ORIGINAL

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, California 90014
Telephone: (213) 955-9400
Facsimile: (213) 622-0791

Attorneys for Plaintiff
OLIVIA DE HAVILLAND, DBE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT

OLIVIA DE HAVILLAND, DBE, an individual, Plaintiff, vs. FX NETWORKS, LLC, a California limited liability company; PACIFIC 2.1 ENTERTAINMENT GROUP, INC., a California corporation; and DOES 3 through 100, inclusive, Defendants.	CASE NO. BC667011 [Complaint Filed June 30, 2017] Assigned for all purposes to: Hon. Holly E. Kendig **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S THIRD AMENDED COMPLAINT PURUSANT TO CALIFORNIA'S ANTI-SLAPP STATUTE, CAL. CIV. PROC. CODE § 425.16** Hearing Date: September 29, 2017 Time: 8:30 am Location: Department 42 Reservation ID: 170727238249

///

///

///

///

///

///

///

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION AND SUMMARY OF DEFENDANTS' POSITION

"[N]ot all expression with respect to celebrities is insulated by the First Amendment." *No Doubt v. Activision Publg., Inc.*, 192 Cal. App. 4th 1018, 1029 (2011). Defendants FX Networks, LLC and Pacific 2.1 Entertainment Group, Inc. ("Defendants") made an eight-part highly successful television series, "Feud: Bette and Joan" ("Feud"), which starred Catherine Zeta-Jones ("Zeta-Jones") as Olivia de Havilland ("Plaintiff" or "de Havilland") and aired in March of 2017. Motion to Strike ("Motion") at 4; Exs. 55-57 to Decl. of James Berkley ("Berkley Decl."). Defendants do not deny that de Havilland is the only living principal character in "Feud," that they did not obtain consent, nor that they intentionally broadcast a fake interview of de Havilland speaking from a personal insider perspective about the alleged "feud" between Bette Davis ("Davis") and Joan Crawford ("Crawford"), which is structured to be an endorsement of "Feud" by Plaintiff. Motion at 2 ("Plaintiff's consent was not needed."); Decl. of Timothy Minear ("Minear Decl.") ¶¶ 7, 15 ("As a device to tell the story . . . [we] created imagined interviews conducted at the 1978 Academy Awards. In these interviews . . . de Havilland . . . discuss[es] Crawford and Davis . . . ."); Decl. of Michael Zam ("Zam Decl.") ¶¶ 9-11. They also portray Plaintiff making negative, vulgar statements, which are false and were never made, about her sister, Joan Fontaine ("Fontaine"), and Frank Sinatra ("Sinatra"), among others.

Despite these uncontested facts, Defendants claim that their conduct was in "furtherance of [their] right to free speech . . . or in connection with a public issue." Motion at 1. They also claim that de Havilland cannot demonstrate that her causes of action meets the minimal showing of merit standard. *Id.* at 3. Defendants are wrong under the controlling law and facts here, and de Havilland's complaint may not be properly stricken under anti-SLAPP.

II. DE HAVILLAND'S CLAIMS CANNOT BE DEFEATED BY DEFENDANTS' MOTION

A. Reasonable Probability Legal Standard Defined

Establishing a "'reasonable probability' in the anti-SLAPP statute . . . requires only a 'minimum level of legal sufficiency and triability.'" *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 598 (9th Cir. 2010) (quoting *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 438 n.5 (2000); *see also*

Davis v. Electronic Arts Inc., 775 F.3d 1172, 1177 (9th Cir. 2015) (denying anti-SLAPP motion to strike §3344 claims for unauthorized use of professional football players' likenesses in video game). "[P]laintiff's burden of establishing a [reasonable] probability of prevailing is not high . . . ." *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688, 699 (2007).

California's anti-SLAPP statute "poses no obstacle to suits that possess minimal merit." *Navellier v. Sletten*, 29 Cal. 4th 82, 93 (2002). "The court's responsibility is to accept as true the evidence favorable to the plaintiff and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." *HMS Capital, Inc. v. Lawyers Title Co.*, 118 Cal. App. 4th 204, 212 (2004) (internal citation omitted).[1] "Thus, plaintiff's burden as to the second prong of the anti-SLAPP test is akin to that of a party opposing a motion for summary judgment." *Yu v. Signet Bank/Virginia*, 103 Cal. App. 4th 298, 317 (2002).

An anti-SLAPP defendant advancing affirmative defenses, including those based on the First Amendment, transformative use, public interest and public affairs "bears the burden of proof on the defense . . . ." *Peregrine Funding, Inc. v. Sheppard Mullin*, 133 Cal. App. 4th 658, 676 (2005). This burden is a heavy one. "Only if [defendant] is entitled to the defense *as a matter of law* can it prevail on its motion to strike." *Hilton v. Hallmark Cards*, 599 F.3d 894, 910 (9th Cir. 2010) (emphasis added).

B. <u>Plaintiff Has a Probability of Success on Her Right to Publicity Claims</u>

1. All Elements for Right to Publicity Common Law and Statutory Actions Are Conceded or Proved

The elements to a claim for misappropriation of the right of publicity under the common law and Section 3344 are: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage . . . ; (3) lack of consent; and (4) resulting injury." *Hilton*, 599 F.3d at 909; *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 417 (1983);

[1] If the Court should find any shortcomings with the TAC due to a lack of detail on the claim elements of the claims, Plaintiff seeks leave to amend based on the evidence presented herein. *Nguyen-Lam v. Cao*, 171 Cal. App. 4th 858, 873 (2009) (where "plaintiff demonstrated a probability of prevailing at trial if she could amend her complaint [to cure a pleading deficiency], [it should be allowed] . . . .").

Motion at 12 n.10. Defendants do not deny Plaintiff can establish all the elements of the right to publicity prima facie case. Defendants, as they admit, clearly and knowingly used Plaintiff's name, identity, image and likeness (collectively "Identity") in "Feud," a commercial production. Minear Decl. ¶¶ 7-15 ("de Havilland . . . appears in six of the eight episodes . . . ."); Zam Decl. ¶¶ 11-14; Murphy Decl. ¶¶ 7, 14-20; Gibbons Decl. Exs. 4-9; Berkley Decl. Ex. 54. Defendants do not claim they obtained Plaintiff's consent or compensated her to use her Identity, and they did not. Decl. of Olivia de Havilland ("ODH Decl.") ¶ 4. Plaintiff, as a result of Defendants' unauthorized use of her Identity, has been injured and Defendants have been unjustly enriched. Roesler Decl. ¶¶ 21-25; Smith Decl. ¶¶ 4-5; Casady Decl. ¶¶ 11-13.

The appropriation of Plaintiff's Identity was to Defendants' advantage, and she played a key role, which Defendants' themselves admit. Murphy Decl. ¶ 15 ("The de Havilland character served as a counterbalance to the more volatile Davis and Crawford and also as an objective, authoritative bridge to the viewer. Put differently, it was important that viewers trust the de Havilland character . . . ."); Minear Decl. ¶ 15 ("[W]e believed that the de Havilland character was perfect for introducing the theme of the show . . . ."); Gibbons Decl. ¶ 10 ("six video advertisements . . . included . . . de Havilland . . . ." which Defendants chose to "mimic the show itself, in which the de Havilland character introduces some of the themes of 'Feud' through an imagined interview at the 1978 Oscars . . . ."); Zam Decl. ¶¶ 10-11; Minear Decl. ¶¶ 7, 13. The use of Plaintiff's Identity was intended to increase the appeal and success of "Feud," as well as to create the impression that Plaintiff, who the audience would trust, endorsed "Feud," Defendants, and their entertainment services. Casady Decl. ¶¶ 11, 13 ("the construction of 'Feud's' storyline is designed to appear to the viewer as if the still-living Miss de Havilland endorsed the production and its content . . . ."); Ladd Decl. ¶ 17 ("'Feud was constructed as if Miss de Havilland . . . endorsed 'Feud.'"); Murphy Decl. ¶ 15. [2]

///

///

///

[2] Defendants filed thousands of pages of exhibits, most are irrelevant to the issues here.

2. Plaintiff's Right to Publicity Claims Are Not Barred by Any Affirmative Defenses

i. The First Amendment Does Not Grant Absolute Immunity

Defendants bear the burden of showing that their First Amendment based affirmative defenses eliminate virtually any chance of plaintiff prevailing on her common law and statutory right to publicity causes of action. *See* Section (II)(A) *supra*. Here, Defendants claim that a movie or television show enjoys virtually unlimited protection under the First Amendment. Motion at 13. This is wrong on the nature and scope of the law. Television and movie broadcasts may come under Constitutional protection, but, even if they do, it is not unlimited. *Browne v. McCain*, 611 F. Supp. 2d 1062 (C.D. Cal. 2009); *Melvin v. Reid*, 112 Cal. App. 285 (1931) (right of privacy common law action allowed for unauthorized use of plaintiff's Identity in semi-historical movie "The Red Kimono," notwithstanding public interest defense).

In the only United States Supreme Court case to consider the constitutionality of a right to publicity statute, *Zacchini v Scripps-Howard Broadcasting*, 433 U.S. 562 (1977), the Court reversed the Ohio Supreme Court, which held the statute violated the First and Fourteenth Amendments to the Constitution. *Zacchini* involved a television broadcast of the 15 second act of Zacchini, the human cannon ball, at the county fair. Zacchini sued the local station for violation of his right to publicity. The Court stated:

> "The rationale [for protecting the right to publicity] is the straight-forward one of preventing unjust enrichment by the theft of goodwill. 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."

Id. at 576.

Defendants cite Chief Justice Bird's concurrence in *Guglielmi v. Spelling-Goldberg Productions*, 25 Cal. 3d 860, 862 (1979), which of course is not controlling. In so far as it suggests that nothing in a television broadcast or even a newspaper account can be a basis for a right to publicity claim, it has been rejected by later controlling Supreme Court and Second District authority. *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (2001); *Eastwood*, 149 Cal. App. 3d at 422.

Guglielmi only holds that, at the time of the action, Rudolph Valentino's heirs had no right to publicity causes of action because it was personal to the actor. *Guglielmi*, 25 Cal. 3d at 861 (statute later amended). Defendants also cite *Polydoros v. Twentieth Cent. Fox Film Corp.*, 67 Cal. App. 4th 318 (1997). *Polydoros* turned on whether plaintiff's identity had been used at all. The Court states that movies have just as much right to First Amendment protection as news reporting, but does not state they have a right to more protection. *Id.* at 323 ("No person seeing this film could confuse the two [plaintiff and the purely fictional character].") Finally, Defendants cite *Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118 (N.D. Cal. 2002). In *Daly*, plaintiff signed a contract and agreed to be filmed in connection with a television show. There was no claim that defendants falsified information in the broadcast in which plaintiff willingly participated. *Daly* does not stand for the proposition that the First Amendment protects all speech or pictures simply because they are in a film. *Id.*[3] Further, the reasoning of *Daly* has been criticized and limited to its facts by other courts, in right to publicity cases involving false statements and endorsements. *Browne*, 611 F. Supp. 2d at 1072 ("RNC's reliance on *Daly v. Viacom* is similarly unpersuasive. This Court is not bound by the district court's decision in that case, which the Court finds factually distinguishable from the current case.").

ii. Defendants Cannot Meet Their Burden on the Public Affairs or Public Interest Affirmative Defenses

When analyzing a defendant's affirmative defenses on an anti-SLAPP motion, in order to prevail, the defendant must show that its evidence bars the plaintiff's claim as a matter of law. *Overstock.com, Inc.*, 151 Cal. App. 4th at 699-700. There are exceptions to right to publicity claims which include news, sports and public affairs and public interest broadcasts. Cal. Civ. Code § 3344(d); *Browne*, 611 F. Supp. 2d at 1071-1072.

///

///

[3] In footnote 12, page 13 of their Motion, Defendants string cite a number of out-of-state, mostly federal district court and court of appeals cases, which deal with the law of other states, including statutes which differ significantly from California law. To the extent that any of these foreign cases contradict controlling California law, they are not authoritative; to the extent that they deal with different statutory language, they are irrelevant.

However, the District Court in *Browne* discussed the fact that the defense is limited: "a mere finding of 'public interest' alone does not automatically exempt a defendant from liability on a right of publicity claim." *Id.* at 1071 (quotation omitted) (denying motion and discussing inapplicability of privilege to use of a plaintiff's identity in a knowingly false manner). None of the defenses preclude either cause of action where the broadcast includes false statements, particularly fake interviews with a celebrity and false endorsements. *Id.*; *see also Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249 (9th Cir. 1997).

The Second District Court of Appeal discussed the limits on public interest in the demurrer context in *Eastwood*, 149 Cal. App. 3d at 409.[4] Actor Clint Eastwood brought an action against a newspaper for false light and infringement of his right to publicity, the latter under both common law and the previous version of § 3344, when it published an unauthorized, false article about a love triangle between Eastwood, his real life partner, and another celebrity.[5] The Court of Appeal granted Eastwood's writ of mandamus, reversing the trial court's order based on "public interest" protection of news under the First Amendment. *Eastwood*, 149 Cal. App. 3d at 413. The Court of Appeal held that celebrities, as a consequence of their fame, relinquish some, but not all, of their rights to privacy and publicity:

> [A]bsolute protection of the press in the case at bench requires a total sacrifice of the competing interest of Eastwood in controlling the commercial exploitation of his personality. Often considerable money, time and energy are needed to develop the ability in a person's name or likeness to attract attention and evoke a desired response in a particular consumer market. Thus, a proper accommodation between these competing concerns must be defined, since "the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy", and in the case at bench, *the right of publicity*.
>
> As noted earlier, all fiction is literally false, but enjoys constitutional protection. However, the deliberate fictionalization of Eastwood's personality constitutes commercial exploitation, and becomes actionable [under the common law and section 3344] when it is presented to the reader as if true with the requisite scienter.

---

[4] The *Eastwood* case was not cited by Defendants. "Attorneys are officers of the court and have an ethical obligation to advise the court of legal authority that is directly contrary to a claim being pressed . . . ." *In re Reno*, 55 Cal. 4th 428, 510 (2012).

[2] Cal. Civ. Code § 3344 was amended in 1984, shortly after the writ of mandamus was issued in *Eastwood*. However, the changes in the law do not change the analysis here.

Id. at 422, 425-26 (emphasis added) (internal citations omitted).

Similarly, in a federal case involving Senator John McCain's bid for president, the District Court denied the RNC's anti-SLAPP motion when defending against the right to publicity cause of action brought by celebrity singer Jackson Browne. *Browne*, 611 F. Supp. 2d at 1062. The Court held that public interest did not preclude a cause of action based on the misuse of Browne's identity and a song he wrote, in a political broadcast, and that Browne demonstrated his identity was used, without consent, for the commercial benefit of the campaign. *Id.* at 1071. Additionally, defendants, simply by using Browne singing his song, falsely suggested that Browne, a lifelong Democrat, endorsed McCain and the RNC, causing him injury, which is not protected by the public interest or First Amendment defenses. *Id.* at 1065; *Eastwood*, 123 F.3d at 1249 (sustaining jury verdict on right to publicity claim based on magazine's publication of fake interview).

Defendants created a fake interview which put false words into the mouth of Plaintiff for their own commercial benefit without her consent. They did so knowingly or with reckless disregard for the standards of practice in the entertainment industry. Casady Decl. ¶¶ 11, 13; Ladd Decl. ¶¶ 15-17. They also intentionally or recklessly set up the portrayal of de Havilland as if she were endorsing "Feud" and Defendants, which characterization is false. *Id.*; Supp Decl. of Olivia de Havilland ("ODH Supp. Decl.") ¶ 2. Thus, Defendants' use of Plaintiff's identity is actionable. *Eastwood*, 123 F.3d at 1249; *Browne*, 611 F. Supp. 2d at 1062. There is no case, and Defendants cite none, holding that having some truthful statements in a published medium allows commercial exploitation of a celebrity through unconsented knowing or recklessly false representations. In fact, both *Eastwood* cases, where there was truthful information salted among the falsehoods, are to the contrary. *Id.*; *Solano v. Playgirl*, 292 F.3d 1078, 1089 (9th Cir. 2002) ("First Amendment does not protect knowingly false speech . . . . [W]e do not believe that the Legislature intended to provide an exemption from liability for a knowing or reckless falsehood under the canopy of 'news.' . . . section 3344 . . . (d), as it pertains to news, does not provide an exemption for a knowing or reckless

///

///

///

falsehood."); *No Doubt*, 192 Cal. App. 4th at 1030 (same holding for public interest and affairs exemptions).[6]

Defendants cite *Dora v. Frontline Video*, 15 Cal. App. 4th 536 (1993), which is inapposite. *Dora* was a true documentary, involving filming of actual surfing on a public beach. There was no falsity issue in *Dora*, simply the broadcast in a documentary of an actual historical, public event. *Id.* at 546. Similarly, *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400 (2001) and *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790 (1995) cited by Defendants are not instructive, as they do not deal with cases where there were false representations made about the celebrities or false endorsement claims. *Davis*, 775 F.3d at 1172 (denying anti-SLAPP claiming First Amendment and public affairs defenses, where football players' identities were literally recreated in a video game playing football as in real life).

iii. Defendants Cannot Meet their Burden of Proof that the Use of Plaintiff's Identity Was Transformative

Defendants claim that their motion should be granted because "Feud" is a docudrama which transformed the character of de Havilland, including by "depicting her falsely." Motion at 14. Defendants cite *Comedy III*, 25 Cal. 4th at 387 and *Winter v. DC Comics*, 30 Cal. 4th 881 (2003), claiming de Havilland's Identity was only "raw material" the value of which did "*not* derive from [her] celebrity fame . . . ." Motion at 14. Again, Defendants miss the mark.

In fact, in *Comedy III*, the California Supreme Court rejected a claim that hand drawings of the recognizable "Three Stooges," on T-shirts were transformative art, and therefore not actionable, and held instead that the heirs did have a right to publicity claim for use of their images. The Court explained the transformative test:

> Depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment . . . . 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

[6] Section 3344 was amended in 1984 to include public affairs among the exemptions. Cal. Civ. Code § 3344. The reasoning of *No Doubt*, *Eastwood*, *Browne* and *Solano* applies equally to public affairs as to news. *Michaels v. Internet Entm't Grp., Inc.*, 5 F. Supp. 2d 823 (C.D. Cal. 1998).

> outweighs the expressive interests of the imitative artist. The right-of-publicity holder [may still] enforce the right to monopolize the production of conventional, more or less fungible, images of the celebrity.

Comedy III, 25 Cal. 4th at 400, 405. The Supreme Court went on to find that the drawings of the Three Stooges were not protected transformations:

> We can discern no significant transformative or creative contribution [in use of the images of the Three Stooges]. [The artist's] 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 [the artist's] depictions were protected by the First Amendment, we cannot perceive how the right of publicity would remain a viable right other than in cases of falsified celebrity endorsements. Moreover, the marketability and economic value of [the artist's] work derives primarily from the fame of the celebrities depicted.

Id. at 409.[7]

In *No Doubt*, 192 Cal. App. 4th at 1018, the rock band, No Doubt, licensed the use of the images of its members for use in a video game, where avatars sing some of their hit songs. No Doubt sued Activision under the right to publicity laws, claiming that Activision used their identities outside the scope of the license, singing songs they did not authorize and found objectionable.[8] The Second District affirmed the denial of Defendants' anti-SLAPP Motion, rejecting the claim that the work was transformative:

> The avatars [likenesses of plaintiffs, band members] perform those songs as literal recreations of the band members. That the avatars can be manipulated to perform at fanciful venues including outer space or to sing songs the real band would object to singing, or that the avatars appear in the context of a video game that contains many other creative elements, does not transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities.

---

[7] In *Winter*, the Supreme Court used the *Comedy III* transformative test in evaluating half-human, half-worm creatures in outer space which resembled two country singers. 30 Cal. 4th at 881. "[The] books do not depict plaintiffs literally . . . . [D]efendants essentially sold . . . DC Comics depicting fanciful, creative characters, not pictures of the Winter brothers. This makes all the difference." *Id.* at 890, 892. The claim of false endorsement was not dismissed but remanded to the Court of Appeal. *Id.* at 886-887. *Winter* confirms that where the identity of the celebrity is a literal imitation using the fame of the celebrity for commercial gain, the First Amendment does not protect it or false statements or false endorsements.

[8] "[V]ideo games are expressive works entitled to as much First Amendment protection as the most profound literature. However, Activision's First Amendment right of free expression is in tension with the rights of No Doubt to control the commercial exploitation of its members' likenesses." *No Doubt*, 192 Cal. App. 4th at 1029 (internal citation omitted).

Id. at 1034. Defendants admit that they wanted to make the de Havilland character in "Feud" as much like the real celebrity as possible in order to give the docudrama authenticity. Murphy Decl. ¶¶ 14-15. They use de Havilland's Identity, doing what she does in her real professional life, capitalizing on her fame. The fact that the words attributed to her and the purported endorsement are false does not transform the character into anything other than an exact depiction of de Havilland. *No Doubt* 192 Cal. App. 4th at 1034; Casady Decl. ¶ 11. This depiction of de Havilland was not transformative as a matter of law. *Id.*

3. The Public Interest and Public Affairs Affirmative Defense Doctrines Do Not Preclude Suits Where Plaintiff Offers Proof of Intentional or Reckless Disregard of the Truth

"As we have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published, we must be guided by circumstantial evidence." *Eastwood*, 123 F.3d at 1253 (affirming jury verdict, holding actual malice satisfied by circumstantial evidence that magazine did not properly investigate authenticity; defendants' claims that they thought the article portrayed Eastwood sympathetically did not defeat malice); *Paulus v. Bob Lynch Ford, Inc.*, 139 Cal. App. 4th 659, 675 (2006) ("[S]ince it is rare that there will be a 'smoking gun' admission of improper motive – malice is established 'by circumstantial evidence and inferences drawn from the evidence.'") (citations omitted).

Plaintiff has presented legally sufficient evidence showing Defendants' knowing or reckless disregard for the falsity of their depiction of Plaintiff in "Feud."[9] Not only does she deny the statements made in "Feud," but her reputation is based in large part on not engaging in such gossip. Casady Decl. ¶ 11; Ladd Decl. ¶ 17; ODH Decl. ¶¶ 4-5; ODH Supp. Decl. ¶¶ 3-7. Further, it is a standard protocol in the film industry to obtain consent from a living celebrity before using her Identity in a way to suggest she was endorsing the film. Casady Decl. ¶¶ 11, 13; Ladd Decl. ¶¶ 15-

[9] "[F]alse statements uttered with actual malice serve no public interest, and where the strike opponent has demonstrated the requisite probability of success in showing such malice, as here, her complaint falls outside the purpose of the anti-SLAPP statute – indeed, it is not a SLAPP suit at all." *Nguyen-Lam*, 171 Cal. App. 4th at 873. Based on the facts here, Defendants cannot meet their burden of showing that the first prong of the anti-SLAPP statute is satisfied.

16. Defendants, while touting "extensive" research, which they claim was "consistent with the historical record," and portrayed Plaintiff in a "complementary" way, never obtained consent or talked to Plaintiff to verify any statements. Minear Decl. ¶¶ 11, 15; Murphy Decl. ¶¶ 14-15; ODH Decl. ¶ 4; Motion at 2; Zam Decl. ¶¶ 9-11. However, Defendants did ask one living celebrity, Don Bachardy, who was used in a minor way, for his consent. Decl. of Don Bachardy ¶ 5. Defendants also requested the consent of Joan Crawford's heirs. Smith Decl. Ex. 7. Defendants admit there was no interview of de Havilland at the 1978 Academy Awards about the private relationship of Davis and Crawford, and that they made this up. *Id.*; *see also* Section (C)(2) *infra*. Further, they do not deny that Plaintiff did not comment on the drinking habits of Sinatra, that they did not contact Plaintiff, and that she did not endorse "Feud."[10] *Id.*; ODH Supp. Decl. ¶ 2-4; Decl. of Gisele Galante ("Galante Decl.") ¶ 4. Defendants clearly knowingly or recklessly disregarded the falsity of their depiction of Plaintiff, including a fake interview and false endorsement.[11] *Browne*, 611 F. Supp. 2d at 1062; *Eastwood*, 123 F.3d at 1257; Casady Decl. ¶¶ 11, 13.

The cases cited by Defendant, including *Davis v. Costa-Gravias*, 654 F. Supp. 653 (S.D.N.Y. 2015) (docudramas are "appropriate and unexceptional *if the content is not distorted when dealing with public and political figures*.") (emphasis added), to support their position are not California cases, are therefore not binding authority for this Court, and are interpreting law and statutes which are irrelevant to this action. The direct and circumstantial evidence shows

///

///

---

[10] Defendants suggest that they have license to have Plaintiff call her sister a "bitch," even if she never did this. Motion at 9-10. They cite no authority for this proposition. The references they cite for her alleged use of the word "bitch" include two books, which mention Plaintiff only in passing, and they have her use the word "bitch" to describe only a role in a movie and a director who was mistreating the actors, not her sister or a friend in public. Supp. Decl. of Cort Casady ("Casady Supp. Decl.") ¶¶ 6-7. Neither book has a reference to a firsthand source, and Defendants did not verify with Plaintiff when they could have. *Id.*; ODH Supp. Decl. ¶¶ 2, 7.

[11] If Defendants created a false impression that Plaintiff endorsed "Feud," the causes of action have a lower level of protection, thus even if Plaintiff does not offer proof of malice, her causes of action may still stand. *Comedy III*, 25 Cal. 4th at 396 ("The right of publicity is often invoked in the context of commercial speech when the appropriation of a celebrity likeness creates a false and misleading impression that the celebrity is endorsing a product. . . . [T]he First Amendment does not protect false and misleading commercial speech, and . . . the right of publicity may often trump the right of advertisers to make use of celebrity figures.").

unequivocally that Defendants knowingly published false statements about de Havilland. *See* Section (B)(3) *supra.*[12]

C. Plaintiff Has a Probability of Success on Her False Light Claim

1. Elements for False Light

A claim for violation of the right of privacy (false light) consists of "a publication that is false, defamatory, unprivileged, and has a tendency to injure or cause special damage." *Hawran v. Hixson*, 209 Cal. App. 4th 256, 277 (2012) (affirming trial court's denial of an anti-SLAPP motion where plaintiff had probability of success on false light and defamation claims based on false statements in press release, which itself was a matter of public interest). Defendants contest only de Havilland's ability to prove falsity and defamation. Motion at 8-12.

Falsity is proven if Defendants' actions portray Plaintiff in a "false light" or give a "false impression" of Plaintiff. *Solano*, 292 F.3d at 1082. Defamation is proven if a reasonable person in the position of plaintiff would be highly offended by the statements. *Id.* at 1082; 1084-84.[13] Injury for false light damages includes economic harm. *Kanarek v. Bugliosi*, 108 Cal. App. 3d 327, 336 (1980). Plaintiff offers substantial evidence of each element false light, and there is no affirmative defense on which Defendants can prevail as a matter of law.[14]

///

---

[12] *Seale v. Gramercy Pictures*, 964 F. Supp. 918 (E.D. Penn. 1997) is also not on point. In *Seale*, the Court held that malice was not satisfied as defendants had consulted plaintiff's own book for the challenged statements, unlike here. *Id.* at 927-29.

[13] Defendants assert that defamation is a question of law to be decided by the Court. Motion at 10. However, the case cited by Defendants stands for this proposition only "[i]f the material complained of is not fairly susceptible of a defamatory meaning . . . ." *Polygram Records, Inc. v. Superior Court*, 170 Cal. App. 3d 543, 551 (1985). "If the language is capable of two meanings . . . one defamatory, it is the province of the trier of fact to determine in which sense the language was used and understood." *Id.*; *see also ZL Techs., Inc. v. Does 1-7*, 13 Cal. App. 5th 603, 624-25 (2017). Portrayal of Plaintiff as a gossip who publicly uses vulgar language is defamatory. *Burnett v. Nat'l Enquirer, Inc.*, 144 Cal. App. 3d 991, 1013 (1983) (Plaintiff's portrayal as a rude drunk was defamatory).

[14] Under California law, privilege is an affirmative defense. *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1217 (C.D. Cal. 2004). To meet this, Defendants would have to show that the communication was made in judicial or quasi-judicial proceedings or that it was a "made without malice to protect a recognized interest" for qualified privilege. *Beroiz v. Wahl*, 84 Cal. App. 4th 485, 492-93 (2000). Defendants offer no evidence of any such privilege. *Eastwood*, 123 F.3d at 1249; ODH Decl. ¶ 4; *see also* Section (B)(3) *supra.*

2. Evidence in Support of False Light Comes from Defendants and Plaintiff

Defendants clearly, and as they admit, publicized "Feud," using the character of de Havilland as if she had made the statements and taken the actions they attribute to her. Zam Decl. ¶¶ 11-14; Murphy Decl. ¶¶ 7, 14-20; Minear Decl. ¶¶ 7-15; Berkley Decl. Ex. 54; Gibbons Decl. ¶¶ 10-13. Specifically, Defendants admit "Feud" places de Havilland in a counterfeit interview, one which never happened. ODH Decl. ¶ 5; Minear Decl. ¶¶ 7, 15; Zam Decl. ¶¶ 9, 11; Gibbons Decl. ¶ 10; Ladd Decl. ¶ 17; Casady Decl. ¶ 11. Defendants admit there was no interview of de Havilland in 1978 at the Academy Awards about the private relationship of Davis and Crawford, and that they made this up. *See generally* Motion; *see also* Minear Decl. ¶¶ 7, 15; Zam Decl. ¶¶ 9, 11; Gibbons Decl. ¶ 10. In that fake interview, de Havilland gossips and makes negative comments about Davis and Crawford's personal life. Casady Decl. ¶ 11; Ladd Decl. ¶ 17; Berkley Decl. Ex. 54 ("Feud" episode 7). De Havilland never said these things. Casady Decl. ¶ 11; ODH Decl. ¶ 5; ODH Supp. Decl. ¶ 3; Minear Decl. ¶¶ 7, 15. "Feud" also has de Havilland call her sister, actor Fontaine, a "bitch" to others in the profession. Minear Decl. ¶¶ 15, 19; Murphy Decl. ¶¶ 16-18. She did not do this. ODH Decl. ¶ 6; ODH Supp. Decl. ¶ 5-6.[15] "Feud" has de Havilland sniping to Davis about Sinatra's drinking habits. Casady Decl. ¶ 11; Minear Decl. ¶ 15; Berkley Decl. Ex. 54. This is not true. Minear Decl. ¶ 15; ODH Supp. Decl. ¶ 4; Galante Decl. ¶ 5. "Feud" and its promotional material is designed to give the impression that Plaintiff participated in and endorsed "Feud," and the hurtful things her character says in the show. Casady Decl. ¶¶ 11, 13; Ladd Decl. ¶ 17. It gives the impression that today de Havilland is complicit in having herself in real life make such

[15] Defendants assert that "Dragon Lady," as Plaintiff referred to her sister in an interview after her sister's death, and on her 100th birthday, is a synonym to "bitch." Defendants claim that having Plaintiff call her sister a "bitch," is true. Motion at 9. They cite to the Merriam Webster definitions of the two words. *Id.* at 9 n.8. However, their own citations show the falsity. "Dragon Lady" is defined as "an overbearing or tyrannical woman; also: a glamorous often mysterious woman[,]" and "bitch" as "**a** *often offensive*: a lewd or immoral woman[;] **b** *often offensive*: a malicious, spiteful, or overbearing woman – sometimes used as a generalized term of abuse[.]" Merriam Webster, https://www.merriam-webster.com/. Clearly the two words are not equal, and the change in terminology from "Dragon Lady" to "bitch" is not a "slight" or "minor" inaccuracy. Motion at 8-9 (quoting *Jackson v. Mayweather*, 10 Cal. App. 5th 1240, 1262-63 (2017); Casady Supp. Decl. ¶ 8. There is a vulgar "F word" for "intercourse," but no one would reasonably suggest that the two have the same implication.

statements, and also gives the impression that she endorsed that dialogue now in a television program. Casady Decl. ¶¶ 11, 13; Ladd Decl. ¶ 17. In fact, Plaintiff did not endorse "Feud" and she does not approve of the characterizations or comments made by "Feud," particularly with respect to her. ODH Supp. Decl. ¶¶ 2, 9-10.

Defendants "dressed up" the fake statements in the guise of real, historical events to make the false statements appear authentic. Murphy Decl. ¶ 16 (discussing adding *Fontaine's* claim (which is not true) that Plaintiff broke her collarbone to the "bitch sister" comment); Minear Decl. ¶¶ 14-15 ("we made sure not to put the de Havilland character in places where [she] did not actually appear . . . . Ms. de Havilland attended the 1978 Academy Awards. . . . Ms. de Havilland was not actually interviewed at the 1978 Academy Awards . . . ."); Casady Decl. ¶ 11 ("There is an interview set at the 1978 Academy Awards ceremony, where Miss de Havilland did present an award. . . . There are scenes with Miss de Havilland at the 1963 Academy Awards where the real Miss de Havilland did present the Best Picture Award. . . . great attention [is] paid to the character of Miss de Havilland in "Feud," to give the film extra realism . . . .").

Not only are the statements and conduct that "Feud" attributes to de Havilland false, but they were highly offensive to her. ODH Decl. ¶¶ 5-7; ODH Supp. Decl. ¶¶ 3-7, 9-10; Galante Decl. ¶ 5. The statements cast de Havilland in an untrue and ill-mannered fashion, which contradicts the professional reputation built over many decades of being a loyal friend, and person of integrity and restraint. They are not minor or insignificant.[16] Casady Decl. ¶¶ 11-12; Roesler Decl. ¶¶ 15, 20-21. "Feud" portrayed Plaintiff as a gossip, using vulgar language with regard to others.[17] Minear Decl.

---

[16] None of the cases Defendants cite hold that falsehoods of the kind which Defendants admit to are not actionable. In *Carver v. Bonds*, 135 Cal. App. 4th 328, 351-52 (2005), there was a minor exaggeration of the number of times complaints were filed against Plaintiff. In *Gilbert v. Sykes*, Plaintiff plastic surgeon told Defendant that she would "look natural after surgery and that we didn't want to make too such change." 147 Cal. App. 4th 13, 30 (2007). The Court held Defendant's statement online that she thought the surgery changes would be "subtle" was protected by the "truth defense." *Id.* In *Jackson*, Defendant's "exaggerated description of the extent of [Plaintiff]'s cosmetic surgery was, in substance, truthful" and plaintiff put on no expert evidence to the contrary. *Jackson*, 10 Cal. App. 5th at 1265.

[17] Defendants filed outtakes from 1944, Berkley Decl. Exs. 44, 46, 48. These show a number of stars, including Davis, Ronald Reagan, Jimmy Stewart, using expletives when they missed a line or made a mistake. On this video is a young Plaintiff using expletives directed to herself, when she missed a line, and not in public. This tasteless use of private moments, never meant by the stars,

¶¶ 7, 15; Zam Decl. ¶¶ 9, 11; Ladd Decl. ¶ 17; Casady Decl. ¶¶ 11-13; *Eastwood*, 123 F.3d at 1249 (claim that Eastwood was humiliated by the suggestion that he would give an interview to the sensationalist publication, the "National Enquirer," was sufficient for damages award for defamation).

Defendants' conduct here clearly has a tendency to injure Plaintiff or cause special damages. Roesler Decl. ¶¶ 21-25; Ladd Decl. ¶ 17; Casady Decl. ¶¶ 11-13. Plaintiff has also incurred costs in attempting to mitigate the false statements. Smith Decl. ¶¶ 4-5. Plaintiff has offered sufficient evidence of actual malice. *See* Section (B)(3) *supra*.[18]

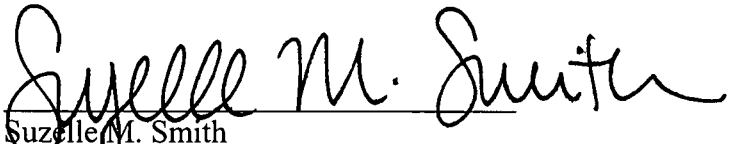
III. CONCLUSION

Based on controlling law and the clear and convincing evidence submitted by all parties, viewed in the light most favorable to the non-moving party, the Motion should be denied in its entirety.

Dated: September 15, 2017

Respectfully submitted,
HOWARTH & SMITH

DON HOWARTH
SUZELLE M. SMITH
ZOE E. TREMAYNE

By: 
Suzelle M. Smith
Attorneys for Plaintiff
OLIVIA DE HAVILLAND, DBE

---

including Plaintiff, to be made public, obviously does not show that Plaintiff is vulgar, and or that she would ever use such a term to refer to her sister or other actors. Casady Supp. Decl. ¶ 5. Indeed, even Defendants claim that is not the impression they know to be true of her real reputation. Minear Decl. ¶ 18; Murphy Decl. ¶¶ 15, 19; Zam Decl. ¶ 14. The outtakes are completely irrelevant and were not used in "Feud."

[18] Defendants argue that as "Feud" is classified by its writers as a "docudrama," it is per se unreasonable to for an audience to think the statements are verifiable fact. Motion at 10. Defendants cite to *Partington v. Bugliosi*, 56 F.3d 1147 (9th Cir. 1995), where the Court, interpreting Hawaii law, held the statements at issue were not defamatory as they were the personal viewpoint of Defendant and were not objectively verifiable facts. *Id.* at 1155-61. The case at issue applies California law, and includes substantial evidence from Defendants and Plaintiff that the endorsement and words spoken were not true. Casady Decl. ¶¶ 11-13; Ladd Decl. ¶ 17; ODH Decl. ¶¶ 4-7; ODH Supp. Decl. ¶¶ 2-10; Zam Decl. ¶¶ 9-11; Murphy Decl. ¶¶ 13; 16-18; Minear Decl. ¶¶ 7, 9-10, 13-19; Gibbons Decl. ¶¶ 10-13.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 523 W. Sixth Street, Suite 728, Los Angeles, California 90014.

On September 15, 2017, I served the foregoing document described as:

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S THIRD AMENDED COMPLAINT PURUSANT TO CALIFORNIA'S ANTI-SLAPP STATUTE, CAL. CIV. PROC. CODE § 425.16

on interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

Aaron Wais, Esq.
Robert Rotstein, Esq.
Mitchell Silberberg & Knupp LLP
11377 W. Olympic Boulevard
Los Angeles, CA 90064

Attorneys for FX Networks, LLC and Pacific 2.1 Entertainment Group, Inc.

[ ] (BY FEDERAL EXPRESS) I caused such document to be transmitted with fees thereon fully prepaid via federal express to the offices of the above addressees.

[X] (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

[X] (BY E-MAIL) I caused such document to be transmitted electronically to the e-mail address(es) of the person(s) set forth above.

[X] (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 15, 2017, at Los Angeles, California.

Alice Gilbert