20-55579

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERRING NETWORKS, INC.

Plaintiff and Appellant,

v.

RACHEL MADDOW; COMCAST CORPORATION; NBCUNIVERSAL MEDIA, LLC; MSNBC CABLE L.L.C.

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

APPELLANT'S OPENING BRIEF

FILED CONCURRENTLY WITH EXCERPTS OF THE RECORD

MILLER BARONDESS, LLP
Louis R. Miller (SBN 54141)
Amnon Z. Siegel (SBN 234981)
Colin H. Rolfs (SBN 280654)
Justin P. McCarthy (SBN 317169)
1999 Avenue of the Stars, Suite 1000
Los Angeles, California 90067
Telephone: (310) 552-4400
Facsimile: (310) 552-8400
Attorneys for Plaintiff – Appellant

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant Herring Networks, Inc. states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

DATED: October 12, 2020

MILLER BARONDESS, LLP

By: /s/ Amnon Z. Siegel
AMNON Z. SIEGEL
Attorneys for Appellant Herring Networks, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL RULES

OTHER AUTHORITIES

INTRODUCTION AND SUMMARY OF ARGUMENT

On July 22, 2019, the most popular show on MSNBC—The Rachel Maddow Show—told millions of viewers that One America News Network ("OAN") "really literally is paid Russian propaganda."

This factual assertion is provably false. OAN is not paid by Russia to run any content, including alleged pro-Russia content. OAN and its owner, Herring Networks, Inc. ("Herring"), are wholly owned and funded by the Herring family who reside in San Diego, California.

The lead-in for Rachel Maddow's false claim was a highly questionable article from an online publication, the *Daily Beast*. The article had reported that a single, low-level OAN employee also wrote articles for Sputnik News ("Sputnik"), a news agency affiliated with the Russian government. This employee never had any editorial control over OAN's content. And he had merely been a freelancer for Sputnik, writing summaries about global financial news for $40 per story.

This was hardly a story worthy of prime-time coverage on MSNBC's most popular show. But Maddow used the article to make a claim that went well beyond what was reported by the *Daily Beast*—that OAN, a cable television news network, is paid Russian propaganda. Maddow's false statement is particularly harmful to an American news agency like OAN and constitutes defamation per se. Claims of payment from Russia to run pro-Russian content is disastrous to OAN's brand.

OAN asked Maddow to retract her statement. She refused. So, Herring filed a single claim for defamation against Maddow, Comcast Corporation, NBCUniversal Media, LLC, and MSNBC Cable L.L.C. ("Defendants").

Defendants moved to dismiss under California's anti-SLAPP statute, California Code of Civil Procedure § 425.16. Defendants argued that Maddow's comment was protected under the First Amendment because it was a statement of opinion, not fact. They claimed Maddow was just being hyperbolic.

The law provides that if a statement is reasonably susceptible to different interpretations, one of which is defamatory, resolution of whether the statement is fact or opinion must be by a jury. *Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002); *Campanelli v. Regents of Univ. of Cal.*, 44 Cal. App. 4th 572, 578 (1996).

A reasonable viewer could easily have understood Maddow's statement as one of fact, not opinion. To begin with, the claim that OAN is paid Russian propaganda can be proven false. Either OAN is paid by the Russian government to produce favorable content, or it is not. It is not. And unlike other parts of her story, Maddow did not couch this false statement as opinion. Instead, she emphasized its truth by stating that OAN "really literally" is paid Russian propaganda.

Herring pleaded these facts in its Complaint establishing that Maddow's statement could have been understood as factual. Herring also submitted substantial

evidence demonstrating that the context of Maddow's statement supported interpreting it as factual, including:

- Examples showing Maddow consistently used "literally" on her show to emphasize statements of fact;
- Maddow's characterization of her show as providing "good, true stories," establishing her show was not merely political opinion;
- A comment from a real 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
- An expert report by Stefan Th. Gries, Ph.D., a linguistics professor at the University of California, Santa Barbara.

Professor Gries analyzed Maddow's entire segment, identifying and analyzing opinion-markers (including words, tone, and cadence) used by Maddow. Professor Gries also analyzed the use of the term "really literally" in American talk shows. His linguistic analysis supports the conclusion that an average viewer would have interpreted Maddow's statement as factual. In fact, Professor Gries opined, among other things, that the average viewer likely would *not* have understood Maddow's statement to be opinion.

After Herring's opposition was filed, one of Maddow's colleagues at MSNBC, Chris Matthews ("Matthews"), reiterated Maddow's statement on his own show by claiming that OAN was "Russian-owned." Herring submitted this statement by *ex parte* application because it showed that one of Maddow's own colleagues had taken her comment literally.

The District Court, however, drew inferences against Herring, refused to consider any of Herring's evidence, and granted Defendants' anti-SLAPP Motion, dismissing Herring's case with prejudice. This was error for four reasons.

First, the District Court wrongly excluded Herring's evidence on the basis that it was outside the Complaint. The anti-SLAPP statute expressly allows a plaintiff to submit evidence. This Court has repeatedly held that the anti-SLAPP statute applies in federal court, absent a conflict with the Federal Rules of Civil Procedure. There is no such conflict here. The District Court should have considered Herring's evidence.

Second, the District Court misapplied well-established law that where a statement can be construed as either fact or opinion, "the issue *must* be left to the jury's determination." *Good Gov't Grp. of Seal Beach, Inc. v. Superior Court*, 22 Cal. 3d 672, 682 (1978) (emphasis added). The District Court recognized this standard but did not adhere to it. The District Court discounted Maddow's own words—"really literally"—and other contextual factors demonstrating that Maddow's statement could be construed as factual.

Third, even if Maddow's statement was a hyperbolic opinion, it was still actionable defamation. In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the U.S. Supreme Court held that statements of opinion can be defamatory if they imply false facts. Here, assuming *arguendo* Maddow was being hyperbolic when she said that

OAN was "paid Russian propaganda," this still implied a connection between OAN's news content and the Russian government, when in truth there was none.

Finally, if Herring was prohibited from relying on evidence outside the pleadings (which Herring contends is incorrect), then the District Court should have allowed Herring to amend its Complaint. The District Court instead wrongly dismissed Herring's very first pleading, with prejudice.

For all of these reasons, Herring respectfully asks this Court to reverse the dismissal of Herring's defamation claim and remand for further proceedings.

JURISDICTIONAL STATEMENT

District Court Jurisdiction. The District Court properly exercised diversity jurisdiction under 28 U.S.C. § 1332(a) because Herring's claim is between citizens of different states and the amount in controversy exceeds $75,000. (Excerpts of Record ("ER") 233 ¶ 13.)

Appellate Jurisdiction. This Court has jurisdiction to review the District Court's order granting Defendants' anti-SLAPP motion under 28 U.S.C. § 1291, as the order was a final decision of the District Court on the merits of Herring's Complaint.

Timeliness of Appeal. The District Court issued its order granting Defendants' anti-SLAPP motion with prejudice on May 22, 2020. (ER 1.) On

June 2, 2020, Herring timely filed a Notice of Appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A). (ER 20.)

STATUTORY AUTHORITIES

California Code of Civil Procedure § 425.16(b)(1)-(2)

> (b)(1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.
>
> (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.

ISSUES PRESENTED

1. This Court has held that the anti-SLAPP statute applies in federal court, unless it conflicts with the Federal Rules of Civil Procedure. The anti-SLAPP statute expressly allows a plaintiff to submit evidence in opposition to an anti-SLAPP motion. Did the District Court err in holding that Herring was precluded from submitting evidence to oppose Defendants' anti-SLAPP motion?

2. Where a statement can be construed as either fact or opinion, the issue must be left to the jury's determination. Maddow said on her show that OAN "really literally is paid Russian propaganda," which the District Court found was in itself susceptible of being interpreted as a statement of fact. Did the District Court

err in concluding Maddow's statement could nevertheless only be construed as opinion?

3. The U.S. Supreme Court has held that an opinion that implies a false assertion of fact is not protected by the First Amendment. Herring contended that, even if Maddow's statement was hyperbolic, it still implied a false connection between OAN's content and the Russian government. Did the District Court err in concluding Maddow's statement was not actionable because she accurately presented the *Daily Beast* article?

4. Leave to amend a pleading should be liberally granted. The District Court did not consider the evidence submitted by Herring in opposition to Defendants' anti-SLAPP motion because it was outside the Complaint. Did the District Court err in not allowing Herring to amend its Complaint to allege, among other things, the facts borne out by that evidence?

STATEMENT OF THE CASE

A. The Complaint

The Herring family launched OAN on Independence Day, July 4, 2013, to deliver timely national and international news 24 hours a day. (ER 233 ¶ 16.) OAN is owned and operated by Herring, which is wholly owned by the Herring family. (ER 234 ¶ 18.) The Herrings, who reside in San Diego, California, alone own and finance OAN. (*Id.*)

Defendant Comcast Corporation ("Comcast") is both the largest cable provider in the United States and a major entertainment company with numerous cable and broadcast channels. (ER 234 ¶ 19.) Among its news channels is MSNBC, which Comcast owns and operates through its subsidiaries, Defendants NBCUniversal Media, LLC and MSNBC Cable L.L.C. (*Id.*)

Despite OAN's rapid rise and growing audience, Comcast has refused to carry OAN on its cable service. (ER 234 ¶ 20.) On July 15, 2019, Charles Herring emailed the President of Content Acquisition for Comcast. (ER 234 ¶ 21.) Charles Herring stated his concern that Comcast is refusing to carry OAN because Comcast opposes distributing another conservative news channel to counter Comcast-owned MSNBC. (*Id.*)

Exactly one week after that email, the most popular show on MSNBC, The Rachel Maddow Show, ran a hit piece on OAN. (ER 234 ¶ 22.) This is what happened:

1. Kristian Rouz

One of OAN's employees is a young man named Kristian Rouz ("Rouz"). (ER 234 ¶ 23.) Rouz collects and analyzes articles from other sources and writes articles based on those sources for OAN. (*Id.*) Rouz's articles go through OAN's editorial process before they are published. (*Id.*) Rouz does not have decision-making authority with respect to the content that is aired on OAN. (*Id.*)

Rouz was born in the Ukraine. (ER 235 ¶ 24.) When he moved to the United States, he had no friends or family here. (*Id.*) To make ends meet, Rouz began writing articles for Sputnik in 2014. (*Id.*) Rouz's work for Sputnik has no relation to his work for OAN, and Herring had no knowledge of Rouz's outside freelance work for Sputnik. (ER 235 ¶ 26.) Rouz has never been an employee of Sputnik. (*Id.*) He worked as a freelancer for Sputnik, receiving approximately $40 an article. (*Id.*)

Rouz chose the topics and viewpoints of the articles he wrote for Sputnik. (ER 235 ¶ 24.) Those articles provided updates about various topics in global economics—e.g., "Japan Q1 GDP Beats Expectations Despite Weak Consumer Spending." (ER 235 ¶¶ 24 -25.)

On July 22, 2019, the *Daily Beast*—an online publication—published an article entitled, "Trump's New Favorite Channel Employs Kremlin-Paid Journalist." (ER 235 ¶ 27.) The article identified Rouz as "on the payroll" of Sputnik. (ER 236 ¶ 29.) But the article did not identify any facts tying Rouz's work for OAN to Sputnik or the Russian government. (*Id.*) This is because there are no such facts. (*Id.*)

2. Maddow's False Statement That OAN "Really Literally Is Paid Russian Propaganda"

Maddow is the host of her own show on MSNBC, The Rachel Maddow Show. (ER 236 ¶ 30.)

On July 22, 2019, Maddow's show opened with a segment about OAN. (ER 237 ¶ 35, Ex. A.) This was the show's "A-block," which is the headlining and typically longest segment of the show. (ER 236 ¶ 34.) Maddow began by discussing the article from the *Daily Beast*. (ER 237 ¶ 37.) But Maddow also made a new unsupported statement not found anywhere in the article: "In this case, the most obsequiously pro-Trump right wing news outlet in America *really literally is paid Russian propaganda*." (ER 237 ¶ 38 (emphasis added).)

This statement was false. OAN has taken no money outside the Herring family whatsoever, and none of OAN's content is paid for or influenced by the Russian government. (ER 237 ¶ 39.) Neither Maddow nor anyone else at MSNBC or Comcast made any effort to reach out to OAN for comment prior to airing her segment. (ER 246, Ex. B.)

On July 25, 2019, OAN wrote to Comcast and Maddow pursuant to California Civil Code § 48, demanding a retraction. (ER 237 ¶ 40, Exs. A, B.) Defendants refused. (ER 237 ¶ 41.)

Herring filed its Complaint on September 9, 2019, asserting a single claim for defamation.

B. Defendants' Anti-SLAPP Motion

Defendants filed a special motion to strike under California's anti-SLAPP statute on October 21, 2019. (ER 191-218.) Defendants argued that Maddow's comment was protected opinion. (ER 204.)[1]

Herring opposed Defendants' motion. (ER 95.) Herring argued that a reasonable viewer could have understood that Maddow meant what she said—that OAN is literally paid by Russia for favorable content. (ER 103.) Herring's opposition was also accompanied by four pieces of evidence further demonstrating why reasonable viewers would have understood Maddow's statement as factual. (ER 126, 141-161, 172, 182, 186.)

First, Herring submitted transcripts from some of Maddow's other shows demonstrating that she regularly uses "literally" in its primary (non-hyperbolic) sense—e.g., "It's *literally* an emergency, a formally declared emergency . . . ." (ER 172 (emphasis added).) These transcripts were offered to show that Maddow's audience would not have understood her assertion that OAN "really *literally* is paid Russian propaganda" as hyperbole.

[1] Defendants also argued that Maddow's comment was not capable of a defamatory meaning and that even if Maddow's comment was not protected opinion, it was substantially true. (ER 214-218.) The District Court did not rule on these arguments.

Second, Herring submitted an interview of Maddow countering Defendants' contention that The Rachel Maddow Show was merely a political opinion show. In the interview, Maddow explained that her show's mantra "is increasing the amount of useful information in the world." (ER182.) She also said that she hopes her viewers acquire "good, true stories about what's going on and why it matters" and said:

> I'm not trying to get anybody elected. I'm not trying to get any policy passed. I'm not trying to get people to call their member of Congress . . . . I'm trying to explain what's going on in the world.

(ER 186.)

Third, Herring submitted a customer message it received the same day Maddow's segment aired saying that OAN is "a propaganda tool for Russian oligarchs," showing that this viewer took Maddow's assertion as true. (ER 126.)

Finally, Herring submitted Professor Gries' expert report. (ER 141-161.) In his report, Professor Gries explained that listeners rely on certain criteria to evaluate whether a statement is fact or opinion—e.g., modal verbs or adverbs, grammatical construction, and intonation. Using these and other criteria, Professor Gries conducted a linguistic analysis of Maddow's segment. (ER 142-161.) He determined that "there are virtually no lexical, grammatical, or intonational characteristics" that would lead a viewer to conclude that Maddow's statement was a statement of opinion. (ER 151.)

In their reply, Defendants contended that the District Court cannot consider Plaintiff's evidence at all, since their anti-SLAPP motion was styled as a pleadings challenge. (ER 84-85.)

C. Herring's *Ex Parte* Application To Supplement The Record

After briefing on the anti-SLAPP motion was completed, on December 9, 2019, one of Maddow's colleagues at MSNBC, Chris Matthews, falsely asserted on air that OAN is "Russian-owned." (ER 71.)

The statement was made during a story about Rudolph Giuliani and OAN. (ER 68.) During the segment, Matthews stated:

> [Rudolph Guiliani's] travels were part of a television show for OAN, a conservative network that Trump often praises, *that's Russian owned by the way*.

(*Id.*)

After Matthews initially made this false claim, Matthews then said (apparently reacting to someone off-screen), "[m]aybe it's not Russian owned, but of that point of view." (*Id.*) Then, immediately after a commercial break, Matthews issued a retraction and corrected the record:

> First of all, that OAN the news to the right of Fox News Network. I thought that was Russian owned, it's owned by an American so I'll straighten that out right now. I just did, anyway.

(*Id.*)

Herring filed an *ex parte* application to supplement the record with evidence of Matthews' statement. (ER 53-62.) The application argued that because one of

Maddow's own colleagues at MSNBC understood her claim literally and reiterated it, Defendants could not prove as a matter of law that no reasonable person could construe Maddow's statement as a statement of fact. (ER 56.)

D. The Court's Order Dismissing Herring's Claim With Prejudice

On May 22, 2020, the District Court granted Defendants' motion with prejudice, denying leave to amend. (ER 1.)

The District Court declined to consider any of the evidence submitted by Herring. (ER 5.) Relying on *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, 890 F.3d 828 (9th Cir. 2018), the District Court reasoned that because "Defendants' Motion is analogous to a motion to dismiss, 'the motion must be treated in the same manner as a motion under Rule 12(b)(6).'" (*Id.*)

On the merits of Herring's defamation claim, the District Court correctly found that Maddow's assertion that OAN is "literally paid Russian propaganda" was in itself susceptible to being proven true or false. (ER 16.) As the District Court recognized, "this factor weighs in favor of a finding that viewers could conclude that the statement implied an assertion of objective fact." (*Id.*)

The District Court nevertheless held that the statement was such that "a reasonable factfinder could only conclude that the statement was one of opinion not fact." (*Id.*)

Despite refusing to consider any of Herring's evidence, the District Court dismissed Herring's claim with prejudice, stating: "there is no set of facts that could support a claim for defamation based on Maddow's statement." (ER 17.)

STANDARD OF REVIEW

This Court reviews *de novo* the District Court's decision to grant a motion to strike under California's anti-SLAPP statute. *Price v. Stossel*, 620 F.3d 992, 999 (9th Cir. 2010). To defeat an anti-SLAPP motion, a plaintiff need only show "that the challenged claims have *minimal merit*." *Dickinson v. Cosby*, 37 Cal. App. 5th 1138, 1155 (2019) (emphasis added).

The denial of leave to amend is reviewed for abuse of discretion. *United States v. Corinthian Colls.*, 655 F.3d 984, 995 (9th Cir. 2011). When that denial is based on futility of amendment, the question of futility of amendment is reviewed "de novo." *United States v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1172 (9th Cir. 2016).

ARGUMENT

I. The District Court erred in excluding Herring's evidence.

The District Court "decline[d] to consider the declarations and exhibits submitted by Plaintiff . . . and the *Hardball* video, as this information is not attached to the complaint, relied on by the complaint, or judicially noticeable." (ER 6.) This was error.

The anti-SLAPP statute provides that "[i]n 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." Cal. Civ. Proc. Code § 425.16(b)(2) (emphasis added). The District Court was required to follow this rule.

In *United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963 (9th Cir. 1999), this Court conducted an *Erie* analysis and determined that a motion pursuant to California's anti-SLAPP statute may be brought in federal court.[2] This holding was based on the Court's finding that there was no "direct collision" between Section 425.16(b) and the Federal Rules of Civil Procedure. *Id.* at 972 (citation omitted).

Subsequently, some provisions of the anti-SLAPP statute have been held to conflict with the Federal Rules of Civil Procedure and thus be inapplicable in federal court. For example, this Court has held that the mandatory discovery stay of Section 425.16(g) conflicts with the discovery-allowing aspects of Rule 56, and the discovery stay thus does not apply in federal court. *See Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001).

[2] The Second Circuit recently disagreed with *Newsham* that California's anti-SLAPP statute applies in federal court. *See La Liberte v. Reid*, 966 F.3d 79, 87 (2d Cir. 2020).

As established by this line of cases, California's anti-SLAPP provisions apply in courts in this Circuit, except where there is a conflict with the Federal Rules of Civil Procedure. No court has ever held that there is a conflict between these rules and Section 425.16(b)(2)'s express provision that "opposing affidavits" "shall" be considered. There is no such conflict. Herring should thus have been allowed to submit evidence to oppose Defendants' anti-SLAPP motion.

In excluding Herring's evidence, the District Court relied on *Planned Parenthood*. This reliance was misplaced and took a line from the decision out of context, ignoring the broader *Erie* analysis governing application of the anti-SLAPP statute in federal courts.

In *Planned Parenthood*, the district court denied an anti-SLAPP motion. 890 F.3d at 831. On appeal, the defendants argued that "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." *Id.* at 832.

Disagreeing with the defendants, this Court held 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. 890 F.3d at 833 (emphasis added). Analogizing to *Metabolife*, the Court reasoned:

> Requiring a presentation of evidence without accompanying discovery would improperly transform the motion to strike under the anti-

> SLAPP law into a motion for summary judgment without providing any of the *procedural safeguards* that have been firmly established by the Federal Rules of Civil Procedure. That result would effectively allow the state anti-SLAPP rules to usurp the federal rules.

Id. at 833-34 (emphasis added). To prevent such a conflict, the Court said 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 District Court here went too far. It incorrectly inferred from this decision that a plaintiff who is not *required* to submit evidence to oppose an anti-SLAPP motion challenging the legal sufficiency of its complaint is also *prohibited from submitting* evidence in opposition to an anti-SLAPP motion. (ER 4-6.) But *Planned Parenthood* did not consider this question. The Court only resolved whether a plaintiff was *required* to submit evidence. *See* 890 F.3d at 833-34 ("Plaintiffs were not *required* to present prima facie evidence"; "plaintiff can properly respond *merely* by showing sufficiency of pleadings, and there's no *requirement* for a plaintiff to submit evidence" (emphasis added)).

In fact, the conflict identified in *Planned Parenthood* was between the state anti-SLAPP requirement that a plaintiff must submit evidence to support its claim and the "procedural safeguards" established by the Federal Rules of Civil Procedure that assure plaintiffs the right to discovery before facing a dismissal on summary judgment for lack of evidence. *See, e.g.*, Fed. R. Civ. P. 56(d) ("If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot

present facts essential to justify its opposition, the court may: . . . (2) allow time to obtain affidavits or declarations or to take discovery . . . .").

Where a plaintiff submits evidence, as here, it does not conflict with these federal procedural safeguards for a court to consider that evidence. Plaintiff has not lost any protections afforded by Rule 56 or any other Federal Rule of Civil Procedure. The portion of Section 425.16(b)(2) that provides that "opposing affidavits" "shall" be considered should therefore apply in federal court. To hold otherwise would be to read *Planned Parenthood* as deciding an issue never raised, while ignoring this Court's established *Erie* jurisprudence regarding the anti-SLAPP statute.[3]

Worse, it would improperly prejudice plaintiffs' efforts to avoid summary dismissal of their claims in the anti-SLAPP context. The District Court erred in refusing to consider Herring's evidence.

[3] Defendants argued below that this provision "does conflict, because courts cannot consider evidence outside the pleadings that is not judicially noticeable or incorporated by reference." (ER 50.) But this contention—that Section 425.16(b)(2) conflicts with Federal Rule of Civil Procedure 12(b)(6)—finds no support in *Planned Parenthood*, which concerned only a conflict with Rule 56. In fact, the argument that Section 425.16 conflicts with Rule 12(b)(6) has been advanced as a reason to rethink Circuit precedent like *Planned Parenthood* and find that the anti-SLAPP statute should not apply in federal court. *See Travelers Cas. Ins. Co. of Am. v. Hirsh*, 831 F.3d 1179, 1183 (9th Cir. 2016) (Conc. Op.) (arguing "our caselaw is wrong" in allowing anti-SLAPP motions in federal court because Section 425.16 conflicts with Rule 12). If this argument were accepted, it would mean that Defendants' anti-SLAPP motion was procedurally improper and should not have been considered.

II. The District Court erred in dismissing Herring's defamation claim because a reasonable viewer could have understood Maddow's statement as factual.

A court may find a statement to be opinion protected by the First Amendment only if it can "declare as a matter of law that *no reasonable person* could construe [the statement] as provably false." *Manufactured Home Cmtys., Inc. v. County of San Diego*, 544 F.3d 959, 964 (9th Cir. 2008) (emphasis added); *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"); *Flowers v. Carville*, 310 F.3d 1118, 1128 (9th Cir. 2002) ("[I]f a statement is "'susceptible of difference constructions, one of which is defamatory, resolution of the ambiguity is a question of fact for the jury.'"" (citation omitted)).

To make this determination, courts examine the "totality of the circumstances." *Dickinson*, 37 Cal. App. 5th at 1163. As stated by the District Court, the analysis begins with these factors:

(1) the statement in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work;

(2) the specific context and content of the statement, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation; and

(3) whether the statement itself is sufficiently factual to be susceptible of being proved true or false.

(ER 7.) *See Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053 (9th Cir. 1990) (considering whether statement used "loose, figurative or hyperbolic language," the "general tenor" of the publication, and whether statement was "sufficiently factual to be susceptible of being proved true or false" (citation omitted)).

An examination of these factors establishes that a reasonable viewer *could* have understood Maddow's statement that OAN "really literally is paid Russian propaganda" as a factual assertion. The allegations of the Complaint demonstrated why Maddow's statement could have been understood as factual, and the evidence submitted by Herring further confirmed that Maddow's statement could be interpreted as factual. The District Court erred in taking this question away from the jury and itself deciding, as a matter of law, that Maddow's statement was protected opinion. *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).

A. Maddow's statement is susceptible of being proved true or false.

There is no dispute that the factor—whether Maddow's statement was susceptible of being proved true or false—weighs in favor of concluding Maddow's statement was factual.

The statement that OAN is "paid Russian propaganda" is readily susceptible to an interpretation that makes it provably false. Either OAN is paid by Russia for favorable coverage, or it is not. *See Unsworth v. Musk*, No. 2:18-cv-08048-SVW-JC, 2019 WL 4543110, at *8 (C.D. Cal. May 10, 2019) (tweet that cave diver was a "pedo guy" was "susceptible of being proved true or false because [he] either is a pedophile or he is not and, if he were, evidence could prove it"). As a matter of provable fact, OAN is *not* paid by Russia for biased coverage. (ER 237.) And none of OAN's content is influenced by the Russian government. (*Id.*)

Even the District Court agreed, concluding that "the statement that OAN is 'literally paid Russia propaganda' is 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.)

B. The specific context of Maddow's statement shows it was not opinion.

In considering another factor—the specific context of the statement—courts look to the existence of "figurative or hyperbolic language," *Unelko Corp.*, 912

F.2d at 1053, and "whether the statement was cautiously phrased in terms of the author's impression." *Dickinson*, 37 Cal. App. 5th at 1164.

Maddow did not cautiously phrase her statement that OAN "is paid Russian propaganda." She did not say "in my opinion" or "in my view." *See Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1245 (D.C. 2016) (noting, in rejecting argument that statements in article were opinion, that the author "does not employ language normally used to convey an opinion, such as 'in my view,' or 'in my opinion,' or 'I think'"); ER 107 (concluding that Maddow's tone, cadence, and lack of use of opinion-markers such as "I mean" suggest that her sentence would be understood as factual.)

Maddow emphasized that OAN "*really literally* is paid Russian propaganda." The definition of "literally" is, "used to emphasize the *truth and accuracy* of a statement or description." *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/literally (last visited Nov. 7, 2017) (emphasis added). And "really" is defined to mean, "in reality," "truly," and "unquestionably." *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/really (last visited Nov. 7, 2017). Maddow used both of these truth-emphasizers together.

The District Court discounted Maddow's use of "literally" because, according to the District Court, "the *alternative* definition [of literally] is: 'in effect

: Virtually — used in an exaggerated way to emphasize a statement or description that is not literally true or possible.'" (ER 43 (emphasis added).) The District Court should not so readily have adopted the "alternative" definition of "literally" as the only reasonable interpretation of Maddow's statement. *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).

On her show, Maddow ordinarily uses "literally" in its primary—not alternative—sense to emphasize the truth of a statement:

- Meanwhile, today the Trump administration tried to push through one of the most controversial judicial nominees of Trump's time in office. They *literally* nominated him to the job two days ago . . . ." (ER 168 (emphasis added).)

- "It's *literally* an emergency, a formally declared emergency . . . ." (ER 169 (emphasis added).)

- "[T]he U.S. military [is] apparently diverting C17 cargo flights to stop at President Trump's golf course in Scotland, *literally* to have U.S. airmen stay at his golf resort . . . ." (ER 176 (emphasis added).)

- "They are *literally* de-funding the day care center at Andrews Air Force Base." (ER 179 (emphasis added).)

A reasonable viewer of her show therefore would have been conditioned by Maddow to believe that her use of the word "literally" preceded an assertion of fact, and was her way of emphasizing the truth of the statement. This supports the conclusion that a jury, not the District Court, should resolve these factual issues.

And it undermines Defendants' contention that Maddow's assertion that OAN "really literally is paid Russian propaganda" was metaphorical hyperbole. *See Dickinson*, 37 Cal. App. 5th at 1157 (considering evidence that defendant "acted in conformance with his general practices" when issuing press release). The District Court improperly refused to consider this evidence.

Maddow, moreover, did not just say "literally"—she said "*really* literally," eliminating any doubt she meant literally in its primary sense. Professor Greis' analysis, in fact, confirmed that Maddow's use of "really literally" further operated to commit her to the truth of her claim that OAN is "paid Russian propaganda."

As Professor Gries explained, linguists today rely on "large databases of texts produced in authentic/natural speech situations" (called "corpora")—which are better tools than dictionaries for determining how words are actually used in real speech situations. (ER 152.) Professor Gries thus conducted a search for "really literally" in the Corpus of Contemporary American English. (ER 155.) He 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.* (emphasis added).)

This is not the kind of analysis the District Court could have conducted unaided, which is why Professor Gries' opinion was proper and should have been considered. *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"). Professor Greis' report also details the growing use of corpus linguistic methods in legal scholarship and practice. (ER 152.)

The District Court nevertheless disregarded Professor Gries' analysis, commenting during the hearing: "[Y]ou know, it's my call on this issue, and I found the expert's statements to be largely irrelevant, frankly." (ER 35.) Professor Gries' report was not irrelevant. Professor Gries is a foremost expert in precisely the areas involved. He is the second most cited cognitive linguist (the study of how language interacts with cognition) and the sixth most widely-cited living corpus linguist (the study of language in samples of real-world text). (ER 128.)

Professor Gries' research about the phrase "really literally," and his report generally, was probative to how a reasonable viewer would interpret Maddow's statement; and it was error for the District Court to ignore it. His analysis confirmed that Maddow used explicitly non-figurative language—meaning that a reasonable viewer could have understood Maddow's statement as factual.

Nor was the District Court correct when it found that the "basis for Maddow's allegedly defamatory statement is clearly the story from the *Daily Beast*, which she presents truthfully and in full." (ER 12.) Maddow went beyond anything in the *Daily Beast* article when she stated that OAN was paid Russian

propaganda. Defendants are not shielded from liability because Maddow discussed some facts reported by the *Daily Beast* before making the false statement at issue. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) ("[T]he test of libel is not quantitative; a single sentence may be the basis for an action in libel . . . ." (alteration in original) (citation omitted)); *Agard v. Hill*, No. CIV 2-10-cv-0323-GEM-JFM (PS), 2010 WL 1444580, at *6 (E.D. Cal. Apr. 9, 2010) (finding negative review constituted actionable defamation, even though it contained "multiple uncontested facts," because it went beyond any disclosed facts).

The District Court interpreted Maddow's use of the *Daily Beast* article as providing "the factual basis for her statement." (ER 12.) But Maddow's use of the *Daily Beast* article cuts the other way. By embedding her statement that OAN was "paid Russian propaganda" amongst facts from the *Daily Beast* and using expressly non-figurative language, Maddow led viewers to believe that her false statement about OAN was just another fact. That Maddow surrounded this false factual statement with other facts from the *Daily Beast* article made it more likely viewers would take the claim as a true fact. Maddow's statement was thus not protected opinion based on disclosed facts (certainly not as a matter of law). *See Competitive Enter. Inst.*, 150 A.3d at 1245 (rejecting that statement was protected opinion based on disclosed facts because "a jury could reasonably interpret [the]

article as asserting as *fact* that the CRU emails 'show[]' that [the scientist] engaged in deceptive data manipulation and academic and scientific misconduct").

The District Court relied on *Cochran v. NYP Holdings, Inc.*, 58 F. Supp. 2d 1113 (C.D. Cal. 1998). (ER 14.) But *Cochran* was very different. In *Cochran*, an opinion columnist stated: "history reveals that [Johnnie Cochran] will say or do just about anything to win, typically at the expense of the truth." *Id.* at 1116. All parties conceded that "history," as used in the column, referred only to Cochran's defense in the O.J. Simpson trial. *Id.* at 1116-17; *see also id.* at 1122.

The court concluded that this statement was opinion because the O.J. Simpson trial "was televised live to the public, widely viewed, and has been thoroughly critiqued and debated in the public arena" and "[a]s a result, there exists a shared public knowledge of the trial . . . ." 58 F. Supp. 2d at 1122-23. In that context, readers would understand that the statement in the recognizable opinion column was not reporting any new, independent facts about the trial, but only providing the *columnist's opinion* based on the highly-publicized O.J. Simpson trial. *Id.*

Unlike Cochran, Maddow was not commenting in an opinion column on a shared public experience people were already familiar with. Maddow was purporting to tell her viewers something they did not already know about OAN based on a new, same-day article from the *Daily Beast*. Worse, she used some

facts from the *Daily Beast* article to make her false statement look more like the truth.

C. The broad context demonstrates that a reasonable viewer could have understood Maddow's statement as factual.

Another factor—the broad context of Maddow's statement—also weighs in favor of concluding that a reasonable viewer could have understood Maddow's statement as factual. Maddow's show is not mere political punditry. In an interview with *The New York Times Magazine*, Maddow said that her show's mantra "is increasing the amount of useful *information* in the world" (ER 182 (emphasis added)); and that she hopes her viewers acquire "good, *true* stories about what's going on and why it matters" (ER 187 (emphasis added)). She contends that her show is factual and unbiased:

> I'm not trying to get anybody elected. I'm not trying to get any policy passed. I'm not trying to get people to call their member of Congress . . . . *I'm trying to explain what's going on in the world*.

(*Id.* (emphasis added).) The District Court failed to consider this evidence that viewers watch Maddow's show for factual information. (ER 4-6.)

The District Court also mistakenly drew inferences against Herring when it concluded that because "Maddow had inserted her own colorful commentary into and throughout the segment," "[f]or her to exaggerate the facts and call OAN Russian propaganda was consistent with her tone up to that point" so "a reasonable viewer would not take the statement as factual given this context." (ER 15.)

Unelko Corp. is illustrative of the District Court's error. There, Unelko sued over a statement on "60 Minutes" that its product Rain-X "didn't work." 912 F.2d at 1050. The Court observed that the overall tenor of the show was "humorous and satirical" and "characterized by hyperbole." *Id*. at 1054.[4] The Court nevertheless reversed an order dismissing Unelko's defamation claim because the "humorous and satirical nature of [the segment] does not negate the impression that [the speaker] was making a factual assertion about Rain-X's performance." *Id*. Here as well, the fact that humor was used in certain portions of Maddow's show does not negate the impression that she was making a factual assertion about OAN when she called it "paid Russian propaganda."

Moreover, the District Court failed to appreciate that Maddow used cues throughout her segment to distinguish her colorful commentary from her factual assertions. These cues flagged her statement that OAN is "paid Russian propaganda" as factual, not commentary.

Professor Gries explained that listeners rely on many criteria to evaluate whether a statement is fact or opinion—e.g., modal verbs or adverbs, grammatical construction, and intonation. (ER 143.) He conducted an analysis of Maddow's segment using these and other criteria. (ER 145.) This analysis went beyond

[4] Indeed, the speaker of the defamatory statement, the late Andy Rooney, was known for his unique style of satire, often involving whimsical commentary on trivial everyday issues.

Maddow's words and also included computer measurements of how Maddow's intonation (i.e., the rise and fall of her voice) was different when she was relaying opinion, rather than facts. (*Id*.)

Professor Gries found that Maddow consistently used markers—such as "I mean" or "I guess" and specific intonations—to distinguish her opinions and commentary from factual information. (ER 151.) But Maddow did not use any of these opinion-markers when she claimed that OAN is "paid Russian propaganda." (*Id.*) As Professor Gries put it: "[i]n a highly-structured and transparent way, Maddow separates informational/factual reporting and opinion *in a way that marks [the sentence at issue] as factual*." (*Id.* (emphasis added).)

In other words, Maddow's colorful commentary and tone elsewhere do not suggest her statement that OAN is "Russian propaganda" was hyperbolic opinion. To the contrary, it is precisely the contrast between Maddow's opinion commentary and her statement that OAN is "Russian propaganda" that evidences that this statement could—and was likely to—have been understood as factual.[5]

Professor Gries opined that "it is very unlikely that an average or reasonable/ordinary viewer would consider the sentence in question to be a statement of opinion." (ER 158.) In the context of an anti-SLAPP motion, courts

[5] The District Court took judicial notice of Maddow's entire segment and so should have taken account of this contrast between Maddow's opinion commentary and her claim that OAN was "Russian propaganda.".

must accept evidence favorable to the plaintiff, such as Professor Gries' declaration, as true. *See HMS Capital, Inc. v. Lawyers Title Co.*, 118 Cal. App. 4th 204, 212 (2004) ("[Courts] accept as true the evidence favorable to the plaintiff and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." (citation omitted)).

The District Court, however, did not even consider this evidence. It's for a jury to decide.

The District Court also erred in relying on *Partington v. Bugliosi*, 56 F.3d 1147 (9th Cir. 1995), which is not at all similar to this case. In *Partington*, a defense attorney involved in the Palmyra Island murder cases claimed he was defamed by a book called *And The Sea Will Tell* about the cases and the made-for-TV movie based on that book. *Id*. at 1149-50. The author of the book was another of the defense lawyers involved in the cases. *Id.* at 1149. The Court observed that "lawyers who write popular books, and particularly trial lawyers, are not known for their modesty; one would generally expect such authors to have a higher opinion of their own performance than of the professional abilities exhibited by other counsel." *Id*. at 1153-54. Thus, the lawyer's book was presented in a context "in which a reader would be likely to recognize that the critiques of the judges, witnesses, and other participants in the two trials … generally represent the highly

subjective opinions of the author rather than assertions of verifiable, objective facts." *Id*. at 1154.

Maddow, by contrast, was not involved in the underlying story and was not talking up her own prowess by means of subjective opinions about the inferior performance of others. Maddow is a host on a cable news channel reporting on a story. She admits that she wants her viewers to acquire "good, true stories about what's going on and why it matters." (ER 187.) Viewers would not recognize that her statements represented her subjective opinions. The circumstances here are very different than they were in *Partington*.

Finally, in *Unelko Corp.*, this Court found significant that the statement at issue "was presented as fact *and understood as such by several viewers who wrote to CBS*." 912 F.2d at 1054 (emphasis added). Here too, on the same day that Maddow's segment aired, OAN received viewer comments through its website, including one expressing shock that OAN is "a propaganda tool for Russian oligarchs," showing that the viewer understood Maddow's assertion as true. (ER 126.)

Moreover, Maddow's own colleague on MSNBC, Matthews, reiterated Maddow's claim by stating on his own show that OAN is "Russian-owned." (ER 68.) Matthews clearly took Maddow's claim as literal enough to believe OAN was

Russian-owned. There is no other plausible explanation for Matthews' comment. This further demonstrates the defamatory nature of Maddow's statement.

The District Court, however, excluded this evidence, instead concluding for itself that no reasonable person could have understood Maddow's comment as factual—ignoring that real, reasonable people could and did.

III. At the very least, Maddow's statement implied a false connection between OAN's content and Rouz's work for Sputnik.

Maddow's statement was not hyperbolic opinion. But even if it was, "[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).

In *Milkovich v. Lorain Journal Co.*, the U.S. Supreme Court held that, "[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." 497 U.S. 1, 18-19 (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).

Here, even assuming *arguendo* Maddow's statement that OAN "really literally is paid Russian propaganda" was hyperbole, it still falsely implied an actual connection between OAN's news content and Russia—i.e., that OAN's content is influenced by the Russian government and pro-Russia as a result or Rouz's work for Sputnik. This implication was false. (ER 236 ¶ 29.)

There is no question this implication was intended. That a low-level OAN employee had a side gig writing summaries of financial news for Sputnik in not national news worthy of MSNBC's most popular show. Yet Maddow used the *Daily Beast* story for the most important segment of her show (the headliner "A-block"). (ER 186.) She did so to use the story as a pretext to falsely imply that there was more to the story—that there was an actual connection between OAN's news content and Russia.

Here, Maddow did not assemble facts showing OAN's content was Russian-influenced, and she provided only a skewed and incomplete picture of the facts. Maddow did not tell her audience that Rouz was merely a freelancer for Sputnik who wrote articles on international finance for about $40 an article. (ER 235 ¶ 26.) Nor did she tell her audience that Rouz has no decision-making authority with respect to the content that is aired on OAN. (*Id.* ¶ 23.) Indeed, Maddow made no attempt to reach out to OAN for comment prior to airing her segment. (ER 247, Ex. B.)

Instead, Maddow falsely portrayed Rouz as some kind of Russian agent disseminating pro-Russia "propaganda" on OAN. Maddow's statement is therefore not protected opinion. *See Competitive Enter. Inst.*, 150 A.3d at 1247 (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").

The District Court asserted that "*Milkovich* does not require the author to include every possible fact before giving an opinion." (ER 13.) But *Milkovich* does require an author not to "imply a false assertion of fact" through an "incomplete" picture of the facts. 497 U.S. at 18-19. That is precisely what Maddow did—imply a false connection between OAN's content and Russia through an incomplete picture of Rouz's work.[6]

IV. At a minimum, it was error for the District Court to dismiss Herring's Complaint without granting leave to amend.

If Herring was not permitted to submit evidence in opposition to Defendants' anti-SLAPP motion (which it was), then Herring should at least have been granted leave to amend its Complaint to add the facts supported by that evidence. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th

[6] Before the District Court, Defendants also repackaged their argument that Maddow was being hyperbolic to contend that Maddow's statement was not capable of a defamatory meaning and was substantially true. (ER 214-218.) The District Court did not rule on these arguments, which are also wrong for the same reasons.

Cir. 2003) ("Generally, Rule 15 advises the court that 'leave shall be freely given when justice so requires.' This policy is 'to be applied with extreme liberality.'" (citation omitted)); *see also Verizon Del., Inc. v. Covad Commc'ns Co.*, 377 F.3d 1081, 1091 (9th Cir. 2004) (holding that "granting a defendant's anti-SLAPP motion to strike a plaintiff's initial complaint without granting the plaintiff leave to amend would directly collide with Fed. R. Civ. P. 15(a)'s policy favoring liberal amendment").

What the District Court did instead was improper. The District Court simultaneously refused to consider Herring's evidence and found amendment would be futile because, purportedly, "there is no set of facts that could support a claim for defamation based on Maddow's statement." (ER 17.) These two positions are not consistent. For the District Court to find that Herring's evidence would make no difference, the District Court needed to consider that evidence, which it did not. This also constituted error.

Whether on consideration of Defendants' anti-SLAPP motion or following amendment, Herring's evidence should have been part of the determination of whether Maddow's statement could be construed as factual.

CONCLUSION

Our system leaves the determination of disputed factual issues to juries. The only question before the District Court was whether a reasonable viewer *could*

have understood Maddow's statement that OAN "really literally is paid Russian propaganda" as factual (or at least implying a factual connection between OAN's content and Russia). The allegations and evidence showed that a reasonable viewer could have understood Maddow as making such a factual claim. Herring therefore respectfully requests that the Court: reverse the District Court's decision granting Defendants' anti-SLAPP motion and dismissing its defamation claim with prejudice; and remand for further proceedings.

DATED: October 12, 2020 MILLER BARONDESS, LLP

By: /s/ Amnon Siegel
AMNON Z. SIEGEL
Attorneys for Plaintiff - Appellant

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 9,402 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: October 12, 2020 MILLER BARONDESS, LLP

By: /s/ Amnon Z. Siegel
AMNON Z. SIEGEL
Attorneys for Plaintiff - Appellant