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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION THREE

OLIVIA DE HAVILLAND,
Plaintiff and Respondent,

v.

FX NETWORKS, LLC, et al.,
Defendants and Appellants.

APPEAL FROM LOS ANGELES COUNTY SUPERIOR COURT
HOLLY KENDIG, JUDGE • CASE NO. BC667011

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. AND NETFLIX, INC. IN SUPPORT OF FX NETWORKS, LLC AND PACIFIC 2.1 ENTERTAINMENT GROUP, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes

Rules of Court

Miscellaneous

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Under California Rules of Court, rule 8.200(c), the Motion Picture Association of America, Inc. (MPAA) and Netflix, Inc. request permission to file the attached amicus curiae brief in support of appellants FX Networks, LLC and Pacific 2.1 Entertainment Group, Inc.

The MPAA is a not-for-profit trade association founded in 1922 to address issues of concern to the United States motion

picture industry. Its members[1] and their affiliates are the leading producers and distributors of audiovisual entertainment in the theatrical, television and home entertainment markets. The MPAA often has appeared as amicus curiae in cases involving claims that potentially implicate the First Amendment rights of its members, including cases (like this one) in which the plaintiff is attempting to assert a right of publicity claim based on allegations that her name, likeness, or persona was used in an expressive work without permission.

Netflix, Inc. is based in Los Gatos, California and is the world's leading internet television network with over 100 million streaming members in over 190 countries. Netflix members view more than 125 million hours of TV shows and movies per day, including owned and licensed original series, documentaries and feature films. Additionally, in the United States, Netflix members can receive DVDs delivered to their homes.

Amici urge this court to reverse the trial court's decision. Affirming the trial court's analysis—an unprecedented deviation from decades of case law protecting freedom of expression from state tort law claims—threatens to doom entire genres of fact-based motion pictures, including docudramas and biopics. The trial court found an actionable claim for false light invasion of privacy based on nothing more than the defendants' use of centuries-old storytelling

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[1] The members of the MPAA are: Paramount Pictures Corporation; Sony Pictures Entertainment Inc.; Twentieth Century Fox Film Corporation; Universal City Studios LLC; Walt Disney Studios Motion Pictures; and Warner Bros. Entertainment Inc.

techniques that are necessary to dramatize stories about or inspired by real people or events. The court also found an actionable claim for right of publicity against the creators of a docudrama about real people merely because the creators did not obtain the consent of, or financially compensate, a celebrity who was relevant to and depicted in the dramatized story.

As discussed in the attached brief, the First Amendment severely limits false light claims in the context of docudramas and other fictional and semi-fictional works. Courts around the country, including the United States Supreme Court, the California Court of Appeal and the Ninth Circuit, recognize that to create docudramas (which unlike documentaries and newspaper accounts depict *dramatized* stories of events and people), screenwriters need the freedom to create fictional dialogue, imagined scenes, composite characters, and other dramatic elements without fear of unfounded liability. A plaintiff pursuing a false light claim must show both that her portrayal is substantially false, and that this false characterization is highly offensive or defamatory. To protect works such as docudramas from censorship by celebrities or politicians who want to tightly control their depiction, public figures pursuing a false light claim must also demonstrate the defendant *intended* to convey the asserted false implication *and* knew, or acted in reckless disregard of whether, that implied meaning or portrayal was false. Thus, docudramas and other constitutionally-protected works of fiction and drama present special concerns that are not at issue with works of non-fiction that aim to be literally true, such as news reports. When a work seeks to dramatize real events, literal truth

is not required or expected, and the use of storytelling techniques (*e.g.*, dramatized interviews, invented conversation, compressed timelines, flashbacks to past events, and other fictionalization tools) cannot support a claim of falsity or actual malice. Indeed, viewers of docudramas understand that real life events are not portrayed in exactly the same way as they actually occurred, but rather are woven together around a story and narrative. Absent the filmmakers' subjective intent to render a knowingly false portrayal about a subject that is not substantially true, and a portrayal that is highly offensive or defamatory, no tort can be stated.

Courts have afforded fictionalized motion pictures based on real events and people even greater constitutional and common law shields from right of publicity claims, which are limited to protecting individuals against unlawful *commercial exploitation* of their name and likeness. The California Supreme Court and numerous other courts have instructed that the plaintiff's depiction in a motion picture about a story to which the plaintiff is relevant flatly does not amount to commercial exploitation, no matter whether the story being dramatized is told realistically, fictionally, or semi-fictionally. This shield against right of publicity claims is guided by the high bar set by the "compelling state interest" test. States do not have a compelling interest in enforcing misappropriation laws against a defendant that is not engaging in crass commercialization of the plaintiff's persona.

The type of claims pursued by a celebrity like Olivia de Havilland here deserve especially heightened scrutiny because docudramas, biopics and historical dramas—which by design do not

portray individuals or events literally or with obedience to historical fact—often depict real people who may not like, and may even be offended or embarrassed by, how they are portrayed. Yet a plaintiff's subjective dissatisfaction with her portrayal is not enough to support an actionable false light claim. An actionable portrayal must be highly offensive to a reasonable person.

In deciding Ms. de Havilland's case, the MPAA and Netflix urge this court to reaffirm that, within these generous boundaries, the First Amendment allows producers to tell fictionalized stories about real people. Only under narrow circumstances, as discussed in the attached amicus brief, can that First Amendment right be trumped by individuals seeking compensation or censorship over creative works. Those circumstances are not remotely present here.

As counsel for the MPAA and Netflix, we have reviewed the briefs filed in this case and believe this court will benefit from additional briefing. We have attempted to supplement, but not duplicate, the parties' briefs.

No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than amicus, its members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. (Cal. Rules of Court, rule 8.200(c)(3).) Although Twentieth Century Fox Film Corporation, to which appellant FX Networks, LLC is a related entity, is a member of the MPAA, and Walt Disney Studios Motion Pictures is a member of the MPAA, neither entity authored this

brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief.

This application is timely. It is being submitted within 14 days of the filing of appellant's reply brief. (Cal. Rules of Court, rule 8.200(c)(1).)

Accordingly, amicus requests that this court accept and file the attached amicus curiae brief.

January 25, 2018

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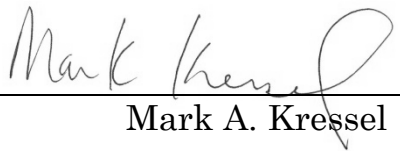
By: 
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AMICUS CURIAE BRIEF

INTRODUCTION

A team of award-winning authors, directors, artists, and actors created a docudrama telling a story about the real-life feud between two Hollywood legends, Bette Davis and Joan Crawford. The eight-part *Feud: Bette and Joan* uses this story as a dramatic vehicle to explore issues that could not be more timely—women in Hollywood; sexism and the challenges it poses for professional advancement; and how the more powerful in society are able to pit the more vulnerable against each other in a fight for survival. Now, Olivia de Havilland, a celebrity who is dissatisfied with her portrayal as a minor character in *Feud*, has filed a lawsuit seeking millions of dollars for allegedly portraying her in a false light and violating her right of publicity. If her lawsuit succeeds, it would stifle the creation and distribution of a culturally-significant docudrama.

Abrogating constitutional free speech rights is a serious matter, and courts must proceed with caution. The trial court, however, threw caution to the wind and permitted Ms. de Havilland's false light claims to proceed because the defendants chose to dramatize and interpret the story of Crawford and Davis's rivalry. The court did this despite defendants' good faith belief based on extensive historical research that *Feud* captured the essence of what had occurred. The court's false light analysis boils down to a conclusion that the common storytelling techniques used

in *Feud*, such as creating dialogue or rearranging timelines, which have been used to create works of fiction and semi-fiction for centuries, result in *per se* liability. The trial court allowed Ms. de Havilland's right of publicity claims to proceed because the defendants knowingly used her persona in a docudrama without consent or compensation, and thus did not give Ms. de Havilland editorial control of her depiction. The trial court's analysis puts creators of docudramas and other fictionalized works about or inspired by real people or events in an untenable Catch-22: the court reasoned that any docudrama that portrays its subjects too realistically is actionable for violating their right of publicity, yet any docudrama that portrays its subjects with anything less than absolute, literal accuracy is actionable under false light. This exacerbates the chilling fear of litigation that would be created by affirming the trial court's decision.

The MPAA and Netflix cannot overstate the serious implications that the trial court's rulings would have for the creation of fictionalized motion pictures and other expressive works about or inspired by real people or events—works, like *Feud* and countless others, that are vital to public discourse. Authors, writers, and directors cannot tell these types of stories if they are required to present every moment with 100 percent literal accuracy, without having any character utter a word that was not actually said, and without every event in the story taking as much time on screen as it did in real life. It would mark a radical departure from decades of case law if the mere use of standard storytelling techniques—indeed the basic tools of the creators' artistry—were

sufficient to support viable false light claims. Similarly, if creators of expressive works that dramatize stories about real people can face actionable right of publicity claims unless they obtain the consent of everyone relevant to the story, fictionalized stories about real people will be stifled by censorship attempts launched by our most popular, powerful, and controversial celebrities and politicians—and limited to depicting only *their* (likely highly sanitized)—version of events. Motion pictures that criticize, analyze, or reimagine our heroes and leaders will be off limits, and both artistic freedom and public discourse will suffer accordingly.

Under long-standing precedent, not only must claims like Ms. de Havilland's fail under the First Amendment, they should not survive dispositive motions such as the anti-SLAPP motion on appeal here. Courts play an important gatekeeping role in ferreting out, early in the litigation process, false light claims that are frivolous, unsubstantiated, or aimed at curtailing constitutionally protected expression. To survive a dispositive motion, the plaintiff must show evidence of: (1) a verifiable statement of fact, that is (2) substantially false, (3) highly offensive to a reasonable person or defamatory,[2] and, where the plaintiff is a public figure (4) shown by

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[2] This brief uses the phrase "highly offensive to a reasonable person or defamatory" in the sense that these two concepts are roughly synonymous, not in the disjunctive to imply that a plaintiff can prevail on a false light claim without proving that the portrayal was highly offensive to a reasonable person. (See *Aisenson v. American Broadcasting Co.* (1990) 220 Cal.App.3d 146, 161 ["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"].) The California Supreme Court has (continued...)

clear and convincing evidence to have been made with actual malice. The trial court erred by not applying this strict test. It did not inquire if the depiction was highly offensive or defamatory. Instead it focused on storytelling techniques that create fictionalizations and are inherent in docudramas. Unless these storytelling techniques are used with actual malice to portray a material and highly offensive falsehood, they are not actionable under a false light theory. Requiring exact replication of past events, conversations, and timelines sets up an impossible situation, creates less compelling stories, and stifles artistic expression.

Dramatized motion pictures that tell stories about real people are also entitled to broad First Amendment protections from right of publicity claims. The California Supreme Court has explicitly held that this robust protection exists regardless of whether the portrayal of the plaintiff is fictional or realistic, transformative or lifelike, documentary or satirical. The Ninth Circuit enforces this broad protection by applying the often dispositive strict scrutiny standard to misappropriation laws—as should this court.

(...continued)
explained: "In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a reasonable person. (Rest.2d Torts, § 652E, p. 394.) 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." (*Fellows v. National Enquirer, Inc.* (1986) 42 Cal.3d 234, 238-239 (*Fellows*); *Brodeur v. Atlas Entertainment, Inc.* (2016) 248 Cal.App.4th 665, 678 (*Brodeur*) [" 'A "false light" claim, like libel, exposes a person to hatred, contempt, ridicule, or obloquy and assumes the audience will recognize it as such' "].)

Affirming the trial court, and thus easing these standards to overcome an author's First Amendment protections, would have a devastating chilling effect on authors, screenwriters, and producers. Indeed, the lists of the 2018 Golden Globe and Academy Awards nominees brim with docudramas about or inspired by real events and real people who are still living, including: *The Post* (The Washington Post's publication of the Pentagon Papers), *Dunkirk* (World War II battle), *I, Tonya* (Tonya Harding's ice skating career), *The Disaster Artist* (the making of the movie *The Room*), *Darkest Hour* (Winston Churchill's decisions during World War II), *All the Money in the World* (Kidnapping of John Paul Getty III), *Molly's Game* (Olympic-class skier who ran the world's most exclusive high-stakes poker game), and *The Crown* (Queen Elizabeth II and royal family). Under the trial court's analysis here, all of these docudramas could be actionable based on their content merely for telling their important stories without adhering to the literal facts of the historical record and obtaining all of their subjects' consent. But, for the reasons explained below, the First Amendment does not permit that result.

LEGAL ARGUMENT

I. THE FIRST AMENDMENT PROTECTS MOTION PICTURES FROM FALSE LIGHT CLAIMS ATTACKING THE USE OF ARTISTIC LICENSE AND COMMON STORYTELLING TECHNIQUES TO DRAMATIZE A TRUE STORY.

A. Producers, authors, and directors are free to make motion pictures that present fictionalized history in a compelling, entertaining way so long as the plaintiff's portrayal is substantially true and not highly offensive to a reasonable person.

The elements of a false light claim brought by a public figure are a published statement or implied meaning that: (1) asserts a verifiable statement of fact; (2) is substantially false; (3) is highly offensive to a reasonable person or defamatory; and (4) was made with actual malice. (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1264 (*Jackson*); Rest.2d Torts, § 652E.) "In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a reasonable person." (*Fellows*, *supra*, 42 Cal.3d at pp. 238-239, citing Rest.2d Torts, § 652E, p. 394.)[3] While amici

[3] The false light cause of action remains controversial, and several states have rejected it as either duplicative of traditional defamation or inconsistent with the First Amendment. (See, e.g., *Jews for Jesus, Inc. v. Rapp* (Fla. 2008) 997 So.2d 1098, 1113 (continued...)

agree with the defendants that the trial court erred with respect to many of these elements, this brief focuses on three of great importance to the motion picture industry because of their power at the dispositive motion stage to weed out meritless claims that attack expressive freedom: whether the portrayal at issue is substantially false and highly offensive, and whether defendants published *that* portrayal with actual malice. A failure to interpret these requirements correctly will lead to an unconstitutional chilling of free speech in the form of culturally-important docudramas, biopics and historical dramas based on real events and people.

" ' "The sine qua non of recovery for defamation . . . is the existence of a falsehood." ' " (*Brodeur*, *supra*, 248 Cal.App.4th at p. 678, emphasis omitted [discussing a false light claim].) However, the law does not require that defendants maintain an absolute adherence to the historical record. Rather, for liability, plaintiff has the burden of proving material falsity (or the absence of substantial truth). (*Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 516-517 [111 S.Ct. 2419, 115 L.Ed.2d 447] (*Masson*).) " ' "Minor inaccuracies do not amount to falsity so long as 'the substance, the

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(...continued)
[" 'there is not even a single good case in which false light can be clearly identified as adding anything distinctive to the law' "]; *Cain v. Hearst Corp.* (Tex. 1994) 878 S.W.2d 577, 580 [it "unacceptably increas[es] the tension that already exists between free speech constitutional guarantees and tort law"]; *Messenger ex rel. Messenger v. Gruner + Jahr Printing & Pub.* (2000) 94 N.Y.2d 436 [727 N.E.2d 549, 556] [New York does not recognize tort of false light].)

gist, the sting, of the libelous charge be justified.' ' " (*Jackson*, *supra*, 10 Cal.App.5th at p. 1262; see also *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 28 (*Gilbert*) [" ' "It is well settled that a defendant is not required in an action of libel to justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, the sting of the libelous charge be justified, and if the gist of the charge be established by the evidence the defendant has made his case" ' "].)

While plaintiff's burden of proving material falsity is critical in any false light claim, it is particularly salient when false light claims are asserted against docudramas because these works by necessity include fictionalized elements to tell a story within the limits of the medium, and they are not expected to be literally true in every detail. All fictional and semi-fictional works are by their nature a type of calculated falsehood—no one really believes King Richard III of England actually said, "Now is the winter of our discontent"[4]—and courts have recognized that First Amendment protections, including the substantial truth and actual malice defenses, must accommodate dramatized works based on real events and people.

Docudramas fit squarely within this protected sphere, being "neither completely factual nor totally fictional." (Note, *Trial by Docudrama: Fact or Fiction?* (1990) 9 Cardozo Arts & Ent. L.J. 201, 201 (hereafter *Trial by Docudrama*).) "[R]eal people's lives rarely fall into a three-act structure." (Howard & Mabley, The Tools of

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[4] Shakespeare, Richard III, act I, scene 1.

Screenwriting: A Writer's Guide to the Craft and Elements of a Screenplay (1995) p. 9.) Thus, "docudrama adapts the basic character, conflict, and closure elements of classic Hollywood narrative form as configurations based on" real life experiences. (Lipkin, Real Emotional Logic: Film and Television Docudrama as Persuasive Practice (2002) p. 55.)

Docudramas' well-recognized storytelling techniques include:

- **Fictionalized dialogue and scenes**. "Where feasible, and when it is sufficiently dramatic, [screenwriters] try to retain authentic dialogue." (See Rosenthal, From *Chariots of Fire* to *The King's Speech*: Writing Biopics and Docudramas (2014) p. 155 (hereafter Rosenthal).) Oftentimes, however, a sufficient record of what was said does not exist. In that case, which is "probably 90 percent of the time," screenwriters "go on to create [their] own." (*Id.* at 155.) Indeed, invented dialogue and concocted scenes are virtually a necessity in docudramas unless the docudrama is based solely on trial transcripts. (See *Trial by Docudrama*, *supra*, 9 Cardozo Arts & Ent. L.J. at p. 201.)
- **Composite characters**. Many of humanity's most interesting achievements have been accomplished by groups of people. It would be impossible for a motion picture or television show about such an achievement to depict all of these individuals. A typical solution is to compress two or more people into a single character. (See Rosenthal, *supra*, p. 90.)

- **Time Compression and telescoping**. Flashbacks, flash-forwards, time compression, and time expansion are often used strategically to tell the author's story. (See Peterson, *Creating Characters*, School Video News <https://goo.gl/Ldgtxu> [as of Dec. 1, 2017].) An event portrayed in a docudrama may have taken months or years, and time compression "allows writers to manage chronology and control the pace of their narratives." (Gutkind, Keep It Real: Everything You Need to Know About Researching and Writing Creative Nonfiction (2011) p. 42.)

Thus, when creating docudramas, due to the constraints of the format, there is no attempt, let alone legal duty, to adhere to the literal historical record. Yet this was the very foundation of the trial court's ruling. (4 JA 1091.) As California and other courts have long recognized, First Amendment protections for docudramas, biopics and other historical dramas mandate that the use of such storytelling techniques do not constitute "falsity" for purposes of false light or defamation claims—otherwise this entire culturally-important genre would be vulnerable to rampant litigation and large civil verdicts. (See *Partington v. Bugliosi* (9th Cir. 1995) 56 F.3d 1147, 1161 (*Partington)*; *id.* at p. 1155 [viewers are aware that docudramas "often rely heavily upon dramatic interpretations of events and dialogue filled with rhetorical flourishes in order to capture and maintain the interest of their audience" and "[c]ourts have consistently rejected attempts to base damage claims upon minor factual errors when the gist of the work, taken as a whole, cannot serve as the basis for a defamation or false light claim"];

Seale v. Gramercy Pictures (E.D.Pa. 1997) 964 F.Supp. 918, 923 (*Seale*) [in docudramas, " '[m]inor inaccuracies do not amount to falsity' "], quoting *Masson*, *supra*, 501 U.S. at p. 516.)

In *Seale*, for example, a founder of the Black Panthers brought a false light claim against the makers of *Panther*, a docudrama about the history of the Black Panthers. (*Seale*, *supra*, 964 F.Supp. at pp. 919, 922.) He challenged a scene that was loosely based on a scene from his own autobiography, containing minor alterations and inaccuracies. (*Id.* at p. 925.) The court explained: "The plaintiff's privacy is not invaded when the unimportant false statements are made, even when they are made deliberately. It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy." (*Id.* at p. 924, quoting Rest.2d Torts, § 652E, com. c.)

The alleged false statement or implied meaning must not only be substantially false, but also highly offensive or defamatory to a reasonable person. A plaintiff's subjective dissatisfaction or embarrassment about her portrayal is insufficient to substantiate a viable claim. Thus, an *actionable* falsity in an expressive work must give the viewer a worse impression of the plaintiff than if the work had been accurate. (See *Masson*, *supra*, 501 U.S. at pp. 516-517; *Jackson*, *supra*, 10 Cal.App.5th at pp. 1262-1263 [statement that actress's entire appearance was the result of plastic surgery not actionable because some of her appearance *was* due to plastic

surgery; the inaccurate part of statement was no more offensive than the true part]; *Gilbert*, *supra*, 147 Cal.App.4th at pp. 29-30 [statement that plastic surgeon " 'quickly' " suggested surgical enhancement, even if not entirely true, was not actionable because not defamatory].)

The trial court here found that Ms. de Havilland presented evidence to create a triable claim of falsity as to *Feud*'s portrayal of her based on the following scenes: (1) giving an interview at the 1978 Academy Awards that she did not give (although she gave interviews with similar content at other times); (2) publicly describing her sister as a "bitch" (although she actually publicly described her sister as a "Dragon Lady"); and (3) joking to her friend in private that Frank Sinatra drank all the alcohol in his dressing room (although it was well known that Sinatra drank heavily). (4 JA 1085-1087.) The trial court fundamentally erred by finding that these scenes constituted actionable "falsity" because they were neither substantially different than the literal truth nor a highly offensive portrayal to a reasonable person. (*Ibid*.) For example, while the imagined interview at the 1978 Academy Awards never occurred, the scene was nonetheless substantially true within the meaning of First Amendment law because Ms. de Havilland gave other actual interviews at which she similarly spoke of people she knew. Furthermore, the mere notion that Ms. de Havilland would have given an interview at the 1978 Academy Awards when in fact she did not is not remotely in itself highly offensive or defamatory. (See AOB 35-36.) In the docudrama context, the interview was—as is so commonly the case—a device used by the screenwriters to

synthesize important story points and frame the issues at the heart of the production. In other words, the mere shifting of the time when substantially true statements were made did not render those statements false under the law. It just improved the storytelling.[5]

Each of Ms. de Havilland's claims is based on nothing more than the exercise of what our Supreme Court has referred to as "literary license" (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 262 (*Reader's Digest*), which is essential to the creation of docudramas. "Courts should proceed very cautiously before upsetting the delicate balance that has developed in the law of defamation between the protection of an individual's interest in redressing injury from published falsehoods, and the protection of society's interest in vigorous debate and free dissemination of the news." (*Fellows*, *supra*, 42 Cal.3d at p. 248.) This same delicate balance exists for motion pictures. Accordingly, this court should reject the trial court's analysis, under which virtually any deviation from reality can be a basis for liability. "Authors should have

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[5] The New York Times's review of *The Post*, a 2018 Golden Globe and Oscar nominee about the publication of the Pentagon Papers, expressly lauds the filmmakers' artistry in this regard: "Like many movies that turn the past into entertainment, 'The Post' gently traces the arc of history, while also bending it for dramatic punch and narrative expediency. . . . And while it's no surprise that the movie omits and elides important players and crucial episodes, its honed focus jibes with the view of the former New York Times columnist Anthony Lewis, who wrote that the 'public disclosure of the Pentagon Papers challenged the core of a president's power: his role in foreign and national security affairs.' " (Dargis, *Review: In 'The Post,' Democracy Survives the Darkness*, N.Y. Times (Dec. 21, 2017) <https://goo.gl/zU4Do3> [as of Jan. 23, 2018].)

'breathing space' in order to criticize and interpret the actions and decisions of those involved in a public controversy. If they are not granted leeway in interpreting ambiguous events and actions, the public dialogue that is so important to the survival of our democracy will be stifled. We must not force writers to confine themselves to dry, factual recitations or to abstract expressions of opinion wholly divorced from real events. Within the limits imposed by the law, we must allow, even encourage, them to express their opinions concerning public controversies and those who become involved in them." (*Partington*, *supra*, 56 F.3d at p. 1159, fn. omitted.)

B. To protect the right to create compelling, sometimes even critical, motion pictures about public figures, the actual malice standard requires that the defendants intended the defamatory portrayal or implication and had actual knowledge of—or acted with reckless disregard toward—the falsity portrayed.

The trial court here also crucially erred by finding that Ms. de Havilland could establish actual malice merely by demonstrating that *Feud*'s producers knowingly fictionalized certain aspects of her portrayal through imagined scenes, fictionalized dialogue, and altered timelines. (4 JA 1088-1091.) The trial court did *not* identify any evidence that the defendants intended any of the alleged false portrayals that Ms. de Havilland challenges, or that they told deliberate falsehoods or recklessly disregarded the truth, with respect to any alleged highly offensive or defamatory statements or

implied meanings. (*Ibid*.) For example, there is absolutely no evidence here that *Feud*'s creators ever intended to portray Ms. de Havilland as a gossip, nor even any evidence that they had any inkling that the mere portrayal of her character giving fictional interviews (which was clearly intended to be a thematic framing device) would even be *interpreted* as implying that Ms. de Havilland was a gossip. (See *ibid*.) Nor did the trial court find that being portrayed as gossipy or vulgar rises to the level of being highly offensive within the meaning of false light doctrine. Rather, the trial court reasoned that because the authors strove to be *generally* consistent with the historical record, they acted with actual malice because they knew that not every word and gesture in *Feud* was anywhere close to 100 percent accurate. (4 JA 1091.)

The trial court's analysis, especially in the context of a docudrama, is fundamentally flawed. Creators of fictional or semi-fictional motion pictures do not lose First Amendment protections from false light claims when they tell stories about real events and people in a manner that employs standard storytelling techniques and dramatic elements. Whether a work is a non-fiction documentary or a fictionalized docudrama, "[t]he First Amendment protects authors and journalists who write about public figures by requiring a plaintiff to prove that the defamatory statements were made with what [courts] have called 'actual malice,' a term of art denoting deliberate or reckless falsification."[6] (*Masson*, *supra*, 501

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[6] The term actual malice is "sometimes referred to as 'constitutional malice' to distinguish it from the malice requirement for recovery of punitive damages under state law as defined in Civil (continued...)

U.S. at p. 499.) The actual malice requirement applies to false light claims. (*Fellows*, *supra*, 42 Cal.3d at pp. 238-239; *Reader's Digest*, *supra*, 37 Cal.3d at p. 265.) It is a "subjective test, under which the defendant's actual belief concerning the truthfulness of the publication is the crucial issue." (*Reader's Digest,* at p. 257.)

A public figure plaintiff cannot recover unless she proves by *clear and convincing evidence* that the defendant made the defamatory statement with " 'knowledge that it was false or with reckless disregard of whether it was false or not.' " (*Masson*, *supra*, 501 U.S. at p. 510, quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280 [84 S.Ct. 710, 11 L.Ed.2d 686] (*New York Times*); see also *Solano v. Playgirl, Inc.* (9th Cir. 2002) 292 F.3d 1078, 1084 [it is plaintiff's burden to prove actual malice by clear and convincing evidence].) Indeed, even at the anti-SLAPP stage, the plaintiff must come forward with evidence that could support a jury finding of actual malice under the demanding clear and convincing standard. (*Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 86.) This bar is so high that on appellate review, " '[j]udges, as expositors of the Constitution, must independently decide' " whether the record evidence " 'is of the convincing clarity required to strip the utterance of First Amendment protection.' " (*Ibid*.)

In addition, where the claimed highly offensive or defamatory aspect of the portrayal is *implied*, as in Ms. de Havilland's case, the

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(...continued)
Code section 3294 (also known as 'malice-in-fact')." (*Jackson*, *supra*, 10 Cal.App.5th at p. 1260, fn. 8.)

plaintiff must show that the defendant " 'intended to convey the defamation impression.' " (*Dodds v. American Broadcasting Co.* (9th Cir. 1998) 145 F.3d 1053, 1063-1064 (*Dodds*).) The California Supreme Court, in an earlier case, alluded to just this, holding that the plaintiff must demonstrate that "the defendant either deliberately cast his statements in an equivocal fashion in the hope of insinuating a defamatory import to the reader, or that he knew or acted in reckless disregard of whether his 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.)

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 (*Newton*); accord, *Howard v. Antilla* (1st Cir. 2002) 294 F.3d 244, 254 (*Howard*).) That would improperly erect an "objective negligence test," whereas "[t]he relevant inquiry" for actual malice asks if the defendant " 'realized that his statement was false' or whether he 'subjectively entertained serious doubt as to the truth of his statement.' " (*Newton*, at p. 680, quoting *Bose Corp. v. Consumers Union of U. S., Inc.* (1984) 466 U.S. 485, 511, fn.30 [104 S.Ct. 1949, 80 L.Ed.2d 502].)

Importantly, a creator of a docudrama, biopic, or historical drama cannot subjectively know that he is conveying a false implication unless he realizes he is conveying that implication in the first place. He cannot have "in fact entertained serious doubts as to the truth *of his publication*" (*St. Amant v. Thompson* (1968)

390 U.S. 727, 731 [88 S.Ct. 1323, 20 L.Ed.2d 262], emphasis added), unless he is aware that his publication conveys a false implication. There is no actual malice where the defendants " '*unknowingly* misled the public.' " (*Dodds*, *supra*, 145 F.3d at p. 1064, emphasis added; see also *Howard*, *supra*, 294 F.3d at p. 254 [that defendant "should have foreseen the potential interpretation" is insufficient].)

As shown above, the plaintiff must demonstrate actual malice with respect *to those false statements she proves are highly offensive or defamatory*. The mere fact that the defendants used standard storytelling techniques inherent in creating a docudrama, such as altering the sequence of events or combining more than one event into a single scene, does not, without more, show actual malice when those creative elements are not themselves highly offensive to a reasonable person or defamatory. A rule to the contrary would be a radical departure from the protections afforded to all fictionalized works. (*Masson*, *supra*, 501 U.S. at p. 514: see also *id*. at p. 516 ["If an author alters a speaker's words but effects no material change in meaning, including any meaning conveyed by the manner or fact of expression, the speaker suffers no injury to reputation that is compensable as a defamation"]; *Reader's Digest*, *supra*, 37 Cal.3d at p. 256 ["he cannot recover unless he proves, by clear and convincing evidence [citation], *that the libelous statement* was made with ' "actual malice" ' " (emphasis added)]; (*Davis v. Costa-Gavras* (S.D.N.Y. 1987) 654 F.Supp. 653, 658 (*Davis*) [no actual malice because "the dramatic overlay supplied by the film *does not serve to increase the impact of what plaintiff charges as defamatory*" (emphasis added)].)

In *Davis*, Judge Pollack reviewed existing case law and provided a comprehensive and persuasive analysis of the importance of the actual malice standard to protecting docudramas from false light claims:

> Self-evidently a docudrama partakes of author's license—it is a creative interpretation of reality—and if alterations of fact in scenes portrayed are not made with serious doubts of truth of the essence of the telescoped composite, such scenes do not ground a charge of actual malice.

(*Davis*, *supra*, 654 F.Supp. at p. 658.) The court concluded, "The cases on point demonstrate that the First Amendment protects such dramatizations and does not demand literal truth in every episode depicted; publishing a dramatization is not of itself evidence of actual malice." (*Ibid*.)

The trial court was also far off base when it found that *Feud*'s creators' reliance on published sources that they subjectively believed were reliable was insufficient to rebut a claim of actual malice, even at the anti-SLAPP stage. (See 4 JA 1090 ["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"].) "Leeway is properly afforded to an author" who attempts to dramatize real events by "fairly represent[ing] the source materials for the film believed to be true by the filmmakers." (*Davis*, *supra*, 654 F.Supp. at p. 658.) One reason such leeway must be given is that often the historical records are incomplete or unknowable, and require authors to make assumptions. Not every

conversation or event is documented. Recollections of the same events can differ or become foggy with time. Requiring 100 percent accuracy is an unachievable standard in the docudrama and biopic context, and would render dramatizations of real events legally perilous for their authors.

Furthermore, many producers invest significant resources and take great pride in the use of well-regarded published historical sources by celebrated historians, as was the case with *Feud*'s creators, who relied on numerous news articles and two full-length books devoted to the subject of Crawford and Davis's rivalry. (See AOB 16-18, 23 [discussing use of Shaun Considine's *Bette and Joan: The Divine Feud* and Ed Sikov's *Dark Victory: The Life of Bette Davis*.) A rule that plaintiffs may proceed to a trial unless producers and authors second-guess their sources and effectively conduct their own independent research on every detail of the story they wish to tell would create an impossible—and unconstitutional—barrier to telling their stories, set an unworkable standard for fact checking and script annotating, and ultimately confer on the filmmakers' subjects a de facto right to censor the motion picture.

Depriving filmmakers of the ability to rely on source material they subjectively believe is reliable is also contrary to governing law, including the very case that the trial court erroneously relied on and selectively quoted to reach a contrary result. (See 4 JA 1090; *Jackson v. Paramount Pictures Corp.* (1998) 68 Cal.App.4th 10, 35-36 [holding that defendant's reliance on sources that may later turn out to be incorrect does not show actual malice if the defendant had

no reason to know or suspect the incorrectness at the time].) Indeed, the trial court's analysis here—suggesting *Feud*'s creators had to verify for themselves whether every statement in a published book they believed to be reliable was properly sourced—sounds more in negligence, i.e., whether the creators used due care in relying on their source material. Yet, the negligence standard for First Amendment protection only applies in the context of *non*-public figures. (See, e.g., *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 345-346 [94 S.Ct. 2997, 41 L.Ed.2d 789].) Negligence is an objective test, whereas the "actual malice" test for public figure plaintiffs is subjective. (See *id*. at p. 334, fn. 6; *Newton*, *supra*, 930 F.2d at p. 680; *Howard*, *supra*, 294 F.3d at p. 254.) Ever since *New York Times*, it would be a violation of binding United States Supreme Court precedent to apply a negligence standard to a public figure's defamation or false light claim. (See *New York Times*, *supra*, 376 U.S. at pp. 279-280.) Thus, no case permitted this trial court to impose a duty of its own creation on *Feud*'s creators to personally check the sourcing of every statement in a published book they believed true. Such a duty would squarely violate the First Amendment.

For similar reasons, the trial court was also mistaken in finding that the defendants' failure to obtain Ms. de Havilland's consent shows actual malice. (See 4 JA 1097.) The failure to contact the plaintiff during the preparation of a docudrama or other fictional work does not support an actual malice finding. (*Reader's Digest*, *supra*, 37 Cal.3d at p. 259; see also *Davis*, *supra*, 654 F.Supp.at p. 657 ["[P]laintiff cannot prove actual malice merely by

asserting that a publisher failed to contact the subject of his work"].)

Cases based solely on allegations of fictionalizations inherent to the docudrama genre should never be allowed to go to a jury for " ' "simple and obvious" ' " reasons:[7] " ' "A participant in judicial proceedings may be utterly free from malice, and yet in the eyes of a jury be open to that imputation; or he may be cleared by the jury of the imputation, and may yet have to encounter the expense and distress of a harassing litigation. With such possibilities hanging over his head, he cannot be expected to speak with that free and open mind which the administration of justice demands." ' " (*Fellows*, *supra*, 42 Cal.3d at p. 251.) Indeed, " 'because unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable.' " (*Reader's Digest*, *supra*, 37 Cal.3d at p. 251.)

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[7] To be clear, Amici's position here is not that a false light claim may never lie in the context of a docudrama. Rather, a plaintiff must meet all the elements of the tort, including a showing that the challenged statement or implied meaning is highly offensive to a reasonable person or defamatory. Also, if the plaintiff is a public figure, as is Ms. de Havilland, then she must also demonstrate that the defendant acted with constitutional actual malice. Demonstrating that the defendant employed common storytelling techniques inherent to the docudrama genre—which is all that Ms. de Havilland has done—is not enough for a false light claim to proceed.

II. THE FIRST AMENDMENT BROADLY PROTECTS MOTION PICTURES FROM RIGHT OF PUBLICITY CLAIMS BECAUSE CREATING A STORY INVOLVING A REAL PERSON IS NOT COMMERCIALLY EXPLOITING THAT PERSON'S LIKENESS.

A. The First Amendment provides docudramas with robust protection against right of publicity claims because they are vital to public discourse in a free society.

The trial court's decision to allow Ms. de Havilland's right of publicity claim to proceed is even more threatening to the vibrancy of the docudrama genre than its false light ruling. Under the First Amendment, the unbroken line of false light cases discussed above would make no sense if the right of publicity nevertheless required that real individuals could not be portrayed in motion pictures without their consent. A plaintiff could easily do an end-run around the First Amendment limitations on defamation and false light claims discussed above by reframing her false light claims as right of publicity claims. Contrary to the trial court's analysis, controlling case law has consistently protected docudrama and biopic creators from right of publicity claims.

Ms. de Havilland's right of publicity claim should have been summarily dismissed. Instead, the trial court reasoned she had established a substantial probability of prevailing merely because "no compensation was given despite using her name and likeness."

(4 JA 1094.) This unprecedented interpretation of right of publicity law is directly contrary to the seminal California right of publicity case, *Guglielmi v. Spelling-Goldberg Productions* (1979) 25 Cal.3d 860 (*Guglielmi*). In that case, the successor in interest of actor Rudolph Valentino sued the creators of a biographical motion picture telling a fictionalized version of Valentino's life story. (*Id.* at p. 861.) The Supreme Court held that "[w]hether exhibited in theaters or on television, a film is a medium which is protected by the constitutional guarantees of free expression" (*id.* at p. 865 [conc. opn. of Bird, C.J.]), and therefore the First Amendment furnishes a complete defense to the plaintiff's right of publicity claim.[8] The Court observed that "[c]ontemporary events, symbols and people are regularly used in fictional works." (*Guglielmi*, at p. 869.) Indeed, "[f]iction writers may be able to more persuasively, or more accurately, express themselves by weaving into the tale persons or events familiar to their readers." (*Ibid.*) The Court explained that "[n]o author should be forced into creating mythological worlds or characters wholly divorced from reality" in order to avoid being charged with violating a plaintiff's right of publicity. (*Ibid.*)

Guglielmi also explained that this First Amendment defense was equally robust whether the plaintiff was an unknown person or a celebrity. "Surely, the range of free expression would be

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[8] Chief Justice Bird's opinion, although styled a concurrence, was endorsed by three other justices and therefore "commanded the support of the majority of the court." (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 396-397, fn. 7 (*Comedy III*).) Accordingly, "all [further] references to *Guglielmi* in this [brief] will be to the Chief Justice's opinion." (*Ibid.*)

meaningfully reduced if prominent persons in the present and recent past were forbidden topics for the imaginations of authors of fiction." (*Guglielmi*, *supra*, 25 Cal.3d at p. 869.) Thus, "[w]hether the publication involved was factual and biographical or fictional, the right of publicity has not been held to outweigh the value of free expression. Any other conclusion 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 a person's identity. (*Id*. at p. 872, fns. omitted.)[9]

Since *Guglielmi*, courts have consistently shielded motion pictures from right of publicity liability under the First Amendment, whether the plaintiff's portrayal was documentary, biographical, or fictional—or any combination of these genres. (See *Guglielmi*, *supra*, 25 Cal.3d at p. 868 ["no distinction may be drawn in this context between fictional and factual accounts of Valentino's life"]; *Polydoros v. Twentieth Century Fox Film Corp.* (1997) 67 Cal.App.4th 318, 322 (*Polydoros*) [California's right of publicity law "was never intended to apply to works of pure fiction"]; *Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 540-541, 546

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[9] *Guglielmi* also held that since the use of the plaintiff's name and likeness in the *motion picture* was not an actionable infringement of his right of publicity, neither was the use of his identity in *advertisements* for that motion picture actionable. (*Guglielmi*, *supra*, 25 Cal.3d at p. 873.) Thus, the trial court here improperly relied on the use of the likeness of the actress portraying Ms. de Havilland in a handful of advertisements for *Feud* as further indication that her right of publicity claim has merit. (See 4 JA 1092.)

[legendary Malibu surfer could not sue makers of documentary about surfing life-style with film footage of the plaintiff]; *Daly v. Viacom, Inc.* (N.D.Cal. 2002) 238 F.Supp.2d 1118, 1123 [" '[u]nder the First Amendment, a cause of action for appropriation of another's 'name and likeness may not be maintained' against 'expressive works, whether factual or fictional' "]; Rest.3d Unfair Competition, § 47, com. c, p. 549 ["use in entertainment and other creative works" is permitted unless "the name or likeness is used solely to attract attention to a work that is not related to the identified person"].)

It is this First Amendment standard that has protected filmmakers who create popular dramatized motion pictures about or inspired by real people and events, free from censorious interference by their subjects, such as *Primary Colors* (Bill Clinton's first presidential campaign), *The Devil Wears Prada* (Anna Wintour, editor of *Vogue*), and *Citizen Kane* (William Randolph Hearst). The list of Academy Awards Best Picture nominees from recent years is crowded with motion pictures of this genre, including: *Hidden Figures*, about three female African-American mathematicians who played a vital role at NASA during the early days of the U.S. space program; *Moneyball*, depicting how Billy Beane and his colleagues from the Oakland Athletics used statistics to change professional baseball; *The Social Network*, chronicling the rise of billionaire Facebook founder Mark Zuckerberg; *The Theory of Everything*, about renowned physicist Stephen Hawking, and *Spotlight*, recounting how the Boston Globe uncovered the child molestation scandal and cover-up within the local Catholic Archdiocese.

Television producers similarly draw on real people and events to create educational, entertaining, and critically acclaimed shows. For example, the acclaimed television docudrama *The People v. O.J. Simpson: American Crime Story* told the story of O.J. Simpson's murder trial, and Netflix's *The Crown* has both educated and entertained with its portrayal of Queen Elizabeth II's reign.

The trial court's ruling here, which found *Feud*'s creators subject to a right of publicity claim merely because they received a financial benefit from airing their work without obtaining permission from or compensating Ms. de Havilland, would have subjected *all* of these culturally significant motion pictures to the threat of lawsuits from persons seeking to censor or control their public portrayal under the guise of protecting the economic value of their personas. O.J. Simpson could have prevented the creators of *The People v. O.J. Simpson* from telling the story of his trial unless they agreed to portray him as completely, undoubtedly innocent. Mark Zuckerberg could have sued to prevent the telling of the story of Facebook's founding unless he and his company were portrayed without having taken ethical shortcuts to achieve success. Orson Welles might never have made *Citizen Kane*, because it is inconceivable that William Randolph Hearst would have consented to having his "persona" depicted as so tortured. Furthermore, these concerns are not limited to the main characters in these motion pictures—secondary and tertiary characters are chosen by the creators to populate the fictionalized world of their motion picture for varied reasons including developing themes, contrasting foils, providing cultural context, and furthering the plot. Yet under the

trial court's ruling, all of the people portrayed as even minor characters in docudramas and biopics could bring viable right of publicity claims. Even if the people portrayed in these motion pictures were only seeking compensation and not substantive control, their demands could easily make production too costly for the work to be made.

B. Permitting a right of publicity claim in the context of docudramas would violate the First Amendment's strict scrutiny test for content-based speech restrictions because there is no compelling state interest in enforcing private misappropriation rights against docudramas.

In *Sarver v. Chartier* (9th Cir. 2016) 813 F.3d 891, 896 (*Sarver*), plaintiff Jeffrey Sarver brought a right of publicity claim against the creators of the critically acclaimed motion picture *The Hurt Locker*, based on a journalist's coverage of Sarver's experiences as a United States Army sergeant in Iraq. The Ninth Circuit affirmed the district court's grant of the defendants' anti-SLAPP motion, holding that the First Amendment barred Sarver's claim, and citing *Guglielmi* with approval. (See *id*. at p. 905 & fn. 9.)

The Ninth Circuit, however, went further. In the context of motion pictures, "California's right of publicity law clearly restricts speech based upon its content," and therefore is "*presumptively unconstitutional* and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests."

(*Sarver*, *supra*, 813 F.3d at p. 903, emphasis added; see also *Hilton v. Hallmark Cards* (9th Cir. 2010) 599 F.3d 894, 909, fn. 11 [reserving the question "whether the First Amendment furnishes a defense to misappropriation of publicity that is broader than the transformative use or public interest defenses"].)[10]

Sarver reasoned that a state's interest in permitting a right of publicity claim to proceed is only sufficiently compelling to survive strict scrutiny where the defendant's work "either appropriates the economic value of a performance or persona or seeks to capitalize off a celebrity's image in commercial advertisements." (*Sarver*, *supra*, 813 F.3d at p. 905.) *The Hurt Locker*, which told a story about Sarver's experiences, did neither. Therefore, "*The Hurt Locker* 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." (*Ibid.*) The same First Amendment protections apply to *Feud*, which transforms the story of Crawford and Davis's rivalry into a multi-episode television documentary exploring sexism in Hollywood and other timely cultural issues.

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[10] Courts outside of California have similarly construed their misappropriation/right of publicity statutes as inapplicable to motion picture storytelling. (See e.g., *Tyne v. Time Warner Entertainment Co.* (Fla. 2005) 901 So.2d 802, 808, 809 [applying Florida's misappropriation statute to *The Perfect Storm* would raise "a fundamental constitutional concern" and other courts "have similarly concluded that works such as the picture in the instant case would be protected by the First Amendment"].)

Although the *Sarver* court also observed that the plaintiff in that case was a private person who had not invested time or money to build up a marketable persona, *Sarver*'s First Amendment analysis cannot be understood to be limited to persons who have not sought or achieved fame. The court's conclusion was that the First Amendment "safeguards the storytellers and artists" who use stories of "real individuals, *ordinary or extraordinary*" as the raw materials for their artistry. (*Sarver*, *supra*, 813 F.3d at p. 905, emphasis added.) Indeed, the more important or famous a person is, the more imperative that the First Amendment protects the right of others to tell her story, including the right to assess or criticize her free from the fear of litigation. (See *Guglielmi*, *supra*, 25 Cal.3d at p. 869.) The First Amendment means nothing if it does not protect the right of artists to create controversial, even unflattering, works about our leaders and celebrities. Thus this Court should apply the strict scrutiny standard to right of publicity claims, just as the Ninth Circuit did in *Sarver*.

C. The transformative use test has not and should not be applied to motion pictures.

Long after *Guglielmi* established broad constitutional protection for the creators of fictional docudramas, biopics and other motion pictures based on the lives of real people, the California Supreme Court extended First Amendment protections against right of publicity claims to mass produced consumer products with an expressive element, like T-shirts printed with celebrity portraits.

For these products, the Court held, the transformative use test could be used to determine whether the First Amendment barred the claims. (See *Comedy III*, *supra*, 25 Cal.4th at pp. 391, 404-407; Volokh, *Freedom of Speech and the Right of Publicity* (2003) 40 Hous. L.Rev. 903, 915-916 [transformative use test created to assess " 'conventional' celebrity memorabilia"].) In the context of T-shirts printed with images of the Three Stooges, the defendant could establish a First Amendment defense to a right of publicity claim by showing that the work "contains significant transformative elements" or the work's value "does not derive primarily from the celebrity's fame." (*Comedy III*, at p. 407; see *id*. at p. 391.) The court must decide whether, on the one hand, the plaintiff's likeness is used as the raw material for someone else's creative expression, or on the other hand, whether the defendant is simply merchandising the plaintiff's image.[11] (See *Comedy III*, at pp. 404-407; accord, *Winter v. DC Comics* (2003) 30 Cal.4th 881, 888-890.) Thus, under the transformative use test, right of publicity claims are not viable when asserted against artistic expression, but they may be viable against crass commercialization.

The trial court here fundamentally erred by using the transformative use test to find that *Feud* could be liable for

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[11] A right of publicity claim may lie where the defendant's work uses the plaintiff's likeness to endorse a product. (See *Comedy III*, *supra*, 25 Cal.4th at p. 395.) As a matter of law, however, the mere portrayal of a person as a character in a dramatization of historical events to which that person is relevant is not sufficient to show a viable "endorsement" claim. (See *Guglielmi*, *supra*, 25 Cal.3d at p. 865, fn. 6.) Yet, that is the sole basis for Ms. de Havilland's thin endorsement theory. (See AOB 60.)

violating Ms. de Havilland's right of publicity. *Comedy III* did not suggest that the transformative use test should be applied to motion pictures. On the contrary, it favorably cited *Guglielmi* multiple times, reaffirming the vitality of that decision's robust First Amendment protection for motion pictures. (*See Comedy III*, *supra*, 25 Cal.4th at pp. 396-398 & fn. 7.) *Comedy III* further cautioned that "the very importance of celebrities in society means that the right of publicity has the potential of censoring significant expression by suppressing alternative versions of celebrity images that are iconoclastic, irreverent, or otherwise attempt to redefine the celebrity's meaning." (*Id.* at p. 397.) The trial court's decision here to apply the transformative use test to a motion picture is unprecedented. Notably, the trial court did not cite a case, from California or anywhere, applying the transformative use test to any type of fictional or dramatic—or even non-fictional—motion picture. (See 4 JA 1094-1096.) Thus, this court should reaffirm *Guglielmi*'s mandate and hold that the transformative use test does not apply to fictionalized motion pictures such as docudramas and biopics.

The trial court compounded its error by focusing only on whether the actual *likeness of the plaintiff within the work* was sufficiently transformed, as opposed to whether the *work as a whole* was sufficiently transformative. (See 4 JA 1095 ["because the Defendants admit that they wanted to make the appearance of Plaintiff as real as possible [citation], there is nothing transformative about the docudrama"].) *Guglielmi*, however, held in the context of a docudrama that "[n]o author should be forced into creating mythological worlds or characters wholly divorced from

reality." (*Guglielmi*, *supra*, 25 Cal.3d at p. 869.) Thus, the trial court demanded the very type of alterations that the California Supreme Court has held are *not* required to insulate motion pictures from right of publicity claims. In any event, it is clear that *Feud* as a whole is transformative as a matter of law. Ms. de Havilland's likeness may be realistic, but she appears as a secondary character in a fictionalized, multi-episode, television show that explores themes of fame, feminism, and patriarchy in modern America. Her likeness, recreated with great skill and artistry by another famous actress, Catherine Zeta-Jones, is "one of the 'raw materials' from which [*Feud*] is synthesized," not "the very sum and substance of" that show. (*Comedy III*, *supra*, 25 Cal.4th at p. 406.)

The trial court's ruling to the contrary turns the right of publicity on its head—even if that cause of action had a place in the context of motion pictures, which it does not. In the context of fictional motion pictures, for example, even a realistic portrayal of a person is, by definition: (a) not merchandizing, and (b) more than a carbon copy of that person's life. Filmmakers and other authors make creative choices about which events to include or omit, and in what order. Incorporating events from a real person's life allows viewers to experience important historical, cultural, and personal events. Indeed, actors are lauded for their ability to realistically portray famous people, as was Natalie Portman for her Oscar-nominated performance as First Lady Jacqueline Kennedy in

Jackie,[12] and Margot Robbie for her Oscar-nominated performance as Olympic figure skater Tonya Harding in *I, Tonya*.[13] In short, the realistic portrayal of another person in docudramas and similar fictional art forms is part of the craft that enhances the expressive power of the works, and renders them transformative as a matter of law. This is as it should be, and surely is fully protected by the First Amendment.

D. Consent or compensation is not required to protect against right of publicity claims, lest important expressive works become subject to censorship by their subjects.

The trial court veered far from governing law by holding that Ms. de Havilland's claims could proceed despite their First Amendment implications because the defendants did not obtain her consent and negotiate compensation for the use of her likeness. (4 JA 1094.) Just as factual news coverage cannot be constitutionally censored by individuals seeking to avoid media attention or

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[12] See Svetkey, *Making of 'Jackie': How a Chilean Director Convinced Natalie Portman to Play the Grieving First Lady*, The Hollywood Reporter (Dec. 1, 2016) <https://goo.gl/oMisiw> [describing Portman's extensive research to portray Kennedy accurately] [as of Jan. 23, 2018].

[13] Fleming, *'I, Tonya's Margot Robbie Goes For Gold Playing Disgraced Olympic Figure Skater*, Deadline (Nov. 29, 2017) <https://goo.gl/ZSpXyY> [as of Jan. 24, 2018].

criticism, it is well established that unauthorized biographies, historical stories, and other expressive works—both fictional and non-fictional—enjoy full First Amendment protection. (See, e.g., *Gates v. Discovery Communications, Inc.* (2004) 34 Cal.4th 679, 695 [" '[T]he constitutional guarantees of freedom of expression apply with equal force to the publication whether it be a news report or an entertainment feature' "].) "Surely, the range of free expression would be meaningfully reduced if prominent persons in the present and recent past were forbidden topics for the imaginations of authors of fiction." (*Guglielmi*, *supra*, 25 Cal.3d at p. 869.) Indeed, "prominence invites creative comment." (*Ibid.*) Requiring consent from an individual before portraying her in a docudrama based on or inspired by historical events in which she was involved "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 a person's identity." (*Id.* at p. 872.)

As one leading commentator explained:

> If the law mandated that the permission of every living person and the descendants of every deceased person must be obtained to include mention of them in news and stories, both in documentary and docudrama telling, then they would have the right to refuse permission unless the story was told "their way." That would mean that those who are participants in the news and history could censor and write the story and their descendants could do the same. This would be anathema to the core concept of free speech and a free press.

(2 McCarthy, The Rights of Publicity & Privacy (2d ed. 2017) § 8:64.)

The trial court here was swayed by a declaration Ms. de Havilland solicited from a self-professed "expert," with no known experience in the docudrama genre,[14] baldly claiming there is some sort of industry standard for obtaining celebrities' consent before using their likeness in all motion pictures—a factual contention that the MPAA and Netflix would vigorously dispute if it were relevant. (See JA 1094.) The purported industry standard, however, is not relevant because motion picture creators, including docudrama screenwriters, "have a constitutional right to free expression, which they exercised when they made and released this film." (*Polydoros*, *supra*, 67 Cal.App.4th at p. 326.) Any supposed "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." (*Ibid.*)

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[14] See *Cort Casady*, IMDb <https://goo.gl/3hPkwv> [Internet Movie Database entry listing Mr. Casady's work on numerous awards shows, but no docudramas] [as of Jan. 23, 2018].

III. THE TRIAL COURT'S ANALYSIS WOULD CREATE A CATCH-22 FOR CREATORS OF ALL TYPES OF FICTIONALIZED MOTION PICTURES ABOUT REAL PEOPLE AND EVENTS THAT WOULD THREATEN THE FUTURE OF THESE IMPORTANT WORKS.

The trial court's analysis of Ms. de Havilland's publicity and false light claims would create a Catch-22 for creators of dramatic and fictionalized motion pictures inspired by or about real people or events that, if affirmed, would have a chilling effect on their creation.

Under the trial court's analysis here, any docudrama that purports to show its subjects realistically would be insufficiently transformative and therefore violate the right of publicity. (See 4 JA 1095 ["because the Defendants admit that they wanted to make the appearance of Plaintiff as real as possible [citation], there is nothing transformative about the docudrama"].) At the same time, under the court's analysis, any docudrama that is sufficiently transformative to avoid right of publicity liability will be sufficiently knowingly false to be exposed to false light liability. (See 4 JA 1091 ["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' "].)

If affirmed, the result would be that almost all docudramas and other fictionalized works based on actual events and real people, whether depicted as realistically as possible or as highly

fictionalized, will lose First Amendment protection, thus depriving the public of these historically and culturally important works. As the United States Supreme Court has explained, "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press." (*Time, Inc. v. Hill* (1967) 385 U.S. 374, 388 [87 S.Ct. 534, 17 L.Ed.2d 456].) First Amendment protections "are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society. Fear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to 'steer * * * wider of the unlawful zone,' [Citations]; and thus 'create the danger that the legitimate utterance will be penalized.' " (*Id*. at p. 389; see also *id*. at pp. 401-402 (conc. opn. of Douglas, J.) ["Once we narrow the ambit of the First Amendment, creative writing is imperiled and the 'chilling effect' on free expression . . . is almost sure to take place"].)

CONCLUSION

For the foregoing reasons, the relief requested in the appellants' opening brief should be granted. Amici urge this court to make clear that a plaintiff cannot assert a viable false light claim against a docudrama, biopic or historical drama based on the creators' use of storytelling techniques inherent in those genres.

This court should also make clear that despite intervening cases in later years addressing works outside the context of motion pictures, *Guglielmi* is still the governing law in California with regards to motion pictures, and that right of publicity claims may not be asserted against motion pictures that tell stories about or inspired by real people or events.

January 25, 2018

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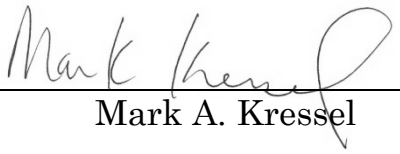
By: 
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CERTIFICATE OF WORD COUNT
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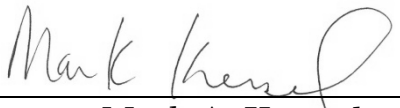
The text of this brief consists of 11,020 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: January 25, 2018



Mark A. Kressel

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 3601 West Olive Avenue, 8th Floor, Burbank, California 91505-4681.

On January 25, 2018, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. AND NETFLIX, INC. IN SUPPORT OF FX NETWORKS, LLC AND PACIFIC 2.1 ENTERTAINMENT GROUP, INC.** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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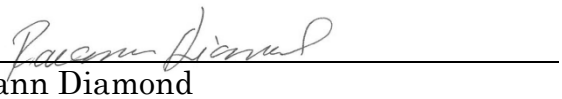
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 25, 2018, at Burbank, California.



Raeann Diamond

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Court of Appeal No. B285629

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