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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES — CENTRAL DISTRICT

OLIVIA DE HAVILLAND, DBE, an individual,

Plaintiff,

v.

FX NETWORKS, LLC, a California limited liability company; PACIFIC 2.1 ENTERTAINMENT GROUP, INC., a California corporation; and DOES 3 through 100, inclusive,

Defendant.

CASE NO. BC 667011

Date: September 29, 2017
Time: 8:30 a.m.
Location: Dept. 42
Judge: Honorable Holly E. Kendig

Reservation Number: 170727238249

REPLY IN SUPPORT OF DEFENDANTS FX NETWORKS, LLC AND PACIFIC 2.1 ENTERTAINMENT GROUP, INC.'S MOTION TO STRIKE PLAINTIFF OLIVIA DE HAVILLAND'S THIRD AMENDED COMPLAINT PURSUANT TO CALIFORNIA'S ANTI-SLAPP STATUTE, CODE CIV. PROC. § 425.16

[Declaration of Casey LaLonde; Evidentiary Objections; and Response to Evidentiary Objections filed concurrently]

File Date: June 30, 2017
Trial Date: November 27, 2017

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I. INTRODUCTION

The right of publicity cannot, consistent with the First Amendment, be a right to control a celebrity's image by censoring portrayals she finds disagreeable. *See Comedy III Prod. v. Gary Saderup, Inc.*, 25 Cal.4th 387, 403 (2001). Nor can a plaintiff use a false light claim to impede dramatization of historical events merely because she disapproves. By asserting that the creator of a historical docudrama may not make the work without the consent of all living persons portrayed, Plaintiff advocates for a dangerous right of censorship. Her claims, if accepted, would strike at the heart of docudrama, which depends on imagined dialogue and scenes to tell stories inspired by history and real people.[1] Plaintiff has not met her burden of establishing by competent, admissible evidence the probability that she will prevail on any of her claims. She therefore fails to satisfy the second prong anti-SLAPP statute.[2] The Third Amended Complaint should be stricken.

II. THE RIGHT OF PUBLICITY CLAIMS SHOULD BE STRICKEN

A. Plaintiff's Depiction In *Feud* Is Constitutionally Protected Speech

"Under the First Amendment, a cause of action for appropriation of another's name and likeness may not be maintained against expressive works, whether factual or fictional." *Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118, 1123 (N.D. Cal. 2002) (*citing Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal.3d 860 (1979)) (Bird, C.J., concurring); *see also Sarver v. Chartier*, 813 F. 3d 891, 905-06 (9th Cir. 2016) (plaintiff's portrayal in film was "fully protected by the First Amendment"). *Guglielmi* held that the First Amendment protects against right of publicity claims even where the defendant allegedly depicted without consent a celebrity in a dramatized film and in related advertising; knew the film did not truthfully portray the celebrity's life; and included the celebrity to increase the film's value. 25 Cal.3d at 862-64. Under *Guglielmi* and its progeny,

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[1] Docudramas like *FEUD: Bette and Joan* ("*Feud*") are essential forms of expression that greatly contribute to the public discourse. *E.g., Argo, The King's Speech, Spotlight, Schindler's List, Chariots of Fire, Patton* (Oscar winners for Best Picture); *Hidden Figures, The Big Short, Hacksaw Ridge, Bridge of Spies, Selma, American Sniper, American Hustle, Captain Phillips*, and *Dallas Buyers Club* (Oscar nominees since 2013). Plaintiff herself has portrayed real people. *See, e.g., Royal Romance of Charles and Diana* (as the living Queen Mother), *The Woman He Loved* (as Bessie Merryman), *Anastasia: The Mystery of Anna* (as Dowager Empress Maria).

[2] Her footnote 9 notwithstanding, Plaintiff effectively concedes that Defendants have met the first prong of the anti-SLAPP statute. Her only authority in challenging prong one, *Nguyen-Lam v. Cao*, 171 Cal. App. 4th 858, 866 (2009) was decided under the *second* prong.

Defendants' depiction in *Feud*, an expressive docudrama, enjoys absolute First Amendment protection as against Plaintiff's right of publicity claims, both of which should be stricken.[3]

Clearly recognizing that *Guglielmi* governs use of celebrities in motion pictures, Plaintiff argues that the Byrd concurrence was "rejected" by *Comedy III*. Opp. 4. In fact, *Comedy III* cited *Guglielmi* as binding authority. 25 Cal. 4th at 396, n.7 ("Chief Justice Bird's views in Guglielmi commanded the support of the majority of the court.").[4] *Comedy III* cites *Guglielmi* favorably throughout the opinion. *Id.* at 397, 406 (quoting *Guglielmi*: "right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire. Rather, prominence invites creative comment"; movie in *Guglielmi* example of constitutionally protected work).[5]

Unable to cite any law in her favor, Plaintiff invokes purported industry custom to engraft a consent requirement for portraying a celebrity in a docudrama. Her only evidence is a purported expert who contends with no foundation that consent is always mandated yet gives not a single instance where consent was obtained. Ladd Decl.[6] Moreover, her reliance on consent "establishes nothing, other than the unfortunate reality that many filmmakers may deem it wise to pay a small sum up front for a written consent to avoid later having to spend a small fortune to defend

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[3] This is also true for any advertising related advertising. Mot. 15, n.13; *Winter v. D.C. Comics*, 30 Cal. 4th 881, 891 (2003) (relying on concurrence in *Guglielmi* for the proposition that "if the work is sufficiently transformative to receive legal protection, 'it is of no moment that the advertisements may have increased the profitability of the [work]'"); *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal. App. 4th at 325-26 (constitutional protection "not diminished when respondents advertised then sold their work as mass public entertainment").

[4] *Eastwood v. Sup. Ct.*, 149 Cal. App. 3d 409 (1983), does not discuss *Guglielmi's* concurrence. Plaintiff say *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal. App. 4th 318, 324-25 (1997) turned on if plaintiff's identity "had been used at all" (Opp. 5), but it held: "Because respondents were creating a fictionalized artistic work, their endeavor is constitutionally protected."

[5] None of Plaintiff's cited cases avail her. In *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 564 (1977), defendant filmed plaintiff's "entire act" (a human cannonball performance) and aired it on television. *Guglielmi* distinguished *Zacchini*: "Respondents did not surreptitiously film a performance by Valentino and incorporate that film in a motion picture. They did not appropriate 'an entire act for which the performer ordinarily gets paid...'" 25 Cal. 3d at 875. *Melvin v. Reid*, 112 Cal. App. 285, 292 (1931) concerned a claim for public disclosure of private facts; the court ***dismissed*** plaintiff's publicity claim. *Browne v. McCain* 611 F. Supp. 2d 1062 (C.D. Cal. 2009), involved an explicitly misleading political *commercial*. *Id.* at 1070-71.

[6] While Plaintiff argues that Defendants licensed Don Bachardy's name and likeness for *Feud*, Bachardy makes clear that the license was for use his *copyrighted painting*, a wholly separate issue. Bachardy Ex. A. Finally, Plaintiff asserts that Defendants requested consent from Joan Crawford's grandson, Casey LaLonde. Opp. 11; Smith Decl., ¶ 12, Ex. 7. This is a brazen misstatement. Defendants neither asked for nor received LaLonde's consent. LaLonde ¶¶ 2-10.

unmeritorious lawsuits such as this one." *Polydoros,* 67 Cal. App. 4th at 326. As a leading commentator has observed:

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

McCarthy, Thomas J., 2 *Rights of Publicity & Privacy* (2017 ed.) at § 8:64, p. 205. Indeed, *Guglielmi* and its progeny stand for the rule that consent is *not* required to depict a celebrity in a motion picture. In each of those cases, the plaintiff unsuccessfully challenged lack of consent.

Neither is there merit to Plaintiff's claim that the depiction of her in *Feud* is a commercial endorsement and therefore outside the purview of the First Amendment. *E.g.*, Opp. 3, 6-7.[7] She proffers no admissible evidence for this assertion but merely relies on the inadmissible declaration of her expert, who avers only that "the construction of 'Feud's' storyline is designed to appear to the viewer as if [Plaintiff] endorsed the production and its content" and that "'*Feud* was written and produced to lead viewers to believe that [Plaintiff] endorsed the production." Casady ¶¶ 11, 13. Neither Plaintiff nor her expert identifies a single specific statement or element in *Feud* for this conclusion. So, Plaintiff's claim boils down to the contention that her mere depiction in *Feud* constituted a false endorsement. But a false endorsement in an expressive work *cannot* be implied unless the use is a disguised ad unrelated to the work and, thus, explicitly misleading. *See Guglielmi*, 25 Cal.3d at 865, n. 6 (protected use of celebrity's name in movie differs from entirely *unrelated* use of celebrity name – *e.g.*, a "Rudolph Valentino's Cookbook," with recipes unrelated to Valentino); *Comedy III*, 25 Cal. 4th at 399 (images on T-shirts not endorsement); *cf. Winchester Mystery House, LLC v. Global Asylum, Inc.*, 210 Cal. App. 4th 579, 593 (2012) (use of trademark in motion picture not actionable unless explicitly misleading). While Plaintiff relies *Eastwood, supra*, that case highlights the difference between her claim and the actionable use of a celebrity in a commercial "subterfuge or coverup." In *Eastwood*, defendant fabricated a news article about plaintiff so as to put his photo on the cover; plaintiff stated a right-of-publicity claim because the

[7] Despite her assertion (Opp. 3), *Feud*'s economic motivation does not make it commercial speech. *Comedy III,* 25 Cal.4th at 396 ("[An expressive activity] does not lose its constitutional protection because it is undertaken for profit."); *Sarver*, 813 F. 3d at 905 (movie not commercial speech).

use was "a subterfuge or coverup" to sell the tabloid. 149 Cal. App. 3d at 420.[8] Here, Plaintiff is depicted in a show about a historical period in which she actively participated, a use closely related to *Feud*—just as the depiction of Valentino was related to the movie in *Guglielmi*. 25 Cal. 3d at 865, n.6. There is no endorsement.

Even if Plaintiff could make *Feud* out to be a false endorsement, she would have to show actual malice, namely that Defendants knew and intended that the viewer would perceive her as endorsing *Feud*. *See* § IV, *infra*. She has presented no evidence of malice, much less clear and convincing evidence. *Id.* Certainly, nothing in *Feud* suggests an endorsement. Moreover, as a docudrama, *Feud* does not make a statement about endorsement at all. *See Guglielmi*, 25 Cal. 3d at 871 (Plaintiff's "effort to import the 'actual malice' standard of liability in defamation actions [] is misguided"; "[a]ll fiction, by definition, eschews an obligation to be faithful to historical truth.") As in *Guglielmi*, Plaintiff's reliance on actual malice cannot save her right of publicity claims.

Because *Feud* is constitutionally protected, her right of publicity claims should be stricken.

B. *Feud* is Transformative[9]

Having wrongly dismissed the dispositive *Guglielmi* case as not being good law, Plaintiff argues that she can prevail because her depiction in *Feud* is not transformative under *Comedy III* and *No Doubt, infra*. In fact, those cases establish the opposite.

The transformative-use test is designed to ensure that the right of publicity, essentially an economic right, does not impinge on the critical First Amendment right to create expressive works. *Comedy III*, 25 Cal. 4th at 391. Thus, the critical determination is "whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question." *Id.* at 406. Transformative expression can take many forms. *Id.* A depiction itself can be transformative (*e.g.*, Warhol's Monroe paintings discussed in *Comedy III*) or transformed by

[8] *Solano v. Playgirl*, 292 F.3d 1078 (9th Cir. 2002) and *Eastwood v. National Enquirer*, 123 F.3d 1249 (9th Cir. 1997), also involved explicitly misleading covers.

[9] Irrespective of which party has the burden of proof on affirmative defenses, the Court can resolve Defendants' First Amendment defenses "as a matter of law simply by viewing the work in question." *Winter v. DC Comics*, 30 Cal.4th 881, 891-92 (2003).

context. *No Doubt v. Activision Pub., Inc.* 192 Cal. App. 4th 1018, 1034 (2011) ("[W]hen the context into which a literal celebrity depiction is placed creates something new, with a further purpose or different character, altering the first [likeness] with new expression, meaning, or message, the depiction is protected by the First Amendment.") (citations omitted). Plaintiff's depiction in *Feud* is transformative both itself and in context.

As to the entire work, *Feud*'s writers created new expression by dramatizing a decades-old rivalry so as to comment on modern-day Hollywood and current social issues (*e.g.*, sexism, misogyny), in which Plaintiff played a historical role. Mot. 1, 4, 7. The de Havilland character was written from the perspective of writers who viewed past events through the lens of present day cultural issues. In contrast to the static, photo-realistic image of the Three Stooges on T-Shirts in *Comedy III* and the digital reproductions of the plaintiffs in *No Doubt*, Oscar-winner Zeta-Jones' performance of de Havilland itself was not literal. Zeta-Jones used her unique talents to portray Plaintiff forty years ago in an interpretive performance that she artistically rendered under the direction of a film director and further transformed via artistic viewpoint, music, lighting, cinematography, and editing. Nothing about Zeta-Jones' depiction of a figure was part of the history told is analogous to the computer-generated avatars that are mere reproductions of celebrities and do not meld with the other elements of the work. *No Doubt, supra.*[10] Thus, Plaintiff's depiction in *Feud* is transformative under the primary test set forth in *Comedy III.*

Feud is also transformative under the secondary test: its marketability and economic value do not derive primarily from Plaintiff's fame and depiction in *Feud.* Mot. 14-15; *See Winter*, 30 Cal. at 889. Plaintiff was a secondary character in a story about *Crawford* and *Davis.* In the nearly 400 minutes of the series, Plaintiff appears in less than twenty. As evidenced by its subtitle, content, and marketing campaign (Mot. 14-15), the primary economic value of *Feud* clearly derived from the creators and principal cast, and none of Plaintiff's evidence overcomes this secondary test. For this additional reason, her right of publicity claims must be stricken.

[10] Plaintiff asserts that Defendants somehow conceded in the Motion that they "depicted her falsely." Opp. 8. In fact, the Motion merely refers to Plaintiff's *allegation* that she was depicted falsely. Mot. 14." In alleging that she was depicted "falsely," she implicitly acknowledges that her portrayal was not a literal, fungible reproduction of her persona.

III. THE FALSE LIGHT CLAIM SHOULD BE STRICKEN

To sustain her false light claim, Plaintiff must prove a published and specific statement of fact that is false, defamatory,[11] and unprivileged; and that has a natural tendency to injure or that causes special damage. Mot. 8. Plaintiff has not met her burden in many ways.

First, a claim for false light will not lie unless the challenged statements are "sufficiently factual to be susceptible of being proved true or false." *Brodeur v. Atlas Entm't, Inc.*, 248 Cal. App. 4th 665, 680 (2016). Because *Feud* is a docudrama, reasonable viewers will not assume that its statements represent assertions of verifiable fact. *Id.* Indeed, "[t]he United States Supreme Court has noted that statements made in 'a so-called docudrama or historical fiction' should not be accepted unquestioningly." *Partington v. Bugliosi*, 56 F.3d 1147, 1154-55 (9th Cir. 1995), *citing Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 512-13 (1991).[12]

Here, *Feud* is clearly dramatized. The imagined interview occurs backstage *as the 1978 Academy Award ceremony proceeds*. Reasonable viewers would not assume that a documentary of Crawford's life is actually being filmed backstage during the Oscars or that depictions in that interview make assertions of verifiable fact. The interview shows a clapboard between "scenes," off-screen discussion, makeup artists, and dissolves into the past. In the final episode, a group of actors, including de Havilland, Blondell, and Davis, are backstage at the Oscar ceremony watching the in-memoriam tribute, which includes Crawford. The director of the documentary walks over and tries to convince Davis to give an interview; she declines. This fanciful scene again signals to the viewer that the interviews are dramatized. Likewise, the use of the word "bitch" and the Sinatra joke are clearly rhetorical flourishes. Plaintiff's false light claim fails for this reason alone.

Second, Plaintiff must show that, *viewed as a whole*, *Feud* defames her. *Sarver*, 813 F.3d at 907-09. Plaintiff alleges that *Feud* portrays her contrary to her "professional reputation" of

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[11] Plaintiff (Opp. 12) cites *Solano*, 292 F.3d at 1082, 1084 for the proposition that "defamation is proven if a reasonable person *in the position of plaintiff* would be highly offended by the statements." In fact, *Solano* describes the element as "something highly offensive that would have a tendency to injure [plaintiff's] reputation." *Id.* at 1082. Plaintiff's mischaracterization is an implicit acknowledgment that the allegedly defamatory statements are not offensive to the reasonable person but only to her. Such statements are not actionable.

[12] Plaintiff dismisses *Partington* as applying Hawaii law but completely ignores *Brodeur*, which applies California law and favorably cites *Partington*.

"being a loyal friend, and person of integrity and restraint," as "a gossip, using vulgar language [about] others," and as somehow endorsing *Feud.* Opp. 13-14. These allegations "do not stand up in light of the [show] as a whole." *Sarver,* 813 F.3d at 906. A reasonable viewer would see the de Havilland character as Davis' wise, respectful friend, as a Hollywood icon with a unique outlook on the past. So even if snippets of dialogue were "unflattering" (they were not), "it does not support the conclusion that [*Feud's*] overall depiction of [Plaintiff] could reasonably be seen to defame [her]." *Id.* at 906. Plaintiff's false light claim should be stricken on this ground, too.

Third, even assuming the Court were to analyze specific statements without the context of the entire work, Plaintiff could still not prevail. To prevail, Plaintiff must specifically identify each allegedly libelous statement, "verbatim." *Vogel v. Felice*, 127 Cal. App. 4th 1006, 1017, n. 3 (2005) ("[W]ords constituting an alleged libel must be specifically identified..."). Each statement must be capable of defamatory meaning and be false, *i.e.*, "diverge[] from the true facts in and to such manner and degree as to produce a more damaging effect on the mind of the reader than would the truth." *Id.* at 1021. At best, Plaintiff has identified only these specific statements:

Use of the Word "Bitch." Plaintiff complains about the de Havilland character referring to Fontaine as her "bitch sister" in a phone call with Davis and saying "I don't do bitches ... Call my sister" in a phone call with Robert Aldrich. Plaintiff fails to proffer admissible evidence that these statements are false. In her declarations, she does not deny *ever* calling her sister a bitch but avers only that she (i) did not tell "*any director or producer* that [her] sister [] was a bitch" (de Havilland ¶ 6); (ii) "never had a conversation *with Bette Davis*" referring to her sister as a "bitch," (Supp. ¶. 5); and (iii) "never had a conversation with *director Robert Aldrich about 'Hush Hush ... Hush Sweet Charlotte,'* wherein [she] used the word 'bitch' or said 'you know how much I hate to play bitches; they make me unhappy.'" (*id.*, 6). Such averments are classic negative pregnants, *i.e.*, "denial[s] of the literal truth of the total statement, but not of [their] substance," which leave open the possibility that she used the word "bitch" or other profanity toward her sister in some setting. *Vogel*, 127 Cal. App. 4th at 1021-22 (by denying only the specific statement at issue – that he "d[id] not owe my wife and kids thousands" – plaintiff "[left] open the possibility of a debt in some other, perhaps substantially equivalent, amount"); *Brodeur*, 248 Cal. App. 4th at 679

(Plaintiff failed to produce admissible evidence that he never made statements attributed to him).

And, Plaintiff admits using the word "bitch" and calling Fontaine "Dragon Lady." Supp. de Havilland Decl. 8; Opp. 13. While Plaintiff claims that she felt she was in a confidential setting when she used profanity on set, *Feud* depicts her using the word "bitch" in confidential settings.[13] Her claim that "bitch" and "Dragon Lady" are not synonymous because some dictionaries define *bitch* as "often offensive" is belied by the dictionaries that define *dragon lady* as "often offensive."[14] Plaintiff has failed to meet her burden as to the falsity of these statements. Neither has Plaintiff shown her use of the word *bitch* regarding her rival sister is capable of defamatory meaning. Mot 10-11. "Rhetorical hyperbole and vigorous epithets are not defamatory, and to label them so would subvert the right to free speech." *Polydoros*, 67 Cal. App. 4th at 326-27.[15]

Sinatra Quip. Plaintiff avers not that she never commented about Sinatra or others drinking alcohol, but only that she never so commented about Sinatra to *Davis* (Supp. ¶. 4). Nor does she deny that she joked about others in private.[16] Thus, she has not proven falsity. *Vogel, supra*. Regardless, portraying her as making the quip is not defamatory.

Dramatized Interview. The mere giving of an interview is not capable of a defamatory meaning. Celebrities give interviews about their lives and interactions with others daily. Moreover, Plaintiff fails to identify any statements in the interview that purportedly defame her or that would be highly offensive to the reasonable person. [17] The de Havilland character compliments Davis, discusses challenges in the studio system, and speaks of the real-life issues facing actresses, particularly as they age. While Plaintiff complains of the dialogue, "There was

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[13] In fact, the conversations depicted in *Feud* are far more private than a movie set, in which directors, other cast members, and crew are present.

[14] *See* https://ahdictionary.com/word/search.html?q=Dragon+lady+&submit.x=0&submit.y=0;, http://www.thefreedictionary.com/Dragon+lady; http://www.yourdictionary.com/dragon-lady.

[15] *Burnett v. National Enquirer*, 144 Cal. App. 3d 991 (1983), is distinguishable. There, defendant published a false news story stating that plaintiff was drunk and disorderly, had a loud argument with the Secretary of State, and spilled wine on a patron. Such a report is in no sense comparable to the dramatized portrayal of Plaintiff using the word "bitch" to refer to her long-time rival.

[16] In fact, de Havilland was widely reported to have a sharp wit and to "put [people] on the pan" in front of the press. Berkley Exs. 19, 27-28. Thus, the "gist and sting" is true.

[17] Despite Plaintiff's repeated references regarding the fictional or counterfeit interview, the U.S. Supreme Court "has never endorsed the categorical rule that false statements receive no First Amendment protection." *United States v. Alvarez*, 567 U.S. 709, 719 (2012).

never a rivalry like theirs. For nearly half a century, they hated each other, and we loved them for it," there is nothing defamatory or highly offensive in attributing to a person this comment, which divulges no private information but mentions a widely reported matter of public knowledge.[18] For these reasons, too, the Motion should be granted as to the false light claim.[19]

IV. PLAINTIFF HAS PROFFERED NO EVIDENCE OF ACTUAL MALICE

Though the Court need not reach the issue, Plaintiff's false light claim also fails because she has not shown, by clear and convincing evidence, probable success on actual malice. For a docudrama, Plaintiff must establish that "alterations of fact in scenes portrayed" were made with "serious doubts of truth of the essence of the telescoped composite." *Davis v. Costa-Gavras*, 654 F. Supp. 653, 658 (S.D.N.Y. 1987); Mot. 11 (citing cases). Moreover, Plaintiff argues defamation by implication. Opp. 13 ("Feud is designed to give the *impression* that Plaintiff endorsed ... *Feud*...."); Opp. 1, 12, n. 13. So, she must also meet the additional heavy burden of proving by clear and convincing evidence that Defendants "either deliberately cast [their] statements in an equivocal fashion in the hope of insinuating a false import to the reader, or that [they] knew or acted in reckless disregard of whether [their] words would be interpreted by the average reader as [false] statements of fact." *Good Gov't Gr. Seal Beach, Inc. v. Sup. Ct.*, 22 Cal.3d 672, 684 (1978).

Unlike the clear false and defamatory "Exclusive Interview" headline in *Eastwood*, the purported false implication (were it to exist at all) in *Feud* arising from her alleged portrayal as a voluntary participant in an interview about Joan and Bette is ambiguous. *See* Opp. 12, n. 13. Plaintiff must show that Defendants *both* acted with knowledge of, or reckless disregard for, the purported false implication of her depiction *and* that they subjectively *intended* for their portrayal of Plaintiff to defame her and to falsely portray her as endorsing *Feud*. Plaintiff has not proffered a shred of such evidence, let alone clear and convincing evidence as to either knowledge or

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[18] Plaintiff also fails to meet her burden of proving the statement is substantially false. She merely says that she never gave an interview in which she talked about the personal relationship of Davis and Crawford; she does not *aver* that she never gave interviews about celebrities or that she never commented publicly about the Davis Crawford feud. Nor could she. *E.g.*, Berkley Exs. 19, 26-29.

[19] Plaintiff has also not pled or proffered competent evidence of extrinsic facts or special damages, required in false light *per quod* cases. *Palm Springs Tennis Club v. Rangel*, 73 Cal. App. 4th 1, 7 (1999). Her only purported damage is an alleged lost license fee for using her in *Feud* but her consent was not needed and such a fee would only relate to her right of publicity claims.

communicative-intent. On the contrary, it is undisputed that *Feud*'s writers investigated, consulted many resources, and subjectively intended to portray—and believed they did portray—Plaintiff favorably and consistently with the historical record. See Mot. 4-5; Murphy ¶¶ 14-20; Minear ¶¶ 16-19; Zam ¶¶ 12-14; *Davis*, 654 F. Supp. at 658 (no actual malice where writers consulted references in dramatizing real life events); *Seale*, 964 F. Supp. at 928-29 (same); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1187 (9th Cir. 2001) (no proof that "defendant subjectively intended that the reader believe plaintiff had endorsed" use).

While Plaintiff asserts that the allegedly actionable statements are purportedly false and injurious to her reputation, this assertion just restates the elements of falsity and defamatory meaning and do not meet her burden of proving actual malice. Equally unavailing are her contentions that Defendants violated "standard protocol in the film industry" by not obtaining Plaintiff's consent and by not consulting her. Opp. 10-11. As noted, no consent to depict Plaintiff in *Feud* was required, so Defendants could not have violated any "standard protocol." Neither is there admissible evidence of a "standard protocol." And violations of "standard protocols" do not constitute actual malice. *Christian Research Institute v. Alnor*, 148 Cal.App.4th 71, 84, 88 (2007). Not even gross negligence satisfies the standard. *Id.* Nor does a purported failure to contact Plaintiff to verify *Feud's* portrayal of her evidence malice.[20] *See Rosenaur v. Scherer*, 88 Cal. App. 4th 260, 278 (2001) (no recklessness by failing to contact plaintiff before publication).[21]

The Court should grant Defendants' motion to strike in its entirety and award fees.

DATED: September 29, 2017

MITCHELL SILBERBERG & KNUPP LLP

By: _____
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Attorneys for Defendants

[20] Plaintiff's cases are inapposite. *Paulus v. Bob Lynch Ford, Inc.*, 139 Cal. App. 4th 659 (2006), was a malicious prosecution, not a defamation, case; the court did not reach the malice issue. *Browne*, a right of publicity case, did not address malice. *Eastwood* actually overturned the jury's finding of malice as to the article in question but affirmed as to the cover of the tabloid, which falsely stated that Eastwood had given an exclusive interview to the Enquirer when, in fact, the editors knew the interview came from a reporter for another publication. 123 F. 3d 1256.

[21] Plaintiff nowhere justifies her unjust enrichment claim. As to her offer to correct pleading deficiencies, once a court determines a cause of action is subject to the statute, amendment is not permitted. *Simmons v. Allstate Ins. Co.*, 92 Cal. App. 4th 1068, 1073-74 (2001).