COMMENT BY ARIZONA CHAMBER OF COMMERCE REGARDING TASK FORCE ON THE ARIZONA RULES OF CIVIL PROCEDURE

The Arizona Chamber of Commerce and Industry ("Arizona Chamber") respectfully submits this Comment to supplement its Pre-Petition Comments & Suggestions on Task Force Vetting Draft Appendix A. The Arizona Chamber is a nonpartisan, nonprofit organization that is the leading statewide advocate for the Arizona business community. Our diverse membership employs 250,000 Arizonans in all business sectors from manufacturing to services and includes small, medium and large employers. We are committed to advancing Arizona's competitive position in the global economy by advocating free-market policies that stimulate economic growth, and protecting businesses from unnecessary and cumbersome legal and regulatory burdens.

The Arizona Chamber has closely followed the work of the Task Force on the Arizona Rules of Civil Procedure ("Task Force") and its revision of Rules 11, 16, 23, 26, 26.1, 27, 30, 37, 38.1, 45, 45.1, and 80 (collectively, the "Rules") in Appendix A of the Task Force Vetting Draft. The supplemental language below, with an attached version of the revised Rules, is the result of the Arizona Chamber's independent review with a variety of stakeholders from the legal and business communities in Arizona and nationwide. This Comment incorporates some of the revisions made by the Task Force, as well as urges the Task Force to adopt the Arizona Chamber's recommendations.

The Arizona Chamber appreciates and applauds the Task Force for adopting the following suggestions:

1) requiring an attorney to make an independent reasonable inquiry into the facts if the attorney has reason to believe the self-represented person the attorney is assisting has made a false or materially insufficient representation of such facts (proposed 11(d));

2) sharing or shifting of costs, if appropriate, incurred by the parties in producing electronically stored information during scheduling conferences in non-medical malpractice actions (proposed 16(d)(3)(A);

3) requiring the court to set forth its reasons for maintaining a case as a class action when granting a certification order (proposed 23(c)(1)(B)(iii));

4) allowing the court to shift the costs, if appropriate, in resolving any dispute regarding electronically stored information (proposed 26.1(b)(2)(B));

5) shortening the time period for allowing any expected adverse party to file an opposition to a discovery petition before an action is filed from 7 days to 5 days. (proposed 27(a)(4));

6) requiring good cause, instead of sufficient cause, to postpone trial once a court has set an action for trial on a specified date (proposed 38.1(b)(1)(A)); and

7) ensuring Arizona businesses and employees sought as witnesses in out-of-state proceedings will not be unduly subjected to the varying discovery rules of other fora (proposed 45.1).

The Arizona Chamber strongly urges the adoption of the following material suggestions:

Rule 11:

1) using the "good faith and reasonable argument" standard for claims, defenses and other legal contentions instead of the "nonfrivolous argument" standard. The good faith and reasonable argument standard is well established and Arizona courts are familiar with applying it. Conversely, the nonfrivolous standard is arbitrary, hard to enforce, and there is no case law interpreting it (proposed 11(b)(2));

2) requiring contentions made in pleadings, motions, and other documents to be well grounded in fact instead of requiring evidentiary support. The well grounded in fact standard is clear and Arizona courts are familiar with applying it (proposed 11(b)(3));[1]

3) replacing "and" with "or" in the list following the attorney or party's representations to the court in 11(b). A violation of any of the items listed in (1) through (5) results in a violation of Rule 11, not a violation of all of them (proposed 11(b)(4));

4) requiring signers of documents served or filed with the court to make an independent reasonable inquiry into the facts of representations made by others, if the signer has reason to believe those representations were false or materially insufficient (proposed 11(b)(5));

5) joining other states, including Nebraska, Oklahoma, Pennsylvania and Texas, in imposing mandatory sanctions for violations of Rule 11, along with a heightened standard of review for exceptions to mandatory dismissal sanctions where appropriate (proposed 11(c)(1);

Rule 23:

6) requiring the court to hold a hearing and determine by order whether to certify an action as a class action within 120 days after a person sues and serves or is sued and served as a class representative (proposed 23(c)(1)(A));

7) requiring the court to describe all evidence, instead of merely the evidence, in support of the court's determination to maintain an action as a class action (proposed 23(c)(1)(B)(iv));

Rule 26:

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[1] *James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Prot.*, 177 Ariz. 316, 320, 868 P.2d 329, 333 (App. 1993) ("The standards of conduct with which a lawyer must comply to avoid sanctions under Rule 11 are well-defined. . . . before signing a pleading, [Rule 11 requires that] a lawyer possess a good faith belief, formed on the basis of a reasonable investigation, that a colorable claim or defense exists.") (citing *Boone v. Superior Court*, 145 Ariz. 235, 241, 700 P.2d 1335, 1341 (1985)).

8) allowing discovery only if appropriate to the needs of the action considering the importance of the discovery in resolving the issues and achieving a just resolution of the action on the merits, the importance of the issues at stake, the amount in controversy, the burden or expense imposed by the discovery, and the parties' resources (proposed 26(b)(1)(A));

9) excusing a party's production of electronically stored information from sources that the party shows are not reasonably accessible because of the good-faith routine operation of an electronic information system (proposed 26(b)(2));

10) requiring the court to impose an appropriate sanction—including any order under 16(i)—against a party or attorney who has engaged in unreasonable, groundless, abusive, or obstructionist conduct in connection with discovery (proposed 26(f));

Rule 26.1:

11) requiring each party to disclose in writing a disclosure statement that sets forth the existence, basis and a copy of any disclaimer, limitation or denial of coverage or reservation of rights under the insurance policy, indemnity agreement, or suretyship agreement (proposed 26.1(a)(10));

12) requiring each party to disclose in writing a disclosure statement that sets forth whether any tangible evidence, documents or electronically stored information that the disclosing party believes may be relevant to the subject matter of the action is being withheld on the grounds that it is unreasonably duplicative; can be obtained from another source that is more convenient, less burdensome, or less expensive; is information that the party has had ample opportunity to obtain; or is unduly burdensome or expensive given the needs of the action, the importance of discovery, the importance of the issues at stake, the amount in controversy and the parties' resources (proposed 26.1(a)(11));

13) requiring each party to produce electronically stored information in native form or in another reasonably usable form unless the parties agree or the court orders otherwise (proposed 26.1(b)(2)(D));

Rule 27:

14) requiring a party who wants to perpetuate testimony or preserve evidence under the rules to move for leave to conduct discovery during the pendency of the appeal (proposed 27(b)(2));

Rule 30:

15) requiring a party to produce to the requesting party any documents or tangible items specified in the notice of deposition reasonably in advance of a deposition being taken remotely (proposed 30(b)(4));

16) requiring the court to impose appropriate sanctions—including any under 16(i)—against a party or attorney who has engaged in unreasonable, groundless, abusive or obstructionist conduct in connection with a deposition, including an unreasonable refusal to agree to extend a deposition beyond 4 hours (proposed 30(d)(2));

Rule 37:

17) requiring the party seeking documents in a subpoena served under Rule 45 to show clearly and convincingly in its motion to compel a discovery response that such documents are not obtainable from another source and are indispensable to the party's claim (proposed 37(a)(3)(B)(v));

18) requiring the court to order the party or person whose conduct necessitated a granted motion for order compelling discovery, the party or attorney advising the conduct, or both, to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees (proposed 37(a)(5)(A));

19) requiring the court to order the movant, the attorney filing the motion, or both, to pay the party or person who opposed a denied motion for order compelling disclosure or discovery its reasonable expenses incurred in opposing the motion, including attorney's fees (proposed 37(a)(5)(B));

20) requiring the court to treat a deponent who fails to obey an order to be sworn or to answer a question as contempt of court (proposed 37(b)(1));

21) requiring the court to enter any or all of the further just orders listed in (i) through (vii) when a party or party's officer, director, or managing agent—or a witness designated under 30(b)(6) or 31(b)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 35 or Rule 37(a) (proposed 37(b)(2));

22) requiring the court to order the disobedient party, the attorney advising that party, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure to comply with a court order, unless the failure was substantially justified or other circumstances make an award of expenses unjust (proposed 37(b)(2)(C));

23) disallowing the use of information, a witness or a document as evidence at trial or on a motion when a party fails to timely disclose the information, witness or document required by Rule 26.1 unless the court orders otherwise for good cause shown or unless such failure is harmless (proposed 37(c)(1));

24) requiring the court to order a party or attorney who makes disclosure under Rule 26.1 that the party or attorney knew or should have known was inaccurate or incomplete to

reimburse the opposing party for the reasonable cost, including attorney's fees, of any investigation or discovery caused by the inaccurate or incomplete disclosure (proposed 37(c)(2));

25) requiring the court to impose serious sanctions, up to and including the dismissal of the action—or rendering of a default judgment—in whole or in party when a party knowingly fails to make a timely disclosure of damaging or unfavorable information required under 26.1 (proposed 37(d));

26) requiring the court to order sanctions if a party is in violation of 37(f)(1)(A)(i) or (ii) (proposed 37(f)(1)(A));

27) requiring the court to impose instead of or in addition to the orders listed in 37(b)(2)(A)(i) through (iv) the sanction of paying the reasonable expenses—including attorney's fees—caused by the party's failure to attend its own deposition or to respond to interrogatories or requests for production, unless the failure was substantially justified or other circumstances make an award of expenses unjust (proposed 37(f)(3));

28) requiring the court to order additional discovery to restore or replace electronically stored information that should have been preserved was lost because a party—either before or after an action's commencement—failed to take reasonable steps to preserve it, including, if appropriate, an order under Rule 26(b)(2) (proposed (37)(g)(2));

29) requiring the court to order measures no greater than necessary to cure the prejudice resulting from a party's failure to take reasonable steps to preserve electronically stored information that should have been preserved when the information cannot be restored or replaced through additional discovery (proposed 37(g)(2)(A));

30) requiring the court to (i) presume that the lost information was unfavorable to the party; (ii) instruct the jury that it may or must presume the information was unfavorable to the party; or (iii) dismiss the action or enter a default judgment when the court finds that the party acted with the intent to deprive another party of the information's use in the litigation (proposed 37(g)(2)(B));

31) allowing the court to dismiss the action or enter a default judgment without finding prejudice to another party when electronically stored information that should have been preserved is lost because a party failed to take reasonable steps to preserve it and the information cannot be restored or replaced through additional discovery (proposed 37(g)(2)(B)(iii);

<u>Rule 38.1</u>:

32) requiring the court to deny a postponement if, among other grounds, it rules that the described testimony of an unavailable or absent witness would be inadmissible if presented at trial or if all non-moving parties stipulate that the movant's description of witness's

expected testimony is accurate and would be admissible if presented at trial (proposed 38.1(b)(3)(B));

Rule 45:

33) allowing a person responding to a discovery request not to produce electronically stored information from sources that the person shows are not reasonably accessible because of undue burden or expense or because of the good-faith routine operation of an electronic information system (proposed 45(c)(2)(D));

34) requiring the court to impose an appropriate sanction—which must include, but is not limited to, lost earnings, the reasonable costs of production, and reasonable attorney's fees—on a party or attorney who fails to comply with its duty to take reasonable steps to avoid imposing undue burden or expense on a person subject to a subpoena (proposed 45(e)(1));

35) requiring the court to quash or modify a third-party subpoena when the party seeking the information has not shown clearly and convincingly that such documents are not obtainable from another source and are indispensable to the party's claim (proposed 45(e)(2)(A)(v));

36) requiring the party or person serving a subpoena in the circumstances described in Rule 45(e)(2)(B) to compensate the subpoenaed person for expenses related to travel or production if those expenses are at issue (proposed 45(e)(2)(C)(ii);

37) requiring the party requesting discovery to pay for the reasonable production or inspection costs resulting from a subpoena to a third-party commanding production of documents, electronically stored information, tangible things, or permission for the inspection of premises under 45(c) unless the court determines the third-party has an interest in the outcome of the case. A third-party that is unrelated to the case should not have to pay production or inspection expenses. Since the party seeking discovery is requesting the information, it is reasonable to require that party to cover the reasonable expenses of production. For authority on this cost-shifting issue, see e.g., Freedom of Information Act, 5 U.S.C. § 552(a)(4)(A)(ii) (2012) (requiring a person requesting public records to pay "for document search, duplication, and review, when records are requested for commercial use; . . . [and] reasonable standard charges for document duplication when records are not sought for commercial use"); N.Y. C.P.L.R. 3111 & 3122(d) (McKinney 2016) ("The reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery"); *Guy Chem. Co., Inc. v. Romaco AG*, 243 F.R.D. 310, 313 (N.D. Ind. 2007) ("it is not the [non-party's] lawsuit and they should not have to pay for the costs associated with someone else's dispute) (proposed 45(e)(3)); and

38) authorizing the court to require advanced payment of a third-party's reasonably calculated production or inspection expenses by the party requesting discovery resulting from a third party subpoena for production or inspection under 45(c) at the time of the 16(d) Scheduling Conference unless the third-party has an interest in the outcome of the case. Freedom of

Information Act, 5 U.S.C. § 552(a)(4)(A)(ii) (2012) (allowing the agency to require the advanced payment of production expenses if the agency has determined that the [production expense] will exceed $250); (proposed 45(e)(3)).

Additional Suggestions:

39) including the "independent reasonable inquiry into the facts" requirement in the verification provisions of what the Task Force now proposes as Rule 8(i) (formerly proposed 80(g)); and

40) remaining consistent with the corresponding federal Rules 26 and 45 by using "trial-preparation materials" instead of "work product materials." *Compare* Fed. R. Civ. P. 26 & 45 *and* Rules 16, 26 & 45 proposed by the Task Force.

Thus, the Arizona Chamber urges the Task Force to adopt in its Petition the recommendations included in this Comment. These recommendations seek additional clarity in the above civil rules, which is an important step toward protecting businesses and all litigating parties from undue legal and regulatory burdens. Thank you for your consideration of the above and the attached.