IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

Appellate Case No.:
LT Case No: 502009CA040800XXXXMB AG

JEFFREY EPSTEIN,

Petitioner/Plaintiff,

v.

SCOTT ROTHSTEIN, individually, and
BRADLEY J. EDWARDS, individually,

Respondents/Defendants.

EMERGENCY MOTION FOR REVIEW OF ORDER DENYING STAY

Pursuant to Florida Rule of Appellate Procedure 9.310(f), Petitioner Jeffrey Epstein, the plaintiff/counter-defendant below, files this motion for review of the circuit court's Order entered March 8, 2018 denying a stay of trial court proceedings, and states:

INTRODUCTION

An emergency stay is needed because trial is set to begin on **Tuesday, March 13, 2018**,[1] and the circuit court (the Honorable Donald Hafele) has just made two rulings which warrant extraordinary relief. The first ruling in an Order of March 8, 2018, denying Epstein's Motion to Remove Case from Trial Docket in

[1] In compliance with this Court's Administrative Order No. 2014-1, the Petitioner has contemporaneously filed a separate Request for Emergency Treatment.

Order to Comply With the Mandate Set Forth in Rule 1.440, warrants mandamus relief. The second ruling granting Edwards' Motion for Separate Trials, warrants certiorari relief. Epstein files his Emergency Petition for Writ of Mandamus along with this motion. An Emergency Petition for Writ of Certiorari will follow, addressing the severance order, and may be consolidated with the mandamus petition.[2]

At the March 8, 2018 hearing, Epstein advised Judge Hafele of his intent to file the extraordinary writ petitions in this Court, and made an *ore tenus* motion for stay of the trial court proceedings pending this Court's review of the writs. The court denied the motion for stay, and this Emergency Motion for Review of that order follows.

STATEMENT OF THE CASE AND FACTS

On December 7, 2009, Epstein filed his initial Complaint in this action against Scott Rothstein, Bradley Edwards and L.M.[3] Epstein alleged the following counts against Rothstein:

a. (1) Violation of § 772,101 – Florida Civil Remedies for Criminal Practices Act
b. (2) Violation of § 895.01 – Florida's RICO Act
c. (3) Abuse of Process
d. (4) Fraud
e. (5) Conspiracy to Commit Fraud

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[2] One Appendix will accompany these filings.
[3] L.M. was dismissed from this case on August 9, 2010. (**App. 5**).

(**App. 1**).

On December 21, 2009, just 17 days after Epstein instituted the civil proceeding, Edwards filed a Counterclaim for abuse of process against Epstein. (**App. 2**). Thereafter, Edwards amended his Counterclaim several times, ultimately alleging a count for malicious prosecution against Epstein. (**App. 3**).

On January 21, 2010, a Clerk's Default was entered against Rothstein as to all claims in the December 7, 2009 Complaint. (**App. 4**). Rothstein retained counsel, Mark Nurik, who moved to set aside the default, but an order was never entered on that motion. Mr. Nurik has not withdrawn from this case and has been on the service list since 2010.

On April 12, 2011, Epstein filed an Amended Complaint against Rothstein. The Amended Complaint asserted a single count against Defendant Rothstein for Abuse of Process. The remaining counts against Rothstein in the initial Complaint (Florida Civil Remedies for Criminal Practices Act, Florida's RICO Act, Fraud, and Conspiracy to Commit Fraud), were abandoned. (**App. 6**).

On August 22, 2011, Epstein filed a Second Amended Complaint (which was corrected on August 24, 2011 for a scrivener's error), bringing a claim for abuse of process against Edwards, and a claim for conspiracy to commit abuse of process against Rothstein. (**App. 7 and 8**). Rothstein never answered the Second

Amended Complaint, and a default has not been entered against him on the Second Amended Complaint.

On August 16, 2012, Epstein dismissed his claims without prejudice against Edwards. (**App. 9**).

On May 24, 2017, following remand from the appellate courts, Edwards noticed this entire matter for trial. In his Motion to Set Case for Trial, Edwards requested this Court "to set the above-styled cause for trial by jury," and expressly stated: "This long delayed matter is now ripe for resolution." (**App. 10**). The trial was initially set for December 2017, and then reset to March 13, 2018. (**App. 11 and 12**).

On December 22, 2017, the parties entered into a Joint Pretrial Stipulation, listing the Stipulated Facts and Statement of Issues of Fact for Determination at Trial. (**App. 13**). Pursuant to the stipulation, the first issue to be tried is the "Case Against Rothstein". Second, is Edwards' malicious prosecution counterclaim. (**App. 13** at C. 1.).

Apparently, Edwards did not realize that the matter was not yet ripe until almost the eve of trial. On March 2, 2018, at 5:12:19 p.m., in a "Supplement" to his Motion for Separate Trials[4] filed just the day before, Edwards asserted for the

[4] Edwards' March 1, 2018, Motion for Separate Trials or, in the Alternative, to Adjust the Order of Proof. (**App. 14**).

first time that Epstein's case against Rothstein may not proceed based on Florida Rule of Civil Procedure 1.440. (**App. 15**).

Rule 1.440 provides:

> (a) **When at Issue.** An action is at issue after any motions directed to the last pleading served have been disposed of or, if no such motions are served, 20 days after service of the last pleading. The party entitled to serve motions directed to the last pleading may waive the right to do so by filing a notice for trial at any time after the last pleading is served. The existence of crossclaims among the parties shall not prevent the court from setting the action for trial on the issues raised by the complaint, answer, and any answer to a counterclaim.
>
> (b) **Notice for Trial.** Thereafter any party may file and serve a notice that the action is at issue and ready to be set for trial. . . .
>
> (c) **Setting for Trial.** If the court finds the action ready to be set for trial, it shall enter an order fixing a date for trial. Trial shall be set not less than 30 days from the service of the notice for trial. By giving the same notice the court may set an action for trial. In actions in which the damages are not liquidated, the order setting an action for trial shall be served on parties who are in default in accordance with rule 1.080.

Fla. R. Civ. P. 1.440. Pursuant to the clear language of the rule, if the action involves a main claim or counterclaim which has neither been answered nor defaulted, then the entire action (excluding only crossclaims) is not at issue. *See id*.

Upon receiving Edwards' Supplement to his Motion for Separate Trials, Epstein's counsel immediately researched the Rule 1.440 issue raised by Edwards. After researching thoroughly, Epstein agrees that, despite Edwards' request to set

the cause for trial, the "action" was not "at issue." Florida law is clear: "strict compliance with rule 1.440 is mandatory." *Bennett v. Cont'l Chemicals, Inc.*, 492 So. 2d 724, 727 (Fla. 1st DCA 1986) (emphasis added). *Accord Teelucksingh v. Teelucksingh*, 21 So. 3d 37, 37 (Fla. 2d DCA 2009). *See also Melbourne HMA, LLC v. Schoof*, 190 So. 3d 169, 170 (Fla. 5th DCA 2016) ("Strict compliance with rule 1.440 is required and failure to adhere to it is reversible error."); *Gawker Media, LLC v. Bollea*, 170 So. 3d 125, 131 (Fla. 2d DCA 2015) ("[A] party is absolutely entitled to strict conformance with the terms of rule 1.440, including its mandated fifty-day hiatus between the service of the last pleading and the trial date."); *Genuine Parts Co. v. Parsons*, 917 So. 2d 419 (Fla. 4th DCA 2006) (granting mandamus to enforce Rule 1.440(c), which prohibits the setting of a trial less than thirty days after service of a notice for trial).

At the earliest opportunity on the following Monday, March 5, 2018, Epstein filed his to motion to remove the case from trial docket in order to comply with mandate set forth in Rule 1.440. (**App. 16**).[5] Following argument from the parties at the specially set March 8, 2018 hearing, the circuit court denied the motion. (**App. 18**). The court recognized the case was not at issue at the time the motion to

[5] Epstein simultaneously filed his Motion for Default Against Defendant Rothstein on the Second Amended Complaint. (**App. 17**). Pursuant to Rule 1.440, the "action" will be at issue 20 days after the circuit court grants Epstein's motion for default. Thereafter, any party can notice the case for trial and trial shall be set no less than 30 days from service of the notice for trial.

set trial was filed and the order setting trial was later entered, but mistakenly believed it could cure the defect by severing the counterclaim and holding separate trials. In accordance with its mistaken belief, the court granted Edwards' pending Motion for Separate Trials, and ruled that Epstein's claim against Rothstein and Edwards' counterclaim against Epstein would be tried separately. (**App. 19**)[6].

The court denied Epstein's ore tenus motion for stay, and this motion for review of that denial follows. (**App. 20**).

ARGUMENT

I. EPSTEIN IS LIKELY TO SUCCEED ON THE MERITS OF HIS MANDAMUS PETITION BECAUSE THE CIRCUIT COURT MUST REMOVE THE CASE FROM THE TRIAL DOCKET IN ORDER TO COMPLY WITH THE MANDATE SET FORTH IN RULE 1.440.

In violation of Florida Rule of Civil Procedure 1.440, this case was not "at issue" when Edwards filed his Motion to Set Case for Trial. Therefore, the circuit court's ensuing Order setting a trial date was a nullity. This defect cannot be cured—despite Judge Hafele's belief that he can do so by severing the counterclaim. A writ of mandamus is required because strict compliance with Rule 1.440 is mandatory,[7] and the circuit court has refused to remove the case from the trial docket.

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[6] March 8, 2018, Hearing Transcript. Epstein will supplement his Appendix with the Court's Order once entered.

[7] *See Bennett*, 492 So. 2d at 727; *Teelucksingh*, 21 So. 3d at 37; *Gawker Media, LLC*, 170 So. 3d at 131; *Genuine Parts Co.*, 917 So. 2d at 421.

The purpose of mandamus is "to enforce the respondent's unqualified obligation to perform a clear legal duty." *Gawker Media, LLC v. Bollea*, 170 So. 3d 125, 131 (Fla. 2d DCA 2015). The petitioner need demonstrate only that (1) the respondent is duty-bound to act under the law, and (2) the respondent has failed or refused to do so. *Id*. (citing *Pleus v. Crist*, 14 So. 3d 941 (Fla. 2009)). "A third and final element is that the petitioner must have no adequate legal remedy for the respondent's failure to carry out its duty." *Id*.

These elements are met here, and Epstein will succeed on his mandamus petition. *See Gawker Media, LLC*, 170 So. 3d at 129–30 (granting mandamus to enforce Rule 1.440 and holding that an appeal after final judgment would be insufficient to remedy the rule's provisions requiring a fifty-day hiatus between trial and service of the last pleading).

> Florida Rule of Civil Procedure 1.440 provides that a case may be set for trial when it is "at issue." First, however, "**[a]n answer must be served by or a default entered against all defending parties before the action is at issue**." Thus, where a defendant has not yet answered the complaint, and the plaintiff has failed to obtain a default, the action is not yet at issue.

Reilly v. U.S. Bank Nat. Ass'n, 185 So. 3d 620, 621 (Fla. 4th DCA 2016) (emphasis added; internal citations omitted). The rule "exempts only cross-claims from the determination of when an action is at issue." *Bennett*, 492 So. 2d at 727 (emphasis added).

Here, while a default was entered against the original Complaint, Epstein later amended his complaint twice. As such, the Second Amended Complaint is the operative complaint. *See State Farm Fire & Cas. Co. v. Higgins*, 788 So. 2d 992, 995 (Fla. 4th DCA 2001) ("An amended complaint supersedes an earlier pleading where it does not express an intention to save any portion of the original pleading.") (citation and internal quotation marks omitted). Defendant Rothstein did not file an answer to the Second Amended Complaint, and a default has not been entered on the Second Amended Complaint. Therefore, the circuit court's Order on Edwards' Motion to Set "Cause" for trial was a nullity, and it would be reversible error if this action proceeds to trial on March 13, 2018.

Appellate Courts are Clear: Strict Compliance with Rule 1.440 is Mandatory and the Circuit Court's Failure to Follow the Rule Warrants Mandamus Relief.

This Court, in particular, has spoken on the "mandatory" nature of the timing of Rule 1.440, and reversal if not followed. *See Genuine Parts Co. v. Parsons,* 917 So. 2d 419, 421 (Fla. 4th DCA 2006) (issuing a writ of mandamus is appropriate when the mandatory timing provisions of Rule 1.440 are not complied with). Unlike an order denying a continuance request that does not rise to the level required for certiorari, this Court recognizes that compliance with the mandatory nature of Rule 1.440 is so fundamental that it warrants mandamus relief. *Id.* at 421.

The Second District also has recognized that strict compliance with Rule 1.440 is required, and has granted mandamus relief absent such compliance. *See Gawker Media, LLC v. Bollea*, 170 So. 3d 125 (Fla. 2d DCA 2015). In *Gawker,* following an extensive analysis of mandamus relief and concluding it appropriate when the objection to a premature 1.440 notice is made *before* trial, the Second District ordered that the circuit court:

> "…shall straightaway rescind its June 19, 2015, order setting this action for trial and remove the action from the July 6, 2015, trial docket. This direction is effective immediately, and it shall remain in force notwithstanding the filing of a motion for rehearing, if any."

Id. at 133 (emphasis added).

Gawker, like this case, involved an action that was not at issue. Bollea dismissed one defendant, Blogwire, but amended to seek punitive damages against the remaining defendant. Determined to maintain the trial date, Bollea also filed a "notice that action is still at issue" and asked the court to reset the case for trial. *Id.* at 127. The next day, the circuit court entered an order stating that no further pleading in response to the punitive damages amendment was required and Gawker was deemed to have denied it. *Id.* Meanwhile, Gawker filed an objection, noting that, under Rule 1.440, the case was not at issue until twenty days had elapsed after the pleadings closed. *Id.* The circuit court was unpersuaded and errantly believed it could disregard Gawker's objection as "innocuous technicalities." *Id.* Three days later Gawker appealed to the Second District.

Finding no waiver and reiterating the longstanding tenet in Florida that Rule 1.440 must be strictly adhered to, the Second District granted the writ of mandamus — meant to enforce the circuit court's unqualified obligation to perform a clear legal duty. *Id.* at 131.

The Waiver Cases are ALL from FINAL APPEALS and Inapplicable to This Mandamus Proceeding.

In *Gawker*, the Second District recognized that a party may waive its objection to an order setting trial, "notwithstanding the compulsory nature of rule 1.440." 170 So. 3d at 130. "For example, in *Parrish v. Dougherty*, 505 So. 2d 646 (Fla. 1st DCA 1987), the appellant's attorney appeared at the trial and participated without objecting to the manner in which it had been set," and "[i]n *Correa v. U.S. Bank National Ass'n*, 118 So. 3d 952 (Fla. 2d DCA 2013), the appellant agreed to a rescheduled trial date, participated in the trial, and made no objection to any deviation from rule 1.440." *Id.* (emphasis added). "In both instances, the appellants were deemed to have waived their assertions of error based on the rule." *Id.*

But the *Gawker* Court distinguished the waiver cases in two ways. First, in the waiver cases, the appellants had not objected until *after* the trials, in which they appeared without objection, whereas the Gawker defendants insisted on compliance with Rule 1.440 in advance of trial, and consistently objected to the trial date. *Id.* Second, the waiver cases "were plenary appeals from final

judgments," "whereas this is a mandamus proceeding." *Id*. (emphasis added). The appellate court then explained:

> **The two types of proceedings serve very different purposes, entailing very different requirements**. In an appeal from a final judgment the lower court's rulings are reviewed for reversible legal error. Generally speaking, a judgment may be reversed only for an error that has been preserved by timely objection in the lower court and that has prejudiced the complaining party in a way that likely affected the result. Thus, the appellant's failure to make a timely objection waives the issue on appeal, as happened in *Parrish* and *Correa*. [internal citations omitted.]
>
> **Mandamus is a different animal altogether**. Its purpose is not to review a lower court ruling for prejudicial error; rather, it is meant to enforce the respondent's unqualified obligation to perform a clear legal duty. *State ex rel. Buckwalter v. City of Lakeland*, 112 Fla. 200, 150 So. 508 (1933). **If the petitioner is entitled to demand performance of the duty, he or she need not preserve the issue beyond making the demand. Further, it is unnecessary for the petitioner to suffer prejudice as a result of the respondent's dereliction**. All that must be shown is that (1) the respondent is duty-bound to act under the law, and (2) the respondent has failed or refused to do so. *Pleus v. Crist*, 14 So. 3d 941 (Fla. 2009). A third and final element is that the petitioner must have no adequate legal remedy for the respondent's failure to carry out its duty. *Id*. . . .
>
> By this point in our discussion **it is obvious that the first two elements have been satisfied here. The third element is present, as well.** It is true that the Gawker defendants have available to them the legal remedy of pursuing an appeal from any future final judgment, in which they could complain of the errant order scheduling the trial. But **owing to the mentioned differences between a mandamus proceeding and an appeal, the appellate remedy is not an *adequate* one**. As we have established, a party is absolutely entitled to strict conformance with the terms of rule 1.440, including its mandated fifty-day hiatus between the service of the last pleading and the trial date. **Whereas a writ of mandamus can preserve and effectuate this right in full, an appeal following entry of final judgment is**

> **inherently incapable of doing so because the appellant already will have been forced to trial in violation of the rule.**

Id. at 130-31 (bold and underline emphasis added).

The waiver cases distinguished by *Gawker* are similarly distinguishable from the proceeding at bar. Like the Gawker defendants, Epstein has adamantly voiced his objection *before* trial and has filed a *mandamus petition* when the circuit court denied his request to remove the case from the trial docket. As *Gawker* makes clear, an appeal from any future final judgment would not be an adequate remedy. *See id*. Thus, while Edwards was first to raise the issue, Epstein was left with no option but to seek relief and strict compliance with Rule 1.440.

A waiver also may occur if there is simply a "last minute technical amendment to a complaint." *See Labor Ready Se. Inc. v. Australian Warehouses Condo. Ass'n*, 962 So. 2d 1053, 1055 (Fla. 4th DCA 2007). That is not what occurred here. Thus, Judge Hafele erroneously found this Court's *Labor Ready* decision as the controlling precedent governing his authority to deny Epstein's motion to remove the case from the docket. *Labor Ready*, though well-decided, is both distinguishable and inapplicable to this case.

First of all, *Labor Ready* was a final appeal, <u>not a mandamus proceeding</u>. The appellant in that case argued that the amended pleading removed the case from its "at issue" status under Rule 1.440, and required reversal of the final order. This Court disagreed, holding:

> This is not a case where the case had never been at issue. This is not a case where the parties did not have sufficient time to prepare. This is not a case where anyone was prejudiced by the technical amendment to the complaint. In situations where the parties have received actual, timely notice of the trial, they are precluded from arguing prejudice based upon a technical violation.

Labor Ready Se., 962 So. 2d at 1055 (emphasis added). In so holding, this Court recognized the well-established case law (e.g., *Genuine Parts Co.* and *Bennett*) "emphasizing the mandatory nature of rule 1.440," and explicitly clarified:

> We do not quarrel with those cases or their holdings. However, we point out that none of them involved cases that had been pending and **at issue** for years before a last minute technical amendment to a complaint. And even in those cases where the case is first at issue, any error "**may be waived if the aggrieved party appears at trial and raises no objection to the noncompliance**." [e.a.]

Id. at 1055 (quoting *Parrish*, 505 So. 2d at 648).

The case at bar is clearly distinguishable from *Labor Ready*. First, Epstein did not waive the error by appearing at trial without raising an objection. *See id.* Again, Epstein adamantly voiced his objection *before* trial and immediately filed this *mandamus petition* when the circuit court denied his request to remove the case from the trial docket. Second, this case was not "at issue" under Rule 1.440 when noticed and set for trial. Third, the operative Second Amended Complaint, which had neither been answered nor defaulted, did not contain a mere "technical amendment," but asserted a "brand-new" count—as Edwards aptly pointed out in first bringing this issue to light. (*See* **App. 15** at ¶ 6).

Bifurcation or Severance is Not a Viable Remedy to Cure the Defective Trial Request and Order Setting Trial. Edwards' Counterclaim against Epstein and Epstein's Claim Against Rothstein are Not Separate Actions.

Not only can we not go back in time to cure the defective notice for trial and resulting order setting trial, but we cannot go into the future to retroactively cure those defects either. Severing the claim from the counterclaim is not a solution. *See Bennett v. Cont'l Chemicals, Inc.*, 492 So. 2d 724, 727 (Fla. 1st DCA 1986) ("Since rule 1.440(a) exempts only cross-claims from the determination of when an action is at issue, we disagree with appellee's argument which would have us sever the motions directed to the counterclaim from the answer.").

Contrary to Edwards' argument and the circuit court's belief, Edwards' counterclaim against Epstein and Epstein's claim against Rothstein are not separate, independent actions. They are not separate actions for several reasons.

First, Edwards chose to file a counterclaim, versus a separate lawsuit.

Second, the claim and counterclaim have been joined at the hip and proceeded together since the inception of this lawsuit over eight years ago.

Third, on May 24, 2017, following remand from the appellate courts, Edwards noticed this entire matter for trial when he requested this Court "to set the above-styled cause for trial by jury," and expressly stated: "This long delayed matter is now ripe for resolution." (**App. 10**).

Lastly, Edwards stipulated to one trial of the claim and counterclaim in the

parties' Joint Pretrial Stipulation. Pursuant to the Stipulation—which was ordered by the court and signed by counsel for both parties—the first issue to be tried is the "Case Against Rothstein". Second, is Edwards' Malicious Prosecution Counterclaim. (**App. 13** at C. 1.).

"Pretrial stipulations prescribing the issues on which a case is to be tried are binding upon the parties and the court, and should be strictly enforced." *Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc.*, 174 So. 3d 1037, 1039 (Fla. 4th DCA 2015) (emphasis added; citation and internal quotation marks omitted). Judge Hafele specifically cited this case and its holding at the March 8, 2018 hearing, but failed to explain how he could get around it.

Again, "this matter," this "above-styled cause," since its inception over eight years ago, has always proceeded as one lawsuit. Therefore, severing Edwards' counterclaim from Epstein's originating claim does not make the action "at issue." Indeed, absent strict compliance with Rule 1.440, even Edwards' counterclaim cannot yet proceed.[8]

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[8] Bifurcation is improper in any event. "Although the matter of separation of the issues to be tried rests in the trial court's discretion, a single trial generally tends to lessen the delay, expense and inconvenience to all concerned, and the courts have emphasized that **separate trial should not be ordered unless such disposition is clearly necessary, and then only in the furtherance of justice**." *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 710 So. 2d 1022, 1024 (Fla. 1st DCA 1998) (emphasis added; citation and internal quotation marks omitted). For example, "It is improper to sever a counterclaim . . . from the plaintiff's claim, when [as in this case] the facts underlying the claims of the respective parties are inextricably interwoven." *Id*.

In short, Epstein has established a clear legal right to performance of the act requested, an indisputable legal duty and no adequate remedy at law. Accordingly, Epstein has demonstrated a likelihood of success on his mandamus petition, and a stay should issue pending this Court's disposition of that petition.

Epstein has already filed a motion for default against Rothstein with the circuit court. Pursuant to Rule 1.440, either party must calculate out 20 days from the date a default is entered, for when the notice setting trial can be signed, and then the circuit must wait a minimum of 30 days for setting a trial date. If each of these tasks occurs posthaste, this action could conceivably proceed to trial by the end of April 2018.

II. EPSTEIN WILL SUFFER IRREPARABLE HARM ABSENT A STAY

Epstein will suffer irreparable harm if the trial proceeds, because "[s]trict compliance with rule 1.440 is required and failure to adhere to it is reversible error." *Melbourne HMA, LLC v. Schoof*, 190 So. 3d 169, 170 (Fla. 5th DCA 2016) (emphasis added). *See also Tucker v. Bank of N.Y. Mellon*, 175 So. 3d 305, 306 (Fla. 3d DCA 2014) (final judgment reversed because case noticed for trial before answer to counterclaim was filed); *Precision Constructors, Inc. v. Valtec Constr.*

Bifurcation is improper here, because the issues presented by the claim and counterclaim are so inextricably intertwined that it would cause the lower court to try the case twice with the same underlying issues, witnesses, exhibits, and testimony.

Corp., 825 So. 2d 1062, 1063 (Fla. 3d DCA 2002) (judgment vacated because failure to adhere strictly to the mandates of Rule 1.440 is reversible error);

Once the trial begins, the error cannot be undone. A final appeal is an insufficient remedy. As the Second District explained in *Gawker Media, LLC*:

> It is true that the Gawker defendants have available to them the legal remedy of pursuing an appeal from any future final judgment, in which they could complain of the errant order scheduling the trial. But owing to the mentioned differences between a mandamus proceeding and an appeal, the appellate remedy is not an adequate one. As we have established, a party is absolutely entitled to strict conformance with the terms of rule 1.440, including its mandated fifty-day hiatus between the service of the last pleading and the trial date. Whereas a writ of mandamus can preserve and effectuate this right in full, an appeal following entry of final judgment is inherently incapable of doing so because the appellant already will have been forced to trial in violation of the rule. [e.a.]

Gawker Media, LLC, 170 So. 3d at 131. *See also Campbell v. Wells Fargo Bank*, N.A., 204 So. 3d 476, 479 (Fla. 4th DCA 2016) (citing *Gawker*, and stating: "In that context, the appellate remedy was deemed insufficient to remedy the right to not be subjected to trial in violation of the timing requirements of rule 1.440.") (emphasis added).

CONCLUSION

Having demonstrated that he is likely to prevail on his mandamus petition and that he will suffer irreparable harm absent a stay, Epstein respectfully requests this Court to grant his Emergency Motion for Review of Order Denying Stay.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Motion was furnished via email this 8th day of March, 2018:

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CERTIFICATE OF TYPE SIZE & STYLE

I certify that the type, size, and style utilized in this Motion is 14-point Times New Roman.

/s/ Kara Berard Rockenbach
Kara Berard Rockenbach