20-55579

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERRING NETWORKS, INC.

Plaintiff and Appellant,

v.

RACHEL MADDOW; COMCAST CORPORATION; NBC UNIVERSAL MEDIA, LLC; MSNBC CABLE, LLC

Defendants and Appellees.

Appeal From The United States District Court,
Southern District of California, Case No. 3:19-cv-01713-BAS-AHG,
Hon. Cynthia A. Bashant

HERRING NETWORK'S REPLY IN SUPPORT OF OPENING BRIEF

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I. INTRODUCTION

Defendants contend that Herring "basically ignores" (AB 29) the context of Maddow's statement to her millions of viewers that OAN "really literally is paid Russian propaganda."[1] Not so. Contextual factors demonstrate that Maddow's statement was intended and reasonably understood as fact, not opinion. Defendants' context arguments overlook critical details and rest on false assumptions about Maddow's show and her audience's expectations. These arguments do not justify the District Court's decision to terminate Herring's defamation claim as a matter of law.

A court may find a statement to be protected opinion only if "*no reasonable person*" could construe it "as provably false." *Manufactured Home Cmtys., Inc. v. County of San Diego*, 544 F.3d 959, 964 (9th Cir. 2008) (emphasis added). As the District Court acknowledged, Maddow's statement itself is susceptible to being proven false. Defendants fail to show that the context of Maddow's statement was nevertheless so unequivocal that no reasonable person could have understood her statement as factual.

[1] This Reply uses the terms defined in the Opening Brief. References to "AB" are to Defendants' Answering Brief, and references to "OB" are to the Opening Brief.

Defendants fail to account for the substantial evidence demonstrating that Maddow's statement was likely to be interpreted as factual:

- Examples of Maddow consistently using "literally" to emphasize statements of fact on her show;
- Maddow's characterization of her show as providing "good, true stories";
- A comment from a viewer that understood Maddow's statement as factual;
- On-air statements by Maddow's colleague, Chris Matthews, reiterating Maddow's statement by claiming that OAN is "Russian-owned"; and
- The expert report by Stefan Th. Gries, Ph.D., a linguistics professor at the University of California, Santa Barbara.

Defendants never substantively engage with this evidence, even when it directly contradicts their assumptions.

The anti-SLAPP statute itself expressly allowed Herring to submit this evidence. Defendants argue "that under the *Erie* doctrine such state procedural rules must yield." (AB 30.) But conspicuously absent from Defendants' Answering Brief is any *Erie* analysis. Per the Opening Brief, the anti-SLAPP statute applies in federal court, unless it conflicts with the Federal Rules of Civil Procedure. In response, Defendants fail to identify any conflict.

Defendants' superficial reliance on *Planned Parenthood* is no substitute. In *Planned Parenthood*, the question was whether a plaintiff is *required* to present evidence in opposition to an anti-SLAPP motion challenging the pleadings. The question here is whether a plaintiff is *permitted* to submit evidence. This question was

neither raised nor answered in *Planned Parenthood*. The District Court erred in relying on *Planned Parenthood* to exclude Herring's evidence.

Defendants' context arguments also rest on false assumptions. Chief among them is that Maddow's colorful commentary in her segment would lead viewers to understand Maddow's statement that OAN is paid Russian propaganda as opinion. This assumption ignores the way Maddow switches between colorful commentary about the news she is reporting (e.g., "sparkly story") and the news itself, which she delivers as fact. Maddow's statement that OAN is paid Russian propaganda was delivered in the style and tone of Maddow's factual statements, not her colorful commentary.

Indeed, Maddow expressly distinguished her statement that OAN is paid Russian propaganda from an opinion statement:

> I mean, what? I mean, it's an easy thing to throw out, you know, like an epitaph in the Trump era, right? Hey, that *looks like* Russian propaganda. *In this case*, the most obsequiously pro-Trump right wing news outlet in America *really literally* is paid Russian propaganda.

(ER 245 (emphasis added).) Here, Maddow flags her statement that OAN is paid Russian propaganda as fact—using "in this case" and "really literally"—in contrast to the opinion statement, "Hey, that looks like Russian propaganda." Defendants' characterization of Maddow's show overlooks such critical details.

Defendants' argument that Maddow's immediately following statement made "crystal clear what she was talking about" (AB 2) similarly misreads Maddow's

segment. This subsequent statement—"They're [sic] on air U.S. politics reporter is paid by the Russian government to produce propaganda for that government" (ER 245)—trades on ambiguity. Principally, it fails to make clear that Rouz was paid by Sputnik to write articles for Sputnik—*not* paid by the Russian government to produce propaganda as an on air reporter for OAN. This ambiguity was by design. The explosive, false claim that OAN is paid Russian propaganda made for great TV. A straightforward statement of the truth—that a low-level OAN reporter also freelanced for Sputnik writing articles on international finance—would have gotten in the way.

Defendants' analysis falls far short of vindicating the District Court's decision to take the question of whether Maddow's statement was fact or opinion away from the jury. The evidence and the relevant contextual factors demonstrate that Maddow's statement could be—and was—interpreted as factual. And even assuming Maddow's statement was hyperbolic opinion, it still implied facts—e.g., that OAN's news content itself was connected to the Russian government—that were false and defamatory.

Defendants' "substantial truth" argument—which the District Court did not consider—is also without merit. The fact that Rouz is employed by OAN and, unbeknownst to OAN, also wrote articles for Sputnik does not make it substantially true that OAN "really literally is paid Russian propaganda." The Complaint pleads the absence of any connection whatsoever between the Russian government and OAN's news content. This allegation is fatal to Defendants' "substantial truth" argument.

Finally, Defendants' contention that Herring waived the right to challenge the District Court's decision to dismiss without leave to amend is baseless. After Defendants argued in their reply brief that Herring's evidence could not be considered because it was outside the Complaint, Herring asked for leave to amend to add such evidence to the Complaint, if necessary. There can be no waiver under these circumstances. At a minimum, the District Court erred in refusing to grant Herring leave to amend the Complaint to conform with the evidence submitted in opposition to Defendants' anti-SLAPP motion.

II. ARGUMENT

A. Defendants fail to provide any *Erie* analysis supporting the District Court's exclusion of Herring's evidence.

The Answering Brief defends the District Court's exclusion of Herring's evidence on *Erie* grounds, but Defendants never substantively engage with the *Erie* doctrine. (AB 42-45.) As set forth in the Opening Brief, this Court's *Erie* precedents hold that the anti-SLAPP statute applies in federal court absent "a 'direct collision' with the Federal Rules." *United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 972 (9th Cir. 1999) (citation omitted).

The anti-SLAPP statute expressly allows a plaintiff to submit evidence in opposition to an anti-SLAPP motion. *See* Cal. Civ. Proc. Code § 425.16(b)(2) ("In making its determination, the court *shall* consider the pleadings, and supporting

and *opposing affidavits* stating the facts upon which the liability or defense is based." (emphasis added)). Defendants do not even try to identify any conflict between this provision and the Federal Rules.

Defendants rely on *Planned Parenthood*, but that opinion is not precedent here because it involved an entirely different *Erie* question. In *Planned Parenthood*, the defendants contended that the plaintiffs "were required to demonstrate a probability of prevailing on the challenged claims, and that Plaintiffs did not meet this burden because they did not provide rebutting evidence." *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 832 (9th Cir. 2018). The Court disagreed, holding that a plaintiff is "not *required* to present prima facie evidence supporting [the plaintiff's] claims" where an anti-SLAPP motion challenges only the legal sufficiency of the claims. *Id*. at 833 (emphasis added).

The Court concluded that requiring a plaintiff to present evidence without the opportunity to engage in discovery would conflict with the procedural safeguards of the Federal Rules. 890 F.3d at 833-34. To prevent that conflict, the Court held that a district court in such circumstances should apply the Federal Rule of Civil Procedure 12(b)(6) standard to the motion. *Id*. at 835. The Court did *not* identify any conflict that would result from *permitting* a plaintiff to introduce evidence in opposition to an anti-SLAPP motion.

There is no such conflict. Where a plaintiff voluntarily submits evidence, as here, it does not conflict with any federal procedural safeguards for a court to consider that evidence. Under this Court's established *Erie* jurisprudence, the anti-SLAPP statute's requirement that "opposing affidavits" "shall" be considered, Cal. Civ. Proc. Code § 425.16(b)(2), applies in federal court.

The other cases Defendants rely on also do not identify any conflict or contain any substantive *Erie* analysis. In *Penrose Hill, Ltd. v. Mabray*, 479 F. Supp. 3d 840 (N.D. Cal. 2020), the defendant's anti-SLAPP motion raised both legal and factual challenges, and the court held that the factual challenges were premature because no discovery had taken place. *Id*. at 849. Thus, the court evaluated only the defendant's legal challenges to the plaintiffs' complaint. *Id*. The court *did not* hold that the plaintiffs were barred from submitting evidence in support of their opposition to defendant's anti-SLAPP motion.

In *Peak Health Center v. Dorfman*, No. 19-cv-04145-VKD, 2019 WL 5893188, at *12 n.4 (N.D. Cal. Nov. 12, 2019), the court declined to consider the plaintiff's declaration in opposition to an anti-SLAPP motion because plaintiff "was not required" to present prima facie evidence supporting its claims, but the court did *not* identify any conflict that would have resulted had the court considered plaintiff's evidence. The decision does not engage with this Court's *Erie* precedents and is not persuasive.

The District Court erred in excluding and not considering Herring's evidence.

B. Defendants are wrong that Maddow's statement could *only* have been understood as opinion in context.

The Answering Brief asserts that "whether a '"statement is one of opinion or fact is a question of law."'" (AB 12.) But the District Court was permitted to resolve this question as a matter of law only if "*no reasonable person* could construe [the statement] as provably false." *Manufactured Home Cmtys.*, 544 F.3d at 964 (emphasis added). Where a statement is "'susceptible of different constructions, one of which is defamatory, resolution of the ambiguity is a question of fact for the jury." *Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002) (citation omitted); *see O'Connor v. McGraw-Hill, Inc.*, 159 Cal. App. 3d 478, 485 (1984) (where a statement is "neither 'clearly fact' nor 'clearly opinion,'" the determination "must be left to the trier of fact").

The District Court erred in its application of this standard, and Defendants' arguments in support of the District Court's dismissal fall short. Defendants' analysis of the relevant factors—broad context, specific context, and the statement itself—ignores Herring's evidence and overlooks other critical facts. Reasonable people could (and in fact did) understand Maddow's statement that OAN was paid Russian propaganda as a statement of fact. *See Manufactured Home Cmtys.*, 544 F.3d at 964 (reversing district court grant of anti-SLAPP motion because

reasonable factfinder could disagree with district court's assessment that statements were opinion); *O'Connor*, 159 Cal. App. 3d at 485-86 (reversing grant of demurrer).

1. It is beyond dispute that Maddow's statement is susceptible of being proven true or false.

Defendants assert that the third factor—whether the statement is itself susceptible of being proven false—is "context driven." (AB 39 (citing *Knievel v. ESPN*, 393 F.3d 1068 (9th Cir. 2005)).) This is incorrect. The question of whether the statement at issue is capable of being proven false is separate from the question of how context would bear on the audience's understanding of the statement. *Knieval*, 393 F.3d at 1075 (identifying three factors, with language of statement as its own factor). Defendants try to obfuscate this distinction because, as the District Court acknowledged, Maddow's statement that OAN is paid Russian propaganda is itself "capable of verification" and this "factor weighs in favor of a finding that viewers could conclude that the statement implied an assertion of objective fact." (ER 16.)

2. Defendants' assumptions about the broad context of Maddow's statement are false.

Defendants are wrong that the broad context of Maddow's statement establishes that it is nonactionable opinion as a matter of law. As an initial matter, Defendants ignore the facts regarding the broad context of Maddow's statement set

forth in the Opening Brief. (OB 29-34.) This includes Maddow's interview with the *New York Times Magazine*, where she admits that her show provides "useful *information*" and "good, *true* stories." (ER 182-187 (emphasis added).) These admissions evidence that Maddow's viewers tune in for news and expect her show to be factual.

Defendants similarly disregard Herring's evidence that at least one OAN customer and Maddow's own colleague at MSNBC, Chris Matthews, took her claim that OAN was paid Russian propaganda factually and literally. (ER 68, 126.) This Court has found such evidence probative of whether a statement could reasonably be construed as factual. *See Unelko Corp. v. Rooney*, 912 F.2d 1049, 1054 (9th Cir. 1990) (statement was not protected where "presented as fact *and understood as such by several viewers who wrote to CBS*" (emphasis added)).

Defendants also dismiss out-of-hand the expert report of Professor Gries, arguing that "[t]his Court's defamation cases . . . do not contemplate consideration of this sort of speculative expert opinion." (AB 30.) But expert opinions are regularly admitted to defeat summary judgment, *e.g.*, *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1318 (9th Cir. 1985), and the rule should be no different on an anti-SLAPP motion. Defendants provide no authority for the exclusion of expert opinions in defamation actions, and expert linguistics testimony has been admitted in defamation actions before. *See Weller v. Am. Broad. Cos., Inc.*, 232 Cal. App.

3d 991, 1007 (1991) (affirming admission of testimony of professor of linguistics in defamation action "concerning how the average viewer was likely to understand the broadcasts").

Nor do Defendants explain their claim that Professor Gries' report is "speculative." Professor Gries is a leader in the fields of cognitive linguistics (the study of how language interacts with cognition) and corpus linguistics (the study of language in samples of real-world text), precisely the areas at issue in this case. (ER 128.) And his report is detailed and based on established linguistic methods, such as research using linguistics databases and computer measurements of intonation. (*Id.* at 145.) What reason could there be for not at least considering what Professor Gries has to say?

Among other things, Professor Gries details how Maddow uses linguistic markers to distinguish her opinion commentary from the news itself. (ER 151.) The Court can see some of these opinion markers for itself (such as "we expect" and "I guess") in the transcript of Maddow's segment. Because Maddow did not use these opinion markers when she said that OAN is "paid Russian propaganda," a viewer would not have understood her statement as opinion. (*Id.* at 151, 158.) The Answering Brief does not contain any response to this analysis.

Instead, Defendants argue that the "medium" of Maddow's statement would lead her audience to "anticipate[] efforts . . . to persuade . . . by use of epithets,

fiery rhetoric or hyperbole." (AB 26.) But Maddow herself admits in her *New York Times Magazine* interview that she is "*not* trying to get anybody elected," "*not* trying to get any policy passed," and "*not* trying to get people to call their member of Congress." (ER 186 (emphasis added).) Her show is "trying to explain what's going on in the world." (*Id.*) Maddow's segment on OAN also does not feature her debating anyone or advocating any policy. (*Id.* at 244-45.) Her commentary and figurative language (e.g., "I mean, what?") is aimed at exciting her audience about the facts she is reporting, not policy advocacy.[2]

Defendants also argue that Maddow's statement was "part of the national debate about Russian interference in the 2016 presidential election, President Trump, media bias, and Russian influence in domestic U.S. affairs and on U.S. media." (AB 27 (citing *Koch v. Goldway*, 817 F.2d 507, 509 (9th Cir. 1987)).) These assertions regarding the broader media landscape are made without any supporting evidence. Regardless, statements "do not find shelter under the First Amendment simply because they are embedded in a larger policy debate."

[2] Defendants' reliance on *Cochran* (AB 27) is misplaced, as explained in the Opening Brief at page 28. *Cochran* dealt with a statement in an opinion column concerning the widely publicized trial of O.J. Simpson. *Cochran v. NYP Holdings, Inc.*, 58 F. Supp. 2d 1113, 1116 (C.D. Cal. 1998). The "shared public knowledge of the trial" was a key consideration that led the court to hold that readers of the column would likely understand the statement as not reporting any new independent facts about the trial, but rather the columnist's opinion. *Id*. at 1122-23.

Competitive Enter. Inst. v. Mann, 150 A.3d 1213, 1242-43 (D.C. 2016) (denying anti-SLAPP motion regarding statements made about a climate scientist's work on global warming).

Koch does not hold otherwise. In *Koch*, the defendant was a city council member and then mayor. 817 F.2d at 508. The plaintiff was a property owner opposed to rent control, who had appeared before the city council and then campaigned against the mayor on rent control issues. *Id.* The mayor referred to the property owner as a Nazi war criminal. *Id.* The Court found that the statement was a slur between political rivals, and it was obvious "the mayor had not suddenly lost interest in rent control and politics in order to focus on war criminals." *Id.* at 509. Here, by contrast, Maddow was not attacking a political rival with such an obvious slur.[3]

This case more closely resembles *Unelko Corp. v. Rooney*, which concerned an episode of "60 Minutes" hosted by the famed, late satirist Andy Rooney that was "characterized by hyperbole." 912 F.2d at 1054. This Court concluded that the "humorous and satirical nature of" a television show did not "negate the

[3] Defendants' reliance on *Partington* is also unavailing for the reasons set forth on pages 32-33 of the Opening Brief. The *Partington* court rested its analysis on the fact that the author of the defamatory statement at issue there was a trial attorney who readers would generally expect to "have a higher opinion of their own performance than of the professional abilities exhibited by other counsel." *Partington v. Bugliosi*, 56 F.3d 1147, 1153-54 (9th Cir. 1995). Maddow, by contrast, was not touting her own ability at the expense of others.

impression that [the speaker] was making a factual assertion." *Id*. Here too, Maddow's use of some humor and commentary to accompany her factual assertions does not transform her factual assertions into opinions.

The California Supreme Court's decision in *Good Government Group of Seal Beach, Inc. v. Superior Court*, 22 Cal. 3d 672 (1978), is also instructive. In that case, the City of Seal Beach "was [in the words of Justice Mosk] in the throes of political turmoil and strife that was likely to ulcerate the most tranquil dispositions" when the president of a citizens' organization published an article stating that three city councilmen had "extorted by blackmail $100,000 from" a development company building an apartment complex. *Id.* at 677-78. One of the councilmen filed suit for defamation, and the article's author moved for summary judgment. After the trial court denied summary judgment, the California Supreme Court took up the case on a writ of mandate. *Id.* at 676.

The author argued that his statement was protected opinion that "could not have been viewed by a reader as literally charging" the councilman with extortion. 22 Cal. 3d at 679. The author contended that the statement had been part of a "tense political situation" and merely used "figurative language" to describe the public fact that the city had received $100,000 in a settlement with the developer. *Id.*

The court disagreed, finding that the statement was "ambiguous" and that the court "cannot as a matter of law characterize it as either stating a fact or an opinion." 22 Cal. 3d at 682. On the one hand, the "blackmail" charge was made "in the middle of a lengthy and vehement denunciation" of the councilmen's misdeeds and could be read as merely a "caustic . . . characterization" of the settlement. *Id.* at 681. On the other hand, the statement could be read as charging the councilmen with personally pocketing the settlement funds. *Id.*[4]

Because the court could not say "as a matter of law" that the statement was fact or opinion, it left the determination to the jury. 22 Cal. 3d at 682 ("This conclusion is not contrary to our statement in *Gregory* that the distinction between fact and opinion is a question of law; that remains the rule if the statement *unambiguously* constitutes either fact or opinion. Where, as here, however, the allegedly libelous remarks could have been understood by the average reader in either sense, the issue must be left to the jury's determination." (emphasis added)).

[4] The article in *Seal Beach* contained other figurative and hyperbolic terms about the councilman—such as "recalcitrant," "machinations," and "infamy"—that the Court found "represent statements of opinion as to [the councilman's] conduct." 22 Cal. 3d at 681. The fact that the article contained some statements of non-actionable opinion did not, however, lead the court to conclude that the author was immune from liability for the *other* statement in the article that could be interpreted as fact (i.e., "extorted by blackmail"). Rather, the court held that that determination must be left to a jury. Defendants' claim that Maddow was using "figurative" and "hyperbolic" language throughout the story (e.g., AB 17) does not, therefore, support dismissal of the defamation claim as a matter of law.

Here too, even assuming Defendants' characterization of Maddow's show as "figurative" commentary amidst a national debate was correct, Maddow's statement that OAN was paid Russian propaganda was, at the very least, ambiguous, and certainly could have been understood by a reasonable viewer as Maddow making the factual claim that OAN ran propaganda paid for by the Russian government. The District Court should have denied Defendants' anti-SLAPP motion.

3. Defendants' analysis of the specific context of Maddow's statement overlooks critical details.

Defendants contend that the "fatal flaw in Herring's argument is that it conspicuously and impermissibly ignores the immediate surrounding words of the challenged phrase." (AB 31.) Not at all. The Opening Brief explained how Maddow made her "paid Russian propaganda" claim seem like yet another fact from *The Daily Beast* by embedding it among other factual assertions.

Defendants assert that "the opposite is true" because "where a speaker discloses the facts and source upon which her commentary is based . . . the listener can make up his own mind." (AB 34.) This argument, however, assumes that the listener can distinguish the facts from the commentary. The principle that an opinion is protected when based on disclosed facts only applies, obviously, to a recognizable opinion—i.e., a statement not reasonably susceptible to being understood as a fact. *See Mann*, 150 A.3d at 1245 ("The theory is that when a

writer discloses the facts upon which a statement is based, the reader will understand that the statement reflects the writer's view, based on an interpretation of the facts disclosed . . . . This argument is unavailing here. . . . [A]s we have discussed, a jury could reasonably interpret Mr. Simberg's article as asserting as *fact* . . . .").

Here, Maddow's statement was embedded among other facts from *The Daily Beast*, couched in expressly non-figurative language ("really literally"), and contrasted with an opinion statement ("Hey, that looks like Russian propaganda"):

> I mean, what? I mean, it's an easy thing to throw out, you know, like an epitaph in the Trump era, right? Hey, that looks like Russian propaganda. In this case, the most obsequiously pro-Trump right wing news outlet in America really literally is paid Russian propaganda.

(ER 245.) Given Maddow's cues, a reasonable viewer could easily have understood Maddow's "paid Russian propaganda" claim as yet another factual statement, not an opinion.

Contrary to Defendants' claim, the "immediate surrounding words" (AB 31) would not preclude a reasonable viewer from taking Maddow's statement as factual. The immediately surrounding statements highlighted by Defendants are all (likely deliberately) vague as to whether Rouz was being paid to produce propaganda *for OAN* (which he was not):

- Prior Statement: "We literally learned today that that outlet the president is promoting shares staff with the Kremlin." (ER 245.)

- Subsequent Statement: "They're [sic] on air U.S. politics reporter is paid by the Russian government to produce propaganda for that government." (*Id.*)

The title of Maddow's segment also suffers from the same ambiguity: "Staffer on Trump-favored network is on propaganda Kremlin payroll." (ER 199.) Maddow's segment frequently obscured the distinction between OAN and Sputnik and Sputnik and the "Kremlin," thereby facilitating the believability of her explosive claim that OAN, the network, was "paid Russian propaganda." In truth, Rouz's work for Sputnik had demonstrably no relation to his work for OAN. (ER 235 ¶ 26.) Maddow's claim that it did was false.

Defendants' argument that Maddow's statement was "nonactionable 'rhetorical hyperbole'" (AB 34) also runs headlong into the absence of "figurative or hyperbolic language," *Unelko Corp.*, 912 F.2d at 1053, or "cautious[] phras[ing]." *Dickinson v. Cosby*, 37 Cal. App. 5th 1138, 1164 (2019). Maddow's use of "really literally" strongly weighs against reading Maddow's statement as hyperbolic opinion. *See Mann*, 150 A.3d at 1245 (rejecting argument that statements in article were opinion where author "does not employ language normally used to convey an opinion, such as 'in my view,' or 'in my opinion,' or 'I think'").[5]

[5] For these reasons, Defendants' reliance on *Yagman* is unavailing. (AB 37.) The Court in *Yagman* reasoned that calling a judge "dishonest" "cannot reasonably be construed as suggesting [by the plaintiff] that [he] had committed specific illegal

Defendants argue that "literally" can also mean "virtually." (AB 35.) But this ignores Herring's evidence that Maddow ordinarily uses "literally" to emphasize the factual truth of her assertions on her show (ER 168-69, 176, 179), such that viewers would expect Maddow to use "literally" in its primary sense. And even absent such evidence, it was error for the District Court to favor Defendants' definition over Herring's on an anti-SLAPP motion. *See Flowers*, 310 F.3d at 1127-28 (holding that differing dictionary definitions of a word in a statement made that statement susceptible of a defamatory interpretation and thus the resolution of the ambiguity was a question of fact for the jury).[6]

Defendants also ignore that Maddow said "*really* literally," eliminating any doubt that Maddow meant "literally" in its primary sense. Herring made this point in its Opening Brief (OB 23), and Defendants have no response. Nor do

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acts." *Standing Comm. on Discipline of U.S. Dist. Court for the Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1440 (9th Cir. 1995). By contrast, here, Maddow's comment that OAN is paid Russian propaganda can reasonably be construed as asserting that OAN's content is influenced by the Russian government.

[6] Defendants' reliance on *CACI Premier Technology, Inc. v. Rhodes*, 536 F.3d 280 (4th Cir. 2008), is misplaced. (AB 35). There, the court held that the statement that "[t]hese guys literally fought on the side of [the former dictator in Zaire]" did not state actual facts about the plaintiff because it was not clear that the defendant was *actually referring* to the plaintiff when she made the allegedly defamatory statement. *Id*. at 302 ("[W]hen Rhodes speaks of 'these people' or 'guys' having fought on the side of apartheid or Mobutu, she is referring to certain *individuals* currently employed by the contractors, not the contractors themselves. . . . Rhodes did not accuse CACI in its corporate capacity of fighting on behalf of apartheid or Mobutu."). By contrast, Maddow could not have been more clear that she was making an assertion about OAN.

Defendants have any answer to Professor Greis' research into the meaning of "really literally" using the Corpus of Contemporary American English. (ER 155.) Professor Greis found that "when ordinary speakers in TV talk shows" use the term "really literally," the expression "typically modifies propositions that are supposed to be interpreted literally." (*Id*.)

Given Maddow's statement and its context, a reasonable viewer could easily have understood Maddow's claim that OAN was "really literally" "paid Russian propaganda" as a statement of fact.

C. Defendants fail to address Herring's argument that Maddow's statement implied a false connection between OAN's content and Rouz's work for Sputnik.

In its Opening Brief, Herring explained that, even assuming Maddow's statement was a hyperbolic opinion, it is still actionable as defamation. (OB 34-36.) That is because "[s]tatements of opinion . . . do not enjoy blanket protection." *Dickinson*, 37 Cal. App. 5th at 1163-64 (denying anti-SLAPP motion where statements "impl[ied] provably false assertions of fact"). "Rather, 'a statement that implies a false assertion of fact, even if couched as an opinion, can be actionable.'" *Id*. at 1163 (citation omitted); *see Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990) (holding that a reasonable factfinder could conclude that defendant's statements falsely implied the fact that plaintiff perjured himself, and thus they were not protected opinion).

Defendants' only response, buried in their "specific context" argument, is that Maddow purportedly "disclosed the facts from *The Daily Beast* on which her statement was based," and that she "does not even hint that her opinion is based on any additional, undisclosed facts." (AB 33.) Defendants are wrong. Maddow's viewers were not presented with the full text of *The Daily Beast* article, so when Maddow said the OAN "really literally is paid Russian propaganda," it implied there had been reporting on an actual undisclosed factual connection between OAN's content and Russian government, which is false. (ER 236 ¶ 29.)

Further, Maddow presented a one-sided, skewed picture of the facts that allowed her audience to believe that Rouz was some kind of sleeper agent for the Russian government at OAN. Maddow never told her audience that Rouz was merely a freelancer for Sputnik who wrote articles on global finance (e.g., "Japan Q1 GDP Beats Expectations Despite Weak Consumer Spending"). (ER 235 ¶ 25.) Maddow did not provide the complete picture because it would have undermined her false and attention-grabbing claim that OAN was paid Russian propaganda. Thus, Maddow's statement—even if deemed an opinion—finds no protection under the First Amendment. *See Mann*, 150 A.3d at 1246-47 (article that left out facts in charging scientist with misconduct was not protected opinion); *Milkovich*, 497 U.S. at 18-19 (opinion not protected if "facts are either incorrect or incomplete" or the "assessment of them is erroneous").

D. Maddow's statement was not substantially true.

Defendants argue that this Court may affirm the District Court's decision for the independent reason that Maddow's statement was truthful—an issue that the District Court did not reach. (AB 40.)

Whether a statement is substantially true is a factual determination for the jury. *Bently Reserve LP v. Papaliolios*, 218 Cal. App. 4th 418, 435 (2013) ("[W]hether a statement is true or substantially true is normally considered to be a factual one." (citation omitted)). The defense applies only where "the substance of the charge be proved true, irrespective of *slight* inaccuracy in the details." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516-17 (1991) (emphasis added) (citation omitted); *see also Hughes v. Hughes*, 122 Cal. App. 4th 931, 939 (2004) (statement "Our dad's a pimp" was susceptible to the defense of substantial truth because the dad was, previously, a pimp).

Maddow's assertion that OAN "really literally is paid Russian propaganda" is not a slight inaccuracy. It is wholly false. OAN has never received money from Russia or the Russian government, and none of OAN's content is influenced by Russians or the Russian government. (ER 237 ¶ 39.) Defendants note that Rouz is employed by OAN and also wrote articles for Sputnik. (AB 41-42.) But this fact does not make it substantially true that OAN, the network, "really literally is paid Russian propaganda."

Defendants rely on *Campanelli v. Regents of University of California*, 44 Cal. App. 4th 572 (1996), but the facts there were very different. In *Campanelli*, Berkeley's athletic director explained his firing of the basketball coach by saying, "[t]he players were beaten down and in trouble psychologically." *Id.* at 576. However, because the coach admitted he "engaged in temper tantrums directed at his players which included verbally abusive and profane remarks of a personal nature, to the extent that seven members of the team wanted to transfer unless he was fired," the court concluded that the coach had "admitted the essential accuracy of" the statement. *Id.* at 582.

Here, Herring has not admitted the essential accuracy of Maddow's statement that OAN is "paid Russian propaganda." Herring only admitted that, unbeknownst to it, Rouz wrote articles for Sputnik News. Herring has not been paid by the Russian government; and its content is not, in any way, influenced by Russians or the Russian government. (ER 237 ¶ 39.)

A trier of fact could easily conclude that Maddow's statement was not substantially true. Therefore, Defendants' substantial truth defense fails. *See Bently Reserve*, 218 Cal. App. 4th at 435 (denying anti-SLAPP motion because "trier of fact might conclude [defamatory statement] was not substantially true and was defamatory").

E. Herring did not waive its right to challenge the District Court's dismissal without leave to amend.

Defendants argue that Herring waived its challenge to the District Court's dismissal without leave to amend by not asking for leave to amend in its opposition. (AB 46.) However, Defendants first asserted that Herring's evidence could not be considered by the District Court in their *reply*. (ER 84-85.) Herring thereafter asked for "leave to amend its Complaint" to incorporate such evidence into its Complaint, as necessary. (ER 59.) There was no waiver. Defendants do not provide any authority that Herring was required to request leave to amend in its opposition, before Defendants had argued for the exclusion of Herring's evidence as outside the Complaint.

Defendants' alternative argument that leave to amend would have been futile because Herring's evidence is "irrelevant" (AB 47) is not supported by any explanation or authority. As set forth above, Herring's evidence is probative of whether a reasonable viewer could have understood Maddow's statement as factual, the key issue in dispute. It was error for the District Court to simultaneously refuse to consider Herring's evidence yet conclude "there is no set of facts that could support a claim for defamation based on Maddow's statement." (ER 17.) At a minimum, Herring should have been granted leave to amend to plead the facts set forth in Herring's evidence.

III. CONCLUSION

Herring respectfully requests that the Court reverse the District Court's decision granting Defendants' anti-SLAPP motion and remand the case for further proceedings.

DATED: February 17, 2021 MILLER BARONDESS, LLP

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(g)(1), the attached brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) and 9th Cir. R. 32-1(a) because it contains 5,765 words, as indicated by Microsoft Word word count, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it uses a proportionally spaced Times New Roman typeface in 14-point font.

DATED: February 17, 2021 MILLER BARONDESS, LLP

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 1999 Avenue of the Stars, Suite 1000, Los Angeles, CA 90067.

On February 17, 2021, I served true copies of the following document(s) described as:

HERRING NETWORK'S REPLY

on the interested parties in this action as follows:

BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on February 17, 2021, at Los Angeles, California.

/s/ Tisarai S. Johnson
Tisarai S. Johnson

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