EXHIBIT 2

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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.
_____/

DEFENDANTS' RESPONSE TO PLAINTIFF'S EXCEPTIONS REGARDING DEFENDANTS' FIFTH MOTION TO COMPEL

Defendants Gawker Media, LLC ("Gawker") and A.J. Daulerio (collectively, "Defendants") respectfully submit this Response to plaintiff Terry Gene Bollea's Exceptions to Special Discovery Magistrate Case's Report and Recommendation regarding Defendants' Fifth Motion to Compel, in which plaintiff asks this Court to revisit Judge Case's recommendations concerning the production of twelve months of telephone bills and plaintiff's communications with the FBI and with third parties. To date, Judge Case has made four discovery rulings against plaintiff; he has filed exceptions to three of them (and contended he has nothing responsive on the fourth); and he has sought a stay pending a writ petition to the Second DCA. These extraordinary efforts to forestall discovery should be summarily rejected by this Court.

Rather than rehash the arguments Judge Case has already rejected, Defendants incorporate by reference their briefs on their Fifth Motion to Compel (filed February 13 and 24, 2014) and their lengthy argument before Judge Case on February 24 (transcript of non-confidential portions attached as Exhibit 1). Defendants address below a few new cases cited by plaintiff concerning the request for his telephone records and correct misstatements about the Government's position in connection with communications with the FBI and third parties.

A. 2012 Telephone Records/Account Information (Int. No. 10 and RFP No. 54)

1. This issue was exhaustively briefed and considered by Judge Case, with plaintiff being afforded more than a week to file his opposition brief (and Defendants given only a weekend to file a reply), following which Judge Case heard extended argument about the subject during a two hour telephone hearing. Although plaintiff purports to cite several new cases limiting discovery of phone records, he admits that, where such records are found necessary in discovery, they can be ordered produced. *See, e.g.*, Excptns. at 5 (conceding that records may be produced where "the party seeking such information" has "establish[ed] the necessity of obtaining them"); *id.* at 6-7 (conceding that, in cases relied on by Judge Case, courts "determined that a party's telephone records were relevant and permitted production of phone records in discovery") (citations omitted).[1]

2. Here, Judge Case found the records necessary and directed plaintiff to provide twelve months of telephone bills and his account information. Indeed, because plaintiff's counsel contended earlier during the same hearing that plaintiff could not recall with any specificity communications he had about the key facts at issue in this case, records memorializing those communications were necessary to determine the extent to which plaintiff spoke and texted with key witnesses, including Bubba and Heather Clem, during the relevant time period. *See* Ex. 1 at 46:23 – 48:2 (counsel for plaintiff explaining that "[plaintiff] can't remember every phone call that he had. He can't remember every time he texted. He can't remember certain things and to say when they happened, because this happened a long time ago and this was not the most important thing that's ever happened to him in his life. . . . I don't

[1] *Gateway Logistics, Inc. v. Smay*, 302 P.3d 235, 241 (Colo. 2013) (cited in Excptns. at 5), confirms that telephone records may be produced when necessary. There, the Court reversed the discovery order because the trial court had failed to conduct any balancing the relevant interests, but expressly directed the trial court to do so on remand. Here, Judge Case has already carefully considered that question.

know how we can provide more information beyond what is in . . . Mr. Bollea's brain or beyond the documents that we've already produced.").[2]

3. The few new cases plaintiff cites, Excptns. at 5-6, do not change this analysis. There, the claimed privacy interest was not in the telephone numbers themselves, but in their connection to subjects that are statutorily protected, such as medical records, tax information or financial information. *See, e.g., Berkeley v. Eisen*, 699 So. 2d 789, 790-92 (Fla. 4th DCA 1997) (applying statute prohibiting disclosures about customers of financial institutions to limit discovery seeking to identify and depose such customers) (citing Fla. Stat. § 517.2015); *Higgs v. Kampgrounds of Am.*, 526 So. 2d 980, 981-82 (Fla. 3d DCA 1988) (denying discovery of non-party tax information based on statutory protections for taxpayer information; no mention of telephone records at all); *Colonial Med. Specialties of S. Fla., Inc. v. United Diagnostics Labs, Inc.*, 674 So. 2d 923, 923-24 (Fla. 4th DCA 1996) (quashing order that would have identified other patients of medical provider based on protections applying to medical records). Here, by contrast, there is no private financial, medical or tax information at issue, but simply the telephone numbers that plaintiff called or texted. Certainly, Gawker is entitled to ask plaintiff who he spoke with about the facts of this case, or his relationship with Bubba and Heather Clem, without drawing a privacy objection, and this discovery, which is simply to aid in that process, is equally unobjectionable. The telephone numbers are not even arguably private unless associated

[2] Although plaintiff asserts that he has "produced all of his relevant text communications with Bubba Clem," Excptns. at 8, to date he has produced only six days' worth of texts from October 2012, and then produced, on the morning of Mr. Clem's deposition, on additional text from June 2013 without any explanation for the delay in production. At the depositions of plaintiff and Mr. Clem, neither witness was able to provide detailed testimony about their communications regarding the sex tape and this litigation, and they provided contradictory testimony about the extent to which they historically communicated with each other via text. Because those transcripts are deemed confidential for thirty days after the depositions, Gawker will submit the relevant testimony under seal if directed by the Court. Suffice it to say, however, that access to plaintiff's phone records is likely to clarify these issues and will also permit defendants to obtain documents that plaintiff should have produced, but has not.

with third parties and, contrary to plaintiff's accusation that Gawker will start randomly calling numbers, Excptns. at 9, Gawker has repeatedly represented to the Court that it will not call any of the numbers disclosed without prior approval of Judge Case, *see* Defs.' Reply in Support of Fifth Mot. to Compel at 8; Ex. 1 at 60:13-18.

4. Finally, this Court should disregard plaintiff's wholly inappropriate suggestion that, because Gawker is a media company that (sometimes) publishes content about celebrities like plaintiff, defendants should be treated differently than other parties. Plaintiff has not pointed, and cannot point, to a single instance in which Gawker has published information obtained via discovery in this case, even though plaintiff has been producing discovery responses designated as "confidential" since August 2013. Instead, plaintiff points to Gawker's published commentary opining that this Court's temporary injunction was unconstitutional (a sentiment with which the Second DCA later agreed), and an interview in which Gawker's CEO, Nick Denton, expressed his general views about privacy (including his own) in the modern age. *See* Excptns. at 8-10. Surely, Gawker is allowed to speak out about this litigation and about the broader philosophical issues underlying it without being penalized in unrelated discovery disputes. At bottom, plaintiff's assertion that the discovery should be denied because Gawker "has shown (time and again) its disregard for Mr. Bollea's . . . privacy rights" is flatly incorrect given the Second DCA's ruling that in this case Gawker was engaging in speech protected by the First Amendment. *See, e.g.*, *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1202-03 (Fla. 2d DCA 2014) (rejecting contention that the "speech at issue is not entitled to First Amendment protection" or that privacy interests trump that protection).[3]

[3] Plaintiff attempts to bolster his arguments by contending that, prior to the DCA decision, this Court had issued broad rulings limiting discovery into other areas, including plaintiff's medical records and financial information, on privacy grounds. Excptns. at 4. But the Court's ruling was expressly based on plaintiff's representations substantially curtailing his claimed damages. *See* Order Re: Motions of

B. Communications Related to FBI Investigation (Daulerio Interrogatory No. 10 and RFP No. 52).

5. In response to requests concerning plaintiff's or his counsel's communications with law enforcement agencies, he submitted a ten-page privilege log identifying 162 documents he contends are protected by a law enforcement privilege. *See* Ex. 2 (Affidavit of Seth D. Berlin ("Berlin Aff.")) at ¶ 5.[4] The history of Defendants' requests for this information – and plaintiff's repeated obstacles – illustrates substantial game playing by plaintiff and his counsel.

6. First, some ten months ago, Gawker requested that plaintiff produce "any and all documents in any manner related to any communications [he] had about the Video" (RFP No. 4) and that he identify "each and every communication [he] . . . had with persons other than [his] attorney(s) regarding the" actions plaintiff alleges violated his privacy rights (Interrog. No. 13). Plaintiff failed to disclose these 162 documents, to assert a law enforcement privilege, or to include them on his prior privilege log, identifying them for the first time on Friday, February 28, one business day before a scheduled week of depositions of plaintiff and the Clems.

7. Second, of the 126 documents identified, only 26 of those documents are communications with the FBI or the U.S. Attorney's Office and the remainder are with third parties. It is unclear how communications between plaintiff and third parties could even arguably be privileged as communications with a law enforcement agency.

Plaintiff for Protective Order and Gawker to Compel Further Responses (Feb. 26, 2014) at ¶ 4 ("This portion of the Court's ruling is based on the representations of Terry Bollea's counsel at the hearing that (a) Terry Bollea is not asserting claims for any physical injury and is limiting claims for emotional injuries to 'garden variety emotional distress damages', and (b) Terry Bollea is not seeking damages 'to his career' (including without limitation that his 'brand' has been diminished or that he has lost business opportunities), and intends to limit his claims for economic damages to claims for (i) the 'commercial value in a celebrity sex tape' of the Plaintiff and (ii) financial benefit to Gawker based on the 'value that they got [which] is the value of a celebrity sex tape in which Hulk Hogan is the star.'").

[4] Although plaintiff contends in his Exceptions, at 13, that the log has been designated "confidential" under the protective order, the face of the document reveals that this assertion is incorrect. Moreover, any dispute over whether any privilege was waived by failing to provide a privilege log is moot in light of the privilege log plaintiff has now supplied.

8. Third, as demonstrated in Gawker's motion papers and at two hearings before Judge Case, any law enforcement privilege belongs to the Government. *See* Defs.' Fifth Mot. to Compel at 6-8; Defs.' Reply in Support of Fifth Mot. to Compel at 4-7; Jan. 31, 2014 Tr. at 7:21 – 8:15, 18:12 – 23:2 (attached hereto as Exhibit 3); Ex. 1 at 58:12 – 60:7. Moreover, since the briefing and hearings before Judge Case, both the FBI and the U.S. Attorney's Office have confirmed that (a) the Government is not asserting that *any* documents in plaintiff's or his counsel's possession are privileged and (b) disclosing such documents would not interfere in any way with any investigative efforts. Berlin Aff. ¶¶ 4-9. The U.S. Attorney's Office also advised that it communicated that position to plaintiff's counsel (David Houston), *id.* ¶ 8, raising the question of why plaintiff and his counsel failed to advise the Court of that fact.

9. Finally, plaintiff characterizes Gawker's discovery requests as, among other things, "a dangerous attempt to use the civil discovery process to interfere with a criminal investigation," Excptns. at 11, and has elsewhere asserted that Gawker might be doing so because it could be a target or subject of the investigation. But the Government has advised that producing these documents will in no way interfere with any investigation, Berlin Aff. ¶¶ 4-9, and that Gawker is neither a target nor a subject of any investigation, *id.* ¶ 7.

10. At the end of the day, Judge Case properly concluded that plaintiff must provide discovery about his and his counsel's communications about the very facts at issue in this case, which as a matter of federal law were communicated under penalty of perjury. Particularly given the representations by the Government that such discovery is not privileged and will not interfere with any investigation, Judge Case's report and recommendation should be affirmed.

CONCLUSION

For the foregoing reasons, Gawker respectfully requests that the Court affirm Judge Case's Report and Recommendation on Defendants' Fifth Motion to Compel Discovery from Plaintiff and enter the proposed Order filed herewith.

Dated: March 18, 2014

Respectfully submitted,

THOMAS & LOCICERO PL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of March 2014, 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:

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