EXHIBIT 51

to the

THE GAWKER DEFENDANTS' MOTION TO DISMISS ON THE GROUNDS OF FRAUD ON THE COURT

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 OPPOSITION TO GAWKER MEDIA, LLC'S MOTION TO COMPEL FBI AUTHORIZATION OR, IN THE ALTERNATIVE, FOR AN ORDER OF PRECLUSION

I. INTRODUCTION

The underlying facts in this dispute are that Defendant Gawker Media, LLC operates Gawker.com, a celebrity gossip website that posted an explicit sex tape depicting a private consensual sexual encounter, occurring behind closed doors in a private bedroom, involving the plaintiff, Terry Gene Bollea, professionally known as Hulk Hogan. Mr. Bollea had no knowledge that he was being recorded and certainly did not consent to it. He likewise did not consent to any dissemination of the tape and, on the contrary, has expended substantial resources to have the tape destroyed. Mr. Bollea had no knowledge that Gawker Media obtained a copy, and edited the recording into a 1 minute, 41 second "highlight reel" showing explicit, unblurred,

unblocked scenes of graphic oral sex, sexual intercourse, and Mr. Bollea's exposed genitals.

More than 5.35 million unique visitors viewed the video on the Gawker website and watched the explicit, surreptitiously recorded sex video. Mr. Bollea sued Gawker and its related individuals and entities for invasion of privacy and related counts. Gawker contends in response that its invasion of Mr. Bollea's privacy is protected by the First Amendment because the explicit, clandestinely recorded and unauthorized footage of the private sexual activity supposedly was "newsworthy" and a matter of "public concern."[1]

In this motion, Gawker seeks to compel Mr. Bollea to authorize Gawker to access the files of a confidential FBI criminal investigation. Such documents are **privileged** because they were generated as part of a law enforcement investigation. Moreover, applicable case law provides that even ***if*** the FBI files were discoverable (which they are not), the remedy that Gawker seeks (preclusion) is ***not available*** where the discovery is sought for impeachment purposes, which Gawker admits is its sole reason for seeking the FBI files. Gawker's motion therefore should be denied.

II. THE FBI FILES ARE PRIVILEGED.

The FBI files are protected by the law enforcement investigation privilege. Documents generated as part of ongoing law enforcement investigations are not discoverable. *See In re United States Department of Homeland Security*, 459 F.3d 565, 570 n. 2 (5th Cir. 2006) ("[H]owever it is labeled, a privilege exists to protect government documents relating to an ongoing criminal investigation"). Florida law recognizes the same privilege. *See State v. Maier*,

[1] Judge Campbell issued a temporary injunction against the video. Her order recently was reversed by the Florida Second District Court of Appeal ("DCA"). The Second DCA opinion, however, is not the law of the case. The exhibition of clandestinely-recorded video of two consenting adults naked and engaged in private sexual activity, in a private bedroom, is unlawful, is not "newsworthy," and is not legitimately a matter of "public interest."

366 So.2d 501 (Fla. 1st DCA 1979) (holding that law enforcement agency could decline to disclose identity of confidential informant).

This protection is crucial. It could disrupt or destroy an ongoing investigation or prosecution if the confidential files, witness statements, interviews, notes, identities of informants, and other information held by law enforcement could be discovered in a civil action. It could also undermine law enforcement promises of confidentiality to informants. Further, it would create the incentive for civil litigants to attempt to interfere with a criminal investigation by propounding civil discovery requests, such as document subpoenas and deposition subpoenas, and could be used to coerce the other party into settlement or dropping their claims or defenses, because of the risk of potentially disrupting or destroying a criminal prosecution. Mr. Bollea has reasonably refused Gawker's requests to open the FBI files because a future prosecution of the person or people involved in distributing the clandestinely recorded sex tape could be jeopardized. Moreover, if Gawker (as the publisher) is a target of the FBI criminal investigation, it would be highly improper for Gawker to disrupt the criminal investigation through civil discovery in this action.

The case cited by Gawker, *Rojas v. Ryder Truck Rental, Inc.*, 641 So.2d 855 (Fla. 1994), is distinguishable. *Rojas* did not involve the FBI in any way, including any request for the production of FBI records, or any other type of law enforcement records. *Rojas* also did not involve the Law Enforcement Investigation Privilege in any way or, for that matter, the Freedom of Information Act which is at issue here. Rather, *Rojas* was a car accident case. The plaintiff sued for injuries sustained in a car accident, and the defendant sought plaintiff's medical records relating to that car accident from two medical facilities that treated him. The lawsuit was filed and pending in Florida, yet the medical facilities were located in Massachusetts and, pursuant to

Massachusetts' patient privacy law, the plaintiff's signature was required to release the records. The medical records, however, were not protected by any privilege and were directly relevant to the case. The Florida Supreme Court ruled that the plaintiff was required to consent to allow the defendant to obtain the records.

Here, the records sought are those of an FBI criminal investigation. As discussed earlier, the Law Enforcement Investigation Privilege applies. Gawker cites **no legal authority whatsoever** for the proposition that the Court may ignore that privilege and seek to force the FBI to turn over its criminal investigation documents, or force Mr. Bollea to sign a Freedom of Information Act waiver regarding the FBI's law enforcement investigation records. (Any such order would not guarantee production of the documents in any event, because the FBI still may assert the privilege.) Gawker therefore is asking the Discovery Magistrate to **make new law in this area**, notwithstanding the fact that Gawker's request flies in the face of existing law, discussed herein, **protecting** law enforcement investigation files from being opened by private civil litigants.

As a more fundamental matter, **Gawker has made no showing whatsoever** that the FBI criminal investigation documents are **relevant** to this lawsuit—a civil case filed against the Gawker defendants and Heather Clem. Gawker provides no declarations from any witnesses with personal knowledge, and produces no documentary evidence other than a hearsay blog post from celebrity gossip website, TMZ.com, which **speculates** on what the alleged FBI investigation **might** have pertained to. If the FBI investigation pertains to this case, and Gawker or Ms. Clem were under investigation by the FBI, then presumably a witness (either a Gawker employee or Ms. Clem) would be able to provide an affidavit that the FBI asked them questions about the case or, alternatively, sent them written communications about the case. There is no

such evidence. Thus, it is **pure speculation** by Gawker that the FBI investigation is in any way relevant to this civil lawsuit against Gawker and Ms. Clem. Even if the FBI investigation was relevant, Gawker still has not made a case that the Law Enforcement Investigation Privilege can be ignored. No legal authority cited by Gawker stands for the proposition that the privilege can be ignored, nor does Gawker make any showing that the privilege does not apply. Moreover, even if the FBI investigation does focus on Gawker, it would be highly improper for Gawker to use this civil litigation as a means to disrupt, interfere with, or otherwise open up the FBI's investigation.

In *Franco v. Franco*, 704 So.2d 1121, 1123 (Fla. 3d DCA 1998), the Third District Court of Appeal held that a trial court may **not** compel a civil litigant to sign a release of potentially privileged records. In that case, a husband sought potentially privileged psychological records of his wife, and the court rejected the husband's request to compel execution of a consent form. *Franco* thus controls here, because it involves potentially **privileged** records. Here, the FBI records are privileged and therefore Gawker has no basis to seek to compel Mr. Bollea to sign a consent waiver.

Rojas, cited by Gawker, further is distinguishable because Gawker is not seeking to compel a consent to release records, but rather a Freedom of Information Act ("FOIA") waiver. 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. In *Henderson v. State*, 745 So.2d 319, 325 (Fla. 1999), the court held that a criminal defendant could not use a public records request to obtain discovery in his case.

III. NO PRECLUSION ORDER MAY BE ENTERED BECAUSE THE INFORMATION SOUGHT BY GAWKER IS FOR THE PURPOSE OF IMPEACHMENT.

Gawker admits that the sole purpose of its discovery request is to obtain impeachment evidence. *Motion* at 4 ("Since plaintiff's statements to the FBI were made under oath, they may be used to impeach the plaintiff at trial."). However, the law is clear that the preclusion remedy which Gawker requests is not available where Gawker is unable to obtain potential impeachment evidence. (Moreover, there is no evidence that Mr. Bollea made any statement to the FBI **under oath**, as Gawker claims.)

The "sword and shield" preclusion doctrine invoked by Gawker holds that a privilege is waived when a party raises an issue that necessarily will be proven with privileged information, and thus a preclusion order is permitted when the privilege is asserted. The doctrine only applies, however, when proof of the claim **necessarily** requires the use of privileged evidence. *Jenney v. Airdata Wiman, Inc.,* 846 So.2d 664, 668 (Fla. 2d DCA 2003), for instance, involved a suit for breach of a contract where the plaintiff's claim turned on his intent during the negotiation of the contract. However, the court nonetheless rejected the argument that the plaintiff had waived the lawyer-client privilege with respect to his communications with his lawyers during the contract negotiations. "Airdata is correct that Jenney raised the issue of intent. However, the simple fact that Jenney raised the issue is not sufficient to waive his attorney-client privilege. Under the sword and shield doctrine, a party who raises a claim that will necessarily require proof by way of a privileged communication cannot insist that the communication is privileged." *Id.* at 668 (emphasis in original). Thus, because the plaintiff could prove his intent without relying on the lawyer-client communications, there was no waiver.

The doctrine does not apply here because there can be no preclusion order where, like here, the privilege is asserted to block discovery of potential impeachment evidence, rather than evidence that necessarily will be relied on in the party's case in chief. *Id.* ("[A]ttorney-client privilege is not waived simply because the credibility of Jenney's statements concerning his intent could possibly be impeached by his communications with his former attorney.... Were this court to hold otherwise, it would essentially create a 'credibility exception' to the attorney-client privilege that would swallow the entire rule. We decline to create such an exception."); *accord Cuillo v. Cuillo*, 621 So.2d 460, 462 (Fla. 4th DCA 1993) (holding that the possibility that evidence could be used for impeachment does not waive the privilege under the "sword and shield" doctrine). Thus, Gawker is not entitled to an order precluding Mr. Bollea from adducing relevant evidence in support of his case, merely because of his (reasonable) refusal to sign a FOIA waiver authorizing the release of privileged documents generated in an FBI criminal investigation, for Gawker's use as potential impeachment in this civil litigation.

IV. CONCLUSION

For the foregoing reasons, Gawker's motion to compel Mr. Bollea to consent to the release of FBI investigatory files should be denied.

DATED: January 29, 2014

/s/ Charles J. Harder
Charles J. Harder, Esquire
PHV No. 102333
Harder Mirell & Abrams LLP
1925 Century Park East, Suite 800
Los Angeles, CA 90067
Tel: (424) 203-1600
Fax: (424) 203-1601
charder@hmafirm.com

-and-

Kenneth G. Turkel, Esq.
Florida Bar No. 867233
Christina K. Ramirez, Esq.
Florida Bar No. 954497
BAJO CUVA COHEN & TURKEL, P.A.
100 North Tampa Street, Suite 1900
Tampa, Florida 33602
Tel: (813) 443-2199
Fax: (813) 443-2193
Email: kturkel@bajocuva.com
Email: cramirez@bajocuva.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via E-Service mail this 29th day of January, 2014 to the following:

Barry A. Cohen, Esquire
Michael W. Gaines, Esquire
Barry Cohen, Esquire
Michael W. Gaines, Esquire
The Cohen Law Group
201 E. Kennedy Blvd., Suite 1000
Tampa, Florida 33602
bcohen@tampalawfirm.com
mgaines@tampalawfirm.com
jrosario@tampalawfirm.com
Counsel for Heather Clem

David R. Houston, Esquire
Law Office of David R. Houston
432 Court Street
Reno, NV 89501
dhouston@houstonatlaw.com

Gregg D. Thomas, Esquire
Rachel E. Fugate, Esquire
Thomas & LoCicero PL
601 S. Boulevard
Tampa, Florida 33606
gthomas@tlolawfirm.com
rfugate@tlolawfirm.com
kbrown@tlolawfirm.com
Counsel for Gawker Defendants

Seth D. Berlin, Esquire
Paul J. Safier, Esquire
Alia L. Smith, Esquire
Levine Sullivan Koch & Schulz, LLP
1899 L. Street, NW, Suite 200
Washington, DC 20036
sberlin@lskslaw.com
psafier@lskslaw.com
asmith@lskslaw.com
Pro Hac Vice Counsel for
Gawker Defendants

Julie B. Ehrlich, Esquire
Levine Sullivan Koch & Schultz, LLP
321 West 44th Street, Suite 1000
New York, NY 10036
jehrlich@lskslaw.com
Pro Hac Vice Counsel for
Gawker Defendants

Michael Berry, Esquire
Levine Sullivan Koch & Schultz, LLP
1760 Market Street, Suite 1001
Philadelphia, PA 19103
mberry@lskslaw.com
Pro Hac Vice Counsel for
Gawker Defendants

/s/ Christina K. Ramirez
Attorney