Ninth Circuit Unanimously Affirms First Amendment Protection for Rachel Maddow's "Paid Russian Propaganda" Commentary

By Nathaniel L. Bach & Marissa M. Mulligan

On August 17, 2021, a unanimous Ninth Circuit panel issued its opinion affirming the dismissal of Herring Networks, Inc.'s ("Herring") defamation suit against Rachel Maddow, MSNBC, NBCUniversal, and Comcast ("Defendants"). *Herring Networks, Inc. v. Maddow*, No. 20-55579, 2021 WL 3627126 (9th Cir. Aug. 17, 2021) ("*Herring II*"). The Court held that District Judge Cynthia Bashant of the Southern District of California correctly granted Defendants' anti-SLAPP motion to strike (Cal. Code Civ. Proc. § 425.16) because Ms. Maddow's statement that OAN "really literally is paid Russian propaganda"—in the context of her broadcast, in which she employed entertaining and hyperbolic language while commenting on a matter of public concern and fully disclosing the facts—"is well within the bounds of what qualifies as protected speech under the First Amendment." *Herring II*, 2021 WL 3627126 at *9.

Background

In September 2019, Herring—owner of the upstart conservative cable channel One America News Network ("OAN")—sued Defendants over comments Ms. Maddow made during the July 22, 2019 broadcast of *The Rachel Maddow Show*. During her three-and-a-half-minute intro segment, Ms. Maddow commented on an article *The Daily Beast* published that same day entitled "Trump's New Favorite Channel Employs Kremlin-Paid Journalist," which reported that OAN employs an on-air reporter who also works for Sputnik, a news organization funded by the Russian government.

While commenting on the article, Ms. Maddow exclaimed, "the most obsequiously pro-Trump right wing news outlet in America really literally is paid Russian propaganda. Th[eir] on air U.S. politics reporter is paid by the Russian government to produce propaganda for that government." *Id.* at *2. Herring alleged that Ms. Maddow's statement that the network "really literally is paid Russian propaganda" was false and defamatory, and sought damages of $10 million. *Id.* In May 2020, Judge Bashant granted the Defendants' anti-SLAPP motion to strike Herring's complaint with prejudice, and invited Defendants to seek their attorneys' fees and costs, to which they were entitled after prevailing on their motion. *Herring Networks, Inc. v. Maddow*, 445 F. Supp. 3d 1042, 1054 (S.D. Cal. 2020) ("*Herring I*"). Herring appealed.

Ninth Circuit's Opinion: Writing for the panel—which also included Circuit Judge John B. Owens and Judge Eduardo C. Robreno of the Eastern District of Pennsylvania—Circuit Judge Milan D. Smith, Jr. rejected Herring's arguments and agreed with the Defendants' counter-

arguments across the board, concluding that "the challenged statement was an obvious exaggeration, cushioned within an undisputed news story. The statement could not reasonably be understood to imply an assertion of objective fact, and therefore, does not amount to defamation." *Herring II*, 2021 WL 3627126 at *1.

In rejecting Herring's three principal arguments, Judge Smith authored a strong new First Amendment precedent that will be of use to media defendants nationwide.

First, Herring argued that the district court's refusal to allow it to submit evidence in response to the Defendants' anti-SLAPP motion was in error. Specifically, Herring attempted to oppose the motion to strike using (i) other, unrelated instances of Ms. Maddow using the word "literally" during her shows; (ii) an interview with Ms. Maddow in *The New York Times Magazine*; (iii) a single website comment submitted anonymously to OAN, allegedly in reaction to Ms. Maddow's segment; and (iv) a linguist's 20-page report purporting to analyze Ms. Maddow use of "modal verbs," the word "literally," and "intonational contours" of her speech (including via waveform diagrams). Herring then sought to supplement the record with statements made in December 2019 by Chris Matthews on his show *Hardball*, in which he stated OAN was "Russian owned" before correcting himself after a commercial break. Herring asserted that all this evidence went to the broad context in which a reasonable viewer would have understood the challenged statement.

In response, Defendants argued that they chose to bring their motion to strike as a facial attack on the pleadings and thus, under the Ninth Circuit's controlling decision in *Planned Parenthood Federation of America, Inc. v. Centre for Medical Progress*, 890 F.3d 828 (9th Cir. 2018), their motion is to be examined as under Rule 12(b)(6), which does not permit a plaintiff to submit evidence. The Court agreed that "the applicable reasoning in *Planned Parenthood* squarely forecloses Herring's argument." *Herring II*, 2021 WL 3627126 at *5. And it reaffirmed the Ninth Circuit's view "that 'there is no direct collision' between the special motion to strike subsection of [California's anti-SLAPP law] and the Federal Rules," and to avoid any conflict, courts should "review anti-SLAPP motions to strike under different standards depending on the motion's basis." *Id.* at *4 (quoting *United States ex rel. Newsham v. Lockheed Missiles &*

Space Co., 190 F.3d 963, 972 (9th Cir. 1999) and *Planned Parenthood*, 890 F.3d at 833). Here, as Herring had conceded, Defendants brought their motion as a facial attack without submitting any evidence of their own, and Herring "cannot convert Maddow's motion to strike into a motion for summary judgment" on its own accord. *Id.* at *5.

Second, Herring asserted that it was for a jury, not the court, to determine whether Ms. Maddow's statement asserted or implied a provably false statement of fact. In response, Defendants argued, as they did before the district court, that Ms. Maddow's statement was fully protected opinion under the First Amendment, and that examining its broad and specific contexts under the Ninth Circuit's totality of the circumstances test showed that the statement could not be interpreted in the manner Herring advanced as a matter of law. Defendants specifically highlighted Ms. Maddow's use of colorful language and rhetorical hyperbole—she described *The Daily Beast* article as a "sparkly story"—and that she had disclosed the entire basis for her comments (*i.e.*, *The Daily Beast* article).

The Court agreed with Defendants and the district court "that the broad context of Maddow's show makes it more likely that her audiences will 'expect her to use subjective language that comports with her political opinions.'" *Id.* at *6 (quoting *Herring I*, 445 F. Supp. 3d at 1050). The panel noted Ms. Maddow's tone further supported this finding, as she "opens the segment by calling *The Daily Beast* article 'perhaps the single most perfectly formed story of the day, the single most like sparkly story of the entire day,'" and "one of 'the giblets the news gods dropped off their plates for us to eat off the floor today.'" *Id.* The Court concluded that "Maddow's gleeful astonishment with *The Daily Beast*'s breaking news is apparent throughout the entire segment," and therefore "at no point would a reasonable viewer understand Maddow to be breaking new news. The story of a Kremlin staffer on OAN's payroll is the only objective fact Maddow shares." *Id.*

Turning to the specific context of Ms. Maddow's statement, the Court rejected Herring's effort to read the challenged six-word phrase in isolation, noting that "our precedent requires us to expand our focus to the surrounding sentences." *Id.* at *7. "Because Maddow discloses all

relevant facts and employs colorful, hyperbolic language, we conclude that the specific context of the statement does not render it an assertion of fact." *Id.* Quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Court found that "Maddow's use of hyperbolic rhetoric bolsters this conclusion." *Id.* at *8. Adopting Defendants' characterization of her comment, the challenged statement was thus no more than an "obvious exaggeration" "sandwiched between precise factual recitations" of *The Daily Beast* article—*i.e.*, that OAN employs an on-air reporter paid by the Russian government. *Id.*

Third, Herring argued that it should have been granted leave to amend to allege additional facts, including those submitted as evidence in opposition to the anti-SLAPP motion. While finding it a "much closer question," the Court agreed with Defendants that Herring had waived the issue "because Herring never asked to amend" at the district court, "and if it had, amendment would have been futile" because nothing Herring could plead could change Ms. Maddow's statement or the way a reasonable viewer would have understood it. *Id.* at *8–9.

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Finally, because California's anti-SLAPP law provides for the mandatory award of attorneys' fees and costs to a prevailing defendant, Defendants are entitled to recover their appellate fees and costs in addition to the nearly $250,000 already awarded by the district court for the proceedings below. The Ninth Circuit's well-reasoned and comprehensive opinion thus stands as a clear victory both for these Defendants and the media in general, providing another helpful precedent against SLAPPs like this one.

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