EXHIBIT 52

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 EXCEPTIONS TO REFEREE'S RECOMMENDATION RE: GAWKER MEDIA, LLC'S MOTION TO COMPEL FBI AUTHORIZATION OR, IN THE ALTERNATIVE, FOR AN ORDER OF PRECLUSION

I. INTRODUCTION

In this proceeding, the Referee recommended that Terry Bollea be ordered to sign a written waiver of his objections to Gawker Media obtaining confidential and privileged documents from the Federal Bureau of Investigation ("FBI") relating to an FBI criminal investigation that apparently related in some way to the Bollea-Heather Clem Sex Tape.[1] The Referee's recommendation is **contrary** to the applicable holding of *Franco v. Franco* by the Florida District Court of Appeal. Moreover, the recommendation is not supported by a single

[1] The Referee's recommendation is attached hereto. Mr. Bollea will submit a binder containing the briefing of both parties directed to the Referee, for the Court's convenient reference.

Florida or federal statute or case. The Court therefore should reject the Referee's recommendation.

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**. In *In re United States Department of Homeland Security*, 459 F.3d 565 (5th Cir. 2006), the court held: "[H]owever it is labeled, **a privilege exists to protect government documents relating to an ongoing criminal investigation.**" *Id.* at 570, n. 2 (emphasis added). Florida law recognizes the same privilege. *State v. Maier*, 366 So.2d 501 (Fla. 1st DCA 1979) (holding that law enforcement agency could decline to disclose identity of confidential informant).[2]

This protection is crucial. If civil litigants were permitted to open up law enforcement files – while the criminal investigations were ongoing – for purposes of discovery in the civil case, it could have the effect of disrupting or destroying the ongoing criminal investigation or prosecution. The disclosure, in civil litigation, of confidential criminal files, witness statements, interviews, notes, identities of informants, and other information held by law enforcement could completely undermine the work of law enforcement and criminal prosecutors. As one of many examples, disclosure in civil litigation could undermine law enforcement promises of confidentiality to informants.

Further, it would create the incentive for civil litigants (who might suspect that they are the subject of a criminal investigation) to attempt to **interfere with** the criminal investigation

[2] Gawker argued to the Referee that the Florida privilege is narrower and extends only to the identity of confidential informants. No case has so held, but it is important to recognize that the actual source of the privilege as to FBI records is **federal**, not state law. The broad federal privilege clearly protects a panoply of documents and information generated in criminal investigations, not just the identity of particular sources.

that might involve them, by bringing a civil suit raising claims related to the subject of the investigation, and then propounding civil discovery requests to the law enforcement agency or criminal prosecutor's office, such as by serving civil document and deposition subpoenas. Absent the Law Enforcement Investigation Privilege, law enforcement served with civil discovery could be required to produce information in their files regarding their ongoing criminal investigation, and the civil litigant (target of criminal investigation) could use that information to thwart the criminal investigation, such as by contacting witnesses of the criminal investigation.

Conversely, a civil litigant could use civil discovery propounded to law enforcement to strong-arm a settlement in the civil litigation, because, for example, the opposing civil litigant might wish for criminal prosecution of the wrongdoer (whomever it might be) and the fear of the criminal case being interfered with or dropped because of the intrusive civil discovery could cause the opposing civil litigant to simply drop its civil case. The various scenarios in which civil discovery could be used for improper purposes in connection with an ongoing criminal investigation are numerous.

The case law reflects these concerns: "The federal law enforcement privilege is a qualified **privilege** designed to **prevent disclosure** of information that would be **contrary to the public interest in the effective functioning of law enforcement**. [It] serves to **preserve the integrity of law enforcement techniques and confidential sources, protects witnesses and law enforcement personnel, safeguards the privacy of individuals under investigation, and prevents interference with investigations**." *United States Department of Homeland Security*, 459 F.3d at 570 n. 1 (emphasis added; citation omitted).

Mr. Bollea has reasonably refused Gawker's requests to open the FBI's criminal investigation files in this civil litigation because it could jeopardize a future criminal prosecution

of the person or people involved in distributing the clandestinely-recorded sex tape. Though not dispositive, it is possible that Gawker (as the publisher) is one of the targets of the FBI's criminal investigation. If so, it would be highly improper for Gawker to seek to disrupt that criminal investigation through civil discovery in this action. Even if Gawker is not a target, civil discovery of the FBI's criminal investigation files still could be used by Gawker to interfere with the criminal investigation and/or an eventual prosecution. For example, Gawker could contact the FBI's confidential informants and thereby cause those persons to withdraw from the criminal process, thereby destroying any hope of criminal prosecution. Moreover, Gawker – knowing that this could happen, and knowing that Mr. Bollea has aggressively sought prosecution against all those involved in the distribution of the sex tape – could use its potential interference with the criminal process as a weapon in civil settlement negotiations, i.e., seeking a favorable settlement with Mr. Bollea, or Gawker will seek to defeat the criminal investigation and potential prosecution.

III. THE MOTION TO COMPEL MR. BOLLEA TO AUTHORIZE GAWKER ACCESS TO THE FBI FILES LACKS ANY LEGAL AUTHORITY

Gawker's Motion to Compel cites only **one case** to support its argument that Mr. Bollea should be compelled to authorize disclosure of the FBI's criminal files: *Rojas v. Ryder Truck Rental, Inc.*, 641 So.2d 855 (Fla. 1994). But that case does not apply. *Rojas* did not involve any privilege of any kind. Nor did it involve law enforcement records of any kind. Nor did it involve a Freedom of Information Act waiver—the waiver that Gawker seeks here. Rather, *Rojas* was a car accident case. The plaintiff sued for injuries sustained in a car accident, and the defendant sought plaintiff's **non-privileged** 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' medical records law, the plaintiff's signature was required to release them. The court ruled that, because the medical records were **not privileged**, and were directly relevant to the case, the plaintiff was required to consent to allow the defendant to obtain them. Thus, *Rojas* simply holds that **non-privileged** documents that a party would be able to obtain if they were located in Florida, still can be obtained even if they are located in a different state with different disclosure rules.

The case at bar is completely different. Here, the records sought are those of an FBI criminal investigation. As discussed earlier, the Law Enforcement Investigation Privilege applies to protect those records from disclosure. Gawker cites **no legal authority** for the proposition that the Court may **ignore that privilege** and force Mr. Bollea to sign a Freedom of Information Act waiver for the release of the FBI's **privileged** law enforcement investigation records.

Importantly, the exact argument that Gawker is making here was **expressly rejected** by the Florida District Court of Appeal in *Franco v. Franco*, 704 So.2d 1121, 1123 (Fla. 3d DCA 1998). *Franco* involved a motion to compel a civil litigant to sign a release of **privileged** psychotherapist records. The trial court, citing *Rojas*, ordered the civil litigant to sign a release for those privileged records. The litigant filed a writ to the Florida District Court of Appeal, and the Florida DCA **granted the writ and vacated the order**. The Florida DCA in *Franco* specifically **distinguished the holding in *Rojas* on grounds of privilege**, holding that, because the psychotherapist records were **privileged** (as compared with the records in *Rojas* that were not privileged), the litigant in *Franco* could **not** be compelled to sign a release. In particular, the Florida DCA in *Franco* held:

> "We find the husband's reliance upon *Rojas* to be misplaced, as *Rojas* did not involve the disclosure of privileged medical records. Indeed in *Rojas,* one party was seeking medical records from a Massachusetts hospital that were non-privileged, potentially relevant, and discoverable documents.... The supreme court found that the trial court had the authority to compel the appellants to execute a medical release for the requested documents in light of 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.'... In this case, the husband is seeking records which may be protected by the psychotherapist-patient privilege.... We agree with the wife that *Rojas* does not allow the psychotherapist-patient privilege to be so easily circumvented through the use of discovery...."

Franco, 704 So.2d at 1123. Moreover, the trial court's error in *Franco* was found to be so manifest that it departed "from the essential requirements of the law," and the Florida DCA granted an extraordinary writ and reversed the order. *Id.*

Franco controls here. This case involves **privileged** records. Because the FBI criminal investigation records are privileged, Gawker has no basis to seek to compel Mr. Bollea to sign a waiver for their release. Pursuant to the Florida DCA's holding in *Franco*, if the Referee's recommendation is adopted by this Court, and Mr. Bollea is ordered to sign the release to the privileged records, it would be **reversible error**.[3]

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[3] Gawker argued to the Referee that *Franco* was not applicable because, according to Gawker, Mr. Bollea allegedly has no standing to assert the law enforcement investigation privilege. However, *Franco* does not turn on who has standing to assert the privilege (it does not even discuss standing), but rather the holding turns on the fact that the underlying documents are privileged. *Franco* expressly limits *Rojas*' holding to non-privileged documents. There is no

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 vehicle for 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 (analogous to FOIA) to obtain discovery in his case. Likewise, the FOIA cannot be used for discovery in this civil litigation.[4]

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

Gawker's alternative ground for its motion, not adopted by the Referee, was that Mr. Bollea should somehow be precluded from introducing relevant evidence because he did not consent to the release of the privileged FBI files. 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,

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issue with standing here because Mr. Bollea is not declining to produce a document in his possession on the grounds of privilege (in which case his standing to do so would be at issue); he is simply arguing that the *Rojas* doctrine, which allows courts in certain extraordinary circumstances to compel parties to sign consent forms, does not apply where the underlying documents are privileged.

[4] **Gawker also 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. It is **pure speculation** by Gawker that the FBI investigation is in any way relevant to this civil lawsuit. This further distinguishes our case from *Rojas*, where nobody disputed that the records of plaintiff's medical treatment were relevant. Here, Mr. Bollea disputes the relevance of the FBI's criminal proceeding, and Gawker has made no showing of relevance.

the preclusion remedy which Gawker requests is not available where the evidence sought is for impeachment purposes.

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 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.

V. CONCLUSION

For the foregoing reasons, the Court should decline to adopt the Referee's recommendation, and Gawker's motion to compel Mr. Bollea to sign a release of the FBI's criminal investigatory files should be **denied**.

DATED: February 12, 2014

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via E-Service this 12th day of February, 2014 to the following:

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