

1 MITCHELL SILBERBERG & KNUPP LLP
2 ROBERT H. ROTSTEIN (SBN 72452), rxr@msk.com
3 AARON M. WAIS (SBN 250671), amw@msk.com
4 EMILY F. EVITT (SBN 261491), efe@msk.com
5 11377 West Olympic Boulevard
6 Los Angeles, CA 90064-1683
7 Telephone: (310) 312-2000
8 Facsimile: (310) 312-3100

9 Attorneys for Defendants
10 FX Networks, LLC and
11 Pacific 2.1 Entertainment Group, Inc.

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
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

**NOTICE OF MOTION AND MOTION;
MEMORANDUM OF POINTS AND
AUTHORITIES 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**

[Declarations of Ryan Murphy, Timothy
Miner, Michael Zam, Stephanie Gibbons,
James Berkley, and exhibits to each, Notice
of Lodging and manually lodged exhibits
filed concurrently]

File Date: June 30, 2017
Trial Date: None set

FILED
Superior Court of California
County of Los Angeles

AUG 29 2017

Sherril B. Carter, Executive Officer/Clerk
By Marlon Gomez Deputy

ORIGINAL

Mitchell
Silberberg &
Knupp LLP
9211412.3

CIT/CASE: BC667011
LEADER#: 10
FILED #: CCH621759021
FILED: 08/30/17 11:14 AM
CASH: \$435.00
CHECK: \$0.00
CARD: \$0.00

1 **NOTICE OF MOTION AND MOTION**

2 **TO THE COURT, PLAINTIFF OLIVIA DE HAVILLAND, AND ALL COUNSEL**
3 **OF RECORD:**

4 **PLEASE TAKE NOTICE THAT**, on September 29, 2017 at 8:30 a.m. or as soon
5 thereafter as the matter may be heard in Department 42 of the above-entitled Court, located at 111
6 North Hill Street, Los Angeles, California 90012, the Honorable Holly E. Kendig presiding,
7 Defendants FX Networks, LLC ("FX Networks") and Pacific 2.1 Entertainment Group, Inc.
8 ("Pacific 2.1," together with FX Networks, "Defendants") will and hereby do move, pursuant to
9 Code of Civil Procedure Section 425.16 (California's anti-SLAPP statute), for an order striking all
10 causes of action asserted against them in Plaintiff Olivia de Havilland's Third Amended
11 Complaint, filed on August 28, 2017. Pursuant to Code of Civil Procedure Section 425.16(c)(1)
12 and Civil Code Section 3344(a), Defendants also move for an order awarding them their attorney's
13 fees and costs in an amount to be proven through a subsequent application and motion.

14 This Special Motion to Strike is made on the grounds that each of Plaintiff's causes of
15 action "arise[s] from" Defendants' creation, distribution, exhibition and advertising of the
16 television docudrama *FEUD: Bette & Joan* ("Feud"), which are "act[s] ... in furtherance of
17 [Defendants'] right of ... free speech under the United States Constitution or the California
18 Constitution in connection with a public issue." Code Civ. Proc. § 425.16(b)(1); *see also* Memo.
19 in Support, pp. 6-8.

20 For the following independently sufficient reasons, Plaintiff cannot carry her burden of
21 showing a probability of prevailing on any of her four causes of action asserted against Defendants
22 for (1) common law misappropriation of her right of publicity; (2) statutory misappropriation of
23 her right of publicity under Civil Code § 3344; (3) false light invasion of privacy; or (4) unjust
24 enrichment (Code Civ. Proc. § 425.16(b)(1)):

25 1. Plaintiff cannot establish any of the requisite elements for her Third Cause of
26 Action for false light invasion of privacy against Defendants. To prevail, Plaintiff must prove a
27 (a) publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural
28 tendency to injure or that causes special damage. As a public figure, Plaintiff must also prove

1 constitutional (also termed "actual") malice by clear and convincing evidence. Plaintiff, however,
2 cannot carry her burden of showing a probability of proving:

- 3 a. that *Feud's* depiction of her is false (Memo. in Support, pp. 8-10),
- 4 b. that *Feud's* depiction of her is reasonably susceptible of defamatory
5 meaning or that it is reasonably understood as a statement of fact (Memo. in
6 Support, pp. 10-11), or
- 7 c. by clear and convincing evidence that Defendants acted with constitutional
8 malice that is, with knowledge that *Feud's* depiction of Plaintiff was false
9 or with reckless disregard as to whether the depiction was false or not
10 (Memo. in Support, pp. 11-12).

11 2. Plaintiff's First and Second Causes of Action for common law and statutory
12 misappropriation of her right of publicity against Defendants fail as a matter of law because
13 Defendants' depiction of Plaintiff in the television series *Feud* is constitutionally protected free
14 speech against which a right of publicity claim cannot be maintained. Memo. in Support, pp. 12-
15 13.

16 3. Plaintiff's First and Second Causes of Action for common law and statutory
17 misappropriation of her right of publicity against Defendants fail as a matter of law because *Feud*
18 and the subjects addressed therein, including Plaintiff's life, are matters of public interest and, as
19 such, *Feud* falls within the public-interest common law exemption to liability, as well as the
20 statutory "public affairs" exemption to liability (Civil Code § 3344(d)). Memo. in Support, pp.
21 13-14.

22 4. Plaintiff's First and Second Causes of Action for common law and statutory
23 misappropriation of her right of publicity against Defendants fail as a matter of law because
24 *Feud's* depiction of Plaintiff is transformative and, thus, constitutes constitutionally protected free
25 speech against which a right of publicity claim cannot be maintained. Memo. in Support, p. 14-15.

26 5. Plaintiff cannot establish any of the requisite elements for her First and Second
27 Causes of Action for common law and statutory misappropriation of her right of publicity because
28 Plaintiff cannot sustain her burden of showing a probability of proving that *Feud's* depiction of

1 her is false or of proving by clear and convincing evidence that Defendants acted with
2 constitutional malice that is, with knowledge that *Feud's* depiction of Plaintiff was false or with
3 reckless disregard as to whether the depiction was false or not. Memo. in Support, p. 15; *id.*,
4 incorporating by reference the arguments set forth at pp. 8-12.

5 6. Plaintiff's Fourth Cause of Action fails as a matter of law because it is derivative of
6 her other claims and, in any event, there is no separate cause of action in California for unjust
7 enrichment. Memo. in Support, p. 15; *id.*, incorporating by reference the arguments set forth at
8 pp. 8-15.

9
10 This Motion is based on this Notice of Motion and Motion; the accompanying
11 Memorandum of Points and Authorities in support thereof; the concurrently filed Declarations of
12 Ryan Murphy, Timothy Minear, Michael Zam, Stephanie Gibbons, James Berkley and exhibits to
13 each; the concurrently filed Notice of Lodging; those exhibits lodged manually with the Court; the
14 complete files and records in this action; any matters of which the Court may take judicial notice;
15 any reply papers filed by Defendants; any oral argument heard on this Motion; and any other
16 further argument and evidence that Defendants may present at or before the hearing on this
17 Motion.

18 DATED: August 29, 2017

MITCHELL SILBERBERG & KNUPP LLP

19 By: 
20

21 Robert H. Rotstein
22 Attorneys for Defendants
23 FX Networks, LLC and Pacific 2.1
24 Entertainment Group, Inc.
25
26
27
28

TABLE OF CONTENTS

| | | |
|------|--|----|
| I. | INTRODUCTION..... | 1 |
| II. | STATEMENT OF RELEVANT FACTS | 2 |
| A. | Plaintiff Olivia de Havilland | 2 |
| B. | <i>FEUD: Bette and Joan</i> | 4 |
| 1. | <i>Feud's</i> Creation and Reception | 4 |
| 2. | <i>Feud's</i> Depiction of Plaintiff..... | 5 |
| C. | Plaintiff's Allegations | 5 |
| III. | THE COMPLAINT SHOULD BE STRICKEN UNDER CCP § 425.16(b)(1) | 6 |
| A. | Plaintiff's Claims Arise From Protected Activity | 7 |
| B. | Plaintiff Cannot Establish a Probability of Prevailing on Her Claims | 8 |
| 1. | Plaintiff Cannot Prevail on Her False Light Claim (COA 3)..... | 8 |
| a. | <i>Feud</i> does not falsely portray Plaintiff | 8 |
| b. | <i>Feud</i> is not defamatory | 10 |
| c. | Plaintiff cannot demonstrate constitutional (actual) malice..... | 11 |
| 2. | Plaintiff Cannot Prevail on Her Right of Publicity Claims (COAs 1-2)... | 12 |
| a. | Defendants' depiction of Plaintiff is constitutionally protected.... | 13 |
| b. | <i>Feud</i> is a matter of public interest | 13 |
| c. | <i>Feud</i> is transformative..... | 14 |
| d. | Plaintiff cannot prove falsity or actual malice | 15 |
| 3. | Plaintiff Cannot Prevail on Her Unjust Enrichment Claim (COA 4)..... | 15 |
| IV. | DEFENDANTS ARE ENTITLED TO THEIR ATTORNEYS' FEES AND COSTS..... | 15 |
| V. | CONCLUSION | 15 |

TABLE OF AUTHORITIES

Page(s)

CASES

| | |
|---|---------------|
| <i>Arenas v. Shed Media US Inc.,</i> 881 F. Supp. 2d 1181 (C.D. Cal. 2011)..... | 15 |
| <i>Brodeur v. Atlas Entm't, Inc.,</i> 248 Cal. App. 4th 665 (2016)..... | 7, 8, 10, 11 |
| <i>Burstyn v. Wilson,</i> 343 U.S. 495 (1952) | 1 |
| <i>Carver v. Bonds,</i> 135 Cal. App. 4th 328 (2005)..... | 9 |
| <i>Christian Research Institute v. Alnor,</i> 148 Cal. App. 4th 71 (2007)..... | 12 |
| <i>Club Members for an Honest Election v. Sierra Club,</i> 45 Cal. 4th 309 (2008)..... | 6 |
| <i>Comedy III Prods., Inc. v. Gary Saderup, Inc.,</i> 25 Cal. 4th 387 (2001)..... | 12, 14 |
| <i>Daly v. Viacom, Inc.</i> 238 F. Supp. 2d 1118 (N.D. Cal. 2002) | 13 |
| <i>Davis v. Costa-Gavras,</i> 654 F. Supp. 653 (S.D.N.Y. 1987)..... | 11, 12 |
| <i>Donahue v. Warner Bros. Pictures Distr. Corp.,</i> 272 P.2d 177 (Utah 1954)..... | 13 |
| <i>Dora v. Frontline Video, Inc.,</i> 15 Cal.App.4th 536 (1993)..... | 14 |
| <i>Downing v. Abercrombie & Fitch,</i> 265 F.3d 994 (9th Cir. 2001)..... | 12 |
| <i>Gilbert v. Sykes,</i> 147 Cal. App. 4th 13 (2007)..... | 10 |
| <i>Gionfriddo v. Major League Baseball,</i> 94 Cal. App. 4th 400 (2001)..... | 12, 14 |
| <i>Guglielmi v. Spelling-Goldberg Prods.,</i> 25 Cal. 3d 860 (1979)..... | 1, 12, 13, 15 |

TABLE OF AUTHORITIES

(Continued)

Page(s)

| | | |
|----|---|--------|
| 1 | | |
| 2 | | |
| 3 | <i>Hall v. Time Warner, Inc.,</i> | |
| 4 | 153 Cal. App. 4th 1337 (2007)..... | 7, 8 |
| 5 | <i>Hoffman v. Capital Cities/ABC, Inc.,</i> | |
| 6 | 255 F.3d 1180 (9th Cir. 2001)..... | 12, 15 |
| 7 | <i>Hunter v. CBS Broad. Inc.,</i> | |
| 8 | 221 Cal. App. 4th 1510 (2013)..... | 7 |
| 9 | <i>Ingels v. Westwood One Broad. Serv., Inc.,</i> | |
| 10 | 129 Cal. App. 4th 1050 (2005)..... | 8 |
| 11 | <i>Jackson v. Mayweather,</i> | |
| 12 | 10 Cal. App. 5th 1240 (2017)..... | 8, 9 |
| 13 | <i>Kappella v. Kofman,</i> | |
| 14 | 1 Cal. 3d 20 (1969)..... | 8 |
| 15 | <i>Kniesel v. ESPN,</i> | |
| 16 | 393 F.3d 1068 (9th Cir. 2005)..... | 10 |
| 17 | <i>Matthews v. Wozencraft,</i> | |
| 18 | 15 F.3d 432 (5th Cir. 1994)..... | 13 |
| 19 | <i>Melchior v. New Line Prod., Inc.,</i> | |
| 20 | 106 Cal. App. 4th 779 (2003)..... | 15 |
| 21 | <i>Montana v. San Jose Mercury News, Inc.,</i> | |
| 22 | 34 Cal. App. 4th 790 (1995)..... | 14 |
| 23 | <i>Nygård, Inc. v. Uusi-Kerttula,</i> | |
| 24 | 159 Cal. App. 4th 1027 (2008)..... | 7, 11 |
| 25 | <i>Polydoros v. Twentieth Century Fox Film Corp.,</i> | |
| 26 | 67 Cal. App. 4th 318 (1997)..... | 13 |
| 27 | <i>Polygram Records, Inc. v. Superior Court,</i> | |
| 28 | 170 Cal. App. 3d 543 (1985)..... | 10 |
| | <i>Partington v. Bugliosi,</i> | |
| | 56 F.3d 1147 (9th Cir. 1995)..... | 10, 11 |
| | <i>Reader's Digest Assn. v. Sup. Ct.,</i> | |
| | 37 Cal. 3d 244 (1984)..... | 11 |
| | <i>Rogers v. Grimaldi,</i> | |
| | 875 F.2d 994 (2d Cir. 1989)..... | 13 |

TABLE OF AUTHORITIES

(Continued)

Page(s)

| | |
|---|--------|
| <i>Ruffin- Steinback v. de Passe,</i> 82 F. Supp. 2d 723 (E.D. Mich. 2000) | 13 |
| <i>Seale v. Gramercy Pictures,</i> 949 F. Supp. 331 (E.D. Pa. 1996) | 13 |
| <i>Seale v. Gramercy Pictures,</i> 964 F. Supp. 918 (E.D. Pa. 1997) | 11, 12 |
| <i>St. Amant v. Thompson,</i> 390 U.S. 727 (1968) | 11 |
| <i>Steed v. Dep't of Consumer Affairs,</i> 204 Cal. App. 4th 112 (2012) | 7 |
| <i>Tamkin v. CBS Broad., Inc.,</i> 193 Cal. App. 4th 133 (2011) | 7 |
| <i>Tyne v. Time Warner Entm't Co.,</i> 204 F. Supp. 2d 1338 (M.D. Fla. 2002) | 13 |
| <i>Vogel v. Felice,</i> 127 Cal. App. 4th 1006 (2005) | 8 |
| <i>Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi,</i> 141 Cal. App. 4th 15 (2006) | 6 |
| <i>Winter v. DC Comics,</i> 30 Cal. 4th 881 (2003) | 14, 15 |

STATUTES

| | |
|------------------------------------|---------|
| California Civil Code | |
| § 3334(d) | 14 |
| § 3344 | 12 |
| § 3344(a) | 15 |
| California Code of Civil Procedure | |
| § 425.16(b)(1) | 1, 6, 7 |
| § 425.16(c)(1) | 15 |
| § 425.16(e)(3)-(4) | 7 |

TABLE OF AUTHORITIES
(Continued)

Page(s)

OTHER AUTHORITIES

| | |
|--|----|
| Gillett, Amy, <i>Speak English Like an American</i> (2014 ed.) (set forth in Declaration of James Berkley, Ex. 53) | 9 |
| http://www.nytimes.com/2009/11/14/business/media/14vulgar.html | 11 |
| McCarthy, J. Thomas, <i>2 Rights of Publicity and Privacy</i> (2d ed., April 2017) at § 8:74, n. 2 | 4 |
| Merriam Webster Online Dictionary https://www.merriam-webster.com/dictionary/bitch | 9 |
| https://www.merriam-webster.com/dictionary/dragon%20lady | 9 |
| Rest. (2nd) of Torts § 652E | 8 |

1 **I. INTRODUCTION**

2 Expressive works like motion pictures and television shows are essential to discourse in a
3 democratic society. The California Supreme Court has recognized that “entertainment is entitled
4 to the same constitutional protection as the exposition of ideas.” *Guglielmi v. Spelling-Goldberg*
5 *Prods.*, 25 Cal. 3d 860, 867 (1979) (Bird, C.J., concurring); *see Burstyn v. Wilson*, 343 U.S. 495,
6 501 (1952) (“[M]otion pictures are a significant medium for the communication of ideas.”). The
7 television series at the center of this lawsuit – Defendants’¹ critically acclaimed *FEUD: Bette and*
8 *Joan* (“*Feud*”) – is a prime example of an important expressive work. In dramatizing the
9 infamous rivalry between iconic actors Bette Davis and Joan Crawford and how that rivalry played
10 out during the shooting of their 1962 film *What Ever Happened to Baby Jane?* (“*Baby Jane*”),
11 *Feud* is a social commentary on Hollywood’s history of sexism, misogyny, and media
12 manipulation, issues that still plague Hollywood today.

13 By alleging that *Feud* casts her in a false light and violates her right of publicity, Olivia de
14 Havilland’s meritless lawsuit seeks to impinge on Defendants’ First Amendment right to create
15 expressive works about matters of public interest. Under the anti-SLAPP statute, Code Civ.
16 Proc. § 425.16(b)(1), any acts in furtherance of the right of free speech in connection with an issue
17 of public interest are subject to a special motion to strike. As an expressive work, *Feud* is clearly
18 an act of free speech. *Feud* also concerns numerous issues of public interest, including the show’s
19 own cultural significance and social message; the Crawford-Davis rivalry; *Baby Jane*’s production
20 process; and Plaintiff’s own fame, including her longstanding public feud with her sister, actress
21 Joan Fontaine. Because the anti-SLAPP statute applies to *Feud*, Plaintiff must show a probability
22 of prevailing on the merits of each of her claims. She cannot do so.

23 Plaintiff’s third cause of action alleges that *Feud* casts her in a false light by showing her
24 character (i) giving an interview in which she discusses Crawford and Davis, among many other
25 topics; (ii) referring to her sister as a “bitch”; and (iii) joking about Frank Sinatra drinking the
26 booze in his dressing room. The elements of false light are identical to defamation, requiring

27 _____
28 ¹ Defendants are FX Networks, LLC (cable television network) and Pacific 2.1 Entertainment
Group, Inc. (production company).

1 proof of falsity, defamatory meaning, and constitutional (also termed “actual”) malice, *i.e.*,
2 knowledge of falsity or reckless disregard for the truth. Plaintiff can establish none of these
3 elements. Contrary to Plaintiff’s assertions, her character’s challenged traits and statements in
4 *Feud* are substantially true. Indeed, Plaintiff has given numerous interviews in which she has
5 discussed other actors. And, ironically, while Plaintiff complains that *Feud* portrays her as
6 privately referring to her sister as a “bitch,” Plaintiff has used the word “bitch” in semi-private
7 settings and, just last year, very publicly referred to her sister using highly derogative terms
8 (dubbing her “Dragon Lady”).² Moreover, *Feud*’s portrayal of Plaintiff is not defamatory. *Feud* is
9 also a docudrama, so no reasonable viewer would take the depiction of Plaintiff as statements of
10 totally objective fact. And because Defendants meticulously researched *Feud* to provide a
11 historical basis for their dramatic narrative, Plaintiff cannot establish actual malice. *Infra*, pp. 8-12.

12 Plaintiff’s first and second causes of action allege that her inclusion in *Feud* was
13 unauthorized and thus violates her right of publicity. However, Plaintiff’s consent was not
14 needed. Because *Feud* is an expressive television show and concerns matters of public interest, its
15 portrayal of Plaintiff cannot give rise to right of publicity claims. In any event, *Feud*’s depiction
16 of Plaintiff is transformative and constitutionally protected for that separate reason. Moreover, a
17 public figure like Plaintiff cannot hold the creators of an expressive work liable in tort absent
18 falsity and actual malice, neither of which is present here. *Infra*, pp. 12-15.

19 Finally, Plaintiff’s fourth cause of action for unjust enrichment claim fails because it is
20 derivative of her other claims and is not a separate claim under California law. *Infra*, p. 15.

21 In sum, the Court should strike the Third Amended Complaint (“TAC”) in its entirety.

22 **II. STATEMENT OF RELEVANT FACTS**

23 **A. Plaintiff Olivia de Havilland**

24 Plaintiff is a “living legend” for “multiple generations of actors and fans.” TAC ¶ 9. She
25 has received numerous accolades and honors, including two Oscars. *Id.*, ¶¶ 9-12. She has also

26
27 ² A video compilation of excerpts of Plaintiff’s interviews and her use of salty language is attached
28 as Exhibit 59 to the Berkley declaration and is being lodged with the Court. Plaintiff’s public
comments about her sister (e.g., calling her “Dragon Lady”) are at Exhibits 30-31. (Hereafter,
citations to declarations state the declarant’s name plus the relevant paragraph or exhibit number.)

1 received considerable public attention over her career and has remained in the public eye even in
2 recent years, giving interviews and republishing her memoir in 2016. *Id.*; Berkley, Exs. 1-16, 59.

3 Plaintiff and Bette Davis were close friends until Davis' death in 1989. TAC ¶ 15;
4 Berkley, Exs. 1-6, 10-11, 17-21, 25-26, 27-29. Thus, Plaintiff had a front-row seat to Davis' and
5 Crawford's infamous feud. *Id.* In addition, Plaintiff herself had a highly publicized, decades-long
6 acrimonious relationship with her sister, actress Joan Fontaine. TAC ¶ 13; Berkley, Exs. 7, 17, 30-
7 40, 42. In a 2016 interview with the Associated Press, Plaintiff was quoted as saying of her sister:

8 Dragon Lady, as I eventually decided to call her, was a brilliant,
9 multi-talented person, but with an astigmatism in her perception of
10 people and events which often caused her to react in an unfair and
11 even injurious way ... If Dragon Lady were alive today (for my
[100th] birthday), out of self-protection I would maintain my
silence!" [Berkley, Exs. 30-31.]

12 Plaintiff gave many other television and print interviews in which she commented on other
13 actors. *Id.*, Exs. 1-14, 27-29, 59. For example, in 1977 on *Dinah!*, she discussed her relationship
14 with actor Errol Flynn, including her "deep crush" for him and how Flynn tried to woo her before
15 his divorce. *Id.*, Ex. 2, 59. In an Academy of Achievement video interview, she criticized British
16 actor Ralph Richardson: "He would do rather naughty things. He was a glove flapper...." *Id.*,
17 Ex. 13-14, 59. Moreover, Plaintiff's use of salty language is a matter of public record. For
18 example, in publicly available outtake videos on YouTube, Plaintiff flubs or forgets multiple lines
19 and variously says, "God damn," "Oh, Christ, I'm sorry," "Oh, Christ, son of a bitch," "Oh, God
20 damn it," and "son of a bitch." *Id.*, Exs. 43-48, 59. And in connection with the motion picture
21 *Hush, Hush Sweet Charlotte*, she told director Robert Aldrich, "I don't play bitches. They make
22 me unhappy." *Id.*, Ex. 19. See also *id.*, Exs. 30-31, 49-52. Plaintiff's willingness to make
23 flippant or irreverent remarks about others is also in the public record. *Id.*, Exs. 27-29. During the
24 press tour to publicize *Hush Hush Sweet Charlotte* (a movie in which Plaintiff famously replaced
25 Crawford), Plaintiff commented that the crowd was "here to see Joan Crawford," to which Davis
26 smiled thinly. *Id.*, Ex. 28. And at a press luncheon, when Davis expressed her displeasure,
27 Plaintiff quipped, "How would you like to make this tour with Joan Crawford?" To which Davis
28 retorted, "And how would you like to make it with Joan Fontaine?" *Id.*, Ex. 19.

1 **B. FEUD: Bette and Joan**

2 **1. *Feud's* Creation and Reception**

3 *Feud* was created by well-known writer, director, and producer Ryan Murphy.³ Over eight
4 episodes, *Feud* tells the story of the rivalry between Crawford and Davis, principally by focusing
5 on the making of *What Ever Happened to Baby Jane?*. Minear ¶¶ 7, 15; Berkley, Ex. 54. *Feud*
6 also explores ageism, sexism, and misogyny in Hollywood, issues that have received considerable
7 public interest. Murphy, ¶¶ 4, 9-10; Berkley, Exs. 55-57. The series received widespread public
8 attention and critical acclaim, garnering eighteen Emmy nominations. Berkley, Exs. 55-57.

9 *Feud* is a classic docudrama – a “stage or film dramatization either closely or loosely based
10 upon actual events with fictional dramatic elements embellishing the hard facts.” McCarthy, J.
11 Thomas, *2 Rights of Publicity and Privacy* (2d ed., April 2017) at § 8:74, p. 273, n. 2 (collecting
12 authorities); Murphy ¶ 6. The series stars prominent actors known for performing in dramatic
13 works.⁴ Berkley, Ex. 54; Gibbons ¶¶ 4-5. The opening titles are animated and fanciful, signaling
14 the program is dramatized. Scenes occur in intimate settings and contain action or dialogue that
15 are clearly imagined (e.g., bedroom scenes, a scene in which Davis calls a dying Crawford but
16 hangs up, private scenes between Davis or Crawford and their confidantes). Berkley, Ex. 54.

17 *Feud* is told through the framing device of imagined interviews at the 1978 Academy
18 Awards, the year after Crawford’s death. The interview derived from the original screenplay by
19 Jaffe Cohen and Michael Zam upon which the series is based. Minear ¶ 7; Zam ¶¶ 9-11, Ex. 1.
20 The interviewees, actresses Olivia de Havilland (Catherine Zeta-Jones) and Joan Blondell (Kathy
21 Bates), narrate and emphasize plot points, with the narration dissolving into the obvious dramatic
22 scenes involving the principal characters. Minear ¶¶ 7, 15; Berkley, Ex. 54.

23 *Feud's* writers conducted meticulous research about the history underlying the show’s
24 story. Murphy ¶¶ 12-14; Minear ¶¶ 6, 8-15 (referring to Berkley, Exs. 2, 6-8, 11, 19, 21, 24, 26,

25 ³ Murphy is also responsible for the highly successful *Nip/Tuck* (2003-10), *Glee* (2009-15),
26 *American Horror Story* (2011-present) and *American Crime Story* (2016-present), among others.
Murphy ¶¶ 2, 3, 6, 12.

27 ⁴ Academy Award winner Jessica Lange plays Crawford and Academy Award winner Susan
28 Sarandon plays Davis. The principal cast also includes Alfred Molina, Stanley Tucci, Judy Davis,
Jackie Hoffman, and Alison Wright. Berkley, Ex. 54.

1 30-33, 43-48). Their sources included well-respected nonfiction books, news articles, interviews
2 of key individuals available online, and online video clips. *Id.* Using this research, the writers
3 wove together a dramatic narrative that filled the gaps in the historical record by crafting private
4 moments and fictionalized dialogue that could have happened consistently with reported facts. *Id.*

5 **2. *Feud's* Depiction of Plaintiff**

6 The de Havilland character appears sporadically in six of the eight episodes of *Feud*.⁵ The
7 writers never intended to – and did not – disparage Plaintiff. Murphy ¶¶ 14-20; Minear ¶¶ 16-19;
8 Zam ¶¶ 12-14. Rather, the de Havilland character was scrupulously written to be nuanced and
9 consistent with the historical record. Murphy ¶¶ 14-20; Minear ¶¶ 16-19. While Plaintiff alleges
10 that she is portrayed as a “gossip,” the opposite is true: she is shown to be a wise, respectful friend
11 and counselor to Davis, and a Hollywood icon with a unique perspective on the past. Murphy
12 ¶ 15; Minear ¶ 15; Berkley, Ex. 54. She serves as a voice of reason who informs the audience
13 about two iconic actresses, sexism in Hollywood, female empowerment, and media manipulation.
14 *Id.* She also appears in several dramatic scenes of *Feud* as Davis’ loyal and devoted friend.⁶
15 Murphy ¶ 16. Indeed, it would have been inconsistent with *Feud's* narrative to have portrayed
16 Plaintiff as a petty gossip or otherwise disparage her character. Murphy ¶ 15. She served as a
17 counterbalance to the more volatile Crawford and Davis and also as an objective, authoritative
18 bridge to the viewer. *Id.* Put differently, it was important that viewers trust the de Havilland
19 character. *Id.* In sum, it was the writers’ intent to portray the de Havilland as wise, objective, and
20 professional. *E.g.*, Berkley, Ex. 54; Minear ¶ 15; Murphy ¶¶ 14-20.

21 **C. Plaintiff's Allegations**

22 Plaintiff filed her lawsuit on June 30, 2017. The operative complaint, the TAC, filed on
23 August 28, 2017, asserts claims for common law and statutory misappropriation of her right of

24 ⁵ See Berkley, Ex. 54 (episodes 1-2, 4-5, 7-8); Minear ¶¶ 13, 15. Notably, Zeta-Jones receives a
25 “special guest star” in the *end* credits of the episodes in which she appears. *Id.* In contrast,
26 Sarandon, Lange and the rest of the principal cast appear in the opening credits before each
episode. *Id.*, Ex. 54 (all episodes).

27 ⁶ In Episode 5, the de Havilland character flies in from Paris to provide moral support for Davis at
the 1963 Academy Awards. Berkley, Ex. 54; Minear ¶ 15(d)(v-vi). In Episode 7, she saves the
28 production of the 1964 film *Hush Hush Sweet Charlotte* by taking on the role that Crawford
abandoned. Berkley, Ex. 54; Minear ¶ 15(e).

1 publicity (COAs 1 & 2), false light invasion of privacy (COA 3), and unjust enrichment (COA 4).
2 In her false light claim, Plaintiff alleges that she cultivated a reputation for having “refused to use
3 what she knew about the private or public lives of other actors ... to promote her own press
4 attention and celebrity status” (TAC ¶ 14; *id.*, ¶¶ 13, 15), and that *Feud* falsely depicts her as
5 giving an imagined interview at the 1978 Academy Awards, in which she discusses Crawford and
6 Davis and their “feud,” among other topics, in order to promote herself, thereby injuring her
7 reputation (TAC ¶¶ 19-23). Plaintiff further alleges that she “built a public image of being a
8 lady,” who did “not speak[] in crude and vulgar terms about others, including her sister,” Fontaine
9 (TAC ¶ 26; *id.*, ¶¶ 13, 24), and that three lines of dialogue in *Feud* demean this reputation by
10 falsely portraying her as “speaking in crude and vulgar terms about others, including her sister,
11 when in private.” TAC ¶¶ 24-26. Plaintiff also contends that Defendants violated her common
12 law and statutory rights of publicity by falsely portraying her and failing to obtain her consent to
13 include the de Havilland character in *Feud*. TAC ¶¶ 29-31.

14 III. THE COMPLAINT SHOULD BE STRICKEN UNDER CCP § 425.16(b)(1)

15 California’s anti-SLAPP statute “provide[s] for the early dismissal of unmeritorious claims
16 filed to interfere with the valid exercise of the constitutional rights of freedom of speech.” *Club*
17 *Members for an Honest Election v. Sierra Club*, 45 Cal. 4th 309, 315 (2008); Code Civ. Proc.
18 § 425.16(b)(1). The statute is “broadly construed to encourage continued participation in free
19 speech and petition activities.” *Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi*, 141
20 Cal. App. 4th 15, 22 (2006), *citing* Code Civ. Proc. § 425.16(a) (statute is “construed broadly”).
21 When ruling on an anti-SLAPP motion, courts employ a two-step process. First, the defendant
22 must make a threshold showing that the challenged causes of action “arise[] from any act of that
23 person in furtherance of the person’s right of ... free speech ... in connection with a public

24 _____
25 ⁷ The specific lines of dialogue challenged are (i) a scene in which Zeta-Jones’ de Havilland refers
26 to her “bitch sister” during a private telephone call with Sarandon’s Davis; (ii) a scene in which
27 Zeta-Jones’ de Havilland remarks that she doesn’t “do bitches” and the director “should call [her]
28 sister” during a private telephone call with the director and Davis; and (iii) a scene in which Zeta-
Jones’ de Havilland and Sarandon’s Davis are having a private moment in Frank Sinatra’s
dressing room at the 1963 Academy Awards and, in response to Davis’ query as to where all the
alcohol is, de Havilland quips that Sinatra must have drunk it. Berkley Ex., 54, Episode 5 (at
10:00); Ex. 54, Episode 7 (at 43:47), and Ex. 54, Episode 5 (at 34:54).

1 issue....” Code Civ. Proc. § 425.16(b)(1); *see Brodeur v. Atlas Entm’t, Inc.*, 248 Cal. App. 4th
2 665, 674 (2016). If the defendant makes this showing, the burden shifts to the plaintiff to show,
3 by “competent admissible evidence,” that it will probably prevail on the merits. *Steed v. Dep’t of*
4 *Consumer Affairs*, 204 Cal. App. 4th 112, 124 (2012); Code Civ. Proc. § 425.16(b)(1).

5 **A. Plaintiff’s Claims Arise From Protected Activity**

6 Protected activity includes any “written or oral statement or writing made in a place open
7 to the public or a public forum in connection with an issue of public interest” or “any other
8 conduct in furtherance of the exercise ... of the constitutional right of free speech in connection
9 with a public issue or an issue of public interest.” Code Civ. Proc. § 425.16(e)(3)-(4). Television
10 shows like *Feud* are core speech, and the acts about which Plaintiff complains – creating,
11 distributing, exhibiting and advertising *Feud* – clearly fall within the broad scope of acts in
12 furtherance of that speech. *Hunter v. CBS Broad. Inc.*, 221 Cal. App. 4th 1510, 1521 (2013)
13 (“‘[C]reat[ing] ... a television show’ qualif[ies] as ‘[an] exercise[] of free speech.’”); *Tamkin v.*
14 *CBS Broad., Inc.*, 193 Cal. App. 4th 133, 143 (2011) (“creation, casting, and broadcasting of an
15 episode of a popular television show” are exercises of free speech). *See also Brodeur*, 248 Cal.
16 App. 4th at 674 (films are free speech).

17 *Feud* also meets the public interest requirement. An issue of public interest is “any issue in
18 which the public is interested.” *Nygård, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1042
19 (2008) (emphasis in original). *Feud* and its creation were the subjects of substantial public
20 discourse, and the show has garnered numerous award nominations and positive reviews.
21 Berkley, Exs. 55-57. This, by itself, satisfies the public interest requirement. *See Tamkin*, 193
22 Cal. App. 4th at 143 (creation and broadcasting of CSI television episode were public issues);
23 *Brodeur*, 248 Cal. App. 4th at 674-78 (creation and exhibition of movie *American Hustle* were
24 public issues). And, the show focuses on matters of public interest, including Davis’ and
25 Crawford’s lives, their rivalry, and the film *Baby Jane*; and touches on others, e.g., Plaintiff’s
26 rivalry with Joan Fontaine and ageism, sexism, and misogyny in Hollywood. Murphy ¶¶ 4, 9-10,
27 12-13; Berkley, Ex. 56. *See, e.g., Brodeur, supra; Hall v. Time Warner, Inc.*, 153 Cal. App. 4th
28 1337, 1347 (2007) (public interest in the personal life of Marlon Brando); *Ingels v. Westwood One*

1 *Broad. Serv., Inc.*, 129 Cal. App. 4th 1050, 1056, 1064 (2005) (relationships between men and
2 women are subjects of public interest). Moreover, because Plaintiff herself is a well-known public
3 figure, the details of her life are matters of public interest. TAC ¶¶ 9-12; Berkley, Exs. 1-16, 59.
4 *See Brodeur*, 248 Cal. App. 4th at 675; *Hall, supra*.

5 **B. Plaintiff Cannot Establish a Probability of Prevailing on Her Claims**

6 Because Plaintiff's claims all fall within the scope of the anti-SLAPP statute, she has the
7 burden of showing a probability of prevailing on each of her claims. She cannot do so.

8 **1. Plaintiff Cannot Prevail on Her False Light Claim (COA 3)**

9 False light is "a species of invasion of privacy, based on publicity that places a plaintiff
10 before the public in a false light that would be highly offensive to a reasonable person." *Jackson*
11 *v. Mayweather*, 10 Cal. App. 5th 1240, 1264 (2017); Rest. (2nd) of Torts § 652E. Where, as here,
12 the false light claim "rest[s] on the allegedly false nature of the [] statements" at issue, it must
13 meet the "same requirements" as a libel claim. *Kappella v. Kofman*, 1 Cal. 3d 20, 35, n. 16
14 (1969); *Brodeur*, 248 Cal. App. 4th at 678 (false light claim "is in substance equivalent to a libel
15 claim, and should meet the same requirements"). Thus, Plaintiff must prove a "(a) publication that
16 is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or
17 that causes special damage." *Brodeur*, 248 Cal. App. 4th at 678. As a public figure, Plaintiff must
18 also prove "constitutional malice" – *i.e.*, that Defendants acted with knowledge of falsity or with
19 reckless disregard of the truth – *by clear and convincing evidence. Id.*

20 **a. *Feud* does not falsely portray Plaintiff**

21 Plaintiff bears the burden of proving falsity. *Vogel v. Felice*, 127 Cal. App. 4th 1006, 1021
22 (2005). "[F]alsity cannot be shown if the challenged statements appear substantially true."
23 *Jackson*, 10 Cal. App. 5th at 1262. Specifically:

24 To bar liability, it is sufficient if the *substance* of the charge be
25 proved true, irrespective of slight inaccuracy in the details. Minor
26 inaccuracies do not amount to falsity so long as the substance, the
27 gist, the sting of the libelous charge be justified. Put another way,
the statement is not considered false unless it would have a different
effect on the mind of the reader from that which the pleaded truth
would have produced.

28 *Id.* at 1262-63 (emphasis in original) (internal quote marks and citations omitted).

1 Plaintiff first complains that *Feud* depicts her speaking about other celebrities in a public
2 interview. Yet, Plaintiff has given numerous television, video, and print interviews and otherwise
3 publicly shared many stories about Hollywood and other actors over the years, some admiring and
4 others critical. *Supra*, p. 3. In 1977 – in a format much like *Feud*’s dramatized 1978 interview –
5 Plaintiff appeared with other actresses on *Dinah!* and discussed her personal life and Hollywood.
6 Berkley Exs. 1-4, 59. Plaintiff also actually attended the 1978 Academy Awards as a presenter.
7 *Id.*, Exs. 40-42. As recently as 2016, Plaintiff gave a lengthy interview to the Associated Press
8 touching on many topics, including her sister. *Id.*, Exs. 30-31. So, while Plaintiff may not have
9 specifically given an interview at the 1978 Academy Awards, the “gist” and “sting” of the charge
10 – that Plaintiff has contributed to the public discourse on Hollywood and its celebrities, including
11 at or near the time of the 1978 Awards – is substantially true. *See, e.g., Jackson*, 10 Cal. App. 5th
12 at 1262-63 (defendant’s “exaggerated description of the extent of [plaintiff’s] cosmetic surgery
13 was, in substance, truthful”); *Carver v. Bonds*, 135 Cal. App. 4th 328, 352 (2005) (no defamation
14 where article stated that 22 medical board complaints were filed against plaintiff: “The ‘sting’ ...
15 was [] that plaintiff had received an unusually large number of [complaints]. That essential point
16 would have been the same whether the [] complaints had [numbered] six or 22”).

17 Neither is the de Havilland character’s reference to her sister as a “bitch” nor her quip
18 about Sinatra false. Again, Plaintiff in fact wisecracked about others and used profane language.
19 Berkley, Exs. 27-29, 43-52 (collecting examples, including Plaintiff uttering “God damn,” “son of
20 a bitch” and “Oh, Christ, son of a bitch,” on set). And Plaintiff actually said to director Robert
21 Aldrich that “she doesn’t play bitches.” *Id.*, Ex. 19. As to her sister, Plaintiff not only dubbed
22 Fontaine “Dragon Lady,” but said her sister had “an astigmatism in her perception of people and
23 events which often caused her to react in an unfair and even injurious way.” *Id.*, Exs. 30-31.
24 Generally, “bitch” and “dragon lady” are considered synonyms.⁸ Here, the character’s use of the
25 term *bitch* dramatically and accurately captured a bitter, long-term rivalry between sisters.

26
27 ⁸ *See, e.g., Berkley*, Ex. 53. *See* <https://www.merriam-webster.com/dictionary/dragon%20lady>
28 (defining “dragon lady” as “an overbearing or tyrannical woman” and as “a woman who is often
angry or cruel especially when people do not do what she wants”) and [https://www.merriam-](https://www.merriam-webster.com/dictionary/bitch)
[webster.com/dictionary/bitch](https://www.merriam-webster.com/dictionary/bitch) (defining “bitch” as “a malicious, spiteful or overbearing woman”).

1 Murphy ¶¶ 16-18. Thus, even if Plaintiff never made the precise joke at issue or used the exact
2 word “bitch” in reference to Fontaine, the “gist” and “sting” of her comments are substantially
3 true. *See, e.g., Gilbert v. Sykes*, 147 Cal. App. 4th 13, 30 (2007) (“The ‘gist’ and ‘sting’ of
4 Gilbert’s assertion that Sykes assured her the changes [from plastic surgery] would be ‘subtle’ was
5 substantially true, regardless of whether Sykes ever used the word [subtle].”).

6 **b. *Feud* is not defamatory**

7 Plaintiff’s claim also fails because *Feud*’s portrayal of her is not reasonably susceptible of
8 defamatory meaning. “A ‘false light’ claim, like libel, exposes a person to hatred, contempt,
9 ridicule, or obloquy and assumes the audience will recognize [the publication] as such.” *Brodeur*,
10 248 Cal. App. 4th at 678. Whether a statement is defamatory and reasonably understood as a
11 statement of fact are questions of law to be decided by the court. *See Polygram Records, Inc. v.*
12 *Superior Court*, 170 Cal. App. 3d 543, 551 (1985). The determination is made “from the
13 standpoint of the average reader, judging the statement not in isolation, but within the context in
14 which it is made.” *Knievel v. ESPN*, 393 F.3d 1068, 1074 (9th Cir. 2005). Furthermore, “[i]n
15 evaluating the context in which the statement appeared, [a court] must take into account all parts
16 of the communication that are ordinarily heard or read with it.” *Id.* at 1076.

17 Where, as here, the work at issue is a docudrama, it is unreasonable to assume that all
18 statements in the work represent assertions of verifiable fact. *Partington v. Bugliosi*, 56 F.3d
19 1147, 1154-55 (9th Cir. 1995) (“[T]he general tenor of the docu-drama [] tends to negate the
20 impression that the statements involved represented a false assertion of objective fact.”). Instead,
21 it is well-accepted and the average viewer understands that:

22 Docudramas often rely heavily upon dramatic interpretations of
23 events and dialogue filled with rhetorical flourishes; viewers in this
24 case would be sufficiently familiar with this genre to avoid
25 assuming that all statements within them represent assertions of
26 verifiable facts. To the contrary, most of them are aware by now that
27 parts of such programs are more fiction than fact.

28 *Brodeur*, 248 Cal. App. 4th at 680 (quoting *Partington*, 56 F.3d at 1155).

There is nothing defamatory in depicting a celebrity giving an interview about other
celebrities. Indeed, such interviews occur on talk shows daily. Moreover, today, making a quick-
witted remark about a well-known partier like Frank Sinatra or attributing the use of the word

1 "bitch" to a person who has a bitter, lifelong rivalry with a sibling is not defamatory, *i.e.*, does not
2 expose the person to scorn, ridicule, etc., and is not highly offensive.⁹

3 Moreover, *Feud* does not purport to be a documentary. Minear ¶ 10. Thus, a reasonable
4 viewer would have understood that *Feud* relies on dramatic interpretations of historical events and
5 private conversations that were, by necessity, fictionalized because the writers were not present.
6 As such, a reasonable viewer would have neither assumed that the imagined 1978 interview
7 actually occurred, nor taken the private conversations between the de Havilland and Davis
8 characters as being verbatim historical recitations. *See Brodeur*, 248 Cal. App. 4th at 680 ("We
9 doubt any audience member would perceive any of [a character's] dialogue as assertions of
10 objective fact."); *Partington*, 56 F.3d at 1154-55 (context of statement "if I defend you the way
11 Partington is defending Walker, you'll spend the rest of your life in prison" in film negated the
12 impression that it asserted an objective fact). Plaintiff's false light claim should be stricken.

13 **c. Plaintiff cannot demonstrate constitutional (actual) malice**

14 Even if *Feud* had made false and defamatory statements about Plaintiff (it did not), she still
15 could not prevail. As a public figure, she must establish actual malice, *i.e.*, that Defendants acted
16 "with knowledge that [their statements were] false or with reckless disregard of whether it was
17 false or not." *Nygård*, 159 Cal. App. 4th at 1048. The inquiry is "a subjective test, under which
18 the defendant's actual belief concerning the truthfulness of the publication is the crucial issue."
19 *Reader's Digest Assn. v. Sup. Ct.*, 37 Cal. 3d 244, 257 (1984). Mere evidence of a failure to
20 investigate or of factual errors in a publication will not suffice. *See id.* at 259-65; *St. Amant v.*
21 *Thompson*, 390 U.S. 727, 733 (1968). And, "[s]elf-evidently a docudrama partakes of author's
22 license – it is a creative interpretation of reality – and if alterations of fact in scenes portrayed are
23 not made with serious doubts of truth of the essence of the telescoped composite, such scenes do
24 not ground a charge of actual malice." *Davis v. Costa-Gavras*, 654 F. Supp. 653, 658 (S.D.N.Y.
25 1987); *see Seale v. Gramercy Pictures*, 964 F. Supp. 918, 928 (E.D. Pa. 1997) (same).

26 _____
27 ⁹ The use of the word "bitch" is commonplace on television and has been for some time. *See*
28 <http://www.nytimes.com/2009/11/14/business/media/14vulgar.html> ("[U]se of the word, 'bitch,'
for example, tripled in the last decade alone, growing to 1,277 uses on 685 shows in 2007 from
431 uses on 103 prime-time episodes in 1998.").

1 Plaintiff must establish actual malice by clear and convincing evidence; “a heavy burden,
2 far in excess of the preponderance sufficient for most civil litigation.” *Hoffman v. Capital*
3 *Cities/ABC, Inc.*, 255 F.3d 1180, 1186-87 (9th Cir. 2001). It “requires a finding of high
4 probability. The evidence must be so clear as to leave no substantial doubt.” *Christian Research*
5 *Institute v. Alnor*, 148 Cal. App. 4th 71, 84 (2007).

6 *Feud*’s writers investigated and consulted numerous resources to ensure a factual basis for
7 their dramatic narrative and to accurately depict Plaintiff’s documented use of salty language, her
8 bitter rivalry with Fontaine, and her style and approach in public interviews. *Supra*, pp. 4-5.
9 Thus, Plaintiff cannot possibly meet her heavy burden of showing that Defendants entertained
10 “serious doubts of the truth of the essence of the telescoped composite” of the de Havilland
11 character. *Davis*, 654 F. Supp. at 658 (no actual malice where creators of docudrama consulted
12 numerous references in dramatizing real life events); *Seale*, 964 F. Supp. at 928-29 (same).

13 2. Plaintiff Cannot Prevail on Her Right of Publicity Claims (COAs 1-2)

14 The right of publicity is “an economic right ... to prevent others from misappropriating the
15 economic value generated by the celebrity’s fame through the merchandising of the ‘name, voice,
16 signature, photograph or likeness’ of the celebrity.”¹⁰ *Comedy III Prods., Inc. v. Gary Saderup,*
17 *Inc.*, 25 Cal. 4th 387, 403 (2001). The right is not absolute; when free speech is implicated, “an
18 action for infringement of the right of publicity can be maintained only if the proprietary interests
19 at issue clearly outweigh the value of free expression in this context.” *Guglielmi*, 25 Cal. 3d at
20 871 (Bird, C.J., concurring)¹¹; *Gionfriddo*, 94 Cal. App. 4th at 409 (same). Plaintiff cannot prove
21 her right of publicity claims for numerous reasons.

22
23 ¹⁰ In California, the right of publicity is both a common law right and a statutory right. The
24 elements of the tort, at common law, are “(1) the defendant’s use of the plaintiff’s identity; (2) the
25 appropriation of plaintiff’s name or likeness to defendant’s [advantage commercially or
26 otherwise]; (3) lack of consent; and (4) resulting injury.” *Gionfriddo v. Major League Baseball*,
27 94 Cal. App. 4th 400, 409 (2001). A statutory claim under California Civil Code §3344 requires a
28 similar showing: plaintiff must show the use of one of the statutorily protected rights – “plaintiff’s
name, voice, signature, photograph, or likeness” (not “identity”), Civil Code § 3344, as well as “a
knowing use by the defendant [and] a direct connection between the alleged use and the
commercial purpose,” *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001).

¹¹ Chief Justice Bird’s concurring opinion is persuasive authority because the concurrence
“commanded the support of the majority of the court.” *Comedy III*, 25 Cal. 4th at 396, n.7.

1 **a. Defendants' depiction of Plaintiff is constitutionally protected**

2 A right of publicity claim cannot be maintained for the use of a person's name or likeness
3 in a constitutionally protected motion picture or television program. *Guglielmi*, 25 Cal. 3d at 872-
4 73 ("A cause of action for the appropriation of [silent motion picture actor Rudolph] Valentino's
5 right of publicity through the use of his name and likeness in [a] film may not be maintained.");
6 *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal. App. 4th 318, 324-25 (1997) ("Because
7 respondents were creating a fictionalized artistic work, their endeavor is constitutionally
8 protected" against a right of publicity claim); *Daly v. Viacom, Inc.* 238 F. Supp. 2d 1118, 1123
9 (N.D. Cal. 2002) (applying California law). As Chief Justice Bird explained in *Guglielmi*:

10 [N]o distinction may be drawn in this context between fictional and
11 factual accounts of Valentino's life...

12 ...[T]he false report, no less than the truthful, may stimulate interest
13 and infuse great value in the previously insignificant publicity value
14 in a celebrity's identity. A fictional account is as likely to laud as to
 denigrate. It may either augment or diminish the value of a
 celebrity's right of publicity. Therefore, any assertion that fictional
 accounts pose a unique threat to the right of publicity not found in
 truthful reports is simply not justified.

15 25 Cal. 3d at 867-68, 70; *see Daly*, 238 F. Supp. 2d at 1123 (same).¹² To hold otherwise would
16 mean that "the creation of historical novels and other works inspired by actual events and people
17 would be off limits to the fictional author. An important avenue of self-expression would be
18 blocked and the marketplace of ideas would be diminished." *Guglielmi*, 25 Cal. 3d at 872. For
19 this reason alone, Plaintiff's right of publicity causes of action should be stricken.

20 **b. Feud is a matter of public interest**

21 The "public interest in the subject matter of [the work in question] [also] gives rise to
22

23 ¹² *Accord Matthews v. Wozencraft*, 15 F.3d 432, 439 (5th Cir. 1994) ("Courts long ago recognized
24 that a celebrity's right of publicity does not preclude others from incorporating a person's name,
25 features or biography in a literary work, motion picture, news or entertainment story."); *Rogers v.*
26 *Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989) (right of publicity does not "bar the use of a
27 celebrity's name in the title and text of a fictional or semi-fictional book or movie"); *Seale v.*
28 *Gramercy Pictures*, 949 F. Supp. 331, 336 (E.D. Pa. 1996) (depiction of Black Panther leader in
movie docudrama and book); *Donahue v. Warner Bros. Pictures Distr. Corp.*, 272 P.2d 177, 182
(Utah 1954) (celebrity Jack Donahue in a film); *Tyne v. Time Warner Entm't Co.*, 204 F. Supp. 2d
1338, 1342 (M.D. Fla. 2002) (crew members featured in film *The Perfect Storm*), *aff'd on other*
grounds, 425 F.3d 1363 (11th Cir. 2005); *Ruffin-Steinback v. de Passe*, 82 F. Supp. 2d 723, 730-
31 (E.D. Mich. 2000) (television miniseries depicting plaintiffs in a story about the Temptations).

1 constitutional protection against liability” for right of publicity claims. *Dora v. Frontline Video,*
2 *Inc.*, 15 Cal.App.4th 536, 542, 545-46 (1993) (no liability for using video of well-known surfer in
3 surfing documentary; use met common-law public-interest exemption to liability and documentary
4 constituted “public affairs” under Civ. Code § 3334(d)); *Gionfriddo*, 94 Cal. App. 4th at 411, 416-
5 17 (no liability for fantasy baseball game because of “substantial public interest” in baseball
6 players); *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 795-796 (1995) (poster
7 reproduction of newspaper account of football team’s victory a protected form of public-interest
8 presentation). Here, as a dramatization of the real-life rivalry between Davis and Crawford, *Feud*
9 concerns a matter of public interest, as does the depiction of Plaintiff, an iconic actress.

10 **c. *Feud* is transformative**

11 Plaintiff also cannot prevail on her right of publicity claims for another reason. “[W]hen a
12 work contains significant transformative elements, it is not only especially worthy of First
13 Amendment protection, but it is also less likely to interfere with the economic interest protected
14 by the right of publicity.” *Comedy III*, 25 Cal. 4th at 405. Here, actor Zeta-Jones’ dramatic
15 interpretation of the de Havilland character is transformative. Moreover, *Feud* is a docudrama,
16 and therefore scenes are dramatized – *i.e.*, transformed. Indeed, in alleging that she was depicted
17 falsely, Plaintiff effectively admits that *Feud*’s portrayal of her is transformative. *See Winter v.*
18 *DC Comics*, 30 Cal. 4th 881, 890 (2003) (plaintiffs were “raw materials” in expressive work).

19 Moreover “if the marketability and economic value of the challenged work do *not* derive
20 primarily from the celebrity’s fame, ‘there would generally be no actionable right of publicity.’”
21 *Id.* at 889. Rather, “when the value of the work comes principally from some source other than the
22 fame of the celebrity – from the creativity, skill, and reputation of the artist – it may be presumed
23 that sufficient transformative elements are present to warrant First Amendment protection.” *Id.*
24 Here, the economic value of *Feud* clearly does *not* primarily derive from Plaintiff’s fame. Rather,
25 the series derives its primary value from the critically acclaimed writing and directing; the fame
26 and performances of the series’ Emmy-nominated stars, Lange and Sarandon, along with the rest
27 of the prestigious cast; the series’ production value; and the work’s subject matter. In contrast, the
28 de Havilland character appears sporadically in *Feud*. Berkley, Ex. 54. Moreover, Zeta-Jones is

1 not billed in the opening credits as a recurring cast member but in the end credits as a guest star
2 and she was not a primary feature of the show's marketing campaign. *Id.*; Gibbons ¶¶ 4-8, 10-14.
3 Because the value of *Feud* comes principally from sources other than Plaintiff's fame, her right of
4 publicity claims fail. *See Arenas v. Shed Media US Inc.*, 881 F. Supp. 2d 1181, 1191 (C.D. Cal.
5 2011) (use of basketball player's identity in reality-TV show about women in relationships with
6 players was transformative because plaintiff was "incidental to the show's plot as a whole").

7 **d. Plaintiff cannot prove falsity or actual malice**

8 Finally, a public figure like Plaintiff may not recover in tort where the depiction is
9 substantially true or where the creator did not act with actual malice. *Hoffman*, 255 F.3d at 1186-
10 88 (dismissing right of publicity claim). As noted, Plaintiff can prove neither.¹³

11 **3. Plaintiff Cannot Prevail on Her Unjust Enrichment Claim (COA 4)**

12 Plaintiff's cause of action for unjust enrichment fails because it is derivative of Plaintiff's
13 other claims. In any event, there is no such cause of action in California for unjust enrichment."
14 *Melchior v. New Line Prod., Inc.*, 106 Cal. App. 4th 779, 793 (2003).

15 **IV. DEFENDANTS ARE ENTITLED TO THEIR ATTORNEYS' FEES AND COSTS**

16 Section 425.16(c)(1) states that "a prevailing defendant on a special motion to strike shall
17 be entitled to recover his or her attorney's fees and costs." *Id.* Civil Code § 3344(a) also entitles
18 the prevailing party on a statutory right of publicity claim to recover its attorneys' fees. Thus,
19 Defendants request an award in an amount to be proven through subsequent application.

20 **V. CONCLUSION**

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

22 DATED: August 29, 2017

MITCHELL SILBERBERG & KNUPP LLP

23 By: 

24 Robert H. Rotstein
Attorneys for Defendants

25 _____
26 ¹³ The same constitutional protections identified in sections III(B)(2)(a)-(d) apply equally to the
27 unidentified advertisements referred to in the TAC (TAC ¶ 22) because any advertisements are
28 adjuncts of and promoted the show. (Gibbons ¶¶ 4-8, 10-14, Exs. 1-9). *See, e.g., Guglielmi*, 25
Cal. 3d at 872-73 (right of publicity claim cannot be maintained "for the use of Valentino's name
and likeness in advertisements for the film"); *Winter*, 30 Cal. 4th at 891 ("If the challenged work
is transformative, the way it is advertised cannot somehow make it nontransformative.").

THIS IS YOUR CRS RECEIPT

INSTRUCTIONS

Please print this receipt and attach it to the corresponding motion/document as the last page. Indicate the Reservation ID on the motion/document face page (see example). The document will not be accepted without this receipt page and the Reservation ID.

ALIFORNIA, COUNTY OF LOS ANGELES
) CASE NO.: BC66000
) NOTICE OF MOTION AND MOTION
) TO COMPEL ANSWERS TO PERM
) INTERROGATORIES
)
) DATE: January 12, 2020
) TIME: 2:30 pm
) DATE:
) TIME:
) RES ID: 131112001085

RESERVATION INFORMATION

Reservation ID: **170727238249**
Transaction Date: July 27, 2017
Case Number: BC667011
Case Title: OLIVIA DE HAVILLAND DBE VS FX NETWORKS LLC ET AL
Party: FX NETWORKS LLC (Defendant/Respondent)
Courthouse: Stanley Mosk Courthouse
Department: 42
Reservation Type: Special Motion to Strike under CCP Section 425.16 (Anti-SLAPP motion)
Date: 9/29/2017
Time: 08:30 am

FEE INFORMATION (Fees are non-refundable)

First Paper Fee: (See below)

| Description | Fee |
|-------------------------------|--|
| First Paper (Unlimited Civil) | \$435.00 |
| Total Fees: | Receipt Number: 1170727K5433 \$435.00 |

PAYMENT INFORMATION

Name on Credit Card: Elizabeth Carrera
Credit Card Number: XXXX-XXXX-XXXX-3272

**A COPY OF THIS RECEIPT MUST BE ATTACHED TO THE CORRESPONDING
MOTION/DOCUMENT AS THE LAST PAGE AND THE RESERVATION ID INDICATED ON THE
MOTION/DOCUMENT FACE PAGE.**

170727238249