

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.

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FIRST LOOK MEDIA, INC.,  
WFTS-TV and WPTV-TV, SCRIPPS MEDIA, INC.,  
WFTX-TV, JOURNAL BROADCAST GROUP,  
VOX MEDIA, INC.  
WFLA-TV, MEDIA GENERAL OPERATIONS, INC.,  
CABLE NEWS NETWORK, INC.,  
BUZZFEED, and  
THE ASSOCIATED PRESS

Intervenors.

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**MOTION TO INTERVENE, AND MEMORANDUM IN 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**

Intervenors, First Look Media, Inc., WFTS-TV and WPTV-TV, Scripps Media, Inc., and WFTX-TV, Journal Broadcast Group, Vox Media, Inc., WFLA-TV, Media General Operations, Inc., Cable News Network, Inc. ("CNN"), BuzzFeed, and The Associated Press ("AP") (collectively, the "Intervenors"), move the Court to intervene in this matter, to schedule an expedited hearing at which this Motion may be heard, and to deny 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 (“Closure Motion”), as well as any other motion filed by Plaintiff to seal any portion of the record or close any portion of the proceedings in this case. Intervenor is a coalition of internet, broadcast and print publishers dedicated to their function as watchdogs of all institutions of government, including the courts in the Tampa Bay area, through rigorous and transparent news coverage. Intervenor is concerned with principles that transcend the subject matter of the specific publication at issue here, and which are universally applicable to all Intervenor - and indeed all journalists who work to provide the public with timely and informative news coverage - regardless of their primary publishing medium or topic category. The overarching principles at stake - that the public is entitled to know what takes place in the courts of the state of Florida, and the First Amendment right of Intervenor to report what happens in the courtroom to its readers - transcend this case alone.

The fundamental proposition that the public is entitled to know and be informed about how decisions are made and how disputes are resolved peacefully through our civil justice system has deep roots in Florida. As Chief Justice Charles T. Canady stated in a letter dated November 17, 2010 (a copy of which is attached hereto as **Exhibit “A”**), in response to closure issues that had been brought to the attention of the Florida Supreme Court in the context of civil foreclosure cases:

The courts of Florida belong to the people of Florida. The people of Florida are entitled to know what takes place in the courts of this state. No crisis justifies the administrative suspension of the strong legal presumption that state court proceedings are open to the public.

The reason is crystal clear – in the absence of access to courts, and the evidence put on by the parties in order for a judge or jury to render a decision, the public cannot have confidence in their court system. No reason advanced by the Plaintiff here justifies a breach of this fundamental principle. The transparency essential to the public’s confidence in the judicial process is at grave

risk in this case should the Court grant the Closure Motion, or any other motion to seal court records or to close the courtroom in this case.

In support hereof, Intervenors state as follows:

1. On June 12, 2015, Plaintiff, Terry Gene Bollea, professionally known as “Hulk Hogan” (“Hogan”) filed his Closure Motion. The central focus of the Closure Motion is also the gravamen of his claim for alleged invasion of privacy in this case; a sex tape showing him engaged in sexual intercourse with a woman who reportedly is Heather Clem, the ex-wife of local radio shock jock Bubba the Love Sponge Clem. Portions of the sex tape have been published and widely reported on since 2012. Hogan has frequently contributed to public discussions in the media about the video.

2. Hogan now seeks this Court’s assistance in what would be an extreme departure from established Florida law – a departure which finds no support in any authority Hogan relies upon. Purportedly seeking to protect the privacy which he claims has already been invaded, Hogan seeks a court order preventing the very thing at issue from being available to the press and public during a public trial. Hogan has also filed nearly two dozen other motions seeking to seal large portions of the record and proceedings.<sup>1</sup> This effort to try his case in private, rather than in public, should be rejected by the Court.

3. The Intervenors in this matter are: (i) First Look Media, Inc., a digital journalism company and publisher of the internet magazine The Intercept. First Look Media is based on the

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<sup>1</sup> It is the understanding of Intervenors that Hogan has filed approximately 23 pretrial motions in limine, some of which purport to address various discrete sealing issues. While Intervenors specifically address Hogan’s Closure Motion herein, Intervenors also oppose any attempt by Hogan to seal any portion of the record at what should be a public trial of this action. The same principles that govern the Closure Motion should also govern the efforts to seal any evidence, as set forth in Fla. R. Jud. Admin. 2.420(e).

belief that democracy depends on a citizenry that is highly informed and deeply engaged in the issues that affect their lives, including full and uninhibited access to court proceedings such as this one; (ii) WFTS-TV, the ABC affiliate television station that serves the Tampa Bay area, operates the web site [abcactionnews.com](http://abcactionnews.com), and is owned by Scripps Media, Inc. WPTV-TV is the NBC affiliate television station based in West Palm Beach, Florida, operates the web site [wptv.com](http://wptv.com), and is owned by Scripps Media, Inc. WFTX-TV is the FOX affiliate in Ft. Myers, Florida, operates the web site [fox4now.com](http://fox4now.com), and is owned by Journal Broadcast Group, a Scripps Media, Inc., company. WFTS-TV, WPTV-TV and WFTX-TV all depend on full access to Florida courts, including this court, to provide Floridians and others with news and information; (iii) Vox Media, Inc., is a digital media company that empowers smart emerging digital voices with proprietary technology to create and distribute their stories, and connect with an audience of 165 million affluent and educated young adults worldwide. Vox Media is comprised of eight distinct media brands covering major consumer categories: The Verge (Technology and Culture), [Vox.com](http://Vox.com) (News), SB Nation (Sports), Polygon (Gaming), Eater (Food and Nightlife), Racked (Shopping, Beauty and Fashion), Curbed (Real Estate and Home), and Re/code (Tech Business); (iv) WFLA-TV, is the NBC affiliate television station in Tampa that serves the Tampa Bay area, operates the web site [wfla.com](http://wfla.com), and is owned by Media General Operations, Inc.; (v) CNN is a division of Turner Broadcasting System, Inc., a Time Warner Company, is a portfolio of two dozen news and information services across cable, satellite, wireless devices and the Internet in more than 200 countries and territories worldwide. Domestically, CNN reaches more individuals on television, the web and mobile devices than any other cable TV news organization in the United States; internationally, CNN is the most widely distributed news channel reaching more than 271 million households abroad, and CNN Digital is a top network for online news,

mobile news and social media. Additionally, CNN Newsource is the world's most extensively utilized news service partnering with hundreds of local and international news organizations around the world. CNN divisions Head Line News and CNN Money have each reported on this case, and will continue to do so; (vi) BuzzFeed is a social news and entertainment company which provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million people; (vii) The AP is a not-for-profit news cooperative whose members are U.S. newspapers and broadcasters. The AP operates from more than 280 locations worldwide, and it has significant operations within the State of Florida. On any given day, AP's content can reach more than half of the world's population.

4. Hogan's Closure Motion fails to meet the high burden established by Florida law for restricting access by the public and press to evidence presented in a public trial. Any order restricting access to the sex tape, or any other evidence at trial, including court testimony, as well as argument of counsel, is required to pass the rigors of Florida Rule of Judicial Administration 2.420, which broadly provides that "[t]he public shall have access to all records of the judicial branch of government" and establishes a high bar that Hogan's Closure Motion cannot clear.

5. The First Amendment right of access is an affirmative, enforceable right that lies at the core of the public oversight of government. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 n. 17 (1980) (noting that "historically both civil and criminal trials have been presumptively open"); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982). The standing of the press to enforce this right is well-settled in Florida. See WESH Television, Inc. v. Freeman, 691 So. 2d 532, 534-35 (Fla. 5th DCA 1997) (holding that the press has the right to be heard prior to the entry of an order closing public records); Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d 113, 118 (Fla. 1988) (recognizing right of news media to challenge any closure

order in a civil case); Times Publ'g Co. v. Penick, 433 So. 2d 1281, 1284 (Fla. 2d DCA 1983); News-Press Publishing Co. v. State, 345 So. 2d 865, 866 (Fla. 2d DCA 1977) (newspapers entitled to intervene to seek access to sealed deposition transcripts, because closure order had the "practical effect of making it more difficult for the press to obtain information [that] it may wish to publish"). Intervenors, therefore, are entitled to intervene in this action for the limited purposes of defending the right of access to judicial proceedings, and to publish information from them.

6. In Florida there is a long tradition of public access to judicial proceedings, including civil trials. "[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." See Barron, 531 So. 2d at 118; 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.").

7. The closure Hogan seeks to purportedly protect his privacy over a sex tape, portions of which have been widely disseminated on the Internet, and that he chose to bring to the courts for adjudication, is prohibited by Rule 2.420 of the Florida Rules of Judicial Administration, and this type of closure has been consistently rejected by Florida courts. As the First District Court of Appeal held nearly 20 years ago in Florida Freedom Newspapers, Inc. v. Sirmons, 508 So.2d 462, at 463 (Fla. 1st DCA 1987), "[t]here is no private litigation in the courts of Florida. All proceedings before the trial judge are public proceedings."

8. Intervenors respectfully request that this Court deny Hogan's Closure Motion, as well as any other motion filed by Hogan to seal any portion of the record or close any portion of the proceedings at the trial of this case.

WHEREFORE, Intervenors respectfully request that this Court enter an appropriate order granting this Motion, and denying 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, as well as any other motion filed by Plaintiff to seal any portion of the record or close any portion of the proceedings in this case.

### **MEMORANDUM OF LAW**

On countless occasions, courts have been asked to entertain orders limiting information that may be released to the public concerning judicial matters. Before a court enters such an order it must conduct an exacting inquiry into the circumstances. Fla. R. Jud. Admin. 2.420(e) specifically addresses the type of requests made by Hogan's Closure Motion. Fla. R. Jud. Admin. 2.420(e) provides that any Court order must, among other things, state the particular grounds under subdivision (c) for determining that the information at issue is confidential. In addition, the Court must make a finding "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 subdivision (c); and (ii) no less restrictive measures are available to protect the interests set forth in subdivision (c) ... ."

Hogan appears to rely on Fla. R. Jud. Admin. 2.420(c)(9)(A)(i) and (vi) in arguing in his Closure Motion that he wants the sex tape and other matters declared confidential for trial purposes in order to (1) "prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice," and (2) "avoid substantial injury to a party (Hogan) by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of proceeding sought to be closed." He also references Article I, Section 23, of the Florida Constitution. None of these grounds are sufficient in this case to support the relief Hogan requests.

**I. Court proceedings and records are presumptively open.**

Newsgathering is protected by the First Amendment. See United States v. Sherman, 581 F.2d 1358, 1361 (9th Cir. 1978) ("The Supreme Court has recognized that newsgathering is an activity protected by the First Amendment."); CBS Inc. v. Young, 522 F.2d 234, 237-38 (6th Cir. 1975) (newsgathering "qualifies for First Amendment protections"); CBS Inc. v. Smith, 681 F. Supp. 794, 803 (S.D. Fla. 1988) ("[s]imply put, newsgathering is a basic right protected by the First Amendment").

The first amendment's broad shield for freedom of speech and of the press is not limited to the right to talk and print. The value of these rights would be circumscribed were those who wish to disseminate information denied access to it, for freedom to speak is of little value if there is nothing to say.

In re The Express-News Corp., 695 F.2d 807, 808 (5th Cir. 1982).

Reporting by the press on trials and cases pending before the courts serves to protect litigants' rights to fair and impartial adjudications of their claims. As described by the United States Supreme Court:

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.

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A responsible press has always been regarded as the handmaiden of effective judicial administration . . . . Its function in this regard is documented by an impressive record of service over several centuries. 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). Open courts and court records provide 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). In this context, the



media serves as a surrogate for the public. The media's access to judicial proceedings and records and reporting thereon informs the public with respect to those proceedings. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559-60 (1976); Nixon v. Warner Communications, Inc., 435 U.S. 589, 609 (1978).

Courts have recognized that the "protected right to publish the news would be of little value in the absence of sources from which to obtain it." CBS Inc. v. Young, 522 F.2d at 238. The United States Supreme Court has opined that "[w]ithout some protection for seeking out the news, freedom of the press could be eviscerated." Branzburg v. Hayes, 408 U.S. 665, 681 (1972). "If a court order burdens constitutional rights and the action proscribed by the order presents no clear and imminent danger to the administration of justice, the order is constitutionally impermissible." CBS v. Young, 522 F.2d at 240. Accordingly, an order that inhibits newsgathering carries a presumption against its constitutionality. An order that impinges on the "journalistic right to gather news" must therefore be "narrowly tailored to prevent a substantial threat to the administration of justice." In re Express-News Corp., 695 F.2d 807, 810 (5th Cir. 1982); CBS, Inc. v. Smith, 681 F. Supp. 794, 796 (S.D. Fla. 1988); see also Lewis, 426 So. 2d at 8 (holding that closure order must extend no further than the circumstances warrant). A court must also consider less restrictive alternatives before restraining newsgathering activities. Id.; Fla. R. Jud. P. 2.420(c)(9)(C) and (e).

Florida's Supreme Court has been equally forceful in recognizing that court proceedings are the public's business. In a pair of decisions – Miami Herald Pub. Co. v. Lewis, 426 So. 2d 1 (Fla. 1982) and Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d 113 (Fla. 1988) – the Court adhered to "the well established common law right of access to court proceedings and records" in both criminal and civil cases. Barron, 531 So. 2d at 116. Rule 2.420, Florida Rules of Judicial Administration, was adopted from those rulings.

## **II. Plaintiff's Closure Motion Fails to Establish Sufficient Grounds to Seal Court Records and to Exclude the Public and Press From Court Proceedings.**

"This is no private litigation in the courts of Florida. All proceedings before the trial judge are public proceedings." Florida Freedom Newspapers, Inc. v. Sirmons, 508 So.2d 462, 463 (Fla 1st DCA 1987), approved, Barron v. Florida Freedom Newspapers, Inc., 531 So.2d 113 (Fla. 1988) (reversing sealing order in divorce case).

Hogan asserts a broad privacy right over the highly-publicized video, and relies on Fla. R. Jud. Admin. 2.420(c)(9)(A)(vi) to argue that the video should be considered confidential. His reliance, however, is misplaced. Not only should the video and any other evidence at trial not be considered confidential, but the portion of the Rule upon which Hogan relies is not applicable.

In appropriate circumstances, Fla. R. Jud. Admin. 2.420(c)(9)(A)(vi) permits the Court to declare a judicial record confidential where that evidence is tangential to the case. The Rule provides that a court may cloak the evidence as "confidential" where it would be required 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 proceedings sought to be closed.*" (emphasis supplied). This provision, however, narrowly protects only private information in "matters that are *peripheral* to the litigation." Carnegie v. Tedder, 698 So. 2d 1310, 1312 (Fla. 2nd DCA 1997) (emphasis added). In other words, where the evidence is central to the proceeding, as it is here, this provision of the Rule does not apply. The Rule is not designed to protect information that is integral to the claims in the case, even if a party may think of that information as private. Id. (Rule 2.420 did not permit court to seal offensive information in counterclaim filings); see also Barron v. Florida Freedom Newspapers, Inc., 531 So. 2d 113, 119 (Fla. 1988) (medical records, although generally protected by a privacy interest, were integral to divorce proceeding and thus could not provide the basis for closure of the proceedings). Accordingly, in this case, Rule 2.420 does not

permit the sealing of the video, excerpt, testimony or argument concerning the same because they are integral to Hogan's invasion of privacy claims—indeed, they are the reason he brought his claims.

Similarly unavailing is Hogan's reliance on Article I, Section 23 of the Florida Constitution declaring that all persons have a right to be "free from governmental intrusion into the person's private life" to assert constitutional protection over the video. Florida courts have consistently held that provision does not create a right to private judicial proceedings.

Whenever litigants utilize the judicial process they place themselves in the position where the details of their difficulties will invariably be made public. It is sometimes felt that this is too high a price to pay for living in a civilized society, particularly when measured against a person's right to privacy ... But every right is not absolute to the point of inflexibility; some rights must bend and give way to other rights in certain instances.

Goldberg v. Johnson, 485 So. 2d 1386, 1389-90 (Fla. 4th DCA 1986) (citing State Ex. Rel. Gore Newspaper v. Tyson, 313 So.2d 777, 783, 784 (Fla. 4th DCA 1975), overruled on other grounds, English v. McCrary, 348 So.2d 293 (Fla.1977)); Carnegie, 698 So. 2d at 1312 ("Historically, litigants have had no reasonable expectation of privacy with regard to trial proceedings and court files.").

In short, one party's preference that proceedings be conducted in private to prevent disclosure of information they consider private is not a basis for overcoming the strong presumption in favor of "preserving the independence and integrity of the judicial process through open and publicly scrutinized judicial proceedings [on] the issue." Sirmons, 508 So.2d at 464-65.

Hogan's belief that the tape, excerpts and testimony about them "is private, intrusive and potentially offensive" is a wholly insufficient basis to override the public's right of access to the court proceedings and records. See Palm Beach Newspapers, Inc. v. Limbaugh, 967 So. 2d 219

(Fla. Dist. Ct. App. 2005) (settlement agreement viewed by judge in divorce proceedings even though handed back to the parties and not filed in the record was a public record).

Moreover, neither the video nor its content are truly private. To the contrary, a substantial amount of the information is already public. The excerpts were available online and have been viewed by more than 2 million people. The video and excerpt have been the subject of public disclosure and discussion for more than three years now. Plaintiff himself has widely commented on them, their contents, and the events surrounding the depictions in the video. Thus, any order sealing the video and excerpts at this point would be futile.

Hogan also appears to rely on Fla. R. Jud. Admin. 2.420(c)(9)(A)(i) which is designed to “prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice.” Hogan argues that he cannot obtain a fair trial unless the video is declared confidential, and he also posits that the public attending the trial may react in a way that disturbs the order and decorum of the trial itself. Of course, these arguments are wildly speculative. There is no basis to suggest that in order to consider and weigh the evidence involved the jury must do so in private. That runs counter to common sense and the long history of open trials in Florida where, particularly in criminal cases where there are charges such as a rape or murder, juries consider evidence that would generally be far more upsetting than what is at issue here. Juries perform their function in view of the public daily throughout Florida. Finally, the suggestion that members of the press and public that may be in attendance cannot be adequately controlled by the Court should be rejected. This Court has the ability through numerous devices to control order in the courtroom.

### **CONCLUSION**

For all of the foregoing reasons, Intervenors respectfully request that this Court enter an appropriate order granting this Motion, and denying 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, as well as any other motion filed by Plaintiff to seal any portion of the record or close any portion of the proceedings in this case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Motion has been served upon the following individuals by placing a copy in the United States mail, sufficient postage affixed, on this 30<sup>th</sup> day of June, 2015, and addressed as follows:

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