IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

Case No. 12012447CI-011

vs.

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 BOLLEA'S *PRELIMINARY* OPPOSITION TO MOTION OF MEDIA COMPANY INTERVENORS TO UNSEAL CONFIDENTIAL COURT FILINGS (STYLED MOTION "FOR PUBLIC ACCESS TO COURT RECORDS FILED IN CONNECTION WITH PLAINTIFF'S EMERGENCY MOTION SEEKING INVESTIGATION OF ALLEGED VIOLATIONS OF COURT'S PROTECTIVE ORDER"

Plaintiff, Terry Bollea professionally known as Hulk Hogan ("Mr. Bollea"), objects and preliminarily responds in opposition to 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, "Intervenors"), Motion and Memorandum in Support of Public Access to Court Records Filed in Connection with Plaintiff's Emergency Motion Seeking Investigation of Alleged Violation of Court's Protective Order (the "Motion") as follows:

I. INTRODUCTION

Mr. Bollea is already the victim of two gross invasions of his privacy: first, Gawker Defendants published surreptitious footage, taken without his knowledge or consent, of Mr. Bollea naked and having sex in a private bedroom; second, someone leaked and a tabloid published the contents of sealed court files, including the purported contents of additional illegally recorded, private conversations containing offensive language. Intervenors' Motion, if granted, would victimize Mr. Bollea (and the public's interest in privacy in general) yet again; *further* invading his privacy by disclosing additional materials related to **illegal** recordings of Mr. Bollea having private conversations and sex in a private bedroom—recordings that should have never been made in the first place, and have nothing to do with this case. Mr. Bollea did not waive his privacy rights *in toto* when he was forced to file a lawsuit because Gawker Defendants published a one minute, 41 second video of him naked and engaged in sex (which contained none of the content being sought in Intervenors' motion). The prospect that anyone who sues to protect his or her privacy will be subjected to further widespread invasions of the rest of his or her private life in the process (even on matters that are **not at issue** in the case) will have the very serious consequence of chilling victims of privacy invasions from seeking redress for their claims. The Florida Constitution provides all residents of the state – including Mr. Bollea – with a right to privacy. Intervenors' motion would thwart the purpose of the privacy rights, and privacy torts, long recognized in Florida.

Intervenors' motion should be denied on at least the following independent grounds: (1) it is brought on insufficient notice, raising complex public policy issues while purporting to be noticed for hearing on just five court days notice; (2) this Court's prior sealing orders were entirely proper, because the sealed materials are entirely collateral to this case, and contain

highly sensitive, private content, which Gawker Defendants were only permitted to obtain in the first place by having the Court require Mr. Bollea to sign a **limited** privacy waiver for the exclusive purpose of discovery in this case; (3) disclosure of the irrelevant material at issue is not in the public interest because it pertains to private conversations in a private bedroom that were recorded illegally in violation of Florida's Wiretapping Act, and (4) unsealing the documents would cause Mr. Bollea, already victimized by Gawker's original publication of the sex video and by the leak of offensive language, to have his privacy invaded again—without in any way contributing to the legitimate public interest with respect to the actual issues in this case.

II. INTERVENORS' MOTION RAISES COMPLEX AND IMPORTANT ISSUES THAT SHOULD NOT BE DECIDED ON JUST FIVE COURT DAYS NOTICE.

Intervenors filed their motion in the afternoon of September 24, 2015, and unilaterally cross-noticed it for hearing the morning of October 1, 2015; giving Mr. Bollea less than five court days[1] notice on a motion that seeks to unseal extremely sensitive materials. Intervenors' cross-notice severely prejudices Mr. Bollea because it gives him as little time as possible to research the issues and prepare a response. The issues underlying the Motion have been pending for *months*; and this Court discussed its sealing orders extensively during court proceedings in June 2015, with members of the media and counsel for Intervenors physically present in the courtroom. Intervenors could have sought this relief at any time in June, July, August or early September – thereby allowing Mr. Bollea a reasonable period to research the law and prepare a response. Instead, Intervenors sprung their Motion on Mr. Bollea at the last moment. The Court should *deny* the motion on this ground, or alternatively continue it to a hearing date no earlier than October 28, 2015.

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[1] Mr. Bollea and his counsel are also preparing for the numerous other items already set for hearing on October 1, 2015, as well as participating in a full-day, court ordered mediation on September 29, 2015.

III. IF THE COURT DECIDES INTERVENORS' MOTION ON THE MERITS, THE COURT SHOULD *DENY* THE MOTION BECAUSE THERE ARE NO GROUNDS FOR UNSEALING THESE SENSITIVE, COLLATERAL MATERIALS.

Florida law is clear that Intervenors bear the burden of showing good cause to unseal court records. "Sealed court records are entitled to a presumption that the sealing was properly and correctly done." *Scott v. Nelson*, 697 So.2d 207, 209 (Fla. 1st DCA 1997) (citing *Russell v. Miami Herald Publishing Co.*, 570 So.2d 979, 983 (Fla. 2d DCA 1990); *Sentinel Communications Co. v. Smith*, 493 So.2d 1048, 1049 (Fla. 5th DCA 1986), *review denied*, 503 So.2d 328 (Fla. 1987). "[P]roperly sealed court records are no longer 'public records' within the meaning of the state statutes and constitution [but rather] are *former* public records, now sealed, subject to being reopened upon 'good cause shown.'" *Scott*, 697 So.2d at 209 (emphasis in original); *Times Publishing Co. v. Russell*, 615 So.2d 158, 158-59 (Fla. 1993). "Seeking to close records that are presumably open is a substantially different task than seeking to open records that have already been closed by a court." *Russell*, 615 So.2d at 15859.

The burden to show "good cause" is on the Intervenors. *Nelson*, 697 So.2d at 209. Good cause is defined as "such a substantial, material change in circumstances that under law it is error to keep the court records sealed." *Id.*[2]

Intervenors, who are represented by counsel well-versed in the areas of the First Amendment and public records laws, noticeably fail to address the controlling case law on unsealing records.[3] The main cases cited by Intervenors, containing general statements about the

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[2] *Goldberg v. Johnson*, 485 So.2d 1386 (Fla. 4th DCA 1986), a 29 year old case cited by Intervenors, purported to decide a motion to unseal without applying the proper, good cause standard and the presumption that sealed records remain sealed. Accordingly, it is inconsistent with *Scott* and the weight of Florida authority and should not be followed.

[3] Indeed, Intervenors do not even characterize their Motion as one to "unseal" documents. Instead, they style their Motion as a motion seeking "public access" to court records, making it

importance of open judicial proceedings, do not displace the black letter law governing motions to **unseal** court records. *Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113 (Fla. 1988) (discussing standard for order closing a divorce trial); *Florida Freedom Newspapers, Inc. v. Simmons*, 508 So.2d 462 (Fla. 1st DCA 1987) (same); *Miami Herald Publishing Co. v. Lewis*, 426 So.2d 1 (Fla. 1982) (discussing standard for order closing court proceedings in criminal prosecution); *Carnegie v. Tedder*, 698 So.2d 1310 (Fla. 2d DCA 1997) (discussing standard for order closing entire court file including central issues in case).[4]

Intervenors failed to meet their burden of showing good cause to unseal the materials at issue here. The sealing orders were entered for four primary reasons: (1) the materials at issue involve matters which are completely collateral, and are not generally inherent in the claims and defenses being litigated in this case; (2) these materials contain extremely sensitive matters, such as private sexual activity and private conversations, and were obtained illegally, in violation of Florida's Wiretapping Act, and a resulting, ongoing criminal investigation; (3) the U.S. Government's files **are** exempt from disclosure under FOIA, and only were made available

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sound as if they are members of the general public being excluded from a court proceeding, rather than members of the media (**not** the "public") who are seeking to unseal documents in connection with a civil lawsuit between private parties.

[4] Intervenors assert a First Amendment right to inspect documents produced in civil discovery. This argument is directly contrary to a controlling US Supreme Court case which Intervenors fail to disclose to this Court, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). The First Amendment cases cited by Intervenors involve the First Amendment right of members of the press to **cover criminal proceedings** (a fact never mentioned by Intervenors in their discussion of the cases), an issue that has absolutely nothing to do with this case. *Press Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (First Amendment right to attend voir dire in criminal case); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) First Amendment right to report on multiple murder trial); *Nixon v. Warner Communications*, 435 U.S. 589 (1978) (First Amendment right to copy and broadcast recordings introduced into evidence at criminal trial). Finally, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), cited by Intervenors, does not involve any claim of a right of access to court proceedings at all; instead, *Landmark Communciations* deals with a First Amendment claim to publish information leaked from court files.

exclusively to Gawker Defendants' counsel based on a court ordered, **limited** privacy waiver allowing **only** Gawker Defendants to try to obtain discovery in this case—subject to a Protective Order stipulated by the parties to protect Mr. Bollea from the public disclosure of such materials; and (4) disclosure of these materials would victimize Mr. Bollea *again* for having sought to enforce his privacy rights as to Gawker, and sought to protect himself from extortion by seeking the assistance of law enforcement (the FBI and U.S. Attorney's Office), and would substantially harm the public interest by its chilling effect on anyone who might seek redress for a privacy invasion (such as a secret filming of them in a state of undress, or having consensual sex) because of the threat that media companies could use such lawsuits to gain wholesale access to and then publish private facts about the victim (even facts completely unrelated to the case). The public's interest here is in protecting victims, not further violating them such that privacy rights can no longer be protected.

The same reasons for entering the Protective Order, and sealing the records, warrant a denial of the Intervenors' motion. First, **the materials are still collateral to the case**. This case is about **one** video posted online and whether Gawker Defendants' publication of that one minute, 41 second video is a matter of legitimate public concern and thus protected by the First Amendment. Those issues will be tried in public, in open court. With the exception of this Court's narrow ruling permitting the video of Mr. Bollea naked and engaged in sex to be played to the jury in open court, with video monitors turned away from the courtroom gallery and pool camera, all of the evidence presented by the parties on those central issues will be seen and potentially reported upon by the press. Despite the fact that these issues include testimony and evidence relating to private acts in a private bedroom, because the issues are at the center of the case, Mr. Bollea did not seek to seal them.

The additional materials the Intervenors want access to, by contrast, concern an extortion attempt involving **additional** purported recordings, which are **not** at issue in this case because they were not published by Gawker. The offensive language that was reported by *The National Enquirer* does not appear on the sex video published by Gawker. This Court has already ruled that the materials Intervenors want are irrelevant, by granting Mr. Bollea's motion *in limine* to exclude them from trial. Thus, Mr. Bollea is not seeking "private litigation" of his case, as Intervenors claim; the documents and materials that are under seal concern **collateral** matters, whereas the central issues and evidence in this case will be tried in public and with the media present.

Intervenors argue that Mr. Bollea's motion to conduct an investigation of the source of the leak to *The National Enquirer* renders the Gawker-FBI documents relevant to this case. This argument is nonsensical. It would be completely unjust to hold that Mr. Bollea cannot seek to determine if Gawker Defendants committed a violation of this Court's Protective Order without forfeiting his very privacy rights that the Protective Order was entered to protect. Doing so would not only render the Protective Order meaningless, but also punish Mr. Bollea for having privacy rights in the first place, while potentially rewarding a severe violation of the Court's Protective Order which had the effect of wiping out Mr. Bollea's 38 year career and ability to earn a living. Mr. Bollea certainly did not forfeit his privacy rights, as Intervenors claim, by seeking to protect and enforce them. The opposite is true: by protecting his privacy rights, he preserves them, thus justifying the Court to uphold the Protective Order and deny Intervenors' motion which seeks to revoke it.

Second, **the information contained in the Gawker-FBI documents is still highly sensitive and confidential**. The *Enquirer* published one purported "transcript" of one private

conversation from a video **not** at issue in this case. However, the U.S. Government's records contain additional, highly sensitive and private information still protected by FOIA exemptions. Importantly, the U.S. District Court ordered production of such materials **only** to Gawker's counsel and **expressly subject to this Court's Protective Order**, which was stipulated to by the parties. This Court's determination that the FBI documents must be subject to the Protective Order stipulated by the parties was not based solely on the issue of alleged offensive language; and the leak of one purported conversation does not in any way justify blanket disclosure of all private facts contained in those materials.

Third, **the FBI documents are still exempt under the privacy exemption to FOIA, and were produced confidentially to Gawker Defendants' counsel *only* because of Gawker Defendants' asserted interest in civil discovery in this action**. The U.S. District Court specifically required the U.S. Government to follow this Court's Protective Order in producing the materials to Gawker. Intervenors completely omit these facts and incorrectly assert that the FBI documents were produced "under FOIA" and supposedly were thus "public records." As the Court is aware, Gawker's counsel originally requested these records and the U.S. Government **refused production**, on the ground that they contained private information about Mr. Bollea and thus were exempt from disclosure. In other words, these were **not** records legally required to be disclosed to the public, but rather records that were **protected from public disclosure**. Gawker Defendants were granted a privilege to obtain these documents anyway (over objection) as a matter of **civil discovery**, but only subject to this Court's power under *Seattle Times v. Rinehart* to **restrict dissemination of private materials** produced in response to discovery. This Court issued a stringent Protective Order, stipulated by the parties and recommended by Special Discovery Magistrate Judge James Case; and U.S. District Court Judge

Susan Bucklew further required the U.S. Government to comply with this Court's Protective Order. In doing so, Judge Bucklew confirmed that her rulings are subject to this Court's power to enter orders restricting the further dissemination of documents produced by the U.S. Government to the Gawker Defendants' lawyers. Because Gawker Defendants obtained documents that no ordinary member of the public or the press has the right to obtain under FOIA, Intervenors have no legal right to access them as "public records."

In fact, on September 23, 2015, the Court entered its Order on Plaintiff's Emergency Motion for Clarification; which specifically holds that all materials Gawker obtained through FOIA are and remain "Highly Confidential – Attorneys' Eyes Only." Moreover, the Court clarified that the records, videos and audio recordings, documents and other materials produced by the U.S. Government to Gawker's counsel under FOIA shall not be disclosed to anyone other than the attorneys of record for the parties and the Court under seal. This ruling belies any contention that the FOIA documents are "public records."

Fourth, **unsealing the records would harm the public interest by chilling all future litigants from pursuing remedies for invasions of their privacy**. The law does permit the wholesale invasion of the privacy of anyone who files a lawsuit to protect his or her privacy. While it is inevitable that some private matters will be discussed and introduced into evidence at trial—those central to the claims and legitimate defenses in the case—namely, a plaintiff in a case for public disclosure of private facts does not and cannot be held to waive his or her privacy rights *in toto* with respect all private facts, particularly those collateral to the claims and legitimate defenses. If a blanket order unsealing documents concerning wide swaths of Mr. Bollea's private life (as well as the private lives of third parties such as Bubba Clem and Heather Cole), even extending beyond matters that are directly relevant to the issues in the case, were

entered, then no plaintiff would ever file this sort of action. Media companies with limitless resources and self-interested in publishing sensitive, private facts about people, would effectively destroy the right to privacy recognized by Florida law and guaranteed under Florida's Constitution. If Intervenors' motion is granted, invasion of privacy torts in Florida would be severely undermined, if not eliminated, both legally and practically, because no one would bring them out of fear of further victimization by the media, as well as the opposing party who invaded their rights in the first place.

IV. CONCLUSION

For the foregoing reasons, the Court should deny or continue Intervenors' motion on the grounds of insufficient notice. If the Court reaches the merits, the Court should deny the motion because Intervenors have not shown good cause to unseal sensitive court records.

Respectfully submitted,

/s/ Kenneth G. Turkel

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by E-Mail via the e-portal system this 28th day of September, 2015 to the following:

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