 years; they have the infrastructure in place to serve
26 as a pass-through organization for *cy pres* funds.
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Conclusion

For all the above reasons we urge the Court to grant the petition and adopt the proposed changes to Rule 23

RESPECTFULLY SUBMITTED this 17th day of May 2015.

By /s/James E. Barton II
James E. Barton II

Electronic copy filed with the Clerk of the Supreme Court of Arizona this 17th day of May 2015

By: /s/ James E. Barton II