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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,

Case No.: 12012447-CI-011

vs.

HEATHER CLEM; GAWKER MEDIA,
LLC aka GAWKER MEDIA; et al.,

Defendants.
_____________________________________/

GAWKER MEDIA, LLC'S OPPOSITION TO PLAINTIFF'S MOTION FOR STAY PENDING WRIT OF CERTIORARI REVIEW

Defendant Gawker Media, LLC ("Gawker") respectfully submits this opposition to the motion of plaintiff Terry Gene Bollea professionally known as "Hulk Hogan" ("Hogan" or "plaintiff") to stay this Court's February 26, 2014 order. That order directed plaintiff and his counsel to provide signed authorizations to obtain records related to his request that the FBI investigate issues concerning the creation and dissemination of the sex tape at issue that is at the heart of this matter. Even though plaintiff's motion simply rehashes the same arguments both Judge Case and then this Court already have rejected, he nevertheless asserts that, for unexplained reasons, the outcome surely will be different on certiorari review and that a lengthy delay in the completion of discovery is somehow warranted. Moreover, the underlying premise of his stay request – that the Order at issue directs the actual release of records – is incorrect. Rather, it merely requires him to provide an authorization, while the FBI continues to maintain any objections – based on any law enforcement privilege or otherwise – that it would have in response to a FOIA request. In that regard, although plaintiff's Motion to Stay and his writ petition asserted that the order violates a law enforcement privilege, will interfere with an FBI

investigation and that Gawker might be trying to do so deliberately as a target or subject of that investigation, both the FBI and the United States Attorney's Office have advised Gawker's counsel that none of plaintiff's documents related to the FBI investigation are subject to the law enforcement privilege, that disclosing them would not interfere in any way with any investigation, and that Gawker is not a target or subject of any such investigation. *See* Affidavit of Seth D. Berlin ¶¶ 4-9 ("Berlin Aff.") (attached hereto as Exhibit 1). This Court should not countenance plaintiff's filing of a writ petition and then seeking a stay based on a materially incorrect characterization of the Government's position.

This Court should deny plaintiff's motion for a stay, and should direct him and his counsel to provide the Authorizations as ordered.[1]

SUMMARY OF RELEVANT BACKGROUND

As this Court is aware, plaintiff's motion constitutes his third attempt to forestall providing to Gawker executed Authorizations, so that Gawker may file a FOIA request with the FBI for records related to plaintiff's initiation of an FBI investigation about the creation and the dissemination of the very tape at issue in this case. Gawker has sought the Authorizations since November 20, 2013, when it first requested that Hogan sign a standard form, one that would, among other things, allow the FBI to produce any records without redacting the names of Hogan and/or his counsel. Gawker's request arose out of public reports, soon after Gawker published

[1] Denial of plaintiff's motion is not only correct as a matter of law but also in keeping with the Court's practice in this case; as the Court will recall, the Court denied Gawker's request for a stay of its order directing Gawker to produce certain cease and desist communications it has received. Plaintiff has provided no basis for reaching a different result concerning his request to defer his compliance with this Court's order, particularly here where the order at issue was the result of proceedings before both Judge Case *and* this Court. Indeed, this Court clearly that explained at the October 29, 2013 hearing that it was appointing Judge Case because it did not "intend to be second-guessing" him or to waste time with "whole days worth of hearings" giving parties "two bites at the apple" on each disputed discovery issue. *See* October 29, 2013 Tr. at 86:18 – 87:12 (relevant pages attached hereto as Exhibit 3). Plaintiff has nevertheless persisted in filing exceptions to each of Judge Case's rulings against him.

the Gawker Story and Excerpts, that plaintiff had contacted the FBI to complain that his sexual encounter with Ms. Clem was unlawfully recorded and distributed and to request that the Bureau investigate. *See, e.g.*, http://www.tmz.com/2012/10/14/hulk-hogan-sex-tape-fbi/ (attached as Exhibit 2). In complaining to the FBI, Hogan and/or his counsel undoubtedly made statements setting forth his contentions with respect to the creation and dissemination of the sex tape at issue. Pursuant to federal law, those reports to the FBI were made under oath. *See* 18 U.S.C. § 1001. Statements under oath by Hogan and his counsel about the central facts at issue in this action, and the Government's investigation in response thereto, are unquestionably relevant evidence in connection with the various claims he asserts against the Gawker defendants.

After ignoring Gawker's request for three weeks, Hogan's counsel informed Gawker that Hogan would not comply. Gawker then moved before the Special Discovery Magistrate (Hon. James Case) for an order compelling Hogan and his counsel to provide the Authorizations, and Hogan opposed that relief advancing the same arguments he does now. After Special Discovery Magistrate Case reviewed the parties' substantive briefs and heard the argument of counsel on January 31, 2014, he concluded that Gawker's motion should be granted, issuing a Report and Recommendation to that effect.[2]

[2] Gawker separately requested plaintiff to produce information and documents concerning his own communications about the FBI investigation. When plaintiff refused, Gawker filed a separate motion to compel on February 13, 2014. After briefing and a hearing held on February 24, 2014, Special Discovery Magistrate Case directed the records to be produced by 4:00 p.m. on February 27, 2014 in light of depositions of key witnesses, including plaintiff, commencing on March 3, 2014. Plaintiff produced no such records, and instead (a day after the deadline) produced a 10-page privilege log listing 162 such communications, only 26 of which are with the FBI or U.S. Attorney's Office and the remainder are with third parties. *See* Berlin Aff. Ex. A. Plaintiff also filed exceptions to Judge Case's Report and Recommendation on that issue. As described in the accompanying Berlin Affidavit, at ¶¶ 4-9, both the FBI and the U.S. Attorney's Office have confirmed that the government is not asserting any privilege in connection with any documents in plaintiff's or his counsel's possession, including the documents listed on that privilege log.

After Hogan filed exceptions, this Court adopted Judge Case's Report and Recommendation, issuing an order on February 26, 2014, directing Hogan to provide the requested Authorizations within three days. Despite the unequivocal direction of Judge Case and this Court, Hogan has not complied and has instead asked this Court to stay its ruling, further delaying discovery that was first requested in November of last year.

ARGUMENT

To obtain a stay, plaintiff has the high burden of demonstrating a "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 (Fla. 3d DCA 1999); *see also* Fla. R. App. P. 9.310; 2 Fla. Prac., Appellate Practice § 11:2 (2014) (explaining that Fla. R. App. P. 9.310 applies to trial courts' review of motions to stay their orders pending certiorari review). The likely injury must be irreparable. *Lampert-Sacher v. Sacher*, 120 So. 3d 667, 668 (Fla. 1st DCA 2013). Plaintiff's motion offers no new legal arguments, identifies no controlling law this Court has overlooked, and does not even seriously attempt to demonstrate that the appellate court is likely to reverse. In short, Hogan falls far short of meeting either prong of the standard for a stay. The Court should deny his motion, and direct plaintiff to comply with its earlier order.

A. Plaintiff Has Not Established Likely Success on the Merits.

As an initial matter, the entirety of plaintiff's motion conflates an Authorization – which is all that this Court has ordered plaintiff and his counsel to provide – with the FBI records themselves. *See, e.g.*, Mot. at. 2 ("FBI representatives have repeatedly instructed Mr. Bollea and his attorneys not to release any information concerning the investigation"); *id.* at 6 ("Gawker has made no showing that it is entitled to the fruits of the FBI's investigative endeavors"); *id.* at 9 (characterizing the Authorization as "opening the FBI's criminal investigation files"). Gawker

has not asked this Court to direct the release of the FBI investigative materials, and this Court has not done so. At this point, all that Gawker has requested – and all that this Court has ordered – is that plaintiff and his counsel provide *Authorizations* so that Gawker may take the next step in the FOIA process: requesting the materials from the relevant government agency. It is only after Gawker makes this request and the FBI provides some response that the question of whether Gawker is entitled to receive the relevant FBI records will be ripe. The Court should resist plaintiff's invitation to turn his narrow stay motion into a premature ruling on what records, if any, the FBI should produce.

Turning to the substance of plaintiff's motion, Hogan simply rehashes the very same contentions that both Judge Case and this Court already have considered and rejected. First, plaintiff has not demonstrated that the documents Gawker will seek from the FBI are subject to any privilege that he has standing to invoke. As Gawker has shown, to the extent any law-enforcement privilege shields documents relating to the FBI's investigation into Hogan's complaint, the privilege cannot be claimed by individuals (such as Hogan) but instead only by the government. Under both federal and state law, any such privilege only allows the *government* to withhold certain information. *See, e.g.*, *JTR Enters., LLC v. An Unknown Quantity of Colombian Emeralds, Amethysts & Quartz Crystals*, --- F.R.D. ---, 2013 WL 6570941, at *6 (S.D. Fla. Dec. 10, 2013) (noting that the privilege may be raised only "by a department having control over the documents at issue"); Fla. Stat. Ann. § 119.071(2)(c) (Florida's open-records law exempting agencies *of the State* from disclosing certain sensitive law-enforcement information relating to active criminal investigations). To the extent Gawker's FOIA request seeks information the FBI believes is protected, the FBI can – and presumably will – either redact the responsive documents or itself assert objections, including any such

privilege.[3] In this case, it is important to emphasize that the government is *not* asserting any privilege with respect to the substantial number of documents in plaintiff's and his counsel's possession. *See* Berlin Aff. ¶¶ 5-6, 8-9.

Second, the Florida Supreme Court has expressly held that, as part of supervising the discovery process, courts can and should direct parties to provide records releases, including because doing so assures that the records produced are legitimate. *See Rojas v. Ryder Truck Rental, Inc.*, 641 So. 2d 855, 857 (Fla. 1994) ("We hold that [directing a party to provide an authorization] provides the most practical and least burdensome method for obtaining the records at issue and allows for the records to be sent in an expeditious, readable, and uncensored fashion."). Plaintiff continues to rely heavily on *Franco v. Franco*, 704 So. 2d 1121, 1123 (Fla. 3d DCA 1998), which he also raised in his earlier papers and which was discussed a length in the hearing before Judge Case. *See* Pl.'s Opp. to Mot. to Compel FBI Auth. at 5; Jan. 31, 2014 Tr. at 12-22 (attached hereto as Exhibit 4). But that reliance is misplaced. As plaintiff concedes, *Franco* involved a subpoena to an out-of-state psychotherapist for records indisputably protected by the psychotherapist-patient privilege, *without* allowing the privilege to be adjudicated. 704 So. 2d at 1121-22. Specifically, although the therapist objected to the release of documents, he had no choice but to comply upon receiving the release. Unlike a release to a doctor, which in effect requires the records to be released, if the FBI contends any records here are privileged, it will have ample opportunity to assert a privilege and have it adjudicated. *Franco* is

[3] The cases cited by plaintiff (*see* Mot. at 3, 5-6) *all* support this point. *See In re U.S. Dep't of Homeland Security*, 459 F.3d 565, 569 (5th Cir. 2006) (allowing DHS to invoke law enforcement privilege against "compelled production of *government documents* [which] could impact highly sensitive matters relating to national security") (emphasis added); *In re City of New York*, 607 F.3d 923, 944 (2d Cir. 2010) (privilege invoked by City of New York); *Delwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122 (7th Cir. 1997) (privilege invoked by Department of Justice); *State v. Maier*, 366 So. 2d 501, 503 (Fla. 1st DCA 1979) (criminal case concerning state Attorney General's invocation of "*governmental* privilege of non-disclosure of [a] confidential informer" to the U.S. Naval Investigative Service) (emphasis added).

distinguishable on the additional ground that, there, the person resisting signing the release was the person who held the ostensibly applicable privilege. Here, it is the FBI – not plaintiff – that holds any law enforcement privilege, and it may still attempt to invoke the privilege to withhold documents if it believes any law enforcement privilege legitimately applies here.

Third, Hogan's contention that "the United States Supreme Court has . . . held that attempts to use FOIA as a discovery tool . . . is [sic] wholly contradictory to the purposes of the Act," Mot. at 6, misrepresents both the cases he cites and the posture before the Court here.[4] None of the cases upon which plaintiff relies stands for the proposition that FOIA may not be used "as a discovery tool" in litigation between two non-governmental parties. Mot. at 6. Indeed, as the Supreme Court explained in *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975) (Mot. at 6), a person's right to government information through FOIA is "neither increased nor decreased by reason of the fact" that it is also engaged in litigation in which the documents would be useful – even if that litigation is against the government itself, as was the case there.[5]

Here, the question is not whether Gawker can ultimately obtain the records, since the FBI will obviously weigh in on that question. Rather, the question is whether plaintiff can litigate

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[4] Plaintiff did not raise this argument or cite to any of these cases in his opposition to Gawker's motion to compel, in his argument before Judge Case, or in his exceptions, and cannot have a likelihood of success on a writ for an argument he never made.

[5] The other cases cited by plaintiff stand at most for the unremarkable proposition that FOIA cannot be used to obtain records as to which a privilege otherwise applies. *See, e.g.*, *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 796, 801-02 (1984) (Air Force pilot injured in plane crash could not obtain through FOIA records otherwise protected by "*Machin* privilege," which applies to "[c]onfidential statements made to air crash safety investigators"); *Baldridge v. Shapiro*, 455 U.S. 345, 360 (1982) (explaining that, under Census Act, raw Census data was expressly protected against disclosure, whether through FOIA or civil discovery); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 23 (1974) (while FOIA could not be used to supplement *administrative* contract renegotiation process, parties retained all the "normal litigation rights" in litigation and discovery in the Court of Claims). Because Gawker simply seeks an *Authorization* to permit it to complete the process of seeking documents from the FBI, cases potentially limiting the FBI's response are not germane to the issue before the Court.

affirmative claims against Gawker, while at the same time himself opposing the release of records directly relevant to the core issues in the case – including statements he and his counsel made to the FBI under penalty of perjury about these very facts. In that regard, both the FBI and the U.S. Attorney's Office has advised that it is not asserting *any* law enforcement privilege in connection with documents in plaintiff's or his counsel's possession, including the 162 documents listed on the ten-page privilege log belatedly served by plaintiff. As described above, *see* note 2 *supra*, discovery of those records directly from plaintiff is the subject of a separate motion, but this statement by the government confirms that the FBI is not, as plaintiff asserts, taking the position that no documents related to the FBI investigation can be produced at this time or the providing authorizations will interfere with any investigative efforts.[6]

B. Hogan Has Not Shown Irreparable Harm.

Hogan contends that, absent a stay, he will suffer irreparable harm. But the harm he identifies is far too speculative and far-fetched to satisfy the demanding standard for obtaining a stay. *See Tampa Sports Auth. v. Johnston*, 914 So. 2d 1076, 1079 (Fla. 2d DCA 2005) (vacating stay based on absence of likelihood of irreparable harm). He asserts that giving Gawker a signed Authorization "*could* imperil or preclude a future criminal prosecution of the person . . . involved in distributing the . . . sex tape," and "*could* . . . be used by Gawker to interfere with the criminal investigation," and that "Gawker *could* contact the FBI's confidential informants or other witnesses in an attempt to limit their cooperation." Mot. at 9 (all emphases added). Plaintiff posits that Gawker "is itself one of the subjects or targets of the FBI's criminal investigation"

[6] For the same reason, plaintiff's contention that the February 26, 2014 order constitutes an invasion of his privacy or a violation of the Privacy Act is a red herring. Plaintiff has made numerous public statements about the sex tape and his own steps to initiate an FBI investigation into it. He has filed affirmative claims both in federal court and then in this court. Having put these matters at issue, he cannot now claim that merely submitting a *request* for documents related to a governmental investigation which he initiated is somehow an invasion of his privacy.

and that Gawker may be trying to "disrupt that criminal investigation." *Id.* This parade of possible horrors is completely untethered to reality in light of the fact that (a) *all* that an Authorization from him and his counsel will permit Gawker to do is to *ask* the FBI for the relevant records and (b) the government has confirmed that Gawker is "'neither a target nor a subject of any investigation in the Middle District of Florida.'" Berlin Aff. ¶ 7 (quoting supervisor in United States Attorney's Office). If the FBI nevertheless believes that releasing additional documents in its possession will lead to any of these harms (or, presumably, any others), the FBI will deny Gawker's request or will produce redacted documents (redacting for example the identities of any confidential informants). Particularly given that Gawker is not a target or subject of any investigation, Hogan incorrectly asserts that it has some desire to interfere with such an investigation (which it does not) and would take illegal action to obstruct justice (which it would not), ignoring that Gawker has scrupulously adhered to the Agreed Protective Order in place in this action. At bottom, because the decision whether to release the relevant records (and in what form) rests entirely with the FBI, a stay of this Court's order directing plaintiff and his counsel to provide the Authorizations will not make the release of information plaintiff believes to be privileged any more or less likely; it will only unnecessarily delay resolution of whether the documents ultimately will be released.

CONCLUSION

For the foregoing reasons, Gawker respectfully requests that the Court deny plaintiff's motion for a stay pending writ of certiorari review and direct plaintiff and his counsel to provide executed Authorizations within three business days.

Dated: March 14, 2014

Respectfully submitted,

THOMAS & LOCICERO PL

By: *_/s/ Gregg D. Thomas_*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of March 2014, I caused a true and correct copy of the foregoing to be served via the Florida Courts' E-Filing Portal upon the following counsel of record:

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