Case No. _____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

OLIVIA DE HAVILLAND, DBE,
Plaintiff and Respondent,

v.

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

After a Published Decision of the California Court of Appeal
Second Appellate District, Division 3, Case No. B285629

Reversing a Ruling of the Los Angeles County Superior Court
Case No. BC667011
The Honorable Holly E. Kendig, Dept. 42

PETITION FOR REVIEW

HOWARTH & SMITH
Don Howarth (SBN 53783)
dhowarth@howarth-smith.com
*Suzelle M. Smith (SBN 113992)
ssmith@howarth-smith.com
Zoe E. Tremayne (SBN 310183)
ztremayne@howarth-smith.com
523 West Sixth Street, Suite 728
Los Angeles, CA 90014
Tel: (213) 955 – 9400
Fax: (213) 622 – 0791

Attorneys for Plaintiff and Respondent
Olivia de Havilland, DBE

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I. ISSUES PRESENTED

1. Does the appellate court's interpretation of the anti-SLAPP statute, by which the court determines credibility and accepts the evidence of the moving party instead of the contrary evidence of the plaintiff, render the statute unconstitutional as an infringement of the rights to a jury trial and to petition for redress of grievances?
2. Does the First Amendment defense absolutely bar both a defamation/false light claim and a right to publicity claim where there is admissible direct, and circumstantial, evidence of publication of knowing or reckless falsehoods, and harm to reputation?
3. Is the use of a living celebrity's real name, identity, and photograph, in a portrayal crafted to be as realistic as possible, "transformative" as a matter of law, defeating right to publicity claims?

II. THIS COURT SHOULD GRANT REVIEW

Review of the published Opinion of the Second District ("Opinion") should be granted because in reversing the Ruling of the trial judge, the Honorable Holly Kendig, on Defendants' FX Networks, LLC and Pacific 2.1 Entertainment Group, Inc. ("Defendants" or "FX") Motion to Strike ("anti-SLAPP"), which allowed Miss Olivia de Havilland ("Plaintiff" or "de Havilland") to proceed to jury trial on her right of publicity and false light causes of action, the Opinion raises important issues of constitutional significance which impact the rights of celebrities and of ordinary citizens who are defamed, as well as those whose names or images are improperly used.[1]

[1] For example, SAG-AFTRA filed an *amicus* brief in support of de Havilland with the Court of Appeal on behalf of "more than 165,000 actors, announcers, broadcasters, journalists, dancers, DJs, news writers, news editors, program hosts, puppeteers, recording artists, singers, stunt

Review should also be granted because the Opinion establishes new rules of law that conflict with the decisions of this Court, of the U.S. Supreme Court, and with those of other appellate courts, including holding that in opposing an anti-SLAPP motion to dismiss, plaintiff must produce "credible" and "direct" evidence,[2] turning on its head the rule of such cases as *Briggs*,[3] *Oasis*,[4] and *Baral*,[5] under which the court must credit plaintiff's evidence in order not to infringe the right to jury trial and the right to petition, and *Overstock*, an anti-SLAPP libel case which provides that malice may be proved by circumstantial evidence.[6] Further, the Opinion eviscerates the "transformative" test of *Comedy III*[7] and *Winter*[8] by holding, in conflict with *No Doubt*,[9] that literal depictions, using real names and identities, which are part fiction, are "transformative" as a matter of law.[10]

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performers, voiceover artists and other media professionals." SAG-AFTRA *Amicus Curiae* Brief at 1.

[2] Opinion at 13.

[3] *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.

[4] *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 disapproved on other grounds in *Baral v. Schnitt* (2016) 1 Cal.5th 376; *see also Bahl v. Bank of Am.* (2001) 89 Cal.App.4th 389, *as modified on denial of reh'g* (June 20, 2001); *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347. *See* Sections (IV)(B)-(D), *infra*.

[5] *Baral*, 1 Cal.5th at 376. *See* Sections (IV)(C)-(D), *infra*.

[6] *Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688; *see also Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 257-58. *See* Section (IV)(C), *infra*.

[7] *Comedy III Prods., Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387. *See* Section (IV)(E), *infra*.

[8] *Winter v. DC Comics* (2003) 30 Cal.4th 881. *See* Section (IV)(E), *infra*.

[9] *No Doubt v. Activision Publishing, Inc.* (2011) 192 Cal.App.4th 1018. *See* Section (IV)(E), *infra*.

[10] Opinion at 23-27. The Opinion noted that lower California Courts have "struggled mightily" with application of the transformative use test. *Id.* at 25.

The Opinion also eliminates false light claims despite evidence of knowing falsehoods and harm to a living person's reputation, where the producer asserts that there was no intent to injure, in conflict with *Masson*[11] and *Weller*.[12]

For example, on the issue of proper review of the evidence, in *Oasis*, this Court held that, in considering the second prong of an anti-SLAPP motion, "we neither 'weigh credibility, [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.'"[13] Again, most recently in *Baral*, this Court stated, "[the] court does not weigh evidence or resolve conflicting factual claims…. It accepts the plaintiff's evidence as true… [Citation.]"[14]

On the issue of transformation, in *Comedy III* and *Winter*, this Court held that, under the transformative test applicable to any form of artistic expression, there is no blanket First Amendment protection where the identity of the celebrity is a literal imitation, including real names or likenesses.[15] In *No Doubt*, following *Winter*, the court found that unconsented use of literal names and identities in a video game, even

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[11] *Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496. *See* Section (IV)(D), *infra*.

[12] *Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1005, fn.12 ("[I]f appellants had persuaded the jury that they actually investigated and accurately reported the allegations made by their sources, the jury would not have found malice …."); *see also Hutchinson v. Proxmire* (1979) 443 U.S. 111, 120, fn.9. *See* Section (IV)(D), *infra*.

[13] *Oasis*, 51 Cal.4th at 820 (quoting *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn.3).

[14] *Baral*, 1 Cal.5th at 384-385 (citing *Oasis*, 51 Cal.4th at 819-820).

[15] *Comedy III*, 25 Cal.4th at 406; *Winter*, 30 Cal.4th at 889.

though there were many other characters and artistic components, was not transformative.[16]

On the issue of the standard of proof for defamation cases, in *Masson*, the U.S. Supreme Court reversed summary judgment, holding that where defendant admits that statements attributed to, but denied by plaintiff, including that plaintiff referred to himself as an "intellectual gigolo" and "the greatest analyst who ever lived," and that he said he intended to make Freud's home a place of "sex, women, fun[,]" could be found to be false, defamatory, and made with actual malice by a reasonable jury.[17]

In *Weller*, the court, affirming judgment for plaintiff in a defamation case, confirmed that the First Amendment does not protect all speech of public interest: "[T]he California Constitution states, 'Every person may freely speak, write and publish his or her sentiments on all subjects, *being responsible for the abuse of this right*.' … This provision makes clear that the right to speech is not unfettered and reflects a considered determination that the individual's interest in reputation is worthy of constitutional protection."[18]

The de Havilland case is being closely followed.[19] It is the textbook vehicle for this Court to address these issues of statutory and constitutional

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[16] *No Doubt*, 192 Cal.App.4th at 1034.

[17] *Masson*, 501 U.S. at 503-05, 521, 525. The Supreme Court also rejected the idea, endorsed by the Opinion, that it is a defense against libel that false statements are only a small part of a bigger whole. *Compare* Opinion at 27 *with Masson*, 501 U.S. at 510 ("The test of libel is not quantitative; a single sentence may be the basis for an action in libel even though buried in a much longer text.").

[18] *Weller*, 232 Cal.App.3d at 1006.

[19] Brownfield, *At 101, a Survivor of Hollywood's Golden Age Throws Down the Gauntlet* (Mar. 3, 2018) N.Y. Times (https://www.nytimes.com/2018/03/03/style/olivia-de-havilland-fx-ryan-murphy-lawsuit.html); Times Editorial Board, *Olivia de Havilland's legal*

significance, including the "inviolate" right to civil jury trial on issues of fact under California's Constitution,[20] and the vitality of the right of publicity and defamation causes of action, when plaintiff offers admissible evidence, both percipient and expert, that defendants knowingly or recklessly made false statements and misappropriated her literal identity, damaging her professional reputation and profiting themselves. Further, this Court has not addressed the right to publicity and false light in the context of the procedures applicable to the anti-SLAPP statute and needs to do so. This case presents pressing and recurring issues being confronted in the courts dealing with state law causes of action and First Amendment law.[21] This Court should grant Plaintiff's petition.[22]

III. BACKGROUND

A. Factual Summary

Plaintiff, a two-time Academy Award winning actress,[23] is 101 years

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loss means historical fiction gets to survive (Mar. 28, 2018) L.A. Times (http://www.latimes.com/opinion/editorials/la-ed-dehavilland-ruling-20180328-story.html); Cullins, *Olivia de Havilland, FX Debate Whether "Bitch" is a Vulgar Term in 'Feud' Arguments* (Mar. 20, 2018) The Hollywood Reporter (https://www.hollywoodreporter.com/thr-esq/olivia-de-havilland-fx-debate-bitch-is-a-vulgar-term-feud-arguments-1095793).

[20] Cal. Const., Art. I, §16; *Shaw v. Superior Court* (2017) 2 Cal.5th 983, 994-95.

[21] *See* Section (IV), *infra*.

[22] De Havilland's complaint was filed on June 30, 2017. Her motion for trial preference on the basis of her age, 101 years old, and health was granted. JA0680-681 [Order Granting Trial Preference]. The Court of Appeal also granted her motion to expedite. Order Granting Calendar Preference and Expediting Appeal. De Havilland did not file a motion for rehearing in the Court of Appeal because, among other reasons, this would cause additional delay.

[23] Plaintiff is a Dame of the Order of the British Empire, and a recipient of the French Legion d'Honneur and the National Medal of Honor for the Arts, the highest honor conferred on an individual artist on behalf of the people of the United States. *See* JA0962 [ODH Decl. ¶¶2-3]; Saad, *Olivia de Havilland 101: Everything you need to know as the movie legend*

old. She is also a citizen entitled to the constitutional right to petition for redress of grievances and to have a jury decide controverted fact and credibility issues as to her claims of damage to her professional reputation and of misappropriation of her name and identity for commercial purposes.

In 2017, FX aired "Feud: Bette and Joan" ("Feud"), an eight-part television series in which Academy Award winner Catherine Zeta-Jones played de Havilland, identified in the series by name, professional activities, and a photograph.[24] In "Feud," women in Hollywood use profane and vulgar language, lies, sex, and betrayal of each other in order to succeed in their careers.[25] Joan Crawford and Bette Davis are the principal

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celebrates her 101st birthday (Jul. 1, 2017) L.A. Times http://www.latimes.com/entertainment/movies/la-et-mn-olivia-de-havilland-101-birthday-20170701-htmlstory.html. The medal was presented by President George W. Bush, who commended her "for her persuasive and compelling skill as an actress in roles from Shakespeare's Hermia to Margaret Mitchell's Melanie. Her independence, integrity, and grace won creative freedom for herself and her fellow film actors." *President and Mrs. Bush Attend Presentation of the 2008 National Medals of Arts and National Humanities Medals* (Nov. 17, 2008) The White House Archives https://georgewbush-whitehouse.archives.gov/news/releases/2008/11/20081117-2.html.

[24] JA0192-193 [Minear Decl. ¶¶5-6]; Opinion at 6, fn.2.

[25] Of Feud, critics said: "In title and in trailer, FX's *Feud: Bette and Joan* promises the same unseemly thrill that unites *The Real Housewives*, *Mean Girls*, and whatever the latest headline is about Taylor Swift. It lures viewers craving slaps and screams and madcap montages featuring the word 'bitch.' … 'Can somebody say, 'Cat Fight?' Rrrreow.'" Kornhaber, *Feud: Bette and Joan Deconstructs a Rivalry for Tragedy, Not Comedy* (Mar. 3, 2017) The Atlantic (https://www.theatlantic.com/entertainment/archive/2017/03/feud-fx-bette-joan-review-tragedy/518400/). "More precisely, 'Feud' is about … how Hollywood creates a catfight narrative between two women and sells tickets to it. It's about hate as a commodity, a product, a shameful meal plated under a silver dome." Poniewozik, *Review: 'Feud: Bette and Joan,' A Clash of the Gossip Girls* (Mar. 2, 2017) N.Y. Times (https://www.nytimes.com/2017/03/02/arts/television/feud-bette-joan-tv-review-fx.html). "[T]he c-word isn't often used on TV …. The show likely

examples of this, with de Havilland, who was a close friend of Davis, used as the insider who narrates and introduces "dramatized" scenes, supposed reenactments of the actors' "natural enmity." FX also uses Plaintiff to underscore the unflattering, anti-feminist theme of the program as a further example of a Hollywood gossip who would discuss a close friend's confidences on camera in order to promote herself, make snide comments about another actor's drinking habits to another member of the profession, and call her sister, actor Joan Fontaine, a "bitch" to other members of the profession while they were both alive and working actresses, none of which occurred. Plaintiff's photograph is used by FX, and the viewer is told that she is alive at 100 years old and living in Paris.[26] As narrator, she opens, speaking the first words of the entire series, and the structure of the show is designed to have the viewer believe that she participated in such real-life events and endorsed the show.[27]

The statements and characterization of de Havilland by FX are knowingly false. FX did not ask de Havilland's permission to use her name, photograph, and identity in "Feud."[28] De Havilland testified that she was not asked to give consent and FX did not ask her about the truth of any

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got away with it thanks to it's 10 p.m. time slot, the fact that it isn't a broadcast network, and the fact that Ryan Murphy is an unstoppable force of nature in the entertainment world." Bonner, *How 'Feud: Bette and Joan' Got Away with Saying the C-Word on TV* (Mar. 6, 2017) Marie Claire (https://www.marieclaire.com/culture/news/a25774/feud-c-word/).

[26] Opinion at 6, fn.2.

[27] JA0731-732 [Ladd Decl. ¶17] ("'Feud' was constructed as if Miss de Havilland, a narrator, was being interviewed to make it appear that she, virtually the only living, significant person in the series from the actual era, endorsed 'Feud.'"); JA0957 [Casady Decl. ¶11] ("Feud" is "designed to appear to the viewer as if the still-living Miss de Havilland endorsed the production and its content, which is not true.").

[28] JA0874 [Roesler Decl. Ex. 11].

of the factual statements attributed to her in "Feud."[29] De Havilland testified that she never gave any interview about Bette Davis, her friend, and Davis' relationship to Crawford.[30] She also testified that she never called her sister a "bitch," and certainly would not do so to members of the profession while they were both working actors.[31] She never commented on Frank Sinatra's drinking habits, as "Feud" portrays.[32] She did not approve of "Feud;" did not approve her use as narrator; and did not endorse "Feud" or its portrayals of her or Davis and Crawford.[33]

FX admits that it fabricated the statements it attributes to Plaintiff.[34] FX does not deny that Plaintiff's character calls Fontaine a "bitch" at least twice to industry professionals, which never happened.[35] FX admits it intentionally broadcast the fake interview of de Havilland.[36] FX admits that de Havilland was well known for not speaking about her sister's criticisms of her during her sister's life (Fontaine was 96 when she died).[37]

FX admits that Plaintiff was portrayed, without her knowledge or consent, to enhance the appearance of "Feud" and increase its sensationalist attraction to the public.[38] "Feud" was designed to appear authentic, and to

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[29] JA0971 [ODH Decl. ¶2].
[30] JA0962 [ODH Decl. ¶5]; JA0971 [ODH Decl. ¶3].
[31] JA0962 [ODH Decl. ¶6]; JA0971 [ODH Decl. ¶5].
[32] JA0971 [ODH Decl. ¶4].
[33] JA0962 [ODH Decl. ¶¶4, 7]; JA0971 [ODH Decl. ¶¶2-7].
[34] JA0193 [Minear Decl. ¶7] ("[W]e writers on the project created imagined interviews conducted at the 1978 Academy Awards."); JA0188 [Zam Decl. ¶9] ("[We] decided to use the dramatic device of imagined interviews at the 1978 Academy Awards ….").
[35] JA0183-184 [Murphy Decl. ¶¶16-18]; JA0204 [Minear Decl. ¶19].
[36] JA0195 [Minear Decl. ¶15]; Appellants' Reply Brief at 35-36.
[37] JA0203-204 [Minear Decl. ¶¶17-18].
[38] JA0183-184 [Murphy Decl. ¶¶15, 18] ("The de Havilland character served as … an objective, authoritative bridge to the viewer…. I had the de Havilland character refer to her sister as a 'bitch' because it was a powerful

make the audience "trust" de Havilland's character and what she said about the alleged relationship between Davis and Crawford, and her own private relationship with Fontaine.[39] The setup is purposely structured to appear as if the real de Havilland participated in and endorsed "Feud."[40] The false portrayal of Plaintiff has injured her reputation and the value of her identity.[41]

B. The Trial Court Ruling

Following the holdings of this Court and previous opinions of courts of appeal setting forth the constitutional limits on the role of the courts in considering anti-SLAPP motions before discovery and without jury trial, the trial court, in a 16-page opinion and Ruling, after two hours of oral argument, denied Defendants' motion. The court held that "Plaintiff has successfully met her burden in showing that she has a likelihood of prevailing on the merits."[42]

The Ruling set out the legal standard for a court's anti-SLAPP analysis as to whether the case possesses "minimal merit:"

> The plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. The court does not weigh the credibility or comparative probative strength of competing evidence.[43]

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and succinct way to convey the deep enmity between de Havilland and Fontaine.").

[39] JA0195 [Minear Decl. ¶¶14] ("[W]e made sure not to put the de Havilland character in places where Ms. de Havilland did not actually appear in reality."); JA0183 [Murphy Decl. ¶15] ("[I]t was important that viewers trust the de Havilland character….").

[40] JA0731-732 [Ladd Decl. ¶17]; JA0956-957 [Casady Decl. ¶11].

[41] JA0957 [Casady Decl. ¶11]; JA0745 [Roesler Decl. ¶15].

[42] Ruling at 2.

[43] *Id.* (citing *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 768).

The Ruling then carefully reviewed the entire record, giving credit to Plaintiff's admissible evidence and also reviewing evidence offered by FX.[44] The Ruling first identified Plaintiff's allegations of false statements of fact in the complaint as follows:

> 1. [F]alsely indicating that Plaintiff gave an interview at the 1978 Academy Awards discussing the relationship between Bette Davis and Joan Crawford…[;]
> 2. [F]alsely giv[ing] the impression that Plaintiff referred to her sister, Joan Fontaine, as her "bitch sister."...[;]
> 3. Falsely indicating that she said that Frank Sinatra must have drunk all the alcohol because they [de Havilland and Davis] couldn't find any…[;]
> 4. [F]alsely indicating that she turned down a role … by stating that she doesn't "play bitches" and that the director should call her sister….[45]

The Ruling addressed the substantive law on false light:

> "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."[46]

The Ruling set forth the affirmative defense of substantial truth, raised by Defendants.[47]

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[44] The Trial Court also separately considered and made rulings on the objections FX made to Plaintiff's evidence both percipient and expert. JA1079-1082 [Ruling on Evidentiary Objections]. The evidence cited in this Petition is only admissible evidence. FX did not challenge the evidentiary rulings of the trial court.

[45] Ruling at 2.

[46] *Id.* (citing *Aisenson v. American Broadcasting Co.* (1990) 220 Cal.App.3d 146, 161).

[47] Ruling at 3 (citing *Masson*, 501 U.S. at 516-17 (reversing summary judgment for a defamation defendant where there were triable issues of fact on falsity, actual malice, and harm to professional reputation)).

In this context, the Ruling reviewed the record evidence, starting with the issue of whether or not the statements were susceptible of being interpreted as false statements of fact.[48] The Ruling quoted the admission of FX's writers that Plaintiff had not given an interview at the Academy Awards, or anywhere, discussing the relationship of her close friend, Davis, and Crawford, and that the interviews were "imagined":

> Many of the de Havilland character's scenes take place during imagined interviews at the 1978 Academy Awards. Research indicates that Ms. de Havilland attended the 1978 Academy Awards. Although, to my knowledge, Ms. de Havilland was not actually interviewed at the 1978 Academy Awards….[49]

The Ruling also considered the FX declarations claiming that while de Havilland did not call her sister a "bitch," she called her a "dragon lady" in 2016 after her death, and claiming these are synonymous.[50] The Ruling cited the two declarations of Plaintiff denying she had given such interviews as broadcast in "Feud," denying calling her sister a bitch publicly or privately; and denying discussing Sinatra's drinking.[51] The Ruling cited the declaration of expert Casady stating that "bitch" and "dragon lady" are not synonyms and finding:

> For purposes of this motion, Plaintiff has sufficiently met her burden in showing that the use of the term "bitch" and "bitches" in the television show were not factually accurate. *Navellier v. Sletten* ….
>
> [A]s to the Frank Sinatra scene, Defendant claims that this is a true event…. However, the actual line about Frank Sinatra does not appear to have been a true

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[48] Ruling at 3-5.
[49] Ruling at 3 (quoting Minear Decl. ¶15).
[50] Ruling at 3-4 (quoting Murphy Decl. ¶1) ("'I had the de Havilland character refer to her sister as a "bitch"….'").
[51] Ruling at 3-5.

> event. As implicitly admitted in the [Minear] declaration ….[52]

The Ruling reviewed the evidence that the false statements and portrayal of Plaintiff were defamatory.[53]

> "In determining whether a publication has a defamatory meaning, the courts apply a totality of the circumstances test to review the meaning of the language in context and whether it is susceptible of a meaning alleged by the plaintiff. [Citation]."[54]

The Ruling looked at the FX admissions, noting that "Defendants assert that even if some of the statements and scenes are not accurate [citation], the television program is not defamatory …. As Defendants noted in the [Minear] declaration …: [they were aware] 'of Ms. de Havilland's guarded attitude toward publicly discussing Fontaine….'"[55]

> For purposes of this motion, and in considering the show as a whole, the Court finds that Plaintiff has sufficiently met her burden of proof in that a viewer of the television show, which is represented to be based on historical facts, may think Plaintiff to be a gossip who uses vulgar terms about other individuals, including her sister…. For a celebrity, this could have a significant economic impact for the reasons set forth in the declaration of C[o]rt Casady at ¶12:
>
> > In order for the property rights to have value to Miss de Havilland, she must be able to control their use and limit their use to productions for which she has given consent and which are accurate. "Feud's" unauthorized and untrue portrayal, left unchecked, has and will devalue Miss de Havilland's name and identity and her ability, and the ability of her heirs, to obtain

[52] Ruling at 4-5.
[53] Ruling at 5-6.
[54] Ruling at 6.
[55] Ruling at 5.

> compensation for such use now and in the future.[56]

On malice, the Ruling states:

> Defendant's assert that even if the depiction of Plaintiff is false and defamatory, there is insufficient evidence of actual malice.
>
> As explained in *Reader's Digest* …:
>
> > If the person defamed is a public figure, he cannot recover unless he proves, by clear and convincing evidence [citation], that the libelous statement was made with "'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'"[57]

The trial court described the evidence at length and found that: "[a]lthough Defendant's argue that they were trying to portray Plaintiff in a nuanced way, Plaintiff has met her burden for purposes of this motion."[58] The Ruling refers to Plaintiff's Supplemental Declaration, Defendants' declarations, and evidence from industry experts that nothing in the declarations of FX substantiated the actual statements attributed to Plaintiff,[59] finding:

> Finally, while the movie is deemed to be a docudrama which, according to Defendants, is "a dramatized retelling of history"…, the declaration of Mark Roesler, … Chairman and CEO of Celebrity Valuations …, notes…:
>
> > The authentic details are used to lead the viewers into believing that what de Havilland says and does is accurate and factual, rather than made up and false, and that de Havilland herself endorsed the "Feud" portrayal of her

[56] Ruling at 6.
[57] Ruling at 6-7.
[58] Ruling at 7.
[59] Ruling at 7-8 (citing Casady Decl. ¶¶6-7).

> private and public remarks about other actors at the time "Feud" is set.
>
> Here there is no attempt to show that the movie was considered a "farce." …. [T]he statements made in the show may lead a reasonable viewer to believe the statements were actually made by Plaintiff.
>
> [F]or purposes of this motion … Plaintiff has sufficiently met her burden by showing that … [Defendants] attributed comments to her "with knowledge that it was false or with reckless disregard of whether it was false or not." [Citation].[60]

On the right to publicity, the Ruling found that Plaintiff had sustained her burden, quoting this Court:

> As *Comedy III* … notes, "What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity's fame through the merchandising of the 'name, voice, signature, photograph, or likeness' of the celebrity." (§ 990.)[61]
>
> "[D]epictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment." [Citation.][62]

The Ruling also quoted *Zacchini v. Scripps-Howard Broadcasting* (1977) 433 U.S 562, 576: "'No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.'"[63]

The Ruling addressed Defendants' claim that there was no malice, and their First Amendment, public interest and transformative affirmative

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[60] Ruling at 9.
[61] Ruling at 9-10.
[62] Ruling at 12.
[63] *Id.*

defenses to determine whether they would prevent the action as a matter of law.[64]

The Ruling examined the FX evidence, including the declaration of Gibbons, "President of Marketing… for FX Networks," admitting that "images of Catherine Zeta-Jones, who portrayed [] de Havilland … [, were used] in our marketing and promoting for Feud."[65]

The Ruling also reviewed Plaintiff's evidence:

> As noted in the expert declaration of Cort Casady, who has worked in the television industry as a writer, producer and creator…:
>
> > … To use the name and identi[ty] of a celebrity without permission is conduct below industry standard …. The writers of "Feud" clearly and intentionally capitalized on the actual character and fame of Olivia de Havilland … the construction of "Feud's" storyline is designed to appear to the viewer as if the still-living Miss de Havilland endorsed the product and its contents, which is not true…. [I]t is certainly beneath industry standards – in fact, it is production malpractice – to attribute false statements and inaccurate endorsements to a person portrayed in a production without their permission ….
> >
> > The use of Miss de Havilland's name and identity without her permission… depreciates the property value of her name and identity, which is considerable ….[66]

The Ruling also reviewed the declaration of industry expert David Ladd stating:

> "Before [any] project begins production, the errors and omission insurance policies were strict about the studios confirming consent from a well-known living

[64] Ruling at 10-15.
[65] Ruling at 10.
[66] Ruling at 11.

> person, or well-documented authentications of previously disclosed statements or conduct by the well-known living person."[67]

Based on the holdings of the California and U.S. Supreme Courts that the First Amendment does not preclude a cause of action in every "expressive work," as a matter of law, and based on the evidence here, the Ruling found:

> [B]ecause no compensation was given despite using her name and likeness, plaintiff has adequately met her burden…. Moreover, Plaintiff has submitted expert declaration[s] indicating that this is standard in the industry and, if credited, is sufficient to meet her burden. *Navellier v. Sletten* ….[68]

Next the Ruling examined the record under anti-SLAPP standards as to the defense of transformation, quoting this Court in *Comedy III*:

> "[W]e can discern no significant transformative or creative contribution. His undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame. Indeed, were we to decide that Saderup's depictions were protected by the First Amendment, we cannot perceive how the right of publicity would remain a viable right other than in cases of falsified celebrity endorsements."
>
> …
>
> "When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain… the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist."[] *See also No Doubt*….[69]

The Ruling examined the evidence from FX as well as Plaintiff's experts:

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[67] Ruling at 12 (quoting Ladd Decl. ¶15).
[68] Ruling at 12.
[69] Ruling at 13-14.

> [H]ere, because the Defendants admit that they wanted to make the appearance of Plaintiff as real as possible… there is nothing transformative about the docudrama….
>
> Defendant argues that because "the economic value of Feud does not primarily derive from Plaintiff's fame [but] from the acclaimed writing and directing, the fame and performances of the series' Emmy-nominated stars … and the work's subject matter" … there is no violation of the right of publicity.
>
> However, Plaintiff has met her burden on this motion by showing that the use of her likeness in the television program resulted in economic benefit to the Defendants. As noted in the [Roesler] declaration ….:
>
> > …[I]t is my opinion that a [fair market value] of the FX Defendant's use of de Havilland's [right of publicity] Related Rights … would be between $1.38 million to $2.1 million, conservatively.[70]

Finally, as to knowing or reckless falsity, the Ruling examined the evidence, including the declaration of another celebrity used in a minor role in "Feud," Don Bachardy, stating that FX asked his permission to use his name and a painting of his, as well as the declaration of Plaintiff's expert.[71] Denying the FX motion to dismiss and allowing Plaintiff to proceed to jury trial, the Ruling states:

> For purposes of this motion, the Court finds that Plaintiff has sufficiently met her burden of proof in showing that Defendants acted with knowledge that their portrayal of Plaintiff "was false or with reckless disregard of whether it was false or not" ….[72]

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[70] Ruling at 13-14.
[71] Ruling at 15.
[72] *Id.* The Ruling also found: "Plaintiff may be able to pursue a theory of unjust enrichment which, under applicable law, 'is synonymous with restitution.'" Ruling at 16.

C. The Appellate Opinion

The Court of Appeal reversed the trial court, granted the FX Motion entirely, and awarded attorneys' fees against Plaintiff.[73] The Opinion states the legal standard it used in reviewing the record and Ruling denying FX's anti-SLAPP motion: "plaintiff must present *credible* evidence that satisfies the standard of proof…."[74] Describing the record to be reviewed, the Opinion lists all FX declarations submitted.[75] The Opinion lists only some of Plaintiff's declarations, namely valuation expert Roesler,[76] industry experts Casady and Ladd (writers and producers), and "a declaration from [de Havilland's] attorney attaching posts from Instagram and Facebook with photographs of Zeta-Jones as de Havilland."[77] Declarations of de

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[73] The amount of attorneys' fees and costs are unknown but given similar cases, they are expected to be substantial. *See, e.g., Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1319 (seeking an award of over $250,000). Where, as here, the trial court found minimal merit, an award of attorneys' fees infringes impermissibly an individual's right to petition and right to a jury trial. This Court should address this very serious deterrent to citizens petitioning the court.

[74] Opinion at 13 (citing no authority) (emphasis added).

[75] Opinion at 7-8.

[76] The Opinion omits any discussion of the exhibits to the declaration and states that "Roesler calculated the fair market value … of de Havilland's 'rights' to be between 1.38 and 2.1 million dollars." Opinion at 8. The Opinion asserts that "[t]his works out to be between approximately $84,000 and $127,000 per minute of time that Zeta-Jones appears on screen." *Id.* The Opinion gives no explanation of the basis for these calculations. The Opinion states that "[t]he de Havilland role is a limited one, consuming fewer than 17 minutes …." Opinion at 5. The number of minutes calculated by FX was 18. Appellants' Opening Brief at 23. In any event, Roesler's opinion of the value of de Havilland's fame to FX was not based on minutes, but on use per episode, significance of the character, and use in FX sponsored advertisements. Ruling at 14; JA0749-759 [Roesler Decl. ¶¶21-25].

[77] Opinion at 9. The attachments to the Smith declaration were posted on the official Facebook, Twitter, and Instagram accounts of "Feud: Bette and

Havilland (two), Gisele Galante, Don Bachardy, and the supplemental declaration of Casady, are not mentioned in the Opinion, and it references only a few truncated quotes from Plaintiff's admitted evidence.[78] In discussing its findings of fact, the Opinion does not refer to Plaintiff's evidence, but only to that of FX.[79]

On the false light claim, with no discussion of Plaintiff's expert or percipient testimony, the Court simply concludes, "[i]n light of the actual docudrama itself – which we have viewed in its entirety – de Havilland cannot meet her burden."[80]

The Opinion finds the fabricated interview of de Havilland revealing confidential information about her close friend, Davis, and the false statement attributed to the de Havilland character about Sinatra's drinking – and ignoring Plaintiff's evidence to the contrary – not "reasonably susceptible to a defamatory meaning nor highly offensive to a reasonable person[.]"[81] The Opinion, citing FX evidence exclusively, states: "Zeta-Jones acts as a guide for the viewer through the tale, a Beatrice to the viewer's Dante. Zeta-Jones plays de Havilland as a wise, witty, sometimes playful woman."[82]

Joan," @feudfx, displaying Olivia de Havilland's name in type at least three times larger than Zeta-Jones'. JA0705-718 [Smith Decl. Exs. 1-6].

[78] *See, e.g.*, Opinion at 7-9.

[79] *See generally* Opinion at 11-37. The Opinion's only mention of Plaintiff's evidence is the partial list on pages 8-10.

[80] Opinion at 30.

[81] Opinion at 30.

[82] Opinion at 31-32. The Opinion refers several times to the role of de Havilland as "small." *See, e.g.*, Opinion at 27. Plaintiff's evidence is to the contrary, describing the role as a "significant person in the series" and "an important structural element of the story." JA0731 [Ladd Decl. ¶17]; JA0956 [Casady Decl. ¶11]; *see also, Feud: Bette and Joan Transformations: See How Much the Cast Looks Like the Real-Life Figures*, Entertainment Online (http://www.eonline.com/photos/20339/feud-bette-and-joan-

The Opinion, with no discussion of Plaintiff's evidence finds "[t]he 'bitch' remarks – when de Havilland's actual words [in 2016, 40 years later, when her sister was dead] were 'dragon lady' – are not highly offensive to a reasonable person and are, in addition, substantially truthful…."[83] "Ryan [Murphy] declared he used the word 'bitch' 'because, in [his] mind, the terms *dragon lady* and *bitch* generally have the same meaning….'"[84] However, the dictionary definition, etymology, and meaning conveyed by "bitch" and "dragon lady" are entirely different, one profane, the other refined.[85]

On Plaintiff's right of publicity claim, the Opinion finds "the use of de Havilland's name – along with photographs of Zeta-Jones – in social media promotion for the miniseries [is not a basis for false endorsement]…."[86] Again, there is no consideration of Plaintiff's evidence to the contrary. Relying on dicta from the concurring opinion in *Guglielmi*,

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transformations-see-how-much-the-cast-looks-like-the-real-life-figures/747373). The reference to Beatrice also undermines the "small" finding. Opinion at 31, fn.13 (citing Alighieri, "The Divine Comedy" (1320)). "Beatrice is the single most important figure in the *Commedia* [Divine Comedy] apart from Dante himself." Montemaggi, Treherne and Rowson, *2. Dante's Idea of Paradise and the Cosmos*, University of Leeds (http://www.leeds.ac.uk/arts/info/125127/paradiso/1743/2_dantes_idea_of_paradise_and_the_cosmos/3). And as the Supreme Court, interpreting California defamation law, has stated: "[T]he test of libel is not quantitative; a single sentence may be the basis for an action in libel even though buried in a much longer text…." *Masson*, 501 U.S. at 510 (quoting *Washburn v. Wright* (1968) 261 Cal.App.2d 789, 795). The Opinion also recharacterizes de Havilland's claims, which are based on the false statements attributed to her verbatim in "Feud," and a false on-camera interview where she discloses confidential private information about a friend. *See* Ruling at 2-6.

[83] Opinion at 33.

[84] Opinion at 34.

[85] Ruling at 4.

[86] Opinion at 22.

the Opinion states that using de Havilland's name and likeness is "fully protected by the First Amendment …."[87] Finally, despite Plaintiff's evidence to the contrary, the Opinion holds:

> [W]e conclude as a matter of law that *Feud*'s "marketability and economic value" does not "derive primarily from [de Havilland's] fame" but rather "comes principally from … the creativity, skill, and reputation" of *Feud*'s creators and actors.

Opinion at 26.

The Opinion awarded attorneys' fees and costs against Plaintiff.[88]

IV. LEGAL ANALYSIS

The Opinion radically departs from the holdings of this Court and the U.S. Supreme Court on issues of constitutional significance – including the right to jury trial and the right to petition – and has eviscerated the statutory right of publicity and common law right to sue for defamation where there are publications of admitted falsehoods and fabrications.

A. Anti-SLAPP Statute

The Legislature designed CCP Section 425.16 to address "meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so."[89] The process is designed to accelerate certain pre-trial procedures in order to dispose of patently "meritless" cases.[90] Section 425.16 allows a special motion for dismissal with a two-step process. If defendant proves the case

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[87] Opinion at 19.
[88] Opinion at 38.
[89] *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 816 (disapproved on other grounds by *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53).
[90] *Un Hui Nam v. Regents of the Univ. of California* (2016) 1 Cal.App.5th 1176, 1189.

involves free speech about a public issue,[91] then plaintiff must demonstrate a probability of prevailing on the claim.[92]

Anti-SLAPP "'subjects to potential dismissal only those actions in which the plaintiff cannot 'state[ ] and substantiate[ ] a legally sufficient claim.'' [Citation] …. [Thus] the Legislature's detailed anti-SLAPP scheme 'ensur[es] that claims with the requisite minimal merit may proceed.' [Citation.]"[93]

B. Constitutional Limitations on the Anti-SLAPP Statute

As recognized by this Court, California's anti-SLAPP statute involves several issues of constitutional significance, including the right to free speech, the right to petition, and the right to jury trial,[94] which must be carefully balanced in applying the statute.[95] Otherwise, the statute can be used to undermine rather than protect constitutional rights. *Navellier*, 29 Cal.4th at 96 (Brown, J., dissenting) ("The cure has become the disease– SLAPP motions are now just the latest form of abusive litigation.").[96] To paraphrase the First District in *Un Hui Nam*, "the disease would become fatal for most … [right to publicity and defamation] actions against [the entertainment industry] … if … [this court] were to accept the … [Opinion's] misguided reading of the anti-SLAPP law and [affirm] the [reversal of] the trial court's denial of … [the FX] motion to strike."[97]

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[91] Prong one is not contested here. JA1083 [Ruling at 1].
[92] *Equilon*, 29 Cal.4th at 67.
[93] *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 738, 740-41 (quoting *Navellier v. Sletten* (2002) 29 Cal.4th 82 at 93-94).
[94] *Briggs*, 19 Cal.4th at 1122-1123.
[95] *S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 380-81.
[96] "SLAPPs pit two sets of fundamental constitutional rights against each other: (1) defendants' rights of free speech and petition and (2) plaintiffs' rights of access to the judicial system and rights to non-falsely maligned reputations." Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs* (1993) 26 Loyola L.A. L. Rev. 395, 397-98.
[97] *Un Hui Nam*, 1 Cal.App.5th at 1179.

The California Constitution states: "[t]rial by jury is an inviolate right and shall be secured to all…."[98] Issues of fact must be decided by a jury, and only issues of law may be decided by a Court.[99] Indeed, having disputed facts tried to a jury is "'a basic and fundamental part of our system of jurisprudence…. As such, it should be zealously guarded by the courts…. In case of doubt therefore, the issue should be resolved in favor of preserving a litigant's right to trial by jury.' [Citations]."[100]

California Constitution Article I, Section 3 recognizes the right to "petition government for redress of grievances…."[101] "[T]he right of petition protects attempts to obtain redress through the institution of judicial proceedings…. Hence, the act of filing suit… invokes constitutional protection."[102] The only instance in which this petitioning activity may be constitutionally punished is when a party pursues frivolous litigation, whether defined as lacking any "reasonable basis" or as sham litigation.[103]

This Court has emphasized the legislative and judicial limitations imposed on anti-SLAPP motions to safeguard the right to a jury trial:

> The Legislature … has provided … substantive and procedural limitations that protect plaintiffs against overbroad application of the anti-SLAPP mechanism. As we recognized in *Rosenthal v. Great Western Fin. Securities Corp., supra,* 14 Cal.4th at page 412, "This

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[98] Art. I, Section 16; *see also* Code Civ. Proc. § 631(a); *Why Jury Trials are Important to a Democratic Society*, Nat. Jud. College (https://www.judges.org/uploads/jury/Why-Jury-Trials-are-Important-to-a-Democratic-Society.pdf)
[99] *Shaw v. Superior Court* (2017) 2 Cal.5th 983, 993.
[100] *Cohill v. Nationwide Auto Service* (1993) 16 Cal.App.4th 696, 699.
[101] *See also* U.S. Const., 1st Amend.
[102] *City of Long Beach v. Bozek* (1982) 31 Cal.3d 527, 534-35, judg. vacated and cause remanded *sub nom*. *City of Long Beach v. Bozek* (1983) 459 U.S. 1095, sub. opn. *City of Long Beach v. Bozek* (1983) 33 Cal.3d 727 (reiterating and adopting prior opinion in its entirety).
[103] *See, e.g., Bill Johnson's Restaurants, Inc. v. N.L.R.B.* (1983) 461 U.S. 731, 743.

> court and the Courts of Appeal, noting the potential deprivation of jury trial that might result were [Section 425.16 and similar] statutes construed to require the plaintiff first to *prove* the specified claim to the trial court, have instead read the statutes as requiring the court to determine only if the plaintiff has stated and substantiated a legally sufficient claim. [Citations.]"

Briggs, 19 Cal.4th at 1122-1123. This Court stated the principle again:

> In order to satisfy due process, the burden placed on the plaintiff must be compatible with the early stage at which the motion is brought and heard [citation] and the limited opportunity to conduct discovery [citation].

Wilcox, 27 Cal.App.4th at 823. Indeed, to protect a plaintiff's constitutional rights, this Court has established the following rules for courts in ruling on an anti-SLAPP motion:

> [W]e neither "weigh credibility, [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law."

Oasis, 51 Cal.4th at 820 (quoting *Soukup*, 39 Cal.4th at 269, fn.3).

"A plaintiff is not required 'to *prove* the specified claim to the trial court….'"[104] Plaintiff's burden requires only a "minimum level of legal sufficiency and triability…."[105]

C. The Opinion Renders the Statute Unconstitutional

In contrast to the holdings of this Court on anti-SLAPP, the Opinion announced a new standard:

> [P]laintiff must present *credible evidence* that satisfies the standard of proof….

Opinion at 13 (emphasis added).

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[104] *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 105 (disapproved on other grounds in *Baral*, 1 Cal.5th 376).
[105] *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 438 fn.5.

Under *Oasis* and *Baral*, Plaintiff is expressly not required to prove "credibility" to the court, but rather the court credits and "accepts the plaintiff's evidence as true…."[106] The Opinion, in changing the word admissible to "credible" evidence, amounts to a sea change in the meaning of the statute and forfeits its constitutionality.[107]

The Opinion also requires Plaintiff to prove knowing and reckless falsehood by "direct evidence," in contradiction to this Court's ruling that: "actual malice can be proved by circumstantial evidence."[108]

It is the role of the jury, not the Court, to determine the credibility of admissible direct and circumstantial evidence produced by a plaintiff.[109] The Opinion arrogates to the court the right to judge credibility, an unconstitutional extension of the statute.[110] The Opinion also puts itself in conflict with other courts of appeal, such as the First District in *Overstock.com*,[111] and the Fourth District in *Mann*.[112]

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[106] *Baral*, 1 Cal.5th at 385 (citing *Oasis*, 51 Cal.4th at 819-20).
[107] *Id*.
[108] *Reader's Digest*, 37 Cal.3d at 257 (citing *St. Amant v. Thompson* (1968) 390 U.S. 727, 732).
[109] *Robertson*, 36 Cal.App.4th at 356, fn.3.
[110] *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 741-42; *see also* Simpson, *SLAPP-ing Down the Right to A Jury Trial: Anti-Strategic Lawsuits Against Public Participation and the Seventh Amendment* (2016) 48 U. Tol. L. Rev. 169, 178-79.
[111] *Overstock.com*, 151 Cal.App.4th at 688.
[112] *Mann*, 120 Cal.App.4th 90. Recently, the Supreme Courts of Washington and Minnesota reversed dismissals of claims by anti-SLAPP motions, declaring their state versions of such statutes unconstitutional for violating the rights to jury trial and to petition due to language which allowed lower courts to weigh factual issues. *See Davis v. Cox* (2015) 183 Wash.2d 269, 288-94; *Leiendecker v. Asian Women United of Minnesota* (Minn. 2017) 895 N.W.2d 623, 631.

D. The Opinion Eliminates Jury Trial in Defamation Cases

Fact rich, most defamation cases cannot be decided by a court. "The fact that an implied defamatory charge or insinuation leaves room for an innocent interpretation as well does not establish that the defamatory meaning does not appear from the language itself."[113]

Actual malice is rarely a question of law, and almost always a question of fact for the jury. "The proof of 'actual malice' calls a defendant's state of mind into question, *New York Times Co. v. Sullivan*, 376 U.S. 254, … and does not readily lend itself to summary disposition. [Citations.]."[114]

> The defendant in a defamation action … cannot … automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, [or] is the product of his imagination…."

St. Amant, 390 U.S. at 732.

With reference to the statements and actions attributed to Plaintiff in "Feud," almost all of them have been found sufficient for a defamation action. The words "drop it bitch[,]" ascribed to plaintiff, a character in a novel, were sufficient.[115] A fake interview showing Tom Selleck's father discussing his son's views on women, was sufficient to support libel

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[113] *MacLeod v. Tribune Publishing Co., Inc.* (1959) 52 Cal.2d 536, 548-549; *see also Good Gov't Grp. of Seal Beach, Inc. v. Superior Court* (1978) 22 Cal.3d 672, 682.

[114] *Hutchinson v. Proxmire* (1979) 443 U.S. 111, 120, fn.9; *see also Masson*, 501 U.S. at 510-511.

[115] *Bindrim v. Mitchell* (1979) 92 Cal.App.3d 61, 76-78 (disapproved on other grounds by *McCoy v. Hearst Corp.* (1986) 92 Cal.App.3d 61).

because it could damage a father's reputation to be portrayed as disclosing his son's confidences.[116]

Further, the First Amendment does not protect knowing falsehoods in any medium. "For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected."[117] Such calculated falsehoods fall into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[118] Hence, the knowingly false statement, and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.[119]

On a record with fulsome admissible evidence, direct and circumstantial, to sustain the opposite factual conclusions,[120] the Opinion ruled that the statements attributed to de Havilland in "Feud" were not false, were not made knowingly or recklessly, and that no reasonable jury could find they harmed de Havilland's professional reputation.[121] This went beyond what a court can do.[122] The Opinion, if left to stand, would extend constitutional protection to any knowingly false statements as long as the defendant produces a self-serving declaration claiming they were

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[116] *Selleck v. Globe International, Inc.* (1985) 166 Cal.App.3d 1123, 1129, 1135-36; *see also Eastwood v. National Enquirer, Inc.* (9th Cir. 1997) 123 F.3d 1249; *Browne v. McCain* (C.D.Cal. 2009) 611 F.Supp.2d 1062.
[117] *Garrison v. State of La.* (1964) 379 U.S. 64, 75.
[118] *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, 572.
[119] *Garrison*, 379 U.S. at 75-76.
[120] *See Section* (III)(A)-(B), *supra*.
[121] Opinion at 30-36.
[122] *Masson*, 501 U.S. at 510; *MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536; *Good Gov't*, 22 Cal.3d at 682.

made in good faith. Such a result would effectively abolish virtually all claims of defamation and false light.

E. The Opinion Decimates the *Comedy III-Winter* Transformation Test

The Opinion, relying heavily on dicta in the concurring opinion by Justice Bird in *Guglielmi,*[123] a case dealing only with whether heirs of deceased celebrities have a right to publicity, holds that the use of the name, likeness, photograph, and character of plaintiff in a film is nevertheless "transformative," under the *Comedy III* test, because there are other artistic elements, other characters, and de Havilland was not important in the marketing of "Feud."[124] This analysis is directly contrary to *Winter* and *No Doubt*.

In *Winter*, plaintiffs were only two out of many characters in the comic book.[125] *Winter* applied the test set forth in *Comedy III* which looks to whether the name, identity, or literal likeness of a plaintiff is used in any form of commercial expression without consent. If "yes," then the First Amendment does not protect the use, if the answer is "no," then it does:

> Application of the test to this case is not difficult.… [T]he books do not depict plaintiffs literally…. To the extent the drawings of the Autumn brothers resemble plaintiffs at all, they are distorted for purposes of lampoon, parody, or caricature… [D]efendants essentially sold, and the buyers purchased, DC Comics depicting fanciful, creative characters, not pictures of the Winter brothers. This makes all the difference.

Id. at 890-892.

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[123] *Guglielmi v. Spelling-Goldberg Productions* (1979) 25 Cal.3d. 860, 862-76.
[124] Opinion at 23-27.
[125] *Winter*, 30 Cal.4th at 886.

Here, de Havilland's name is used, not some fanciful variation, her photograph is used, and her character is portrayed realistically.[126] Prefaced by the statement that "[l]ower courts have struggled mightily…," the Opinion simply rewrites this Court's test so that it is meaningless, and holds that conventional, literal portrayals are entitled to First Amendment protection if there is some fictional component to the work.[127]

This Court should make clear that "literal" portrayals are actionable under the *Comedy III – Winter* transformation test, and the right to publicity does not evaporate for docudramas.[128]

V. CONCLUSION

This Court should grant this petition, review and reverse the published Opinion, correct the legal standards applicable here, and reinstate the Ruling of the trial court.

Dated: April 4, 2018

Respectfully submitted,

HOWARTH & SMITH

By: /s/ Suzelle M. Smith
Don Howarth
Suzelle M. Smith
Zoe E. Tremayne
Attorneys for Plaintiff and Respondent OLIVIA DE HAVILLAND, DBE

[126] Opinion at 6, 22.
[127] Opinion at 25.
[128] *See, e.g.*, *Zacchini*, 433 U.S. 562; *No Doubt*, 192 Cal.App.4th 1018; *Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409.

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief of Respondent's is produced using 13-point Roman type including footnotes and contains approximately 8,391 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: April 4, 2018

Respectfully submitted,

HOWARTH & SMITH

By: /s/ Suzelle M. Smith
Suzelle M. Smith
Attorneys for Plaintiff and Respondent OLIVIA DE HAVILLAND, DBE

Filed 3/26/18

CERTIFIED FOR PUBLICATION

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.	B285629 (Los Angeles County Super. Ct. No. BC667011)

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

Munger, Tolles & Olson, Glenn D. Pomerantz, Kelly M. Klaus, Fred A. Rowley, Jr., and Mark R. Yohalem for Defendants and Appellants.

Horvitz & Levy, Frederic D. Cohen and Mark A. Kressel for Motion Picture Association of America, Inc. and Netflix, Inc. as Amici Curiae on behalf of Defendants and Appellants.

Davis Wright Tremaine, Kelli L. Sager and Rochelle L. Wilcox for A&E Television Networks, LLC, Discovery Communications, LLC, Imperative Entertainment, LLC, Urban One, Inc., Critical Content, LLC, Reporters' Committee for Freedom of the Press, and First Amendment Coalition as Amici Curiae on behalf of Defendants and Appellants.

Jennifer E. Rothman and Eugene Volokh for Intellectual Property and Constitutional Law Professors as Amici Curiae on behalf of Defendants and Appellants.

Daniel K. Nazer for Electronic Frontier Foundation, Organization for Transformative Works, and Wikimedia Foundation as Amici Curiae on behalf of Defendants and Appellants.

Jack Lerner, UCI Intellectual Property, Arts, and Technology Clinic, for International Documentary Association as Amicus Curiae on behalf of Defendants and Appellants.

Howarth & Smith, Don Howarth, Suzelle M. Smith, and Zoe E. Tremayne for Plaintiff and Respondent.

Duncan W. Crabtree-Ireland and Danielle S. Van Lier for Screen Actors Guild-American Federation of Television and Radio Artists as Amicus Curiae on behalf of Plaintiff and Respondent.

Authors write books. Filmmakers make films. Playwrights craft plays. And television writers, directors, and producers create television shows and put them on the air -- or, in these modern times, online. The First Amendment protects these expressive works and the free speech rights of their creators. Some of these works are fiction. Some are factual. And some are a combination of fact and fiction. That these creative works generate income for their creators does not diminish their constitutional protection. The First Amendment does not require authors, filmmakers, playwrights, and television producers to provide their creations to the public at no charge.

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

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

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

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

FACTUAL AND PROCEDURAL BACKGROUND

1. **Feud *airs and de Havilland sues***

In March 2017, FX began airing its eight-part docudrama, *Feud: Bette and Joan*. The docudrama portrays the rivalry between actresses Joan Crawford and Bette Davis. The central theme of the program is that powerful men in Hollywood pressured and manipulated women in the industry into very public feuds with one another to advance the economic interests of those men and the institutions they headed. A secondary theme -- as timely now as it was in the 1960's -- is the poor treatment by Hollywood of actresses as they age.

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[1] *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387 (*Comedy III*).

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

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

attributable to the unauthorized use of [her] name, photograph,[2] or likeness"; punitive damages; attorney fees; and a permanent injunction prohibiting the "broadcast and distribution" of the series.[3]

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

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

2. ***FX's special motion to strike***

a. *FX's motion, declarations, and exhibits*

On August 29, 2017, FX filed a motion to strike the complaint under California's anti-SLAPP[4] law, Code of Civil Procedure section 425.16. FX submitted declarations from Ryan Murphy, a co-creator, executive producer, writer, and director of *Feud*; Michael Zam, a screenwriter who co-wrote a script called *Best Actress* on which *Feud* was based in part; and Timothy Minear, an executive producer and writer for *Feud*. Minear explained the writers on the project created "imagined interviews" conducted at the 1978 Academy Awards as a "framing device" to introduce viewers to *Feud*'s themes such as the unfair treatment of women in Hollywood. Minear stated *Feud*'s writers based the imagined interview on actual interviews de Havilland had given over the years. Minear also explained that a "docudrama" is a "dramatized retelling of history."

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

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

FX submitted the declaration of James Berkley, a research analyst for FX's law firm, together with 59 exhibits. These included books, newspaper and magazine articles, and videos of de Havilland appearing as a guest on talk shows. In a number of the articles and video clips, de Havilland granted interviews and made statements about other actors, including her sister Joan Fontaine. In a July 2016 Associated Press interview -- on the occasion of her one hundredth birthday -- de Havilland said this about her sister: "Dragon Lady, as I eventually decided to call her, was a brilliant, multi-talented person, but with an astigmatism in her perception of people and events which often caused her to react in an unfair and even injurious way."

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

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

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

program.[5] In addition, de Havilland submitted a declaration from her attorney attaching posts from Instagram and Facebook with photographs of Zeta-Jones as de Havilland**.**

c. *FX's reply*

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

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

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

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

her burden of proof. The court stated de Havilland had to show only that her lawsuit had minimal merit.

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

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

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

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

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

DISCUSSION

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

A special motion to strike under the anti-SLAPP statute, Code of Civil Procedure section 425.16, " 'is a procedural remedy to dispose of lawsuits brought to chill the valid exercise of a party's constitutional right of petition or free speech. [Citation.] The purpose of the anti-SLAPP statute is to encourage participation in matters of public significance and prevent meritless litigation designed to chill the exercise of First Amendment rights. [Citation.] The Legislature has declared that the statute must be "construed broadly" to that end.' " (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 268; see also Code Civ. Proc., § 425.16(a); cf. *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1114, fn. 3 [an appellate court, whenever possible, should interpret the First Amendment and section 425.16 in a manner "favorable to the exercise of freedom of speech, not its curtailment"].) This legislative directive "is expressed in unambiguous terms." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119.) "[T]he broad construction expressly called for in subdivision (a) of section 425.16 is desirable from the standpoint of judicial efficiency." (*Id*. at pp. 1121-1122.)

"Resolution of an anti-SLAPP motion 'requires the court to engage in a two-step process.' " (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.) First, the defendant must show the conduct underlying the plaintiff's cause of action arises from the defendant's constitutional rights of free speech or petition in connection with a public issue. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) If the defendant satisfies this prong, the burden shifts to the plaintiff to prove she has a legally sufficient claim and to prove with admissible evidence a probability that she will prevail on the claim. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821; see also *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212 ["In opposing an anti-SLAPP motion, the plaintiff cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial."].) "In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." (*Wilson v. Parker,* at p. 821; see also *Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1251 (*Jackson*).) "[O]n its face the [anti-SLAPP] statute contemplates consideration of the substantive merits of the plaintiff's complaint, as well as all available defenses to it, including, but not limited to, constitutional defenses. This broad approach is required not only by the language of the statute, but by the policy reasons [that]

gave rise to our anti-SLAPP statute." (*Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398.)

To satisfy this prong-two showing, the plaintiff must present credible evidence that satisfies the standard of proof required by the substantive law of the cause of action the anti-SLAPP motion challenges. Generally, a plaintiff's claims need only have " 'minimal merit' " to survive an anti-SLAPP motion. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 95, fn. 11.) But when the plaintiff is a public figure, to establish a prima facie case she must demonstrate by clear and convincing evidence that the defendant acted with "actual malice." (*Annette F. v. Sharon S.* (2004) 119 Cal.App.4th 1146, 1162, 1169-1172 [trial court should have granted anti-SLAPP motion where limited purpose public figure plaintiff "failed to show a probability of proving actual malice by clear and convincing evidence"]; *Conroy v. Spitzer* (1999) 70 Cal.App.4th 1446, 1451, 1454 [to meet anti-SLAPP statute's requirement that he show he would "probably" prevail on his claim, public figure plaintiff "was required to 'show a likelihood that he could produce clear and convincing evidence' " that defendant made statements with actual malice]; *Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 950 ["The clear and convincing standard requires that the evidence be such as to command the unhesitating assent of every reasonable mind. [Citation.] Actual malice cannot be implied and must be proven by direct evidence"]; see also *Makaeff v. Trump University, LLC* (9th Cir. 2013) 715 F.3d 254, 271 [whether plaintiff has "reasonable probability of proving, by clear and convincing evidence, that [defendant] made her critical statements with actual malice" is "inherently fact-intensive question"].) "The requirement that a public figure plaintiff prove malice by clear

and convincing evidence arises from First Amendment concerns that freedom of expression be provided 'the "breathing space" that [it] "need[s] . . . to survive . . . ." ' " (*Christian Research*, *supra*, 148 Cal.App.4th at p. 82, quoting *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 272 [11 L.Ed. 2d 686].)

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

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

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

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

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

As noted, de Havilland alleges causes of action for violation of the statutory right of publicity, Civil Code section 3344, and for the common law tort of misappropriation. Section 3344,

subdivision (a) provides, in part, "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in *products, merchandise, or goods*, or for purposes of advertising or selling, or soliciting purchases of, *products, merchandise, goods, or services*, without such person's prior consent, . . . shall be liable for any damages sustained by the person or persons injured as a result thereof." (Italics added.) Misappropriation is one of the four branches of the privacy tort identified by Dean William Prosser. (Prosser, *Privacy* (1960) 48 Cal. L.Rev. 383, 389; see generally 5 Witkin, Summary of Cal. Law (11th ed. 2017) Torts, § 756, p. 1043.) The Restatement Second of Torts adopted Prosser's classification. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24.) "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Ibid.*) The Restatement defines the misappropriation tort: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." (Rest.2d Torts § 652C.)

De Havilland's statutory claim raises a preliminary question of whether the portrayal of a real person in a television program (or a book, play, or film) constitutes the "use" of that person's name or "likeness" "on or in" a product, merchandise, or good. Books, films, and television shows are "things" but are they "merchandise" or "products"? Many of the cases in this area involve products and merchandise such as T-shirts and lithographs (*Comedy III*, *ante*), greeting cards (*Hilton v. Hallmark Cards* (9th Cir. 2010) 599 F.3d 894), and video games (*Davis v. Elec. Arts, Inc.* (9th Cir. 2015) 775 F.3d 1172; *In re NCAA Student-Athlete Name & Likeness* (9th Cir. 2013) 724 F.3d

1268; *Kirby v. Sega of America, Inc.* (2006) 144 Cal.App.4th 47), or advertisements for products and merchandise. (See, e.g., *Newcombe v. Adolf Coors Co.* (9th Cir. 1998) 157 F.3d 686, 691-694 [beer advertisement]; *Waits v. Frito-Lay, Inc.* (9th Cir. 1992) 978 F.2d 1093 [advertisement for SalsaRio Doritos]; *Midler v. Ford Motor Co.* (9th Cir. 1988) 849 F.2d 460 [advertisement for Ford Lincoln Mercury]; cf. CACI No. 1804A [to establish violation of Civil Code section 3344, plaintiff must prove (among other elements) that defendant knowingly used plaintiff's name or likeness "on merchandise/[or] to advertise or sell [*describe what is being advertised or sold*]" and that defendant's use of plaintiff's name or likeness "was directly connected to [defendant's] commercial purpose."].)

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

constitutionality of a state's right of publicity law." (*Sarver,* at p. 903.) An Ohio television station broadcast 15 seconds of Zacchini performing his "human cannonball" act. Zacchini sued for violation of his right of publicity under Ohio law. The Court concluded the First Amendment interests in broadcasting Zacchini's *entire* act -- rather than, for example, his name or picture -- was minimal. (*Zacchini*, at pp. 563-564, 573.) The *Sarver* court noted that, in the intervening forty years, the "Court has not revisited the question of when a state's right of publicity law is consistent with the First Amendment." (*Sarver,* at p. 904; see also *Matthews v. Wozencraft* (5th Cir. 1994) 15 F.3d 432, 439 (*Matthews*) [" 'Courts long ago recognized that a celebrity's right of publicity does not preclude others from incorporating a person's name, features, or biography in a literary work, motion picture, news or entertainment story. Only the use of an individual's identity in advertising infringes on the persona.' "].)

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

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

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

his nephew Guglielmi sued, alleging misappropriation of Valentino's right of publicity and seeking damages and injunctive relief. The Court affirmed the dismissal of the complaint on the ground that, at the time, the right of publicity was not descendible to heirs.

In a concurring opinion joined by three other justices, the Chief Justice framed the issue as whether the use of a celebrity's "name and likeness in a fictional film exhibited on television constitutes an actionable infringement of that person's right of publicity." (*Guglielmi*, *supra*, 25 Cal.3d at p. 862.) She concluded, "It is clear that [Guglielmi's] action cannot be maintained." (*Ibid.*) The Chief Justice noted Guglielmi alleged the television production company "knew that the film did not truthfully portray Valentino's life." (*Ibid.*) She summarized Guglielmi's contentions: the film was not entitled to constitutional protection because the producers "incorporated Valentino's name and likeness in: (1) a work of fiction, (2) for financial gain, (3) knowing that such film falsely portrayed Valentino's life." (*Id.* at p. 865.) The Chief Justice noted Guglielmi's argument "reveal[ed] a fundamental misconception of the nature of the constitutional guarantees of free expression," adding, "Our courts have often observed that entertainment is entitled to the same constitutional protection as the exposition of ideas." (*Id.* at pp. 865-867.) "Thus," the justice said, "no distinction may be drawn in this context between fictional and factual accounts of Valentino's life." (*Id.* at p. 868.) "[T]ruthful and fictional accounts" "have equal constitutional stature." (*Id.* at p. 871.) The Chief Justice "readily dismissed" Guglielmi's next argument, stating, "The First Amendment is not limited to those who publish without charge." (*Id.* at p. 868.)

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

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

Feud is as constitutionally protected as was the film in *Sarver*, *The Hurt Locker*. As with that expressive work, *Feud* "is speech that is fully protected by the First Amendment, which safeguards the storytellers and artists who take the raw materials of life -- including the stories of real individuals, ordinary or extraordinary -- and transform them into art, be it articles, books, movies, or plays." (*Sarver*, *supra*, 813 F.3d at p. 905; see also *Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542 [producer of documentary about surfers

in Malibu was entitled to judgment on surfer's claims for violation of common law and statutory right of publicity; "[w]hether [Dora] is considered a celebrity or not, whether he is seeking damages for injury to his feelings or for the commercial value of his name and likeness, . . . the public interest in the subject matter of the program gives rise to a constitutional protection against liability"]; cf. *Polydoros, supra,* 67 Cal.App.4th at pp. 322-325 ["*Guglielmi* unequivocally prevent[ed] [plaintiff] from proceeding on his claim for commercial appropriation of identity" against writer and director of fictional film with character that resembled plaintiff as a child; "[t]o succeed in his claims, [plaintiff] must establish a direct connection between the use of his name or likeness and a *commercial* purpose"]; *The Institute v. Target Corp.* (11th Cir. 2016) 812 F.3d 824, 826 (*Rosa & Raymond Parks*) [books, movie, and plaque depicting civil rights pioneer Rosa Parks were protected under Michigan's constitution]; *Seale v. Gramercy Pictures* (E.D. Pa. 1996) 949 F.Supp. 331 (*Seale*) [First Amendment protected filmmakers' use of name and likeness of Black Panther Party's co-founder; "the creation, production, and promotion of a motion picture and history book [that] integrate[d] fictitious people and events with the historical people and events surrounding the emergence of the Black Panther Party in the late 1960's" constituted First Amendment expression and was not for a commercial purpose]; *Matthews*, *supra*, 15 F.3d at p. 440 [First Amendment protected book and movie about narcotics officers from misappropriation and false light claims; "[i]t is immaterial whether [the book] 'is viewed as an historical or a fictional work,' [citation], so long as it

is not 'simply a disguised commercial advertisement for the sale of goods or services' "].)[7]

That *Feud*'s creators did not purchase or otherwise procure de Havilland's "rights" to her name or likeness does not change this analysis. Producers of films and television programs may enter into agreements with individuals portrayed in those works for a variety of reasons, including access to the person's recollections or "story" the producers would not otherwise have, or a desire to avoid litigation for a reasonable fee. But the First Amendment simply does not require such acquisition agreements. (*Polydoros, supra,* 67 Cal.App.4th at p. 326 ["[t]he industry custom of obtaining 'clearance' establishes nothing, other than the unfortunate reality that many filmmakers may deem it wise to pay a small sum up front for a written consent to avoid later having to spend a small fortune to defend unmeritorious lawsuits such as this one"]; cf. *Rosa & Raymond*

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

Parks, *supra,* 812 F.3d at p. 832 [privilege based on state constitution's free speech guarantee was not "contingent on paying a fee"].) The creators of *The People v. O.J. Simpson: American Crime Story* can portray trial judge Lance Ito without acquiring his rights. *Fruitvale Station*'s writer and director Ryan Coogler can portray Bay Area Rapid Transit officer Johannes Mehserle without acquiring his rights. HBO can portray Sarah Palin in *Game Change* without acquiring her rights. There are myriad additional examples.

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

Nor does the use of de Havilland's name -- along with photographs of Zeta-Jones -- in social media promotion for the miniseries support de Havilland's claims for violation of her right of publicity. Constitutional protection for an expressive work such as *Feud* " 'extends to the truthful use of a public figure's name and likeness in advertising [that] is merely an adjunct of the protected publication and promotes only the protected publication.' " (*Montana v. San Jose Mercury News, Inc.* (1995) 34 Cal.App.4th 790, 797 [First Amendment protected posters that reproduced newspaper stories and photographs of famous quarterback "for two distinct reasons: first, because the posters

themselves report newsworthy items of public interest, and second, because a newspaper has a constitutional right to promote itself by reproducing its originally protected articles or photographs"].) "[U]se of a person's name and likeness to advertise a novel, play, or motion picture concerning that individual is not actionable as an infringement of the right of publicity." (*Seale, supra,* 949 F.Supp. at p. 336; see also *Guglielmi, supra*, 25 Cal.3d at pp. 872-873.)

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

The parties spend considerable time discussing the "transformative" test set forth in *Comedy III*. There, a company that owns the rights under Civil Code section 990[8] to The Three Stooges (all three are deceased) sued an artist who had made a charcoal drawing of The Three Stooges, put it on T-shirts and lithographs, and sold those items. The Supreme Court noted the statute imposes liability on a person who uses a deceased personality's name or likeness "either (1) 'on or in' a product, *or* (2) in 'advertising or selling' a product." (*Comedy III*, *supra*, 25 Cal.4th at p. 395.) The T-shirts and lithographs were, the Court said, "tangible personal property," "consisting of fabric and

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[8] Civil Code section 990 has since been renumbered as Civil Code section 3344.1. Enacted in 1984, the statute essentially provides a descendible right of publicity. In language similar to section 3344 governing the rights of living persons, section 3344.1 gives a "deceased personality's" heirs and their assignees a cause of action against someone who uses the deceased person's "name, voice, signature, photograph, or likeness . . . on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods, or services, without prior consent."

ink" and "paper and ink." (*Ibid*.) The Court found the artist's drawing was an "expressive work[] and not an advertisement for or endorsement of a product." (*Id*. at p. 396.) But, the Court continued, "[A] celebrity's heirs and assigns have a legitimate protectable interest in exploiting the value to be obtained from *merchandising* the celebrity's image." (*Id*. at p. 400, italics added.)

To resolve this "difficult issue" (*Comedy III, supra,* 25 Cal.4th at p. 396), the Court borrowed a concept from copyright law: " 'whether and to what extent the new work [the product bearing the deceased personality's likeness] is "transformative." ' " (*Id*. at p. 404.) The Court held: "When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist." (*Id.* at p. 405.) The Court continued, "Another way of stating the inquiry is whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question." (*Id.* at p. 406.) The Court identified a "useful . . . subsidiary inquiry:" "does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted? If this question is answered in the negative, then there would generally be no actionable right of publicity. When the value of the work comes principally from some source other than the fame of the celebrity -- from the creativity, skill, and reputation of the artist -- it may be presumed that sufficient transformative

elements are present to warrant First Amendment protection." (*Id.* at p. 407.) Applying its "transformative" test to the sketch artist's T-shirts and lithographs, the Court concluded the charcoal drawing on the shirts and prints was a "literal, conventional depiction[] of The Three Stooges" and therefore not constitutionally protected. (*Id.* at p. 409.)

Comedy III's "transformative" test makes sense when applied to products and merchandise -- "tangible personal property," in the Supreme Court's words. Lower courts have struggled mightily, however, to figure out how to apply it to expressive works such as films, plays, and television programs. [9] The trial court's analysis here is a good example. [10] The court wrote, "[H]ere, because [FX] admit[s] that [it] wanted to make the appearance of [de Havilland] as real as possible . . . , there is nothing transformative about the docudrama. Moreover, even if [FX] imagined conversations for the sake of being creative, such does not make the show transformative."

We disagree. The fictitious, "imagined" interview in which Zeta-Jones talks about Hollywood's treatment of women and the

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[9] Cf. *Sarver, supra*, 813 F.3d at p. 904, fn. 6 [unnecessary in *Hurt Locker* case to reach affirmative defense of "transformative use"].

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

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

In the words of the *Comedy III* Court, Zeta-Jones's "celebrity likeness [of de Havilland] is one of the 'raw materials from which [the] original work [*Feud*] is synthesized." (*Comedy III, supra,* 25 Cal.4th at p. 406.) Applying *Comedy III*'s "useful subsidiary inquiry" here, we conclude as a matter of law that *Feud*'s "marketability and economic value" does not "derive primarily from [de Havilland's] fame" but rather "comes principally from . . . the creativity, skill, and reputation" of *Feud*'s creators and actors. Ryan Murphy is a successful screenwriter, director, and producer who counts among his credits the television series *Glee* and the Emmy-award-winning miniseries *The People v. O.J. Simpson: American Crime Story*. Accomplished writers contributed to the script. Highly-regarded and award-winning actors including Susan Sarandon, Jessica Lange, Catherine Zeta-Jones, Stanley Tucci, Alfred Molina, Judy

Davis, and Kathy Bates performed in *Feud*. In short, *Feud* constitutes "significant expression" -- a story of two Hollywood legends -- of which the de Havilland character is but a small part. While viewers may have "tuned in" to see these actors and watch this Hollywood tale, there is no evidence that de Havilland as a character was a significant draw. (Cf. *Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, 895 [use in textbook of article about janitor who found and returned large sum of money was not actionable misappropriation; article was neither "a primary reason for the textbook" "nor was it a substantial factor in the students' purchases of the book"].)

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

a. *The allegations of de Havilland's complaint*

In her third cause of action, de Havilland alleges false light invasion of privacy. Though not entirely clear,[11] the complaint

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

seems to ground this claim in four scenes or lines in *Feud*: (1) a fictionalized interview at the 1978 Academy Awards; (2) a reference by the de Havilland character to her "bitch sister" in a private conversation with the Bette Davis character; (3) a remark to the Aldrich character that she "do[esn't] do bitches" and he should "call [her] sister" about a film role; and (4) a response to the Davis character's question ("where's the booze?") when the two are alone in Frank Sinatra's dressing room that "Frank must've drunk it all."

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

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

To defeat FX's anti-SLAPP motion on her false light claim, de Havilland, as a public figure, must demonstrate a reasonable probability she can prove FX broadcast statements that are (1) assertions of fact, (2) actually false or create a false impression about her, (3) highly offensive to a reasonable person or defamatory, and (4) made with actual malice. (*Brodeur*, *supra*, 248 Cal.App.4th at p. 678; see also *Dodds v. American Broadcasting Co.* (9th Cir. 1998) 145 F.3d 1053 (*Dodds*); cf. *Fellows, supra,* 42 Cal.3d at p. 239 ["Although it is not necessary that the plaintiff be defamed, publicity placing one in a highly offensive false light will in most cases be defamatory as well"].) We decide as a matter of law whether a reasonable viewer would interpret *Feud* as conveying (a) statements of fact that are (b) defamatory or highly offensive to a reasonable person and (c) actually false or that convey a false impression of de Havilland. (*Couch v. San Juan Unified School Dist.* (1995) 33 Cal.App.4th 1491, 1497, 1500-1501 (*Couch*) [" 'the proper focus of judicial inquiry in [defamation and false light cases] is simply whether the communication in question could be reasonably understood in a defamatory sense by those who received it' "; "[t]his question must be resolved by considering whether the reasonable or 'average' reader would so interpret the material"]; *Moyer v. Amador Valley J. Union High School Dist.* (1990) 225 Cal.App.3d 720, 724; see also *Ollman v. Evans* (D.C. Cir. 1984) 750 F.2d 970, 978 [questions as to privileges derived from the First Amendment are to be decided as matters of law].) "The Supreme Court and other courts have emphasized that one must analyze a statement in its broad context to determine whether it implies the assertion of an objective fact." (*Partington v. Bugliosi* (9th Cir. 1995) 56 F.3d 1147, 1153 (*Partington*).)

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

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

First, we question whether a reasonable viewer would interpret *Feud* -- a docudrama -- as entirely factual. Viewers are generally familiar with dramatized, fact-based movies and miniseries in which scenes, conversations, and even characters are fictionalized and imagined. (See *Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, 512-513 [111 S.Ct. 2419, 115 L.Ed.2d 447] (*Masson*) ["[A]n acknowledgement that the work is so-called docudrama or historical fiction . . . might indicate that the quotations should not be interpreted as the actual statements of the speaker to whom they are attributed"]; *Partington, supra,* 56 F.3d at pp. 1154-1155 ["the general tenor of the docudrama also tends to negate the impression that the statements involved represented a false assertion of objective fact"; docudramas "often rely heavily upon dramatic interpretations of events and dialogue filled with rhetorical

flourishes"; most viewers of docudramas "are aware by now that parts of such programs are more fiction than fact"].)

In any event, assuming for argument's sake that the average, reasonable viewer would see the scenes in question as literal statements of actual fact, de Havilland's false light claim fails nevertheless because *Feud*'s depiction of her is not defamatory nor would it "highly offend" a reasonable person. Granting an interview at the Academy Awards is not conduct that would subject a person to hatred, contempt, ridicule, or obloquy. (Cf. *Jackson, supra*, 10 Cal.App.5th at pp. 1264-1265 [famous boxer's social media postings that he broke up with his girlfriend because she had an abortion "did not expose [girlfriend] to 'hatred, contempt, ridicule, or obloquy' "].) *Feud*'s writers explained in their declarations that they employed the fictitious interview as a "framing device." In the interview, Zeta-Jones as de Havilland introduces the theme of powerful men misusing women in Hollywood. She says she was "furious" when she learned how Crawford and Davis had been pitted against one another. *Feud*'s producers wove this theme throughout the miniseries, culminating in the title of the final episode: "You Mean All This Time We Could Have Been Friends?" From time to time in the docudrama -- in brief segments[12] -- Zeta-Jones acts as a guide for the viewer through the tale, a Beatrice to the viewer's Dante.[13]

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

[13] Aligheri, The Divine Comedy (1320).

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

Nor is Zeta-Jones's light-hearted, offhand remark as de Havilland to her good friend Bette Davis while they are alone in Sinatra's dressing room that he must have drunk the liquor defamatory or highly offensive to a reasonable person. FX submitted evidence in support of its motion that Sinatra's fondness for alcohol was well known, and Zeta-Jones's comment to Sarandon would not subject de Havilland to hatred, contempt, ridicule, or obloquy. (*Jackson*, *supra*, 10 Cal.App.5th at

pp. 1264-1265; see also *Sarver, supra*, 813 F.3d at pp. 906-907 ["a reasonable viewer of the film would be left with the conclusion that the character [Sarver says is him] was a heroic figure, albeit one struggling with certain internal conflicts"; "even if the film's portrayal of Sarver were somehow false, such depiction certainly would not 'highly offend' a reasonable person"].)

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

" 'California law permits the defense of substantial truth,' and thus a defendant is not liable ' "if the substance of the charge be proved true . . . ." ' 'Put another way, the statement is not considered false unless it "would have a different effect on the mind of the reader from that which the . . . truth would have produced." ' " (*Carver v. Bonds* (2005) 135 Cal.App.4th 328, 344-345, quoting *Masson, supra,* 501 U.S. at pp. 516-517; see also *Jackson*, *supra*, 10 Cal.App.5th at p. 1262; *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 28 [" ' "it is sufficient if the substance, the gist, the sting of the libelous charge be justified" ' "].)

In *Feud*, Zeta-Jones uses the word "bitch" twice. In the fifth episode, Sarandon, as Davis, calls Zeta-Jones, as de Havilland, who is living in Paris. The two close friends have a private telephone conversation. Sarandon complains that Crawford "sets [her] off," and then refers to de Havilland's well-known estrangement from her sister Joan Fontaine. Zeta-Jones tells Sarandon her "bitch sister" has started telling the press that she broke Fontaine's collarbone when they were children. The second use of the word comes in the seventh episode when Sarandon and Alfred Molina, playing Robert Aldrich, call

de Havilland in Paris to ask her to replace Crawford as cousin Miriam in *Hush . . . Hush, Sweet Charlotte*. Molina tells Zeta-Jones that the role is not a victim but a "villainess." Zeta-Jones responds, "Oh, no. I don't do bitches. They make me so unhappy." She then adds, "You should call my sister."[14]

In its motion to strike, FX submitted declarations from Ryan Murphy and Timothy Minear, who both wrote parts of *Feud*. Both men were familiar with the well-publicized life-long animosity between de Havilland and her sister Joan Fontaine. Murphy wrote the scene in which Zeta-Jones uses the words "my bitch sister" on the telephone with Sarandon. Ryan declared he used the word "bitch" "because, in [his] mind, the terms *dragon lady* and *bitch* generally have the same meaning, but 'bitch' would be more recognizable to the audience than 'Dragon Lady.' " Similarly, Minear declared *Feud*'s writers "thought 'bitch' was more mainstream and would be better understood by the modern audiences than 'Dragon Lady.' "

Had *Feud*'s creators had Zeta-Jones refer to Fontaine as "my dragon lady sister," the "effect on the mind of the reader" would not have been appreciably different. Nor would a line by the de Havilland character, "Oh, no. I don't do dragon ladies. They make me so unhappy. You should call my sister."[15] "[W]e decline ' "to dissect the creative process." ' " (*Brodeur, supra*,

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[14] De Havilland eventually accepted the role of cousin Miriam in *Hush . . . Hush*.

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

248 Cal.App.4th at p. 677, quoting *Tamkin, supra,* 193 Cal.App.4th at p. 144.) " ' "We must not permit juries to dissect the creative process in order to determine what was *necessary* to achieve the final product and what was not, and to impose liability . . . for that portion deemed unnecessary. Creativity is, by its nature, creative." ' " (*Brodeur* at p. 675, quoting *Tamkin, supra,* 193 Cal.App.4th at pp. 144-145.)

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

De Havilland does not dispute that she is a public figure. Her attorneys describe her as "a living legend" and "an internationally-known celebrity." Accordingly, the Constitution requires de Havilland to prove by clear and convincing evidence that FX "knew the [docudrama] would create a false impression about [her] or acted with reckless disregard for the truth." (CACI No. 1802.)

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

Recognizing this, in cases where the claimed highly offensive or defamatory aspect of the portrayal is implied, courts have required plaintiffs to show that the defendant " 'intended to

convey the defamatory impression.' " (*Dodds, supra*, 145 F.3d at pp. 1063-1064.) De Havilland must demonstrate "that [FX] either deliberately cast [her] statements in an equivocal fashion in the hope of insinuating a defamatory import to the reader, or that [it] knew or acted in reckless disregard of whether [its] words would be interpreted by the average reader as defamatory statements of fact." (*Good Government Group of Seal Beach, Inc. v. Superior Court* (1978) 22 Cal.3d 672, 684 (*Good Government Group*).) Moreover, because actual malice is a "deliberately subjective" test, liability cannot be imposed for an implication that merely " 'should have been foreseen.' " (*Newton v. National Broadcasting Co., Inc.* (9th Cir. 1990) 930 F.2d 662, 680.)

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

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

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

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

CONCLUSION

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

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16 Heller, Catch-22 (1961).

DISPOSITION

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

CERTIFIED FOR PUBLICATION

EGERTON, J.

We concur:

EDMON, P. J.

DHANIDINA, J.*

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

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 523 W. Sixth Street, Suite 728, Los Angeles, CA, 90014.

On April 4, 2018, I served true copies of the following documents described as:

PETITION FOR REVIEW

On the interested parties in this action as follows:

Glenn D. Pomerantz, Esq.
glenn.pomerantz@mto.com
Kelly M. Klaus, Esq.
kelly.klaus@mto.com
Fred A. Rowley, Esq.
fred.rowley@mto.com
Mark R. Yolahem, Esq.
mark.yohalem@mto.com
MUNGER TOLLES & OLSON LLP
350 South Grand Avenue, 50th Floor
Los Angeles, California 90071
Tel: (213) 683 – 9100
Fax: (213) 687 – 3702

Supreme Court of California

California Court of Appeal

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 above. According to the TrueFiling website, these persons are registered TrueFiling users who have consented to receive electronic service of documents in this case.

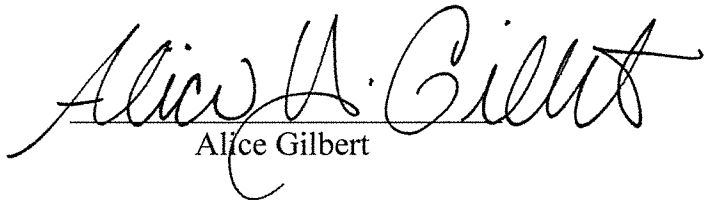
Los Angeles Superior Court
111 N. Hill Street
Department 42

Los Angeles, California 90012

BY MAIL: I enclosed the documents in a sealed envelope or package addressed to the persons at the address listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practices for collecting and processing correspondence for mailing. On the same day that 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.

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

Executed on April 4, 2018, at Los Angeles, California.



Alice Gilbert