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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

OLIVIA HUSSEY and LEONARD WHITING,

Plaintiffs,

v.

PARAMOUNT PICTURES CORP., CRITERION COLLECTIONS, INC., a wholly owned subsidiary of JANUS FILMS, LLC, JANUS FILMS, LLC, a New York Limited Liability Company, and DOES I through D, inclusive,

Defendants.

Case No. 24STCV03814

NOTICE OF MOTION AND SPECIAL MOTION OF DEFENDANTS TO STRIKE FIRST AMENDED COMPLAINT PURSUANT TO CCP § 425.16; MEMORANDUM OF POINTS AND AUTHORITIES

Filed concurrently with Declarations of Nary Kim, Jonathan Strauss, Susan Chun, Jeffrey Ullman, Rachel Alexander, Patricia Valdezco, Andrea Kalas, Richard Redlich, Jonathan Turell, and Stéphane Percharman; Notice of Lodging of Media; Request for Judicial Notice; and [Proposed] Orders

Judge: Hon. Holly J. Fujie
Dept.: 56
Date: July 25, 2024
Time: 8:30 a.m.

RESERVATION ID: 021757680851

Action Filed: February 14, 2024

TO ALL PARTIES AND THEIR COUNSEL:

PLEASE TAKE NOTICE THAT on July 25, 2024 at 8:30 a.m., or as soon thereafter as counsel may be heard, in Department 56 of the above-captioned Court, located at 111 North Hill Street, Los Angeles, California 90012, Defendants Paramount Pictures Corporation ("PPC"), Criterion Collections, Inc. ("Criterion"), and Janus Films, LLC (all three, collectively, "Defendants") will and hereby do move this Court to strike, with prejudice, all of the causes of action in the First Amended Complaint ("FAC") of Plaintiffs Leonard Whiting and Olivia Hussey (together, "Plaintiffs"), pursuant to California's anti-SLAPP statute, Code of Civil Procedure § 425.16.[1]

This Motion is made on the grounds that each and every one of Plaintiffs' causes of action is based on Defendants' production and/or distribution of the 1968 film *Romeo and Juliet* (the "Film"), which is conduct in exercise of their First Amendment rights under Section 425.16, subdivisions (e)(3) and (e)(4). In fact, a Los Angeles Superior Court judge already concluded the conduct at issue satisfies the public-interest requirement for purposes of the anti-SLAPP statute, in granting PPC's anti-SLAPP motion to dispose of an earlier action by Plaintiffs. The doctrine of issue preclusion will preclude any efforts by Plaintiffs to relitigate that issue today. Nor can Plaintiffs prove that they probably will prevail on any of their claims. Plaintiffs cannot establish a probability of prevailing on their claims because, *inter alia*:

1. Each of Plaintiffs' claims in the FAC rests on sham pleadings that are contradicted by their prior sworn declarations and pleadings;

2. Plaintiffs' third cause of action for "violation of Performers Rights Act of the United Kingdom" fails because the statute on which they purport to sue was repealed in 1989;

3. Each of Plaintiffs' claims requires, as a threshold element, the absence of consent. Plaintiffs' express consent, as memorialized in each of their contracts to star as the co-lead actors of the Film, dispenses of all of their claims;

4. Alternatively, Plaintiffs' implied consent—as demonstrated by their decades-long conduct celebrating and promoting the Film, including the high-resolution 4K digital version of the Film, which each of them watched and honored at film festivals since 2016—is equally dispositive of all of their claims;

[1] All three Defendants submit this single notice of motion and motion, pursuant to the Court's May 17, 2024 order granting permission to file a combined thirty-page memorandum of points and authorities.

5. Plaintiffs' second cause of action for misappropriation of their likenesses fails for additional, independent reasons, including because the claim is preempted by the Copyright Act and barred by the First Amendment;

6. Plaintiffs' first, fourth, and fifth causes of action, premised on the distribution of "revenge porn," likewise fail for additional, independent reasons, including because the Film constitutes a matter of public interest, which immunizes the Film from liability under the statutory exemptions provided by each of the relevant statutes; and

7. Each of Plaintiffs' causes of action also is barred by the applicable statutes of limitations.

Pursuant to Code of Civil Procedure § 425.16(c) and Civil Code § 3344(a), Defendants will be entitled to recover their respective attorneys' fees and costs incurred in defending this action. If the Court grants this Motion, Defendants will file a noticed motion for their fees and costs.

The Motion is based on this Notice of Motion; the below Memorandum of Points and Authorities; the Declarations of Nary Kim, Jonathan Strauss, Susan Chun, Jeffrey Ullman, Rachel Alexander, Patricia Valdezco, Andrea Kalas, Richard Redlich, Jonathan Turell, and Stéphane Percharman, filed concurrently herewith; the accompanying Request for Judicial Notice and Notice of Lodging of Media, all pleadings, files, and records in this proceeding, all other matters of which the Court may take judicial notice, and any argument or evidence that may be presented to or considered by the Court prior to its ruling.

DATED: May 23, 2024 KENDALL BRILL & KELLY LLP

By: */s/*
Richard B. Kendall
Attorneys for Defendant Paramount Pictures Corp.

DATED: May 23, 2024 ULLMAN, FURHMAN & PLATT, P.C.

By: */s/*
Jeffrey D. Ullman
Attorneys for Defendants Criterion Collection, Inc. and Janus Films

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In 1967, Plaintiffs Leonard Whiting and Olivia Hussey contracted to star in the film adaptation of *Romeo and Juliet* (the "**Film**"), directed by Franco Zeffirelli. In 1968, PPC released the Film, which went on to be nominated for four Academy Awards, including for Best Director and Best Picture of the year.

The Film became the definitive movie adaptation of the play and has been commemorated by film lovers, beloved by Shakespeare enthusiasts, and analyzed by students in school, for decades since. As acknowledged by Plaintiffs themselves, the Film has become a cultural touchstone due to Zeffirelli's unprecedented decision to cast two unknown actors, equal to the ages of the fictional Romeo and Juliet, to embody the sweetness and tenderness of young love. One memorable scene is the Film's bedroom scene, which is Act 3, scene 5 of the play, in which Romeo and Juliet wake up the morning after their nuptials.

Due to the Film's enduring popularity, including the continuing demand for its exhibition at high-profile film festivals, PPC has created a number of masters of the Film over the years. Most recently, PPC undertook the restoration of the Film in 2016, resulting in the creation of the highest-resolution 4K digital master in existence. Plaintiffs, then well into their 60s, attended post-2016 screenings of the Film which utilized the digitally-restored 4K master. Plaintiffs were asked in these recent appearances about the now-iconic bedroom scene, including how each felt about the display of nudity and how each recalled the mechanics of shooting the bedroom scene. Time after time, Plaintiffs maintained the bedroom scene was tastefully done, "needed" for the Film, and shot with the utmost level of professionalism and care.

After ***55 years*** of celebrating and promoting the Film (and notably, only after Zeffirelli had died), Plaintiffs unsuccessfully sued PPC in December 2022 (LASC case no. 22SMC02968) (the "**Prior Action**"). The Prior Action rested on the wild accusation that Zeffirelli had convinced Plaintiffs to perform in the nude for the bedroom scene under the false promise that the nudity would not be shown in the as-released Film. PPC filed an anti-SLAPP motion, to which Plaintiffs each submitted a declaration in opposition providing—under the penalty of perjury—a step-by-step account of how each had purportedly been directed by Zeffirelli to simulate "sexual intercourse" for this scene. But anyone who watches the Film (which is rated PG) would see it does not show Plaintiffs simulating any act of sexual intercourse. Nevertheless, at the hearing on the anti-SLAPP motion, Plaintiffs' counsel reiterated that Plaintiffs are

shown "engaging in sexual congress," which allegedly made the Film child pornography and ineligible for First Amendment protection. Judge Mackenzie responded that she had watched the Film, confirmed it does ***not*** depict Plaintiffs simulating sexual intercourse, and admonished Plaintiffs for this "gross mischaracterization" of the Film. Judge Mackenzie granted the anti-SLAPP motion and entered judgment for PPC on July 6, 2023. Plaintiffs' subsequent appeal of the judgment also has been dismissed.

That should have been the end of this nonsense.

But this year, Plaintiffs initiated this second lawsuit based on the same basic premise (*i.e.*, that they had been tricked in 1967 into filming the bedroom scene while nude)—with a baffling twist. As before, Plaintiffs contend they were told on the day of shooting that they would be acting nude for the bedroom scene. But this time, Plaintiffs claim that ***after*** their performances had concluded, they simulated "sexual intercourse" on the set in a spurt of "ribaldry" to shake off their jitters, when they believed filming had ceased, and that this supposed sex scene was surreptitiously slipped into the final Film. Plaintiffs then claim that, although they admittedly "acquiesced" for over 5 decades to the inclusion of the alleged sex scene in the Film, they now draw the line at the 2023 Criterion Blu-ray release of the Film, on the mistaken premise that the Criterion release is a higher resolution of the Film than the original theatrical release in 1968. Plaintiffs' erratic new allegations of how the bedroom scene was filmed contradict their pleadings and their sworn testimony in the Prior Action detailing the same day of filming; defy the stern admonition by Judge Mackenzie that Plaintiffs should stop lying that the Film depicts sexual intercourse; and are patently absurd, as the scene in question shows the two actors ***performing for the cameras*** while ***reciting word-for-word Shakespeare's immortal text that accompanied the scene***. Likewise, Plaintiffs' theory that the Criterion release of the Film exceeds the resolution of all prior iterations of the Film is simply wrong; the Criterion release is, in reality, a ***lower*** picture quality of the Film than the 1968 theatrical release; a ***lower*** resolution than the digitally-restored 4K Film that Plaintiffs watched and applauded at a public film festival in 2016; and the ***same*** resolution as the Film that has been in wide television and digital distribution since 2007 or earlier. None of Plaintiffs' sham efforts to re-write what happened on the set in 1967, or how they have comported themselves since, saves this lawsuit from the fate of the Prior Action. Once again, this action should end with this anti-SLAPP motion.

That Defendants meet their burden under Prong One of the anti-SLAPP framework is a foregone

conclusion. Judge Mackenzie's determination that Prong One was satisfied in the Prior Action precludes any attempt by Plaintiffs to relitigate that issue today. *See* Declaration of Nary Kim ("Kim Decl."), Ex. F (Order). As Judge Mackenzie found, "[u]nder California law, the creation, production, and distribution of entertainment such as television or film are activities in furtherance of the exercise of the right to free speech, and thus protected under the anti-SLAPP statute." *Id*. at p. 9. Nor can Plaintiffs argue the conduct at issue loses First Amendment protection because the Film depicts "child pornography." Again, Judge Mackenzie considered and rejected that same contention in the Prior Action, and her finding on that identical issue, too, has preclusive force here. *See id*. at pp. 9-12.

As a result, the burden shifts to Plaintiffs to demonstrate a probability of prevailing on their claims. Plaintiffs cannot meet this burden for a litany of reasons, including but not limited to the following.

First, Plaintiffs' action rests on numerous factual assertions—including that Plaintiffs did not know they were being filmed when they performed the bedroom scene—which contradict their pleadings and declarations in the Prior Action. These are sham allegations, which should be stricken from consideration.

Second, Plaintiffs' third cause of action under the U.K. statute, The Dramatic and Musical Performers' Protection Act of 1958 (DMPPA), fails for the simple reason that this statute was repealed 35 years ago in 1989. As the conduct underlying Plaintiffs' present action ***post-dates*** the repeal of the DMPPA, no cause of action can be advanced under this statute.

Third, each and every one of Plaintiffs' causes of action is foreclosed by the existence of consent. Plaintiffs' consent exists in two forms: express consent (memorialized in the contracts each Plaintiff entered through their respective guardians) and implied consent (evidenced by Plaintiffs' decades-long non-objection to the inclusion of the bedroom scene in the Film). Both types of consent are independently dispositive of Plaintiffs' claims, all of which require an absence of consent as a necessary element.

Fourth, Plaintiffs' second cause of action for misappropriation of likeness under Civil Code section 3344 is preempted by the Copyright Act, barred by the First Amendment, and—in the case of Whiting (who is a U.K. resident)—categorically unavailable, as no such claim exists under U.K. law.

Fifth, Plaintiffs' first, fourth, and fifth causes of action for "revenge porn" fail as a matter of law, including because "material [that] constitutes a matter of public concern" is exempted from liability.

Sixth, Plaintiffs' action is untimely. The pixel resolution of the Criterion release that this action

puts at issue is the exact ***same*** resolution of the Film that entered mass public circulation no later than 2007. Under the single-publication rule, which ensures the limitations period for a tort based on mass communication or aggregate publication begins to run from the first publication, the longest of any of the limitations periods available for any of Plaintiffs' claims expired well before the filing of this action.

This action is without a shred of merit and must be dismissed.

II. FACTUAL BACKGROUND

A. Plaintiffs' Performer Contracts

In 1967, the now-deceased film director Zeffirelli contracted with producer B.H.E. Productions Limited to direct the motion-picture adaptation of Shakespeare's *Romeo and Juliet*. Declaration of Jonathan Strauss ("Strauss Decl."), Ex. A. That same year, B.H.E. entered into a Distribution Agreement with PPC. *Id*., Ex. C. The terms of the Distribution Agreement required B.H.E. to enter into written employment contracts with the members of the Film's principal cast. *Id*. at ¶¶ 11(c) & 12.

On May 18, 1967, B.H.E. and Olivia Hussey (through her legal guardian) entered a Weekly Salary Engagement. Strauss Decl., Ex. B. In this form contract, Hussey agreed, among other things, that she:

- "acknowledges the Company's right to perform and authorize performance of the Film";
- "acknowledges … [t]he Company will have the right to record products of the Artist's services hereunder and to include the same in the said Film and … for the purposes of exploitation, advertising, etc., by any and all means and by all media and for any other purposes the Company will require"; and
- "gives any consent which may be necessary" to use "the Artist's name and photograph." Strauss Decl., Ex. B at ¶ 11.

On May 18, 1967, PPC sent to Leonard Whiting's representatives at Fraser & Dunlop Ltd. a memorandum confirming that Zeffirelli had selected Whiting to portray Romeo in the Film. Strauss Decl., Ex. H. B.H.E. thereafter entered into a similar form contract with Whiting. *Id*. at ¶¶ 10-12.

B. The Film Premieres In 1968 To Popular And Critical Acclaim

The Film was shot in Italy in 1967. Hussey was 16 years old at the time of filming. Kim Decl. at ¶ 10. Whiting was 17 years old. *Id*. at ¶ 11.

On March 4, 1968, the Film premiered during the Royal Film Performance in Great Britain. It was

released in the U.S. in October 1968. The Film was a critical and box-office success. The Film went on to be nominated for four Academy Awards, including Best Picture and Best Director; it won two Academy Awards for Best Cinematography and Best Costume Design. Kim Decl., Ex. N. Plaintiffs also each won Golden Globe Awards for New Stars of the Year. *Id*., Exs. O & P.

C. The Film Stokes The Public Interest And Ongoing Debate About Nudity In Cinema

Notwithstanding the positive critical and popular response to the Film, Zeffirelli's decision to cast minor-age actors, and to depict them briefly in the nude in a tender scene following their first night of marriage, set off a public debate about nudity in cinema. As Roger Ebert of the *Chicago Sun-Times* wrote:

> A lot of fuss has been made about the brief, beautiful nude love scene. I doubt whether anyone could see it and disapprove of it, but apparently someone has. The Chicago Board of Education I am informed, objects to the nudity and will not approve the film for educational use after its commercial run. This is stupidity. If Chicago's educators could show me a city filled with students who rejoice in Shakespeare, I would yield the point. But they cannot, and Zeffirelli is so far ahead of them, so much richer and deeper, so much more inspired in his interpretation of our greatest poet, that the Board of Education cannot fly with him and must find excuses in half a dozen frames of a joyous film.

Kim Decl., Ex. Q at p. 228. The public's interest in Zeffirelli's decision to depict the teenaged actors in a tender romantic scene has persisted into the modern day. In a 2008 interview to commemorate the Film's 40th anniversary, Hussey was prompted to recount the process of filming the scene in detail:

> Marvin, the makeup gentleman came to my dressing room that day, I wasn't sent down to makeup. And he said Franco wants me to make you up from head to toe. And I said what do you mean head to toe. And he said, well, he wants, you know, he just wants no marks, no lines, nothing. And I said, but I'm wearing a long robe, a long nightdress. And he said, well, we should do it just to keep him happy. And then, I said I've got flesh colored underwear on, you know. So, he made me up and then we go to the set, and it was done very tastefully. And by then they all knew how young we were. So, the crew when they didn't – they pinned the microphone up to the bed and when they didn't have to really do something, all of these hardworking grips and incredible people would turn with their backs to us and look in the other direction. Of course, Leonard was an exhibitionists, he just walked around that way.…
>
> [B]ecause everybody was so – they handled it so delicately, after 20 minutes you forget you don't have your clothes on anymore and it's just like nothing. They cut most of it out or it wouldn't be, you know, because we got out of the bed in the scene.

Kim Decl., Ex. W (2/14/2008 Interview Tr.) at 11:8-12:4; *id*. 13:12-13:22.

D. PPC's Distribution Of The Film And Creation Of New High-Definition Masters

The enduring popularity of the Film also resulted in the distribution of the Film on VHS, DVD, television, pay television, pay-per-view, streaming platforms, transactional digital on demand, and digital

download. In connection with such distribution, PPC has created numerous new masters of the Film. Most relevant here, in 2007, PPC created a new 1920 x 1080 HD master (the "**2007 HD Master**"). Declaration of Andrea Kalas ("Kalas Decl.") at ¶ 8(c). The 2007 HD Master employed the 1080p specification, which continues to be the standard for HD distribution today. *Id*.

Since 2007, the 2007 HD Master has been used for distribution of the Film through television broadcasters, cable and satellite television services, as well as video-on-demand services and streaming platforms, and other forms of digital distribution to consumers. Declaration of Susan Chun at ¶ 6. (Even before 2007, a 2000 HD master with the same resolution was used for some licensees. *Id*.)

In 2013, PPC's home-entertainment affiliates and licensees released the Film in the Blu-ray disc format, which was created using the 2007 HD Master and sold in international markets. Redlich Decl. at ¶ 4(g). Tens of thousands of units of these Blu-ray copies have been sold worldwide. *Id*.

Most recently, in 2016, PPC's Archive Group completed a restoration of the Film from the scan of the original 35mm film negative, resulting in the creation of an ultra high-definition master in 4K video pixel resolution. Kalas Decl. at ¶ 8(d). The 4K master of the Film was thereafter used to create a new 4K Digital Cinema Package (DCP) for future theatrical exhibitions of the Film. *Id*.

These digital versions of the Film attempt to, but do not match, the original picture quality of the 1968 theatrical release. *See* Kalas Decl. at ¶ 5.

E. <u>In 2016, Plaintiffs Celebrate The 4K DCP At Widely-Attended Public Film Festivals</u>

In 2016, the Film was exhibited as an integral part of the 2016 "Shakespeare Lives" program, which was a "global celebration of William Shakespeare on the 400th anniversary of his death." Kim Decl., Ex. V. Shakespeare Lives "held more than 900 screenings of the BFI film collection, attended by people in over 100 countries." *Id*. at p. 253. As described on the official website, "[t]he digitally remastered film of this Academy Award-winning adaptation of *Romeo and Juliet* was included in our touring package of outstanding British film adaptations of Shakespeare's work, delivered by the British Council, the British Film Institute, Film London and other partners." *Id*. at p. 252. At the time of the "Shakespeare Lives" global tour in 2016, Hussey was 65 years old and Whiting 66 years old.

In June 2016, Whiting attended a screening of the Film at the British Council's presentation of Shakespeare Lives at the Midsummer Nights Festival in Moscow. Kim Decl. at ¶ 26 & Ex. X. During the

Q&A that accompanied the screening of the Film, Whiting was asked how he felt about the newest digital restoration of the Film, which had been screening "in countries all around the world" as part of Shakespeare Lives. To this, Whiting responded he was "honored really" to know the Film was "still important to people's minds and still immediate" and "***they've done wonderful job on the remastering*** and I'm grateful for that." *Id*., Ex. Y (6/23/2016 Interview Tr.) at 40:23-41:3 (emphasis added).

One of the most highly-anticipated screenings of the Film took place in December 2016, when the digitally-remastered 4K Film was exhibited with both of "the original stars of the film" in attendance at the Aero Theatre in Santa Monica. Kim Decl. at ¶ 27 & Exs. Z & AA; Kalas Decl. at ¶ 9. After the screening, Plaintiffs sat for a Q&A, during which Plaintiffs were asked what they remembered as the most "challenging" scenes to film. Whiting immediately responded the "fight scenes." *Id*., Ex. BB (12/2016 Interview Tr.) at 6:13-6:19. Hussey piped in the "bedroom scene" also was memorable to shoot, while laughing at the memory of Whiting "strutting around the set, not shy at all." *Id*. at 6:13-7:2.

At the close of the Q&A, Whiting effused, "[W]here so many elements of entertainment lead kids, especially, to like the dark side and things that are really not full of life and love and everything, I think that I'm proud and I know that Olivia's proud to be part of a something that was full of life and positive energy…. [I]t's a bit corny I suppose, but goodness, … I wish more people would go out of their way to make that kind of movie again." *Id*. at 20:6-20:18.

F. <u>In January 2018, Whiting Demands More Remuneration Under His Film Contract</u>

One year after making his successive appearances at the Shakespeare Lives festival to promote the Film, on January 30, 2018, Whiting sent to James Gianopulos, the former CEO of PPC, a letter requesting additional remuneration for the Film. Strauss Decl., Ex. K. Whiting did so on the premise that his original contract, under which he was paid $1,500, was not "fair" in light of the ongoing commercial success of the Film. *Id*. Nowhere in this correspondence did Whiting suggest that any element of the bedroom scene should not have been included in the Film. *Id*.

G. <u>In April 2018, Plaintiffs Attend Another Public Screening Of The Film</u>

In April 2018, the Film also was presented at the Turner Classic Movies Film Festival, as part of the "Shakespeare After Dark" selection. Again, Plaintiffs attended the TCM Film Festival and walked the red carpet together. Kim Decl. at ¶¶ 29-30. In one of their joint red carpet interviews, they praised

Zeffirelli's vision to cast actors who were "close to the ages" of Romeo and Juliet, "which had not been done before." *Id*., Ex. DD at 3:14-16. Plaintiffs also revealed plans to release a "coffee table book" of images from the Film to honor their cherished memories of making the Film. *Id*., Ex. EE at 4:17-25.

H. In October 2018, Plaintiffs Commemorate The Fiftieth Anniversary Of The Film

To commemorate the 50th-year anniversary of the Film, in October 2018, *Variety* magazine ran an article titled *"Romeo & Juliet" at 50: Olivia Hussey and Leonard Whiting on Viewers' Big Question*. Kim Decl., Ex. FF. The article recounts how the Film "struck a chord with audiences when it opened during the 1960s youthquake" and that "[a] major reason[] this film was such a success is because you have two young actors" who "were very much close to the ages of the actual Romeo and Juliet." *Id*.

The article revisited the public "controversy" sparked by "Hussey and Whiting's nude scene. Though nudity was commonplace in European films, the scene was frowned upon by some in U.S." *Id*. In the article, the then 67-year-old Hussey confirmed her view that the bedroom scene at the center of the controversy was "tastefully" shot and "needed for the film." *Id*. at p. 442. Hussey also reminded the interviewer that Plaintiffs had long been working as professional actors, even as teenagers, and knew what they were getting into when they filmed the bedroom scene for the Film: "Everyone thinks [Whiting and I] were so young [we] probably didn't realize what [we] were doing," said Hussey. "But we were very aware. We both came from drama schools and when you work, you take your work very seriously." *Id*.

In 2018, Hussey also published her memoir, *The Girl on the Balcony: Olivia Hussey Finds Life After Romeo and Juliet*. Kim Decl., Ex. H. At Hussey's request, Zeffirelli wrote the forward to the memoir. *Id*. In January 2019, Hussey appeared on the podcast, "Shakespeare Unlimited," to promote her memoir. *Id*., Ex. GG. On the podcast, Hussey agreed that "Zeffirelli took this great risk of casting two young people, having two teenagers in the role. [As stated] in [her] memoir … it wasn't [her] acting that made the film. It was because [Plaintiffs] were both so young." *Id*. When asked about the bedroom scene, Hussey declared, "By the time we did the bedroom scene, I didn't even care. Because [Zeffirelli] had made such a big deal of it and brought it up so much that it just didn't mean anything anymore. *Id*. In recounting the production set and setup of the filming equipment for the scene, Hussey recalls in detail:

> Well, you have a few people there, but by that point in the filming … we knew the camera crew so well, and they were so professional, that when they weren't needed to light something or to hold something, they would just stand, but they turned their backs, which

> was really nice. But the sound man had, like, some strange kind of crush on me. It was strange because he had white hair, and he was an older man. So when we did the bedroom scene, I said, 'Franco, I am not comfortable with him being there.' So, they set up the microphone on the—they built up a thing over the bed for the close-ups and they set up a microphone and they said to him, 'We don't need you. It's a closed set.'

Id., Ex. GG (1/22/2019 podcast transcript) at p. 458.

On the topic of the Film's massive commercial success, however, the interview took a bitter turn. Hussey lamented, "People think, 'Oh my God, you were in this classic film that will go on for all time.' Leonard and I, Paramount paid us £1500 each. That's $3,000, back then…. And when the film was grossing so much money and it was a phenomenon, they didn't give us a boost, they didn't give us a—nothing. And they've had us touring all over America and I didn't have money for clothes." *Id*. at p. 463.

A few months later, Zeffirelli passed away at the age of 96 on June 15, 2019 in Rome, Italy. Whiting attended Zeffirelli's funeral.

I. <u>In 2021, Hussey Teases A Global Tour By Plaintiffs To Promote The Film</u>

In April 2021, Hussey made a virtual appearance at the Festival Shakespeare in Buenos Aires to continue to promote her memoir. Kim Decl. at ¶ 33. In this interview, Hussey described the fanfare and public adoration for the Film that continues "to this day." *Id*., Ex. HH (4/2021 Tr.) at 4:2-13. She recalled how prescient it had been for Zeffirelli to hire "complete unknown" actors, as young as the characters in the play, to co-star in the Film—a choice that has ensured the Film's long-running popularity to the present day. *Id*. at 12:12-13. In light of the positive attention still generated by the Film, Hussey explained to the interviewer that she and Whiting had plans to travel the world, once the COVID-19 pandemic subsides, to "meet the young people" to talk to them about their experiences on the Film. *Id*. at 4:2-4:13.

When asked about the "most difficult" scene to film, Hussey responded the "balcony scene." *Id*. at 16:2-7. When asked about the most "fun" scene, she identified the "bedroom scene," explaining, while laughing, it was fun "because we were very young" and "Leonard was not shy at all." *Id*. at 23:10-13.

J. <u>In 2019, The Film Is Selected For Inclusion In The Criterion Collection</u>

In further recognition of the Film's timeless appeal, the Film has earned a place in the Criterion Collection—widely viewed among cinephiles as "a catalog so synonymous with cinematic achievement that it has come to function as a kind of film Hall of Fame," "the arbiter of what makes a great movie," and "akin to" a work of art being selected for display at "the Louvre." Kim Decl., Ex. II. As Criterion

explained, it selected the Film for inclusion among its prestigious ranks because "[t]he film's influence on the imaginations of subsequent Shakespearean directors has been profound." *Id*., Ex. JJ. "Entrenched as an authoritative adaptation, Zeffirelli's *Romeo and Juliet* is still admired, taught, and studied today for its spectacular re-creation of the past and its reinvention of the Shakespearean spoken word." *Id*.

In June 2019, PPC granted Criterion the exclusive DVD and Blu-ray rights to the Film. In September 2019, PPC delivered to Criterion a copy of the 2016 Restoration ProRes File in 1920 x 1080 resolution. Redlich Decl. at ¶ 4(i). This is a ***lower resolution*** than the 4K master of the Film screened at film festival attended by Plaintiffs. In fact, the Criterion Blu-ray has the same 1920 x 1080 resolution used (i) for at least 16 years of television and digital distribution of the Film and (ii) for the prior 2013 Blu-ray releases of the Film—all of which were sourced from the 2007 HD Master. *Id*. at ¶4(j). And, like all other digital versions of the Film, the Criterion release is of lower quality than the original 1968 theatrical release of the Film. Kalas Decl. at ¶ 5.

K. PPC's Anti-SLAPP Motion Dismissing Plaintiffs' Prior Action

Eighteen months after Zeffirelli passed away, on December 30, 2022, Plaintiffs (both over 70 years of age) filed the Prior Action, in which they alleged, for the first time, that Zeffirelli had tricked them into appearing nude in the Film:

> Plaintiffs were told by Mr. Zefferelli [*sic*] that there would be no nudity filmed or exhibited, and that Plaintiffs would be wearing flesh colored undergarments during the bedroom/love scene. However, on the morning of the shoot of the bedroom scene in the second week of December, 1968, the very last days of the photography, the minor children Plaintiffs were given body make-up and were told by Mr. Zifferelli [*sic*] that they must act in the nude or the Picture would fail. Millions were invested. They would never work again in any profession, let alone Hollywood. Zifferelli [*sic*] showed them where the cameras would be set so that no nudity would be filmed or photographed for use in Romeo & Juliet or anywhere else. Plaintiffs believed they had no choice but to act in the nude with body makeup as demanded on the last days of filming. … [I]mages of Plaintiffs' nude bodies were secretly and unlawfully obtained ***during the performance*** for later use….

Kim Decl., Ex. A at p. 13 (emphasis added).

When PPC filed an anti-SLAPP motion, Plaintiffs opposed on the ground that "[w]hat Defendant claims is speech is 'child pornography' … and is not entitled to First Amendment protection." *Id*., Ex. C (Opp.) at p. 2. In an effort to establish the Film is "child pornography," Plaintiffs submitted declarations testifying, in detail, about how each of them had been directed to act in the bedroom scene. Whiting declared, under the penalty of perjury, "we were directed to sit on the bed with Zeffirelli, who spoke to us

at length and persuaded us to act in the nude for the Bedroom Scene for artistic beauty." *Id*., Ex. C (Whiting Decl.) at ¶ 9. He describes how he acted in the scene as though he "was awakened and walked naked to the window with my buttocks fully exposed" and how "Hussey then woke up in bed with her breasts exposed." *Id*. at ¶¶ 12-13. He details how Hussey "then pulled up the covers, and beckoned me back to bed," after which he "returned to the bed and got under the covers with Plaintiff Hussey, climbed on top of her and ***we acted*** like we were having intercourse." *Id*. at ¶¶ 14-15. "Afterwards, Plaintiff Hussey ***acted like she was startled*** and grabbed for her nightshirt, which revealed and exposed her naked breasts and nipples." *Id*. at ¶ 16. "I then pulled on my pants on and exited via the balcony, ***and the Bedroom Scene ended with Plaintiff Hussey in her nightshirt watching 'Romeo' descend***." *Id*. at ¶ 17.

Hussey's declaration likewise details how Whiting was directed to lie "nude on a bed" before awakening and "walk[ing] naked to the window with his buttocks fully exposed." *Id*., Ex. C (Hussey Decl.) at ¶¶ 12-13. She elaborates that she then acts as though she "woke up in bed with my breasts exposed," before she "pulled up the covers, and beckoned a nude Mr. Whiting back to bed." *Id*. at ¶¶ 14-15. She describes how Whiting returns to bed and "gets under covers with me, climbs on top of me and we acted like we were having intercourse." *Id*. at ¶ 16. Like Whiting, she describes how she "***acted like I was startled*** and grabbed for my nightshirt" then watched Whiting ***acting as "Romeo"*** descend down the balcony. *Id*. at ¶¶ 17-18. Plaintiffs enclosed corresponding copies of screen captures from the Film to match the description of how they were directed to act in the bedroom scene. *Id*., Exs. A1-A2, A5-A6.

Plaintiffs' detailed accounts of how they came to film a "sex scene" for the Film proved unpersuasive in the Prior Action, as Judge Mackenzie confirmed no sexual intercourse is depicted in this scene, based on her own viewing of the Film. Kim Decl., Ex. F (Order). Instead, as any unbiased viewer would confirm, the bedroom scene plays out as follows:

Hussey, as Juliet, awakens with bedsheets covering her body. She blinks at Whiting, as Romeo, who sits beside her ***after pulling up his trousers***, gets ready to leave. To persuade him to stay, Juliet says: "Wilt thou be gone? It is not yet near day. It was the nightingale, and not the lark, that pierced the fearful hollow of thine ear. Nightly she sings on yon pom'granate tree. Oh believe me, love, it was the nightingale." Romeo leans toward Juliet and corrects her: "It was the lark, the herald of the morn, no nightingale. Night's candles are burnt out." Romeo kisses Juliet and says: "And jocund day stands tiptoe

on the misty mountain tops." He stands and tugs his trousers above his waistline, then says: "I must be gone and live, or stay and die." Juliet responds, "Yon light is not the daylight; I know it, I. Therefore, stay yet. Thou need'st not to be gone," and reaches for Romeo. Romeo, wearing his trousers, comes back to the bed saying, "Oh, let me be ta'en, let me be put to death." ***Still wearing his trousers***, he embraces Juliet ***over the bedsheets*** and continues: "I am content, so thou wilt have it so. I'll say yon grey is not the morning's eye; nor that is not the lark whose notes do beat the vaulty heaven so high above our heads. I have more care to stay than will to go. Come, death, and welcome; Juliet wills it so." Kim Decl. at ¶ 40.

This scene—in which Whiting as Romeo (while wearing trousers) embraces Hussey as Juliet (who is covered in bedsheets)—is what Plaintiffs have claimed shows them "simulating sexual intercourse." As Judge Mackenzie observed in the Prior Action, the Romeo and Juliet characters are never shown having intercourse, simulating intercourse, or engaging in or simulating any other form of sexual contact:

> **Plaintiffs' counsel**: We have alleged that these are photographs of people under 18 engaging in sexual congress. We have submitted the photographs. There's a picture of Leonard whiting on top of Olivia.
>
> **The Court**: I have watched the video. Wait. I need to interject because it is a gross mischaracterization that they are involved in sexual congress. I watched the clip that was lodged with the Court.
>
> …
>
> **The Court**: Maybe you didn't hear me. I said I watched the clips and it did not comport with your description of sexual congress.

Kim Decl., Ex. E (Hearing Tr.) at 5:5-6:10. After shutting down Plaintiffs' "gross mischaracterization" of the bedroom scene as depicting sexual intercourse, Judge Mackenzie granted PPC's anti-SLAPP motion, finding "Plaintiffs' claims in this action arise from Defendant's involvement in the production and distribution of a film, which is protected activity under the First Amendment." *Id*., Ex. F (Order) at p. 12.

Plaintiffs' subsequent appeal in the Prior Action also has been dismissed.

III. PLAINTIFFS' SHAM PLEADINGS IN THE PRIOR AND PRESENT ACTIONS

Plaintiffs' account of how the bedroom scene was filmed in 1967 has conflicted across their pleadings in the Prior Action, the initial complaint in this action, and the operative first amended complaint filed on March 4, 2024 (the "**FAC**").

The Prior Action. As recounted above, in describing the filming of the bedroom scene, Plaintiffs' sworn testimony confirms they were directed to "act" as "Romeo" and "Juliet" during this scene, and that

the partially nude images were captured during the course of their performance. Nowhere did Plaintiffs suggest in their declarations that any part of their movements during this bedroom scene occurred when they were not performing and thought ***no*** cameras were filming. Rather, Plaintiffs each testified that they "acquiesced" with the directions given to them for this scene, including acting in the nude, because Zeffirelli allegedly "promised that the shots would be very tasteful, and that the nudity would be suggested but nobody would see our naked bodies." Kim Decl., Ex. C (5/11/23 Declarations) at pp. 89-94.

The Initial Complaint. The initial complaint Plaintiffs filed (but never served) in this new action told the same story as before. Plaintiffs alleged that "[d]uring the creation and production of the Original Work, Zeffirelli demanded that Hussey and Whiting perform a part of their performance while immodestly wearing no clothing whatsoever and totally in the nude and allow themselves to be photographed in this state of undress." Compl. at ¶ 8. They alleged, "Hussey and Whiting acceded to Zeffirelli's demand that they perform a honeymoon bedroom sequence in the nude" because they were promised "any photograph that may inadvertently depict their private body parts would remain the exclusive property of Zeffirelli and never be distributed, or displayed publicly without due obscuration of those private body parts and any such photos would never be included as part of the Original Work for any reason." *Id*. at ¶ 9.

The FAC. In the FAC, Plaintiffs changed their story. In their latest retelling of the same events, Plaintiffs allege—for the first time—that they "simulated sexual intercourse" during a period of off-script "ribaldry" to shake off their jitters ***after*** filming the bedroom scene, "with the representation by Zeffirelli that photography had concluded" and "after they understood that photography had ceased." FAC at ¶ 9. This revisionist account (i) contravenes the detailed account of the directed filming of the bedroom scene provided under the penalty of perjury in the Prior Action; (ii) contradicts the story Plaintiffs continued to repeat in their initial complaint filed in this action; and (iii) defies all common sense, as the bedroom scene in the Film plainly shows the two actors acting for the cameras while ***performing the precise Shakespearean lines from the play***. *See* Kim Decl. at ¶ 40.

Nor do the fallacies in the FAC end there. Plaintiffs still contend that the physical interaction in the bedroom scene between Whiting (who is wearing trousers), plus Hussey (who is underneath the sheets), equals "simulated sexual intercourse." *See* FAC at ¶¶ 9, 24, 31, 54, 60.

In the FAC, Plaintiffs also allege that "throughout the pendency of [the Prior Action]," "neither

Hussey, nor Whiting were aware that Paramount [and Criterion] … had released and distributed" the Film as part of the Criterion Collection. FAC at ¶ 19. They claim they learned of the Criterion release "subsequent to the dismissal of the [Prior Action] and entry of judgment upon that dismissal" in July 2023. *Id*. at ¶ 20. That, too, is false. Plaintiffs expressly referenced the Criterion release in opposing the anti-SLAPP motion in the Prior Action, claiming "[t]his new release of brand new high definition images previously unseen by the public is an equally brand new tortious act." Kim Decl., Ex. C (5/12/23 Opp.) at p. 11. In each of their declarations signed on May 11, 2023, Plaintiffs testified: "in February, 2023, the Picture was re-released and once again distributed by Paramount in California and the rest of America in a new high-definition format." *Id*. (5/11/23 Whiting and Hussey Declarations) at ¶ 7.

Plaintiffs' FAC rests on another error of fact—that the Criterion release is a higher resolution of the Film than the releases of the Film that came before it. It is not. The 1968 theatrical release of the Film "remains the high watermark for picture quality and visual clarity." Kalas Decl. at ¶ 5. After that, the 4K master of the Film created in 2016 is the highest pixel resolution of the Film now in existence. The Criterion release, however, is of a lower quality than both the 1968 theatrical release and the 4K master; it is of the same lower-pixel resolution as the prior 2013 Blu-ray releases and the various forms of television and digital distribution that were sourced from the 2007 HD Master. Redlich Decl. at ¶ 4(i)-(j).

In the FAC, Plaintiffs plainly admit that they have long "acquiesced in the inclusion of the Objectionable Photos in the [Film] as published and distributed by Paramount," including in the 1968 theatrical release, "because Hussey and Whiting did not feel that the presentation in the [Film] so far exceeded Zefferilli's [*sic*] undertaking as to be actionable as a breach of that undertaking." FAC at ¶ 16. That admission is fatal to this entire case. The original 1968 theatrical release had the highest quality of all the Film's iterations; and all of the digital versions since (including the Criterion release) are of a lower quality than the original theatrical release. *See* Kalas Decl. at ¶ 5. Having "acquiesced" to the 1968 theatrical release of the Film, Plaintiffs necessarily acquiesced to each of the digital versions that followed.

IV. GOVERNING STANDARDS

Anti-SLAPP motions involve a familiar two-step process. First, the defendant has to show the claims arise from protected activity. Code Civ. P. § 425.16(b). This burden "is not an onerous one" and requires only a *prima facie* showing the claims arise from protected activity. *Symmonds v. Mahoney*, 31

Cal. App. 5th 1096, 1103 (2019). The burden then shifts to the plaintiff to avoid dismissal by showing a probability of success on the merits. This includes both "show[ing] that the complaint is legally sufficient" and "present[ing] a prima facie showing of facts," which "must consist of evidence that would be admissible at trial." *Hall v. Time Warner, Inc.*, 153 Cal. App. 4th 1337, 1346 (2007).

California's anti-SLAPP laws apply to each of the claims in the FAC, including the third cause of action under a U.K. statute and the fifth cause of action under 15 U.S.C. § 6851. When a plaintiff chooses to file his claims in California state court, he chooses to be subjected to California's procedural laws, including its anti-SLAPP law. Thus, when a plaintiff files in California state court claims arising under a federal or foreign-law statute, California's anti-SLAPP law will apply to such claims and allow for their early adjudication. *See Patel v. Chavez*, 48 Cal. App. 5th 484, 487-88 (2020) (because "the anti-SLAPP statute is a procedural law, rather than a substantive immunity," California's anti-SLAPP laws apply to federal causes of action filed in California court); *Francis v. Wynn Las Vegas*, 557 F. App'x 662, 663-64 (9th Cir. 2014) ("California's anti-SLAPP statute applies [to foreign cause of action]" since "California is both the domicile and selected forum of the putatively injured party").

V. PRONG ONE: ALL OF THE CLAIMS ARISE FROM PROTECTED ACTIVITY

In the FAC, Plaintiffs assert five causes of action, all of which arise from Defendants' alleged inclusion and distribution of the footage constituting the Film's bedroom scene. *See* FAC at ¶¶ 35, 39, 48, 53, 61. Thus, the alleged conduct underlying the claims constitutes protected activity under Code of Civil Procedure § 425.16(e)(3)-(e)(4). Indeed, this very issue was decided by Judge Mackenzie in her order granting PPC's anti-SLAPP motion in the Prior Action. Kim Decl. Ex. F (Order). Her finding that the conduct at issue was in furtherance of PPC's First Amendment rights in connection with a matter of public concern precludes Plaintiffs from attempting to relitigate it here.

Issue preclusion applies "(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." *Meridian Fin. Servs., Inc. v. Phan*, 67 Cal. App. 5th 657, 686 (2021) (superior court finding in earlier action that investor had unclean hands in connection with financing transaction precludes investor from relitigating unclean-hands issue in later action). The doctrine is particularly consonant with the purpose behind the SLAPP statute—*i.e.*, the efficient disposal of meritless actions that

impede free speech—as "[t]he doctrine of [issue preclusion] rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent." *Shopoff & Cavallo LLP v. Hyon*, 167 Cal. App. 4th 1489, 1516-17 (2008) (applying issue preclusion to conclude a finding in prior proceeding that a contract is "illegal and unenforceable" "must be given collateral estoppel effect" in subsequent action involving same that it is "illegal in its entirety").

A. As Determined In The Prior Action, Defendants' Conduct Was In Furtherance Of Their First Amendment Rights In Connection With A Matter Of Public Interest

It is beyond dispute that the production or distribution of a film constitutes the exercise of free speech protected by the anti-SLAPP statute. Films "affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952); *see also Ojjeh v. Brown*, 43 Cal. App. 5th 1027, 1040 (2019) (pre-filming solicitation of investments for uncompleted film was conduct "in furtherance" of right of free speech for SLAPP protection); *Brodeur v. Atlas Ent't, Inc.*, 248 Cal. App. 4th 665, 674-78 (2016) (reversing denial of anti-SLAPP motion by producers/distributors of movie *American Hustle*); *ITN Flix, LLC v. Hinojosa*, 2019 WL 3562669, at *4 (C.D. Cal. Aug. 6, 2019) (granting anti-SLAPP motion for claims arising from the "creation, production, and distribution of the *Machete* films").

As Judge Mackenzie found in the Prior Action (Kim Decl., Ex. F), it is equally certain that the conduct put at issue in each of Plaintiffs' claims involves a matter of "public interest," as an appreciable segment of the public is interested in works of entertainment and engaged in a debate about them. *E.g.*, *Tamkin v. CBS Broad., Inc.*, 193 Cal. App. 4th 133, 143-44 (2011) (finding public interest "in the writing, casting and broadcasting" of episode of *CSI*, "as shown by the posting of the casting synopses on various Web sites and the ratings for the episode"); *ITN Flix*, 2019 WL 3562669 at *4 (*Machete* films "are matters of public interest" as evidenced by release in 2,600+ theaters, box-office receipts, and award nominations); *Woulfe v. Universal City Studios LLC*, 2022 WL 18216089, at **4-5 (C.D. Cal. Dec. 20, 2022) ("creation

and dissemination" of film trailer is protected activity due to public interest in movies and its actors).

B. Plaintiffs Are Precluded By The Judgment In The Prior Action From Contending The Conduct At Issue Involves "Child Pornography"

Nor can Plaintiffs seek to overcome the First Amendment protection afforded to Defendants' conduct in furtherance of the production or distribution of the Film by claiming "the bedroom scene from the film constitutes illegal child pornography under federal and California law." *See* Kim Decl., Ex. F at p. 9. The Court in the Prior Action rejected this argument, in holding "Plaintiffs have not put forth any authority showing the film here can be deemed to be sufficiently sexually suggestive as a matter of law to be held to be conclusively illegal." *Id*. Once again, all of the elements of issue preclusion are present here: there is a final adjudication of the same issue, which was strenuously litigated and expressly decided against the same Plaintiffs in the Prior Action. *Id*. Thus, Plaintiffs cannot take a second shot at contending the activity here is "illegal" because the Film constitutes "child pornography."

VI. PRONG TWO: PLAINTIFFS CANNOT DEMONSTRATE A PROBABILITY OF PREVAILING ON ANY CLAIM

Under Prong Two, each Plaintiff must establish a reasonable probability of prevailing on the claims. Here, neither Plaintiff can do so, for a multitude of reasons.

A. All Of The Claims Are Based On Sham Pleadings

As detailed above, Plaintiffs' FAC rests on at least two sham allegations.

Sham allegation no. 1: In the Prior Action, Plaintiffs alleged in the complaint, and further testified under oath, that they had "acquiesced" to performing the bedroom scene in the nude, because they did not realize the nudity would be captured by the cameras or be included in the final Film. This story remained largely unchanged in their retelling of the same events in their initial complaint in this action. *See* pp. 21-22, *supra*. In the FAC, however, the story changes dramatically. Now, in a misguided effort to evade the fact that they had consented to the inclusion of their performances in the Film, Plaintiffs contend they only simulated the alleged "sexual intercourse" depicted in the Film "[f]ollowing the photography and with the representation by Zeffirelli that photography had concluded, during a period of ribaldry engaged in to dispel the nervous tension engendered by being required to perform without clothing." FAC at ¶ 9.

Sham allegation no. 2: In the Prior Action, Plaintiffs had referred repeatedly to the Criterion

release and even described learning about its release in each of their sworn declarations. *See* p. 23, *supra*. Nonetheless, in the present action, Plaintiffs now profess:

> At the time they drafted the pleadings framing the Litigation and throughout the pendency of that Litigation, neither Hussey, nor Whiting were aware that Paramount and Janus through its wholly owned subsidiary Criterion intended to release and distribute, or had released and distributed the Digital Release containing the Objectionable Photos.
>
> Upon their first time viewing the Digital Release, subsequent to the dismissal of the Litigation and entry of judgment upon that dismissal, both Whiting and Hussey were made aware thereby that the obscured depiction of their naked buttocks and breasts in the publicly distributed copies of the Original Work had been digitally enhanced such that, unlike the Original Work, the Digital Release depicted their private areas in such high detail that the gratuitous display was lewd and lascivious and demeaning to them.

FAC at ¶¶ 19-20.

These allegations—which are contradicted by their prior sworn declarations and pleadings—fall squarely within the prohibitions of the sham pleadings doctrine. A plaintiff is not permitted to plead "facts or positions" in a subsequent pleading that "contradict the facts or positions that the plaintiff pleaded in earlier [pleadings or] actions or suppress facts that prove the pleaded facts false." *Larson v. UHS of Rancho Springs, Inc.*, 230 Cal. App. 4th 336, 344 (2014). "When the plaintiff pleads inconsistently," including "in separate actions, the plaintiff's complaint is nothing more than a sham…. Under such circumstances, the court will disregard the falsely pleaded facts." *Id*. (citations omitted); *see also State of Cal. ex rel. Metz v. CCC Info. Servs., Inc*., 149 Cal. App. 4th 402, 412 (2007) (sham pleadings doctrine precludes a plaintiff from "amending complaints to omit harmful allegations, without explanation, from previous complaints" by treating the plaintiff as "bound by his allegations in the [prior] action"); *Amid v. Hawthorne Comm. Med. Grp., Inc*., 212 Cal. App. 3d 1383, 1391 (1989) ("court has inherent power by summary means to prevent an abuse of its process and peremptorily to dispose of sham causes of action") (citations omitted). As such, these sham allegations should be treated as a nullity.

B. <u>Janus Has No Involvement In The Alleged Conduct</u>

As another threshold matter, Defendant Janus does not belong in this action. The FAC alleges that Criterion is "a wholly owned subsidiary of defendant Janus Films, LLC, a New York Limited Liability Corporation [*sic*], ('Janus')." FAC at ¶ 2. Janus's liability in the action is predicated solely on the parent-subsidiary relationship allegedly existing with Criterion. *See, e.g.*, FAC at ¶¶ 12, 19, 34-37, 42-45, 48-51, 53, 57, 61, 63-65. But the allegation is fundamentally flawed. At all relevant times, Janus was and is

a Delaware limited partnership and Criterion was a Delaware corporation. Criterion is not and never has been a partner in Janus, and Janus is not and never was a shareholder, let alone the sole shareholder, of Criterion. Turell Decl. at ¶ 4. Accordingly, no predicate exists for Janus's liability in this action.

In any case, it is "fundamental that a corporation is a legal entity that is distinct from its shareholders" (*Grosset v. Wenaas,* 42 Cal. 4th 1100, 1108 (2008)), and that "a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998); *see also Santa Clarita Org. for Plan. & Env't v. Castaic Lake Water Agency*, 1 Cal. App. 5th 1084, 1104, *as modified on denial of reh'g* (Aug. 16, 2016). Thus, even if (contrary to fact) Janus were Criterion's parent entity (it is not), that status would not ground Janus's liability for Criterion's alleged acts, as a matter of law.

C. <u>There Is No Cause Of Action Under The U.K. DMPPA</u>

Plaintiffs' third cause of action under the U.K. statute, The Dramatic and Musical Performers' Protection Act of 1958 ("DMPPA"), too, fails for a simple reason: the DMPPA was repealed in its entirety in 1989. Declaration of Rachel Alexander ("Alexander Decl.") at ¶ 8. Because the acts complained of here occurred after the DMPPA's repeal, no cause of action can lie under this statute. *Id*.

D. <u>Consent Destroys All Of Plaintiffs' Claims</u>

The remainder of Plaintiffs' claims fail because the absence of consent is a necessary element of each of them. Civ. Code § 1708.85(a) ("A private cause of action lies against a person who intentionally distributes by any means a photograph, film, videotape, recording, or any other reproduction of another, ***without the other's consent***," which "exposes an intimate body part of the other person, or shows the other person engaging in an act of intercourse, oral copulation, sodomy, or other act of sexual penetration"); *Local TV, LLC v. Superior Court*, 3 Cal. App. 5th 1, 7-8, 13 (2016) (plaintiff in misappropriation of likeness case must prove the defendant appropriated her name or likeness ***without consent***); 15 U.S.C.§ 6851(b) ("an individual whose intimate visual depiction is disclosed … ***without the consent of the individual*** … may bring a civil action") (emphases added).[2] Here, Plaintiffs' consent exists in two forms:

[2] As explained above, Plaintiffs' claim under the DMPPA is barred due to the statute's repeal in 1989. Beyond that, the DMPPA would have only applied had the Film been made ***without the consent*** of the performers. Alexander Decl. at ¶¶ 9-10. Thus, even if the DMPPA had still been in force during the

express and implied. Each is dispositive of all of the claims here.

1. Plaintiffs' Express Consent Disposes of all Claims

Hussey does not deny that her legal guardian entered a valid written contract governing her services on the Film. She merely claims the written consent was limited to the "medium or format" of "35 mm analogue cinematographic photographs." FAC at ¶ 4. But her contract includes no such limitation. To the contrary, it grants the "right to record products of the Artist's services hereunder and to include the same in the said Film and … for the purposes of exploitation, advertising, etc., ***by any and all means and by all media and for any other purposes*** the Company will require." Strauss Decl., Ex. B.[3]

The terms of Whiting's written contract are substantially the same. That Whiting's contract has gone missing before he filed a lawsuit over 5 decades too late—long after his legal guardian, his talent agents and representatives, and any witness at B.H.E. and PPC had all passed away—is not surprising. Indeed, the loss of documents in circumstances like these is common enough that the law enables parties to re-construct the material terms of missing documents through circumstantial evidence, such as declarations or testimony. *Dart Indus., Inc. v. Commercial Union Ins. Co*., 28 Cal. 4th 1059, 1074 (2002); *see also Kenniff v. Caulfield*, 140 Cal. 34, 43-44 (1903) ("It is not necessary, in order to admit evidence of the contents of a lost instrument, that the witnesses should be able to testify with verbal accuracy to its contents; it is sufficient if they are able to state it in substance."); *Clendenin v. Benson*, 117 Cal. App. 674, 678 (1931) (permitting terms of written policy to be "sufficiently shown by the testimony of employees of the insurer and by its records"); *Levy, Guardianship of*, 137 Cal. App. 2d 237, 249 (1955) (allowing oral testimony to prove contents of lost instrument); 1 Witkin, Summary 11th Contracts § 351 (2023) ("the loss or destruction of a memorandum does not deprive it of its effect; its contents may be shown by an unsigned copy or by oral evidence") (citing Rest.2d, Contracts § 137).

Here, the evidence of the existence and terms of Whiting's contract is beyond serious dispute:

First, following a diligent search, PPC has located other documents that expressly reference

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relevant time period, this claim would still fail due to existence of Plaintiffs' consent.

[3] Recognizing this contractual language is dispositive of their entire action, Plaintiffs have tried to advance a new sham allegation that the bedroom scene was merely "ribaldry" captured after they believed that filming had been completed. This sham allegation must be disregarded as set forth *supra* at pp. 26-27.

Whiting's contract, including (i) a memorandum confirming the decision to cast him as Romeo with an overview of the contract terms (Strauss Decl., Exs. H-I); and (ii) a memorandum, dated February 13, 1970, which states it is enclosing "(a) copy of LEONARD's contract for 'ROMEO AND JULIET.'" *Id*., Ex. J.

Second, the Distribution Agreement with B.H.E. required it to enter into written agreements with all principal cast members. *Id*., Ex. C at ¶¶ 11(c) & 12.

Third, Whiting's own January 2018 letter to PPC (i) mentions having reached out to "Sally Nichols head of Contracts, Wardour Street" to find a copy of his contract; (ii) repeatedly complains of the allegedly unfair financial terms of his contract; and (iii) demands more remuneration for his services under a contract that he acknowledges exists. *Id*., Ex. K.

Fourth, in his sworn declaration in the Prior Action, Whiting confirms, "I agreed to act in the Picture." Kim Decl., Ex. C (Whiting Decl.) at ¶ 9. In fact, in opposing the anti-SLAPP motion in the Prior Action, Plaintiffs did not deny they both gave their express, written consent to the Film's use of their names and likenesses. The sole argument they made to deny the existence of consent in the Prior Action was that a minor cannot "consent" to being depicted in child pornography. *Id*., Ex. C (Opp.) at p. 20.

Fifth, there is no reasonable basis to contend Hussey and Whiting would have entered contracts with materially different terms, when the two of them had comparable levels of experience and name recognition (*i.e*., none at the time), and when both Hussey and Whiting recount entering the exact same financial terms for their services in describing the terms of their contracts as adults. *See* pp. 16, 18, *supra*.

2. <u>Alternatively, Implied Consent is Equally Dispositive of the Claims</u>

Express consent is dispositive of Plaintiffs' claims. But even if it were not, Plaintiffs' consent here exists in a second form. It is well-settled that "consent to use a name or likeness need not be express or in writing, but it may be implied from the consenting party's conduct and the circumstances of the case." *Jones v. Corbis Corp*., 815 F. Supp. 2d 1108, 1113 (C.D. Cal. 2011), *aff'd* 489 Fed. Appx. 155 (9th Cir. 2012); *see also Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 26 (1994) (a "plaintiff in an invasion of privacy case must have conducted himself or herself in a manner consistent with [the claim], i.e., he or she must not have manifested by … conduct a voluntary consent"). Whether implied consent exists is "determined objectively from the perspective of a reasonable person." *Jones*, 489 Fed. Appx. at 156. In other words, "consent is measured from Plaintiff's manifested action or inaction," rather than from her

"subjective beliefs" as to whether she intended to manifest consent. *Jones*, 815 F. Supp. 2d at 1114 (finding actress implicitly consented to use of her image in photos taken of her, regardless of her subjective understanding of how the photos would be used).

Plaintiffs' 55 years of conduct—consisting of (i) Plaintiffs' continuous expressions of excitement for their work on the Film in interviews as adults; (ii) Plaintiffs' continuing non-objection to the production, theatrical release, and distribution of the successive releases of the Film in home-entertainment formats, including the DVD and Blu-ray releases commencing in 2000 and 2013, and television and digital distribution of the HD Film since no later than 2007; and (iii) Plaintiffs' non-objection to the exhibition of the restored 4K Film in theatres and at festivals since 2016—establishes their consent to the Film's inclusion of the bedroom scene, including in digital formats. When a plaintiff knowingly allows a film of herself to circulate in the public, for even a brief time, that amounts to "consent," as a matter of law. *E.g.*, *Newton v. Thomason*, 22 F.3d 1455, 1461 (9th Cir. 1994) (affirming summary judgment for defendant on state-law misappropriation claims, where plaintiff expressed excitement about use of his likeness and did not object for 6 months; "Although [plaintiff] never uttered the words 'I consent,' it is obvious that he did consent."); *Rios v. Fekkai Retail LLC*, 2021 WL 3160192, at *3 (C.D. Cal. July 6, 2021) (granting summary judgment on state-law misappropriation claims, despite absence of signed agreement and plaintiff's subjective view of non-consent, where plaintiff voluntarily appeared for 2 days of the shoot and did not object at any time during shoot); *Jones*, 815 F. Supp. 2d at 1114-15 (granting summary judgment on state-law misappropriation claims, because plaintiff's non-objection to sale of her photos to the public amounted to consent).

Plaintiffs themselves outright admit: "Hussey and Whiting ***acquiesced in the inclusion of the Objectionable Photos*** in the Original Work as published and distributed by Paramount because Hussey and Whiting did not feel that the presentation in the Original Work so far exceeded Zefferilli's [*sic*] undertaking as to be actionable as a breach of that undertaking." FAC at ¶ 16. The only version of the Film that Plaintiffs did ***not*** "acquiesce to," according to their own FAC, was the Criterion release in 2023, allegedly because it was the first release of the Film that was "digitally enhanced" to show the nudity in the bedroom scene in graphic detail. *Id*. But the quality of the Criterion release is ***lower*** than the original 1968 Film as exhibited in theaters in 1968; ***lower*** than the 4K DCP exhibited at film festivals attended by

Plaintiffs in 2016; and an exact match to the resolution of the Film in circulation since at least 2007, with no objection from Plaintiffs. *See* pp. 15, 19, *supra*. Having "acquiesced" to the higher picture quality of the Film shown in 1968 for ***55 years***; to the exact same resolution of the Film made available to the public for ***over 16 years*** prior to the Criterion release; and the higher 4K resolution Film that they watched at film festivals for ***7 years***, Plaintiffs have "acquiesced" to the resolution of the Film in the Criterion release as well. *See, e.g*., *Newton*, 22 F.3d at 1458, 1461 (no jury could find element of non-consent necessary for misappropriation when plaintiff was aware of the planned use by June 1990, but only objected months later in December 1990); *Rios*, 2021 WL 3160192, at *4 (disregarding plaintiff's objection as ineffectual when plaintiff did not object "until several months after he found out his name was being used").

3. Plaintiffs Cannot Rescind Their Consent at this Late Stage

Under California law, "consent is an absolute defense" to any intentional tort, "even if improperly induced." *Baugh v. CBS, Inc*., 828 F. Supp. 745, 757 (N.D. Cal. 1993). Even where the consent of a party to a contract is procured by fraud or duress, the consent is merely ***voidable***, not void *ab initio*. *Rosenthal v. Great Western Fin. Securities Corp*., 14 Cal. 4th 394, 415 (1996). As a result, "[i]n order to escape from its obligations the aggrieved party must ***rescind***" its consent. *Id*. (emphasis in original); *see also* Civ. Code § 1691 ("to effect a rescission a party to the contract must, promptly upon discovering the facts which entitle him to rescind," including on the basis of "duress, menace, undue influence or disability," take the prescribed steps to formally rescind its consent). Here, Plaintiffs have never taken any action to rescind their contracts on any basis, including fraud, and would not be able to timely initiate an action for rescission today. Any rescission claim today would be dead on arrival, for the following reasons.

First, Plaintiffs cannot rescind their consent based on the assertion that, over 55 years ago, they were somehow tricked into performing nude in the Film. Plaintiffs made these same allegations in their "second cause of action for fraud" in the Prior Action (*see* Kim Decl., Ex. A at p. 15); Plaintiffs' claim for fraud was rejected as time-barred then (*id*., Ex. F), and any attempt to bring a new action on the basis of the alleged fraud would be time-barred now. *See* Code Civ. P. § 337(c) (four-year statute to sue for rescission based on fraud begins to run upon discovery of the facts constituting the fraud).

Second, diligence is "mandatory" and a "condition of the right to rescind." *Clanton v. Clanton*, 52 Cal. App. 2d 550, 555-56 (1942) (collecting cases holding inaction for "much shorter periods than a year

have been held to be fatal to the right to rescind"); *see also Cutter Labs., Inc. v. Twining*, 221 Cal. App. 2d 302, 317 (1963) (laches, waiver, and estoppel bar rescission where plaintiffs "treated the agreement as valid and subsisting and accepted all benefits under it for 18 years"); *Campbell v. Title Guar. & Trust Co.*, 121 Cal. App. 374, 376 (1932) (9 months' delay after discovery of fraud by party attempting to rescind contract was laches barring rescission); *Gedstad v. Ellichman*, 124 Cal. App. 2d 831, 834-35 (1954) (failure to sue for rescission in prior litigation confirms plaintiff failed to exercise diligence required for rescission). Instead of exercising the diligence required to revoke their consent, Plaintiffs here admit they did the opposite: in their own words, they "***acquiesced***" to the distribution of the Film containing the bedroom scene for over 55 years, including for 16 years after the exact same resolution of the Film now at issue in the FAC went into wide public distribution, and 7 years after seeing the most digitally-enhanced version of the bedroom scene that exists today screened during film festivals. FAC at ¶ 16; *see also* J. Thomas McCarthy and Roger E. Schechter, 2 Rights of Publicity and Privacy § 10:33 ("One who is aware that another is making commercial use of one's identity, and stands silently by or even assists in some way while another expends effort and money, may well be estopped by "acquiescence" from later coming to life and suing."); Evid. Code, § 623 ("Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.").

Third, any action seeking to rescind Plaintiffs' consent and return the parties to the *status quo ante* that existed back in 1967 could not be entertained because it would be impossible to implement. In the 57 intervening years in which Plaintiffs never acted to rescind their consent, the Film won multiple Academy Awards, has become a fixture of culture, literature, media, and academia, and is now among Criterion's inductees into its "hall of fame" for all-time great films. Under these circumstances, rescission of Plaintiffs' contracts simply would be infeasible. *Strategic Diversity, Inc. v. Alchemix Corp.*, 666 F.3d 1197, 1207-1208 (9th Cir. 2012) (rescission to reverse fraudulent transaction to return the parties to the positions each occupied pre-fraud is "neither feasible nor practical" due to "the passage of time").

E. <u>Plaintiffs' Second Cause of Action For Misappropriation Of Their Likenesses Fails For Additional, Independent Reasons</u>

Beyond their express and implied consent, Plaintiffs' second cause of action alleging that PPC

misappropriated Plaintiffs' likenesses fails for a number of additional reasons.

1. The Copyright Act preempts the misappropriation claim

Plaintiffs cannot maintain their second cause of action for misappropriation of likeness because it is preempted by federal copyright law. Where a plaintiff contends a defendant has misappropriated her likeness under state law by publishing or distributing a copyrighted work without her consent, that state-law claim is preempted by the Copyright Act, since the essence of the claim is within the subject matter of copyright law. *Jules Jordan Video, Inc. v. 144942 Canada, Inc*., 617 F.3d 1146, 1152-55 (9th Cir. 2010) (performer's misappropriation claim based on distribution of pornographic films that plaintiff appeared in was preempted by the Copyright Act, as a matter of law); *see also, e.g.*, *Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911, 1919 (1996) ("Since [plaintiffs'] section 3344 claims seeks only to prevent CBS from reproducing and distributing their performances in the film, their claims must be preempted by federal copyright law."); *KNB Enterprises v. Matthews*, 78 Cal. App. 4th 362, 372 (2000) ("*Fleet* stands for the solid proposition that performers in a copyrighted film may not use their statutory right of publicity to prevent the… copyright holder from distributing the film.").

2. The First Amendment bars Plaintiffs' misappropriation claim

Because the Film is an expressive work, Plaintiffs' misappropriation claim also is barred by the First Amendment. A right-of-publicity claim targeting expressive speech is "presumptively unconstitutional." *Sarver v. Chartier*, 813 F.3d 891, 903 (9th Cir. 2016). Under the strict First Amendment scrutiny that applies when an expressive work is at issue, the Ninth Circuit has rejected a right-of-publicity claim targeting the fictional film *The Hurt Locker*, as "applying California's right of publicity in [such a] case would violate the First Amendment." *Id*. at 905-906. California courts have reached the same conclusion, including in *Guglielmi v. Spelling-Goldberg Prods*., 25 Cal.3d 860, 866 (1979), in which the California Supreme Court rejected a right-of-publicity claim by the heirs of an actor based on a fictional film. In a concurrence that the Court has recognized as controlling,[4] then-Chief Justice Bird explained that because the film was an expressive work entitled to the highest degree of First

[4] The Chief Justice's opinion "commanded the support of the majority of the court," because it was joined or endorsed by three other Justices. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 396 n.7 (2001).

Amendment protection, there was no countervailing interest that could "clearly outweigh the value of free expression in this context." *Id*. at 871 (Bird, C.J., concurring). Consequently, a "cause of action for the appropriation of [an actor's] right of publicity through the use of his name and likeness in respondents' film ***may not be maintained***." *Id*. at 872 (emphasis added); *see also de Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845, 860-61 (2018) (striking actress' right-of-publicity claim based on her portrayal in T.V. docudrama *Feud* under heightened First Amendment scrutiny). Just like in *Sarver*, *Guglielmi*, and *de Havilland*, Plaintiffs' misappropriation claim here hinges on the alleged use of their images in a Film entitled to the highest degree of First Amendment protection, meaning there is no countervailing interest that could "outweigh the value of free expression in this context." Plaintiffs' second cause of action thus "may not be maintained" against Defendants here. *See Guglielmi*, 25 Cal.3d at 871.

Alternatively, the use of Plaintiffs' likenesses in the Film also would be protected under the traditional "transformative use" test, which California courts have long applied to determine whether a claim for misappropriation must yield to the First Amendment. *Comedy III Prods.*, 5 Cal. 4th at 391. Under this test, courts have long concluded that where the marketability and economic value of the challenged work do ***not*** "derive primarily from the fame of the celebrity depicted," "then there would generally be no actionable right of publicity." *Id*. at 407. That is because "[w]hen 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 [who made the challenged work]—it may be presumed that sufficient transformative elements are present to warrant First Amendment protection." *Id.*

In *de Havilland*, the Court of Appeal observed it is often unnecessary to reach the transformative use test where, as here, the misappropriation claim arises from an expressive work (as opposed to "products and merchandise" like the T-shirts at issue in *Comedy III*). Nonetheless, the Court applied the test in the alternative and held that a docuseries portraying the plaintiff was sufficiently transformative to bar the misappropriation claim on this alternative basis. 21 Cal. App. 5th at 863-64. Here, where Plaintiffs were little-known actors cast for their anonymity to playact the fictional characters of Romeo and Juliet, the outcome of the balancing test is obvious. The value of the Film derived from the "significant creative elements" added by Zeffirelli's direction and movie-making magic, not from the negligible fame of Plaintiffs or any literal resemblance to them. From any angle, the First Amendment is a complete defense.

3. Whiting has no Misappropriation Claim under U.K. Law

Whiting's attempt to maintain a misappropriation of name or likeness claim under California law fails for yet another reason. As a longtime citizen of Great Britain, Whiting is not entitled to pursue this claim under California's laws, at all.

The threshold question in determining whether Whiting is likely to prevail on his misappropriation claim is which country's substantive law governs his claim. That question requires application of California's governmental interest test, under which courts routinely hold it is the domicile of the celebrity claiming impairment to his right of publicity that determines the governing body of law. *See Cairns v. Franklin Mint Co*., 24 F. Supp. 2d 1013, 1024, 1028-29 (C.D. Cal. 1998) ("it is worth noting that cases based on publicity rights under § 3344 have typically selected the law of the property owner's domicile when resolving choice of law questions under California's governmental interests test") (collecting cases); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 823 n.4 (9th Cir.1974) (for right of publicity "the state of plaintiff's residency is normally the state of the greatest injury"); *Lightbourne v. Printroom Inc.,* 307 F.R.D. 593, 600 (C.D. Cal. 2015) ("in the right of publicity context, a plaintiff's residency is often determinative" of the governing law and "[i]t is well established that, where defendants publish or distribute the materials in various states, the state of plaintiff's domicile usually has the most significant relationship to the action"); *cf. Sinatra v. Nat'l Enquirer, Inc.*, 854 F.2d 1191, 1197 (9th Cir. 1988) ("[T]he nature of the injury—using Sinatra's name without compensation and potentially diluting the commercial value of the name—produces a situs of the injury in California. Sinatra conducts his business from California, he licenses his name in California, and the center of his business is in California").

Here, where Whiting has always been domiciled in the U.K., the U.K. has the stronger interest in its laws applying to his efforts to exploit and monetize his identity as a purported celebrity in the U.K. Kim Decl., Ex. C (Whiting Decl.) at ¶ 8. That means U.K. law governs his claim. *Cairns*, 24 F. Supp. 2d at 1028-29. And the application of U.K. law to his claim requires its dismissal, as the right of publicity is nonexistent under the applicable U.K. law. *Id*. (so confirming in dismissing right of publicity claim under U.K. law); *Love v. Assoc. Newspapers, Ltd.*, 611 F.3d 601, 609-11 (9th Cir. 2010) (affirming dismissal of right of publicity claim as nonexistent under U.K. law where California's laws had no application to claim). Thus, for this reason as well, Whiting has no ability to pursue his appropriation claim in this Court.

F. Plaintiffs' Claims For "Revenge Porn" Fail For Additional, Independent Reasons

Plaintiffs' first,[5] fourth, and fifth causes of action are premised on the distribution of "revenge porn." Beyond the absurdity of likening the Film to "revenge porn," and aside from the consent that destroys each of these claims (discussed at pp. 29-33, *supra*), Plaintiffs cannot establish any of the other elements required to advance a claim under Civil Code § 1708.85 or 15 U.S.C. § 6851.

A cause of action under Civil Code § 1708.85 requires a plaintiff to establish, *inter alia*: (i) intentional distribution of a recording of a plaintiff without his consent; (ii) by a defendant who knew, or reasonably should have known, the plaintiff had a reasonable expectation that the recording would remain private; and (iii) exposure of an intimate body part or depiction of the plaintiff in an act of sexual intercourse. CACI 1810 (listing essential factual elements). As an initial matter, Whiting has no cause of action under this statute, as no "intimate body part" of his (which is defined by statute, for a male subject, as his "genitals") is exposed in the Film, and the Film does not show Plaintiffs engaging in any act of intercourse or sexual penetration. Nor can Plaintiffs—two professional actors who publicly celebrated the Film and spoke with affection about their memories filming the bedroom scene ***for 55 years***—establish Defendants knew or should have known they had a "reasonable expectation that the recording [of a famous scene from the Film] would remain private." Further still, subsection (c) of Section 1708.85 confirms no liability can attach where:

- "The distributed material was created under an agreement by the person appearing in the material for its public use and distribution or otherwise intended by that person for public use and distribution" (here, the Film was created under contracts with Plaintiffs that contemplated its public use and distribution [*see* pp. 13, 29-30, *supra*]); or
- "The person possessing or viewing the distributed material has permission from the person appearing in the material to publish by any means or post the material on an internet website" (again, Plaintiffs permitted the Film to be published by any means in their written contracts, as well as through

[5] Plaintiffs' first cause of action, denominated "unlawful distribution of intimate photographs," is not a cognizable cause of action on its own and is, at most, a duplicate of its fourth cause of action under Civil Code § 1708.85, which provides a civil cause of action for the "distribution" of recordings that reveal the "intimate body parts" of another person.

their decades-long course of conduct; and plainly admit that they "acquiesced in the inclusion" of the bedroom scene in the Film from 1968 until the filing of their lawsuits [FAC at ¶ 16]); or

- "The distributed material constitutes a matter of public concern" (as described above, the Film amply qualifies as a matter of public concern, including under California's anti-SLAPP laws); or
- "The distributed material was photographed, filmed, videotaped, recorded, or otherwise reproduced in a public place and under circumstances in which the person depicted had no reasonable expectation of privacy" (again, the Film was shot on a professional movie set with Plaintiffs' knowledge of its plans for worldwide distribution).

Each one of the foregoing statutory exemptions applies and precludes liability for Defendants under Civil Code § 1708.85.

Plaintiffs' fifth cause of action under 15 U.S.C. § 6851 fails for similar reasons. Like its state-law counterpart, Section 6851 requires the "intimate visual depiction" to be disclosed "without the consent of the individual" and by a defendant "who knows that, or recklessly disregards whether, the individual has not consented to such disclosure." 15 U.S.C. § 6851(b)(1)(A). Again, Plaintiffs cannot establish that Defendants here knew, or acted with reckless disregard, in presuming that two professional actors—who had accepted Golden Globe Awards for their roles in the Film, appeared at film festivals to promote the Film, conducted interviews in which they laughed with affection at the memory of filming the bedroom scene, and (in the case of Hussey) orchestrated a multi-year media blitz to promote a memoir written about her fond memories of playing Juliet in the Film—had consented to the disclosure of their images in the Film, for purposes of 15 U.S.C. § 6851(b)(1)(A). Also like its state-law counterpart, Section 6851 contains a statutory exemption for material that is "a matter of public concern or public interest" (*id*. § 6851(b)(4)(C)), which operates to bar the federal cause of action as well.[6]

G. Plaintiffs' Claims Are Time-Barred

Even if their depiction in the Film's bedroom scene was (as Plaintiffs contend) unconsented, the statutes of limitations on their claims ran long before 2024. *Christoff v. Nestle USA, Inc*., 47 Cal. 4th 468,

[6] Whiting's attempt to state a claim under Section 6851 fails for the additional reason that a display of his buttocks in the Film does not satisfy the statutory definition of an "intimate visual depiction." *See State v. A.M*., 163 Wash. App. 414, 418-19 (2011) (highlighting distinction between "anus" and "buttocks"); *United States v. Urbina*, 2023 WL 2565167, at *4 (E.D. Wash. Mar. 19, 2023) (same).

472 (2009) (2-year statute for misappropriation of likeness); Cal. Prac. Guide Civ. Pro. Trial Claims and Def. Ch. 2(XII)-B (3-year statute for distribution of sexually explicit materials under Civ. Code P. § 338); 28 U.S.C. § 1658 (4-year statute for 15 U.S.C. § 6851); Alexander Decl. at ¶ 10 (6-year statute for DMPPA). This is true regardless of whether the statutes of limitations on the claims run from the 1968 distribution of the Film; or the distribution of the Film with the exact resolution that Plaintiffs complain of today (which began no later than 2007); or the distribution of the 4K version of the Film (in 2016).

Nor could the Criterion release re-start the limitations period for any of the claims. The single-publication rule prohibits Plaintiffs from treating it as a new publication for purposes of re-setting any limitations period based on the mass publication of the Film. "Under the single-publication rule, with respect to the statute of limitations, publication generally is said to occur on the first general distribution of the publication to the public." *Shively v. Bozanich*, 31 Cal. 4th 1230, 1245 (2003), *as modified* (Dec. 22, 2003) (internal citations omitted). "The purpose of the single-publication rule is to prevent hundreds of suits against publishers for repeated publication of the same statement/materials." *Christoff*, 47 Cal. 4th at 480. Here, the Criterion release has the same resolution as the prior 2013 Blu-ray releases and the various forms of television and digital distribution that were sourced from the 2007 HD Master. Redlich Decl. at ¶ 4(i)-(j). Given the sameness of the Film's content and the sameness of the Film's pixel resolution, there is no basis for Plaintiffs to contend the Criterion release is a "new" publication outside the reach of the single-publication rule, which exists "to protect defendants from harassment through multiple suits and to reduce the drain of … on judicial resources" in frivolous cases just like this. *Oja v. U.S. Army Corps of Engineers*, 440 F.3d 1122, 1131 (9th Cir. 2006).

VII. CONCLUSION

For the foregoing reasons, the Court should grant this Motion.

DATED: May 23, 2024 KENDALL BRILL & KELLY LLP

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DATED: May 23, 2024

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Court Reservation Receipt

Reservation

Reservation ID: 021757680851	Status: RESERVED
Reservation Type: Special Motion to Strike under CCP Section 425.16 (Anti-SLAPP motion)	Number of Motions: 1
Case Number: 24STCV03814	Case Title: OLIVIA HUSSEY, et al. vs PARAMOUNT PICTURES CORP., et al.
Filing Party: Paramount Pictures Corp. (Defendant)	Location: Stanley Mosk Courthouse - Department 56
Date/Time: July 25th 2024, 8:30AM	Confirmation Code: CR-GPFPJBFSAXPMIAUDW

Fees

Description	Fee	Qty	Amount
Special Motion to Strike under CCP Section 425.16 (Anti-SLAPP motion)	0.00	1	0.00
TOTAL			$0.00

Payment

Amount: $0.00	Type: NOFEE

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