EXHIBIT 21

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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 REPLY BRIEF IN SUPPORT OF ITS MOTION TO COMPEL FBI AUTHORIZATION OR, IN THE ALTERNATIVE, FOR AN ORDER OF PRECLUSION

Defendant Gawker Media, LLC ("Gawker") respectfully submits this brief reply in support of its motion to compel Plaintiff Terry Gene Bollea (a/k/a Hulk Hogan) ("Hogan") to provide an Authorization to obtain records related to his request that the FBI investigate the creation and the dissemination of sex tapes depicting him have sexual relations with defendant Heather Clem.

1. Neither a federal nor a state privilege is available to Hogan here. As an initial matter, to the extent any law-enforcement-records privilege exists (and Gawker does not concede that it does), it cannot be asserted by a private party. It is a form of executive privilege that allows the *government* to withhold certain information. *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 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.

2. Even if a private party could invoke a state-law or federal evidentiary privilege in this context, neither privilege protects any of the information Gawker seeks. Florida recognizes only a "limited privilege" held by the State "to withhold the identity of a confidential informer." *State v. Zamora*, 534 So. 2d 864, 867 (Fla. 3d DCA 1988); *see also State v. Carter*, 29 So. 3d 1217, 1219 (Fla. 2d DCA 2010) ("The State has the privilege to withhold the identity of a confidential informant."); *State v. Borrego*, 970 So. 2d 465, 467 (Fla. 2d DCA 2007) ("The State has a limited privilege to withhold the identity of persons who provide law enforcement officers with information about criminal activity."); Fla. R. Crim. P. 3.220(g). The single Florida case Hogan cites does nothing more than recognize this narrow "governmental privilege of non-disclosure of the confidential informer." *State v. Maier*, 366 So. 2d 501, 503 (Fla. 1st DCA 1979) (cited in Opp. at 2-3). The corresponding federal privilege is (a) qualified and (b) likewise applies only to the "identities of confidential informants," as well as, *inter alia*, information pertaining to specific "law enforcement techniques and procedures," "information that would undermine the confidentiality of sources," and "information that would endanger witness and law enforcement personnel." *FTC v. Timeshare Mega Media & Mktg. Grp., Inc.*, 2011 WL 6102676, at *3-4 (S.D. Fla. Dec. 7, 2011) (discussing narrow contours of federal common-law law-enforcement privilege). Gawker is not requesting any such information and, if the FBI were inadvertently to interpret Gawker's request to call for it, the Bureau presumably would assert this privilege for itself.

3. Even assuming *arguendo* that the law enforcement privilege would apply *and* that a private party may invoke it (neither of which is correct), Hogan has waived his ability to rely on the privilege by failing to log any of his or his counsel's communications with the FBI as to which he claims a privilege. *See TIG Ins. Corp. of Am. v. Johnson*, 799 So. 2d 339, 340-41 (Fla. 4th DCA 2001) (affirming finding of waiver of attorney-client privilege where party did not log relevant communications).

4. The sprinkling of other cases Hogan cites are inapposite. *Franco v. Franco*, 704 So. 2d 1121 (Fla. 3d DCA 1998), involved a subpoena to an out-of-state psychotherapist, who objected to the release of documents. Despite his objections, his patient was subsequently ordered to provide a release, as to which the doctor – unlike the FBI in responding to a FOIA request – had no choice but to comply and release the records, in effect permitting the litigant to use the discovery process to "circumvent" the privilege the doctor wished to assert without adjudicating it. *Id.* at 1122. The court in *Franco* expressly distinguished *Rojas v. Ryder Truck Rental, Inc.*, 641 So. 2d 855, 957 (Fla. 1994), in which the Supreme Court of Florida had expressly approved a lower court order compelling a party to execute a release permitting the disclosure of records that are "non-privileged, potentially relevant, and discoverable." *Franco*, 704 So. 2d at 1123 (describing *Rojas*). Here, if the FBI contends the records are privileged, it will have ample opportunity to assert that privilege and have it adjudicated. The court in *Henderson v. State*, 745 So. 2d 319 (Fla. 1999),[1] simply noted that FOIA does not *supplant or expand* the rules of *criminal* discovery, which expressly delineate the State's required disclosures to a criminal defendant. It did not say, as Hogan implies, that a litigant cannot use public-records requests to seek discovery insofar as such requests are consistent with the governing discovery

[1] Although not noted by Hogan in his opposition, *Henderson* was amended on other grounds. *See Henderson v. State*, 763 So. 2d 274 (Fla. 2000).

rules. *See id.* at 326 (Henderson, "like any other Florida citizen, has a right of access to any nonexempt state document.").

5. If, notwithstanding the above, the Court declines to direct Hogan to provide the Authorization, a preclusion order is both warranted and proper. First, the records relating to Hogan's complaint to the FBI are admissible, and Hogan badly misrepresents Gawker's anticipated use of them. Gawker's motion expressly stated that the information sought is "relevant to the core facts at issue," Mot. at 3, and will be admissible in Gawker's case in chief, not just for impeachment purposes. For example, Hogan repeatedly has asserted that, despite his familiarity with the Clems' home, he did not know that he and Heather Clem were being recorded having sex; that he does not know who leaked the tape and that he played no part in its dissemination; and that he did not know about the tape, even though reports of a Hulk Hogan sex tape first surfaced in March and April of 2012. Yet each of these statements is subject to significant dispute. Hogan's or his counsel's statements to the FBI, which by operation of law are under oath, are direct proof concerning these facts that are central both to Hogan's presentation of his case and to Gawker's defense.[2] Hogan's assertion – that his complaint to the FBI about the leaking of the very material that he is suing Gawker for posting is not relevant and is based upon speculation concerning the contents of Hogan's FBI complaint, Opp. at 4-5 – is not well taken. The TMZ article Gawker attached as Exhibit 1 to its motion cites *Hogan's own*

[2] Hogan asserts that there is no evidence that his statements to the FBI were made under oath. *See* Opp. at 6. Assuming Hogan initiated a formal complaint with the FBI, as his attorney informed the media he had, *see* Mot. Ex. 1, he did so subject to 18 U.S.C. § 1001, which makes it a crime to provide false information to a government agency. *See, e.g.*, https://tips.fbi.gov (FBI tip form with declaration regarding veracity and citation to section 1001 at the top); http://www.ic3.gov/complaint/default.aspx (complaints concerning internet crime are made subject to penalty of perjury). Moreover, whether the statements were made under oath is not relevant to their availability for use to impeach plaintiff's testimony at trial: Under Florida law, statements need not have been made under oath to be used for impeachment purposes. *See* Fla. Stat. Ann. § 90.608(1).

attorney as the source of the information about and description of the FBI complaint, and Hogan nowhere contends the article inaccurately quoted his own counsel's statement.

6. Moreover, Hogan himself has placed both his statements to the FBI and the fact that he was complaining to the FBI at issue. Hogan and his counsel have repeatedly asserted, both publicly *and* to this Court, that Gawker's conduct, as well as the actions of the person who recorded the Video and sent it to Gawker, was criminal. A central theme in Hogan's statements has been that he and his counsel were actively pressing the FBI to investigate and prosecute whoever recorded, leaked and published the tape, and he has asserted variously in this case that (a) Bubba Clem was responsible, (b) Heather Clem was responsible, (c) that both were responsible, (d) he, Hogan, was not responsible, and (e) he was so outraged by the underlying conduct at issue that he sought to protect his privacy interests through criminal charges. Because Hogan himself has put the contents of the FBI file at issue, including his communications with the FBI which he has otherwise not produced or logged, and because he is certainly relying on the information Gawker seeks from those records in building his case, he may not use those statements as a "sword" in advancing his claims, while attempting to "shield" them from Gawker by claiming a privilege belonging to the FBI. *Accord City of St. Petersburg v. Houghton*, 362 So. 2d 681, 685 (Fla. 2d DCA 1978) (holding that "a plaintiff may not seek affirmative relief in a civil action and then . . . avoid giving discovery in matters pertinent to the litigation"); *Mikhlyn v. Bove*, 2011 WL 4529619, at *1 n.3 (E.D.N.Y. Aug. 3, 2011) (noting that party created "'sword-shield' problem" by "putting directly at issue" certain communications in which the party asserted a privilege). Principles of basic fairness dictate that Hogan should be precluded from referencing his complaint to the FBI, his communications between him or his agents and the FBI, or any facts learned from the FBI through those communications, while at the same time

obstructing Gawker's efforts to access those records. The Court should not permit Hogan to conceal highly relevant information about material, disputed facts from Gawker while he is asserting (and vigorously prosecuting) claims arising out of his version of *these very facts* and which began with him seeking $100 million in damages.

7. At the end of the day, Gawker does not seek an order directing the FBI to produce its records or to overrule preemptively any objections that the FBI may later assert. Rather, Gawker merely seeks an order directing Hogan (and for the avoidance of doubt, his counsel) to provide an Authorization so that the FBI, to the extent it otherwise can produce records consistent with the applicable FOIA rules and its obligations to ensure the integrity of ongoing law enforcement operations, can produce unredacted records involving the dissemination or attempted dissemination of sex tapes involving Hogan and Heather Clem. These records involve facts that are undeniably at the center of this case, and Hogan should not be permitted to refuse this "first step" in obtaining them.

CONCLUSION

For the foregoing reasons, Gawker respectfully requests that its Motion to Compel be granted, that plaintiff be ordered to provide an executed Authorization to Gawker within three business days, that Gawker be awarded its costs and attorneys' fees incurred in connection with bringing this motion, and that the Court grants such further relief as it deems appropriate.

Dated: January 31, 2014

Respectfully submitted,

THOMAS & LOCICERO PL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of January, 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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