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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA, professionally
known as HULK HOGAN,

Plaintiff,

vs. Case No. 12012447CI-011

HEATHER CLEM; GAWKER MEDIA, LLC
aka GAWKER MEDIA; GAWKER MEDIA
GROUP, INC. aka GAWKER MEDIA;
GAWKER ENTERTAINMENT, LLC;
GAWKER TECHNOLOGY, LLC; GAWKER
SALES, LLC; NICK DENTON; A.J.
DAULERIO; KATE BENNERT, and
BLOGWIRE HUNGARY SZELLEMI
ALKOTAST HASZNOSITO KFT aka
GAWKER MEDIA,

Defendants.
_______________________________________/

PLAINTIFF TERRY GENE BOLLEA'S
MOTION FOR STAY PENDING WRIT OF CERTIORARI REVIEW

Pursuant to Florida Rule of Appellate Procedure 9.310, Plaintiff Terry Bollea, by and through his undersigned counsel, respectfully moves this Court for an order staying its February 26, 2014, Order affirming the Special Discovery Magistrate's recommendation (the "February 26 Order") pending writ of certiorari review. The February 26 Order was received in the mail at the offices of Mr. Bollea's counsel on Saturday, March 1, 2014, and immediately reviewed by counsel the next business day on Monday, March 3, 2014; the order sought compliance within **three days**. Mr. Bollea intends to file a petition for writ of certiorari seeking immediate review of the February 26 Order in the Second District Court of Appeal.

I. INTRODUCTION

After Gawker posted a secretly-recorded and explicit tape of a sexual encounter between

Mr. Bollea and Heather Clem, without Mr. Bollea's knowledge or authorization, Mr. Bollea and his attorney, David Houston, contacted law enforcement, including the Federal Bureau of Investigation (the "FBI"). The FBI, in turn, promptly opened an investigation. **That FBI investigation remains open, and FBI representatives have repeatedly instructed Mr. Bollea and his attorneys not to release any information concerning the investigation to anyone**. Affidavit of David R. Houston ("Houston Aff.") ¶¶2–3. Notwithstanding this open investigation, the FBI's documents, files and communications generated as part of this investigation are sought by Gawker's motion to compel and are the subject of this Court's February 26 Order requiring Mr. Bollea to sign a release authorizing the FBI to release these materials to Gawker. Presumably, the reason why Gawker is seeking Mr. Bollea's authorization is that it (Gawker) previously made a Freedom of Information Act ("FOIA") request for the FBI's records that **was denied** because it would "constitute a clearly unwarranted invasion" of Mr. Bollea's "personal privacy" within the meaning of the FOIA, 5 U.S.C. § 552(b)(6), and it also would violate the prohibition against non-consensual disclosures embodied in the Privacy Act, 5 U.S.C. §552a(b).

The Court should stay the February 26 Order pending writ of certiorari review, for at least the following reasons:

First, Mr. Bollea is likely to succeed on the merits of his writ petition: In an analogous case, the argument advanced by Gawker in its motion was considered by the Florida Court of Appeal and **summarily rejected**. In *Franco v. Franco*, 704 So.2d 1121, 1123 (Fla. 3d DCA 1998), the appellate court held that a civil litigant could not be compelled to sign a release form for the release of **privileged** records. The Court of Appeal also declined to apply **the only case** relied on by Gawker in its motion to compel, finding that it is "misplaced" in the context of authorizing a release of **privileged** documents. *Id.*

Florida and federal law recognize a law enforcement investigation privilege. *See, e.g.*, *In re United States Department of Homeland Security*, 459 F.3d 565 (5th Cir. 2006); *In re City of New York*, 607 F.3d 923, 944 (2d Cir. 2010); *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1997); *State v. Maier*, 366 So.2d 501 (Fla. 1st DCA 1979). In addition, as the United States Supreme Court has held time and again, any attempt to use the FOIA as a discovery tool—which is precisely what Gawker seeks to do here—is wholly contrary to the purposes of the Act. *See, e.g.*, *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975) ("Act is fundamentally designed to inform the public about agency action and not to benefit private litigants.").

Second, the likelihood of harm should a stay not be granted is substantial. Without a stay, Mr. Bollea faces an untenable choice between compromising the integrity of the FBI's ongoing privileged investigation and being held in contempt of this Court's February 26 Order. *See Huet v. Trump*, 912 So.2d 336, 338 (Fla. 5th DCA 2005) (trial court granted stay pending review where order required disclosure of documents claimed to be protected by the work product doctrine). A stay will allow Mr. Bollea to appeal this important compelled waiver issue without risking contempt. In addition, release of the FBI's files on Mr. Bollea's case could irreparably harm and interfere with the FBI's **open investigation** and potential prosecution. Such a result would waste the substantial time and resources devoted by Mr. Bollea to bringing to justice those responsible for the unauthorized distribution and release of the secretly-recorded sex tape.

II. PROCEDURAL BACKGROUND

Following a hearing on January 31, 2014, the Special Discovery Magistrate

recommended on February 5 that Mr. Bollea provide Gawker with a signed release of the FBI's files concerning an open investigation into the sex tape at issue in this lawsuit.

On February 12, 2014, Plaintiff filed and served Exceptions to the Special Discovery Magistrate's recommendation, on the following grounds: (a) the FBI files are protected by the Law Enforcement Investigation Privilege; (b) the recommendation is **contrary** to the applicable holding of *Franco v. Franco*, 704 So.2d 1121, 1123 (Fla. 3d DCA 1998); and (c) the recommendation is not supported by a single Florida or federal statute or case.

The Exceptions were noticed for hearing on April 23, 2014, at 2:00 p.m. However, on February 26, 2014—without prior notice, any hearing, or a ruling on Plaintiff's Exceptions—this Court summarily affirmed the Special Discovery Magistrate's recommendation. The February 26 Order was received by Plaintiff's counsel via regular mail on Saturday, March 1, 2014, ordering compliance within **three days**.

III. ARGUMENT

A stay of the February 26 Order is necessary in this case. "Factors which are considered . . . in deciding whether to grant a stay include the moving party's likelihood of success on the merits, and the likelihood of harm should a stay not be granted." *Perez v. Perez*, 769 So.2d 389, 391 n.4 (Fla. DCA 1999). Florida courts routinely grant a stay of an order compelling production of documents claimed to be protected by privilege. *See, e.g., Huet v. Trump*, 912 So.2d 336, 338 (Fla. 5th DCA 2005) (trial court granted stay pending review where order required disclosure of documents claimed to be protected by the work product doctrine).

A. Mr. Bollea is likely to succeed on the merits of his writ petition.

The documents sought from the FBI are subject to the federal law enforcement privilege. Documents generated as part of **ongoing** law enforcement investigations, such as the ones

subject to the Court's February 26 Order, are **not discoverable** because they are **privileged**. In *In re United States Department of Homeland Security*, 459 F.3d 565 (5th Cir. 2006), the Court of Appeals held: "[H]owever it is labeled, **a privilege exists to protect government documents relating to an ongoing criminal investigation.**" *Id.* at 570 n.2 (emphasis added). Florida law recognizes the same privilege. *State v. Maier*, 366 So.2d 501 (Fla. 1st DCA 1979) (holding that law enforcement agency could decline to disclose identity of confidential informant).[1]

The federal law enforcement privilege serves a variety of critically important purposes. It is "designed to prevent disclosure of information that would be contrary to the public interest in the effective functioning of law enforcement. [It] serves to preserve the integrity of law enforcement techniques and confidential sources, protects witnesses and law enforcement personnel, safeguards the privacy of individuals under investigation, and **prevents interference with investigations**." *In re United States Dept. of Homeland Security*, 459 F.3d 565, 570 n.1 (5th Cir. 2006) (emphasis added). The law enforcement privilege applies both to ongoing and closed investigations. "An investigation . . . need not be ongoing for the law enforcement privilege to apply as the ability of law enforcement to conduct future investigations may be seriously impaired if certain information is revealed to the public." *In re City of New York*, 607 F.3d 923, 944 (2d Cir. 2010) (granting extraordinary writ and holding undercover police reports are privileged).

The presumption against discovery of law enforcement investigatory materials is strong. "[T]here ought to be a pretty strong presumption against lifting the privilege. . . .

[1] Gawker argued to the Special Discovery Magistrate that Florida's state privilege is narrower and extends only to the identity of confidential informants. Though no case has so held, it is important to recognize that the actual source of the privilege as to FBI records is **federal**, not state, law. The broad federal law enforcement privilege protects a panoply of documents and information generated in criminal investigations, not just the identity of particular sources.

Otherwise courts will be thrust too deeply into the investigative process. . . . The plaintiffs in these civil suits, who are seeking to obtain material from the government's criminal investigation, are not criminal suspects or defendants. Thus, they have no definitive rights to the fruits of the FBI's investigative endeavors conducted in confidence. . . . ." *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1997).

Likewise, Gawker has made **no showing** that it is entitled to the fruits of the FBI's investigative endeavors conducted in confidence. Indeed, **the United States Supreme Court has repeatedly held that attempts to use the FOIA as a discovery tool—which is precisely what Gawker seeks to do here—is wholly contrary to the purposes of the Act**. *See, e.g.*, *Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 24 (1974) ("Discovery for litigation purposes is not an expressly indicated purpose of the Act."); *N. L. R. B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975) ("Act is fundamentally designed to inform the public about agency action and not to benefit private litigants."); *Baldrige v. Shapiro*, 455 U.S. 345, 360 n.14 (1982) ("The primary purpose of the FOIA was not to benefit private litigants or to serve as a substitute for civil discovery."); *U.S. v. Weber Aircraft Corp.*, 465 U.S. 792, 801–02 (1984) ("Moreover, respondents' contention that they can obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. We have consistently rejected such a construction of the FOIA. [Citing cases.] We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented."). If all that is required to lift the law enforcement privilege is a litigant's desire for documents as part of a civil lawsuit, then the presumption against discovery of law enforcement's investigation documents is nullified, and the likelihood that future investigations will be seriously impaired by the interference of civil

litigants is guaranteed.

Because the documents at issue are privileged, Mr. Bollea cannot be compelled to authorize their release. Under *Franco*, a civil litigant cannot be compelled to sign an authorization for the release of **privileged** documents. *Franco* involved a motion to compel a civil litigant to sign a release of **privileged** psychotherapist records. The trial court ordered the civil litigant to sign a release for those privileged records. The litigant petitioned for a writ to the Florida Third District Court of Appeal, and the Florida DCA **granted the writ and vacated the order**. Like Gawker, the movant in that case relied on the Florida Supreme Court's decision in *Rojas v. Ryder Truck Rental, Inc.*, 641 So.2d 855 (Fla. 1994) (holding that a signed authorization for the release of **non-privileged**, **out-of-state** documents that a party would be able to obtain if they were located in Florida may be compelled even if the documents are located in a state with more limited disclosure rules). The Florida DCA in *Franco* specifically **distinguished the holding in *Rojas*** on the grounds that psychotherapist records are **privileged** (whereas the records sought in *Rojas* were not). Accordingly, the litigant in *Franco* could **not** be compelled to sign a release. In particular, the *Franco* Court held:

> **We find the husband's reliance upon *Rojas* to be misplaced, as *Rojas* did not involve the disclosure of privileged medical records.** Indeed in *Rojas*, one party was seeking medical records from a Massachusetts hospital that were **non-privileged**, potentially relevant, and discoverable documents. The supreme court found that the trial court had the authority to compel the appellants to execute a medical release for the requested documents in light of the fact that the records being sought constituted nothing more than what the appellee "would be entitled to if the Massachusetts medical providers were residents of this state." In this case, the husband is seeking records which may be protected by the psychotherapist-patient privilege. We agree with the wife that *Rojas* does not allow the psychotherapist-patient privilege to be so easily circumvented through the use of discovery pursuant to Rule 1.351. Thus, **in ordering the wife to execute the medical release for the requested documents, we conclude that the lower court departed from the essential requirements of the law** when it failed to consider the timely objection made by the wife's psychotherapist. We therefore grant the writ and quash the order under review.

704 So.2d at 1123 (citations omitted). Thus, because the Florida District Court of Appeal has already considered and expressly **rejected** the exact argument that underlies this Court's February 26 Order, Mr. Bollea is likely to succeed on the merits of his writ petition. Significantly, too, the Court of Appeal **granted a stay** pending its review of the order at issue in *Franco*. *Id.* at 1122.

Additionally, the fact that Gawker is seeking Mr. Bollea's authorization for release of the FBI records suggests that it has already made an FOIA request for those records, but was denied because the files are exempt from disclosure under FOIA as an unwarranted invasion of Mr. Bollea's personal privacy. *See* 5 U.S.C. § 552(b)(6) (exempting from FOIA disclosure "files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"). Federal law strictly prohibits federal agencies from disclosing private information about individuals to anyone except as specifically authorized by statute. *See* 5 U.S.C. § 552a(b) (listing conditions of disclosure). The FBI files at issue contain private and sensitive information, and Gawker should not be allowed to effect an end-run around the federal government's rules for releasing such information.

B. There is a substantial likelihood of harm should a stay not be granted.

As the Florida Supreme Court has held: "Discovery of certain kinds of information may reasonably cause material injury of an irreparable nature. This includes 'cat out of the bag' material that could be used to injure another person or party outside the context of the litigation, and **material protected by privilege**, trade secrets, work product, or involving a confidential informant may cause such injury if disclosed." *Allstate Ins. Co. v. Langston*, 655 So.2d 91, 94 (Fla. 1995) (emphasis added; internal citation and quotations omitted). The discovery sought by Gawker is protected by privilege, and exactly the kind of "cat out of the bag" material that could

irreparably harm and interfere with the FBI's **open investigation** and potential prosecution.

Mr. Bollea has reasonably refused Gawker's demand that he sign a release opening the FBI's criminal investigation files because it could imperil or preclude a future criminal prosecution of the person or persons involved in distributing the secretly-recorded sex tape—a cause to which Mr. Bollea has devoted substantial time and resources. Indeed, it is possible that Gawker (as the unauthorized publisher of the surreptitiously recorded sex tape) is itself one of the subjects or targets of the FBI's criminal investigation. If so, it would be highly improper for Gawker to seek to disrupt that criminal investigation through civil discovery in this action. Even if Gawker is not a subject or target, civil discovery of the FBI's criminal investigation files could still be used by Gawker to interfere with the criminal investigation and/or any eventual third-party prosecution. For example, Gawker could contact the FBI's confidential informants or other witnesses in an attempt to limit their cooperation. Worse yet, Gawker could contact and "tip off" those who are the subjects and/or targets of the FBI's investigation, thus undermining any hope of criminal prosecution.

Where the effects of denying a stay implicate the disclosure of privileged information and are irreparable and wide-reaching, such as here, the likelihood of substantial harm is palpable and a stay of this Court's February 26 Order pending writ of certiorari review is necessary.

IV. CONCLUSION

For the foregoing reasons, Mr. Bollea respectfully requests that this Court grant his motion for a stay pending writ of certiorari review.

DATED: March 5, 2014

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Service via the e-portal system this 5th day of March, 2014 to the following:

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