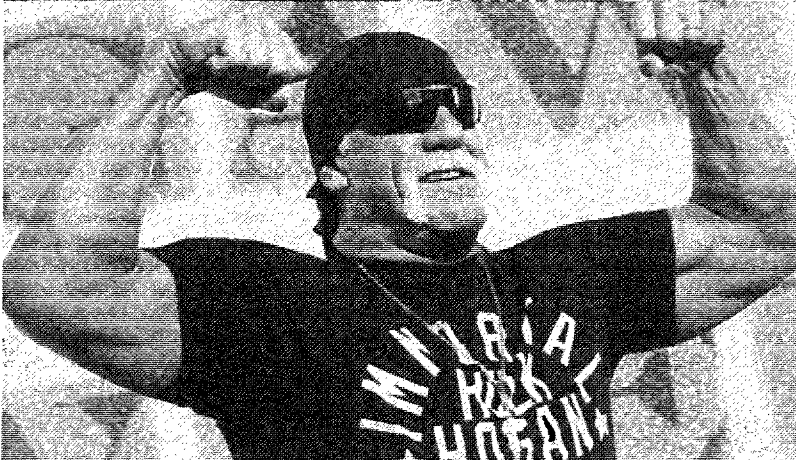
EXHIBIT C to Plaintiff's Notice that Action is Still at Issue and Motion to Set Cause for Trial

Gawker in the fight of its life with Hulk Hogan sex-tape suit



Hulk Hogan. (Evan Agostini/Invision/AP)

By Peter Sterne 9:00 a.m. | Jun. 12, 2015 22

Nick Denton is preparing for the biggest fight of his life. The Gawker Media founder and C.E.O.'s opponent: celebrated professional wrestler Hulk Hogan (real name: Terry Bollea), who sued Denton and Gawker in 2012 after the gossip blog published a supercut of his sex tape and refused to take it down. The case has seen numerous twists and turns over the past three years, but it's finally set to come to trial in Pinellas County, Fla.—where Hogan lives—on July 6.

Denton faces a judge and jury who are skeptical of, if not outright hostile to, his blog empire and philosophy of reporting the "story behind the story," and some inside Gawker say that they expect the company to lose the case. A loss, and an award of even a fraction of the $100 million Hogan's attorneys are seeking, could empty the company's coffers, forcing Denton to either sell the company outright or to hand much of its equity over to deep-pocketed investors.

Denton was frank about the situation in a tense all-hands editorial meeting on June 4 in Gawker's Nolita headquarters. Denton was his usual charming and irreverent self as he addressed a number of customary challenges facing the company—including issues with the company's content platform, Kinja, and soft display advertising sales. But he was at turns apologetic and defiant when it came time to discuss the lawsuit. Denton warned staff that the legal battle posed a threat to the company's fundamental operating principles: its longstanding independence from the demands of venture capitalists and big-media ownership.

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"I have way, way less money than people think!" Denton told his staff. "... I don't have hundreds of millions of dollars to kind of bail the company out. If we are in an environment with higher business risk and higher legal risk, then the company is going to need somebody with deeper pockets and hopefully principles in order to keep it both commercially viable and editorially viable."

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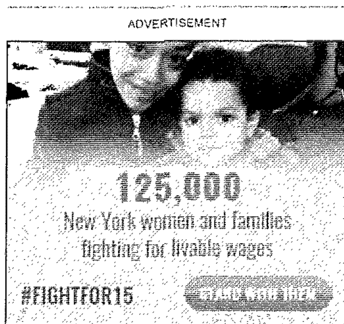

The case has its roots in **an Oct. 4, 2012 post** written by Gawker's then-editor A.J. Daulerio about Hogan's 2006 sex tape. By the time Daulerio published the post, it had been seven months since TMZ broke the news about the existence of the sex tape and more than five months since gossip website The Dirty had published grainy screenshots from the video.

The video shows Hogan having sex with Heather Clem—then the wife of his close friend, the shock jock Bubba the Love Sponge Clem—in Bubba's house. The video also shows Bubba giving his blessing for Hogan and Clem to have sex.

Gawker received a DVD of the 30-minute video and decided to edit it down to a "highlights reel" about a minute and a half long, and published that along with a long post by Daulerio commenting on the tape and the nature of celebrity sex tapes in general. Hogan had already threatened to sue a number of other websites if they posted the sex tape, and he sued Gawker in federal court on Oct. 15, 2012.

The history of the case is convoluted, to say the least. Hogan initially sued Gawker in federal court, but after a federal judge **denied his motion** for a preliminary injunction (which would have forced Gawker to immediately take down the post while the case was argued in the courts), he dropped the federal case. In December 2012, he added Gawker as a defendant in the state court case that he had already filed against Heather Clem and Bubba Clem. Gawker argued that Hogan was court-shopping and tried to remove the case back to federal court, but a federal judge remanded it back to the state court in March 2013.

In April 2013, a state judge—Judge Pamela Campbell—granted Hogan's motion for a preliminary injunction, forcing Gawker to take down both the video and Daulerio's commentary. Gawker took down the video, but not the commentary, and **wrote a post** about the ruling. Gawker also appealed the injunction order and a state appeals court **reversed the injunction** in January 2014 on First Amendment grounds. Gawker then filed a motion to dismiss the case, which was denied, and a motion for summary judgment, which was also denied. Since those motions were denied, the case is set to be argued before a jury in state court later this summer.

There's a very real possibility that Gawker will lose the jury trial. The jury, drawn from Hogan's hometown, will likely be more sympathetic to the wrestler than to a Manhattan media gossip blog. Gawker, Denton said, writes for open-minded, media-savvy millennials. The Pinellas County, Fla. jury is not the site's target audience.

Some among Gawker's leadership find it easy to imagine how Hogan's legal team could portray the case—the all-American hero and local celebrity who's just trying to protect his privacy versus the gay European founder of a Manhattan media gossip blog that published pornography for pageviews.

"I hope that somehow we can be charming enough in our writing and on the stand so that they recognize that we might be mean, bitchy Gawker bloggers, run by someone who will probably be portrayed as a New York pornographer and foreigner, but I hope that beyond that, we can make it clear that we're fighting for the truth to hold elites accountable ... whether that light exposes a Florida celebrity having a swingers party invited by the host to have sex with his wife—whether it's that or whether it's the fact that the system is rigged and people can't make it," Denton said during last week's editorial meeting.

Heather Dietrick, Gawker's president and general counsel, presented a more hopeful view of the case to Capital, and suggested that the Florida jury would be moved by their argument that Hogan had turned his own sex life into a public spectacle long before Gawker published this tape.

"I think as a common-sense matter, they're going to see that, see what he's talked about in the past. He's talked about really, really graphic details of his sex life, again and again and again, including on the shock jock's show," she said. "These are practical people. I think they're going to see through him and say, 'Give me a break. Take responsibility for what you did here.'"

"It will be difficult to sell Gawker to them, but also I think he's going to have a really hard time selling his version of the story to them," she added.

Hogan is certainly a very public person, having written two memoirs and starred in the reality show, "Hogan Knows Best." He has been particularly open about his sex life. During various appearances on both Bubba's radio show and Howard Stern's radio show, he has discussed: his erection, the size of his penis, where he prefers to ejaculate during sex, how he uses his mustache during sex, the way his wife pleasures him in the car, his penchant for rough sex, and more.

If Gawker does lose the jury trial, it is likely to win on appeal. The appeals court, after all, reversed the lower court's preliminary injunction back in January 2014, ruling that both the video and Daulerio's commentary about it were protected by the First Amendment. The problem for Gawker is that it could already be broke by the time the appeals court overturns the jury's decision.

"The $100 million, obviously—we don't have enough cash on hand, I don't think anybody does, in order to deal with an outcome as extreme as him picking a number out of the air without any particular basis, doing one of those headline-grabbing lawsuits," Denton told Capital.

Florida law generally requires a party that wants to appeal a monetary judgment to **post a bond** equal to the judgment plus two years' interest. If the jury found that Hogan was entitled to $100 million in damages and Gawker was required to post a bond of at least that amount, the company would not be able to do so without selling itself to a larger company or bringing on outside investors. Even if the jury only awarded Hogan a fraction of that (and Florida courts are known to give high awards) the results for the company would be disastrous.

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Denton said that he estimates there's a roughly 1-in-10 chance that Gawker will face "disaster"—meaning that they lose the trial, the jury awards Hogan a large amount in damages, and Gawker is required to put up a bond for the full amount while it appeals the ruling.

For perspective, Denton said that most years, there's a roughly 1-in-50 chance that Gawker will face a similar sort of disaster. Gawker tolerates a certain level of risk, he said, which lets it do things—like publish the Hogan video and then fight the case instead of settling—that other media companies will not.

"The way I look at the whole spectrum, you can't just focus on the worst-case scenario. If you did that, you'd be a coward like most of these media companies that settle, that actually don't exercise their constitutional rights as members of the free press," he said.

One of the main questions at issue in the trial is whether or not Hogan's sex tape was a newsworthy matter of "public concern." Among other things, Hogan is claiming that Gawker violated the tort of "**publication of private facts**," which prohibits people from publishing private facts about others, even if they are true, unless the facts are related to matters of "public concern."

In their opposition to Gawker's motion for summary judgment, Hogan's legal team argues that the actual sex tape—described in court documents as "footage of Mr. Bollea naked, aroused, and having sex in multiple positions"—is not a matter of public concern, even though Hogan's sex life and infidelity are matters of public concern. They quote a "journalism expert"—Mike Foley, a journalism professor at the University of Florida—who labels Gawker's practices "pornography" and "not journalism." And they argue that there's a crucial distinction between writing about the existence of Hogan's sex tape and actually publishing uncensored excerpts from the tape:

"All those media outlets that covered Mr. Bollea's sex life, including even the *National Enquirer*, at least had the decency not to broadcast the Sex Video or any part of it. All of them understood that while the information relating to the romantic and sexual lives of celebrities may be matters of public concern, the act of publishing secretly-recorded footage of a celebrity naked and having sex in a private bedroom is not a matter of public concern."

Gawker's lawyers, though, argue that the courts do not have the power to decide how Gawker covers the sex tape story. If the topic is newsworthy, then a story about it—even one that includes nude photos or videos—is newsworthy. Dietrick said that courts have ruled this way in the past.

"Once you see that that topic is a matter of public concern," Dietrick said, "the law does not allow a judge or the plaintiff or the subject of the story to come along with a red pen and say, 'I didn't really like the way you said it here. I didn't like the way you added this source material. I would've done this part differently.' You don't get a line item veto, basically. The journalist has freedom and the organization has freedom to write about that topic as they see fit."

Hogan's lawyers warn that Gawker's interpretation of the law will lead to a dire future in which no one has any privacy and everyone's sex tapes and nude photos are published on Gawker. This is an actual quote from their opposition to Gawker's motion for summary judgment:

"If it were up to the Gawker Defendants, there would be no privacy in America—everyone's secrets would be exposed, the intimate details of their lives would be fully published—and everyone would gather at Gawker to mock, ridicule, and gawk at what previously was confined to private conversations and closed bedroom doors. In other words, if it were up to Gawker, all walls would become windows, and no privacy would exist anywhere."

Denton and Dietrick say that this is not true, and that Gawker's journalists make decisions every day about what is newsworthy and what is not.

"I have a simple editorial litmus test, which is: is it true, and is it interesting?" Denton said. "The interest in is in proportion to the gap between the story that a brand or a celebrity brand is telling and the reality. The more the gap, the more interesting it is. Here, there was a gap between [Hogan's] rather boastful sexual persona that was on display in these radio interviews and elsewhere and the real story, which made it interesting."

As a counter-example, Denton mentioned the nude photos of Jennifer Lawrence and other celebrities that leaked last year, which Gawker did not publish.

"When the Jennifer Lawrence photographs were leaked, was that true that it was her? I think she confirmed it, so yes it was true," he said. "Was it interesting? Was there any lie being exposed there? ... That wouldn't satisfy, to my mind, the test of being both true and interesting."

With the sex tape, though, Gawker did expose some lies. After the video had been recorded in 2006, but before Gawker published its post in 2012, Hogan had said in an interview that he would never sleep with Clem. Once screenshots of the video were published in early 2012, many speculated online that Bubba had set up the cameras in order to catch Hogan and Clem cheating. Gawker's publication of excerpts of the sex tape, which revealed that Bubba had encouraged Hogan and Clem to have sex, refuted both of these false narratives.

Denton is proud of publishing the video taken from Hogan's sex tape. He sees it as a quintessential Gawker story—entirely true, about a celebrity who peddled a false narrative but brought public attention upon himself, and involving sex. The suit, he said, has actually strengthened the company, since all of Gawker's different divisions—tech, operations, sales, and editorial—are united behind the company's decision to publish the post and defend it in court.

"The story was a real sober take on a version of events that [Hogan] had been talking about," he said. "If you don't defend that, then what do you defend? You might as well just take the First Amendment and tear it up."

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