NO. B285629

IN THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION 3

FX NETWORKS, LLC AND PACIFIC 2.1 ENTERTAINMENT GROUP, INC.,
Defendants-Appellants,

v.

OLIVIA DE HAVILLAND, DBE,
Plaintiff-Respondent.

On Appeal From
Los Angeles County Superior Court Case No. BC667011
The Honorable Holly E. Kendig, Dept. 42

APPELLANTS' OPENING BRIEF

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CERTIFICATE OF INTERESTED PARTIES OR PERSONS

Pursuant to Rule of Court 8.208, the following entities or persons have an ownership interest of 10% or more in the parties filing this certificate:

Twenty-First Century Fox, Inc., a publicly traded company.

Dated: December 4, 2017

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

By: */s/ Mark R. Yohalem*
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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff Olivia de Havilland seeks to impose liability based on Defendants' dramatized portrayal of her in a docudrama about the real-life rivalry between actors Bette Davis and Joan Crawford—a rivalry in which Plaintiff played a real-life part. Defendants' docudrama, like other works in the genre, "rel[ies] heavily upon dramatic interpretations of events and dialogue filled with rhetorical flourishes." (*Partington v. Bugliosi* (9th Cir. 1995) 56 F.3d 1147, 1155.) Plaintiff alleges that because Defendants wrote lines of dialogue for the de Havilland character that she did not utter and that she claims are inconsistent with her public persona, Defendants committed false-light defamation. She also alleges that because Defendants included a de Havilland character in their docudrama without obtaining Plaintiff's approval, they violated her right of publicity. Plaintiff's claims strike at the heart of the First Amendment and the essence of the docudrama genre. Under longstanding First Amendment precedent, the trial court should have stricken all of Plaintiff's claims under the anti-SLAPP statute. The court fundamentally erred in failing to do so.

This case arises out of Defendants' Emmy-winning docudrama, *FEUD: Bette and Joan* ("*Feud*").[1] The show is largely set in the 1960s and recounts the bitter conflict between Davis and Crawford. The story centers around the making of two movies: *Whatever Happened to Baby Jane?* ("*Baby Jane*"), starring Davis and Crawford; and director Robert Aldrich's ill-fated attempt to reprise the pairing two years later in *Hush … Hush,*

[1] All eight episodes of *Feud* are in the record (on DVDs) for the Court's review. (Joint Appendix ["JA"] 237, 445-446 [Berkley Decl. ¶ 64, Ex. 54]; see also JA1141 [Stip. Lodging *Feud* DVDs].)

Sweet Charlotte ("*Charlotte*"). *Feud*'s creators use the rivalry and its Hollywood backdrop to explore "issues affecting women in Hollywood—sexism, the glass ceiling, [and] how men pit women against each other." (JA181 [Murphy Decl. ¶ 9].) Plaintiff was a close friend and confidante of Davis's. And Plaintiff ultimately replaced Crawford in *Charlotte*. In other words, Plaintiff played a public, real-life role in the historical events that *Feud* dramatizes.

Six months after *Feud*'s initial installment was broadcast, however, Plaintiff brought this lawsuit. Plaintiff's operative Third Amended Complaint ("TAC") takes issue with *Feud*'s use of the familiar cinematic technique of dramatized interviews—here, of the de Havilland character and others, situated backstage at the 1978 Academy Awards—to set up a storyline revealed in flashbacks. Plaintiff insists that the interview and a handful of lines of dialogue in which her character utters the word "bitch" and makes an offhanded quip about Frank Sinatra created the false implication that she was a "gossip," "vulgar," and a "hypocrite," and give rise to a false-light defamation claim. (JA647-648 [TAC ¶¶ 30-31].) Plaintiff also alleges that, despite the historical matters *Feud* depicts, Plaintiff's role in them, and Plaintiff's status as a public figure, Defendants had to obtain her consent and pay her before portraying her in their docudrama.

Defendants immediately brought an anti-SLAPP motion. While the trial court correctly held that Plaintiff's complaint targeted protected First Amendment activity, the court erred in holding that Plaintiff established a probability of prevailing on her claims. As to false light, the trial court held that because Plaintiff denied that the dramatized interview took place or

that she uttered the challenged lines of dialogue, and because Defendants "sought to portray the show 'consistent with the historical record,'" Plaintiff could prevail on her claim. (JA1090-1091 [Ruling 8-9].) As to right of publicity, the court held that Plaintiff's economic interests took precedence over the First Amendment because her public persona had economic value and *Feud* benefitted from it. (JA1094 [Ruling 12].) The court held that *Feud* lacked "transformative" qualities "even if Defendants imagined conversations for the sake of being creative." (JA1095 [Ruling 13].)

Plaintiff's claims are at war with fundamental First Amendment principles, and the court should have dismissed them under the anti-SLAPP statute. In allowing them to proceed, the trial court adopted an analytic framework that, if upheld, would eliminate the docudrama genre. By definition, a docudrama will contain dramatized elements within a historically documented narrative. If that alone constitutes false statements made with actual malice, then the genre would be inherently tortious. Also by definition, a docudrama about a public figure—or a biography of such a figure, for that matter—will depict someone whose persona may have economic value. If that alone violates a public figure's publicity rights, then the only docudramas that could ever be made would be puff pieces crafted to suit the public relations interests of their celebrity subjects. The court's order should be reversed for multiple reasons.

First, Plaintiff's false light claim fails to meet the basic requirements of a representation of fact that is false and defamatory. Plaintiff's claim, and the order sustaining it, ignore that *Feud* was not a documentary, which is a literal retelling of history; it is a docudrama, which is by its very nature

a work of historical *fiction*. "[A] docudrama partakes of the author's license," meaning that its creators must have leeway to interpret historical events and figures. (See, e.g., *Davis v. Costa-Gavras* (S.D.N.Y. 1987) 654 F. Supp. 653, 658.) The dramatic toolbox of this genre is well known to viewers, who understand that "parts of [docudrama] programs are more fiction than fact" (*Partington*, *supra*, 56 F.3d at 1155), and that "quotations should not be interpreted as the actual statements of the speaker to whom they are attributed" (*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 512-513).

The trial court, however, concluded that the very fact that Defendants used imagined scenes and dialogue rendered its portrayal of Plaintiff false and defamatory. (JA1086-1088 [Ruling 4-6].) That ruling cannot be squared with the robust protections afforded to the creators of docudramas under defamation law principles as well as the First Amendment. The trial court failed to assess, among other requirements, whether the challenged scenes and dialogue created a reasonable implication that Plaintiff was vulgar, a gossip, or a hypocrite; whether the implications would have been highly offensive to a reasonable person; and whether the overall portrayal of the de Havilland character in *Feud* dispelled any arguable implication that Plaintiff was a vulgar gossip or hypocrite rather than a venerable person and loyal friend. When Plaintiff's allegations are reviewed, as they must be, in accordance with controlling law (*Davis*, *supra*, at p. 658), Plaintiff cannot demonstrate that the challenged scenes or dialogue imply representations of fact that are both false and defamatory.

Second, the trial court committed manifest errors in applying the controlling actual malice requirements, which Plaintiff had to satisfy at the anti-SLAPP stage. Because Plaintiff asserts that Defendants defamed her by implication, she must show that Defendants intentionally or recklessly created the alleged false impression with knowledge that such a false impression was likely. (See *Good Government Group of Seal Beach, Inc. v. Super. Ct.* (1978) 22 Cal.3d 672, 683-686 ("*Good Government*").) Plaintiff argued, and the trial court agreed, however, that a jury could infer actual malice because Defendants knowingly dramatized the interview and the character's dialogue while giving the show an overall ring of historical authenticity. The evidence showed only that Defendants intended to create a docudrama, not that they intentionally or recklessly aimed to give viewers the impression that Plaintiff was as a gossip, vulgar, or a hypocrite. (*Ibid.*) *Feud*'s creators exhibited diligence by adding dramatized elements that were connected to actual historical events, and in doing so, intended to cast Plaintiff in a *favorable* light as a "wise, respectful friend and counselor" to Davis. (JA183 [Murphy Decl. ¶ 15].) By treating the intent to create a docudrama as tantamount to actual malice, the court carved out the genre from First Amendment and anti-SLAPP protections.

The trial court further erred by ignoring the heavy burden of proof necessary for Plaintiff to establish actual malice. Because Plaintiff "is a public figure, [s]he cannot recover unless [s]he proves, by *clear and convincing evidence* [citation], that the libelous statement was made with 'actual malice.'" (*Reader's Digest Ass'n v. Super. Ct.* (1984) 37 Cal.3d 244, 256.) But the trial court adamantly refused to apply the clear and convincing evidence standard, repeatedly asserting that it "would be

judicial error" to do so "in the anti-SLAPP context." (Reporter's Transcript ["RT"] 337.) The "judicial error," however, was the trial court's refusal to apply the heightened burden of proof that the law requires (*Christian Research Inst. v. Alnor* (2007) 148 Cal.App.4th 71, 84 (*CRI*)), and its conclusion that actual malice could be shown where there was *no* evidence—let alone clear and convincing evidence—that Defendants intended to create a defamatory portrayal of Plaintiff.

Third, Plaintiff's right-of-publicity claim cannot be squared with controlling First Amendment precedent that bars a public figure from invoking economic publicity rights to challenge a docudrama portraying her. In a decision that remains vital today, the California Supreme Court held nearly 40 years ago that the constitutional balance must tip in favor of creative expression about public events and people. (*Guglielmi v. Spelling-Goldberg Prods.* (1979) 25 Cal.3d 860, 869 [Bird, C.J., concurring].[2]) "Prominence invites creative comment," and the First Amendment protects such commentary. (*Ibid.*) Numerous other courts around the country have reached the same conclusion. Plaintiff's claim would flip this principle on its head, privileging a celebrity's purported right to "compensation" over the right to dramatize a story that for decades has commanded the public interest and in which Plaintiff played a prominent, public role.

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[2] All *Guglielmi* citations are to Chief Justice Bird's concurring opinion, which, as the Court has stressed, "commanded the support of a majority of the court." (*Comedy III Prods., Inc. v. Gary Saderup, Inc*. (2001) 25 Cal.4th 387, 396, note 7; accord 25 Cal.3d at p. 869 [C.J., concurring, joined by Tobriner, J., and Manuel, J.]; *id*. at p. 876 [Newman, J., concurring in opinion].)

To deny First Amendment protection to Defendants because the authors chose the docudrama format to embellish dry history, or strove too hard for realism, would not only defeat the purpose of the anti-SLAPP law, but would also deter authors from using the docudrama format at all. This Court should reverse and direct the trial court to grant Defendants' motion.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Feud: Bette and Joan*

A. *Feud*'s Creation

Feud's creator, Ryan Murphy, is a prolific auteur, whose "anthology" television series have included the critically acclaimed *American Horror Story* and *American Crime Story*. (JA180-181 [Murphy Decl. ¶¶ 3, 6].) *Feud*, Murphy's latest anthology, explores the "human dilemma of pain and misunderstanding" through dramatizations of famed fraught relationships. (JA180 [Murphy Decl. ¶ 4].) *Feud*'s first season, *Bette and Joan*, told a story based on the famously contentious relationship between Davis and Crawford.

The Davis-Crawford rivalry has fascinated the public for decades, yielding numerous articles and two full-length books devoted to the subject. (JA226-227, 296-309 [Berkley Decl. ¶¶ 23-24, Exs. 18-21 (including Shaun Considine's *Bette and Joan: The Divine Feud* ("*The Divine Feud*") and Ed Sikov's *Dark Victory: The Life of Betty Davis* ("*Dark Victory*")].) *Feud* centers its account of this rivalry on the making of *Baby Jane* in 1962 and *Charlotte* in 1964. *Baby Jane* was the only motion picture in which Davis and Crawford appeared together. (JA193 [Minear Decl. ¶ 7].) Aldrich, the director of *Baby Jane*, tried to reunite the pair two years later in *Charlotte*.

Crawford was originally cast in the latter film, but was fired during production and replaced by de Havilland. (JA201-202 [Minear Decl. ¶ 15(e)(i)].)

To frame its story, *Feud* uses dramatized interviews set backstage at the 1978 Academy Awards, mostly with Hollywood stars such as the de Havilland character. (JA188 [Zam Decl. ¶¶ 9-10]; JA193 [Minear Decl. ¶ 7].) From these dramatized interviews, the story flashes back to the events of the 1960s. (JA193, 195-203 [Minear Decl. ¶¶ 7, 15].) These flashbacks range from dramatized confrontations on the sets of *Baby Jane* and *Charlotte*, to depictions of more private moments in Davis's and Crawford's lives. (JA237, 445-446 [Berkley Decl. ¶ 64, Ex. 54].) *Feud*'s creators use the rivalry and its Hollywood backdrop to explore "issues affecting women in Hollywood—sexism, ageism, the glass ceiling, [and] how men pit women against each other." (JA181-182 [Murphy Decl. ¶ 10].)

Feud follows a long line of creative works that have drawn engaging stories and universal themes from historical events, including Shakespeare's histories, the Pulitzer-Prize-winning musical *Hamilton*, and recent motion pictures like *Straight Outta Compton* and *The Social Network*. Today, that genre is commonly called "docudrama." In the tradition of the genre, *Feud*'s creators and writers conducted extensive research to ground the dramatized scenes and retellings that form the show's storyline. (JA182-183 [Murphy Decl. ¶¶ 12-14]; JA193-203 [Minear Decl. ¶¶ 6, 8-15].)

Murphy had been familiar with the Davis/Crawford rivalry long before creating *Feud*; he developed a "pen-pal relationship" with Davis,

eventually interviewing her shortly before she died. (JA181 [Murphy Decl. ¶ 7].) In that interview, Davis related many anecdotes that inspired scenes and moments in *Feud*. (*Ibid.*) In weaving these anecdotes and the actors' rivalry into a story, the *Feud* team devoted many hours to researching the events surrounding the feud, the Hollywood culture in which it took place, and the characteristics and statements of the actors portrayed. (JA182-183 [Murphy Decl. ¶¶ 12-14]; JA193-195 [Minear Decl. ¶¶ 6, 8-15].)

While carefully researched, *Feud* was self-evidently not written, developed, produced, or presented as a documentary. (JA194 [Minear Decl. ¶ 10]; JA180 [Murphy Decl. ¶ 4].) The show instead was a dramatization of real-life events, performed by professional actors, not real-time accounts of historical events and verbatim actual dialogue. (JA192-193 [Minear Decl. ¶ 5]; JA182 [Murphy ¶ 11].) The writing team therefore worked to "imagin[e] private moments" and to craft dialogue that would bring the feud between Davis and Crawford to life for a contemporary audience. (JA182 [Murphy ¶ 13].) They sought to capture the "dialogue, tone [and] sentiment" of each character, including the de Havilland character (JA182-183 [Murphy Decl. ¶ 14]), and to create dramatized scenes that "could have happened" (JA194 [Minear ¶ 10].) As with all docudramas, the writers' objective was to situate real events, involving real people, in a "dramatic narrative" that might "fill[] in gaps in the historical record." (*Ibid.*) Their objective was not to summarize or reprise reported facts, but to "create a dramatic narrative" (JA182 [Murphy Decl. ¶13]) and provide the audience with a "dramatized retelling of history" (JA194 [Minear Decl. ¶ 10]).

Feud's creative force is reflected not just in its writing, but also in its dramatic, visual, and editorial elements. Murphy and his team cast two renowned and award-winning actors—Susan Sarandon and Jessica Lange—as the lead characters. (JA182 [Murphy Decl. ¶ 10].) Catherine Zeta-Jones, who portrayed de Havilland, is a highly respected, Oscar-winning actress in her own right, as is Kathy Bates, who portrayed Joan Blondell (another of the characters included in the backstage interviews). The actors' dramatic performances were set against original music, editing, lighting, and cinematography. (JA237, 445-446 [Berkley Decl. ¶ 64, Ex. 54].) These expressive elements combine in a work with the hallmarks of its creators' aesthetic sensibility: camp, dynamism, sharp dialogue, lush production design, and pointed song cues. Any viewer would immediately know this to be a docu*drama*, not a docu*mentary*.

B. *Feud*'s Marketing and Critical Acclaim

To market *Feud*, Fox ran an advertising campaign using print media, video advertisements, and social media. (JA206-207 [Gibbons Decl. ¶ 4].) The campaign focused on the story and characters at the heart of the show—the rivalry between Davis and Crawford—and the contemporary stars playing them, Sarandon and Lange. (*Ibid.*) Consistent with this approach, most of the advertisements used images only of Sarandon and Lange portraying the show's protagonists. (*Ibid.*) None of the advertisements used images of Plaintiff herself; even Zeta-Jones, the actress who portrayed Plaintiff, was not "prominently feature[d]" in the campaign. (JA207 [*id.* ¶¶ 6-7].)

Feud has received widespread critical acclaim. (JA237 [Berkley Decl. ¶¶ 65-68].) A critic for *The New Yorker*, for example, commended the show's depiction of its "stark theme"—"how skillfully patriarchy screws with women's heads"; *Salon* broadly praised the series for "transform[ing] the tale of two film icons who hated each other into lovely, heartbreaking art."[3] *Feud* went on to receive 18 Emmy nominations across multiple categories, including writing, directing, production design, costumes, title design, music composition, and acting. (JA460-464 [Berkley Decl. Ex. 57]; JA842 [Roesler Decl. Ex. 6]).)

C. *Feud*'s Dramatized Olivia de Havilland Character

In the context of *Feud's* story arc, the de Havilland character played a supporting role, whose past reflections and flashback scenes helped frame the plot surrounding the Davis/Crawford relationship. (JA181 [Murphy Decl. ¶ 8]; JA194 [Minear Decl. ¶ 11].) As writer and producer Timothy Minear explained, "[t]he de Havilland character in *Feud* was written to be a minor role." (JA194 [Minear Decl. ¶ 11].) The actor who portrayed her, Zeta-Jones, did not appear in every episode as a series regular, and when she did appear was credited as a "special guest star." (*Ibid.*)

Murphy and the show's other writers chose to include a de Havilland character because she was a well-known confidante of Davis's. (JA193,

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[3] (See Nussbaum, Emily, "'Feud': A Bittersweet Beauty" (Mar. 20, 2017), *The New Yorker*, JA450-459 [Berkley Decl. Ex. 56], *also available at* https://www.newyorker.com/magazine/2017/03/20/feud-a-bittersweet-beauty; McFarland, Melanie, "With 'Feud: Bette and Joan,' a Hollywood Rivalry For the Ages Becomes an Epic TV Experience" (Mar. 4, 2017), *Salon*, *available at* https://www.salon.com/2017/03/04/with-feud-bette-and-joan-a-hollywood-rivalry-for-the-ages-becomes-an-epic-tv-experience/.)

194-195 [Minear Decl. ¶¶ 7, 12]; JA192-184 [Murphy Decl. ¶¶ 15-16].) Davis expressed affection and admiration for de Havilland in her interview with Murphy, and those sentiments informed the way Murphy envisioned the de Havilland character. (JA181 [Murphy Decl. ¶ 7].) As Murphy explained, the de Havilland character was written to be "a wise, respectful friend and counselor to Bette Davis," who could serve as a "bridge to the viewer." (JA183 [Murphy Decl. ¶ 15].) It was "important," Murphy explained, "that viewers trust the de Havilland character." (*Ibid.*)

In addition to appearing in the show's framing device, the de Havilland character also appears in flashbacks as Davis's friend and as Crawford's replacement in *Charlotte*. The de Havilland scenes show the character supporting Davis and discussing movie roles. In two of these scenes, de Havilland makes remarks about her own famously fraught relationship with another Hollywood legend—de Havilland's sister, the actress Joan Fontaine—and how the media fueled the tension between them. (JA195-203 [Minear Decl. ¶ 15].) Plaintiff's difficult relationship with Fontaine has been documented and discussed for decades. (JA230-233, 337-406 [Berkley Decl. ¶¶ 35-46, Exs. 30-39].) There is a famous photograph, for example, of Plaintiff facing away from her sister—in what the press widely described as a "snub"—after Plaintiff won the Best Actress Oscar in 1947.[4] (JA230 [Berkley Decl. ¶ 36].)

[4] The photograph, by Hymie Fink of *Photoplay*, can be viewed in a July 1, 2016 article in the *Telegraph* newspaper, among many other places. (JA356-357 [Berkley Decl. Ex. 32], *also available at* http://www.telegraph.co.uk/films/2016/07/01/100-years-of-shade-olivia-de-havilland-joan-fontaine-and-the-sto/).

To craft the de Havilland character and dialogue, Murphy and Minear grounded the character in real events and facts, but necessarily "imagined" and sought to "dramatize" elements based on their understanding of her character. (JA193-194 [Minear Decl. ¶¶ 7, 10].) Some of the show's scenes are based on events that actually occurred, including de Havilland traveling to support Davis at the 1963 Academy Awards and Aldrich begging de Havilland to replace Crawford in *Charlotte*. (JA200, 201-202 [Minear Decl. ¶¶ 15(d)(v); *id.* (e)(i)].) Murphy, Minear, and the other writers carefully researched these events, as well as Davis's perspective and "point of view" on them. (JA182-183 [Murphy Decl. ¶ 14]; JA196-202 [Minear Decl. ¶¶ 15(a)-(f)].) To give the de Havilland character historical resonance in the context of creative storytelling, the writers researched and considered Plaintiff's "comments, sentiments and tonal emotion". (JA180 [Murphy Decl. ¶ 4]; JA196-202 [Minear Decl. ¶¶ 15(a)-(f)].)

One of the lines that Plaintiff challenges illustrates how the writers went about their work: the de Havilland character's reference to her sister, Fontaine, as "my bitch sister" in the show's fifth episode, entitled *And the Winner Is … (The Oscars of 1963)*. (JA198-199 [Minear Decl. ¶ 15(d)(iii)].) The de Havilland character uses that line in an imagined conversation in which she offers the Davis character advice about how to handle her combative relationship with Crawford. (*Id.*) The writers used the phrase "bitch sister" as an expressive way of capturing de Havilland's well-known enmity toward Fontaine. (*Id*.) In the course of their research, the writers had learned that de Havilland had dubbed her sister "Dragon Lady, as I [Plaintiff] eventually decided to call her," in a 2016 interview.

(JA231, 337-348 [Berkley Decl. ¶¶ 37-39, Exs. 30-31]; JA198-199 [Minear Decl. ¶ 15(d)(iii)].) The writers believed the word "bitch" would be "more mainstream" and "better understood by the modern audience than 'Dragon Lady.'" (JA199 [Minear Decl. ¶ 15(d)(iii)].)

There was also precedent for de Havilland herself using the word "bitch." For example, *Feud*'s creators learned from the book *The Divine Feud* that when Aldrich asked de Havilland to replace Crawford in *Charlotte*, de Havilland reportedly responded: "Darling, you know how much I hate to play bitches." (JA226, 301-302 [Berkley Decl. ¶ 23, Ex. 19, at 403].) That reported conversation is depicted in a separate telephone scene —which Plaintiff also challenges—between the Aldrich and the de Havilland character in Episode 7. (JA201-202 [Minear Decl. ¶ 15(e)(i)].)

In total, the de Havilland character appears in 18 of *Feud*'s 400 minutes. These brief scenes were grounded in historical events, but they contained dramatized elements. Overall, *Feud*'s creators' intent was to design the de Havilland character to be viewed as a wise, strong woman who acted as "voice of reason," while possessing a sharp wit. (JA182-185 [Murphy Decl. ¶¶ 14-20]; JA194-204 [Minear Decl. ¶¶ 11-19]; JA188-190 [Zam Decl. ¶¶ 11-14].)

II. Trial Court Proceedings

A. Plaintiff's Lawsuit

Plaintiff filed her original complaint on June 30, 2017, and her operative complaint, the TAC, on August 28, 2017. (JA638 [TAC at 1].) Mischaracterizing *Feud* as a "documentary" (e.g., JA645-647 [TAC ¶¶ 27, 29]), Plaintiff asserts four causes of action: (1) infringement of the

common law right of publicity; (2) infringement of the statutory right of publicity, Civil Code section 3334; (3) false light; and (4) unjust enrichment (JA648-654 [*id.* ¶¶ 32-80]).

Plaintiff alleges that *Feud* depicts her in a false light by having the de Havilland character speak lines of dialogue she did not actually utter, and by featuring her in the imagined interview at the 1978 Academy Awards in which the de Havilland character states "[t]here was never a rivalry like theirs. For nearly half a century they hated each other, and we loved them for it." (JA644-645 [*id.* ¶¶ 19-26].) The complaint also challenges three additional lines of dialogue:

(1) the de Havilland character's reference to her sister, Fontaine, as her "bitch sister" in the imagined 1963 conversation with Davis noted above (JA645 [TAC ¶ 24]);

(2) the de Havilland character's response to Aldrich's request that she replace Crawford in *Charlotte*: "Oh no, I don't [do] bitches. They make me so unhappy. You should call my sister." (JA645 [*id.* ¶ 26]); and

(3) the de Havilland character's reference to Frank Sinatra's drinking in a dramatized conversation between de Havilland and Davis in Sinatra's dressing room at the 1963 Academy Awards. (JA645 [TAC ¶ 25].) The drama of the fifth episode centers on the Best Actress Oscar, for which Davis, but not Crawford, had been nominated based upon *Baby Jane*. Shortly before the Oscar is awarded, the de Havilland character tries to lift Davis's spirits, saying, "this is supposed to be a celebration." Davis laughingly asks, "Well then, where's the booze?," and de Havilland responds, jokingly, "I think Frank must've drunk it all." (JA200-201 [Minear Decl. ¶ 15(d)(vii)].)

Plaintiff avers that these lines made her appear in a false light. (JA645 [TAC ¶¶ 24-26].) She claims she "never referred to her sister as her 'bitch sister'" or "a 'bitch,'" and "did not, and does not, engage in such vulgarity." (JA645 [*id.* ¶¶ 24, 26].)

Plaintiff also alleges *Feud* violated her right of publicity by including a de Havilland character that incorporated "specific details from real life" without obtaining Plaintiff's consent and compensating her. (JA642-643, 646-648 [*id.* ¶¶ 17-18, 29-31].) According to the TAC, Defendants used Plaintiff's "name, identity, and likeness" in order to "intentionally promote their companies, services, and products and to make it appear that [Plaintiff] endorsed 'Feud,' FX DEFENDANTS, their services, companies, and products." (JA646-648 [*id.* ¶¶ 29-30].)

B. Defendants' Anti-SLAPP Motion

Defendants filed a special motion to strike under the anti-SLAPP statute, Code of Civil Procedure § 425.16. Defendants argued that Plaintiff failed to establish a likelihood of proving that the challenged representations were false, defamatory, or made with actual malice. (JA169-177 [Mot. 7-15].) Defendants argued that *Feud* constituted expression protected by the First Amendment, which foreclosed Plaintiff's right-of-publicity claims. (JA176-177 [*Id.* at 14-15].) Nor could Plaintiff proceed on her unjust enrichment claim, which was coextensive with her other causes of action. (JA177 [*Id.* at 15].)

To underscore that Plaintiff could not meet her burden, Defendants provided declarations from Murphy and Minear; the author of the screenplay that helped inspire *Feud*; and a Fox executive who oversaw the

marketing of the show. (JA179-213 [Murphy, Minear, Zam, and Gibbons Declarations].) Defendants also submitted extensive documentary, electronic, and physical evidence (including all eight episodes of *Feud*) illustrating the historical research the *Feud* writers undertook, their creative process, and the advertising used to market the show. (JA239-474 [Berkley Decl. Exs. 1-59]; see also JA1144-1147 [Notice Designating Exhibits to be Transmitted to the Court of Appeal].) These declarations and supporting evidence detailed the research, writing, and artistic intentions that went into *Feud*.

In opposition, Plaintiff submitted a declaration in which she denied ever giving "an interview in which I talked about the personal relationship of Miss Bette Davis and Miss Joan Crawford," having "a conversation with Bette Davis where I referred to my sister, Joan Fontaine, as a 'bitch,'" "comment[ing] to Bette Davis about Mr. Frank Sinatra's drinking habits," or using the word "bitch" to refer to her sister or in conversation with Aldrich. (JA971 [Suppl. de Havilland Decl. ¶¶ 3-6].) To support her publicity claims, Plaintiff submitted putative expert declarations purporting to establish a "standards of practice in the entertainment industry" of seeking consent from public figures before using characters based on them in docudramas. (JA694 [Opp'n 7].)

C. The Trial Court's Ruling

The trial court denied Defendants' motion, based on an oral ruling from the bench at a September 29, 2017 hearing, and a written decision bearing the same date. (JA1083 [Ruling 1].) While recognizing that *Feud* was speech protected by the anti-SLAPP statute, the court held that Plaintiff

had met her burden of establishing a probability of prevailing on her false-light and right-of-publicity claims. In assessing Plaintiff's probability of success, the court applied a "minimal merit" standard that assumed the legal sufficiency of Plaintiff's evidence. (JA1084 [Ruling 2].)

As to the false light claim, the court held that Plaintiff met her burden with the declaration denying that she ever uttered the challenged lines. (JA1087-1088 [Ruling 5-6].) The court concluded that the facts "supported by the declaration of Plaintiff" were "sufficient to meet her burden of showing that there was no interview at the 1978 Academy Awards," and that "the use of the term 'bitch' and 'bitches' in the television show were not factually accurate." (JA1086-1088 [*id.* at 4-6].) The court reasoned that because *Feud* was "represented to be based on historical facts," a viewer could infer Plaintiff was "a gossip who uses vulgar terms about other individuals, including her sister." (JA1088 [*id.* at 6].)

The trial court further concluded that Plaintiff had offered sufficient evidence that Defendants acted with actual malice. Defendants pointed to precedent requiring Plaintiff to produce evidence showing she could establish actual malice by clear and convincing evidence. The court insisted, however, that it "would be error on my part" to apply the clear and convincing evidence standard in ruling on an anti-SLAPP motion. (RT 325-326.) Applying a "clear and convincing evidence standard in the anti-SLAPP context," the court said, "would be judicial error," because it "is the standard of proof at trial." (RT 337.) The court found actual malice based upon Plaintiff's assertions that she never said the specific things depicted in *Feud* and that Defendants "never sought her consent or verified any of the statements." (JA1096-1097 [Ruling 14-15].)

Regarding the right of publicity claim, the court held that, because of purported Hollywood practices, Plaintiff's right to be compensated for her public persona outweighed Defendants' First Amendment rights to portray her in *Feud*. The court believed Plaintiff met her burden (1) with evidence purportedly showing that "Defendants admit[ted] that they wanted to make the appearance of Plaintiff as real as possible," (2) with evidence purportedly showing that Defendants benefitted by including a de Havilland character, and (3) because "no compensation was given." (JA1094-1096 [Ruling 12-14].) The court further held that Defendants had acted with actual malice because they "acted with knowledge that their portrayal of [Plaintiff] 'was false or with reckless disregard [for the truth]' which, consequently, could have an economic impact on Plaintiff." (JA1097 [Ruling 15].)

Defendants timely appealed.

ARGUMENT

I. Standard of Review and Anti-SLAPP Framework: This Court Must Conduct an Independent Review of the Record to Determine Whether Plaintiff Established a Reasonable Probability of Prevailing at Trial

This Court "review[s] de novo whether the trial court should have granted [the defendant's] special motion to strike, conducting an independent review of the entire record." (*No Doubt v. Activision Publ'g, Inc.* (2011) 192 Cal.App.4th 1018, 1026.) That inquiry focuses on the burden shifting regime the anti-SLAPP statute establishes:

> [1] A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech … in connection with a public issue shall be

> subject to a special motion to strike, [2] unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(CCP § 425.16, subd. (b)(1).)

Defendants bear the initial burden of showing that the challenged claims arise from protected activity. (E.g., *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-56.) If Defendants meet this burden, then the burden shifts to the Plaintiff to establish a probability of prevailing on her claims. (*Ibid.*) The court must consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (CCP § 425.16, subd. (b)(2).)

Here, the trial court found that the first prong of the anti-SLAPP statute was met, noting 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 … is a matter of public interest." (JA1083 [Ruling 1].) That conclusion is correct, for *Feud*'s subject matter plainly satisfies the first prong of the anti-SLAPP statute.

This brief focuses on the second prong of the anti-SLAPP statute: whether Plaintiff established a "reasonable probability" of prevailing. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 825 [citing § 425.16, subd. (b)(1)].) To meet her burden, "the plaintiff must show both that the claim is legally sufficient and there is admissible evidence that, if credited, would be sufficient to sustain a favorable judgment." (*McGarry v. Univ. of San Diego* (2007) 154 Cal.App.4th 97, 108.) "In making this assessment, the court must consider both the legal sufficiency of and evidentiary support for the pleaded claims, and must also examine whether there are

any constitutional or nonconstitutional defenses to the pleaded claims and, if so, whether there is evidence to negate any such defenses." (*Ibid*.) Plaintiff must meet the anti-SLAPP standard with respect to "each element of [her] claim." (*Balzaga v. Fox News Network, LLC* (2009) 173 Cal.App.4th 1325, 1336.)

While "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." (*CRI, supra,* 148 Cal.App.4th at p. 80, citations and internal quotations omitted.)

II. Plaintiff Failed To Support Her Claim for False Light

"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." (*Price v. Operating Eng'rs Local Union No. 3* (2011) 195 Cal.App.4th 962, 970.) False light and libel are "in substance equivalent," and are subject to the same First Amendment standards. (*Brodeur v. Atlas Entm't, Inc.* (2016) 248 Cal.App.4th 665, 678.) Where, as here, the Plaintiff is a public figure, she can overcome an anti-SLAPP motion only by establishing a reasonable probability of proving that Defendants published a statement (1) that is an assertion of fact, (2) that is actually false or creates a false impression about the Plaintiff, (3) that is defamatory, and (4) that was made with actual malice. (*Ibid*; accord *Dodds v. American Broadcasting Co.* (9th Cir. 1998) 145 F.3d 1053, 1059.) Plaintiff failed to demonstrate a reasonable probability she

could prevail on any of these elements, and the trial court erred by concluding otherwise.

Further, Plaintiff must tailor this showing to her defamation theory, which is based on defamation by implication. The gravamen of Plaintiff's claim is that the interview and three lines of dramatized dialogue created the false impression that Plaintiff was a "hypocrite, selling gossip in order to promote herself" and spoke "in crude and vulgar terms about others." (E.g., JA647-648 [TAC ¶ 31]; see also JA645 [*id.* ¶ 26].)

To meet her burden on falsity, Plaintiff must offer evidence that "the reasonable or 'average' [viewer]," watching the scenes "in their original context," would reasonably have understood them "to convey a provably false assertion of fact"—*viz.*, that that viewers would take from those scenes the implication that Plaintiff was vulgar, a gossip and a hypocrite. (*Couch v. San Juan Unified Sch. Dist.* (1995) 33 Cal.App.4th 1491, 1501; *Weller v. ABC, Inc.* (1991) 232 Cal.App.3d 991, 1002, n.9.)

To meet her burden on defamatory meaning, Plaintiff must offer evidence that those words and their alleged implications were defamatory and this implied impression was "highly offensive to persons of ordinary sensibilities." (*Aisenson v. Am. Broad. Co.* (1990) 220 Cal.App.3d 146, 161.) Plaintiff failed to meet, and cannot satisfy, her anti-SLAPP burden on these elements. Section A, *infra*.

Critically, because Plaintiff is undisputedly a public figure, she must also show that she could prove to a jury by clear and convincing evidence that Defendants acted with actual malice, *i.e.*, that they "knew or acted in reckless disregard of whether [their] words would be interpreted by the average [viewer] as defamatory statements of fact." (*Good Government,*

supra, 22 Cal.3d at p. 684.) But Plaintiff failed to show that she could establish, by clear and convincing evidence, that *Feud*'s creators deliberately tried to make Plaintiff look like a vulgar gossip, or acted with reckless indifference to creating such an impression knowing that the negative impression was likely. In addition, the trial court committed pure legal error by applying the wrong burden of proof and the wrong substantive standard to Defendants' motion. Section B, *infra*.

A. Plaintiff Failed To Show that *Feud* Implied Anything False or Defamatory About Her

The trial court allowed Plaintiff's false light claim to proceed on the theory that because Defendants sought "to portray the show 'consistent with the historical record,'" any statement "not actually made by Plaintiff" and any deviation from literal fact constituted proof of defamation. (JA1088, 1091 [Ruling 6, 9].) This theory contravenes the law of defamation and the First Amendment in the context of docudramas.

Even in the context of factual, journalistic reporting, the First Amendment guarantees "a certain degree of literary license" for authors reporting on events or public figures, and "flexibility in their choice of the proper words and phrases." (*Reader's Digest Ass'n*, *supra*, 37 Cal.3d at pp. 256, 261.)

For obvious reasons, even greater leeway exists in the context of docudramas, which are not news reports. Docudramas are permitted to employ "dramatic interpretations of events and dialogue filled with rhetorical flourishes in order to capture and maintain the interest of their audience." (*Partington*, *supra*, 56 F.3d at p. 1155.) "[T]he First Amendment protects the 'rhetorical hyperbole' and 'imaginative

expression' that enlivens writers' prose" (*id.* at p. 1157), and "does not demand literal truth in every episode depicted" (*Davis*, *supra*, 654 F.Supp. at p. 658). By arguing that *Feud*'s use of this constitutionally protected "dramatic overlay" (*ibid*) establishes defamation, Plaintiff inverts the foregoing principles. Under the proper standards, Plaintiff failed to meet her anti-SLAPP burden of showing she could prevail on the elements of falsity and defamation.

1. Plaintiff Showed Only that the Challenged Interview and Dialogue Were Dramatized, Not that They Reasonably Implied False Statements of Fact

Feud, like all docudramas, "does not purport to depict … events precisely as they actually occurred," but offers a dramatized account of "historical event[s] or the lives of real people" using "simulated dialogue" and other creative aspects of storytelling. (*Davis*, *supra*, 654 F.Supp. at p. 657-658.) Courts have stressed that "the First Amendment protects such dramatizations" (*ibid*), and that "[a]uthors should have 'breathing space' in order to criticize and interpret the actions and decisions of those involved in a public controversy" (*Partington*, *supra*, 56 F.3d at p. 1159).

Because there is rarely a transcript of proceedings for historical events, the "dialogue is necessarily fictional" in a docudrama, and the story must necessarily be altered and telescoped. (*Youssoupoff v. CBS Inc.* (N.Y. Sup. Ct. 1963) 244 N.Y.S.2d 701, 706.) Courts have therefore recognized that a reasonable docudrama viewer would not "perceive [the characters'] dialogue as assertions of fact" (*Brodeur*, *supra*, 248 Cal.App.4th at p. 678), but instead understands that a docudrama is "a dramatization of an historical event or lives of real people using actors and actresses" (*Davis*,

supra, 654 F. Supp. at p. 658). Indeed, as the Supreme Court has stated, "quotations [in a docudrama] do not always convey that the speaker actually said or wrote the quoted material." (*Masson, supra*, 501 U.S. at pp. 497.) "The general tenor of the docudrama … tends to negate th[at] impression." (*Partington, supra*, 56 F.3d at pp. 1154-1155; accord *Brodeur, supra*, 248 Cal.App.4th at p. 680.) It is only where the dramatization abuses the "author's license" by "materially distorting" the "fundamental story being told" that a character's words or conduct can be deemed "false" statements of fact about the character's real-life counterpart. (*Davis, supra*, 654 F.Supp.2d at p. 658; cf. *Bose v. Consumers Union of U.S.* (1984) 466 U.S. 485, 512-513.)

Plaintiff asserts that the challenged dramatizations were actionably "false" because *Feud* shows her making statements she says she did not utter and giving an interview she did not give. (JA971 [Suppl. de Havilland Decl. ¶¶ 4-6].) The trial court agreed, holding that because *Feud*'s creators tried to be "'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," and that this supported Plaintiff's claim for false light. (JA1091 [Ruling 9].) Plaintiff's argument and the trial court's agreement with it are wrong under the controlling law.

While Plaintiff's putative expert contended that *Feud*'s "authentic details" would have misled "viewers into believing that what de Havilland says and does is accurate and factual" (JA748 [Roesler Decl. ¶ 20]), those "details" do not somehow transform an overtly dramatic work into a documentary. In fact, viewers are "familiar with this genre," and do not "assum[e] that all statements within them represent assertions of verifiable

facts," but on the contrary are "aware by now that parts of such programs are more fiction than fact." (*Partington*, supra, 56 F.3d at pp. 1154–1155.)

Here, no viewer would reasonably understand the challenged dialogue and action to be *implying* the representations of fact that Plaintiff purports to draw from them.

Plaintiff contends that the fact the de Havilland character twice utters the word "bitch"—once in a scene with the Davis character, referring to Plaintiff's sister, Fontaine; and once in a scene with director Aldrich ("I don't do bitches. … You should call my sister.")—creates the false impression that Plaintiff was a vulgarian. No viewer would reasonably understand these lines of dialogue to be implying such a fact about Plaintiff. At most, the character's use of that word in reference to Fontaine implies that Plaintiff and her sister had a fraught relationship—which is true. (See JA198-199, 201-202 [Minear Decl. ¶ 15(d)(iii), (e)] (noting historical evidence of Plaintif saying to Aldrich: "I hate to play bitches") and referring to Fontaine as "Dragon Lady").)

Plaintiff makes much of the fact that she never gave an interview discussing the Davis/Crawford feud at the 1978 Academy Awards, alleging the scene portrays her as "gossip[ing]" when she "never said these things." (JA700 [Opp'n 13]; JA962 [de Havilland Decl. ¶ 5]; JA971 [Suppl. de Havilland Decl. ¶ 3].) But a character's appearance in an imagined interview does not render *Feud*'s depiction "false," for it is a standard dramatic device, used here to frame and tell the show's core story. (Cf. *Reader's Digest*, *supra*, 37 Cal.3d at p. 262.) Moreover, using the de Havilland character as one of the interviewees had a clear factual basis, because Plaintiff did give interviews in which she discussed Hollywood

celebrities (including Davis and her sister Fontaine). (JA195-199 [Minear Decl. ¶¶ 15 (a), (b), (d)(iii)].)

"[I]f dramatizing some details, excluding others …, and implicitly expressing [an] opinion… is actionable, then virtually any docudrama on a controversial topic could be defamatory." (*Heller v. NBCUniversal, Inc.* (C.D. Cal., June 29, 2016, No. CV-15-09631-MWF-KS) 2016 WL 6583048, at *7.) Dramatized elements, such as those Plaintiff cites, fall comfortably within the "[l]eeway" authors are afforded when they "attempt[] to recount a true event" in a docudrama or other dramatization. (*Davis, supra*, 654 F.Supp.2d at p. 658.)

2. Plaintiff Failed To Show that *Feud* Cast Her in a Highly Offensive Light

Even assuming that the asserted implications could be provably and actionably false, no "reasonable or 'average' [viewer]," watching the challenged scene and dialogue in "their original context," would have understood such minor dramatizations to paint Plaintiff as a vulgar gossip or hypocrite, rather than as a sympathetic and witty friend. (See *Weller, supra*, 232 Cal.App.3d at p. 1002, n.9.) Nor would such a viewer have found that the impression created by these dramatizations was "highly offensive" (*Price, supra*, 195 Cal.App.4th at p. 970), as required for there to be defamation.

The challenged elements do not come close to casting the de Havilland character in a light "highly offensive to a reasonable person" (*id.*) or "expos[ing] [Plaintiff] to hatred, contempt, ridicule, or obloquy" (*Brodeur, supra*, 248 Cal.App.4th at p. 678). Moreover, the Court must consider *Feud* "as a whole in order to understand its import and the effect

which it was calculated to have on the reader." (*Balzaga v. Fox News Network LLC* (2009) 173 Cal.App.4th 1325, 1339; see also *Sarver v. Chartier* (9th Cir. 2016) 813 F.3d 891, 906 [reasonable viewer of film as a whole would be left with impression that character was heroic, even if certain traits were "unflattering"]; *Seale v. Gramercy Pictures* (E.D. Pa. 1997) 964 F.Supp. 918, 928 [similar].) Taken as a whole, the de Havilland character serves as "an objective, authoritative bridge to the viewer." (JA183 [Murphy ¶ 15].) She is shown throughout the series—in scenes unmentioned by Plaintiff and ignored by the trial court—to be a wise and respectful friend and counselor to Davis. (JA237, 445-446 [Berkley Decl. ¶ 64, Ex. 54]). The integrity and wisdom attributed to the de Havilland character are also reflected in the very scenes that Plaintiff challenges, for she is portrayed as urging Davis to take the high road (JA198-199 [Minear Decl. ¶ 15(d)(iii)]), and supporting her in difficult times (JA200-201 [Minear Decl. ¶ 15(d)(vii)]).

While Plaintiff herself objects to the dramatization, "[i]t is not sufficient, standing alone, that the language is unpleasant and annoys or irks plaintiff." (*Gang v. Hughes* (S.D. Cal. 1953) 111 F.Supp. 27, 29.) Nor does the possibility "that some person might, with extra sensitive perception, understand [a defamatory] meaning … establish liability." (*Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 699.) Plaintiff failed to establish that a reasonable person could draw "highly offensive" inferences from the dialogue, let alone inferences so offensive that they would overshadow the otherwise glowing portrayal of the de Havilland character. If a plaintiff could proceed on a false light claim by taking this sort of divide-and-conquer approach, then anyone portrayed in a docudrama

could fashion claims out of a few scenes or words within many hours of scenes and imagined dialogue in the work.

B. Plaintiff Did Not Show that She Could Prove Actual Malice by Clear and Convincing Evidence, and the Trial Court Erred by Holding Her to Too Low a Standard

Far from pointing to clear and convincing evidence of actual malice, Plaintiff rested upon the creators' mere acknowledgment they were creating a work that included fiction as well as fact. As an independent review of the record confirms, *Feud*'s creators showed a level of diligence and care foreclosing any inference Defendants intentionally or recklessly portrayed Plaintiff in a false light.

This review establishes that Plaintiff failed to make the necessary showing of actual malice, and that the trial court's actual malice analysis rested on multiple errors of law. First, the court failed to apply the defamation-by-implication standard, which requires a showing that the defendant intended to convey the defamatory impression, or recklessly disregarded that risk. Second, the court compounded that error by refusing to apply the clear and convincing evidence standard for actual malice, deeming it inapplicable to the anti-SLAPP context.

1. The Trial Court Failed To Apply Both the Substantive Standard for Defamation by Implication and the Clear and Convincing Evidence Burden for Actual Malice

Because Plaintiff's theory was one of defamation by implication, she was required to demonstrate that Defendants "either deliberately cast [their] statements in an equivocal fashion in the hope of insinuating a defamatory import to the reader" or "acted in reckless disregard of whether [their]

words would be interpreted by the average reader as defamatory statements of fact." (*Good Government, supra*, 22 Cal.3d at p. 684; accord *Solano v. Playgirl, Inc.* (9th Cir. 2002) 292 F.3d 1078; *Hoffman v. Capital Cities/ABC, Inc.* (9th Cir. 2001) 255 F.3d 1180.) This standard is necessary, the courts have explained, lest speakers be held liable for the unintended consequences of statements about public figures, which "would create precisely the chilling effect on speech which the *New York Times* [actual malice] rule was designed to avoid." (*Good Government, supra,* at pp. 683-684 [citing *New York Times Co. v. Sullivan* (1964) 376 U.S. 254].)

Plaintiff could not meet that standard. But despite recognizing that Plaintiff's false light claim rested on the theory that *Feud*'s audience would "think Plaintiff to be a gossip" (JA1088 [Ruling 6]), the trial court failed to examine whether Defendants *intended* to create that negative impression or recklessly took that risk knowing that such a negative impression was likely. Instead, the court concluded that Defendants acted with actual malice because they "knew the [challenged] interview was false" and "what was said" by the de Havilland character "was not true." (RT 332.) For the court, it was enough that Defendants "made it up." (*Ibid*.) But that is not enough. Indeed, it is not enough even if "the implication it took from the broadcast was 'clear and inescapable' to the court," unless Plaintiff has shown that Defendants "intended to convey the defamatory impression at issue here." (*Newton v. Nat'l Broad. Co., Inc.* (9th Cir. 1990) 930 F.2d 662, 681.) Plaintiff has not made, and cannot make, that showing because the unrebutted evidence submitted by Defendants demonstrated that *Feud*'s creators intended to create a positive impression of the de Havilland character (JA183 [Murphy Decl. ¶ 15]), and the trial court was not

permitted to "substitute[] its own view as to the supposed impression left by the broadcast for that of the [creators] who prepared [it]." (*Ibid.*)

The trial court married its relaxed, erroneous substantive standard for malice to a lower, and equally erroneous, burden of proof. Because Plaintiff is a public figure, she must prove with "clear and convincing evidence" that the defamatory statement was made with actual malice. (*Reader's Digest, supra*, 37 Cal.3d at p. 256.) The clear and convincing standard is "a heavy burden, far in excess of the preponderance sufficient for most civil litigation." (*CRI, supra*, 148 Cal.App.4th at p.84.)

Despite Defendants' urging (RT 325-326), the court concluded that it "would be judicial error" to "apply a clear and convincing evidence standard in the anti-SLAPP context," asserting that this was only "the standard of proof at trial" (RT 337; see *id.* at 325). But it is well-established that the "clear and convincing" burden applies in the anti-SLAPP context, requiring that "the evidence in the record [be] sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by *clear and convincing* proof of 'actual malice.'" (*CRI, supra*, 148 Cal.App.4th at p. 86.)

These errors worked together to convert a standard meant to safeguard free speech into an instrument for silencing it. The clear and convincing evidence burden and the special standard for defamation-by-implication claims form a daunting standard in the anti-SLAPP context: the plaintiff must show "'that a jury could reasonably find by clear and convincing evidence that [Defendants] intended to convey the defamatory impression.' [Citation.]" (*Thomas v. Los Angeles Times Commc'ns, LLC* (C.D. Cal. 2002) 189 F.Supp.2d 1005, 1013; accord *Dodds, supra*, 145 F.3d

at p. 1064; *Saenz v. Playboy Enterprises, Inc.* (7th Cir. 1988) 841 F.2d 1309, 1318.) Yet, instead of examining whether Plaintiff's factual showing indicated she could prove malice with "the *convincing clarity* required to strip [the challenged] utterance[s] of First Amendment protection" (*CRI, supra,* 148 Cal.App.4th at p. 86), the trial court treated *Feud*'s dramatic elements as presumptively actionable, and then applied a watered-down burden of proof and scienter standard for actual malice. The resulting analysis undermines the anti-SLAPP protections, and permitted a demonstrably deficient claim to proceed here.

2. Plaintiff Cannot Bear Her Burden of Showing Actual Malice Merely By Showing that *Feud*'s Creators Knew They Were Creating a Docudrama that Included Dramatized Elements

At bottom, Plaintiff's theory of actual malice is that because Defendants knowingly dramatized scenes and dialogue while seeking to ground their docudrama in historical events, Defendants acted with actual malice. That theory fails as a matter of law. "[P]ublishing a dramatization is not of itself evidence of actual malice." (*Davis, supra,* 654 F.Supp. at p. 658; accord *Seale, supra,* 964 F.Supp. at p. 928.) A docudramatist will necessarily know that he has "embellished or perhaps even fabricated aspects of the actual events" precisely "because the film [is] a docudrama," but that is insufficient to establish actual malice. (*Lovingood v. Discovery Commc'ns, Inc.* (N.D. Ala., Aug. 1, 2017, No. 14-cv-00684) ___F.Supp.3d___ [2017 WL 3268951, at *8].) If knowing dramatization were enough to establish actual malice—and it is not—then the genre

would disappear altogether. Neither the First Amendment nor precedent, however, permits that result.

Defendants' effort to portray the de Havilland character and other events in *Feud* "'consistent with the historical record'" (JA1091 [Ruling 9]) is in the very nature of docudramas. The undisputed evidence is that *Feud*'s creators wrote *Feud* as a "creative work" grounded in "actual fact" (JA194 [Minear Decl. ¶ 10]), and they could reasonably expect that their audience would be "aware by now that parts of [a docudrama] are more fiction than fact" (*Partington, supra,* 45 F.3d at pp. 1154-1155). If docudrama authors were required to choose between pure fact and pure fiction, the genre would be dead.

3. An Independent Review under the Proper Standards Confirms that Plaintiff Did Not Demonstrate Actual Malice

This Court must independently review the conclusion that Plaintiff established a likelihood of showing that Defendants acted with actual malice, *i.e.*, that Defendants entertained "serious doubts of truth of the *essence* of the [depicted story]" and the impression the scenes would create considering *Feud* as a whole. (*Davis, supra,* 654 F.Supp. at p. 658, italics added.) That duty flows from the anti-SLAPP statute, under which this Court conducts an "independent review of the entire record" (*No Doubt, supra,* 192 Cal.App.4th at p. 1026), and from the First Amendment itself.

As an "expositor[] of the Constitution," this Court has a duty to "independently decide whether the evidence in the record is sufficient to cross the constitutional threshold" of "clear and convincing proof of 'actual malice.'" (*Bose, supra,* 466 U.S. at p. 511].) In reviewing the trial court's

actual malice determination, "[n]ormal principles of substantial evidence review do not apply," and this Court "is not bound to consider the evidence of actual malice in the light most favorable to respondents." (*McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 846.) This review confirms that Plaintiff failed to make any prima facie showing of actual malice, and that the record evidence precludes such an inference.

***Dramatized Interview*:** The undisputed evidence is that *Feud's* writers chose this dramatic device to "flash back" to scenes depicting past events because they viewed it as "an effective storytelling technique" that would "advance the plotline." (JA188 [Zam Decl. ¶¶ 9-10]; JA193 [Minear Decl. ¶ 7].) The evidence was undisputed, in fact, that the writers were aware that television audiences understood the framing device of having characters address the audience directly as one that demonstrates dramatization. (JA188 [Zam Decl. ¶ 10]; JA194 [Minear Decl. ¶ 10].) They chose the de Havilland character as an interviewee not to portray her as a gossip or a hypocrite, but for the opposite purpose: to offer a kind and sympathetic friend, one with "admiration and love" for Davis, as an entry into the acrimonious Crawford/Davis feud. (JA188-189 [Zam Decl. ¶ 11]; JA 183 [Murphy Decl. ¶ 15].)

Plaintiff offers no evidence that Defendants intended, or recklessly risked, that audience members would interpret these scenes to portray actual interviews or as implying that Plaintiff was vulgar, a gossip, and a hypocrite. The interviews are shown taking place offstage *as the Academy Awards* are being presented. There is no evidence at all that any writer thought viewers would reasonably believe *Feud* was recreating backstage interviews—of Plaintiff and others, including Crawford's former

housekeeper—that actually occurred at the 1978 Academy Awards to imply that de Havilland (or any other character for that matter) was a vulgar gossip or hypocrite.

The historical research recounted by Murphy and Minear refutes the notion that they acted with reckless indifference to the essence of the underlying event or of Plaintiff's public persona. The writers conducted research showing that Plaintiff had conducted interviews in which she talked about Davis, including interviews on the *Merv Griffin Show* and *Dinah!* (JA194-196 [Minear Decl. ¶¶ 12, 15, 15(a)-(f), 16]; JA189-190 [Zam Decl. ¶ 14]; JA226, 301-302 [Berkley Decl. ¶ 23, Ex. 19 at 407-08]; see also JA222-225, 229-230, 239-285, 322-331 [*id.* ¶¶ 3-17, 32-34, Exs. 1-14, 27-29].)

***The de Havilland Character's Use of "Bitch"*:** Plaintiff presented no evidence showing that she could establish at all—let alone by clear and convincing evidence (as required)—that Defendants sought intentionally or recklessly to cast her as a vulgar gossip or hypocrite by using the word "bitch." The record actually shows that these lines were the product of the writers' careful research and interpretation, and that the writers sought to present the de Havilland character in a positive light.

Even though they had no burden on the second prong of the anti-SLAPP motion, Defendants submitted detailed declarations explaining that they penned the dialogue with "care and respect," and demonstrating how they grounded it in "comments, sentiments, and tonal emotions expressed through the years by [Plaintiff] herself." (JA182-183 [Murphy Decl. ¶ 14].) That evidence, which is undisputed, forecloses the inference that

Defendants acted with reckless indifference to the truth or the implied meaning of the de Havilland character's statements.

The authors drew the character's remark that "I don't play bitches" in the conversation with Aldrich about *Charlotte* nearly verbatim from Considine's book *The Divine Feud*. The authors understood that book to be one of the two "definitive accounts of the relationship between Crawford and Davis." (JA193, 201-202 [Minear Decl. ¶¶ 6, 15(e)(i)].) In the other scene, the de Havilland character urged Davis not to fuel press coverage of her rivalry with Crawford by invoking her own feud with her sister: "You know what my bitch sister has taken to telling the press? That I broke her collarbone when we were children. Can you imagine?" (JA183-184 [Murphy Decl. ¶ 16].) These dramatized lines were informed by real events and comments by Plaintiff. Plaintiff's feud with her sister was well publicized, and the *Feud* writers knew from their research that she had dubbed her "Dragon Lady" in a 2016 AP interview. (JA194 [*Id.* ¶ 17]; JA198-199 [Minear Decl. ¶ 15(d)(iii)]; JA231, 337-348 [Berkeley Decl. ¶¶ 37-39, Exs. 30-31].)

California courts have stressed that a false light action must be dismissed under the anti-SLAPP statute unless the plaintiff shows she can present evidence "foreclos[ing] the possibility" that the defendants published a falsity innocently or merely negligently. (See *CRI*, *supra*, 148 Cal.App.4th at pp. 88-89.) Plaintiff did not come close to foreclosing that possibility here. The creators researched the character and had a factual basis for her imagined dialogue. This is not an instance, then, where the authors had "serious doubts about the truth of the essence" of the scenes and dialogue they created, or their implications. (*Davis*, *supra*, 654

F.Supp.2d at p. 658.) Rather, their decision to use the word "bitch" in place of "Dragon Lady" was well within the scope of creative license entailed by a docudrama, presenting a "rational interpretation" of the historical record (*Bose*, *supra*, 466 U.S. at p. 512), using "colorful [and] hyperbolic" language that is "precisely the type of rhetorical flourish that the First Amendment protects" (*Partington*, *supra*, 56 F.3d at p. 1160).

Courts have repeatedly found such dramatized dialogue protected. For instance, in *Seale*, *supra*, 964 F.Supp. at p. 928, former Black Panthers leader Bobby Seale objected to a scene in a docudrama in which he argued with another leader, Eldridge Cleaver. The argument had never taken place, the dialogue was invented, and the docudrama's creators knew that, which Seale argued proved actual malice. (*Ibid.*) The court, however, rejected this argument because the scene "serve[d] as a 'dramatization of th[e] schism'" between the two men—a schism that was real—and "dramatization is not of itself evidence of actual malice." (*Ibid*; see also, e.g., *Leopold v. Levin* (Ill. 1970) 259 N.E.2d 250, 256 [rejecting defamation claim involving docudrama where "the fictionalized aspects of the book and motion picture were reasonably comparable to, or conceivable from facts of record from which they were drawn, or minor in offensiveness when viewed in the light of such facts"].)

Indeed, even that reasonable license was not lightly taken, for the writers articulated many reasons for having the de Havilland character use "bitch." They believed (JA236, 443 [Berkley Decl. ¶ 64, Ex. 53]),

reasonably, that "Dragon Lady" and "bitch" had similar meanings,[5] but that "bitch" would be more recognizable to a modern audience (JA184 [Murphy Decl. ¶ 17]; JA198-199 [Minear Decl. ¶ 15(d)(iii)]). They also thought the word had narrative value, as "a powerful and succinct way to convey the deep enmity between de Havilland and Fontaine." (JA184 [Murphy Decl. ¶ 18].)

Plaintiff argued, and the trial court agreed, that Defendants should not have relied on Considine's book *Divine Feud* because the statement attributed to Plaintiff in it is not "properly sourced" with footnote references or citations. (JA1090 [Ruling 8].) No authority supports the notion that only books adhering to the standards of academic journals may be consulted by docudramatists, or that docudramatists must review for themselves the sources in such books. In fact, even journalists "may rely on the investigation and conclusions of reputable sources" without personally evaluating the underlying evidence (*Reader's Digest*, *supra*, 37 Cal.3d at p. 259), and the record is clear that *Divine Feud* was considered "definitive" (JA193 [Minear ¶ 6]). Regardless, "[l]ack of due care is not the measure of liability, nor is gross or even extreme negligence." (*McCoy*, *supra*, 42 Cal.3d at p. 860.)

***The Character's Joke About Frank Sinatra*:** Plaintiff failed to submit clear and convincing evidence—or *any* evidence—of actual malice concerning the de Havilland character's passing joke that Frank Sinatra

[5] This is supported by dictionaries. (See JA236, 443 [Berkley Decl. ¶ 63, Ex. 53] (*Speak English Like an American*) (entry for "dragon lady" says a synonym is "bitch"); compare https://www.merriam-webster.com/dictionary/dragon%20lady, with https://www.merriam-webster.com/dictionary/bitch.)

"must've drunk" all the booze in his dressing room. The authors explained that they used the line to underscore that the de Havilland character was "a strong woman with a sharp wit." (JA189-190 [Zam Decl. ¶ 14].) The joke resonated with the show's Hollywood milieu, the specific setting (Sinatra's dressing room), and with Sinatra's own persona. Moreover, it is neither gossipy nor vulgar, and thus does not even fit within Plaintiff's defamation-by-implication theory.

***The Record Evidence of Defendants' Intent to Portray Plaintiff Positively*:** On top of Plaintiff's manifest failure to come forward with any evidence that Defendants knowingly or recklessly created an impression that Plaintiff was a vulgar gossip or hypocrite, Defendants submitted unrebutted evidence that *Feud*'s creators intended to portray her "as a wise, respectful friend and counselor to Bette Davis" who "serves as a voice of reason" and "who informs the audience" about the show's subjects and themes. (JA183 [Murphy Decl. ¶ 15].) Thus, the character is repeatedly shown counseling Davis to take the high road, not give the press the vitriol it seeks, and not publicly debase other women. (JA183-184 [*Id.* ¶ 16]; JA203-204 [Minear Decl. ¶ 18].) It "would have been inconsistent with *Feud*'s narrative to have portrayed Ms. de Havilland as a gossip or otherwise negatively." (JA183 [Murphy Decl. ¶ 15].)

* * *

The trial court's opinion allows a false light claimant to hail creators of artistic works into court on nothing more than the premise that the plaintiff was portrayed in a dramatized role, on a factual record that shows, if anything, diligence rather than recklessness. It must be reversed.

III. Plaintiff Failed To Support Her Claims for Violation of the Right Of Publicity

Accepting Plaintiff's arguments, the trial court held that Plaintiff could proceed with her right-of-publicity claims because (1) Defendants benefitted from the use of Plaintiff's name and likeness in *Feud*, (2) no compensation was paid to Plaintiff, and (3) the use was not transformative because Defendants strove to make the appearance of Zeta-Jones as Plaintiff as real as possible.

The court's ruling poses a grave threat to the docudrama genre and creative expression generally. It also is marked departure from precedent. The California Supreme Court recognized in 1979 that the First Amendment immunizes dramatized or "fictionalized" movies about public figures from right-of-publicity claims, lest they be censored by tort suits. (*Guglielmi*, *supra*, 25 Cal.3d at p. 862.) That conclusion remains valid today, and accords with decisions from numerous other jurisdictions from around the country. When the Court subsequently adopted the "transformative test" to protect free speech under the First Amendment (*Comedy III*, *supra*, 25 Cal.4th 387 [merchandise]; *Winter v. DC Comics* (2003) 30 Cal.4th 881 [comic books]), it also made clear that "fictionalized portrayal" in docudramas is a paradigmatic example of protected transformative expression for the reasons expressed in *Guglielmi*. (*Comedy III*, *supra*, 25 Cal.4th at p. 406.) Plaintiff's right-of-publicity claims must be dismissed.

Moreover, California law protects expressions concerning matters of public interest—which *Feud* undoubtedly is—from publicity claims. This defense can be overcome only by clear and convincing evidence of actual

malice. Plaintiff alleges that Defendants portrayed the de Havilland character "as if she endorsed 'Feud'" (JA50-51, 650 [TAC ¶¶ 37, 50]), but there is zero evidence, let alone clear and convincing evidence, that Defendants intended to convey any such impression.

A. The First Amendment Protects Dramatizations, Like *Feud*, Which Are Inspired by Real-Life Events

"Film is a 'significant medium for the communication of ideas,' and whether exhibited in theaters or on television, is protected by constitutional guarantees of free expression." (*Polydoros v. Twentieth Century Fox Film Corp*. (1997) 67 Cal.App.4th 318, 323-324, citation omitted.) *Guglielmi* specifically applied these constitutional guarantees to reject a right-of-publicity claim challenging a movie's dramatizing of real-life people and events. (25 Cal.3d at p. 862.)

Guglielmi involved a suit alleging that a television movie, *Legend of Valentino*, violated the actor Rudolf Valentino's right of publicity by using his "name, likeness and personality" in both the film and in its advertising. (25 Cal.3d at pp. 862, 864.) The California Supreme Court flatly rejected the theory that a celebrity must consent, and may demand payment, whenever a docudrama is made about him:

> Fiction writers may be able to more persuasively, or more accurately, express themselves by weaving into the tale persons or events familiar to their readers. The choice is theirs. … The right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire. Rather, prominence invites creative comment.

(*Id.* at p. 869.) "Any other conclusion," the Court explained, "would allow reports and commentaries on the thoughts and conduct of public and prominent persons to be subject to censorship under the guise of preventing the dissipation of the publicity value of the person's identity." (*Id*. at p. 872.)

Guglielmi distinguished docudramas from commercial merchandise which, "unlike motion pictures, are not vehicles through which ideas and opinions are regularly disseminated." (*Id.* at p. 874.) Nor could a docudrama be compared to a television show usurping the value of an entertainer's work by filming and replaying his "entire act." (*Id.* at p. 875 [distinguishing *Zacchini v. Scripps-Howard Broadcasting Co*. (1977) 433 U.S. 562].) Dramatizing public events and figures is "much more akin to *commenting upon or reporting* the facts of [such a] performance" than misappropriating it. (*Id.* at p. 875, italics added.)

Plaintiff's right-of-publicity claims fall squarely within *Guglielmi*'s holding, and thus necessarily fail. Indeed, Plaintiff's claims against *Feud*—resting on her depiction as a historically important but secondary, non-titular character appearing in a small fraction of the season's airtime—are weaker than was the claim against *Legend of Valentino*, in which Valentino was the central, titular character. The trial court's conclusion that Plaintiff's economic interests as a celebrity "trump the [F]irst [A]mendment" (JA1092 [Ruling 10]) is directly contrary to *Guglielmi*.

The trial court attempted to escape from *Guglielmi* by suggesting that a putative industry custom of paying a celebrity to be portrayed in a

production could trump the Constitution.[6] But "the constitutional right to free expression" does not melt away merely because "there is an entertainment industry custom of obtaining 'clearance'"; indeed, any such custom "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." (*Polydoros*, *supra*, 67 Cal.App.4th at pp. 324, 326.)

The trial court also questioned what the "current Supreme Court [would] say" about *Guglielmi*. (RT 341.) But the Supreme Court unanimously reconfirmed *Guglielmi's* vitality in *Comedy III*, and the trial court was not at liberty to disregard those decisions. *Comedy III* cited *Guglielmi* with approval in evaluating a right-of-publicity claim, albeit one challenging a medium that straddled the line between purely commercial products and "vehicles through which ideas and opinions are regularly disseminated." (Cf. *Guglielmi*, *supra*, 25 Cal.3d at p. 874.) In that context—T-shirts featuring the likeness of *The Three Stooges*—the California Supreme Court set forth a further iteration of the balancing approach, the "transformative" test. But it did not disturb the balance struck by *Guglielmi* as to docudramas, nor has any later case. (See, e.g., *Winter*, *supra*, 30 Cal.4th 881 [comic books].) Indeed, *Comedy III* cited the "fictionalized portrayal" in *Guglielmi* as an archetype of transformative expression. (25 Cal.4th at p. 406.)

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[6] To be clear, the court's finding of such a practice is wrong, but it is a red herring. *Guglielmi* makes clear that the docudramatist's First Amendment right trumps the claim for compensation.

Guglielmi also made clear that First Amendment protection is not stripped away because Defendants used clips and stills of Zeta-Jones's de Havilland character in some of its advertisements for *Feud*. (See JA1092-1093 [Ruling 10-11].) "Since the use of [the celebrity's] name and likeness in the film was not an actionable infringement of [the celebrity's] right of publicity, the use of his identity in advertisements for the film is similarly not actionable." (*Guglielmi*, *supra*, 25 Cal.3d at p. 873.) "It would be illogical to allow respondents to exhibit the film but effectively preclude any advance discussion or promotion of their lawful enterprise." (*Ibid*.; accord *Polydoros*, *supra*, 67 Cal.App.4th at p. 325; *Montana* v. *San Jose Mercury News* (1995) 34 Cal.App.4th 790, 797 [newspaper's use of likeness of celebrity quarterback to promote football coverage was constitutionally protected].)

This Court should hold that under *Guglielmi*, dramatized motion pictures such as *Feud* are protected from right-of-publicity claims by the First Amendment. Courts around the country have consistently reached similar results. (See, e.g., *Polydoros, supra,* 67 Cal.App.4th at p. 318 [following *Guglielmi* and applying constitutional protections to the movie *The Sandlot*, which was inspired by the creator's childhood experiences]; *Moore v. Weinstein Co., LLC* (6th Cir. 2013) 545 Fed.Appx. 405, 409 [applying constitutional protections to the movie *Soul Men*, about celebrity musicians]; *Matthews v. Wozencraft* (5th Cir. 1994) 15 F.3d 432, 440 [dramatized portrayal based on real-life police officer]; *Seale v. Gramercy Pictures* (E.D. Pa. 1996) 949 F.Supp. 331, 337 [precluding right-of-publicity claim concerning the docudrama *Panther*]; *Hicks v. Casablanca Records* (S.D.N.Y. 1978) 464 F.Supp. 426, 433 [holding that dramatized

movie and novel about Agatha Christie's life are protected by the First Amendment].) Because this case falls neatly within *Guglielmi*'s four corners, *Feud* is entitled to constitutional protection.

B. *Feud* Is Transformative as a Matter of Law

The trial court not only failed to apply *Guglielmi*, but erred further by misconstruing *Comedy III*'s transformative test. The rule is that a "work is protected by the First Amendment inasmuch as it contains significant transformative elements *or* that the value of the work does not derive primarily from the celebrity's fame." (*Comedy III*, *supra*, 25 Cal. 4th at p. 407, italics added; *Winter*, *supra*, 30 Cal.4th at p. 889.) A right-of-publicity claim must be dismissed if defendant's work satisfies *either* standard. *Feud* satisfies both.

1. *Feud* Is the Expression of Its Creators and Actors, Not the Mere Facsimile of a Celebrity

Under the transformative test, Plaintiff's claim fails if her "likeness is one of the 'raw materials' from which an original work is synthesized"; it can succeed only if her "depiction or imitation … is the very sum and substance" of *Feud*. (*Comedy III*, *supra*, 25 Cal.4th at p. 406.) Put another way, First Amendment protection applies if the work "containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness." (*Ibid*.)

That is precisely the case here. The press has praised *Feud* for "*transform[ing]* the tale of two film icons who hated each other into lovely, heartbreaking art," including *Feud*'s social commentary on such themes as

sexism and ageism.[7] Such transformation is evident in every frame of every reel; *Feud* reflects the artistry of hundreds, including not just the writers, directors, and actors, but also the numerous professionals responsible for cinematography, editing, lighting, production design, and other crafts. Indeed, *Feud* won two Emmy awards for its makeup and hairstyling, and was nominated for its writing, directing, acting, casting, historical costuming, and production design (JA842 [Roesler Decl. Ex. 6])—all part of the creativity that went into developing an acclaimed "original work" that speaks to important themes in contemporary culture.

The trial court dismissed that labor and art. Citing Murphy's declaration, the court held that "Defendants admit[ted] that they wanted to make the appearance of [Zeta-Jones as] Plaintiff as real as possible," and that "there is nothing transformative about the docudrama."[8] (JA1095 [Ruling 13].) That approach, if left standing, would categorically strip First Amendment protection from docudramas, since the genre's very aim is to tell stories about real-life events and public figures. Followed to its logical

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[7] (See Nussbaum, Emily, "'Feud': A Bittersweet Beauty" (Mar. 20, 2017), *The New Yorker*, JA450-460 [Berkley Decl. Ex. 56], *also available at* https://www.newyorker.com/magazine/2017/03/20/feud-a-bittersweet-beauty; McFarland, Melanie, "With 'Feud: Bette and Joan,' a Hollywood Rivalry For the Ages Becomes an Epic TV Experience" (Mar. 4, 2017), *Salon*, *available at* https://www.salon.com/2017/03/04/with-feud-bette-and-joan-a-hollywood-rivalry-for-the-ages-becomes-an-epic-tv-experience/, italics added.)

[8] In fact, the Murphy declaration said nothing about wanting to make "the appearance" of the de Havilland character "as real as possible," but rather that the character's dialogue was based on "comments, sentiments and tonal emotions" that Plaintiff had expressed. (JA182-183 [Murphy Decl. ¶¶ 14-15].)

conclusion, the ruling would place even non-fiction works critical to public discourse—such as biographies and documentaries—beyond the purview of the First Amendment.

That is of course *not* the law. The Supreme Court has made it clear that "[n]o author should be forced into creating mythological worlds of characters wholly divorced from reality." (*Guglielmi*, *supra*, 25 Cal.3d at p. 869.) That is why *Guglielmi* rejected the right of publicity challenge to a docudrama, why courts have steadfastly protected the creative efforts of authors to dramatize historical events (*supra* at p.53), and why the Court has stressed that "the 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).

"[T]ransformative elements or creative contributions that require First Amendment protection . . . can take many forms," including "fact reporting" as well as "*fictionalized portrayal*" of a celebrity. (*Id*. at p. 406, italics added.) The historical persona of de Havilland is merely one among the numerous raw materials *Feud* drew upon. It cannot plausibly be characterized as the "very sum and substance of the work in question." (Cf. *Comedy III*, *supra*, 30 Cal.4th at p. 406.) There is simply no basis to conclude that the skills of the creators and the cast were "subordinated," like the tee-shirts in *Comedy III* or the role-playing videogame figures in *No Doubt*, "to the overall goal of creating literal, conventional depictions of [Plaintiff] so as exploit [her] fame." (*No Doubt*, *supra*, 192 Cal.App.4th at p. 1031 (quoting *Comedy III*, *supra*, at p. 409].) That is particularly so given that the show is not *Feud: The de Havilland Story*, but rather a

docudrama in which the de Havilland character is a minor one in the larger story of the Davis/Crawford rivalry. (JA194 [Minear Decl. ¶ 11].)

2. Plaintiff Cannot Show that *Feud*'s Success and Value Derive Primarily from Her Celebrity

Under the transformative test, a publicity claim fails where the "marketability and economic value of the challenged work do *not* derive *primarily* from [Plaintiff's] fame." (*Winter*, 30 Cal.4th at p. 889, italics added; see also *Comedy III*, *supra*, 25 Cal.4th at p. 407.) This rule strikes an appropriate balance between the right of publicity—which "is essentially an economic right"—and protection of creative expression under the First Amendment. (*Comedy III*, *supra*, 25 Cal.4th at pp. 403, 407.) "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, italics added.)

The trial court misconstrued this test. It allowed Plaintiff's claims to proceed merely because "the use of her likeness in the show appears to have resulted in *some* economic benefit" to Defendants. (RT 320, italics added; JA1096 [Ruling 14].) Indeed, the trial court's decision rested on nothing more than Plaintiff's contention that Defendants did not pay the fee Plaintiff would have demanded for the use of her likeness in *Feud*. (JA1096 [Ruling 14].) That cannot possibly be enough; if that were so, any celebrity could get around the First Amendment simply by showing uncompensated use of her likeness. Such a low threshold would unravel the balance the California Supreme Court has already struck between celebrities' economic rights and society's need to protect free speech. As

the Court has made clear, that a celebrity's "name and likeness were used because they increased the value or marketability of the film" does not diminish First Amendment protections. (*Guglielmi, supra,* 25 Cal.3d at p. 868.) Instead, there can be potential liability only if the value of the entire work derives "primarily" from the fame of the celebrity plaintiff. (*Winter*, *supra,* 30 Cal. 4th at p. 890.)

Here, the record confirms what common sense suggests: that *Feud*'s economic value derives primarily from factors *other than* Plaintiff's fame.

As its title conveys, *FEUD: Bette and Joan* is centered on the Davis/Crawford rivalry, not the de Havilland character. The de Havilland character appears in only 18 minutes of the approximately 400-minute series, and in only a small fraction of the advertisements for the show. (JA237, 445-446 [Berkley Decl. ¶ 64, Ex. 54]; JA208 [Gibbons Decl. ¶ 10].) The show's success derives mainly from "the creativity, skill, and reputation" of its creators, producers, and actors. (*Comedy IIII*, *supra*, 25 Cal.4th at p. 407.) As Plaintiff's expert observed, showrunner Ryan Murphy "has a long track record of success" that includes *Glee*, *American Horror Story*, *American Crime Story*, and *Nip/Tuck*, and he "is also known to attract top talent." (JA746 [Roesler Decl. ¶¶ 18-19].) Critical reception focused on the writing, Murphy's creative vision, and the acting performances of Lange and Sarandon in their roles as Crawford and Davis. (See, e.g., JA450-459 [Berkley Decl. Ex. 56]; JA840 [Roesler Decl. Ex. 6].)

Under the correct test, applied to the undisputed record, it is abundantly clear that the marketability and economic value of *Feud* does *not* derive primarily from Plaintiff's fame.

C. Plaintiff's Right-Of-Publicity Claims Are Further Barred by the Public Interest Defense

Plaintiff's right-of-publicity claims fail for yet another independently sufficient reason. "Publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it, is not ordinarily actionable." (*Dora v. Frontline Video, Inc*. (1993) 15 Cal.App.4th 536, 542.) The public interest defense applies not just to news reporting but also to entertainment, including docudramas. (*Id*. at pp. 543, 546; *Heller v. NBCUniversal, Inc.* (C.D. Cal. Mar. 30, 2016, No. CV-15-09631) 2016 WL 6573985, at *5-*6 [dismissing publicity claim on public interest grounds for the docudrama *Straight Outta Compton*].)

The trial court agreed with Defendants that "the subject matter of the show is a matter of public interest," but concluded that Plaintiff provided sufficient evidence to invoke the actual malice exception to the public interest defense. (RT 320.) This, too, was reversible error.

Eastwood v. Superior Court (1983) 149 Cal.App.3d 409, announced such an exception to the public interest defense. That case involved allegations that the defendant invented a salacious, "entirely false" news story about Clint Eastwood as a "subterfuge" to market a tabloid. (*Id.* at p. 423.) The court held that the claim could proceed if the false story was "presented to the reader as if true with the requisite scienter" of actual malice, *i.e*. "with knowledge of their falsity or with reckless disregard for the truth." (*Id*. at pp. 424, 426.)

Eastwood's exception has no application here. *First*, Plaintiff is a actual historical figure in the Davis/Crawford story. Unlike in *Eastwood*, there is no allegation that Plaintiff's portrayal was entirely fabricated to

maliciously exploit her fame. *Second*, Plaintiff's theory of economic appropriation is that Defendants "falsely portrayed Olivia de Havilland as if she endorsed 'Feud' …." (JA648-649, 650 [TAC ¶¶ 37, 50].) But viewed in light of "the totality" of the show (*Hoffman*, supra, 255 F.3d at p. 1187), Plaintiff is merely one of many historical figures portrayed in a docudrama about a Hollywood rivalry that took place decades ago. There is no evidence, much less clear and convincing evidence, that Defendants "knew (or purposefully avoided knowing)" that *Feud* would mislead viewers into thinking that Plaintiff had given the show her personal endorsement. (See *ibid*.; see also *ibid*. [requiring "clear and convincing evidence that [defendants] intended to create the false impression …."]).

IV. The Unjust Enrichment Claim Fails

"Unjust enrichment is not a cause of action, just a restitution claim. [Citations.] There being no actionable wrong, there is no basis for the relief." (*Hill v. Roll Intern. Corp.* (2011) 195 Cal.App.4th 1295, 1307.)

CONCLUSION

Defendants respectfully submit that the trial court's decision denying the anti-SLAPP motion must be reversed.

Dated: December 4, 2017

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 13,816 words according to the word count feature of the computer program used to prepare this brief.

Dated: December 4, 2017

By: */s/ Mark R. Yohalem*
Mark R. Yohalem

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 350 South Grand Avenue, Fiftieth Floor, Los Angeles, CA 90071-3426.

On December 4, 2017, I served true copies of the following documents described as:

APPELLANTS' OPENING BRIEF

On the interested parties in this action on the attached Service List.

BY ELECTRONIC TRANSMISSION VIA TRUEFILING: I caused a copy of the document(s) to be sent via TrueFiling to the persons at the e-mail addresses listed in the Service List. According to the TrueFiling website, these persons are registered TrueFiling users who have consented to receive electronic service of documents in this case. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 4, 2017, at Los Angeles, California.

Michelle Godfrey

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