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5 **IN THE SUPREME COURT**
6 **STATE OF ARIZONA**
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8 In the Matter of:

Supreme Court No. R-11-_____

9 PETITION TO AMEND
10 RULE 15(a)(3), Ariz. R. Civ. P.

Petition to Amend Rule 15(a)(3)

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13 Pursuant to Rule 28, Rules of the Supreme Court, Michael Raine respectfully petitions
14 this Court to adopt amendments to Rule 15(a)(3), governing the timing for a response to an
15 amended pleading, as proposed herein.
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17 **I. Background and Purpose of Proposed Rule Amendment**

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19 Petitioner proposes amendment to Rule 15(a)(3), Ariz. R. Civ. P. which currently
20 reads:

21 “A party shall plead in response to an amended pleading within the time remaining for
22 response to the original pleading or within ten days after service of the amended
23 pleading, whichever period may be the longer, unless the Court otherwise orders.”

24 The perceived need for amendment comes from the “shall plead in response” language
25 which can and has been construed to require an Amended Answer by all defendants to any
26 Amended Complaint, without exception. For example, in a pending appeal in Arizona, a
27 Plaintiff filed an amended complaint naming a new defendant but no new legal claims against
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1 existing defendants. The Amended Complaint was served on an existing defendant who had
2 already answered and whose existing verified Answer, if re-filed without change, would
3 effectively deny all material matters in the Amended Complaint. In that case, the defendant
4 did not file an Amended Answer and was then defaulted. In reviewing this issue in a
5 subsequent legal malpractice action, a Maricopa County Superior Court judge ruled that the
6 language “shall plead” in Rule 15(a)(3), Ariz. R. Civ. P. requires a new Answer in all cases.
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8 This interpretation leads to absurd results, is a trap for the unwary and conflicts with
9 existing Rules of Civil Procedure. Consider Rule 8(f), Ariz. R. Civ. P. (“All pleadings shall
10 be so construed as to do substantial justice”), 8(d), Ariz. R. Civ. P. (“Averments in a pleading
11 to which no responsive pleading is required or permitted shall be taken as denied or
12 avoided”); 8(b), Ariz. R. Civ. P. (“a general denial puts in issue every averment of the
13 complaint which a plaintiff is required to prove to sustain his cause of action including
14 jurisdiction”); and 55(a), Ariz. R. Civ. P. (“When a party against whom a judgment for
15 affirmative relief is sought has failed to plead or otherwise defend as provided by these Rules,
16 the clerk shall enter that party’s default”). Under these Rules, a party who has filed a verified
17 Answer effective to deny all allegations against that party, should have that pleading
18 construed to deny a subsequent Amended Complaint, especially where no new legal claims
19 are asserted in the amendment. Such a defendant has not “failed to plead” under Rule 55(a),
20 and a default should not issue.
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25 Interpreting Rule 15(a)(3), Ariz. R. Civ. P. to require a new Answer under such
26 circumstances also conflicts with the overriding theme of the Arizona and Federal Rules. *See*
27 *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 103 (1957), (*overruled* on other grounds by
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1 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007) (“The Federal Rules reject
2 the approach that pleading is a game of skill in which one misstep by counsel may be decisive
3 to the outcome and accept the principle that the purpose of pleading is to facilitate a proper
4 decision on the merits.); or the Arizona Supreme Court’s statements in *Guerrero v. Copper*
5 *Queen Hosp.*, 112 Ariz. 104, 107, 537 P.2d 1329, 1331-32 (1975) (“The purpose of the
6 [pleading] rule is to avoid technicalities and give the other party notice of the basis for the
7 claim and its general nature.”). A change in the Arizona rule could prevent this
8 interpretation, as is seen in the interpretations of the slightly different Federal counterpart,
9 Rule 15(a)(3), Fed. R. Civ. P.

12 Federal Rule 15(a)(3) reads:

13 *Time to Respond.* Unless the court orders otherwise, any required response to an
14 amended pleading must be made within the time remaining to respond to the original
15 pleading or within 10 days after service of the amended pleading, whichever is later.

16 The language “any required response” makes it more clear that Rule 15(a)(3) is a
17 timing mechanism, not a Rule discussing whether an answer to an amended complaint is
18 always required. The Federal Rule was amended in 2007 creating the difference between the
19 Arizona and Federal rules, which were essentially identical prior to the amendment.
20 However, the Notes of the Advisory Committee on the 2007 amendments state: “These
21 changes are intended to be stylistic only.” Therefore, interpretations of the Federal rule
22 remain persuasive, if not authoritative. *ESI Ergonomic Solutions, LLC v. United Artists*
23 *Theatre, Inc.*, 203 Ariz. 94, 98, ¶11, FN2, 50 P. 3d 844, 848 (App. 2002)

26 The majority of Federal courts and respected treatises interpreting Rule 15(a)(3), Fed.
27 R. Civ. P. have held a response to an Amended Complaint is not always required and Rule
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1 15(a)(3) is not the source of such a requirement when it exists. See *Nelson v. Adams United*
2 *States*, 529 U.S. 460, 467, 120 S. Ct. 1579, 1584-85 (2000); *Wagner v. Choice Home*
3 *Lending*, 266 F.R.D. 354, 357 (D. Ariz. 2009); *Lucente v. IBM*, 310 F.3d 243, 260 (2d Cir.
4 2002); *La Gorga v. Kroger Company*, 407 F.2d 671, 673 (3d Cir. 1969) (*Per Curium*);
5 *Stanley Works v. Snydergeneral Corp.*, 781 F. Supp. 659, 664-65 (E. D. Cal. 1990) (citing to
6 Wright, Miller & Kane, 6 Federal Practice and Procedure, 1476, p. 558-59.); *Brown v. E.F.*
7 *Hutton & Co., Inc.*, 610 F.Supp. 76, 78 (S.D.Fla. 1985); and James Wm. Moore, 3 Moore's
8 Federal Practice § 15.17(5), at 15-83 to 15-84 (3d ed. 2009); *Contra Snyder v. Pascack Valley*
9 *Hosp.*, 303 F.3d 271, 276 (3rd Cir. 2002).

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12 Arizona Rule 15(a)(3) should be amended to mirror the Federal Rule, or otherwise, to
13 clarify that it governs only the time for filing a “required” response to an Amended
14 Complaint and is not a Rule that, itself, requires the response in the first place.

15 **II. Contents of Proposed Amendment**

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17 Petitioner proposes amendment to Rule 15(a)(3), Ariz. R. Civ. P. to mirror the federal
18 counterpart, Rule 15(a)(3), Fed. R. Civ. P., resulting in the following change:

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20 Current Rule 15(a)(3)

21 ~~“A party shall plead in response to an amended pleading within the time remaining for~~
22 ~~response to the original pleading or within ten days after service of the amended~~
23 ~~pleading, whichever period may be the longer, unless the Court otherwise orders.”~~

24 Proposed New Rule

25 UNLESS THE COURT ORDERS OTHERWISE, ANY REQUIRED RESPONSE TO
26 AN AMENDED PLEADING MUST BE MADE WITHIN THE TIME REMAINING
27 TO RESPOND TO THE ORIGINAL PLEADING OR WITHIN 10 DAYS AFTER
28 SERVICE OF THE AMENDED PLEADING, WHICHEVER IS LATER.

1 **III. Conclusion**

2 The Petitioner has seen the impact of this current language in Rule 15(a)(3), Ariz. R.
3 Civ. P. in practice. Whether a response *should* be required in all cases where the Complaint
4 is amended is not a question this Peitition seeks to answer. Rather, the issue is that the “shall
5 plead” language of Rule 15(a)(3), Ariz. R. Civ. P. has the tendency to suggest that the rule
6 itself requires a response and the Petitioner does not believe that was the intent behind the
7 Rule. The slight difference in the Federal rule has seemingly promoted, more often than not,
8 an understanding that the Rule is a mere timing mechanism. However, as a minority of
9 Federal courts have interpreted the Rule to require an amended Answer in all cases, Petitioner
10 closes with the suggestion that perhaps amendments to other rules or a further amendment to
11 Rule 15(a)(3) than what is suggested herein are adviseable.

12 RESPECTFULLY SUBMITTED this 30 day of November, 2011

13 BY: /s/ *Michael Raine*
14 MICHAEL RAINE, ASB#027509