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.
_____/

PUBLISHER DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO DETERMINE CONFIDENTIALITY OF COURT RECORDS AND FOR PROTECTIVE ORDER EXCLUDING THE PUBLIC AND PRESS AT TRIAL FOR CERTAIN EVIDENCE AND ARGUMENT

Defendants Gawker Media, LLC ("Gawker"), Nick Denton, and A.J. Daulerio (collectively, the "Publisher Defendants") hereby file this opposition to the Motion to Determine Confidentiality of Court Records and for Protective Order Excluding the Public and Press at Trial for Certain Evidence and Argument of plaintiff Terry Bollea, professionally known as "Hulk Hogan" ("Closure Motion"). Hogan seeks an order that would, at the very least, exclude the public from being in the courtroom for all presentation or argument about any of the following: (1) the Video Excerpts on which the lawsuit is based, (2) the full length Sex Tape that was edited to produce the Video Excerpts, and (3) images from either.

The motion should be denied for three reasons. First, Hogan has not made the showing necessary to overcome the strong presumption in favor of openness of courtrooms, particularly where he intends to bar the public from the presentation of evidence integral to the case. Second, the order Hogan seeks would be highly prejudicial to the Publisher Defendants. The central issue in this case is whether it was legally permissible to publish the Video Excerpts because

they relate to matters of public concern. For this Court to conclude that the Excerpts are so private that it is necessary to clear the courtroom before they are played would be to pre-judge the very issue it is the jury's job to decide, and to do so in a way that makes clear to the jury how this Court thinks that issue should be decided. Third, Hogan's speculative concerns about "disorder," which can easily be addressed on a case-by-base basis, provide no basis for clearing the courtroom.

Background

1. Hogan is seeking $100 million in damages based on Gawker's publication of Video Excerpts that reflect 110 seconds of grainy black and white footage, of which fewer than 9 seconds depict largely indecipherable sexual activity.

2. While the Closure Motion itself is not very clear on this point,[1] the subsequently filed Affidavit of Charles J. Harder ("Harder Aff.") in support of that motion, asks for the following relief: that the Video Excerpts, "the full 30-minute version of the sex tape, and images from [the] videos be deemed confidential and sealed and that the public be excluded from seeing those images at the trial during the presentation of this evidence and argument utilizing this evidence." Harder Aff. At ¶ 5.

3. In other words, despite the fact that Hogan's claims relate exclusively to the Video Excerpts, Hogan now moves this Court for an order restricting the public from being able to view what will constitute core evidence and argument at trial on all his claims. For the reasons set forth below, the law does not permit that.

---

[1] This alone is grounds to deny the Closure Motion as Florida Rule of Judicial Administration 2.420(e)(1)(A) requires the movant to state with particularity the court records or portion of the records for which confidentiality is sought. The Closure Motion is also facially deficient and should be denied because Hogan has failed to submit a signed certification that his confidentiality request was made in good faith and is supported by sound factual and legal bases as required by Florida Rule of Judicial Administration 2.420(e)(1)(C).

Argument

I. Hogan Cannot Overcome The Very Strong Presumption In Favor Of Open Proceedings.

4. In holding that civil trials in Florida are subject to the "well established common law right of access to court proceedings and records," the Florida Supreme Court observed that:

> A trial is a public event. What transpires in the court room is public property.... There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.

Barron v. Fla. Freedom Newspapers, Inc., 531 So. 2d 113, 117 (Fla. 1988) (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947), and also citing Justice Potter Stewart's concurring opinion in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 599 (1980), that recognized a First Amendment-based right of access to trials). *See also Sentinel Commc'ns Co. v. Watson*, 615 So. 2d 768 (Fla. 5th DCA 1993) (explaining there is a "strong presumption" in favor of public access to proceedings and records of court proceedings).

5. Because of the "strong presumption of openness in judicial proceedings," any closure order "must be drawn with particularity and narrowly applied," with the "heavy" burden of proof falling on the party seeking closure. *Barron*, 531 So. 2d at 117-18. Further, before any closure order is entered, a trial court must determine that no reasonable alternatives exist to protect the purported interest justifying closure, employing the least restrictive means possible.[2] In this case, while the scope of the relief Hogan seeks is not entirely clear, he appears to be seeking to ban the public from, *inter alia*, both the "presentation" of the Video Excerpts *and* "argument utilizing this evidence." Harder Aff. at ¶ 5. In a case that is about the Video

[2] The *Barron* closure standard was subsequently incorporated into the Florida Rules of Judicial Administration. *See* Fla. R. Jud. Admin. 2.420(c)(9).

Excerpts, and, specifically, whether Gawker had a right to publish them, that is hardly a narrowly tailored order.

6. The crux of Hogan's argument is that the evidence he would bar from public view relates to his "privacy," and privacy is a recognized basis for closing proceedings. *See* Closure Motion at ¶ 6 (citing *Barron*, 531 So. 2d at 118). But the case he relies on for this proposition, *Barron*, expressly held that privacy concerns justify closure only where the alleged privacy right at issue is "***not generally inherent in the specific type of civil proceeding sought to be closed.***" *Barron*, 531 So. 2d at 118 (emphasis added); *see also* Fla. R. Jud. Admin. 2.420(c)(9)(A)(vi) (articulating this same limitation). In that case, the Supreme Court denied a motion to close the portion of the proceedings dealing with the plaintiff's medical history, despite her privacy interest in the subject matter, explaining as follows: "Although generally protected by one's privacy right, medical reports and history ***are no longer protected when the medical condition becomes an integral part of the civil proceeding, particularly when the condition is asserted as an issue by the party seeking closure***." *Id.* at 119 (emphasis added).

7. Here, Hogan's entire case centers on the alleged privacy invasions he contends he suffered as a result of the publication of the Video Excerpts. Accordingly, the evidence he seeks to seal and/or otherwise prevent the public from viewing strikes at the heart of both proving and defending those very claims.

8. *Post-Newsweek Stations, Florida Inc. v. Doe*, 612 So. 2d 549 (Fla. 1992), upon which Hogan also relies, is equally unavailing. In that case, the Florida Supreme Court applied *Barron* and held that third-party "Does" whose names and addresses were contained in a prostitute's Rolodex and produced during criminal discovery were not protected by Florida's constitutional right of privacy. *Id.* at 552-53. As *Post-Newsweek* demonstrates, Florida courts

do not reflexively close matters simply because "private" sexual activity is involved, especially when such evidence is crucial to the matter.

9. Hogan further argues that the alleged violation of the Florida Wiretap Act (Chapter 934 of the Florida Statutes) is also grounds for closure based on privacy grounds because the law provides that any recording made in violation of the law can be suppressed. This argument fails as well because Hogan conflates evidentiary suppression with judicial sealing. Chapter 934 has been held not to govern sealing procedures. *See Brugmann v. State*, 117 So. 3d 39, 56 (Fla. 3d DCA 2013) (finding that the court failed to follow proper procedure in sealing such records).

II. The Publisher Defendants Would Suffer Great Prejudice As A Consequence Of The Sealing Order Hogan Seeks.

10. Hogan's suggestion that he would suffer prejudice in the absence of a sealing order gets it exactly backwards. A central issue in this case is whether the Video Excerpts related to matters of public concern, making it legally permissible for them to be published notwithstanding Hogan's privacy concerns. For this Court to take the position, in front of the jury, that the Video Excerpts cannot be played in front of the public *even in a context in which they are the central piece of evidence in a $100 million case*, would send the unmistakable message to the jury that these are private matters, not fit for public disclosure. Hogan should not be permitted to have this Court color the jurors' perception of the central issue in the case by sending the message that the Video Excerpts are too "private" for public consumption.

11. Hogan's contrary concern that "playing the [Video Excerpts] may legitimize [their] publication by Gawker with the jury," *see* Closure Motion at ¶ 11, is simply not comparable. Surely, a jury is capable of understanding that displaying the key evidence in the case, the Video Excerpts, does not decide whether it was permissible for the Publisher

Defendants to post those excerpts in the first instance, which is what the jury is being asked to decide. The converse is not true. If it is not permissible to play the Video Excerpts in open court, even in a lawsuit about the Video Excerpts, then, surely, it was not permissible to publish them on the Internet in the first place. At any rate, any concerns Hogan has can be easily cured with an instruction by this Court.[3]

III. Hogan's Unfounded Speculation About "Disorder" Provides No Basis To Clear The Courtroom.

12. Finally, Hogan's purely speculative assertion that "a public viewing" of the materials that are the focus of his sealing motion "will likely incite disorder in the courtroom and distract the jury from the evidence," *id.* at ¶ 12, provides no basis for excluding the public from the courtroom. The law is clear that closure is permitted "only for the most cogent reasons." *Gore Newspapers Co. v. Tyson*, 313 So. 2d 777, 782 (Fla. 4th DCA 1975). The only support Hogan offers is a citation to *Ocala Star-Banner v. State*, 697 So. 2d 1317 (Fla. 5th DCA 1997). That case does not even address closing of a courtroom, let alone doing so based on concerns about disorder. Rather, it held only that certain documents, rendered confidential by statute, could be sealed. *Id.* at 1318-19. At any rate, any concerns about disorder can be addressed as the need arises based on this Court's inherent power to maintain order in the courtroom and admonish any member of the public causing a disturbance. This fact alone demonstrates that the relief Hogan seeks fails under *Barron* as less restrictive means to handle such concerns are available.

---

[3] To the extent that Hogan's motion concerns the full Sex Tape, it is not ripe. Most of that tape consists of conversation, not sexual activity. And, at this point, neither party has indicated that it intends to use any part of the video showing sexual activity. If either party decides to use that footage during trial, then the Court can address this issue.

CONCLUSION

For the foregoing reasons, the Publisher Defendants respectfully request that this Court deny the Closure Motion in its entirety.[4]

Dated: June 26, 2015

Respectfully submitted,

THOMAS & LOCICERO PL

By: */s/ Gregg D. Thomas*

Gregg D. Thomas
Florida Bar No.: 223913
Rachel E. Fugate
Florida Bar No.: 0144029
601 South Boulevard
P.O. Box 2602 (33601)
Tampa, FL 33606
Telephone: (813) 984-3060
Facsimile: (813) 984-3070
gthomas@tlolawfirm.com
rfugate@tlolawfirm.com

Seth D. Berlin
Pro Hac Vice Number: 103440
Michael D. Sullivan
Pro Hac Vice Number: 53347
Michael Berry
Pro Hac Vice Number: 108191
Alia L. Smith
Pro Hac Vice Number: 104249
Paul J. Safier
Pro Hac Vice Number: 103437
LEVINE SULLIVAN KOCH & SCHULZ, LLP
1899 L Street, NW, Suite 200
Washington, DC 20036
Telephone: (202) 508-1122
Facsimile: (202) 861-9888
sberlin@lskslaw.com
msullivan@lskslaw.com
mberry@lskslaw.com

[4] Alternatively, and at the very least, if this Court grants the motion as to the public, it should deny it as to the news media. *See e.g.*, Fla. Stat. § 918.16 (2014) (stating that even when a courtroom is permitted to be cleared because a sexual offense victim is testifying, the media shall be allowed to remain in the courtroom).

asmith@lskslaw.com
psafier@lskslaw.com

Counsel for Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of June 2015, 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:

Kenneth G. Turkel, Esq.
kturkel@BajoCuva.com
Shane B. Vogt, Esq.
shane.vogt@BajoCuva.com
Bajo Cuva Cohen & Turkel, P.A.
100 N. Tampa Street, Suite 1900
Tampa, FL 33602
Tel: (813) 443-2199
Fax: (813) 443-2193

David Houston, Esq.
Law Office of David Houston
dhouston@houstonatlaw.com
432 Court Street
Reno, NV 89501
Tel: (775) 786-4188

Charles J. Harder, Esq.
charder@HMAfirm.com
Douglas E. Mirell, Esq.
dmirell@HMAfirm.com
Sarah Luppen, Esq.
sluppen@HMAfirm.com
Harder Mirell & Abrams LLP
1925 Century Park East, Suite 800
Los Angeles, CA 90067
Tel: (424) 203-1600
Fax: (424) 203-1601

Attorneys for Plaintiff

Barry A. Cohen, Esq.
bcohen@tampalawfirm.com
Michael W. Gaines
mgaines@tampalawfirm.com
Barry A. Cohen Law Group
201 East Kennedy Boulevard, Suite 1000
Tampa, FL 33602
Tel: (813) 225-1655
Fax: (813) 225-1921

Attorneys for Defendant Heather Clem

/s/ Gregg D. Thomas
Attorney