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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: PETITION FOR AMENDMENTS TO ARIZONA RULES OF CIVIL PROCEDURE 11 AND 26	Supreme Court No. R-17-0050 **Comment in Support of Petition to Further Amend the Arizona Rules of Civil Procedure to Modify Rule 11 and Add Rule 26(b)(2)(D)**

Pursuant to Rule 28, Rules of the Arizona Supreme Court, the undersigned respectfully file this comment in support of Petition No. 17-0050 to Further Amend the Arizona Rules of Civil Procedure to Modify Rule 11 and Add Rule 26(b)(2)(D). The amendments would reduce the time and expense of civil litigation in Arizona courts.

Although these amendments were unanimously recommended by this Court's Committee on Civil Justice Reform (CCJR), they were left out of the Court's Order on the petition filed by that Committee. The Court should remedy that exclusion and adopt these amendments effective July 1, 2018, when most of the rest of the CCJR's work takes effect.

I. The Court should Adopt Amendments to Rule 11

The Court should adopt Petitioner's amendments to Rule 11 that were not adopted during the last rules cycle, but would nevertheless maximize civil justice reform. The proposed changes are included below in blackline for reference:

> **(b) Representations to the Court.** By signing a pleading, motion, or other document, the attorney or party certifies that to the best of the person's knowledge, information, and belief formed after reasonable inquiry:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the factual contentions are well grounded in fact;
>
> (3) the denials of factual contentions are well grounded in fact or, if specifically so identified, are reasonably based on lack of knowledge or information sufficient to form a belief.
>
> (4) the claims, defenses, and other legal contentions are warranted by existing law or by a ~~nonfrivolous~~colorable argument for extending, modifying, or reversing existing law or for establishing new law. A

legal contention may be colorable even if it does not succeed on the merits.

~~(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and~~

~~(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.~~

(c) Sanctions.

(1) *Generally.* If a pleading, motion, or other document is signed in violation of this rule, or if a party fails to participate in good faith in the consultation required under Rule 11(c)(2), the court—on motion or on its own—~~may~~ must impose on the person who signed it, a represented party, or both, an appropriate sanction. The sanction may include an order to pay to the other party or parties the amount of the reasonable expenses incurred, including a reasonable attorney's fee, because of the filing of the document or because of the party's failure to participate in the required Rule 11(c)(2) consultation. In considering an appropriate sanction, the court must take into account the opportunities provided to the person or party violating Rule 11 to withdraw or correct the alleged violation under Rule 11(c)(2). The sanction otherwise required by this rule is not applicable if the party seeks in good faith to vindicate a constitutional right. It is an abuse of discretion to fail to impose an appropriate sanction when the standards of this rule are met.

Those proposals include (1) modifications that would better represent Arizona Rule 11 case law, (2) modifications requiring factual allegations to be "well grounded in fact," thus minimizing frivolous filings, and (3) changes making Rule 11(c) sanctions generally mandatory, rather than discretionary, upon a violation.

First, the word "nonfrivolous" should be replaced with the word "colorable" in Rule 11(b)(4) to harmonize the Rule with existing case law. The term "colorable" is already established in Arizona's existing Rule 11 case law. *See, e.g.*, *Villa de Jardines Ass'n v. Flagstar Bank*, 227 Ariz. 91, 96 (App. 2011) ("Rule 11 requires that attorneys have 'a good faith belief, formed on the basis of . . . reasonable investigation, that a colorable claim exists'") (emphasis added) (quoting *Boone v. Superior Court*, 145 Ariz. 235, 241 (1985)); *see also Bucho-Gonzalez v. Life Time Fitness Inc.*, No. 1 CA-CV 16-0691, 2018 WL 1281599, at *4 (Ariz. Ct. App. Mar. 13, 2018). In contrast, the term "nonfrivolous" still does not appear in any Arizona civil Rule 11 case. Given this background, using "colorable" in place of "nonfrivolous" would reduce, not increase, confusion, confusion for Arizona litigants and judges.

Second, the Court should adopt changes to Rule 11(b) that would require the factual contentions of any pleading, motion, or other document signed by an attorney or party to be "well grounded in fact." As compared with newly amended Rule 11(b)(3), which provides that factual contentions need only have "evidentiary support after a reasonable opportunity for further investigation or discovery," the

proposed change could minimize the filings for which that evidentiary support never materializes. And, as above, the proposed change is compatible with well-established Rule 11 case law already applying the "well grounded in fact" standard. See *Villa de Jardines Ass'n*, 227 Ariz. at 96 (upholding sanctions via "well grounded in fact" standard); see also *State v. Shipman*, 208 Ariz. 474, 474, 94 P.3d 1169, 1170 (Ct. App. 2004).

Third, Petitioners respectfully request that the Court adopt a mandatory sanctions provision in Rule 11(c) through the use of "must" rather than "may," with an exception for a party seeking in good faith to vindicate a constitutional right. The change would, again, provide increased certainty and therefore improve the aims of justice.

The change will also increase fundamental fairness for those litigants hit with frivolous lawsuits. As the U.S. House of Representatives Committee on the Judiciary noted in its Report in support of the Lawsuit Abuse Reduction Act of 2017, "When sanctions for filing frivolous lawsuits are not mandatory, which they are not now, those who are the victims of frivolous lawsuits have no incentive to litigate the frivolous nature of the claims against them because there is

no guarantee that even if the claims against them are found to be frivolous they will be compensated for the harm caused by those frivolous claims." Instead, "the victims of frivolous lawsuits are routinely extorted to settle the case for certain sums just below those that would be necessary to litigate the case to judgment, at which point the case drops out of the dockets[.]" See H.R. Rep. No. 115-16, at 3 (Feb. 24, 2017).

For these admirable aims of predictability and fundamental fairness, this Comment respectfully supports the proposed changes to Rule 11 in Petition No. 17-0050.

II. The Court Should Add Proposed Rule 26(b)(2)(D).

The Court should also add proposed Rule 26(b)(2)(D), stating:

> (D) *Contractual Limits.* In determining the permissible scope of discovery, the court must enforce any mutually and freely negotiated pre-litigation contract between business organizations (as defined in Experimental Rule 8.1(a)(3)) limiting the obligations of the contracting parties to preserve information, or to provide disclosure or discovery. Nothing in this subdivision impairs the rights of non-parties to the contract.

This provision should be added because (1) it would enhance predictability and save judicial resources; (2) the provision is in line with general freedom of contract principles; and (3) adoption would

bring Rule 26 in line with the Court's recent adoption of Rule 45.2, Ariz. R. Civ. P.

The new Rule 26(b)(2)(D)) aims to reduce needless litigation over the enforceability of pre-dispute, negotiated discovery, disclosure, and preservation terms in business contracts and transactions. This Court charged the CCJR primarily with developing recommendations, "including rule amendments . . . to reduce the cost and time required to resolve civil cases in Arizona's superior courts." (Admin. Order, 2015-126, at 1.) The addition of the subparagraph Rule 26(b)(2)(D) would help accomplish this goal. The new Rule would provide business organizations with certainty and predictability that their mutually and freely negotiated contracts will be enforced. Predictability and certainty inure to reducing the costs and burdens of civil litigation as a whole.

Second, the addition would reduce the necessary adjudication of the enforceability of pre-litigation agreements that courts already face—a list including jury trial waivers, arbitration, and a host of other issues. See *BNCCORP, Inc.*, 769 Ariz. Adv. Rep. 4, 400 P.3d at 162-64 (reviewing trial court's ruling enforcing pre-litigation jury trial waiver contained in business contract); see also Jay Brudz & Jonathan M.

Redgrave, Using Contract Terms to Get Ahead of Prospective eDiscovery Costs and Burdens in Commercial Litigation, 18 RICH. J. L. & TECH. 13, 25 (Summer 2012) (noting enforceability of near-ubiquitous venue, jury waiver, choice-of-law, and arbitration clause provisions).

Additionally, the provision would support the general freedom of contract principle that parties' mutual agreements should generally be enforced. See, e.g. BLACK'S LAW DICTIONARY (10th ed. 2014), freedom of contract ("judicial concept that contracts are based on mutual agreement and free choice, and thus should not be hampered by undue external control such as governmental interference"); *Dobson Bay Club II DD, LLC*, 242 Ariz. 108, 393 P.3d at 458 ¶46 (Bolick, J., dissenting) (discussing freedom of contract and Arizona Constitution); *Swanson v. Image Bank, Inc.*, 206 Ariz. 264, 268, 77 P.3d 439, 443 (2003) ("Generally speaking, …parties do have the power to determine the terms of their contractual engagements. Restatement § 187 cmt. c. We find this to be particularly true in this case where parties of relatively equal bargaining power, both represented by counsel, selected the law of the state to govern their contract."). Refusing to adopt the

subparagraph would invite needless litigation over enforceability of predispute contract provisions, and therefore would burden the courts with the same. And, while the provision would save judicial resources and improve efficiency, it would do so only through enforcing agreements that parties themselves have already made.

Finally, the Court should adopt new rule 26(b)(2)(d) because it dovetails with the recent adoption of Rule 45.2, Ariz. R. Civ. P., entitled "Dispute Resolution Procedures Regarding Preservation Requests." It is believed to be the nation's first procedural rule reining in unreasonable preservation demands regarding electronically stored information (ESI). In memorializing the proper procedure for objecting to unreasonable preservation demands, the new Rule 45.2 reduces frivolous litigation and its associated time and expense. The Court should not overlook the connection between new Rule 45.2 and proposed Rule 26(b)(2)(d). Just as Rule 45.2 will minimize costs for all parties and reward cooperative behavior, proposed Rule 26(b)(2)(D) would do the same.

III. CONCLUSION

The amendments to Rule 11 and addition to Rule 26 should, respectfully, have been adopted by this Court during its August 2017

Rules Agenda. Their omission should be remedied by considered—yet just and speedy—action of this Court. This Comment urges the Court to adopt the proposed rule amendments of Petition No. 17-0050 on an expedited basis as submitted, to take effect on July 1, 2018.

RESPECTFULLY SUBMITTED this 21st day of May, 2018.

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