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14 UNITED STATES DISTRICT COURT
 15 SOUTHERN DISTRICT OF CALIFORNIA
 16

17 HERRING NETWORKS, INC.,

18 Plaintiff,

19 v.

20 RACHEL MADDOW; COMCAST
 21 CORPORATION; NBCUNIVERSAL
 22 MEDIA, LLC; and MSNBC CABLE
 23 L.L.C.,

24 Defendants.
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CASE NO. 19-cv-1713-BAS-AHG

**DEFENDANTS' OPPOSITION TO
 PLAINTIFF'S *EX PARTE*
 APPLICATION TO SUPPLEMENT
 THE RECORD AND REQUEST TO
 STRIKE**

Action Filed: September 9, 2019

Judge: Hon. Cynthia Bashant

1 **I. INTRODUCTION**

2 Plaintiff's *ex parte* Application to supplement the record with comments made by
 3 Chris Matthews on his on December 9, 2019 *Hardball* show should be denied. Such
 4 material is not considerable by the Court on Defendants' anti-SLAPP Motion, *see*
 5 *Planned Parenthood Fed'n of Am., Inc. v. Ctr. For Med. Progress*, 890 F.3d 828, 833–34
 6 (9th Cir. 2018), and Mr. Matthews's comments are irrelevant to the Court's examination
 7 of Ms. Maddow's statement in any event. Plaintiff's Application should therefore be
 8 denied, its memorandum stricken as an improper surreply, and Defendants' Motion
 9 granted.

10 **II. ARGUMENT**

11 **A. Plaintiff's Additional Evidentiary Submission is Improper.**

12 As Defendants made clear in their Reply, the Ninth Circuit does not permit the
 13 submission or consideration of evidence to oppose an anti-SLAPP motion based on
 14 "deficiencies in the plaintiff's complaint," as here. Dkt. 20, Reply at 1–2 (quoting
 15 *Planned Parenthood*, 890 F.3d at 834). In *Planned Parenthood*, the Ninth Circuit stated
 16 that "[i]n order to prevent the collision of California state procedural rules with federal
 17 procedural rules, we will review anti-SLAPP motions to strike under different standards
 18 depending on the motion's basis." *Id.* at 833. The Court of Appeals then drew a
 19 distinction between those anti-SLAPP cases that are brought upon evidence, which must
 20 be treated as under Rule 56 (and discovery therefore allowed), and those brought upon
 21 the pleadings, where "the motion must be treated in the same manner as a motion under
 22 Rule 12(b)(6)." *Id.* at 834 (internal quotations omitted). Defendants' Motion is
 23 unquestionably the latter, brought on the same record as a Rule 12(b)(6) Motion.¹ And
 24 federal courts are clear that on a Rule 12(b)(6) motion they cannot consider material,
 25 evidence, or affidavits that go beyond the pleadings. *See Agricola ABC, S.A. De C.V. v.*
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27
 28 ¹ Plaintiff's request to take discovery also fails because Defendants' Motion is not
 brought upon evidence such that it is treated under Rule 56's standard. *See Planned
 Parenthood*, 890 F.3d at 833–34.

1 *Chiquita Fresh North America, LLC*, No. 10-cv-772, 2011 WL 13100714, at *3 (S.D.
2 Cal. Mar. 8, 2011) (“On [a] motion to dismiss under Rule 12(b)(6), the Court cannot
3 properly consider” declarations that “offer fact-based opinions”); *City of Royal Oak*
4 *Retirement Syst. v. Juniper Networks, Inc.*, No. 5:11-cv-04003, 2013 WL 2156358, at *6
5 (N.D. Cal. May 17, 2013) (citing the “well settled proposition that a district court
6 normally may not consider evidence outside the pleadings when addressing a motion to
7 dismiss under Rule 12(b)(6)”). Moreover, as Defendants confirm in their Reply, courts
8 routinely decide and dismiss defamation cases using Rule 12(b)(6)’s standard—based on
9 the publication and its context—without the submission of evidence. *See* Dkt. 20, Reply
10 at 2–3 (collecting cases).

11 Plaintiff asserts that the Court may consider its evidence because the anti-SLAPP
12 statute provides that a court “shall consider the pleadings, and supporting and opposing
13 affidavits stating the facts upon which the liability or defense is based.” App. at 6 (citing
14 Cal. Civ. Proc. Code § 425.16(b)(1)). Yet, Plaintiff acknowledges that this rule only
15 survives in federal court “to the extent it does not conflict with the Federal Rules of Civil
16 Procedure,” *id.*, and indeed it does conflict, because courts cannot consider evidence
17 outside the pleadings that is not judicially noticeable or incorporated by reference. *See*
18 *Agricola ABC*, 2011 WL 13100714, at *3; *Planned Parenthood*, 890 F.3d at 834
19 (confirming that “[i]n [the anti-SLAPP] context, if there is a contest between a state
20 procedural rule and the federal rules, the federal rules of procedure will prevail”).
21 Because the state law’s procedural provision does not apply here, Mr. Matthews’s
22 comments, like Plaintiff’s evidence submitted with its Opposition, are not properly
23 considerable in relation to Defendants’ Motion.

24 **B. Mr. Matthews’s Comments Are Not Relevant in Any Event.**

25 Plaintiff’s Application should also be denied because Mr. Matthews’s comments—
26 made on his *Hardball* show on December 9, 2019, more than four months after Ms.
27 Maddow’s show—are not relevant to how an average viewer of Ms. Maddow’s July 22,
28 2019 show would have understood her statement. Indeed, Mr. Matthews did not refer to

1 Ms. Maddow’s July 22 statements about OAN, nor did he state that his December 9
2 comments were based on his understanding of what she said.

3 Moreover, Ms. Maddow and Mr. Matthews made different comments. Ms.
4 Maddow stated, in part, that OAN is “paid Russian propaganda,” before clarifying in the
5 very next sentence what she meant, that OAN’s “on air U.S. politics reporter is paid by
6 the Russian government to produce propaganda for that government.” Compl., Ex. A. at
7 4. Indeed, the entire context of Ms. Maddow’s segment—which was based entirely on
8 *The Daily Beast* article, as her words and on-screen graphics confirm—makes clear that
9 she was commenting on the “ridiculous” nature of the day’s news, a “sparkly story” in
10 which a U.S. news network employs a reporter who is also paid by the Kremlin-financed
11 Sputnik in the midst of an ongoing national conversation about Russian election
12 interference. Compl., Ex. A at 3.

13 Mr. Matthews’s comments were of a different nature and context. Commenting on
14 Rudy Giuliani’s recent trip to Ukraine to meet with former Ukrainian prosecutors as part
15 of a television program being filmed for OAN, Mr. Matthews stated about the network,
16 “that’s Russian owned by the way,” before immediately correcting himself and stating
17 “[m]aybe it’s not Russian owned, but of that point of view.” App. at 4. He then followed
18 up with an additional clarification that OAN is “owned by an American.” *Id.*² Mr.
19 Matthews’s comments do not affect how a reasonable viewer would have interpreted Ms.
20 Maddow’s statement but, in any event, his comment (which he corrected) was a different
21 one. For this same reason, Mr. Matthews’s comments do not bear upon Defendants’
22 substantial truth argument. His different comments in a different context do not change
23 the fact that Plaintiff has conceded it employs a reporter who is also paid by a Russian
24 propaganda media organization—thereby confirming that Ms. Maddow’s statement is
25 substantially true.

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28 ² The transcript Plaintiff submitted with its Application is not an official transcript of
Mr. Matthews’s show, and Defendants reserve the right to correct it if and as
needed.

1 Finally, Plaintiff’s suggestion that it should be permitted leave to amend—made
2 for the first time in its Application (and mentioned nowhere in its Opposition)—is also
3 improper. Because Mr. Matthews’s comments (as well as the evidence and expert report
4 submitted with Plaintiff’s Opposition) are not relevant to the interpretation of Ms.
5 Maddow’s separate and different statement made four months earlier, amending the
6 Complaint to plead such information would not affect the legal determination of Ms.
7 Maddow’s statement, and would therefore be futile. *See Gardner v. Martino*, 563 F.3d
8 981, 990 (9th Cir. 2009) (“A district court does not err in denying leave to amend where
9 the amendment would be futile.”).

10 **III. CONCLUSION**

11 Plaintiff’s improper Application is the last gasp of its failed claim. The Court
12 should deny Plaintiff’s Application, strike its memorandum, and grant Defendants’
13 Motion.

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15 DATED: December 13, 2019

Respectfully Submitted,

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17 GIBSON, DUNN & CRUTCHER LLP

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19 By: /s/ Theodore J. Boutrous Jr.
20 Theodore J. Boutrous Jr.

21 Attorneys for Defendants
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