No. 18-

IN THE

Supreme Court of the United States

OLIVIA DE HAVILLAND, DBE,

Petitioner,

v.

FX NETWORKS, LLC AND PACIFIC 2.1 ENTERTAINMENT GROUP, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEALS, SECOND DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Olivia de Havilland is a 102-year-old, two-time Academy Award winning best actress, who played Melanie Hamilton in the movie classic, "Gone with the Wind." Of particular relevance here, she is also a woman who lives her life devoted to high moral and ethical standards.

FX Networks, LLC and Pacific 2.1 Entertainment Group, Inc. appropriated the literal name and identity of Olivia de Havilland, without consent or compensation, to be the narrator of a mini-series, "Feud: Bette and Joan," devoted to the theme of women actors cat-fighting, using vulgar language, and backstabbing one another. FX, claiming artistic license, admits that many of the statements and vulgar language attributed to de Havilland were fabricated and knowingly untrue.

The California Court of Appeal reversed the trial judge's denial of a Motion to Strike, and dismissed Miss de Havilland's claims, based on a First Amendment defense for docudramas.

The Question for the Court is:

> Are reckless or knowing false statements about a living public figure, published in docudrama format, entitled to absolute First Amendment protection from claims based on the victim's statutory and common law causes of action for defamation and right of publicity, so as to justify dismissal at the pleading stage?

PARTIES TO THE PROCEEDINGS

Petitioner, Plaintiff and Appellee below, is Miss Olivia de Havilland, an individual ("Petitioner" or "Miss de Havilland").

Respondents, Defendants and Appellants below, are FX Networks, LLC, a cable network company registered as a limited liability company in the State of California, and Pacific 2.1 Entertainment Group, Inc., a production company incorporated in the State of California ("FX," "FX Respondents," or "Respondents").

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DECISIONS BELOW

The opinion of the California Court of Appeal reversing the order of the trial court denying Defendants/Respondents' special motion to strike Plaintiff/Petitioner's complaint (App. 1a-40a) is reported at 21 Cal.App.5th 845. The Los Angeles Superior Court order (App. 41a-74a) is available at 2017 WL 4682951. Both are attached in the Appendix at 1a and 41a.

STATEMENT OF JURISDICTION

The California Court of Appeal entered its judgment on March 26, 2018. App. 1a. The California Supreme Court denied review on July 11, 2018. App. 75a. This Petition is timely as it is filed within 90 days of the California Supreme Court's denial of review. SUP. CT. R. 13.1. This Court has jurisdiction of this matter under 28 U.S.C. § 1257(a). *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1727 (2018). The Opinion of the California Court of Appeal calls into question the validity of California Civil Code section 3344 (right of publicity) on the grounds that the cause of action it creates violates the First Amendment, even where the unconsented commercial use of the name or identity involves knowing or recklessly false publications and eliminates the right to sue for defamation because it sets up an immunity under the Constitution in its holding that the First Amendment grants absolute protection for knowing or recklessly published false statements in a docudrama format. *See* App. 17a-23a.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

At issue in this case is the application of a First Amendment defense to immunize publication in docudramas of knowing and reckless falsehoods so as to infringe Petitioner's First Amendment right to petition for redress in the form of a suit for defamation and violation of California Civil Code section 3344 (right of publicity). "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

California's right of publicity statute, section 3344 of the California Civil Code states, in subsection (a):

> Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars ($750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are

> attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs.

The statute has an exception for matters of public interest: "For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a)." Cal. Civ. Code § 3344(d). The public interest exception in 3344(d) does not protect knowing or reckless publication of false statements. *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 424 (1983) (denying dismissal of a right of publicity case on First Amendment grounds where newspaper published a fake interview).

STATEMENT OF THE CASE

A. Factual Background

It is true and uncontested that 102-year-old Olivia de Havilland is alive and fiercely protective of her name and professional reputation. The two-time Academy Award-winning Best Actress, perhaps best known for her iconic portrayal of Melanie Hamilton in "Gone with the Wind," is one of the few living actors from the Golden Age of

Hollywood. Miss de Havilland is almost unique among major stars in that she achieved success without sacrificing her strong moral and personal commitment to truth, loyalty, consideration of others, and plain old fashioned good manners. She was awarded the National Medal of the Arts by President George W. Bush, the Legion d'Honneur by French President Nicolas Sarkozy, and was appointed a Dame of the British Empire by Her Majesty Queen Elizabeth II.[1] Petitioner has built a professional reputation over her eighty-year career for integrity, honesty, fidelity, and dignity.[2] Despite living most of her life in the public eye, Petitioner has refused to involve herself in tabloid gossip. For example, she specifically restrained herself from making rude comments about her sister, actress Joan Fontaine, even when provoked.[3]

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1. CNN Library, *Olivia de Havilland Fast Facts*, CNN, https://www.cnn.com/2013/01/21/us/olivia-de-havilland-fast-facts/index.html (last updated June 25, 2018). She has been nominated for five Academy Awards and an Emmy, and won two Academy Awards for Best Actress. *Id.* She received an Honorary Doctorate of Humane Letters from Mills College. Press Release, Mills College, Immigrants' Rights Advocate to Deliver Commencement Address at Mills College (Apr. 11, 2018), https://www.mills.edu/news/press-releases/immigrants-rights-advocate-to-deliver-commencement-address.php (noting Miss de Havilland's social activism and penchant for "standing up for her rights and the rights of her colleagues.").

2. Until she was 100 years old and troubled by diminished eyesight, Olivia de Havilland read the scriptures on Easter and Christmas Eve at the American Cathedral in Paris, where she has been a parishioner for over 65 years. Summer Hargrove, *Our Own Miss de Havilland*, TRINITÉ, Autumn 2006, at 8-9, https//issuu.com/americancathedralinparis/docs/trinitefall06.

3. Joan Fontaine herself denied she had any feud with her sister. Scott Feinberg, *New Details About the Joan Fontaine-*

In direct and purposeful contradiction to the facts and historical truth, FX Respondents created and broadcast a so-called docudrama-style television series, entitled "Feud: Bette [Davis] and Joan [Crawford]" ("Feud"), in which Petitioner was used by name as the narrator, allegedly endorsing the theme of vulgar-speaking, cat-fighting, back-biting, female Hollywood stars, including with her own sister.[4] Tens of millions of people viewed "Feud," and for a new generation, most likely all they know of Petitioner is found in the unauthorized lies and mischaracterization of her life, her work, and her nature as put forward in that series. Throughout the production, in keeping with its vulgar theme, Petitioner is falsely portrayed as a gossip who, for example, shares intimate details on-camera about her close friend, Bette Davis, calls her sister a "bitch" to others in her profession, and makes snide remarks about Frank Sinatra's alcohol consumption.[5] Despite being the only living principal character in "Feud," Petitioner's consent was not obtained for the use of her identity, name, or likeness in the production, she

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Olivia de Havilland Feud Revealed, Hollywood Reporter (Dec. 17, 2013), https://www.hollywoodreporter.com/race/joan-fontaine-olivia-de-havilland-666087.

4. "'Feud' is about . . . how Hollywood creates a catfight narrative between two women and sells tickets to it. It's about hate as a commodity, a product, a shameful meal plated under a silver dome." James Poniewozik, *Review: 'Feud: Bette and Joan,' A Clash of the Gossip Girls*, N.Y. Times (Mar. 2, 2017), https://www.nytimes.com/2017/03/02/arts/television/feud-bette-joan-tv-review-fx.html.

5. App. 44a, 56a-57a. Ellis Amburn, Olivia de Havilland and the Golden Age of Hollywood 321-25 (2018) (hereinafter "Amburn, The Golden Age").

was not consulted as to the truth of the statements made by her character, and she was not compensated for the use of her identity.[6] This false portrayal has damaged Petitioner's reputation.[7]

FX admits it did not obtain consent for the use of Petitioner's name and identity, and does not deny it intentionally broadcast a fake and false interview with Petitioner to enhance the "Feud" theme with a real Hollywood icon of the period.[8] As the author of a recent biography of Miss de Havilland states therein: "Watching *Feud*, I found almost none of the statements made by the de Havilland character, certainly not the negative portrayal of her as another female actor who would gossip and stab friends and relatives in the back, supported by my own research."[9] FX admits "Feud" was designed to make it appear authentic, and to make the audience "trust" Petitioner's character and what she said about the alleged relationship between Davis and Crawford, and her own private relationship with Fontaine.[10] The series was purposely structured to appear as if the real Petitioner participated in and endorsed "Feud." Executive producer and writer, Ryan Murphy, made a deliberate decision not to contact Petitioner to verify the authenticity of "Feud's" portrayal or any of the statements attributed

6. App. 66a, 71a-72a.

7. App. 53a-54a, 65a-66a.

8. App. 46a, 51a, 72a.

9. Amburn, The Golden Age at 321-22.

10. App. 59a, 62a-63a.

to her in the series.[11] Yet FX contacted, in accord with standard industry practice, artist Don Bachardy, who was portrayed in a minor role, for permission to use his name and property.[12] The statements and endorsement which form the basis for Petitioner's lawsuit are all false or have no factual support, and many are contradicted by FX's own research.[13]

FX claims that the First Amendment creates a special exemption from suit based on publication of knowing falsehoods for docudramas, and thus, because "Feud" is a docudrama, it is entitled to an absolute protection from Miss de Havilland's claims.[14] FX also asserts that the First Amendment allows it to use the literal name and identity of a living person in a docudrama without consent despite the California right of publicity statute to the contrary.[15]

The trial court rejected this defense position, denying FX's special motion to strike before discovery, but the California Court of Appeal reversed, holding that the First Amendment does absolutely protect publication of knowing or reckless falsehoods in a docudrama format, granting the FX special motion to strike and awarding

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11. Scott Feinberg, *Emmys: Ryan Murphy on the Role the Oscars Play Throughout 'Feud' (Q&A)*, Hollywood Reporter (Apr. 1, 2017), https://www.hollywoodreporter.com/race/emmys-ryan-murphy-role-oscars-play-throughout-feud-q-a-990187.

12. App. 71a.

13. App. 46a-50a, 57a-59a; Amburn, The Golden Age at 321-22.

14. App. 61a-67a.

15. App. 67a.

attorneys' fees against Petitioner for bringing her claims.[16] The Court of Appeal, stating that, under the First Amendment, Miss de Havilland "does not own history," also dismissed her cause of action for violation of her right of publicity.[17] Despite extensive public and press attention over the constitutional issues raised by the case,[18] and the filing of over 80 amicus letters in support of review, the California Supreme Court denied Miss de Havilland's Petition for review, with Justice Mariano-Florentino Cuéllar voting to grant review.[19]

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16. App. 39a.

17. App. 2a, 26a-28a; *but see Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977) (reversing the Ohio Supreme Court and holding that the First Amendment did not render the right of publicity unconstitutional).

18. *See, e.g.*, Paul Brownfield, *At 101, a Survivor of Hollywood's Golden Age Throws Down the Gauntlet*, N.Y. Times (Mar. 3, 2018), https://www.nytimes.com/2018/03/03/style/olivia-de-havilland-fx-ryan-murphy-lawsuit.html; Saul S. Rostamian et al., *Based on True Events*, L.A. Lawyer, May 2018, at 16; Ninth Circuit Court Conference, *Rights of Publicity Law*, C-SPAN (July 26, 2018), https://www.c-span.org/video/?448660-2/ninth-circuit-court-conference-rights-publicity-law; Eriq Gardner, *Olivia de Havilland, Now 102, Will Take 'Feud' to Supreme Court*, Hollywood Reporter (Aug. 23, 2018) (https://www.hollywoodreporter.com/thr-esq/actress-olivia-de-havilland-now-102-will-take-feud-supreme-court-1137142?); Bonnie Eslinger, *De Havilland Takes 'Feud' Fight to Calif. High Court*, Law360 (May 3, 2018), https://www.law360.com/articles/1040764; Nardine Saad, *Appellate Court Hears Arguments In Hollywood Legend Olivia de Havilland's 'Feud' Lawsuit*, L.A. Times (Mar. 20, 2018), http://www.latimes.com/entertainment/tv/la-et-st-de-havilland-feud-appeal-20180320-story.html.

19. App. 75a.

This Court has jurisdiction over final state court opinions involving a federal constitutional question when the highest court in the state refuses review. Miss de Havilland asks this Court to review the position of the Court of Appeal that the long line of this Court's prior cases stating that knowing or recklessly false statements in any form of publication have no First Amendment protection[20] do not apply to a genre which calls itself docudrama, and reject the conclusion that claims based on such falsities are unconstitutional as a matter of law.[21]

B. State Court Proceedings

On June 30, 2017, Miss de Havilland filed her Complaint in the Superior Court of California in Los Angeles County on the grounds that Respondents violated her California common law and statutory right of publicity, committed false light invasion of privacy, and unjustly enriched themselves in the process. On August 29, 2017, Respondents filed a special motion to strike Petitioner's Third Amended Complaint under California Code of Civil Procedure section 425.16 ("anti-SLAPP motion"), alleging that their unconsented and false use of Miss de Havilland's name and image in the docudrama format had absolute immunity under the First Amendment, trumping Miss de Havilland's right to petition for relief.

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20. "Time and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value." *United States v. Alvarez*, 567 U.S. 709, 746-47 (2012) (Alito, Thomas, and Scalia, J.J., dissenting) (numerous citations omitted).

21. App. 38a.

On September 29, 2017, following full briefing and oral argument, the trial court issued its Ruling denying Respondents' anti-SLAPP motion. The trial court found, pursuant to the anti-SLAPP standard, that Petitioner had "successfully met her burden in showing that she has a likelihood of prevailing on the merits . . . ." App. 44a. As to her false light claim, the trial court ruled that "[Petitioner] has sufficiently met her burden in showing that the use of the term 'bitch' and 'bitches' in the television show were not factually accurate," that "[critical] comments about Frank Sinatra were false," that "a viewer of the television show, which is represented to be based on historical facts, may think [Petitioner] to be a gossip who uses vulgar terms about other individuals, including her sister . . . [which] could have a significant economic impact," and that Respondents "attributed comments to her 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" App. 49a-50a, 53a, 59a. The trial court further found that Respondents' appropriation of Petitioner's name and likeness was not constitutionally protected. App. 61a-67a. "In other words, 'depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment.'" App. 65a.

On October 10, 2017, Respondents appealed. The oral argument took place on March 20, 2018 to an overflow crowd of reporters, lawyers, law students, and members of the public. Four business days after the argument, on March 26, 2018, the court of appeal issued an Opinion reversing the trial court and granting Respondents' anti-SLAPP motion in its entirety, based on its conclusion that the First Amendment provides a complete defense for docudramas, knowingly false or not, as a matter of law:

> When the expressive work at issue is . . . a combination of fact and fiction, the "actual malice" [publication of a knowing or reckless falsehood] analysis takes on a further wrinkle. De Havilland argues that, because she did not grant an interview at the 1978 Academy Awards or make the "bitch sister" or "Sinatra drank the alcohol" remarks to Bette Davis, *Feud*'s creators acted with actual malice. But fiction [or part fiction] is by definition untrue. It is imagined, made-up. Put more starkly, it is false. Publishing a fictitious [false] work about a real person cannot mean the author, by virtue of writing [part] fiction, has acted with actual malice.

App. 37a.

The Court of Appeal also found as a matter of law that the false depiction of Miss de Havilland was not offensive. App. 38a ("[W]e conclude Zeta-Jones's portrayal of de Havilland in *Feud* is not highly offensive to a reasonable person as a matter of law."). The Court of Appeal further held that the: "First Amendment protects FX's portrayal of de Havilland in a docudrama without her permission," and "*Feud* 'is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life – including the stories of real individuals, ordinary or extraordinary – and transform them into art, be it articles, books, movies, or plays.'" App. 14a, 20a. "That *Feud*'s creators did not purchase or otherwise procure de Havilland's 'rights' to her name or likeness does not change this analysis. . . . [T]he First Amendment simply does not require such

acquisition agreements." App. 21a-22a.[22] The Court of Appeal awarded attorneys' fees against Miss de Havilland under California Code of Civil Procedure section 425.16, subdivision (c).[23]

On May 4, 2018, Petitioner filed a Petition for Review in the California Supreme Court. Eighty-seven amicus letters were submitted in support of Miss de Havilland's Petition, and none were submitted in opposition. In a Notice dated July 11, 2018, the California Supreme Court declined to review the case, although Justice Mariano-Florentino Cuéllar published that he was "of the opinion the petition should be granted." App. 75a.

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22. *Contra Zacchini*, 433 U.S. at 576, 578-79 ("'The rationale for (protecting the right of publicity) is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.' . . . We conclude that although the State of Ohio may as a matter of its own law privilege the press in the circumstances of this case, the First and Fourteenth Amendments do not require it to do so.").

23. App. 39a; Cal. Code Civ. Proc. § 425.16(c)(1) ("[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs.") (In contrast, the complaining party is only entitled to attorney fees and costs if "the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay . . . ."). Anti-SLAPP statutes which present a serious infringement of the First Amendment right to petition the Government for grievances are unconstitutional. *Davis v. Cox*, 183 Wash. 2d 269, 295-96 (2015), *abrogated on other grounds by Maytown Sand & Gravel, LLC v. Thurston Cty.*, 423 P.3d 223 (Wash. 2018) (The Washington Legislature attempted "to protect one group of citizens constitutional rights of expression and petition—by cutting off another group's constitutional rights of petition and jury trial. This the legislature cannot do.").

REASONS FOR GRANTING THE PETITION

I. The First Amendment Does Not Grant Absolute Immunity to Docudramas Which Harm Living Persons by Publishing Known or Reckless Falsehoods

A. The California Court of Appeal's Reasoning Conflicts with the Limited First Amendment Protection for Publication of Falsehoods this Court Has Repeatedly Enunciated

"Time and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value." *Alvarez*, 567 U.S. at 746-47 (Alito, Thomas, and Scalia, J.J., dissenting).[24]

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24. *See Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 612 (2003) ("Like other forms of public deception, fraudulent charitable solicitation is unprotected speech."); *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002) ("[F]alse statements may be unprotected for their own sake . . . ."); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective."); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) ("There is 'no constitutional value in false statements of fact.'") (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983) ("[F]alse statements are not immunized by the First Amendment right to freedom of speech . . . ."); *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) ("Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements."); *Herbert v. Lando*, 441 U.S. 153, 171 (1979) ("Spreading false information in

Further, this Court has consistently rejected the absolutist view of the First Amendment even in application to the news media:

> The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. See New York Times Co. v. Sullivan, supra, at 293, 84 S.Ct., at 733 (Black, J., concurring); Garrison v. Louisiana, 379 U.S., at 80, 85 S.Ct., at 218 (Douglas, J., concurring); Curtis Publishing Co. v. Butts, 388 U.S., at 170, 87 S.Ct., at 1999 (opinion of Black, J.). Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice

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and of itself carries no First Amendment credentials."); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake."); *Gertz*, 418 U.S. at 340 ("[T]he erroneous statement of fact is not worthy of constitutional protection . . . ."); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) ("[T]he constitutional guarantees [of the First Amendment] can tolerate sanctions against calculated falsehood without significant impairment of their essential function."); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) ("[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.").

> of the competing value served by the law of defamation.
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> . . . We would not lightly require the State to abandon this purpose, for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being–a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."

Gertz, 418 U.S. at 341.

The First Amendment does not protect knowing or reckless publication of a falsehood, even if such falsehoods are artfully constructed and entertaining. *Id.* This basic principle of First Amendment jurisprudence is currently under attack from powerful media forces because sensationalist lies are more popular, and hence more profitable, than reality, which is often relatively dull.[25] To those commercial interests that reap enormous profits from this form of entertainment, any collateral

25. *See, e.g.*, Chandra Johnson, *Documentary Films Are Becoming More Popular – But Are They Fact or Fiction*, Deseret News (July 7, 2016), https://www.deseretnews.com/article/865657443/Documentary-films-are-becoming-more-popular--but-are-they-fact-or-fiction.html.

damage done to real human beings by publicizing known falsehoods in a successful television series should be an acceptable social cost.[26] Publication of known falsehoods about real people is not "history," but a perversion of the actual past.[27] The law as stated by this Court has traditionally provided recourse for those, like Miss de Havilland, damaged by knowing misuse of an identity and publication of falsehoods, in the form of causes of action for violation of the rights to privacy and publicity,[28] consistent with the legitimate purposes of the First Amendment.[29]

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26. Neither is political expression absolutely protected, when unauthorized misleading use results in harm. *See, e.g.*, *Browne v McCain*, 611 F. Supp. 2d 1062, 1072 (C.D. Cal. 2009) (denying an anti-SLAPP motion to strike the complaint of singer song writer Jackson Browne for unconsented use of his literal voice and identity in a political advertisement, finding the "RNC has not shown that political expression's broad First Amendment protection bars, as a matter of law, *all* actions based on allegedly improper use of a person's identity in campaign-related materials.").

27. *See supra* note 26.

28. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280; *Zacchini*, 433 U.S. at 576-578; *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991).

29. The legitimate purposes of the free speech clause of the First Amendment include: "discovery of truth, democratic deliberation, the development of individuals, and the holding of government to account." Gavin Phillipson, *Press freedom, the public interest and privacy*, *in* Comparative Defamation and Privacy Law 136, 138 (Andrew T. Kenyon ed., Cambridge Intellectual Property and Information Law 2016).

B. The New First Amendment Rule for Docudramas Conflicts with Holdings of Other Courts

The California Court of Appeal distinguishes, without any justification, docudramas from other forms of publication, and holds that knowingly false statements in this genre are protected by the First Amendment to the same extent as the truth.[30] In contrast to the California Court of Appeal, many courts have applied the actual *New York Times* standard to docudramas.[31] However, several courts, state and federal, including the California Court of Appeal here, have departed from *New York Times* and its progeny, and have created a "modified" standard resulting in absolute First Amendment immunity for docudramas.[32]

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30. "'[N]o distinction may be drawn in this context [docudrama] between fictional [knowingly false] and factual accounts of Valentino's life.' [Citation.] '[T]ruthful and fictional [knowingly false] accounts' 'have equal constitutional stature.'" *See* App. 18a (quoting concurring opinion of Justice Bird in *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal.3d 860, 868, 871 (1979)).

31. *See, e.g.*, *Reid v. Viacom Int'l Inc.*, No. 1:14-cv-01252 (N.D. Ga. Sept. 14, 2016) (order granting in part and denying in part motion for summary judgment in a defamation case involving a docudrama and rejecting the argument that, as a matter of law, a docudrama has First Amendment protection beyond the actual malice standard); *Partington v. Bugliosi*, 56 F.3d 1147, 1155 (9th Cir. 1995) ("We do not intimate that the First Amendment shields from scrutiny . . . every statement made in a docudrama based upon such an [actual] event . . . .")*; Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1551 (4th Cir. 1994); *Street v. Nat'l Broad. Co.*, 645 F.2d 1227, 1233 (6th Cir. 1981).

32. Amy J. Field, *A Curtain Call for Docudrama-Defamation Actions: A Clear Standard Takes a Bow*, 8 Loy. L.A. Ent. L. Rev. 113 (1988); *Thoroughbred Legends, LLC v. Walt Disney Co.*, No.

The so-called modified rule for docudramas in fact eliminates the *New York Times* actual malice standard.

First Amendment analysis under *New York Times* protects only negligent publication of falsehoods about a public person, not intentional or reckless publications. The California Court of Appeal Opinion here, if left standing, would also protect knowing or recklessly false statements to the same degree as truthful or negligently false ones in a docudrama, precluding any cause of action based on a docudrama, even if knowingly or recklessly false statements are made which harm a living public figure.[33]

II. Olivia de Havilland's Case Should Be Reviewed by This Court Because It Involves an Important Constitutional Issue Which Affects Thousands of Public Figures and Private Persons Who May Be Involved in Public Issues

The California Court of Appeal's treatment of docudramas, such that they alone are absolutely protected by the First Amendment from right of publicity and defamation claims, leaves a limitless number of public figures without any means to protect their reputations

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1:07-CV-1275-BBM, 2008 WL 616253, at *13 (N.D. Ga. Feb. 12, 2008) ("[T]he statements attributed to the Plaintiffs in the 'Ruffian' film may not be actionable if . . . any falsity was incident to 'author's license' in creating a dramatization of the story."); *Guglielmi*, 25 Cal 3d. at 868 (Bird, J. concurring) (in determining whether defendants' work was protected by the First Amendment, "no distinction may be drawn in this context [film] between fictional and factual accounts of [plaintiff]'s life.").

33. *See* App. 18a-19a (quoting concurring opinion of Justice Bird in *Guglielmi*, 25 Cal.3d at 868).

and secure compensation for harm done. *See* App. 17a-20a, 26a-28a[34] Since FX brought its special motion to strike under California's anti-SLAPP statute,[35] the Court also awarded attorneys' fees against Petitioner as punishment for filing her non-frivolous suit.[36]

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34. The Court of Appeal's decision also adopts the position that the First Amendment prevents a living person from a cause of action based on the right of publicity, where the statements made are false, because using the name and identity of a living person is transformed by the medium of docudrama, and employing a comparison of how many minutes of time are spent on subjects other than the victim. *See* App. 4a, 26a-28a, 32a n.12. The California Supreme Court in *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, developed the "transformative" test to distinguish between a First Amendment protected use of a living person's name and identity and an unlawful misappropriation. *Comedy III* held that an unconsented use of the literal name or image of a living person, rather than a "transformed" or merely suggestive one, was not protected under the First Amendment, and therefore, the right of publicity statute was available to protect name and image and did not raise constitutional concerns. *Comedy III*, 25 Cal.4th 387, 403-405 (2001); *see also Zacchini*, 433 U.S. at 573-576. The Court of Appeal decision below redraws the test, finding that if there is a numerically greater amount of "expression" contributed by a docudrama than the numerical amount of time devoted to unconsented use, computed by adding up all the separate installments shown at different times, then the First Amendment prohibits any right of publicity claim. *See* App. 4a, 26a-28a, 32a n.12; *contra Masson*, 501 U.S. at 510 ("'[T]he test of libel is not quantitative; a single sentence may be the basis for an action in libel even though buried in a much longer text . . . .'") (quoting *Washburn v. Wright*, 261 Cal. App. 2d 789, 795 (1968)).

35. Cal. Code Civ. Proc. § 425.16.

36. *See* App. 39a. During the oral argument, Justice Anne Egerton stated: "I think frivolous isn't the test, is it?" *Complete Audio | Olivia de Havilland Lawsuit Hearing | "Feud: Bette*

Miss de Havilland's case presents the right vehicle for this Court to review and clarify whether the First Amendment creates a special immunity for knowingly false statements published in a docudrama at a time when this genre is at an all-time high point,[37] and the public is being bombarded with fake representations masquerading as historical fact.[38]

The California Court of Appeal Opinion frames the issue and squarely contradicts the holding and reasoning of *New York Times Co. v. Sullivan*. There is nothing about a docudrama or partially fictionalized historical work which does or should allow the genre to freely and without consequence mix in falsehoods in order to increase ratings or to fill gaps in the narrative with lies in order to improve profits or make it more interesting to the public, where those distortions and fabrications of the historical record cause damage to living persons.

Davis & Joan Crawford," YouTube at 54:21-23 (Mar. 23, 2018), https://www.youtube.com/watch?v=48J9xfQR1d8.

37. *See, e.g.*, Chandra Johnson, *Documentary Films Are Becoming More Popular – But Are They Fact or Fiction*, Deseret News (July 7, 2016), https://www.deseretnews.com/article/865657443/Documentary-films-are-becoming-more-popular--but-are-they-fact-or-fiction.html.

38. *See* Eriq Gardner, *Olivia de Havilland, Now 102, Will Take 'Feud' to Supreme Court*, Hollywood Reporter (Aug. 23, 2018), https://www.hollywoodreporter.com/thr-esq/actress-olivia-de-havilland-now-102-will-take-feud-supreme-court-1137142 ("A petition that could forever impact biopics and docudramas: What does 'actual malice' mean when the genre is by definition untrue?").

At a time when the courts need to maintain the line between truth and falsehood, it is critical that knowing or reckless fabrications not be permitted under the cloak of the First Amendment.[39] The protections of the First Amendment are not limitless, and indeed when sound restrictions on speech, including defamation and right of publicity laws, are kept in place, this "helps to make meaningful discourse possible," and "gives society a means for announcing that certain speech has crossed the bounds of propriety."[40] Without checks on the accuracy of information, public discourse "would have no necessary anchor in truth" and the "credibility of the press would be at the mercy of the least scrupulous among it."[41]

Petitioner thus respectfully requests that this Court grant this petition for writ of certiorari and review the opinion from the California Court of Appeal which would grant absolute constitutional protection to false and damaging speech in a docudrama, unlike any other form

39. "Docudramas weave fact with fiction to create a captivating story: they often change artistically unsatisfactory facts and fabricate unavailable facts." Megan Moshayedi, *Defamation by Docudrama: Protecting Reputations from Derogatory Speculation*, 1993 U. Chi. Legal F. 331, 332 (1993) (arguing that the *New York Times* test does not do enough to protect reputation from speculation in a docudrama which cannot be proved by plaintiff to be false).

40. Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 886 (2000) (citing Robert C. Post, Constitutional Domains (1995); Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 Cal. L. Rev. 691, 713 (1986)).

41. David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. Rev. 487, 490 (1991).

of publication. "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966). If the decision below is allowed to stand, living victims of this medium will not be able to petition for redress where damage is caused to one's reputation in a so-called historical drama which capitalizes on the value of a real persona while mixing in knowing falsehoods at will.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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October 5, 2018

APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE, FILED MARCH 26, 2018

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

B285629

OLIVIA DE HAVILLAND,

Plaintiff and Respondent,

v.

FX NETWORKS, LLC, *et al.*,

Defendants and Appellants.

March 26, 2018, Opinion Filed

APPEAL from an order of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Reversed with directions.

Authors write books. Filmmakers make films. Playwrights craft plays. And television writers, directors, and producers create television shows and put them on the air—or, in these modern times, online. The First Amendment protects these expressive works and the free

speech rights of their creators. Some of these works are fiction. Some are factual. And some are a combination of fact and fiction. That these creative works generate income for their creators does not diminish their constitutional protection. The First Amendment does not require authors, filmmakers, playwrights, and television producers to provide their creations to the public at no charge.

Books, films, plays, and television shows often portray real people. Some are famous and some are just ordinary folks. Whether a person portrayed in one of these expressive works is a world-renowned film star—"a living legend"—or a person no one knows, she or he does not own history. Nor does she or he have the legal right to control, dictate, approve, disapprove, or veto the creator's portrayal of actual people.

In this case, actress Olivia de Havilland sues FX Networks, LLC, and Pacific 2.1 Entertainment Group, Inc. (collectively FX), the creators and producers of the television miniseries *Feud: Bette and Joan* (*Feud*). In the docudrama about film stars Bette Davis and Joan Crawford, an actress plays de Havilland, a close friend of Davis. De Havilland alleges causes of action for violation of the statutory right of publicity and the common law tort of misappropriation. De Havilland grounds her claims on her assertion—which FX does not dispute—that she "did not give [her] permission to the creators of 'Feud' to use [her] name, identity[,] or image in any manner." De Havilland also sues for false light invasion of privacy based on FX's portrayal in the docudrama of a fictitious interview and

the de Havilland character's reference to her sister as a "bitch" when in fact the term she used was "dragon lady." De Havilland seeks to enjoin the distribution and broadcast of the television program and to recover money damages.

The trial court denied FX's special motion to strike the complaint. The court concluded that, because *Feud* tried to portray de Havilland as realistically as possible, the program was not "transformative" under *Comedy III Productions*[1] and therefore not entitled to First Amendment protection. As appellants and numerous amici curiae point out, this reasoning would render actionable all books, films, plays, and television programs that accurately portray real people. Indeed, the more realistic the portrayal, the more actionable the expressive work would be. The First Amendment does not permit this result. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Feud* airs and de Havilland sues

In March 2017, FX began airing its eight-part docudrama, *Feud: Bette and Joan*. The docudrama portrays the rivalry between actresses Joan Crawford and Bette Davis. The central theme of the program is that powerful men in Hollywood pressured and manipulated women in the industry into very public feuds with one

1. *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387 [106 Cal. Rptr. 2d 126, 21 P.3d 797] (*Comedy III*).

another to advance the economic interests of those men and the institutions they headed. A secondary theme—as timely now as it was in the 1960's—is the poor treatment by Hollywood of actresses as they age.

Academy-Award-winning actress Catherine Zeta-Jones portrays de Havilland in the docudrama. The de Havilland role is a limited one, consuming fewer than 17 minutes of the 392-minute, eight-episode miniseries. The role consists essentially of two parts: (1) a fictitious interview in which Zeta-Jones—often accompanied by Academy-Award-winning actress Kathy Bates playing actress Joan Blondell—talks to an interviewer (a young man named "Adam") about Hollywood, its treatment of women, and the Crawford/Davis rivalry and (2) scenes in which Zeta-Jones interacts with Academy-Award-winning actress Susan Sarandon playing Bette Davis. These scenes portray the close friendship between Davis and de Havilland. As played by Zeta-Jones, the de Havilland character is portrayed as beautiful, glamorous, self-assured, and considerably ahead of her time in her views on the importance of equality and respect for women in Hollywood. *Feud* was nominated for 18 Emmy awards.

On June 30, 2017, de Havilland filed this lawsuit. Her third amended complaint, filed in September 2017, alleges four causes of action: (1) the common law privacy tort of misappropriation; (2) violation of Civil Code section 3344, California's statutory right of publicity; (3) false light invasion of privacy; and (4) "unjust enrichment." De Havilland asks for damages for emotional distress and harm to her reputation; "past and future" "economic

losses"; FX's "profits gained … from and attributable to the unauthorized use of [her] name, photograph,[2] or likeness"; punitive damages; attorney fees; and a permanent injunction prohibiting the "broadcast and distribution" of the series.[3]

2. FX's special motion to strike

a. FX's motion, declarations, and exhibits

On August 29, 2017, FX filed a motion to strike the complaint under California's anti-SLAPP[4] law, Code of Civil

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2. There seems to be only one photograph to which de Havilland could be referring. At the end of the miniseries, just before the credits, *Feud* displays side-by-side photographs of the real people who had some involvement in the story and the actor who played each. These include director Robert Aldrich (played by Alfred Molina), Jack Warner of Warner Brothers (played by Stanley Tucci), Joan Crawford (played by Jessica Lange), Victor Buono (played by Dominic Burgess), Bette Davis's daughter B.D. Merrill (played by Kiernan Shipka), and Hedda Hopper (played by Judy Davis), as well as Davis and de Havilland, played, as noted, by Sarandon and Zeta-Jones, respectively. A short blurb tells the viewer what became of each person. For de Havilland, the blurb states, "Olivia de Havilland made her screen debut in Max Reinhardt's *A Midsummer Night's Dream* in 1935. She retired from film acting in 1988. She continues to enjoy her retirement in Paris. On July 1, 2016, she turned 100 years old." De Havilland attached a copy of the side-by-side photographs of her and Zeta-Jones to her complaint.

3. On July 25, 2017, de Havilland filed a motion for trial setting preference. De Havilland submitted a declaration stating she lives in Paris and is 101 years old. She also submitted a declaration by a Los Angeles physician stating that any person of that age "will not survive for any extended period of time."

4. SLAPP is an acronym for strategic lawsuit against public participation. (*Christian Research Institute v. Alnor* (2007) 148 Cal. App.4th 71, 76, fn. 1 [55 Cal. Rptr. 3d 600] (*Christian Research*).)

Procedure section 425.16. FX submitted declarations from Ryan Murphy, a co-creator, executive producer, writer, and director of *Feud*; Michael Zam, a screenwriter who co-wrote a script called *Best Actress* on which *Feud* was based in part; and Timothy Minear, an executive producer and writer for *Feud.* Minear explained the writers on the project created "imagined interviews" conducted at the 1978 Academy Awards as a "framing device" to introduce viewers to *Feud*'s themes such as the unfair treatment of women in Hollywood. Minear stated *Feud*'s writers based the imagined interview on actual interviews de Havilland had given over the years. Minear also explained that a "docudrama" is a "dramatized retelling of history."

FX also submitted a declaration from Stephanie Gibbons, its president of marketing and promotion. Gibbons stated FX had not used de Havilland's photograph in any advertising or promotion for the miniseries. Six of 44 video advertisements included pictures of Zeta-Jones; none of these used de Havilland's name. Gibbons explained that Zeta-Jones is a famous actress whom FX thought viewers would want to watch.

FX submitted the declaration of James Berkley, a research analyst for FX's law firm, together with 59 exhibits. These included books, newspaper and magazine articles, and videos of de Havilland appearing as a guest on talk shows. In a number of the articles and video clips, de Havilland granted interviews and made statements about other actors, including her sister Joan Fontaine. In a July 2016 Associated Press interview—on the occasion of her 100th birthday—de Havilland said this about her sister: "Dragon Lady, as I eventually decided to call her, was a

brilliant, multi-talented person, but with an astigmatism in her perception of people and events which often caused her to react in an unfair and even injurious way."

b. De Havilland's opposition, declarations, and exhibits

De Havilland filed an opposition on September 15, 2017. She asserted *Feud* was a "commercial production." De Havilland attached a declaration from Mark Roesler, the chairman of Celebrity Valuations. Roesler declared he had represented many celebrities over the years, including Richard Nixon. Roesler calculated the fair market value of FX's "use" in *Feud* of de Havilland's "rights" to be between $1.38 and $2.1 million. This works out to between approximately $84,000 and $127,000 per minute of time that Zeta-Jones appears on screen.

De Havilland also submitted declarations from David Ladd and Cort Casady. Both men stated they have many years of experience in the entertainment business. In nearly identical language both Ladd and Casady declared the "standard practice" in the film and television industry is to obtain consent from any "well-known living person" before her or his "name, identity, character[,] or image" can be used in a film or television program.[5] In addition, de Havilland submitted a declaration from her attorney attaching posts from Instagram and Facebook with photographs of Zeta-Jones as de Havilland.

5. Casady stated consent "must be obtained." Ladd stated consent "should be obtained." Ladd added that, "[i]f consent could not be obtained," then the producers could use only "authenticated facts previously disclosed" by the person herself or himself.

c. FX's reply

FX filed a reply on September 22, 2017. FX submitted a declaration from Casey LaLonde, Joan Crawford's grandson. LaLonde stated an actor portraying him as a child appears in *Feud.* LaLonde neither granted consent nor received any compensation for this portrayal. LaLonde described the experience of seeing an actor portraying him in the docudrama as "a wonderful surprise." LaLonde also made available to *Feud*'s producers home movies of Crawford. He stated the producers did not pay any compensation to Crawford's family for their portrayal of her. LaLonde declared that de Havilland's attorney's statement to USA Today that *Feud*'s producers had compensated Crawford's family for the use of her identity was untrue.

d. The hearing on the motion and the trial court's ruling

On September 29, 2017, the parties argued the motion. The superior court issued a 16-page written decision. The court denied the anti-SLAPP motion as to all four causes of action. The court first found the docudrama constitutes speech in a public forum, involving an issue of public concern. Noting the burden then shifts to plaintiff to show a probability of prevailing on her claims, the court concluded de Havilland had sufficiently met her burden of proof. The court stated de Havilland had to show only that her lawsuit had minimal merit.

The trial court said de Havilland had met her burden on her right of publicity claims "because no compensation was given despite using her name and likeness." The court, citing Ladd's declaration, stated, "[I]t is standard in the industry, according to Plaintiff, to negotiate compensation prior to the use of a person's likeness." The court said there was "nothing transformative about [*Feud*]" within the meaning of *Comedy III* because FX admitted it "wanted to make the appearance of [de Havilland] as real as possible."

On de Havilland's false light claim, the court noted de Havilland asserted (1) she had not given an interview at the 1978 Academy Awards; (2) she had not referred to her sister Joan Fontaine as "my bitch sister"; (3) she never told a director she did not "play bitches" and he should call her sister; and (4) when asked where the alcohol in Frank Sinatra's dressing room had gone, she never said "Frank must have drunk it all." Rejecting FX's argument that these portrayals are not defamatory, the court said, "[I]n considering the show as a whole, the Court finds [de Havilland] has sufficiently met her burden of proof in that a viewer of the television show, which is represented to be based on historical facts, may think [de Havilland] to be a gossip who uses vulgar terms about other individuals, including her sister." Citing the Casady declaration, the court stated, "For a celebrity, this could have a significant economic impact."

As to actual malice (de Havilland did not dispute she is a public figure),[6] the court concluded de Havilland had

6. De Havilland again concedes on appeal that she is a public figure.

"submitted sufficient evidence that [FX] presented scenes 'with knowledge that [they were] false or with reckless disregard of whether [they were] false or not.'" The court seemed unreceptive to FX's argument that "false" is different from "dramatized." Finally, the trial court rejected FX's argument that de Havilland's fourth cause of action for "unjust enrichment" was not a cause of action.

DISCUSSION

1. California's anti-SLAPP statute and our standard of review on appeal

A special motion to strike under the anti-SLAPP statute, Code of Civil Procedure section 425.16, "'is a procedural remedy to dispose of lawsuits brought to chill the valid exercise of a party's constitutional right of petition or free speech. [Citation.] The purpose of the anti-SLAPP statute is to encourage participation in matters of public significance and prevent meritless litigation designed to chill the exercise of First Amendment rights. [Citation.] The Legislature has declared that the statute must be "construed broadly" to that end.'" (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 268 [147 Cal. Rptr. 3d 88]; see also Code Civ. Proc., § 425.16, subd. (a); cf. *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1114, fn. 3 [57 Cal. Rptr. 2d 207] [an appellate court, whenever possible, should interpret the 1st Amend. and § 425.16 in a manner "favorable to the exercise of freedom of speech, not its curtailment"].) This legislative directive "is expressed in unambiguous terms." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119 [81 Cal. Rptr. 2d

471, 969 P.2d 564].) "[T]he broad construction expressly called for in subdivision (a) of section 425.16 is desirable from the standpoint of judicial efficiency … ." (*Id.* at pp. 1121–1122.)

"Resolution of an anti-SLAPP motion 'requires the court to engage in a two-step process.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733 [3 Cal. Rptr. 3d 636, 74 P.3d 737].) First, the defendant must show the conduct underlying the plaintiff's cause of action arises from the defendant's constitutional rights of free speech or petition in connection with a public issue. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 [124 Cal. Rptr. 2d 507, 52 P.3d 685].) If the defendant satisfies this prong, the burden shifts to the plaintiff to prove she has a legally sufficient claim and to prove with admissible evidence a probability that she will prevail on the claim. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 [123 Cal. Rptr. 2d 19, 50 P.3d 733]; see also *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212 [12 Cal. Rptr. 3d 786] ["In opposing an anti-SLAPP motion, the plaintiff cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial."].) "In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for

the claim." (*Wilson v. Parker*, at p. 821; see also *Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1251 [217 Cal. Rptr. 3d 234] (*Jackson*).) "[O]n its face the [anti-SLAPP] statute contemplates consideration of the substantive merits of the plaintiff's complaint, as well as all available defenses to it, including, but not limited to constitutional defenses. This broad approach is required not only by the language of the statute, but by the policy reasons [that] gave rise to our anti-SLAPP statute." (*Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398 [13 Cal. Rptr. 3d 353].)

To satisfy this prong-two showing, the plaintiff must present credible evidence that satisfies the standard of proof required by the substantive law of the cause of action the anti-SLAPP motion challenges. Generally, a plaintiff's claims need only have "'minimal merit'" to survive an anti-SLAPP motion. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 95, fn. 11 [124 Cal. Rptr. 2d 530, 52 P.3d 703].) But when the plaintiff is a public figure, to establish a prima facie case she must demonstrate by clear and convincing evidence that the defendant acted with "actual malice." (*Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1162, 1169–1172 [15 Cal. Rptr. 3d 100] [trial court should have granted anti-SLAPP motion where limited purpose public figure plaintiff "failed to show a probability of proving actual malice by clear and convincing evidence"]; see *Conroy v. Spitzer* (1999) 70 Cal.App.4th 1446, 1451, 1454 [83 Cal. Rptr. 2d 443] [to meet anti-SLAPP statute's requirement that he show he would "probably" prevail on his claim, public figure plaintiff "was required to 'show a likelihood that he could produce clear and convincing

evidence'" that defendant made statements with actual malice]; *Beilenson v. Superior Court* (1996) 44 Cal. App.4th 944, 950 [52 Cal. Rptr. 2d 357] ["The clear and convincing standard requires that the evidence be such as to command the unhesitating assent of every reasonable mind. [Citation.] Actual malice cannot be implied and must be proven by direct evidence"]; see also *Makaeff v. Trump University, LLC* (9th Cir. 2013) 715 F.3d 254, 271 [whether plaintiff has "reasonable probability of proving, by clear and convincing evidence, that [defendant] made her critical statements with actual malice" is "inherently fact-intensive question"].) "The requirement that a public figure plaintiff prove malice by clear and convincing evidence arises from First Amendment concerns that freedom of expression be provided 'the "breathing space" that [it] "need[s] … to survive … ."'" (*Christian Research, supra*, 148 Cal.App.4th at p. 82, quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 272 [11 L.Ed. 2d 686, 84 S. Ct. 710].)

"An order denying an anti-SLAPP special motion to strike is appealable under [Code of Civil Procedure] sections 425.16, subdivision (i), and 904.1." (*Christian Research, supra*, 148 Cal.App.4th at p. 79.) Our review of the trial court's order denying FX's motion "is de novo, and entails an independent review of the entire record." (*City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 371 [154 Cal. Rptr. 3d 698]; see also *Mundy v. Lenc* (2012) 203 Cal.App.4th 1401, 1408 [138 Cal. Rptr. 3d 464] ["An appellate court reviews an order denying an anti-SLAPP motion from a clean slate"].)

2. De Havilland concedes FX met the first prong of the two-step process

The trial court found that de Havilland's lawsuit arises from FX's exercise of its free speech rights on a topic of public interest in a public forum. De Havilland presented no argument on that issue in her opposition brief. At oral argument, her counsel conceded FX has met the first prong of the anti-SLAPP analysis.

3. The First Amendment protects FX's portrayal of de Havilland in a docudrama without her permission

a. We question whether a docudrama is a product or merchandise within the meaning of Civil Code section 3344

As noted, de Havilland alleges causes of action for violation of the statutory right of publicity, Civil Code section 3344, and for the common law tort of misappropriation. Section 3344, subdivision (a) provides, in part, "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in *products, merchandise, or goods*, or for purposes of advertising or selling, or soliciting purchases of, *products, merchandise, goods or services*, without such person's prior consent, … shall be liable for any damages sustained by the person or persons injured as a result thereof." (Italics added.) Misappropriation is one of the four branches of the privacy tort identified by Dean William Prosser. (Prosser, *Privacy* (1960) 48 Cal. L.Rev. 383, 389; see generally 5 Witkin, Summary of Cal. Law

(11th ed. 2017) Torts, § 756, p. 1043.) The Restatement Second of Torts adopted Prosser's classification. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal. Rptr. 2d 834, 865 P.2d 633].) "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Ibid.*) The Restatement defines the misappropriation tort: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." (Rest.2d Torts, § 652C.)

De Havilland's statutory claim raises a preliminary question of whether the portrayal of a real person in a television program (or a book, play, or film) constitutes the "use" of that person's name or "likeness" "on or in" a product, merchandise, or good. Books, films, and television shows are "things" but are they "merchandise" or "products"? Many of the cases in this area involve products and merchandise such as T-shirts and lithographs (*Comedy III, supra*, 25 Cal.4th 387), greeting cards (*Hilton v. Hallmark Cards* (9th Cir. 2010) 599 F.3d 894), and video games (*Davis v. Electronic Arts, Inc.* (9th Cir. 2015) 775 F.3d 1172; *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* (9th Cir. 2013) 724 F.3d 1268; *Kirby v. Sega of America, Inc.* (2006) 144 Cal.App.4th 47 [50 Cal. Rptr. 3d 607]), or advertisements for products and merchandise. (See, e.g., *Newcombe v. Adolf Coors Co.* (9th Cir. 1998) 157 F.3d 686, 691–694 [beer advertisement]; *Waits v. Frito-Lay, Inc.* (9th Cir. 1992) 978 F.2d 1093 [advertisement for SalsaRio Doritos]; *Midler v. Ford Motor Co.* (9th Cir. 1988) 849 F.2d 460 [advertisement for Ford Lincoln Mercury]; cf.

CACI No. 1804A [to establish violation of Civ. Code, § 3344, plaintiff must prove (among other elements) that defendant knowingly used plaintiff's name or likeness "on merchandise/ [or] to advertise or sell [*describe what is being advertised or sold*]" and that defendant's use of plaintiff's name or likeness "was directly connected to [defendant's] commercial purpose."].)

The United States Court of Appeals for the Ninth Circuit addressed this question in a recent case, *Sarver v. Chartier* (9th Cir. 2016) 813 F.3d 891 (*Sarver*). A United States Army sergeant who had served in Iraq sued the screenwriter, director, and producer of the motion picture The Hurt Locker (Summit Entertainment 2009). The plaintiff alleged "he did not consent to [the] use [of his life and experiences in the film] and that several scenes in the film falsely portray him in a way that has harmed his reputation." (*Sarver*, at p. 896.) He asserted causes of action for (among other torts) misappropriation of his likeness and violation of the right of publicity, false light invasion of privacy, and defamation. (*Ibid.*) The appellate court affirmed the district court's dismissal of the lawsuit under our anti-SLAPP statute. The court observed "*The Hurt Locker* is not speech proposing a commercial transaction." (*Id.* at p. 905.) The court discussed *Zacchini v. Scripps-Howard Broadcasting Co.* (1977) 433 U.S. 562 [53 L.Ed.2d 965, 97 S. Ct. 2849] (*Zacchini*), the only United States Supreme Court case to "review[] the constitutionality of a state's right of publicity law." (*Sarver*, at p. 903.) An Ohio television station broadcast 15 seconds of Zacchini performing his "human cannonball" act. Zacchini sued for violation of his right of publicity

under Ohio law. The court concluded the First Amendment interests in broadcasting Zacchini's *entire* act—rather than, for example, his name or picture—was minimal. (*Zacchini*, at pp. 563–564, 573.) The *Sarver* court noted that, in the intervening forty years, the "Court has not revisited the question of when a state's right of publicity law is consistent with the First Amendment." (*Sarver*, at p. 904; see also *Matthews v. Wozencraft* (5th Cir. 1994) 15 F.3d 432, 439 (*Matthews*) ["'Courts long ago recognized that a celebrity's right of publicity does not preclude others from incorporating a person's name, features or biography in a literary work, motion picture, news or entertainment story. Only the use of an individual's identity in advertising infringes on the persona.'"].)

We need not decide this question, however, because *Feud* is constitutionally protected in any event.

b. Assuming a docudrama is a "use" for purposes of the right of publicity, the First Amendment protects *Feud*

Assuming for argument's sake that a television program is a "product, merchandise, or good" and that Zeta-Jones's portrayal of de Havilland constitutes a "use" of de Havilland's name or likeness within the scope of both the right of publicity statute and the misappropriation tort, we come to FX's First Amendment defense. Nearly 40 years ago, the Chief Justice of our Supreme Court addressed this issue in *Guglielmi v. Spelling-Goldberg Productions* (1979) 25 Cal.3d 860 [160 Cal. Rptr. 352, 603 P.2d 454] (*Guglielmi*). The case involved a television

program that was a "fictionalized version" of the life of actor Rudolph Valentino. Valentino had died years earlier and his nephew Guglielmi sued, alleging misappropriation of Valentino's right of publicity and seeking damages and injunctive relief. The Court affirmed the dismissal of the complaint on the ground that, at the time, the right of publicity was not descendible to heirs.

In a concurring opinion joined by three other justices, the Chief Justice framed the issue as whether the use of a celebrity's "name and likeness in a fictional film exhibited on television constitutes an actionable infringement of that person's right of publicity." (*Guglielmi, supra*, 25 Cal.3d at p. 862.) She concluded, "It is clear that [Guglielmi's] action cannot be maintained." (*Ibid.*) The Chief Justice noted Guglielmi alleged the television production company "knew that the film did not truthfully portray Valentino's life." (*Ibid.*) She summarized Guglielmi's contentions: The film was not entitled to constitutional protection because the producers "incorporated Valentino's name and likeness in: (1) a work of fiction, (2) for financial gain, (3) knowing that such film falsely portrayed Valentino's life." (*Id.* at p. 865.) The Chief Justice noted Guglielmi's argument "reveal[ed] a fundamental misconception of the nature of the constitutional guarantees of free expression," adding, "Our courts have often observed that entertainment is entitled to the same constitutional protection as the exposition of ideas." (*Id.* at pp. 865–867.) "Thus," the justice said, "no distinction may be drawn in this context between fictional and factual accounts of Valentino's life." (*Id.* at p. 868.) "[T]ruthful and fictional accounts" "have equal constitutional stature." (*Id.* at p. 871.) The Chief

Justice "readily dismissed" Guglielmi's next argument, stating, "The First Amendment is not limited to those who publish without charge." (*Id.* at p. 868.)

The Chief Justice wrote, "Valentino was a Hollywood star. His life and career are part of the cultural history of an era. … His lingering persona is an apt topic for poetry or song, biography or fiction. Whether [the producers'] work constitutes a serious appraisal of Valentino's stature or mere fantasy is a judgment left to the reader or viewer, not the courts." (*Guglielmi, supra*, 25 Cal.3d at pp. 869–870.)

In the nearly four decades since, our Supreme Court and Courts of Appeal have continued to cite *Guglielmi* with approval. (See, e.g., *Comedy III, supra*, 25 Cal.4th at pp. 396–398, 401–402, 406; *Winter v. DC Comics* (2003) 30 Cal.4th 881, 887–888, 891 [134 Cal. Rptr. 2d 634, 69 P.3d 473] (*Winter*); *Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 145 [122 Cal. Rptr. 3d 264] (*Tamkin*); *Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1280 [55 Cal. Rptr. 3d 544]; *Polydoros v. Twentieth Century Fox Film Corp.* (1997) 67 Cal.App.4th 318, 324–325 [79 Cal. Rptr. 2d 207] (*Polydoros*).) Federal courts applying California law have as well. (See, e.g., *Sarver, supra*, 813 F.3d at p. 905, fn. 9 [noting *Guglielmi* post-dated *Zacchini* and the four justices "cautioned that the defendants' fictionalized portrayal of Valentino's life was entitled to greater First Amendment protection than the conduct in *Zacchini*"].)

Feud is as constitutionally protected as was the film in *Sarver*, The Hurt Locker. As with that expressive work, *Feud* "is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life—including the stories of real individuals, ordinary or extraordinary—and transform them into art, be it articles, books, movies, or plays." (*Sarver, supra*, 813 F.3d at p. 905; see also *Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542 [18 Cal. Rptr. 2d 790] [producer of documentary about surfers in Malibu was entitled to judgment on surfer's claims for violation of common law and statutory right of publicity; "[w]hether [Dora] is considered a celebrity or not, whether he is seeking damages for injury to his feelings or for the commercial value of his name and likeness, … the public interest in the subject matter of the program gives rise to a constitutional protection against liability"]; cf. *Polydoros, supra*, 67 Cal.App.4th at pp. 322–325 ["*Guglielmi* unequivocally prevent[ed] [plaintiff] from proceeding on his claim for commercial appropriation of identity" against writer and director of fictional film with character that resembled plaintiff as a child; "[t]o succeed in his claims, [plaintiff] must establish a direct connection between the use of his name or likeness and a *commercial* purpose"]; *Rosa & Raymon Parks Institute for Self Development v. Target Corp.* (11th Cir. 2016) 812 F.3d 824, 826 (*Rosa & Raymond Parks*) [books, movie, and plaque depicting civil rights pioneer Rosa Parks were protected under Michigan's constitution]; *Seale v. Gramercy Pictures* (E.D.Pa. 1996) 949 F.Supp. 331, 337 (*Seale*) [1st Amend. protected filmmakers' use of name and likeness of Black Panther Party's cofounder; "the

creation, production, and promotion of a motion picture and history book [that] integrate[d] fictitious people and events with the historical people and events surrounding the emergence of the Black Panther Party in the late 1960's" constituted 1st Amend. expression and was not for a commercial purpose]; *Matthews, supra*, 15 F.3d at p. 440 [1st Amend. protected book and movie about narcotics officers from misappropriation and false light claims; "[i]t is immaterial whether [the book] 'is viewed as an historical or a fictional work,' [citation], so long as it is not 'simply a disguised commercial advertisement for the sale of goods or services'"].)[7]

That *Feud*'s creators did not purchase or otherwise procure de Havilland's "rights" to her name or likeness does not change this analysis. Producers of films and television programs may enter into agreements with individuals portrayed in those works for a variety of reasons, including access to the person's recollections

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7. De Havilland relies on *Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409 [198 Cal. Rptr. 342]. That case—which arose from an unusual set of facts—does not assist our analysis. A tabloid published an article about the supposed involvement of famous actor Clint Eastwood in a "love triangle." Eastwood alleged the article was entirely false. (*Id.* at p. 414.) The court of appeal, citing *Zacchini*, held that Eastwood could proceed with his right of publicity claims. (*Id.* at p. 423.) Here, by contrast, the expressive work at issue is an eight-hour docudrama of which the de Havilland character is but a small part. Moreover, as discussed below, the scenes and lines of which de Havilland complains are permissible literary license and, in any event, not highly offensive to a reasonable person. Unlike *Eastwood, Feud*'s creators did not make out of whole cloth an entirely false "article" for economic gain.

or "story" the producers would not otherwise have, or a desire to avoid litigation for a reasonable fee. But the First Amendment simply does not require such acquisition agreements. (*Polydoros, supra*, 67 Cal.App.4th at p. 326 ["[t]he industry custom of obtaining 'clearance' establishes nothing, other than the unfortunate reality that many filmmakers may deem it wise to pay a small sum up front for a written consent to avoid later having to spend a small fortune to defend unmeritorious lawsuits such as this one"]; cf. *Rosa & Raymond Parks, supra*, 812 F.3d at p. 832 [privilege based on state constitution's free speech guarantee was not "contingent on paying a fee"].) The creators of *The People v. O.J. Simpson: American Crime Story* can portray trial Judge Lance Ito without acquiring his rights. Fruitvale Station's (Weinstein Co. 2013) writer and director Ryan Coogler can portray Bay Area Rapid Transit officer Johannes Mehserle without acquiring his rights. HBO can portray Sarah Palin in Game Change (HBO 2013) without acquiring her rights. There are myriad additional examples.

De Havilland also contends the fictitious interview "is structured as an endorsement of [*Feud*]." The miniseries itself does not support this contention. Nothing Zeta-Jones says or does as de Havilland in the docudrama suggests—much less constitutes—an "endorsement" of the work by de Havilland. De Havilland's argument seems to be that, whenever a filmmaker includes a character based on a real person, that inclusion implies an "endorsement" of the film or program by that real person. We have found no case authority to support this novel argument.

Nor does the use of de Havilland's name—along with photographs of Zeta-Jones—in social media promotion for the miniseries support de Havilland's claims for violation of her right of publicity. Constitutional protection for an expressive work such as *Feud* "'extends to the truthful use of a public figure's name and likeness in advertising [that] is merely an adjunct of the protected publication and promotes only the protected publication.'" (*Montana v. San Jose Mercury News, Inc.* (1995) 34 Cal.App.4th 790, 797 [40 Cal. Rptr. 2d 639] [1st Amend. protected posters that reproduced newspaper stories and photographs of famous quarterback "for two distinct reasons: first, because the posters themselves report newsworthy items of public interest, and second, because a newspaper has a constitutional right to promote itself by reproducing its originally protected articles or photographs"].) "[U]se of a person's name and likeness to advertise a novel, play, or motion picture concerning that individual is not actionable as an infringement of the right of publicity." (*Seale, supra*, 949 F.Supp. at p. 336; see also *Guglielmi, supra*, 25 Cal.3d at pp. 872–873.)

c. In any event, Feud's portrayal of de Havilland is transformative

The parties spend considerable time discussing the "transformative" test set forth in *Comedy III.* There, a company that owns the rights under Civil Code former section 990[8] to The Three Stooges (all three are deceased)

8. Civil Code former section 990 has since been renumbered as Civil Code section 3344.1. Enacted in 1984, the statute essentially provides a descendible right of publicity. In language similar to

sued an artist who had made a charcoal drawing of The Three Stooges, put it on T-shirts and lithographs, and sold those items. The Supreme Court noted the statute imposes liability on a person who uses a deceased personality's name or likeness "either (1) 'on or in' a product, *or* (2) in 'advertising or selling' a product." (*Comedy III, supra*, 25 Cal.4th at p. 395.) The T-shirts and lithographs were, the court said, "tangible personal property," "consisting of fabric and ink" and "paper and ink." (*Ibid.*) The court found the artist's drawing was an "expressive work[] and not an advertisement for or endorsement of a product." (*Id.* at p. 396.) But, the court continued, "[A] celebrity's heirs and assigns have a legitimate protectible interest in exploiting the value to be obtained from *merchandising* the celebrity's image." (*Id.* at p. 400, italics added.)

To resolve this "difficult issue" (*Comedy III, supra*, 25 Cal.4th at p. 396), the court borrowed a concept from copyright law: "'whether and to what extent the new work [the product bearing the deceased personality's likeness] is "transformative"'" (*id.* at p. 404). The court held: "When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law

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section 3344 governing the rights of living persons, section 3344.1 gives a "deceased personality's" heirs and their assignees a cause of action against someone who uses the deceased person's "name, voice, signature, photograph, or likeness … on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent." (Civ. Code, § 3344.1, subd. (a)(1).)

interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist." (*Id.* at p. 405, fn. omitted.) The court continued, "Another way of stating the inquiry is whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question." (*Id.* at p. 406.) The court identified a "useful … subsidiary inquiry:" "does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted? If this question is answered in the negative, then there would generally be no actionable right of publicity. When the value of the work comes principally from some source other than the fame of the celebrity—from the creativity, skill, and reputation of the artist—it may be presumed that sufficient transformative elements are present to warrant First Amendment protection." (*Id.* at p. 407.) Applying its "transformative" test to the sketch artist's T-shirts and lithographs, the court concluded the charcoal drawing on the shirts and prints was a "literal, conventional depiction[] of The Three Stooges" and therefore not constitutionally protected. (*Id.* at p. 409.)

Comedy III's "transformative" test makes sense when applied to products and merchandise—"tangible personal property," in the Supreme Court's words. (*Comedy III, supra*, 25 Cal.4th at p. 395.) Lower courts have struggled mightily, however, to figure out how to apply it to expressive works such as films, plays, and television programs.[9] The

9. Cf. *Sarver, supra*, 813 F.3d at page 904, footnote 6 (unnecessary in The Hurt Locker case to reach affirmative defense of "'transformative use'").

trial court's analysis here is a good example.[10] The court wrote, "[H]ere, because [FX] admit[s] that [it] wanted to make the appearance of [de Havilland] as real as possible … , there is nothing transformative about the docudrama. Moreover, even if [FX] imagined conversations for the sake of being creative, such does not make the show transformative."

We disagree. The fictitious, "imagined" interview in which Zeta-Jones talks about Hollywood's treatment of women and the Crawford/Davis rivalry is a far cry from T-shirts depicting a representational, pedestrian, uncreative drawing of The Three Stooges. The de Havilland role, performed by Zeta-Jones, constitutes about 4.2 percent of *Feud*. The docudrama tells the story, in nearly eight hours, of the competition between Hollywood's leading ladies of the day, Bette Davis and Joan Crawford, for film roles, attention, awards, and acclaim. The miniseries tells many stories within the story as well: Jack Warner's demeaning and dismissive treatment of director Robert Aldrich; Crawford's and Davis's struggles with their personal relationships: husbands, partners, and children; the obstacles faced by capable women like Aldrich's assistant Pauline Jameson who want to direct

10. Amici curiae, 22 constitutional law and intellectual property law professors, note they "have serious reservations about the [*Comedy III*] test [as the appropriate test for deciding the federal question of whether and when the First Amendment protects against right of publicity claims]—highlighted by the trial court's struggle to understand what was meant by a transformative use, and its … reading of that test to devalue realistic uses in works of historical fiction and biography."

motion pictures; and the refusal of powerful men in the entertainment business to take women seriously, even when their movies make money.

In the words of the *Comedy III* Court, Zeta-Jones's "celebrity likeness [of de Havilland] is one of the 'raw materials' from which [the] original work [*Feud*] is synthesized." (*Comedy III, supra*, 25 Cal.4th at p. 406.) Applying *Comedy III*'s "useful … subsidiary inquiry" here, we conclude as a matter of law that *Feud*'s "marketability and economic value" does not "derive primarily from [de Havilland's] fame" but rather "comes principally from … the creativity, skill, and reputation" of *Feud*'s creators and actors. (*Id.* at p. 407.) Ryan Murphy is a successful screenwriter, director, and producer who counts among his credits the television series *Glee* and the Emmy-award-winning miniseries *The People v. O.J. Simpson: American Crime Story.* Accomplished writers contributed to the script. Highly-regarded and award-winning actors including Susan Sarandon, Jessica Lange, Catherine Zeta-Jones, Stanley Tucci, Alfred Molina, Judy Davis, and Kathy Bates performed in *Feud.* In short, *Feud* constitutes "significant expression"—a story of two Hollywood legends—of which the de Havilland character is but a small part. While viewers may have "tuned in" to see these actors and watch this Hollywood tale, there is no evidence that de Havilland as a character was a significant draw. (Cf. *Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, 895 [118 Cal. Rptr. 370] [use in textbook of article about janitor who found and returned large sum of money was not actionable misappropriation; article was neither "a primary reason for the textbook"

"nor was it a substantial factor in the students' purchases of the book"].)

4. De Havilland has not carried her burden of proving with admissible evidence that she will probably prevail on her false light claim

a. The allegations of de Havilland's complaint

In her third cause of action, de Havilland alleges false light invasion of privacy. Though not entirely clear,[11] the complaint seems to ground this claim in four scenes or lines in *Feud*: (1) a fictionalized interview at the 1978 Academy Awards; (2) a reference by the de Havilland character to her "bitch sister" in a private conversation with the Bette Davis character; (3) a remark to the Aldrich character that she "do[esn't] do bitches" and he should "call [her] sister" about a film role; and (4) a response to the Davis character's question ("where's the booze?") when

11. De Havilland's complaint blends the allegations concerning her right of publicity claims with those concerning her false light claim. For example, de Havilland alleges the "fake interview" "put[] false words [in her] mouth," "misappropriated [her] name, likeness[,] and identity without her permission and used them falsely in order to exploit their own commercial interests," and "create[d] the public impression that she was a hypocrite, selling gossip in order to promote herself at the Academy Awards." In her third cause of action for false light, de Havilland alleges that she "benefits financially from the authorized use of her own name, likeness, and identity" and that FX's "misappropriation caused" her harm, and she prays for a permanent injunction restraining FX "from continuing to infringe [her] right of publicity." To assist our analysis, we separate de Havilland's legal theories and address each one separately.

the two are alone in Frank Sinatra's dressing room that "Frank must have drunk it all."

b. False light invasion of privacy and de Havilland's required showing

"'False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.'" (*Jackson, supra*, 10 Cal.App.5th at p. 1264.) "'A "false light" claim, like libel, exposes a person to hatred, contempt, ridicule, or obloquy and assumes the audience will recognize it as such.'" (*Brodeur v. Atlas Entertainment, Inc.* (2016) 248 Cal.App.4th 665, 678 [204 Cal. Rptr. 3d 483] (*Brodeur*).) "In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a reasonable person." (*Fellows v. National Enquirer, Inc.* (1986) 42 Cal.3d 234, 238 [228 Cal. Rptr. 215, 721 P.2d 97] (*Fellows*), citing Rest.2d Torts, § 652E, p. 394.) "'A "false light" cause of action is in substance equivalent to a libel claim, and should meet the same requirements of the libel claim, including proof of malice.'" (*Brodeur*, at p. 678, quoting *Aisenson v. American Broadcasting Co.* (1990) 220 Cal. App.3d 146, 161 [269 Cal.Rptr. 379] (*Aisenson*).)

To defeat FX's anti-SLAPP motion on her false light claim, de Havilland, as a public figure, must demonstrate a reasonable probability she can prove FX broadcast statements that are (1) assertions of fact, (2) actually false

or create a false impression about her, (3) highly offensive to a reasonable person or defamatory, and (4) made with actual malice. (*Brodeur, supra*, 248 Cal.App.4th at p. 678; see also *Dodds v. American Broadcasting Co.* (9th Cir. 1998) 145 F.3d 1053 (*Dodds*); cf. *Fellows, supra*, 42 Cal.3d at p. 239 ["Although it is not necessary that the plaintiff be defamed, publicity placing one in a highly offensive false light will in most cases be defamatory as well"].) We decide as a matter of law whether a reasonable viewer would interpret *Feud* as conveying (a) statements of fact that are (b) defamatory or highly offensive to a reasonable person and (c) actually false or that convey a false impression of de Havilland. (*Couch v. San Juan Unified School Dist.* (1995) 33 Cal.App.4th 1491, 1497, 1500 [39 Cal. Rptr. 2d 848] (*Couch*) ["'the proper focus of judicial inquiry in [defamation and false light cases] is simply whether the communication in question could be reasonably be understood in a defamatory sense by those who received it'"; "[t]his question must be resolved by considering whether the reasonable or 'average' reader would so interpret the material"]; *Moyer v. Amador Valley J. Union High School Dist.* (1990) 225 Cal.App.3d 720, 724 [275 Cal. Rptr. 494]; see also *Ollman v. Evans* (D.C. Cir. 1984) 750 F.2d 970, 978 [questions as to privileges derived from the 1st Amend. are to be decided as matters of law].) "The Supreme Court and other courts have emphasized that one must analyze a statement in its broad context to determine whether it implies the assertion of an objective fact." (*Partington v. Bugliosi* (9th Cir. 1995) 56 F.3d 1147, 1153 (*Partington*).)

Accordingly, de Havilland must offer admissible

evidence that the average, reasonable viewer of *Feud*, watching the scenes in their original context, would have understood them to convey statements of fact that she is "a hypocrite, selling gossip" and a person who "speak[s] in crude and vulgar terms about others." (See *Couch, supra*, 33 Cal.App.4th at p. 1501.) She also must demonstrate that these scenes and lines in *Feud* "'would be highly offensive to a reasonable person'" (*Sarver, supra*, 813 F.3d 891 at p. 907) a person "of ordinary sensibilities" (*Aisenson, supra*, 220 Cal.App.3d at p. 161). In light of the actual docudrama itself—which we have viewed in its entirety—de Havilland cannot meet her burden.

c. The fictitious interview and the light-hearted reference to Frank Sinatra's drinking are neither reasonably susceptible to a defamatory meaning nor highly offensive to a reasonable person

First, we question whether a reasonable viewer would interpret *Feud*—a docudrama—as entirely factual. Viewers are generally familiar with dramatized, fact-based movies and miniseries in which scenes, conversations, and even characters are fictionalized and imagined. (See *Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 513 [115 L.Ed.2d 447, 111 S.Ct. 2419] (*Masson*) ["[A]n acknowledgment that the work is so-called docudrama or historical fiction … might indicate that the quotations should not be interpreted as the actual statements of the speaker to whom they are attributed"]; *Partington, supra*, 56 F.3d at pp. 1154–1155 ["the general tenor of the docudrama also tends to negate the impression

that the statements involved represented a false assertion of objective fact"; docudramas "often rely heavily upon dramatic interpretations of events and dialogue filled with rhetorical flourishes"; most viewers of docudramas "are aware by now that parts of such programs are more fiction than fact"].)

In any event, assuming for argument's sake that the average, reasonable viewer would see the scenes in question as literal statements of actual fact, de Havilland's false light claim fails nevertheless because *Feud*'s depiction of her is not defamatory nor would it "highly offend" a reasonable person. Granting an interview at the Academy Awards is not conduct that would subject a person to hatred, contempt, ridicule, or obloquy. (Cf. *Jackson, supra*, 10 Cal.App.5th at pp. 1264–1265 [famous boxer's social media postings that he broke up with his girlfriend because she had an abortion "did not expose [girlfriend] to 'hatred, contempt, ridicule, or obloquy'"].) *Feud*'s writers explained in their declarations that they employed the fictitious interview as a "framing device." In the interview, Zeta-Jones as de Havilland introduces the theme of powerful men misusing women in Hollywood. She says she was "furious" when she learned how Crawford and Davis had been pitted against one another. *Feud*'s producers wove this theme throughout the miniseries, culminating in the title of the final episode: "You Mean All This Time We Could Have Been Friends?" From time to time in the docudrama—in brief segments[12]—Zeta-Jones

12. The "interview" segments consume fewer than seven minutes of the 392-minute miniseries, about 1.8 percent of the total work.

acts as a guide for the viewer through the tale, a Beatrice to the viewer's Dante.[13]

Zeta-Jones plays de Havilland as a wise, witty, sometimes playful woman. That wit is the same as that displayed by the real de Havilland when she appeared in November 1973 on Merv Griffin's talk show. When Griffin asked de Havilland whether the relationship between a talented director and a talented actress was like that of husband and wife, de Havilland responded, "No. It's like lovers. It's the next best thing to sex." (On the talk show, de Havilland also told Griffin that when she and Bette Davis were both at Warner Brothers Davis "got all the interesting parts" and that Davis deserved them.) De Havilland's wit and playfulness also are evident in her book Every Frenchman Has One (Crown Archetype 2016), published in 1961 and reissued in 2016 with an added "Q and A" with de Havilland. De Havilland includes an entire chapter on the habit of French men of urinating by the side of the road, in public. Taken in its entirety and in context, Zeta-Jones's portrayal of de Havilland is overwhelmingly positive. Indeed, with possible exception of Aldrich's assistant, aspiring director Pauline Jameson (played by Alison Wright), *Feud*'s portrayal of de Havilland is the most favorable of any character in the docudrama. The work itself belies de Havilland's contention that Zeta-Jones portrays de Havilland as a "vulgar gossip" and "hypocrite."

13. Alighieri, The Divine Comedy (1320).

Nor is Zeta-Jones's light-hearted, offhand remark as de Havilland to her good friend Bette Davis while they are alone in Sinatra's dressing room that he must have drunk the liquor defamatory or highly offensive to a reasonable person. FX submitted evidence in support of its motion that Sinatra's fondness for alcohol was well known, and Zeta-Jones's comment to Sarandon would not subject de Havilland to hatred, contempt, ridicule, or obloquy. (*Jackson, supra*, 10 Cal.App.5th at pp. 1264–1265; see also *Sarver, supra*, 813 F.3d at pp. 906–907 ["a reasonable viewer of the film would be left with the conclusion that the character [Sarver says is him] was a heroic figure, albeit one struggling with certain internal conflicts"; "even if the film's portrayal of Sarver were somehow false, such depiction certainly would not 'highly offend' a reasonable person"].)

d. The "bitch" remarks—when de Havilland's actual words were "dragon lady"—are not highly offensive to a reasonable person and are, in addition, substantially truthful characterizations of her actual words

"'California law permits the defense of substantial truth,' and thus a defendant is not liable '"if the substance of the charge be proved true … ."' 'Put another way, the statement is not considered false unless it "would have a different effect on the mind of the reader from that which the … truth would have produced."'" (*Carver v. Bonds* (2005) 135 Cal.App.4th 328, 344–345 [37 Cal. Rptr. 3d 480], quoting *Masson, supra*, 501 U.S. at pp. 516–517; see also *Jackson, supra*, 10 Cal.App.5th at p. 1262; *Gilbert*

v. Sykes (2007) 147 Cal.App.4th 13, 28 [53 Cal. Rptr. 3d 752] [""“it is sufficient if the substance, the gist, the sting of the libelous charge be justified”""].)

In *Feud*, Zeta-Jones uses the word "bitch" twice. In the fifth episode, Sarandon, as Davis, calls Zeta-Jones, as de Havilland, who is living in Paris. The two close friends have a private telephone conversation. Sarandon complains that Crawford "sets [her] off," and then refers to de Havilland's well-known estrangement from her sister Joan Fontaine. Zeta-Jones tells Sarandon her "bitch sister" has started telling the press that she broke Fontaine's collarbone when they were children. The second use of the word comes in the seventh episode when Sarandon and Alfred Molina, playing Robert Aldrich, call de Havilland in Paris to ask her to replace Crawford as cousin Miriam in Hush … Hush, Sweet Charlotte (Twentieth Century Fox 1964). Molina tells Zeta-Jones that the role is not a victim but a "villainess." Zeta-Jones responds, "Oh, no. I don't do bitches. They make me so unhappy." She then adds, "You should call my sister."[14]

In its motion to strike, FX submitted declarations from Ryan Murphy and Timothy Minear, who both wrote parts of *Feud*. Both men were familiar with the well-publicized lifelong animosity between de Havilland and her sister Joan Fontaine. Murphy wrote the scene in which Zeta-Jones uses the words "my bitch sister" on the telephone with Sarandon. Ryan declared he used the word

14. De Havilland eventually accepted the role of cousin Miriam in Hush … Hush, Sweet Charlotte.

"bitch" "because, in [his] mind, the terms *dragon lady* and *bitch* generally have the same meaning, but 'bitch' would be more recognizable to the audience than 'Dragon Lady.'" Similarly, Minear declared *Feud*'s writers "thought 'bitch' was more mainstream and would be better understood by the modern audiences than 'Dragon Lady.'"

Had *Feud*'s creators had Zeta-Jones refer to Fontaine as "my dragon lady sister," the "effect on the mind of the reader" would not have been appreciably different. Nor would a line by the de Havilland character, "Oh, no. I don't do dragon ladies. They make me so unhappy. You should call my sister."[15] "[W]e decline '"to dissect the creative process"' … ." (*Brodeur, supra*, 248 Cal.App.4th at p. 677, quoting *Tamkin, supra*, 193 Cal.App.4th at p. 144.) ""'We must not permit juries to dissect the creative process in order to determine what was *necessary* to achieve the final product and what was not, and to impose liability … for that portion deemed unnecessary. Creativity is, by its nature, creative."'" (*Brodeur* at p. 675, quoting *Tamkin, supra*, 193 Cal.App.4th at pp. 144–145.)

e. De Havilland has not demonstrated she can prove by clear and convincing evidence that *Feud*'s creators acted with actual malice

De Havilland does not dispute that she is a public figure. Her attorneys describe her as "a living legend"

15. *Feud* writer Minear notes the first part of de Havilland's telephone conversation with Aldrich was reported in Shaun Considine's book, Bette & Joan: The Divine Feud, first published in 1989 and reissued twice since.

and "an internationally-known celebrity." Accordingly, the Constitution requires de Havilland to prove by clear and convincing evidence that FX "knew the [docudrama] would create a false impression about [her] or acted with reckless disregard for the truth." (CACI No. 1802.)

When the expressive work at issue is fiction, or a combination of fact and fiction, the "actual malice" analysis takes on a further wrinkle. De Havilland argues that, because she did not grant an interview at the 1978 Academy Awards or make the "bitch sister" or "Sinatra drank the alcohol" remarks to Bette Davis, *Feud*'s creators acted with actual malice. But fiction is by definition untrue. It is imagined, madeup. Put more starkly, it is false. Publishing a fictitious work about a real person cannot mean the author, by virtue of writing fiction, has acted with actual malice.

Recognizing this, in cases where the claimed highly offensive or defamatory aspect of the portrayal is implied, courts have required plaintiffs to show that the defendant "'intended to convey the defamatory impression.'" (*Dodds, supra*, 145 F.3d at pp. 1063–1064.) De Havilland must demonstrate "that [FX] either deliberately cast [her] statements in an equivocal fashion in the hope of insinuating a defamatory import to the reader, or that [it] knew or acted in reckless disregard of whether [its] words would be interpreted by the average reader as defamatory statements of fact." (*Good Government Group of Seal Beach, Inc. v. Superior Court* (1978) 22 Cal.3d 672, 684 [150 Cal. Rptr. 258, 586 P.2d 572] (*Good Government Group*).) Moreover, because actual malice

is a "deliberately subjective" test, liability cannot be imposed for an implication that merely "'should have been foreseen.'" (*Newton v. National Broadcasting Co., Inc.* (9th Cir. 1990) 930 F.2d 662, 680.)

As discussed above, we conclude Zeta-Jones's portrayal of de Havilland in *Feud* is not highly offensive to a reasonable person as a matter of law. Even if it were, however, de Havilland has not demonstrated that she can prove actual malice by clear and convincing evidence. In his sworn declaration, Murphy stated he intended Zeta-Jones's portrayal of de Havilland to be that of "a wise, respectful friend and counselor to Bette Davis, and a Hollywood icon with a unique perspective on the past."

5. De Havilland's cause of action for unjust enrichment cannot proceed

De Havilland's fourth cause of action, entitled "Unjust Enrichment," alleges FX has "received unjust financial and economic benefits at [her] expense," including "the value of the use of [her] name, image[,] and identity for [FX's] commercial purposes." De Havilland asks for FX's "gross revenues" and a constructive trust.

"Unjust enrichment is not a cause of action"; it is "just a restitution claim." (*Hill v. Roll Internat. Corp.* (2011) 195 Cal.App.4th 1295, 1307 [128 Cal. Rptr. 3d 109].) Because de Havilland's right of publicity and false light claims fail, her unjust enrichment claim fails as well. "There being no actionable wrong, there is no basis for the relief." (*Ibid.*)

CONCLUSION

The trial court's ruling leaves authors, filmmakers, playwrights, and television producers in a Catch-22.[16] If they portray a real person in an expressive work accurately and realistically without paying that person, they face a right of publicity lawsuit. If they portray a real person in an expressive work in a fanciful, imaginative—even fictitious and therefore "false"—way, they face a false light lawsuit if the person portrayed does not like the portrayal. "[T]he right of publicity cannot, consistent with the First Amendment, be a right to control the celebrity's image by censoring disagreeable portrayals." (*Comedy III, supra*, 25 Cal.4th at p. 403.) FX's evidence here—especially the docudrama itself—establishes as a matter of law that de Havilland cannot prevail. (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1346 [63 Cal. Rptr. 3d 798].) "'[B]ecause unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable.'" (*Winter, supra*, 30 Cal.4th at p. 891, quoting *Good Government Group, supra*, 22 Cal.3d at p. 685.)

DISPOSITION

The order denying the motion to strike is reversed. The trial court is directed to enter a new and different order granting the motion and awarding defendants their attorney fees and costs. (Code Civ. Proc., § 425.16, subd. (c).) Defendants shall recover their costs on appeal.

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16. Heller, Catch-22 (1961).

Appendix A

CERTIFIED FOR PUBLICATION

EGERTON, J.

We concur:

EDMON, P.J.

DHANIDINA, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX B — RULING OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, FILED SEPTEMBER 29, 2017

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

CASE No. BC667011

OLIVIA DE HAVILLAND, DBE

v.

FX NETWORKS, *et al.*

RULING ON DEFENDANT'S MOTION TO STRIKE (ANTI-SLAPP)

Defendant's motion to strike is DENIED. Although Defendant has shown that the show arises from protected activity, Plaintiff has met her burden in showing a likelihood of prevailing on the merits, as set forth below. The court's ruling on the evidentiary objections is set forth in a separate document.

Section 425.16 posits a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(l).) "A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories

spelled out in section 425.16, subdivision (e)." *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1043; *Navellier v. Sletten* (2002) 29 Cal. 4th 82, 88. If the first prong is met, the burden shifts to the plaintiff to establish a likelihood of prevailing on the complaint.

I. FIRST PRONG – An Issue of Public Interest in a Public Forum

The moving party asserts that the speech at issue is protected under subdivisions (3) and (4) of §425.16(e). *See* Moving Papers, page 7, lines 6-9. As such, the court must first determine if the speech at issue was "made in a place open to the public or a public forum" and involved an issue of public interest.

Public Forum

A public forum is a place open to the use of the general public "for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Krishna Society v. Lee* (1992) 505 U.S. 672, 679, 112 S.Ct. 2701, 2706, 120 L.Ed.2d 541,550. The airing of a television docudrama is "an exercise of free speech" (*Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App.4th 133, 143) that is "undoubtedly a public form." *See Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 476.

Public Interest

A public interest is "any issue in which the public is interested." *Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.

App.4th 1027, 1042. The public interest requirement is to be construed broadly. *Seelig v. Infinity Broadcasting Corp.* (2002) 97 Cal.App.4th 798, 808. The court finds that there is a sufficient basis to find that a television show about Bette Davis and Joan Crawford, including those who knew and worked with them – including a "two-time Academy Award winner" like Plaintiff (*see* operative Complaint, ¶ 9) – is a matter of public interest. Therefore, the court finds that defendant has established the first prong of the Anti-SLAPP statute.

II. SECOND PRONG – Likelihood of Prevailing

As the first prong his been met, the burden shifts to Plaintiff to show a probability of prevailing on the claim. Under CCP § 425.16(b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' *Equilon Enteprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67. The plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. The court does not weigh the credibility or comparative probative strength of competing evidence. *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 768. Furthermore, California's anti-SLAPP statute "poses no obstacle to suits that possess minimal merit." *Navellier v. Sletten*, 29 Cal. 4th 82, 93 (2002). *See* also *Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 884.

In this instance, the Court finds that Plaintiff has successfully met her burden in showing that she has a likelihood of prevailing on the merits, as set forth below and at the hearing on this motion.

3RD CAUSE OF ACTION – INVASION OF PRIVACY/ FALSE LIGHT

The operative Complaint asserts that "FX DEFENDANTS used recreations of OLIVIA DE HAVILLAND in the same activities for which she is known in real life, at the same time putting false words in her mouth, knowingly or recklessly not reporting events truthfully and accurately." (¶ 17). Specifically, Plaintiff identifies 4 scenes that falsely portray Plaintiff:

1. In the opening scene, falsely indicating that Plaintiff gave an interview at the 1978 Academy Awards discussing the relationship between Bette Davis and Joan Crawford. (¶¶ 17, 18, 23, 28, 29).

2. In the fifth segment, falsely given the impression that Plaintiff referred to her sister, Joan Fontaine, as her "bitch sister." (¶¶ 24, 28).

3. Falsely indicating that she said that Frank Sinatra must have drunk all the alcohol because they couldn't find any. (¶ 25).

4. In the seventh segment, falsely indicating that she turned down a role to play a villain in the

> movie "Hush ... Hush, Sweet Charlotte" by stating that she doesn't "play bitches" and that the director should call her sister. (¶ 26).

"A "false light" cause of action is in substance equivalent to a libel claim, and should meet the same requirements of the libel claim, including proof of malice." *Aisenson v. American Broadcasting Co.* (1990) 220 Cal.App.3d 146, 161.

Defendants assert that Plaintiff cannot prevail on this cause of action because (1) the television program does not falsely portray Plaintiff, (2) it is not defamatory, and (3) there is no showing of actual malice.

FALSE PORTRAYAL

First, Defendant argues that the television program accurately portrays Plaintiff – in other words, the scenes are factual. As noted in *Masson v. New Yorker Magazine* (1991) 501 U.S. 496-516-517:

> California law permits the defense of substantial truth and would absolve a defendant even if she cannot "justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details." 5 B. Witkin, Summary of California Law § 495 (9th ed. 1988) (citing cases).

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Regarding the interview scene at the 1978 Academy Awards, Defendants argue that the scene is substantively accurate, even if there are "slight" inaccuracies. As noted in the declaration of Timothy Minear at ¶ 15:

> Many of the de Havilland character's scenes take place during imagined interviews at the 1978 Academy Awards. Research indicates that Ms. de Havilland attended the 1978 Academy Awards. Although, to my knowledge, Ms. de Havilland was not actually interviewed at the 1978 Academy Awards, her dialogue for the imagined interviews was based on a number of actual interviews that she had given over the years. In some instances, as discussed below, the de Havilland character's lines were taken directly from Ms. de Havilland's interviews.

Plaintiff, by contrast, argues that the interview scene contains significant, as opposed to slight, inaccuracies. As the opposition notes:

> Specifically, Defendants admit "Feud" places de Havilland in a counterfeit interview, one which never happened .... Defendants admit there was no interview of de Havilland in 1978 at the Academy Awards about the private relationship of Davis and Crawford, and that they made this up ... In that fake interview, de Havilland gossips and makes negative comments about Davis and Crawford's personal life ... De Havilland never said these things ... "Feud" has de Havilland call

> her sister, actor Fontaine, a "bitch" to others in the profession ... She did not do this ... "Feud" also has de Havilland snipping to Davis about Sinatra's drinking habits ... This is not true ... [*See* Opposition, page 13, lines 5-17.]

These facts, which are supported by the declaration of Plaintiff (*see* Supplemental Declaration of Plaintiff, ¶¶ 4-6), are sufficient to meet her burden of showing that there was no interview at the 1978 Academy Awards and that the sentiments expressed in this interview were not factually accurate.

Second, regarding the scenes wherein she used the term "bitch," Defendant argues that there are multiple examples of her using this type of language (Exhibits 27-29, 43-52), that she actually told director Robert Aldrich that "she doesn't play bitches" (Exhibit 19), and that she called her sister the "Dragon Lady" which, according to Defendants, is a synonym for "bitch." *See* Moving Papers, page 9, line 1 through page 10, line 5. As further explained in ¶ 18 of the declaration of Ryan Murphy, who was the "co-creator, an executive producer, a writer, and a director of FEUD" (Decl. of Murphy, ¶ 1):

> Additionally, I had the de Havilland character refer to her sister as a "bitch" because it was a powerful and succinct way to convey the deep enmity between the de Havilland and Fontaine. I was familiar with the history of the sisters' fraught relationship, including the famous photograph from the 1947 Oscars that captured

> the moment where Ms. Fontaine unsuccessfully attempted to congratulate Ms. de Havilland. Just as a picture is worth a thousand words and can shine light on the essence of a relationship, so too I believed that having the de Havilland character refer to her sister as a "bitch" would capture decades of animosity in a single word.

As further noted in the declaration of Timothy Minear at ¶ 15e(i) and ¶ 19:

> The de Havilland character's line, which I wrote, was a near-verbatim quote of what Ms. de Havilland reportedly really said to Aldrich: "Darling, you know how much I hate to play bitches. They make me so unhappy." *See* Berkley Decl., Exhibit 19 at p. 403. Additionally, as discussed above, Ms. de Havilland spoke critically about her sister, Fontaine, calling her "Dragon Lady," and we had seen "blooper" reels of Ms. de Havilland curing "Oh Christ son of a bitch!" when she messed up a line. *See* Berkley Decl., Exhibits 30-31,43-48.

Plaintiff, however, asserts that "Dragon Lady" is not a synonym for "bitch" (*see* Opposition, page 13, footnote 15 and Supplemental Declaration of Cort Casady at ¶ 8) and that while there are outtakes from 1944 showing that Plaintiff used the term about her own mistakes, she notes that these were private moments not directed at other individuals. *See* Opposition, page 14-15, footnote 17. As fi.1rther noted in the supplemental declaration of Plaintiff at ¶ 6 and ¶ 8:

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> I never had a conversation with director Robert Aldrich about "Hush ... Hush, Sweet Charlotte," wherein I used the word "bitch," or said "you know how much I hate to play bitches; they make me so unhappy." ...
>
> I am aware that Defendants filed certain outtakes from 1944, where I and a number of other actors at Warner Bros., such as Lauren Bacall, Bette Davis, Ronald Reagan, and Jimmy Stewart made mistakes and used slang type expletives expressing frustration with ourselves. These were unguarded, impulsive moments, wherein I felt I was in a confidential setting. They were not public. Looking back at my younger self, I wish I had been more guarded in my language, but these outtakes or bloopers are just that, mistakes and errors, not language that I did or would use in discussing other friends or family in a normal, polite, private or public forum.

For purposes of this motion, Plaintiff has sufficiently met her burden in showing that the use of the term "bitch" and "bitches" in the television show were not factually accurate. *Navellier v. Sletten*, *supra.* While Plaintiff admits that she used that term in 1944, the term was not directed at another person or project whereas "Feud" has Plaintiff using that term in regard to her sister or a movie project.

Finally, as to the Frank Sinatra scene, Defendant claims that this is a true event. *See* Moving Papers, page 9, lines 17-18. However, the actual line about Frank Sinatra does not appear to have been a true event. As implicitly admitted in the declaration of Timothy Minear at ¶ 15(d)(vii):

> Backstage at the 1978 Academy Awards, the de Havilland character gives the Davis character a private pep talk in Frank Sinatra's dressing room, where Ms. de Havilland and Davis reportedly spent most of the real Oscar night in 1963. *See* Berkley Decl., Exhibit 21 at p. 348. The de Havilland character praises Davis, tries to cheer her up, and reminds her how much help Davis provided at the beginning of her own career. The de Havilland character's remarks were inspired by Ms. de Havilland's own comments, such as her praise for Davis on the Merv Griffin show in 1973. At the end of their heart-to-heart, the Davis character asks, "Where's the booze?" and the de Havilland character jokes, "I think Frank must've drunk it all..."

As further noted in the Supplemental Declaration of Plaintiff at ¶ 4: "I never commented to Bette Davis about Mr. Frank Sinatra's drinking habits ..." Accordingly, for purposes of this motion, Plaintiff has sufficiently met her burden of showing that the comments about Frank Sinatra were false.

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DEFAMATORY

Alternatively, Defendants assert that even if some of the statements and scenes are not accurate (*see* Reply, pages 6-9), the television program is not defamatory because (1) there is nothing in the show that would expose Plaintiff to scorn or ridicule, and (2) the show does not purport to be a documentary. *See* Moving Papers, page 10, line 26 through page 11, line 8. As Defendants noted in the declaration of Timothy Minear at ¶ 18:

> Because of our awareness of Ms. de Havilland's guarded attitude toward publicly discussing Fontaine, as well as our Understanding of the widely reported animus between the two sisters, we drew a deliberate distinction between Feud's portrayal of the de Havilland character in public – in the imagined 1978 interview- and its portrayal of the de Havilland character in private – in her candid conversations with Davis (and even Aldridge). In public, the de Havilland character refuses to speak ill of her sister and denies that there is even a feud with Fontaine. Furthermore, consistent with Ms. de Havilland's actual restrained approach, the de Havilland character in Feud decries gossip and counsel's her friend Davis to say "no comment" rather than speaking about Crawford. By contrast, in private conversations with her close friend, Davis, the de Havilland character is freer with her remarks about Fontaine and makes a few pointed comments

> about her sister. But this does not make the de Havilland character a hypocrite – it makes her human. And as discussed above, this depiction is consistent with the actual record and Ms. de Havilland's own most recent comments [where she purportedly called her sister "Dragon Lady" in 2016]."

However, "In determining whether a publication has a defamatory meaning, the courts apply a totality of the circumstances test to review the meaning of the language in context and whether it is susceptible of a meaning alleged by the plaintiff." *Balzaga v. Fox News Network, LLC* (2009) 173 Cal.App.4th 1325, 1337. As *Balzaga*, *supra*, further notes at page 1338:

> "[A] defamatory meaning must be found, if at all, in a reading of the publication as a whole." (*Kaelin v. Globe Communications Corp.* (9th Cir. 1998) 162 F.3d 1036, 1040 (*Kaelin*).) "This is a rule of reason. Defamation actions cannot be based on snippets taken out of context." ...
>
> "In determining whether statements are of a defamatory nature, and therefore actionable, '"a court is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language of the complaint for libelous publication according to its natural and popular construction."'" (*Morningstar, Inc. v. Superior Court*, *supra*, 23 Cal.App.4th at p. 688, 29 Cal.Rptr.2d 547.)

In this instance, the four scenes at issue are (1) falsely indicating that Plaintiff gave an interview at the 1978 Academy Awards discussing the relationship between Bette Davis and Joan Crawford; (2) falsely given the impression that Plaintiff referred to her sister, Joan Fontaine, as her "bitch sister;" (3) falsely indicating that she said that Frank Sinatra must have drunk all the alcohol because she couldn't find any; and (4) falsely stating to director Robert Altman that she doesn't "play bitches" and that the director should call her sister.

For purposes of this motion, and in considering the show as a whole, the Court finds that Plaintiff has sufficiently met her burden of proof in that a viewer of the television show, which is represented to be based on historical facts, may think Plaintiff to be a gossip who uses vulgar terms about other individuals, including her sister. *Jackson v. Paramount Pictures Corp.* (1998) 68 Cal.App.4th 10, 26. ("Moreover, when a party repeats a slanderous charge, he is equally guilty of defamation, even though he states the source of the charge and indicates that he is merely repeating a rumor.") For a celebrity, this could have a significant economic impact for the reasons set forth in the declaration of Cart Casady at ¶ 12:

> In order for the property rights to have value to Miss de Havilland, she must be able to control their use and limit their use to productions for which she has given consent and which are accurate. "Feud's" unauthorized and untrue portrayal, left unchecked, has and will devalue Miss de Havilland's name and identity and her

> ability, and the ability of her heirs, to obtain compensation for such use now and in the future.

MALICE

Finally, Defendant's assert that even if the depiction of Plaintiff is false and defamatory, there is insufficient evidence of actual malice.

As explained in *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal. 3d 244, 256-257:

> If the person defamed is a public figure, he cannot recover unless he proves, by clear and convincing evidence (*see New York Times Co. v. Sullivan*, *supra*, 376 U.S. 254, 285-286, 84 S.Ct. 710, 728-729, 11 L.Ed.2d 686), that the libelous statement was made with "'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (Pp. 279-280, 84 S.Ct. at pp. 725-726.) That decision did not define the phrase "reckless disregard," and its use of the term – "actual malice" – which had a different meaning in the common law of libel, engendered some confusion.
>
> Four years later, in *St. Amant v. Thompson*, *supra*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262, the high court sought to clarify the constitutional standard. First, it explained,

> "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." (P. 731, 88 S.Ct. at p. 1325.)
>
> The quoted language establishes a subjective test, under which the defendant's actual belief concerning the truthfulness of the publication is the crucial issue. (*See Alioto v. Cowles Communications, Inc.* (N.D.Cal. 1977) 430 F.Supp. 1363, 1365-1366.) This test directs attention to the "defendant's attitude toward the truth or falsity of the material published ... [not] the defendant's attitude toward the plaintiff." (*Widener v. Pacific Gas & Electric Co.* (1977) 75 Ca1.App.3d 415, 434, 142 Cal. Rptr. 304.)

Defendants assert that because "Feud's writers investigated and consulted numerous resources to ensure a factual basis for their dramatic narrative and to accurately depict Plaintiff's documented use of salty language, her bitter rivalry with Fontaine, and her style and approach in public interviews ... Plaintiff cannot possibly meet her heavy burden of showing that Defendant's entertained "serious" doubts of the truth of the essence of the

telescoped composite" of the de Havilland character." *See* Moving Papers, page 12, lines 6-11 (citing *Davis v. Costa-Gavras* (S.D.N.Y. 1987) 654 F.Supp. 653, 658).

As also noted in the declaration of Timothy Minear at ¶ 16:

> ... the de Havilland character was scrupulously written to be nuanced, a consummate professional, and consistent with the historical record and Ms. de Havilland's real-life statements; we certainly did not mean to disparage Ms. de Havilland.

Although Defendant's argue that they were trying to portray Plaintiff in a nuanced way, Plaintiff has met her burden for purposes of this motion. *Reader's Digest Assn. v. Superior Court*, *supra* ("This test directs attention to the "defendant's attitude toward the truth or falsity of the material published ... [not] the defendant's attitude toward the plaintiff.") Here, Plaintiff has submitted sufficient evidence that Defendants presented scenes ''with knowledge that it was false or with reckless disregard of whether it was false or not." *Reader's Digest Assn. v. Superior Court*, *supra*. As Plaintiff notes in her Supplemental Declaration of Plaintiff at ¶¶ 3-6:

> I am aware that in "Feud" there is a character designed to look like me, sound like me, and do many of the things I did and do as a professional actor ... I never gave an interview which I talked about the personal relationship of Miss Bette Davis and Miss Joan Crawford ...

> I never commented to Bette Davis about Mr. Frank Sinatra's drinking habits, and to have done so would not have been my normal conduct, custom or habit.
>
> I never had a conversation with Bette Davis where I referred to my sister, Joan Fontaine, as a "bitch," and I would not have done so.
>
> I never had a conversation with Director Robert Aldrich about "Hush ... Hush, Sweet Charlotte," wherein I used the word "bitch," or said "you know how much I hate to play bitches; they make me so unhappy." (I hope you will excuse the present use of the word.)

While Defendants also argue that they relied on books written about Plaintiff, the supplemental declaration of Cort Casady points out that the comments in books attributed to Plaintiff have not been properly sourced. *Jackson v. Paramount Pictures Corp.* (1998) 68 Cal. App.4th 10, 26 ("Moreover, when a party repeats a slanderous charge, he is equally guilty of defamation, even though he states the source of the charge and indicates that he is merely repeating a rumor.") As Casady notes at ¶ 6 and ¶ 7:

> Defendants rely on Miss de Havilland's supposed use of the word "bitch" during a private conversation she reportedly had with director Robert Aldrich ... As a source of this quote, Defendants rely on a book by

> Shaun Considine called "Bette & Joan: The Divine Feude," attached as Exhibit 19 to the Declaration of James Berkley. This book makes no reference or citation to support this statement. ...
>
> The Declaration of James Bekley cites another book, "Round Up the Usual Suspects: The Making of Casablanca – Bogart, Bergman, and World War II" by Aljean Harmetz, attached as Exhibit 52 to Mr. Berkley's declaration. This book discusses an alleged private conversation between Samuel Goldwyn, Jr. and Miss de Havilland in which Miss de Havilland supposedly vented about director Michael Curtiz who was mistreating actors, stating "he was a son of a bitch when I was seventeen, and he's still a son of a bitch." Again, this book includes no reference or citation to support this statement. Further, Defendants do not state that they relied on this book while creating "Feud," rather it was obtained later for the purposes of this Motion ...

Moreover, while Plaintiff may have used the word "bitch" in 1944 in outtakes directed at her own error, it was not directed at any person or project. *See* Supplemental Declaration of Plaintiff at ¶ 6 and ¶ 8.

Finally, while the movie is deemed to be a docudrama which, according to Defendants, is "a dramatized retelling of history" (*see* Declaration of Timothy Minear at ¶ 10),

the declaration of Mark Roesler, who is the Chairman and CEO of Celebrity Valuations (¶¶ 6), notes at ¶ 20:

> The authentic details are used to lead the viewers into believing that what de Havilland says and does is accurate and factual, rather than made up and false, and that de Havilland herself endorsed the "Feud" portrayal of her private and public remarks about other actors at the time "Feud" is set.

Here there is no attempt to show that the movie was considered a "farce." To the contrary, Ryan Murphy notes at ¶ 15 of his declaration that "[t]he de Havilland character was scrupulously written to be nuance and consistent with the historical record." Also, unlike the character in American Hustle, there is no evidence that Defendants sought to portray Plaintiff as unreliable, slightly unhinged, or "a font of misinformation."

In other words, because Defendants sought to portray the show "consistent with the historical record," the statements made in the show may lead a reasonable viewer to believe the statements were actually made by Plaintiff.

Accordingly, for purposes of this motion, the Court finds that on the third cause of action, Plaintiff has sufficiently met her burden by showing that although the Defendants sought to be "consistent with the historical record," they attributed comments to her "with knowledge that it was false or with reckless disregard of whether it was false or not." *Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 884.

Appendix B

1ST AND 2ND CAUSES OF ACTION – COMMON LAW AND STATUTORY RIGHT OF PUBLICITY

As noted in *Timed Out, LLC v. Youabian, Inc.* (2014) 229 Cal.App.4th 1001, 1005-1006: "In this state the right of publicity is both a statutory and a common law right." (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 391 (*Comedy III*).) In 1971, California enacted Civil Code section 3344, a commercial statute that complements the common law tort of misappropriation of likeness. (*Lugosi v. Universal Pictures* (1979) 25 Cal. 3d 813, 819 fn. 6; *KNB*, *supra*, 78 Cal.App.4th at pp. 366-367.)

Section 3344, subdivision (a) provides in relevant part: "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent ... shall be liable for any damages sustained by the person or persons injured as a result thereof." Nothing in section 3344 expressly prohibits assignment of the rights and remedies established by the statute. As *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 403, notes, "What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity's fame through the merchandising of the "name, voice, signature, photograph, or likeness" of the celebrity." (§ 990.)

Appendix B

Defendants contend that Plaintiff cannot prevail on her causes of action for violation of Plaintiff's Right of Publicity because (1) the fictional depiction of Plaintiff in a television series is constitutionally protected, (2) the show is a matter of public interest, (3) the show is "transformative" and, thus, "especially worthy" of protection, and (4) there is no showing of falsity or actual malice.

CONSTITUTIONALLY PROTECTED

Defendants, relying on *Guglielmi v. Spelling-Goldberg* (1979) 25 Cal. 3d 860, note that they did not use any advertisements featuring the actual likeness of Plaintiff and that "a cause of action for appropriation of another's "name and likeness may not be maintained" against "expressive works, whether factual or fictional."" *Daly v. Viacom, Inc.* (N.D. Cal. 2002) 238 F.Supp.2d 1118, 1123 (citing *Guglielmi*, *supra*, at page. 871-872). As noted in the declaration of Stefanie Gibbons, who is the "President of Marketing, Digital Marketing, and On-Air Promotions for FX Networks, LLC" (¶ 1), at ¶ 6:

> In advertising and promoting Feud, FX did not use images of the actress Olivia de Havilland. On certain occasions, FX did use images of Catherine Zeta-Jones, who portrayed the de Havilland character. Consistent with this approach, FX did not use Ms. de Havilland's name in isolation, but rather only to identify the character being played by Ms. Zeta-Jones. Moreover, FX did not prominently feature Ms. Zeta-Jones in our marketing and promoting for Feud.

Plaintiff, by contrast, asserts that Defendants received a benefit from using her likeness to promote the television broadcast such that it appeared Plaintiff was endorsing the television show. In such instances, the right of publicity would trump the First Amendment. As noted in *Comedy III Productions, Inc.*, *supra*, at page 396;

> The right of publicity is often invoked in the context of commercial speech when the appropriation of a celebrity likeness creates a false and misleading impression that the celebrity is endorsing a product. (*See Waits v. Frito-Lay, Inc.* (9th Cir. 1992) 978 F.2d 1093; *Midler v. Ford Motor Co.* (9th Cir. 1988) 849 F.2d 460.) Because the First Amendment does not protect false and misleading commercial speech (*Central Hudson Gas & Elec. Corp. v. Public Serv. Com'n* (1980) 447 U.S. 557, 563-564, 100 S.Ct. 2343,65 L.Ed.2d 341), and because even nonmisleading commercial speech is generally subject to somewhat lesser First Amendment protection (*Central Hudson*, at p. 566, 100 S.Ct. 2343), the right of publicity may often trump the right of advertisers to make use of celebrity figures.

In this case, Plaintiff asserts that Defendants admit that the likeness of Plaintiff "played a key role." *See* Opposition, page 3, lines 10-11. As the opposition asserts:

> The use of Plaintiff's Identity was intended to increase the appeal and success of "Feud," as

> well as to create the impression that Plaintiff, who the audience would trust, endorsed "Feud," Defendants, and their entertainment services." [*See* Opposition, page 3, lines 18-21].

See Zacchini v. Scripps-Howard Broadcasting (1977) 433 U.S 562, 576.

As noted in the expert declaration of Cart Casady, who has worked in the television industry as a writer, producer and creator (¶¶ 3-4), at ¶ 11 and ¶ 12:

> The standard practice in the film and television industry generally ... is that whenever a script or production calls for the inclusion of the name, identity, character, performance or image of a celebrity, consent from the celebrity or their legal representative must be obtained. If the use is significant, as in a supporting character role in a film, compensation needs to be paid for the value of that use. For any use without compensation, a release and waiver of compensation must be obtained ... To use the name and identify of a celebrity without permission is conduct below industry standard ... [¶] The writers of "Feud" clearly and intentionally capitalized on the actual character and fame of Olivia de Havilland by depicting her doing things she did ... the construction of "Feud's" storyline is designed to appear to the viewer as if the still-living Miss de Havilland endorsed the product and its contents, which

> is not true. It is not industry practice to use a celebrity's name and identity in a commercial production without permission, and it is certainly beneath industry standards – in fact, it is production malpractice – to attribute false statements and inaccurate endorsements to a person portrayed in a production without their permission ...
>
> The use of Miss de Havilland's name and identity without her permission and without compensation if allowed to occur without compensation, depreciates the property value of her name and identity, which is considerable ...

Although the Defendants' reply cites *Polydoros v. Twentieth Century Fox Film Corp.* (1997) 67 Cal.App.4th 318, 326, for the proposition that Defendants were not required to compensate Plaintiff, the *Polydoros* case was discussing negligence. Moreover, *Polydoros* did not involve a celebrity, and the film at issue in *Polydoros*, was "a fanciful work of fiction and imagination." *Polydoros*, *supra*, at page 324. Here, by contrast, the defendants attempted to make the program "consistent with the historical record." (*See* declaration of Ryan Murphy at ¶ 15).

As noted in *Comedy III Productions, Inc.*, *supra*, at page 399:

> But having recognized the high degree of First Amendment protection for noncommercial

> speech about celebrities, we need not conclude that all expression that trenches on the right of publicity receives such protection. The right of publicity, like copyright, protects a form of intellectual property that society deems to have some social utility. "Often considerable money, time and energy are needed to develop one's prominence in a particular field. Years of labor may be required before one's skill, reputation, notoriety or values are sufficiently developed to permit an economic return through some medium of commercial promotion. [Citations.] For some, the investment may eventually create considerable commercial value in one's identity." (citing *Lugosi*, *supra*, 25 Cal.3d at pp. 834-835 (dis. opn. of Bird, C. J.).)

In other words, "depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment." *Comedy III Productions, Inc.*, *supra*, at page 400.

Here, Plaintiff argues that the depiction of her in the television program allegedly "depreciate[d] the property value of her name and identity ..." (*see* Declaration of Cort Casady at ¶ 11) by painting her as a gossip who uses vulgar language. Such characterization, according to Casady, would depreciate the economic value of Plaintiff's name and likeness. *See* Declaration of Casady at ¶ 12. Because of this, it is standard in the industry, according to Plaintiff, to negotiate compensation prior to the use of

a person's likeness. As noted in the expert declaration of David Ladd at ¶ 15:

> If the film suggests that the well-known person endorses or is part of the production, then of course this must be accurate and consent obtained. If the use is significant, as in a supporting character role, then if consent is obtained compensation is negotiable. In my personal experience, this issue was delegated to and handled by people who worked either for or with me, either in the legal or business affairs departments of the studios or outside counsel. Before nay project begins production, the errors and omission insurance policies were strict about the studios confirming consent from well-known living person, or well-documented authentications of previously disclosed statements or conduct by the well-known living person.

Here, because no compensation was given despite using her name and likeness, plaintiff has adequately met her burden. *Zacchini v. Scripps-Howard Broadcasting* (1977) 433 U.S 562, 576, ("No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.'") Although the reply argues that compensation is not required when a person's name and likeness is used (*see* reply, page 2, line 10 through page 3, line 7, and declaration of Casey Lalonde, ¶ 8), the *Polydoros* case did not make such a finding but, rather, simply held that "[i]t simply

was not necessary to do so in this case." *Polydoros*, *supra*. Moreover, Plaintiff has submitted expert declaration indicating that this is standard in the industry and, if credited, is sufficient to meet her burden. *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 768.

TRANSFORMATIVE

Defendants assert that the program was transformative because "Feud is a docudrama, and therefore scenes are dramatized – i.e. transformed." *See* Moving Papers, page 14, lines 15-16.

The transformative issue is explained in more detail in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, (2001) 25 Cal.4th 387, notes at page 405:

> On the other hand, when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity. As has been observed, works of parody or other distortions of the celebrity figure are not, from the celebrity fan's viewpoint, good substitutes for conventional depictions of the celebrity and therefore do not generally threaten markets for celebrity memorabilia that the right of publicity is designed to protect. (*See Cardtoons v. Major League Baseball Players* (10th Cir. 1996) 95 F.3d 959, 974 (*Cardtoons*).) Accordingly, First

> Amendment protection of such works outweighs whatever interest the state may have in enforcing the right of publicity. The right-of-publicity holder continues to enforce the right to monopolize the production of conventional, more or less fungible, images of the celebrity.

Specifically, Defendants contend that "The de Havilland character was written from the perspective of writers who viewed past events through the lens of present day cultural issues .... Zeta-Jones used her unique talents to portray Plaintiff forty years ago in an interpretive performance that she artistically rendered under the direction of a film director and further transformed via artistic viewpoint, music, lighting, cinematography and editing. [*See* Reply, page 5, lines 8-15.]

By contrast, Plaintiff asserts that the docudrama was not transformative for the reasons noted in *Comedy III* at page 405:

> Turning to Saderup's work, we can discern no significant transformative or creative contribution. His undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame. Indeed, were we to decide that Saderup's depictions were protected by the First Amendment, we cannot perceive how the right of publicity would remain a viable right other than in cases of falsified celebrity endorsements.

> Moreover, the marketability and economic value of Saderup's work derives primarily from the fame of the celebrities depicted. While that fact alone does not necessarily mean the work receives no First Amendment protection, we can perceive no transformative elements in Saderup's works that would require such protection.

Similarly, here, because the Defendants admit that they wanted to make the appearance of Plaintiff as real as possible (*see* Ryan Murphy Decl. at ¶¶ 14-15), there is nothing transformative about the docudrama. Moreover, even if Defendants imagined conversations for the sake of being creative, such does not make the show transformative. *Comedy III Productions, Inc.*, *supra*, 25 Cal.App.4th 387, 405 ("When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.") *See also No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018, 1034.

Additionally, Defendant argues that because "the economic value of Feud does not primarily derive from Plaintiff's fame [but] from the acclaimed writing and directing, the fame and performances of the series' Emmy-nominated stars ... and the work's subject matter" (*see* Moving Papers, page 14, lines 24-27), there is no violation of the right of publicity.

However, Plaintiff has met her burden on this motion by showing that the use of her likeness in the television program resulted in economic benefit to the Defendants. As noted in the expert declaration of Mark Roesler at 125:

> In consideration of the foregoing, it is my opinion that a [fair market value] of the FX Defendant's use of de Havilland's [right of publicity] Related Rights, assuming such use had been properly negotiated and compensated, in a television production of the instant type and caliber would be between $1.38 million to $2.1 million, conservatively. This results in losses to de Havilland per episode and a financial benefit to FX Defendants from the unauthorized and false use of her name, identity, character and image of approximately $172,500-262,500 per episode.

FALSITY OR ACTUAL MALICE

Finally, Defendant argues that "a public figure like Plaintiff may not recover in tort where the depiction is substantially true or where the creator did not act with actual malice." *See* Moving Papers, page 15, lines 8-10 (citing *Hoffman v. Capital Cities/ABC, Inc.* (9th Cir. 2001) 255 F.3d 1180, 1186-1188).

In response, Plaintiff argues that statements are false and malicious.

First, as Plaintiff notes in her Supplemental Declaration of Plaintiff at ¶ 3-6:

> I am aware that in "Feud" there is a character designed to look like me, sound like me, and do many of the things I did and do as a professional actor ... I never gave an interview which I talked about the personal relationship of Miss Bette Davis and Miss Joan Crawford...
>
> I never commented to Bette Davis about Mr. Frank Sinatra's drinking habits, and to have done so would not have been my normal conduct, custom or habit.
>
> I never had a conversation with Bette Davis where I referred to my sister, Joan Fontaine, as a "bitch," and I would not have done so.
>
> I never had a conversation with Director Robert Aldrich about "Hush ... Hush, Sweet Charlotte," wherein I used the word "bitch," or said "you know how much I hate to play bitches; they make me so unhappy." (I hope you will excuse the present use of the word.)

Second, Plaintiff argues that her depiction was done maliciously because Defendants never sought her consent or verified any of the statements made by her in the movie. *See* Opposition, page 11, lines 1-3. By contrast, the Plaintiff asserts:

> ... Defendants did ask one living celebrity, Don Bachardy, who was used in a minor way, for his consent. Decl. of Don Bachardy ¶ 5. Defendants

> also requested the consent of Joan Crawford's heirs. Smith Decl. Ex. 7. Defendants admit there was no interview of de Havilland at the 1978 Academy Awards about the private relationship of Davis and Crawford, and that they made this up ... Further, they do not deny that Plaintiff did not comment on the drinking habits of Sinatra, that they did not contact Plaintiff, and that she did not endorse "Feud." ... Defendants clearly knowingly and recklessly disregarded the falsity of their depiction of Plaintiff, including a fake interview and false endorsement. [*See* Opposition, page 11, lines 4-13.]

As noted in *Reader's Digest Assn. v. Superior Court*, *supra*:

> If the person defamed is a public figure, he cannot recover unless he proves, by clear and convincing evidence (*see New York Times Co. v. Sullivan, supra*, 376 U.S. 254, 285-286, 84 S.Ct. 710, 728-729, 11 L.Ed.2d 686), that the libelous statement was made with" 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

For purposes of this motion, the Court finds that Plaintiff has sufficiently met her burden of proof in showing that Defendants acted with knowledge that their portrayal of Plaintiff "was false or with reckless disregard of

whether it was false or not" which, consequently, could have an economic impact on Plaintiff. See declaration of Cart Casady at ¶12 (""Feud's" unauthorized and untrue portrayal, left unchecked, has and will devalue Miss de Havilland's name and identity and her ability, and the ability of her heirs, to obtain compensation for such use now and in the future.")

4TH CAUSE OF ACTION – UNJUST ENRICHMENT

"The elements of an unjust enrichment claim are the "receipt of a benefit and [the] unjust retention of the benefit at the expense of another."" *Peterson v. Cellico Partnership* (2008) 164 Cal.App.4th 1583, 1593.

Defendants assert that Plaintiff cannot prevail on this cause of action because (1) it is merely derivative of the prior allegations, and (2) unjust enrichment is not a cause of action (*Melchior v. New Lind Prod., Inc.* (2003) 106 Cal.App.4th 779, 793). The Court finds these arguments without merit in that the prior allegations have sufficiently been pled. While unjust enrichment is not a cause of action, Plaintiff may be able to pursue a theory of unjust enrichment which, under applicable law, "is synonymous with restitution." *Melchior*, *supra* ("The phrase 'Unjust Enrichment' does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so." [Citation omitted]. Unjust enrichment is "'a general principle, underlying various legal doctrines and remedies,'" rather than a remedy itself. [Citation omitted]. It is synonymous with restitution. (*Id.* at 793, citing *Dinosaur Development, Inc. v. White* (1989) 216 Cal.App.3d 1310, 1314-1315.)

Appendix B

CONCLUSION

For the reasons set forth above and in the court reporter's notes, the court denies Defendant's Motion to Strike (Anti-SLAPP).

September 29, 2017

/s/_____
Holly E. Kendig, Judge
Los Angeles Superior Court

APPENDIX C — DENIAL OF PETITION FOR REVIEW OF THE SUPREME COURT OF CALIFORNIA, FILED JULY 11, 2018

Court of Appeal, Second Appellate District,
Division Three - No. B285629

S248614

IN THE SUPREME COURT OF CALIFORNIA

En Banc

OLIVIA DE HAVILLAND,

Plaintiff and Respondent,

v.

FX NETWORKS, LLC *et al.*,

Defendants and Appellants.

The petition for review is denied.

Cuellar, J., is of the opinion the petition should be granted.

CANTIL-SAKAUYE
Chief Justice