EXHIBIT 74-C

to the

CONFIDENTIAL DECLARATION OF GREGG D. THOMAS IN SUPPORT OF PLAINTIFFS' OBJECTIONS

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

CASE NO. 2D14-1079

TERRY GENE BOLLEA, professionally known as HULK HOGAN

Petitioner

v.

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,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA
(Lower Tribunal Case No. 12012447CI-011)

TERRY BOLLEA'S REPLY BRIEF FILED IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

In Florida, a court cannot compel an individual to sign a waiver form for the release of privileged records, especially when the party seeking those records would not otherwise be entitled to them absent such a waiver. In this case, Gawker Media LLC ("Gawker") sought an order compelling Terry Bollea to sign a waiver form for the release of records maintained by the Federal Bureau of Investigation (the "FBI") that implicate the most sensitive of Mr. Bollea's personal privacy rights. Those records are also protected by the federal law enforcement privilege, and Gawker is not entitled to them without Mr. Bollea's authorization. Gawker's 26-page opposition to Mr. Bollea's writ petition (the "Opposition" or "Opp.") does not credibly dispute the foregoing points. Instead, Gawker devotes at least half of its Opposition to making inflammatory attacks on Mr. Bollea. Gawker's substantive arguments (which make up less than half of the Opposition) are inapplicable and without merit:

First, Gawker does not dispute that a court may not compel an individual to sign a waiver for the release of privileged records. Gawker argues, however, that a court *may* compel an individual who is not the holder of the asserted privilege to sign a waiver for the release of privileged records. Yet Gawker cites no authority that makes such a distinction. The holding in *Franco v. Franco*, 704 So. 2d 1121 (Fla. 3d DCA 1998), which controls here, does not turn on who has standing to

assert the privilege. Rather, that holding turns on the fact that the underlying documents are **privileged**. Gawker's arguments that the records are not privileged do not withstand scrutiny.

Second, Gawker is not entitled to the FBI records without a signed waiver from Mr. Bollea. This fact is significant under the applicable case law, and Gawker essentially ignores it in the following ways:

Gawker first disregards the Florida Supreme Court's reasoning in *Rojas v. Ryder Truck Rental, Inc.*, 641 So. 2d 855 (Fla. 1994), where the Court "emphasize[d] that the records being sought constitute **nothing more than what [the litigant] would be entitled to** if the Massachusetts medical providers were residents of this state." *Id.* at 857 (emphasis added). The *Rojas* holding is limited to circumstances where the litigant would otherwise be entitled to the documents. It is a tool to be used for efficiency purposes (to obtain otherwise discoverable documents), not circumvention.

Gawker then falsely contends that Mr. Bollea did not preserve his argument that the Freedom of Information Act (the "FOIA") was not designed to be a vehicle for litigants to gain access to discovery. Opp. at 22 n.12. The contention is wrong. Mr. Bollea made this argument in both his opposition to Gawker's motion to

compel and in his Exceptions to the Discovery Magistrate's Recommendation.[1]

Finally, Gawker fails to substantively address Mr. Bollea's personal privacy claims in the FBI records, dismissing them as a "red herring" in its final footnote. The FBI records contain private information concerning Mr. Bollea and, under the FOIA, Gawker is not entitled to that information. *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").

In sum, Gawker seeks an unfettered waiver of Mr. Bollea's privacy rights in privileged documents. This is an extreme remedy that Florida courts have already found to be unavailable under analogous circumstances. Accordingly, compelling Mr. Bollea to sign a waiver for the release of these privileged and private documents, over his objections, is a departure from the essential requirements of law, will cause irreparable harm, and will leave Mr. Bollea without an adequate appellate remedy. This Court should issue a writ of certiorari directing the trial court to reverse its order compelling Mr. Bollea to sign a waiver permitting disclosure of the FBI records.

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[1] *See* Pet. App. at 87 (Plaintiff's Opposition to Gawker's Motion to Compel) ("It is well established that the purpose of the FOIA is public disclosure of government activities; the FOIA is not a form of discovery in civil or criminal litigation."); *id.* at 107 (Plaintiff's Exceptions to the Discovery Magistrate's Recommendation) ("The FOIA is not a vehicle for discovery in civil or criminal litigation.").

II. ARGUMENT

A. Whether Mr. Bollea Has Standing To Assert The Law Enforcement Privilege Is Irrelevant To The Analysis

The holding in *Franco*, which controls here, does not turn on who has standing to assert the privilege. On the contrary, in *Franco*, it was the doctor (and not the patient) who asserted a privilege objection to producing the records. *Franco*, 704 So. 2d at 1122 (finding that lower court's order requiring the patient to execute a medical release "departed from the essential requirements of the law . . . when an objection was lodged by [the doctor]"). It did not matter that the patient had not earlier asserted the privilege. *Id.* The court could not compel the waiver of the privileged documents. *Id.*

Given the circumstances and holding in *Franco*, Gawker nevertheless argues at length that the law enforcement privilege belongs to the government, and Mr. Bollea thus does not have standing to assert the privilege. Yet, even assuming arguendo that this privilege does belong solely to the government, standing to assert the privilege is not a relevant consideration. The question is whether the documents sought are privileged.

Gawker misunderstands the applicability of *Strauss v. Credit Lyonnais*, 2011 WL 4736359 (E.D.N.Y. Oct. 6, 2011), to the facts here. In *Strauss*, the court considered whether to seal records reflecting communications between an individual and the French police. *Id.* at *6–7. The French police did not assert the

law enforcement investigation privilege over the records. *Id.* Nevertheless, the court found it important to evaluate the applicability of the privilege in making its determination. *Id.* As in *Strauss*, the issue of whether the FBI files are privileged (they are) is relevant to determining whether Mr. Bollea can be compelled to sign a waiver for their release (he cannot).

Gawker also mis-cites *Sanders v. Crotty*, 2008 WL 905993 (N.D. Ill. Apr. 3, 2008), in attempting to distinguish it. *Sanders* does not "expressly state[ ]" that "the law-enforcement privilege 'is the Government's privilege.'" Opp. at 17 (purportedly quoting *Sanders*, 2008 WL 905993, at *3). *Sanders* states that "[f]ederal law has long recognized the **informer's privilege**, which is the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." *Id.* at *3 (emphasis added) (internal quotation omitted). Also, in *Sanders*, the court found that police officers had properly asserted the privilege, suggesting that individuals, as opposed to the government entity, may assert the law enforcement privilege. *Id.* at *5.

All of the other cases cited by Gawker are either irrelevant or distinguishable (because the cases focus on whether the *information* is privileged, not standing to assert the privilege):

- In *White v. City of Fort Lauderdale*, 2009 WL 1298353 (S.D. Fla. May 8,

2009), the court held that the law enforcement privilege did not "apply to the **information** sought" by the discovery, because the discovery sought "information from the individual Defendants and not the information held by or in control of the Police Department." *Id.* at 4, 3 (emphasis added). By contrast, Gawker seeks information held by the FBI, not Mr. Bollea.

- In *JTR Enterprises, LLC v. An Unknown Quantity of Colombian Emeralds, Amethysts and Quartz Crystals*, --- F.R.D. ----, 2013 WL 6570941 (S.D. Fla. Dec. 10, 2013), the litigant "did not request any governmental or law enforcement agency to produce their investigatory files or communications." *Id.* at *6. Here, Gawker seeks the FBI's investigatory records.
- *Sterling Merchandising, Inc. v. Nestle, S.A.*, 470 F. Supp. 2d 77 (D. Puerto Rico 2006), is irrelevant because Mr. Bollea, unlike the litigants in *Sterling*, is not *asserting* the privilege to prevent disclosure. The records *are* privileged, meaning the court cannot compel Mr. Bollea to sign a waiver for their release.
- Neither *Sirmans v. City of South Miami*, 86 F.R.D. 492 (S.D. Fla. 1980), nor *In re Sealed Case*, 856 F.2d 268 (D.C. Cir. 1988), concern whether a non-governmental litigant has standing to assert the privilege.

The relevant question in determining whether a court may compel a litigant to provide a waiver for the release of records is whether the records themselves are privileged. None of the cases cited by Gawker say otherwise.

B. Gawker's Arguments That The Records Sought From The FBI Are Not Privileged Do Not Withstand Scrutiny

It is well-settled, and Gawker does not dispute, that "[u]nder federal common law, there is a qualified privilege which protects disclosure of information contained in criminal investigations." *White v. City of Fort Lauderdale*, 2009 WL 1298353, at *2 (S.D. Fla. May 8, 2009). Instead, Gawker argues that Mr. Bollea has not established that the FBI's records are privileged. Gawker is wrong.

First, Gawker's citation to *Sirmans*, a case from 1980, for the proposition that the privilege must be "narrowly construed" (Opp. at 18) is refuted by more recent cases, which find that "there is a strong presumption against lifting the privilege." *In re City of New York*, 607 F.3d 923, 948 (2d Cir. 2010); *see also Adams v. City of New York*, --- F. Supp. 2d ----, 2014 WL 309640, at *2 (E.D.N.Y. Jan. 29, 2014) ("there is a strong presumption against lifting the privilege"); *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1997) ("there ought to be a pretty strong presumption against lifting the privilege").

Second, Gawker fundamentally misrepresents the holding in *Tuite v. Henry*, 181 F.R.D. 175 (D.D.C. 1998). In *Tuite*, the court considered whether the government's assertion that disclosure of the files "could severely impede the ability of [the government] to conduct future investigations" was sufficient to assert the law enforcement investigation privilege. *Id.* at 178–79. The court found that it was: "Absent the ability of [the government agency] to maintain this

confidentiality in all but the most severe cases, it is logical to conclude that witnesses would indeed be less forthcoming and more reticent in their dealings with [the government agency]. This threat of harm is particularized and not merely speculative . . . ." *Id.* at 179. In making its finding, the court **disagrees** with the cases holding that "broad speculations of harm," such as whether disclosure of the information would deter citizens from providing the government with information, are insufficient to support a finding of privilege. *Id.*[2]

The same threat of harm asserted in *Tuite* is present here—namely, compelling Mr. Bollea to allow the FBI to disclose the sensitive and private information relating to Mr. Bollea is likely to deter individuals from cooperating with and providing information to the FBI in its future investigations. *Tuite* supports a finding that the records are privileged and should not be disclosed.

Third, the government's statements about documents that are not at issue in this petition are irrelevant and misleading. Opp. at 8. The government's statements pertain to materials **outside** of the government's files and have nothing to do with the records at issue in this petition.

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[2] Gawker also mis-cites *Adams v. City of New York*, --- F. Supp. 2d ----, 2014 WL 309640 (E.D.N.Y. Jan. 29, 2014), which does not make the blanket assertion that speculation is insufficient to justify application of the privilege. *Cf.* Opp. at 18 (where Gawker claims that it does). In that case, *Adams* finds the city's failure to provide "concrete details" as to how an undercover police officer's testimony in open court might lead to certain risks to be "insufficient to permit the Court to take the exceptional step of extending this privilege to shield a civil trial witness from testifying in an open courtroom." *Id.* at *2.

C. Compelled Waivers Cannot Be Used As A Tool For Litigants To Gain Access To Documents To Which They Otherwise Would Not Be Entitled

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 decisions of *Rojas* and *Franco*, as well as the purpose of the FOIA.

In *Rojas*, the Florida Supreme Court "emphasize[d] that the records being sought constitute **nothing more than what [the litigant] would be entitled to** if the Massachusetts medical providers were residents of this state." *Rojas*, 641 So. 2d at 857 (emphasis added). The court in *Franco* echoed this point, explaining that the *Rojas* decision was based on 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.'" *Franco*, 704 So. 2d at 1123 (quoting *Rojas*, 641 So. 2d at 857) (emphasis added). Underpinning the reasoning in *Rojas* was the fact that the defendant was able to get the records without the plaintiff signing an authorization form. While the method for doing so would have been less efficient and more burdensome than requiring the party to sign the waiver, the litigant would have been able to gain access to the documents without the waiver—a situation present neither in *Franco* nor here.

Indeed, the *Rojas* court did not intend for compelled waivers to be used, as Gawker seeks to do here, as a way to gain access to documents to which a litigant

would not otherwise be entitled. Recognizing the "potential for abuse" in blanket waivers, *Rojas* fashioned an extremely narrow holding:

> We hold that, when a medical release form is appropriately limited, as it was in this case, and when previous record requests through rule 1.353 have been ignored, judges may use their discretionary authority to order the execution of such a release to allow a party to obtain **the same information available by subpoena** under rule 1.353.

Rojas, 641 So. 2d at 857 (emphasis added). The *Rojas* decision emphasizes that a compelled waiver may be used for efficiency purposes, but is not a tool for circumvention. *Id.* (finding that "[i]t makes no sense to impose a more costly and time-consuming discovery process on the seeking party solely because the medical providers are located out-of-state," but at the same time emphasizing that "***the records sought* in this case are *non-privileged, potentially relevant, and discoverable documents***") (italics in original; bold emphasis added).

The facts here do not fall within the narrow scope of the *Rojas* holding. The waiver form is not limited in any way; it allows for production of any records within the FBI's possession that relate to Mr. Bollea. Moreover, the release would allow Gawker to obtain information **beyond** that which would be reachable by subpoena. The *Rojas* decision was not meant to be used in this way. *See Franco*, 704 So. 2d at 1123 ("We find the husband's reliance upon *Rojas* to be misplaced, as *Rojas* did not involve the disclosure of privileged medical records.").

The purpose of the FOIA—to provide the public with information, not to

benefit private litigants—further underscores the point made in *Rojas* and *Franco*. 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' the person is using the law to seek records for litigation." Opp. at 22 (quoting *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975)). Here, Gawker attempts to use its position as a litigant to **increase** its rights under the FOIA, a practice the Supreme Court has held to be contrary to the Act's purpose.[3]

Further, **federal agencies should not disclose private information about individuals without their authorization.** *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") & 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 **does not foreclose Mr. Bollea's assertion of his personal privacy rights** in the non-public and privileged records generated as part of that investigation.

[3] The cases cited by Gawker where courts required litigants to sign authorization forms for the release of non-privileged government documents are inapposite: *Wesley v. Gates*, 2009 WL 1955997, at *1 (N.D. Cal. July 2, 2009) (ordering authorization for release of non-privileged social security records); *Santillan v. City of Reedley*, 2008 WL 62180, at *1–2 (E.D. Cal. Jan. 4, 2008) (ordering authorization for release of non-privileged social security records); *In re F&H Barge Corp.*, 46 F. Supp. 2d 453, 456 (E.D. Va. 1998) (determining that records sought would not result in a clearly unwarranted invasion of privacy under the FOIA and thus orders authorization for their release).

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 rights—a result that both the United States and Florida Supreme Courts have expressly found impermissible.

D. A Writ Of Certiorari Is Necessary

Mr. Bollea has made the required *prima facie* showing for writ of certiorari review. Indeed, the *Franco* decision is directly on point. In that case, the court granted a writ and quashed the order compelling the litigant to execute a waiver for the release of privileged documents—the exact situation presented here. *Franco*, 704 So. 2d at 1121. The order need not require immediate disclosure of the privileged information to be reviewable. *See, e.g., Pauker v. Olson*, 834 So.2d 198, 200 (Fla. 2d DCA 2002) ("Certiorari review is also appropriate where the discovery material could be used to injure another person or party outside the context of the litigation, and where it is protected by privilege.") (internal quotation omitted).

Once Mr. Bollea signs the waiver form, he cannot withdraw it. As the form itself provides: "The purpose of this solicitation is to ensure that the records of individuals who are the subject of U.S. Department of Justice systems of records

are not **wrongfully disclosed** by the Department." Pet. App. 69 (emphasis added). That purpose is thwarted, and cannot be remedied by appeal at the end of the case, if Mr. Bollea is wrongfully forced to sign the authorization form. He will have made an effectively irrevocable waiver of his personal privacy rights over the FBI's privileged records. Writ review is appropriate.

III. GAWKER'S MISREPRESENTATIONS TO THIS COURT

Throughout its briefing, Gawker attempts to impugn the integrity of Mr. Bollea. Mr. Bollea takes these accusations seriously and, though wholly irrelevant to the issue before this Court, Mr. Bollea is compelled to correct the misstatements and mischaracterizations advanced by Gawker:

1. Regarding Mr. Bollea's settlement with Mr. Clem:

Gawker suggests that Mr. Bollea's settlement with Mr. Clem was somehow motivated by a desire to have Mr. Clem lie about Mr. Bollea's involvement in the sex video.[4] This grave accusation is completely unfounded, as well as false. The simple fact that parties have entered into a settlement agreement suggests nothing untoward; it is inappropriate for Gawker to conjecture otherwise.

2. Regarding whether Mr. Bollea was aware of cameras in the Clems' house:

Mr. Bollea has consistently denied that he had any knowledge of the

[4] *See, e.g.*, Opp. at 4 n.2 ("Notwithstanding the fact that the sexual encounter was filmed in Mr. Clem's bedroom and began in his presence, Bollea quickly settled with Mr. Clem and inexplicably dropped the claims against him.").

cameras in the Clems' house. The so-called "evidence in the record" that purportedly "casts doubt" on those claims (Opp. at 6) is, in fact, statements made by Gawker's counsel, Seth Berlin, during an unrelated hearing (Opp. Pet. at 71–82). Mr. Berlin's statements refer to inadmissible hearsay that was refuted by the declarant when the declarant testified under oath. Gawker's counsel cannot rely on his own *ipse dixit* as "evidence."

3. Regarding the timing of Mr. Bollea's sexual relationship with Ms. Clem:

At the beginning of this case, Mr. Bollea had difficulty remembering the exact time period when he had a sexual relationship with Ms. Clem, which occurred several years before Gawker published the sex video and Mr. Bollea filed suit. Mr. Bollea has diligently sought to accurately recall this time period and has updated his discovery responses to reflect his refreshed recollection.[5]

4. Regarding Mr. Bollea's responses to Gawker's discovery concerning the FBI investigation:

Gawker devotes four pages of its Opposition to detailing a discovery timeline regarding the FBI investigation. Throughout that time, Mr. Bollea was following instructions from law enforcement. Mr. Bollea made objections and responses to Gawker's initial discovery requests in and around August 2013. As of that date, Mr. Bollea's instruction from law enforcement was not to discuss or

[5] In addition, it is unclear why Gawker suggests that Mr. Bollea has been inconsistent in his explanation of the number of times he remembers having had sexual relations with Ms. Clem. Mr. Bollea's recollection on this subject has been consistent.

disclose any aspect of the investigation with anyone. Mr. Bollea and his counsel were not informed of the government's allegedly changed position regarding the documents within Mr. Bollea's possession until very recently.

5. Regarding who distributed the sex video at issue:

Gawker contends that Mr. Bollea's complaint repeatedly accuses Ms. Clem of distributing the sex video at issue. Opp. at 9. In truth, Mr. Bollea's complaint alleges that all of the defendants are responsible for the sex video's distribution. *See, e.g.*, Pet. App. at 10 (FAC ¶39), 14 (FAC ¶ 61). Discovery has yet to reveal precisely who was responsible for sending the sex video to Gawker.

IV. CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari and direct the trial court to reverse its order compelling Mr. Bollea to sign a waiver permitting disclosure of the FBI records.

DATED: May 1, 2014

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