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. 12-012447-CI-011

HEATHER CLEM, et al.,

Defendants.
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FIRST LOOK MEDIA, INC., THE ASSOCIATED PRESS, SCRIPPS MEDIA, INC., JOURNAL BROADCAST GROUP, and TAMPA BAY TIMES,

Intervenors.

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INTERVENORS FIRST LOOK MEDIA, INC., WFTS-TV, WPTV-TV, SCRIPPS MEDIA, INC., WFTX-TV, JOURNAL BROADCAST GROUP, THE ASSOCIATED PRESS, AND THE *TAMPA BAY TIMES*'S MOTION AND MEMORANDUM IN SUPPORT OF PUBLIC ACCESS TO COURT RECORDS FILED IN CONNECTION WITH PLAINTIFF'S EMERGENCY MOTION SEEKING INVESTIGATION OF ALLEGED VIOLATIONS OF COURT'S PROTECTIVE ORDER

Intervenors, First Look Media, Inc., WFTS-TV, WPTV-TV, Scripps Media, Inc., WFTX-TV, Journal Broadcast Group, The Associated Press, and the Times Publishing Company, publisher of the *Tampa Bay Times* (collectively, the "Intervenors"), understand that pending before the Court are motions by the Plaintiff and oppositions by the Defendants related to documents that were declared public records and ordered released by a United States District Court pursuant to

the federal Freedom of Information Act ("FOIA"), and filed with this Court.[1] The Intervenors further understand that the Plaintiff has asked this Court for permission to conduct a wide-ranging leaks investigation to determine whether those public records, which relate to an investigation by the Federal Bureau of Investigation ("FBI") concerning the Plaintiff, were inappropriately made public by Defendants or their counsel.

The Intervenors, previously granted intervention by this Court to assert the public's right of access,[2] are digital journalism companies, broadcasters, and publishers that believe democracy depends on a citizenry highly informed and deeply engaged through maximum transparency by all branches of government. The docket in this action already contains dozens of entries reflecting hundreds of pages of records sealed without this Court's application of any of the safeguards required by Florida Supreme Court precedent and Rule of Judicial Administration 2.420.

Moreover, the latest rounds of filings, made under seal by cautious counsel dutifully litigating under the strictures of this Court's broad protective orders, involve documents that The Honorable Susan Bucklew, United States District Judge, ordered disclosed in FOIA litigation.[3] It is especially inappropriate for a Florida state court proceeding to require the sealing of federal

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[1] The Intervenors, from a review of the docket, understand that the Defendants have made the following motions and filings asking the Court to rule that records filed under seal should not remain sealed: Gawker's Motion to Determine Confidentiality of Transcripts of Closed Court Proceedings; Gawker's Motion For An Order Declaring that Plaintiff Has Improperly Designated Certain Discovery Materials as "Attorneys' Eyes Only"; pending motions to determine the confidentiality of the records listed in Gawker's Notice of Hearing dated August 20, 2015; and Gawker's Motion to Determine Confidentiality of Confidential Supplemental Opposition to Plaintiff's Emergency Motion. The Intervenors file this motion in accord with the Defendants' position that the records filed in this matter should be made public.

[2] The Intervenors, along with other media companies, were granted intervention in connection with the argument held before this Court on July 1, 2015. Following that argument, the Plaintiff and the Intervenors each submitted proposed orders, and the Intervenors also submitted a transcript of the argument. The Court has not yet entered a written ruling from that proceeding.

[3] *See e.g.* Docket #31, Order of June 24, 2015, entered in *Gawker Media, L.L.C.* et al. *v. The Federal Bureau of Investigation et al.*, Case No.: 8:15-cv-1202-T-24EAJ.

government records that are public by virtue of an act of the United States Congress as interpreted in a contested federal court proceeding.[4]

For these reasons, as more fully set forth below, the Intervenors respectfully move this Court to lift any seals currently in place, including especially as related to the FOIA documents, the FBI investigation, and the request by the Plaintiff for a leaks investigation.

I. THE FILING OF HUNDREDS OF PAGES OF SEALED RECORDS VIOLATES FLORIDA'S STRONG PRESUMPTION OF TRANSPARENT COURT PROCEEDINGS, AND THE FIRST AMENDMENT RIGHT OF PUBLIC SCRUTINY.

Florida courts strictly adhere to the country's and this state's long tradition of public access to judicial proceedings: "[A] strong presumption of openness exists . . . A trial is a public event, and the filed records of court proceedings are public records available for public examination." Barron v. Florida Freedom Newspapers, 531 So. 2d 113, 118 (Fla. 1988); *see also* Miami Herald Pub. Co. v. Lewis, 426 So. 2d 1 (Fla. 1982) (Florida Supreme Court holds that before closing a proceeding, court must make specific findings that closure essential to prevent specific harm, and tailor remedy no broader than necessary); Carnegie v. Tedder, 698 So. 2d 1310, 1312 (Fla. 2d DCA 1997) ("Historically, litigants have had no reasonable expectation of privacy with regard to trial proceedings and court files."); Florida Freedom Newspapers, Inc. v. Sirmons, 508 So. 2d 462, 463 (Fla. 1st DCA 1987) ("There is no private litigation in the courts of Florida."); Goldberg v. Johnson, 485 So. 2d 1386, 1388 (Fla. 4th DCA 1986) ("[T]he public and press have a right to know what goes on in a courtroom whether the proceeding be civil or criminal.")

Florida's stalwart presumption of public access to court proceedings and records stems from both this state's own tradition of openness and the safeguards of the First Amendment to the

[4] While this Court directed Plaintiff and Heather Clem to execute privacy waivers that were then provided to the FBI, the federal court was ultimately required to decide whether, and did decide that, these documents were public records under FOIA.

U.S. Constitution. The First Amendment, as the U.S. Supreme Court has said time and again, requires open courts and court records to ensure the "appearance of fairness [that is] so essential to public confidence in the system." Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984). The media's access to judicial proceedings and records keeps the public informed and helps instill public confidence in both the process and the results of trials. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559-60 (1976); Nixon v. Warner Communications, Inc., 435 U.S. 589, 609 (1978). "The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 838-39 (1978).

The First Amendment and Florida's common law tradition of maximum openness are reflected in Florida Rule of Judicial Administration 2.420. The Rule codifies the safeguards for public access by requiring that all orders granting closure must:

- Recite the justifications "with as much specificity as possible" (Rule 2.420(e)(3));
- Specify "particular grounds" under the Rule "for determining the information is confidential" (Rule 2.420(e)(3)(B));
- Specify the particular information that is determined to be confidential (Rule 2.420(e)(3)(E));
- Include findings that "(i) the degree, duration, and manner of confidentiality ordered by the court are no broader than necessary to protect the interests set forth" in [the Rule]; and (ii) no less restrictive measures are available to protect [those] interests" (Rule 2.420(e)(3)(G)).

With all respect to the Court and counsel, none of the strict safeguards under the First Amendment, Florida common law, and the Rule have been followed with these documents. Instead, under the Court's broad protective order, hundreds of records have been stamped "Attorneys' Eyes Only" and filed with the Court. Many of those records relate to the FBI's investigation of the dissemination of the sex tapes involving Plaintiff Hulk Hogan and Heather Clem and related matters, and Plaintiff's counsel's request that this Court conduct a leaks investigation to determine whether its protective order was violated. Because the Plaintiff himself placed the leaks investigation at issue in this action, the records related to that investigation are integral to these proceedings. So to the extent it may ever have been appropriate to label these documents "Attorneys' Eyes Only" (it was not), this no longer holds true because of the Plaintiff's own decision to place the leaks investigation as a key issue in this action.

Furthermore, the public has an interest in understanding the nature of the FBI leaks investigation, particularly since substantial information about that investigation has been made public by the Plaintiff himself. As Defendant Gawker made clear in a motion it filed with this Court on August 20, 2015, the Plaintiff himself disclosed key information related to the leaks investigation, including the identity of the target of an FBI sting in which he and his attorney participated, as well as his admission that he can be heard using racist language in the sex tapes. *See Motion for an Order Declaring That Plaintiff Has Improperly Designated Certain Materials as "Attorneys' Eyes Only,"* at pp. 7-10. With so much information having already been released publicly by the Plaintiff, there can be no "particular ground" on which this Court could rest a specific finding, as Rule 2.420(e)(3)(B) requires, to warrant continued sealing of the information related to the FBI investigation and Plaintiff's calls for a leaks investigation. By permitting such

documents to remain hidden from the public, the Court also would defeat the public's right under FOIA to understand the nature of an FBI matter that the Plaintiff himself has largely publicized.

These issues involve the activities of the FBI that a federal judge has declared a public record under federal FOIA law, as well as matters involving this Court's administration of justice, including its own adjudication of numerous motions. For these reasons, consistent with Florida and First Amendment law, and the principles of public oversight reflected in the law, the Intervenors request that the Court release to the public all records related to these issues.

II. THIS COURT SHOULD NOT COUNTERMAND THE AUTHORITY OF THE U.S. DISTRICT COURT, WHICH HAS DETERMINED THAT THE FBI DOCUMENTS ARE PUBLIC RECORD UNDER FEDERAL LAW.

The federal FOIA, 5 U.S.C.§ 552 *et seq.*, enacted 50 years ago, defines the contours of the public's right of access to documents of the federal government. It requires executive agencies to promulgate procedures for the release of records (5 U.S.C. § 552(a)(1)), contains specific and narrow exemptions (5 U.S.C. § 552(b)) – and, most relevant for this matter, rests exclusive jurisdiction with the United States District Courts to adjudicate disputes and declare the public's rights. 5 U.S.C. § 552(a)(4)(B). State courts do not have the authority to curtail the public's rights of access to documents that are public records under federal FOIA law.

In the proceedings properly brought by Gawker in the U.S. District Court for the Middle District of Florida, Judge Bucklew has largely adjudicated the FOIA issues, having declared that a set of records sought from the FBI were public documents and having ordered the release to Gawker of those records pursuant to federal FOIA. The FBI and the United States Attorney's Office, pursuant to the federal court's orders and the Plaintiff's privacy waiver, have released a substantial number of documents, and many of those documents have been filed with this Court.

By operation of this Court's protective order, which Defendants' counsel have dutifully

obeyed, public FBI records are presently filed under seal. As the undersigned counsel understands it, all discussion of those records have taken place in proceedings closed to the public. And as counsel further understands it, Gawker and counsel are prohibited, again by virtue of this Court's protective order, from sharing the FBI records or discussing their content with anyone.

This Court's protective order therefore effectively has rendered nonpublic the FBI records properly held public records, by a federal court, applying FOIA law in a contested proceeding in the appropriate forum. These records relate to the core issue before the Court, and the Plaintiff has made them central to this action because of the leaks investigation. These public FOIA records, again by virtue of this Court's protective order, will remain under seal until this Court decides otherwise. With all due respect, Congress did not authorize this Court to adjudicate the public's, the Intervenors', or even Gawker's rights to review and disseminate federal records that are public under FOIA.

For this reason as well, the Intervenors request that this Court enter an order lifting the seal, releasing all FBI records that were declared public by the federal court, and permitting full public access to any records and discussions in this Court related to these records.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY THAT on September 24, 2015, I electronically filed the foregoing with the Florida Courts E-Filing Portal, which will serve the foregoing via electronic mail to:

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