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October 30, 2023

VIA HAND DELIVERY
Mississippi Supreme Court
Rules Committee on Civil Practice and Procedure
c/o Clerk of Mississippi Appellate Courts
Post Office Box 249
Jackson, Mississippi 39205-0220

Re: Proposed Amendment to Rule 26 Regarding Rebuttal Experts

Dear Supreme Court Rules Committee:

Please accept this letter as my response and comments regarding the proposed amendments to Rule 26 of the Mississippi Rules of Civil Procedure, which were posted for public comment on September 28, 2023. I write to express my concern with and objection to the proposed revisions to Rule 26 regarding "rebuttal" experts.

My objections to the proposed revisions are threefold: first, the proposed changes will inappropriately restructure the sequence in which parties bearing the burden of proof or persuasion present their arguments; second, the proposed changes are entirely unnecessary as Rule 26 already mandates supplementation of a party's expert witnesses and their opinions; and third, the proposed changes impede the public policy behind the rules of civil procedure. The consequences of the unnecessary proposed revisions not only frustrate the purpose of securing the just, speedy, and inexpensive determination of every action but are also unfairly prejudicial to the non-burden-bearing party. The Mississippi Rules Committee should, in line with a strong majority of other states, reject the proposed amendments.

The essence of our adversarial system requires the party bearing the burden of proof or persuasion to present argument first. That party must meet its burden through proffering evidence, following which the opposing party responds, and then there is the opportunity for rebuttal. The proposed changes as written encourage the circumvention of this sequence, effectively and improperly allocating the burden of proof on the responsive party. Rather than requiring the burden-bearer to initially meet its burden, the proposed amendments to Rule 26 provide that party with the authority to wait and see what evidence the responsive party will bring, allowing it

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to respond to that evidence instead of presenting their own evidence first. Indeed, the proposed Advisory Committee Notes allow that "rebuttal opinions must explain, repel, counteract, or disprove expert opinions disclosed by the opposing party. Rebuttal opinions may criticize the methodology used by the opposing expert or raise alternative analyses or relevant facts the opposing party's expert failed to consider." As such, without any limitations within the rule or Advisory Committee Notes, the burden-bearing party could offer a scant initial expert disclosure and, after a response, then designate new experts to testify about other analyses, facts, and opinions in "rebuttal" to the responsive party's experts' opinions—including issues well beyond the matters in the initial disclosure. The proposed amendments do not allow the responsive party a similar automatic sur-rebuttal, thus, putting that party at risk through (1) not permitting such a sur-rebuttal, and/or (2) unfairly prejudicing that party due to the timeline constraints on its ability to procure a sur-rebuttal. Consequently, the proposed amendments to Rule 26 encourage gamesmanship and unfair conduct and otherwise impermissibly place the burden of proof on the responsive party.

Rule 26 already provides for mandatory supplementation of a party's prior discovery responses of a retained or specially employed expert's opinions, including rebuttal opinions. As such, to the extent that the proposed revisions seek to require such mandatory supplementation, they are not necessary. To the extent that the proposed revisions seek to do more and allow—and by express language, the proposed revisions do provide this opportunity—the burden-bearing party to inject new expert witnesses to discuss, examine, and opine on matters beyond any initial expert disclosure, this would only frustrate the purpose of Mississippi's Rules of Civil Procedure.

Rule 1 states that "[t]hese rules shall be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action." M.R.C.P. 1. The proposed amendments could have the opposite effect. They would not secure a just determination, rather they would unfairly prejudice the non-burden-bearing party by failing to maintain the burden of the initial production of proof on the burden-bearing party. They would not secure a speedy determination, instead by authorizing "rebuttal" opinions that can go beyond the scope of the initial opinion, these provisions would cause delay to the litigation process. Consequentially, by allowing for a scant initial disclosure and failing to further limit the substance of the rebuttal, the proposed amendments encourage another round of rebuttal and sur-rebuttal that are needless under the current rule. Additionally, the responsive party could move for more time to respond to the rebuttal or there would be further delay due to potential additional Daubert motions to challenge the newly injected experts. Due to the delay and expense involved, the proposed amendments would not serve the underlying purpose in securing

inexpensive determination of every action. Therefore, the proposed revisions as written are not only unnecessary but they are irreconcilable with the purpose of the Mississippi Rules of Civil Procedure.

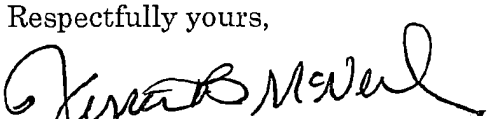
The rules should require leave of court or agreement of the parties to designate a rebuttal expert. There will be disagreements in most cases regarding whether a designation is an appropriate rebuttal expert designation. As a result, motions will be filed asserting the parties' respective arguments. The current version of the rule will require a non-designating party to move to strike the rebuttal designation. I submit that the burden to obtain a court ruling on the matter should instead be on the proponent of the rebuttal designation, and I ask the version of the rule as currently drafted be rejected as it lacks such a safeguard.

In sum, the consequences of the proposed amendments, coupled with their lack of necessity, support their rejection. At least thirty-five (35) states, including the District of Columbia, do not contain any provision regarding "rebuttal" experts within their discovery rules for initial disclosure. The proposed amendments lack sufficient limits and protections to ensure that the party bearing the burden of proof indeed bears that burden. Instead, the proposed revisions as written would serve to encourage gamesmanship that would frustrate the purpose of the rules of civil procedure. Furthermore, due to the largely unfettered discretion with regard to which expert may give the "rebuttal" opinion and what facts, analysis, and opinions it may contain, unfair prejudice to the responsive party would arise. For these reasons and concerns, the proposed amendments should be rejected.

Thank you for your consideration.

With kindest regards, I am

Respectfully yours,



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