IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

Case No. 50-2009CA040800XXXXMBAG

JEFFREY EPSTEIN,

Plaintiff/Counter-Defendant,

v.

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

Defendants/Counter-Plaintiff.
_____/

PLAINTIFF/COUNTER-DEFENDANT JEFFREY EPSTEIN'S MOTION TO REMOVE CASE FROM TRIAL DOCKET IN ORDER TO COMPLY WITH THE MANDATE SET FORTH IN RULE 1.440

Plaintiff/Counter-Defendant, Jeffrey Epstein ("Epstein"), moves to remove case from trial docket in order to comply with the mandate set forth in Florida Rule of Civil Procedure 1.440, and states:

INTRODUCTION

On this past Friday, March 2, 2018, Edwards pointed out that the Action was not at issue when he filed his Motion to Set the Case for Trial. Although Epstein understands the Court's disappointment at having to move the trial to April, it is certainly more efficient and less wasteful of judicial resources to have discovered this now than to have done so after two weeks of trial and an appeal, and then to have to conduct a second trial.

On May 24, 2017, *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." *See* **Exhibit A**. Apparently,

Edwards realized on almost the eve of trial, on March 2, 2018 at 5:12:19 p.m., that his claim of "ripeness" was legally flawed. Just as the weekend started, Edwards claimed for the very first time in a "Supplement" to his Motion for Separate Trials (in support of Edwards' request for severance) that Epstein's case against Rothstein may not proceed based on Rule 1.440. *See* **Exhibit B.** Regrettably, Epstein must agree that despite Edwards' request to set the cause for trial, the "Action" is not "at issue." Not realizing this until receipt of Edwards' Supplement filed after 5:00 p.m. on Friday, Epstein's counsel researched the issue raised by Edwards. Florida law is clear: Trial courts are **mandated** to follow "**strict compliance**" with Rule 1.440 in determining when an Action is "**at issue**." If in the Action there is a main claim or counterclaim as to which there is no answer or default, then the entire Action (excluding only any crossclaims) is not at issue and it is reversible error to try the Action.

In other words, when Edwards hastily moved to set this "Case" and "above-styled cause of action" for trial on May 24, 2017, following remand from the Fourth District Court of Appeal, Edwards' request was defective because the "Action" was not "at issue" for trial setting pursuant to Florida's appellate courts' interpretation of Rule 1.440. Edwards is now correct (albeit at the eleventh hour) – Epstein had amended his complaint twice after the default and there was no default addressing the Second Amended Complaint. Therefore, this Court's Order on Edwards' Motion to Set "Cause" for trial was a nullity. Epstein agrees with Edwards - it would be reversible error to proceed, and this Action would have to be tried twice if this Action proceeded to trial on March 13, 2018.

Contrary to Edwards' suggestion, bifurcation or severance is not a viable remedy to cure the defective trial request and order setting trial. In addition to his separate response squarely addressing the reasons why severance is not an option, Epstein preserves his adamant objection to

severance here and raises the additional point that the only cure for a 1.440-defective notice or motion to set trial and resulting order setting trial is a reset, not a severance. Moreover, bifurcation is inappropriate here, where the issues are so inextricably intertwined that it would cause the Court to try the case twice with the same underlying issues, exhibits and witnesses, including all three of the current named parties, whether their testimony would be live or from prior depositions.

Accordingly, Epstein moves this Court for an order removing the case from the trial docket commencing March 13, 2018. This will avoid having to retry this case and will allow Epstein to expeditiously obtain a judicial default against Rothstein and the Action can be properly noticed and set for trial.[1]

UNDISPUTED RECORD EVIDENCE

After having been informed of the issue upon receipt of Edwards' March 2 Supplement, Epstein has researched the same and now does not disagree with Edwards' belated recitation of the state of the pleadings. **(Exhibit B).** The default entered against Rothstein was entered on Epstein's original complaint – admittedly containing counts that no longer exist. **(Exhibit B, ¶2).** Since the default, Epstein amended twice with the final amendment producing his Second Amended Complaint against Rothstein. **(Exhibit B, ¶¶3, 6).** Epstein agrees that the Second Amended Complaint alleging conspiracy to commit abuse of process, in the operative complaint in this Action. **(Exhibit B, ¶8)**. There is no default and there is no answer to Epstein's Second Amended Complaint.

Epstein also agrees that it was Edwards who prematurely and defectively moved to set this "Case" for trial following the remand from the appellate courts. **(Exhibit B)**. Finally, Epstein

[1] Simultaneously filed with this Motion, Epstein also files his motion for default against Rothstein under the Second Amended Complaint. Pursuant to Rule 1.440, the "Action" will be at issue 20 days after this 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.

further agrees with Edwards that it would be "reversible error" to permit this Action be tried on March 13, 2018, because Epstein's damages against Rothstein are unliquidated. (**Exhibit B**, ¶10). Edwards has raised this issue for the first time on March 2, 2018, by filing his objection to the "at issue" defect, and Epstein does not waive the defect pursuant to Rule 1.440.

ARGUMENT

I. *Reversible Error to Fail to Strictly Comply with Rule 1.440*

The rule is clear.[2] Florida Rule of Civil Procedure 1.440 is unique and "[f]or many years, the appellate courts of this state have emphasized that the rule's specifications are mandatory and they have admonished trial courts to strictly adhere to them." *Gawker Media, LLC v. Bollea*, 170 So. 3d 125, 129 (Fla. 2d DCA 2015). Failure to strictly follow the rule results in reversible error. Simply, if an "Action" is not "at issue," it may not be set for trial. Further, the rule only carves out crossclaims as not preventing an Action from being at issue; logically, there is no similar exception for unripe counterclaims or complaints from the test of whether an "Action" is at issue and for good reason: the "Action" consists of ***both*** the complaint and the counterclaim. If one or the other is not at issue, the case cannot be set for trial.

As noted by one author based on the appellate court decisions, Rule 1.440's "procedure is elegant in its simplicity." Trentalange, "Setting a Case for Trial: Rule 1.440 Means What It Says." *The Florida Bar Journal,* Vol.84 No.3, March 2010. To start, Rule 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.

[2] Trentalange, "Setting a Case for Trial: Rule 1.440 Means What It Says." *The Florida Bar Journal,* Vol.84 No.3, March 2010.

Reilly v. U.S. Bank Nat. Ass'n, 185 So. 3d 620, 621 (Fla. 4th DCA 2016) (emphasis added; internal citations omitted).

In fact, appellate courts have recognized that Rule 1.442 "is very clear as to when the action is ready for trial, or is 'at issue'…[l]eaving little room for improvisation." *Bennett v. Cont'l Chemicals, Inc.*, 492 So. 2d 724, 726 (Fla. 1st DCA 1986). In *Bennett,* there was no issue to be tried at the time the notice of final hearing (trial) was served because Appellant Bennett had "not yet filed his answer and appellee had failed to challenge that delinquency by applying for a default under rule 1.500(b) and (c)." *Id.* As a result, the "case had not been properly set for trial by the court as required by rule 1.440(c)." *Id.*

Similar to Edwards' suggestion inviting reversible error here, the appellee in Bennett asked the Court to "sever" the unripe counterclaim from the main claim that had been answered. The appellate court explained:

> 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.

Id. at 727. Therefore, the test for an "Action" that must be "at issue" for a trial setting relates to "the issues raised by the complaint, answer, and any answer to a counterclaim." *See* Fla. R. Civ. P. 1.440(a).

In a very stern rebuke, the First District Court of Appeal explained the "fundamental error [that] will have been committed by the moving attorney's failure to review the court file and follow the mandatory dictates of the rule":

> The procedure for setting actions for trial is simple, but many attorneys are careless about it. They serve a notice for trial prematurely. This requires a motion to strike the notice or an

> informal request to the court to remove the action from the calendar. There is no excuse for failing to follow the rule. Some judges are equally careless about requiring an order setting the action for trial. Apparently they believe the rule is directory, rather than mandatory. Such is not the case.

Bennett v. Cont'l Chemicals, Inc., 492 So. 2d 724, 727-28 (Fla. 1st DCA 1986)[underlined emphasis added].

In addressing the mandatory dictates set out in *Bennett* and others, the Fourth District Court of Appeal explained, "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." *Labor Ready Se. Inc. v. Australian Warehouses Condo. Ass'n,* 962 So. 2d 1053, 1055 (Fla. 4th DCA 2007). Here, Epstein has not made any last minute technical amendment. As Edwards correctly points out, Epstein's Second Amended Complaint was filed August 21, 2011. *See* **Exhibit B, ¶6.** Rather, it is *Edwards* who, correctly but last minute, creates this issue by pointing out the legal nullity of his premature motion to set cause for trial and the defective order he caused to be issued.

Like the First District, the Third District Court of Appeal has repeatedly held that it is reversible error to try a case before it is "at issue." "Failure to adhere strictly to the mandates of Rule 1.440 is reversible error." *Tucker v. Bank of New York 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 Const. 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); *Ocean Bank v. Garcia-Villalta*, 141 So. 3d 256, 258 (Fla. 3d DCA 2014)(case was not properly "at issue" because Garcia–Villalta had not filed a responsive pleading, no default

had been issued against Garcia–Villalta, and the trial court had not ruled on Ocean Bank's motion for default against Chase Bank).

II. *Edward Raised and Created this Reversible Error Issue and Epstein Will Not Waive It*

Epstein is left with no option but to seek relief and strict compliance with Rule 1.440 in order to avoid **two trials.** Epstein did not initially raise this Rule 1.440 defect issue, only recognizing it after Edwards correctly pointed out the trial order's nullity when Edwards sought severance for the first time nearly on the eve of trial – 6 business days before the trial setting. Additionally, Epstein did not control Edwards' choice to plead his malicious prosecution claim as a counterclaim, thereby necessitating the "combined" suits as one "Action." Typically, litigants wait for the conclusion (here Epstein's voluntary dismissal in 2012) to file a new lawsuit sounding in malicious prosecution. However, Edwards simply could not wait! Edwards was hoping to be sued by Epstein - as evidenced in his email communications wanting to "bait" Epstein to sue and potentially waive his Fifth Amendment. Edwards' eagerness in being sued so he could be a counter-plaintiff and countersue for malicious prosecution is further self-evident by the timing of his malicious prosecution counterclaim filed only 17 days after Epstein filed his original lawsuit in December 2009.

Simply, Edwards made a strategic decision to be a counter-plaintiff. Edwards could have waited until Epstein's suit was completely over and filed a separate case in which Edwards would have been the plaintiff and not have this issue of the "Action" being "at issue." Having made that choice in 2009, Edwards has no grounds to be heard in 2018 to reverse it.

III. *Appellate Courts are Clear: Strict Compliance with Rule 1.440 is Mandatory and So Significant if Not Followed By the Trial Court that an Appellate Writ of Mandamus Issues*

The Fourth District 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, the Fourth District recognizes that compliance with the mandatory nature of Rule 1.440 is so fundamental that it warrants mandamus. *Id.* at 421.

Consistent with the Fourth District's recognition of the significance of strict compliance with Rule 1.440, the Second District Court of Appeal also has applied a writ of mandamus to a trial court order setting trial without complying with Rule 1.440. *See Gawker Media, LLC v. Bollea*, 170 So. 3d 125 (Fla. 2d DCA 2015). In *Gawker,* two nonfinal orders and appeals were consolidated – one granting severance and the other denying a motion to strike a premature notice for trial. *Id.* at 128 ("[w]e consolidated the petitions and, on May 7, 2015, we quashed both orders.")[3] Following an extensive analysis of the relief of a writ of mandamus and concluding it appropriate when the objection to a premature 1.440 notice is made *before* the trial occurs, 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].

Factually, *Gawker* involved an Action that, like this one, 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 trial court entered an order

[3] There was already a petition for writ of certiorari pending in this matter arising out of an order severing one of the Gawker defendants known as Blogwire, who was up on appeal addressing Florida's long-arm statute. *Id.* at 127.

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, pointing out that under Rule 1.440, the case was not at issue until twenty days had elapsed after the pleadings are closed. *Id.* The trial court was unpersuaded and errantly believed she 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 movant's unqualified obligation to perform a clear legal duty. *Id.* at 131.

CONCLUSION

In light of the law interpreting Rule 1.440's mandatory nature and strict compliance requirement, this Action was not at issue when Edwards moved to set the "Case" for trial on May 24, 2017, because the superseding Second Amended Complaint had no answer and no default. Therefore, the action was not at issue either when Edwards filed his Motion to Set Case for Trial prematurely prompting this Court set the trial date of March 13, 2018 (reset from December 2017).

This defect can and will be cured with a default entered by this Court on Thursday, March 8, 2018, at the special set hearing. The *entire* matter—originating claim and inextricably interwoven counterclaim—may then proceed as it should. Pursuant to Rule 1.440, either party must calculate out 20 days from March 8, 2018, for when the notice setting trial can be signed (March 28, 2018), and then this Court must wait a minimum of 30 days for setting a trial date. If each of these tasks occurs on the first date of ripeness, the earliest this Action can proceed to trial is 50 days from Thursday, or on April 29, 2018).

WHEREFORE, Plaintiff/Counter-Defendant, Jeffrey Epstein, respectfully moves to remove this case from the March 13, 2018, trial docket so that the parties can comply with Rule 1.440 and reset the trial for the most immediate rule-compliant date.

CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to the attorneys listed on the Service List below on March 5, 2018, through the Court's e-filing portal pursuant to Florida Rule of Judicial Administration 2.516(b)(1).

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EXHIBIT A

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 502009CA040800XXXXMBAG

JEFFREY EPSTEIN,

Plaintiff(s),

vs.

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

Defendant(s).
_____/

MOTION TO SET CASE FOR TRIAL

Bradley J. Edwards, by and through his undersigned counsel, moves this Honorable Court to set the above-styled cause for trial by jury. This long delayed matter is now ripe for resolution and is expected to take approximately 10 days to try.

See the attached response by Jeffrey Epstein reflecting that appellate issues with respect to this matter have been resolved.

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-Serve to all Counsel on the attached list, this 24th day of MAY, 2017.

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Filing # 56646683 E-Filed 05/18/2017 04:49:34 PM

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-2286

JEFFREY EPSTEIN,

Petitioner,

v.

BRADLEY J. EDWARDS, et al.,

Respondents.

_____/

PETITIONER'S RESPONSE TO ORDER TO SHOW CAUSE

The petitioner responds as follows to this Court's order dated May 3, 2017:

1. On May 3, 2017, this Court issued an order directing the petitioner to show cause on or before May 18, 2017 why this Court's decision in *Debrincat v. Fischer*, 42 Fla. L. Weekly S141 (Fla. Feb. 9, 2017), is not controlling in this case and why the Court should not decline to exercise jurisdiction in this case.

2. In response to the show cause order, the petitioner would show no cause why *Debrincat* is not controlling as to the basis for this Court's jurisdiction, and no cause why this Court should not decline to exercise jurisdiction.

Respectfully submitted,

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s/ *Paul Morris*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this response was emailed to counsel on the list below this 18th day of May, 2017.

s/ *Paul Morris*
PAUL MORRIS

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EXHIBIT B

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT, IN AND
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 502009CA040800XXXXMBAG

JEFFREY EPSTEIN,

Plaintiff,

vs.

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

Defendants.
_____/

SUPPLEMENT TO MOTION FOR SEPARATE TRIALS OR, IN THE ALTERNATIVE TO ADJUST THE ORDER OF PROOF

Counter-Plaintiff Bradley J. Edwards, pursuant to Florida Rules of Civil Procedure 1.270 and 1.440, hereby files this Supplement to Motion for Separate Trials or, in the Alternative, to Adjust the Order of Proof, and as grounds thereof states as follows:

Summary

Epstein is attempting to try a damages-only claim regarding a clerk's default entered against Defendant Rothstein on January 21, 2010. As the Court will see, however, that clerk's default was entered against the Initial Complaint. Epstein has since amended his complaint **twice** and has **abandoned every count** pled against Rothstein in the Initial Complaint. Thus, in addition to the reasons set forth in Edwards' Motion to Separate Trials, the Court should sever Epstein's claim against Rothstein because the only pending claim against Rothstein is a Conspiracy to Commit Abuse of Process count contained in the Second Amended Pleading, to which no default has been entered and which has not been set for trial.

Supplement

1. Epstein filed his Initial Complaint against Defendant Rothstein on December 7, 2009, which pled 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

2. On January 21, 2010, a clerk's default was entered against Defendant Rothstein as to the Initial Complaint and the five counts listed above (see Exhibit A).

3. On April 12, 2011, Epstein filed an Amended Complaint against Defendant Rothstein. The Amended Complaint asserted a single count against Defendant Rothstein, **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.

4. Pursuant to black-letter Florida law, the Amended Complaint against Rothstein superseded the Initial Complaint. See State Farm Fire & Cas. Co. v. Higgins, 788 So. 2d 992, 995 (Fla. 4th DCA 2001), approved, 894 So. 2d 5 (Fla. 2004) ("An amended complaint supersedes an earlier pleading where it does not express an intention to save any portion of the original pleading.") (internal quotations omitted); accord Downtown Investments, Ltd. v. Segall, 551 So. 2d 561, 562 (Fla. 3d DCA 1989). Moreover, the Initial Complaint against Rothstein was not only superseded, but "**cease[] to be a part of the record**" in Epstein's case against him. Babb v. Lincoln Auto Finance Co.,133 So. 2d 566, 568 (Fla. 3d DCA 1966) (emphasis added).

5. Thus, although a tenuous argument remained that the clerk's default applied to the Abuse of Process claim that was re-pled, the clerk's default as to the four abandoned counts in an inoperative pleading that was no longer part of the record was now a nullity.

6. On August 21, 2011, Epstein filed a Second Amended Complaint against Defendant Rothstein. In his Second Amended Complaint, which supersedes the Amended Complaint, Epstein abandoned his Abuse of Process claim against Rothstein and instead asserted a brand-new count: Conspiracy to Commit Abuse of Process.

7. Thus, Epstein had now abandoned every count pled in the Initial Complaint to which the clerk's default applied. The clerk's default was rendered a nullity.

8. No default has been entered against Rothstein as to the Second Amended Complaint, which is the operative pleading against that party, and the brand-new Conspiracy to Commit Abuse of Process count contained therein.

9. Moreover, even if Epstein were to proceed without a default as to liability, the Second Amended Complaint has not been noticed for trial. Pursuant to Rule 1.440, the Court may not set Epstein's Conspiracy to Commit Abuse of Process case for trial against Rothstein without first entering an order fixing the date for that trial, which "shall be set not less than 30 days from the service of the notice for trial."

10. Given that the damages being sought by Epstein against Rothstein for Conspiracy to Commit Abuse of Process are unliquidated, it would be reversible error for the Court to permit Epstein to try his case against Rothstein on March 13th. Wells Fargo Bank, Nat. Ass'n v. Sawh, 194 So. 3d 475, 481 (Fla. 3d DCA 2016) ([T]he setting of unliquidated damages without the required notice and without proof is regarded as fundamental error.").

Conclusion

Thus, in addition to the reasons set forth in Edwards' Motion to Separate Trials, et al, the Court should grant that Motion for the reasons stated above.

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-Serve to all Counsel on the attached list, this 2nd day of March, 2018.

/s/ David P. Vitale Jr.

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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH
COUNTY, FLORIDA

Case Number: 502009CA040800XXXXMB
Division: AG

JEFFREY EPSTEIN
Plaintiff(s),

-vs-

SCOTT ROTHSTEIN, individually,
BRADLEY J. EDWARDS individually
and L.M. individually
Defendant(s),

FILED
2010 JAN 21 AM 10:01
SHARON R. BOCK, CLERK
PALM BEACH COUNTY, FLA.

DEFAULT

A default is entered in the above styled cause against: **SCOTT ROTHSTEIN, individually** for failure to serve a pleading at the time required by law.

DONE AND ORDERED at the Clerk's Office, City of West Palm Beach, this 21 day of JANUARY, 2010.

Sharon R. Bock
Clerk & Comptroller

By: Kimberly Bradley
KIMBERLY BRADLEY
Deputy Clerk

Copies furnished to:
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EXHIBIT
A