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, *et al.*,

Defendants.
_____/

GAWKER DEFENDANTS' MOTION TO DETERMINE CONFIDENTIALITY OF TRANSCRIPTS OF CLOSED COURT PROCEEDINGS

Pursuant to Rule 2.420 of the Florida Rules of Judicial Administration and this Court's Agreed Protective Order Governing Confidentiality, dated July 25, 2013 (the "Protective Order"), undersigned counsel for Gawker Media, LLC, Nick Denton, and A.J. Daulerio (collectively, the "Gawker Defendants"), hereby move to determine the confidentiality of the transcripts of multiple closed proceedings that have been held in this action (hereinafter, "Sealed Transcripts").

Specifically, the Gawker Defendants request that the Sealed Transcripts no longer be deemed confidential, and that they be made public, for two reasons. First, there were not adequate findings made at the time to support the closure of the proceedings. Second, even if closing those proceedings could have been justified at the time, no such justification exists now, given that (a) much of the allegedly "confidential" information at issue is no longer confidential and/or (b) the subject matter of those proceedings has become integral to this litigation.

BACKGROUND

1. In the course of this litigation, proceedings and portions of proceedings have been closed, and their transcripts marked confidential.

2. For instance, on April 23, 2014, this Court closed part of a hearing on a discovery motion following a request by counsel for plaintiff Terry Bollea, who asked for "a confidential session that would be based upon the protective order because, Your Honor, Gawker is a news organization that likes to talk about things like this, and I would like this information not to go to Gawker . . . ." Ex. 1 (April 23, 2014 Hrg. Tr.) at 96:11-15; *see also* Conf. Ex. 2-C (transcript of confidential session). The transcript of the closed portion of that hearing has been marked as Confidential, and the information the Court directed to be produced was then marked "Attorneys' Eyes Only." Conf. Ex. 2-C.

3. On July 18, 2014, a hearing was held before Special Discovery Magistrate James Case (Ret.) on a motion for sanctions filed by the Gawker Defendants and a motion for protective order filed by Bollea asking for permission to redact certain words from materials produced in discovery. The entirety of that lengthy hearing and the transcript of the hearing was deemed "Confidential." *See* Conf. Ex. 3-C (transcript).

4. On April 22, 2015, the courtroom was closed for a significant portion of a hearing before this Court on the Special Discovery Magistrate's October 20, 2014 Report and Recommendation that Bollea be granted the protective order that was the subject of the July 18, 2014 hearing. *See* Conf. Ex. 4-C (confidential portion of transcript). The transcript of that hearing states that it is part of a "confidential record." *Id.*[1]

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[1] The transcript of a February 13, 2015 hearing before the Special Discovery Magistrate has also been marked as Confidential because a portion of that transcript refers to discovery

5. The portions of these proceedings that were accorded confidential treatment (or in the case of the July 18, 2014 hearing, the entire hearing) concerned: (a) the FBI investigation of an alleged extortion attempt involving the sex tapes (the "FBI investigation"), (b) documents relating to that FBI investigation, (c) efforts to conceal the substance of the FBI investigation or other information contradicting Bollea's contentions in this action, and/or (d) Bollea's use of "offensive language." *See* Conf. Exs. 2-C - 4-C; *see also* July 1, 2015 Afternoon Session, Hrg. Tr. (Ex. 5) at 200:13-17 (counsel for Bollea referring to the "offensive language issue that's been festering for awhile").

6. As explained below, these proceedings were closed without any notice to the public and without making the findings required by Florida Rule of Judicial Administration 2.420. Indeed, the July 18, 2014 hearing, at which a potentially case dispositive sanctions motion was adjudicated, was closed in its entirety without *any* findings on the record that the hearing should be closed or the transcript sealed.

ARGUMENT

A. Closure of the Proceedings Was Not Adequately Supported.

7. All trials, civil and criminal, are public events, and there is a strong presumption of public access to these proceedings and their records under both the First Amendment and Florida law. *Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113, 114 (Fla. 1988).

8. Closure of court proceedings should occur only when necessary (a) to comply with established public policy set forth in the constitution, statutes, rules, or case law; (b) to protect trade secrets; (c) to protect a compelling governmental interest; (d) to obtain evidence to properly determine legal issues in a case; (e) to avoid substantial injury to innocent third parties;

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information that Gawker had designated as confidential. The Gawker Defendants now waive that designation and have no objection to the transcript of this hearing being made public as well.

or (f) to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed. *Id.* at 118.

9. The burden of proof is always on the party seeking closure. *Id.* At the outset, the proponent of closure must identify one or more protected interest that is implicated in the proposed closure. *John Doe-1 Through John Doe-4 v. Museum of Sci. & History of Jacksonville, Inc.*, 1994 WL 741009 (Fla. Cir. Ct. June 8, 1994).

10. As the Florida Supreme Court instructed in *Barron*, 531 So. 2d at 118, if the proponent of closure identifies a proper basis, before entering a sealing order, the trial court must also determine that no reasonable alternative is available to accomplish the desired result and must use the least restrictive closure necessary to accomplish its purpose.

11. Importantly:

> *Barron* rules out closure based on privacy interests of parties in the subject matter of the case itself. In recognizing a peripheral role for the privacy claims of civil litigants, the majority held there can be no privacy interest in that which is inherent in the case. Because litigation in a public court system involves an inherent tendency to invade privacy, a litigant has no reasonable expectation of privacy in the subject matter of a case.

John Doe-1 Through John Doe-4, 1994 WL 741009, at *5.

12. In none of the hearings at issue here was this process followed. The Sealed Transcripts contain no findings by the Court or Special Discovery Magistrate as to the basis for closure, nor do they include any determination that no reasonable alternative to closure existed or that the closure was no broader than necessary. Indeed, for the July 18, 2014 hearing before the Special Discovery Magistrate, there was not even a request on the record to proceed in a confidential session. Accordingly, each of these hearings was improperly closed under *Barron*.

B. Closure Is No Longer Necessary.

13. To the extent that it was ever the case that closure of the proceedings at issue here was warranted, that no longer holds.

14. Florida Rule of Judicial Administration 2.420(c)(9)(A)(iv) provides that certain court records are confidential if the Court determines that confidentiality is required to "obtain evidence to determine legal issues in a case." *See also Barron*, 531 So. 2d at 118 (same).

15. However, closure of judicial records on this basis is only proper upon the Court further finding that the degree, duration, and manner of confidentiality shall be no broader than necessary, and no less restrictive measures are available. Fla. R. Jud. Admin. 2.420(c)(9)(B) & (C); *see also Barron*, 531 So. 2d at 118 (same).

16. Because Florida strongly disfavors closure of court proceedings and sealing of court records, the party seeking closure has a heavy burden to overcome. *Brugmann v. State*, 117 So. 3d 39, 55 (Fla. 3d DCA 2013).

17. Any even arguable basis for the original closure of these court proceedings – and the confidential designations of the transcripts – no longer exists.

18. Specifically, the bulk of the closed portions of these proceedings were closed to shield from the public information concerning the details of the FBI investigation and the contents of discovery materials relating to that investigation. Those are now matters of public knowledge. For example, the fact that there was an FBI investigation into an alleged extortion attempt, and that, as part of that investigation, the FBI seized three sex tapes from the alleged extortionist (Keith Davidson) has been repeatedly discussed in open court in this proceeding, in a related discovery proceeding in California involving Mr. Davidson, and in the federal FOIA proceeding. *See, e.g.*, Joint Opposition to Pl.'s Emergency Mot. to Conduct Discovery

Concerning Potential Violation of Protective Order ("Joint Opposition"), filed Aug. 11, 2015, Ex. 24 (July 1, 2015 Hrg. Tr.) at 199:15 – 206:1, 246:21 – 247:3; *id.* Ex. 32 (July 30, 2015 Hrg. Tr.) at 9:15-23, 11:21 – 12:6, 13:6-12, 42:20-22,73:21-24; *id.* Ex. 33 (July 2, 2015 FOIA Hrg. Tr.) at 46:1 – 55:8; Ex. 6 at 2, 4 (Bollea filing in California proceeding describing investigation and FBI sting operation). Those facts also have been the subject of public reporting. *See, e.g.*, Joint Opposition Exs. 34-37. In addition, Bollea has now publicly admitted that one of the tapes depicts him using racially offensive language. *See id.* Ex. 26 (July 24, 2015 *National Enquirer* story reporting on Bollea's use of racially offensive language on one of the sex tapes); *id.* Ex. 28 (article published on same day in *People Magazine* in which Bollea admitted accuracy of *National Enquirer* report).

19. Closure of court records must be as narrow as possible under *Barron* and Rule 2.420. Where information already has been made public, there is little justification for closure to prevent the disclosure of details that have already been publicized. *Miami Herald Pub. Co. v. Lewis*, 426 So. 2d 1, 8 (Fla. 1982); *see also News-Journal Corp. v. Foxman*, 559 So. 2d 1227, 1228 (Fla. 5th DCA 1990) (terminating gag order when no longer necessary to protect fair trial rights); *State v. Rolling*, 1994 WL 722891 (Fla. Cir. Ct. July 27, 1994) (need to protect fair trial rights of criminal defendant could no longer provide basis for closure after trial).

20. Additionally, the facts and information from the FBI investigation and the other topics discussed during the sealed hearings have, at this point in the litigation, become inherent in this case. For example, that information speaks directly to the core facts underlying Bollea's claims and alleged damages, as well as the very different version of events that he – and other key witnesses – provided under oath in this case and previously told the FBI. Those facts are also central to the Gawker Defendants' affirmative defense that Bollea has committed a fraud on

the Court. And, that information is also critical to the Gawker Defendants' defense against Bollea's unfounded leak accusation. These matters have been the subject of public discussion in the press, by Bollea and his counsel in the press, and by Bollea and the FBI in public in this Court, in a California court, and in federal court. As a result, continued sealing of court proceedings, including the adjudication of key motions, is not permitted under Florida law.

21. In balancing the public interest in unfettered and open access to court records against a claim of confidentiality in matters that are inherent to the litigation, the public right of access outweighs any call for confidentiality. *Baker v. Batmasian*, 42 Media L. Rep. (BNA) 2554, 2556 (Fla. Cir. Ct. Oct. 3, 2014); *see also Barron*, 531 So. 2d at 119 (ruling that state senator's medical records that were inherent part of litigation could not be sealed).

22. Release of these transcripts is in the public interest, as it will "permit the appropriate public scrutiny of these court proceedings . . . ." *Gonzalez v. Anthony*, 40 Media L. Rep. (BNA) 1026, 1027 (Fla. Cir. Ct. Oct. 31, 2011) (denying Casey Anthony's request to keep deposition transcript confidential where transcript was to be filed with and reviewed by the court in the course of defamation suit against Anthony, but granting request to keep video of deposition confidential only because its release could threaten Anthony's safety).

23. Given that the information in the closed proceedings is now inherent in this case, the Gawker Defendants should not be required to defend themselves under the continued veil of secrecy, and the public should be able to scrutinize the arguments made by the parties and the basis for the rulings issued by the Special Discovery Magistrate and the Court during the course of this litigation.

WHEREFORE, the Gawker Defendants respectfully request that this Court determine the confidentiality of the Sealed Transcripts; conclude that, pursuant to *Barron* and Rule 2.420, they

are not properly sealed or at a minimum sealing is no longer justified; and immediately unseal them.

Dated: August 20, 2015

Respectfully submitted,
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