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.
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REPLY IN SUPPORT OF TERRY GENE BOLLEA'S MOTION FOR STAY PENDING WRIT OF CERTIORARI REVIEW

Plaintiff Terry Gene Bollea submits this Reply in support of his Motion for Stay Pending Writ of Certiorari Review to rebut four points made by Defendant Gawker Media, LLC's ("Gawker") Opposition thereto:

First, Gawker claims that "the underlying premise of [Mr. Bollea's] stay request – that the February 26 Order "directs the actual release of records" – is incorrect. (Opp. at 1.) It is Gawker that is incorrect. The underlying premise of Mr. Bollea's stay motion is that: (1) documents generated as part of law enforcement investigations are privileged; (2) under Florida law, a Court cannot compel a litigant to authorize the release of privileged documents; and (3) the Freedom of Information Act ("FOIA") cannot be used as a tool for litigants to gain access to documents to which they otherwise would not be entitled.

The documents sought by Gawker's FOIA request are covered by the federal law enforcement privilege. As such, under Florida law, a Court cannot compel Mr. Bollea to authorize their release. *See Franco v. Franco*, 704 So.2d 1121, 1123 (Fla. 3d DCA 1998), discussed in the instant Motion to Stay.

Additionally, the United States Supreme Court has held that 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. *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975) (emphasis added). Here, Mr. Bollea would not provide an authorization for release of the FBI records voluntarily. Thus, by seeking an order compelling Mr. Bollea to waive his privacy rights over the FBI's records, Gawker is seeking access to records that it otherwise would not be able to access, which has the effect of increasing Gawker's (as compared to a non-litigant's) rights under the FOIA—a result that the Supreme Court has expressly held is **not permitted by the FOIA**. *See also 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.").

Second, Gawker's Opposition is based on inadmissible hearsay statements supposedly made by the U.S. Attorney's Office and the Federal Bureau of Investigation (the "FBI"). Gawker fails to present an Affidavit or letter from either such agency regarding the government's assertion of the law enforcement privilege. Instead, on March 18, 2014, Gawker submitted a letter from the Assistant U.S. Attorney for the Middle District of Florida ("AUSA") that purports

to "confirm" that Gawker is not a target of an AUSA investigation.[1] Significantly, that letter says **nothing** about any of the other statements that allegedly were made to Gawker's counsel, Seth Berlin, in an alleged March 14 telephone conversation with the AUSA. *See* Affidavit of Seth D. Berlin ¶¶ 4–9 (the "Berlin Affidavit" or "Berlin Aff."). If the AUSA is not asserting a law enforcement privilege over the law enforcement records at issue in this Motion, then the AUSA presumably would have said so in his March 18 letter. The fact that he did not is significant. Accordingly, the Court should **not** determine that the FBI or AUSA have waived the law enforcement privilege, and the inadmissible hearsay statements provided in the affidavit of Seth Berlin should be rejected.

Mr. Bollea and his counsel were instructed **repeatedly** by the FBI to maintain in strict confidence all information regarding the FBI's investigation. Affidavit of David R. Houston ¶ 3. Mr. Bollea and his counsel intend to comply with those instructions, unless and until told otherwise by the FBI or the Assistant U.S. Attorney ("AUSA"). Mr. Bollea's counsel has had numerous contacts with both the FBI and the AUSA within the past 30 days. Neither agency has told Mr. Bollea's counsel (or Mr. Bollea) that they are authorized to release any information regarding the FBI's investigation, or that they are not asserting the law enforcement privilege. Therefore, Mr. Bollea and his counsel must assume that the privilege has not been waived, and that they remain obligated to comply with the original (and repeated) directives from these agencies to maintain in strict confidence all information regarding the FBI's investigation.

Even so, the substance of Gawker's counsel's conversations with the FBI and U.S. Attorney's Office does not bear on whether this Court should grant Mr. Bollea's request for a

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[1] The March 18 letter from the AUSA was submitted as Exhibit B to Seth Berlin's Affidavit filed in support of Defendants' Response to Plaintiff's Exceptions Regarding Defendants' Fifth Motion to Compel.

stay of the February 26 Order pending writ of certiorari review. The stay should be granted, pending the resolution of the Writ, regardless of what the AUSA or FBI supposedly told Mr. Berlin.

Third, Gawker contends that Mr. Bollea will not suffer irreparable harm if the stay is not granted. That contention is incorrect. Importantly, on March 13, 2014, the Second District Court of Appeal ("DCA") ordered Gawker to serve a response to Mr. Bollea's petition for writ of certiorari by April 2 (20 days after the March 13 Order), and Mr. Bollea may serve a reply within 20 days of Gawker's response. Thus, the DCA is carefully considering Mr. Bollea's writ petition. If the February 26 Order is not stayed while the DCA considers the writ petition (including the parties' briefings over the next 35 days), then Mr. Bollea would be forced to provide Gawker with what could be construed as an irrevocable waiver of his privacy rights over the FBI's privileged records, thus resulting in irreparable harm.

Fourth, Gawker contends that Mr. Bollea seeks a "lengthy delay" of this issue by having filed his writ petition. (Opp. at 1.) Gawker's contention is not correct. It was Gawker that created the delay. Gawker admits that it became aware of the FBI investigation from the October 14, 2012, article at TMZ.com. (Opp. at 3.) Mr. Bollea filed suit against Gawker on October 15, 2012. Gawker waited until June 2013 to propound any discovery at all to Mr. Bollea in this action, and then waited until December 19, 2013, to propound discovery regarding Mr. Bollea's communications with the FBI. Mr. Bollea promptly objected to this discovery in early 2014. Thus, if there has been any delay, it was caused by Gawker.[2]

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[2] Gawker hardly should be complaining about delay in responding to discovery. On May 21, 2013, Mr. Bollea served a document request seeking Gawker's cease and desist/takedown demand communications. Gawker objected, prompting a motion to compel, which was granted on November 25, 2013. Gawker did not comply and instead filed a meritless motion for reconsideration. The court denied the motion for reconsideration on February 24, 2014, and

In sum, Gawker's Opposition does nothing to change the fact that Mr. Bollea's motion for a stay of the February 26 Order satisfies the requirements for a stay: Mr. Bollea is likely to succeed on the merits of his writ petition and the likelihood of harm should a stay not be granted is substantial. The Court should grant Mr. Bollea's motion and enter a stay of its February 26 Order pending writ of certiorari review by the DCA.

I. ARGUMENT

A. Mr. Bollea Is Likely To Succeed On The Merits Of His Writ Petition

Mr. Bollea is likely to succeed on the merits of his writ petition for at least the following reasons:

First, the documents sought by Gawker's FOIA request are covered by the federal law enforcement privilege. "[A] privilege exists to protect government documents relating to an ongoing criminal investigation." *In re United States Department of Homeland Security*, 459 F.3d 565 (5th Cir. 2006); *see also In re City of New York*, 607 F.3d 923, 944 (2d Cir. 2010) (holding that an investigation need not be ongoing for the law enforcement privilege to apply). Gawker does not even try to counter this point, and thereby concedes it. Rather, Gawker attempts to divert the Court's attention from this fact by submitting hearsay evidence that the FBI and the U.S. Attorney's Office for the Middle District of Florida supposedly are not asserting a privilege over documents that are within Mr. Bollea's or his agents' possession and control. *See* Berlin Aff. ¶¶ 4–9. The Berlin Affidavit should not be considered by the Court because it is hearsay. Additionally, the records sought by Gawker's FOIA request are **not** those that Mr. Berlin references in his Affidavit. *Id.* Mr. Berlin's hearsay affidavit and the AUSA's March 18 letter are silent as to the records sought by Gawker's FOIA request—records held by

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ordered Gawker to produce the documents within 15 days (that is, by March 13, 2014). Gawker still has not complied with the Order.

the FBI that were generated as part of a law enforcement investigation and, as such, are privileged.

Second, and related, because the documents sought by Gawker's FOIA request are privileged, the Court cannot compel Mr. Bollea to authorize their release. The Florida District Court of Appeals in *Franco* held that "in ordering the wife to execute the medical release for the requested documents, [which were protected by the psychotherapist-patient privilege] 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." *Franco*, 704 So. 2d at 1123 (emphasis added).

Franco holds that a Court cannot compel a litigant to authorize the release of privileged documents. The *Franco* Court's holding does not draw the distinctions that Gawker urges on this Court. The fact that the FBI will be able to assert its privileges over the documents at a later point does not change the applicability of *Franco's* holding here; nor does it matter whether Mr. Bollea is the holder of the law enforcement privilege. The holding in *Franco*, which controls here, does not turn on who has standing to assert the privilege—the litigant or the entity in possession of the documents. The holding turns on the fact that the underlying documents are **privileged**.

Even so, as Mr. Bollea points out in his writ petition, he has standing to raise the law enforcement privilege.[3] In *Strauss v. Credit Lyonnais, S.A.*, 2011 WL 4736359 at *6–7 (E.D.N.Y. Oct. 6, 2011), the Court held the law enforcement privilege **was applicable** to

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[3] Gawker's citation to *JTR Enterprises, LLC v. An Unknown Quantity of Colombian Emeralds, Amethysts and Quartz Crystals*, --- F.R.D. ---, 2013 WL 6570941, at *6 (S.D. Fla. Dec. 10, 2013), misstates the Court's holding in this regard. It does not say, as Gawker suggests, "that the privilege may be raised **only** 'by a department having control over the documents at issue'" (Opp. at 5 (emphasis added)); the word "only" is not used by the Court.

statements made by a bank official to a police commander in France and justified sealing the statements. In *Strauss*, the law enforcement privilege was asserted by the bank, not the French police, in a motion for protective order. *Id.*

Third, Gawker's attempt to use the Court and the FOIA to gain access to documents that it otherwise would not be able to access is contrary to the purpose of the FOIA, which is to provide the public with information, not to benefit private litigants. *N.L.R.B.*, 421 U.S. at 143 n.10. As Gawker itself pointed out, the United States Supreme Court has held that "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." Opp. at 7 (quoting *N.L.R.B.*, 421 U.S. at 143 n.10) (emphasis added). Here, Gawker is attempting to use its position as a litigant to **increase** its rights under FOIA, a practice that the Supreme Court has held to be impermissible and contrary to the purpose of FOIA.

Importantly, Gawker's conduct in seeking Mr. Bollea's authorization for release of the FBI records strongly suggests that Gawker has already made its own FOIA request for those records, but was **denied** because the files are exempt from disclosure under the FOIA as an unjustifiable 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").

Gawker's labeling of Mr. Bollea's assertion of his personal privacy rights with respect to the FBI's records as a "red herring" (Opp. at 8 n.6) is not supported by federal law, which provides that **federal agencies should not disclose private information about individuals without their authorization** (*see id.*; 5 U.S.C. § 552a(b) (listing conditions of disclosure of private information). The fact that it may be public knowledge that an FBI investigation exists

regarding the distribution of the sex video at issue **does not foreclose Mr. Bollea's assertion of privacy rights** in the non-public and privileged records generated as part of that investigation.

In sum, Gawker cannot access the FBI's records without Mr. Bollea's authorization. Mr. Bollea will not provide that authorization voluntarily. Thus, by seeking an order compelling Mr. Bollea to waive his privacy rights over the FBI's records, Gawker is seeking access to records that it otherwise would not be able to access, which has the effect of increasing Gawker's (as compared to a non-litigant's) rights under the FOIA—a result that the Supreme Court has expressly held is not permitted by the FOIA. *See* Mot. at 6 (citing cases).

B. Mr. Bollea Will Suffer Irreparable Harm If A Stay Is Not Granted

Gawker's Opposition does not rebut the fact that, absent a stay, Mr. Bollea faces an untenable choice between waiving his privacy rights over the FBI's privileged records and being in contempt of this Court's February 26 Order. Gawker cannot obtain the FBI's records without Mr. Bollea's authorization. If he provides the authorization, and the FBI releases the documents while Mr. Bollea's writ petition is pending, then the "cat is out of the bag," and the private and privileged material will no longer be private and privileged. *See Allstate Ins. Co. v. Langston*, 655 So.2d 91, 94 (Fla. 1995) (discovery of "'cat out of the bag' materials that could be used to injure another person or party outside the context of the litigation, and material protected by privilege . . . may cause such injury if disclosed"). The harm is irreparable.

Gawker's citation to *Tampa Sports Authority v. Johnston*, 914 So.2d 1076 (Fla. 2d DCA 2005) is inapposite. In that case, the Court found that the sports authority would not suffer irreparable harm without a stay because "forgoing the searches [for the Buccaneers games] during this appeal would leave the [sports authority] in roughly the same position it maintained during the two years following the specific threat to the stadium and that it continues to maintain

for all non-Buccaneers events." *Id.* at 1081. Here, the status quo will be altered since Mr. Bollea will not be "in roughly the same position" if the stay is not granted. He will have made an effectively irrevocable waiver of his privacy rights over the FBI's privileged records—a position diametrically contrary to what he currently asserts.

II. CONCLUSION

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

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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 18th day of March, 2014 to the following:

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