No. B582629

IN THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION 3

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

v.

OLIVIA DE HAVILLAND, DBE,
Plaintiff-Respondent.

On Appeal From
Los Angeles County Superior Court Case No. BC667011
The Honorable Holly E. Kendig, Dept. 42

RESPONDENT'S BRIEF IN OPPOSITION

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CERTIFICATE OF INTERESTED PARTIES OR PERSONS

Pursuant to Rule of Court 8.208, there are no interested entities or persons that must be listed in this certificate.

Dated: December 22, 2017

Respectfully submitted,

HOWARTH & SMITH

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I. INTRODUCTION

As this Court stated in *No Doubt v. Activision Publg., Inc.* (2011) 192 Cal.App.4th 1018 "[N]ot all expression with respect to celebrities is insulated by the First Amendment." *Id.* at 1029.

Miss Olivia de Havilland ("Respondent"), a 101-year-old, two-time Academy Award winning actress, brought suit against the producers of "Feud: Bette and Joan," ("Feud"), FX Networks, LLC and Pacific 2.1 Entertainment Group, Inc. ("Appellants") for false light defamation and violation of her right to publicity. The gist of her claims is that Appellants knowingly and recklessly published false statements about her, and portrayed her as endorsing "Feud," thereby misappropriating her name and identity for their own commercial advantage. JA642-648 [Complaint at ¶¶16-31]. The trial court, reviewing the record and ruling on 97 objections to Respondent's evidence, and after a lengthy hearing, held that Respondent "has successfully met her burden in showing that she has a likelihood of prevailing on the merits …." JA1084 [Order at 2]. Appellants' Motion was properly denied, and the case was preferentially set for a trial to begin on November 27, 2017. JA680 [Trial Preference Order at 1].

Appellants now urge this Court to prevent a trial by reversing the ruling on their Motion to Strike. Appellants' Opening Brief ("AOB") at 10-16. Appellants repeatedly torture and misrepresent the nature of Respondent's claims, the Order of the trial court, and the controlling case law governing anti-SLAPP motions. Appellants state that "the trial court held that because Plaintiff denied that a [fake] dramatized interview took place or that she uttered the [false] challenged lines of dialogue, and because Defendants 'sought to portray the show 'consistent with the

historical record,'' Plaintiff could prevail on her claim. [citing] (JA1090-1091 [Ruling 8-9].)" AOB at 11-12.

In fact, what the trial court found the evidence showed was:

> The authentic details [of "Feud"] are used to lead the viewers into believing that what de Havilland says and does [in "Feud"] is accurate and factual, rather than made up and false, and that de Havilland herself endorsed the "Feud" portrayal of her private and public remarks about other actors at the time "Feud" is set.

JA1091 [Order at 9]. The trial court further held that "Plaintiff has sufficiently met her burden by showing that although Defendants sought to be 'consistent with the historical record,' they attributed comments to her 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" JA1091 [Order at 9] (citing *Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 884).

Appellants do not deny that Respondent is the only living principal character in "Feud," that they did not obtain consent or have authority for the falsities they attribute to her, or that they intentionally broadcast a fake interview of Respondent speaking about the "feud" between Bette Davis ("Davis") and Joan Crawford ("Crawford"), which is structured as an endorsement of Respondent's program. JA164 [Motion at 2]; JA193, 195 [Minear Decl. ¶¶7, 15]; JA188-189 [Zam Decl. ¶¶9-11].

Appellants do not deny they also portrayed Respondent making negative, vulgar statements, which were never made, about her sister, Joan Fontaine ("Fontaine") (calling her a "bitch") and Frank Sinatra ("Sinatra"), among others. JA193-195 [Minear Decl. ¶¶7-15]; JA204 [Minear Decl.

¶19]; JA200-201 [Minear Decl. ¶15(d)(vii)]; JA183-184 [Murphy Decl. ¶16-18]. This is the basis for Respondent's suit, and not that she was featured in an accurate docudrama, which was "consistent with the historical record." AOB at 12. As this Court, among others, has held, knowing or reckless publication of false statements about a celebrity for Appellants' profit violates both the right to publicity statute and false light protection. *Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 414; *Fellows v. Nat'l Enquirer, Inc.* (1986) 42 Cal.3d 234; *Masson v. New Yorker Magazine, Inc.* (1991)501 U.S. 496, 496. The trial court properly found on this record that Appellants' Motion should be denied and the case should be tried. JA1097-1098 [Order at 15-16]. This Court should affirm the trial court and remand this case for prompt trial.

II. PROCEDURAL HISTORY

The initial Complaint was filed on June 30, 2017, with the Third Amended Complaint ("TAC") filed per stipulation between the parties on September 5, 2017. JA1, 611, 638 [Complaint, Stipulation, TAC]. The causes of action have not changed and the amended complaints primarily address the correct names of Appellant entities. *Id.* Respondent filed a Motion for Trial Preference based on her advanced age, which was granted, and trial was set for November 27, 2017. JA680.

On August 29, 2017, Appellants filed a Motion to Strike Respondent's Third Amended Complaint ("anti-SLAPP"). JA154. Respondent filed briefs and declarations in opposition, including three expert witness declarations. JA682-973. Appellants filed five declarations, including those of Murphy and other writers and producers of "Feud." JA179-474. Appellants also filed a reply brief. JA979.

On September 29, 2017, after a lengthy hearing and argument, the trial court denied Appellants' Motion. Reporter's Transcript ("RT") 301-356. The court later issued a lengthy written ruling. JA1083-1098.

Appellants filed a Notice of Appeal of the trial court's Order on October 10, 2017. JA1099. Respondent filed a Motion for Calendar Preference with this Court on October 16, 2017 to expedite briefing and argument. Appellants filed a partial opposition, asking for a longer briefing schedule. A preference was granted on October 26, 2017 and Appellants filed their Opening Brief on December 4, 2017 per this Court's schedule.

III. STATEMENT OF FACTS

Olivia de Havilland, a two-time Academy Award winning actress, is a 101-year-old living legend. JA744 [Roesler Decl. ¶15]; JA962 [ODH Decl. ¶¶2-3].

Appellants produced "Feud," an eight-part, successful television series, in which Catherine Zeta-Jones played Respondent. JA192-193 [Minear Decl. ¶¶5-6]. "Feud" aired in March 2017. *Id.* Executive producer and writer, Ryan Murphy, was asked whether he had contacted Respondent about her character in "Feud." Murphy stated that he respected her so much he did not contact her because he did not want to bother her. JA866-876 [Roesler Decl. Ex. 11]. Appellants contacted, at the very least, artist Don Bachardy, who was portrayed in a minor role for permission to use his name and property. JA735 [Bachardy Decl. ¶5]. Appellants did not fact-check with Respondent any of the statements attributed to her. JA971 [ODH Decl. ¶¶2, 7]. The statements and endorsement which form the basis for the lawsuit are all false, have no factual support, or are contradicted by

Appellants' own research. JA962 [ODH Decl. ¶¶2-7]; JA071 [ODH Decl. ¶¶2-7]; JA966-967 [Casady Decl. ¶¶5-7].

Respondent's character appears in six episodes as the narrator, and a series-long fake interview with her is used as a framing device. JA193, 195 [Minear Decl. ¶¶7, 13]. "Feud" is designed to make it appear that the real Respondent endorsed and approved the series and its content. JA731-732 [Ladd Decl. ¶17]; JA956-957 [Casady Decl. ¶11]. Respondent's character uses vulgar language to describe her sister, actor Joan Fontaine, to other professionals in the industry. JA195-202 [Minear Decl. ¶15]. Respondent's character also comments crassly about Frank Sinatra's drinking habits. JA200-201 [Minear Decl. ¶15(d)(vii)]. None of this is true, but Respondent was portrayed this way, without her knowledge or consent or other fact-verification, to enhance the appearance of "Feud" and increase its sensationalist attraction to the public. JA182-184 [Murphy Decl. ¶¶13, 15, 17-18]; JA196 [Minear Decl. ¶15(a)].

Appellants admit they did not obtain consent for the use of Respondent's identity, and do not deny they intentionally broadcast the fake interview of Respondent. JA195 [Minear Decl. ¶15]; JA164 [Motion at 2]. They do not deny that they have Respondent's character call Fontaine a "bitch" at least twice to industry professionals, which never happened. JA183-184 [Murphy Decl. ¶¶16-18]; JA204 [Minear Decl. ¶19]. Appellants admit "Feud" was designed to make it appear authentic, and to make the audience "trust" Respondent's character and what she said about the alleged relationship between Davis and Crawford, and her own private relationship with Fontaine. JA195 [Minear Decl. ¶¶14-15]; JA183 [Murphy Decl. ¶15]. The setup is purposely structured to appear as if the

real Respondent participated in and endorsed "Feud." JA731-732 [Ladd Decl. ¶17]; JA956-957 [Casady Decl. ¶11].

Appellants claim that because they meticulously researched other aspects of "Feud" (principally the Davis-Crawford history), the First Amendment allows them to combine fact and falsehoods about Respondent with total immunity from suit. AOB at 44-45.

Respondent's suit alleges infringement of her common law right of publicity, her statutory right of publicity under California Civil Code Section 3344, and invasion of privacy. JA648-653 [TAC ¶¶32-74]. Appellants have been unjustly enriched at the expense of Respondent, and have caused her damages. *Id.*; JA759 [Roesler Decl. ¶25]; JA705 [Smith Decl. ¶¶4-5].

IV. LEGAL STANDARDS GOVERNING APPELLANTS' ANTI-SLAPP MOTION

A. Standard of Review

The anti-SLAPP statute is designed to accelerate certain pre-trial procedures in order to dispose of patently frivolous cases.[1] *Un Hui Nam v. Regents of the Univ. of California* (2016) 1 Cal.App.5th 1176, 1189 ("the anti-SLAPP law … was designed to ferret out meritless [First Amendment] lawsuits …."). It is expressly not to eliminate cases where a plaintiff can demonstrate by admissible evidence what the California Supreme Court has described as "minimal merit."[2]

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[1] Respondent, an internationally-known celebrity, is a public figure and Code of Civil Procedure Section 425.16 applies. JA1083 [Order at 1].

[2] That SLAPP Motions are being used "strategically" to slow litigation and make certain cases impossible to economically litigate, is a subject of

The anti-SLAPP statute "subjects to potential dismissal only those actions in which the plaintiff cannot 'state[ ] and substantiate[ ] a legally sufficient claim.'" …. [Thus] the Legislature's detailed anti-SLAPP scheme "ensur[es] that claims with the requisite minimal merit may proceed." *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 738, 740-41 (internal citations omitted) (quoting *Navellier v. Sletten* (2002) 29 Cal.4th 82, 93-94).

This Court conducts a *de novo* review of the trial court's ruling on Appellants' motion. *Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 681-82.[3] Accordingly, this Court's "review is conducted in the same manner as the trial court in considering an anti-SLAPP motion." *Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1016.

B. The Trial Court Used the Proper Standard for Reviewing the Evidence

The trial court used the correct legal standard for reviewing the evidence and ruling on whether Respondent had shown a "reasonable probability of success on the merits," on each cause of action and defense. JA1084 [Order at 2]. Indeed, Appellants' statement of the legal standard in their brief on the second prong of the statute, while citing different cases; is almost a verbatim quote from the trial court's Order. *Compare* JA1084 [Order at 2] *with* AOB at 29-30; Code Civ. Proc. §425.16.

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concern. "The cure has become the disease—SLAPP motions are now just the latest form of abusive litigation." *Navellier, supra,* 29 Cal.4th at 96 (Brown, J., dissenting); *Grewal v. Jammu* (2011) 191 Cal.App. 977, 981.

[3] When Appellants lost their motion, they were entitled to and took this immediate appeal, which thus, as referenced in fn. 2, even in a preference case, stayed and delayed the trial. JA680 [Trial Preference Order at 1].

The trial court's statement of the standard is entirely consistent with what this Court has repeatedly held:

> The second step of the anti-SLAPP procedure – a "probability of prevailing" on the merits – means a plaintiff must show that he or she has "a reasonable probability of prevailing, not prevailing by a preponderance of the evidence. For this reason, a court must apply a 'summary-judgment-like' test, accepting as true the evidence favorable to the plaintiff and evaluating the defendant's evidence only to determine whether the defendant has defeated the plaintiff's evidence as a matter of law. A court may not weigh credibility or compare the weight of the evidence. The court's single task is to determine whether the plaintiff has made a prima facie showing of facts supporting his or her cause of action."

Lefebvre v. Lefebvre (2011) 199 Cal.App.4th 696, 702 (internal citations omitted). "[P]laintiff's burden of establishing a [reasonable] probability of prevailing is not high …." *Overstock.com, Inc. v. Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699.

Appellants do not seriously argue that the standard is not as the trial court set forth in its opinion. *See* AOB at 29 (stating the same standard used by the trial court here).[4]

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[4] Appellants assert that the trial court "assumed the legal sufficiency of Plaintiff's evidence. (JA1084 [Ruling 2])." AOB at 27. This is not true, and nowhere does the court make such a statement. The court reviewed the record and evidence submitted, using the proper standards set forth by the California Supreme Court and this Court to rule on 97 objections Appellants made. JA1079-82 [Ruling on Evidentiary Objections]. The trial court properly overruled most of these objections, and Appellants have not appealed the correctness of these rulings. Therefore, any claimed error to the admissibility of this evidence is waived. *Lopez v. Baca* (2002) 98

C. Proper Court of Appeal Standard for Review of the Evidence

As this Court has further held:

> In an appeal from an order denying a special motion to strike, " … We do not reweigh the evidence, but accept as true all evidence favorable to the plaintiff and evaluate the defendant's evidence only to determine if it has defeated the evidence submitted by the plaintiff as a matter of law. If the trial court's decision denying an anti-SLAPP motion is correct on any theory applicable to the case, we may affirm the order regardless of the correctness of the grounds on which the lower court reached its conclusion."

Pers. Court Reporters, Inc. v. Rand (2012) 205 Cal.App.4th 182, 188-89 (quoting *City of Alhambra v. D'Ausilio* (2011) 193 Cal.App.4th 1301, 1306-1307).[5]

Cal.App.4th 1008, 1014–1015. If Appellants had appealed the evidentiary rulings, those would be reviewed under a deference standard. *Morrow v. Los Angeles Unified Sch. Dist.* (2007) 149 Cal.App.4th 1424, 1444.

[5] Appellants, throughout their brief, improperly describe cases as "controlling." For example, "Plaintiff's right-of-publicity claim cannot be squared with *controlling* First Amendment precedent that bars a public figure from invoking economic publicity rights to challenge a docudrama portraying her…. (*Guglielmi v. Spelling-Goldberg Prods.* (1979) 25 Cal 3d. 860, 869 [Bird, C.J. concurring].)" AOB at 15 (emphasis added). In fact, in *Guglielmi*, the Supreme Court opinion held only that heirs had no right to bring a right to publicity action. *Guglielmi, supra*, 25 Cal. 3d at 861. The concurring opinion of Justice Bird was expressly not the opinion of the court, even though joined by a majority. Such opinions may be "persuasive," but are not "controlling." *United Steelworkers of America v. Board of Education* (1984) 162 Cal.App.3d 823. The California Supreme Court, when referencing the concurrence in *Guglielmi*, has never quoted the radical language which Appellants urge. *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387. Appellants also refer to federal

"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." Critically, "[a] plaintiff is not required to prove the specified claim to the trial court; rather, so as to not deprive the plaintiff of a jury trial, the appropriate inquiry is whether the plaintiff has stated and substantiated a legally sufficient claim." *Mann v. Quality Old Time Serv., Inc.*, 120 Cal.App.4th 90, 105, (2004) (internal citation omitted) (disapproved on other grounds in *Baral v. Schnitt*, 1 Cal.5th 376 (2016).

That the trial court used the correct standard in this regard is also not seriously contested by Appellants. *Compare* AOB at 30 *with* JA1084 [Order at 2]. As Appellants acknowledge, only if defendants' evidence "*as a matter of law* defeats the plaintiff's attempt to establish evidentiary support for the claim…" may the Motion to Strike be granted. AOB at 30 (emphasis added).

D. California Law Does Not Afford Docudramas any Special Exceptions or Standards

Appellants claim, incorrectly, that Respondent "seeks to impose liability based on Defendants' dramatized portrayal of her in a docudrama" concerning the professional and personal relationship between Davis and Crawford. AOB at 10. They further proclaim that "the trial court adopted

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and out-of-state opinions as "controlling." AOB at 13. Federal court opinions are not controlling authority in California state courts. *Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1317. Respondent cites and references as "controlling," only cases from the Second District and the California Supreme Court.

an analytic framework that, if upheld, would eliminate the docudrama genre." AOB at 12.

The trial court did not deny Appellants' Motion because Respondent's name and identity were used in some historically accurate docudrama. Respondent brought suit because Appellants made false statements, with reckless disregard, using her name and identity. JA1084 [Order at 2]. Labeling the publication a "docudrama" does not save it from the normal rules, and Appellants cite no case so holding.

Appellants urge this Court to rule for the first time and inconsistent with California law, that by virtue of being produced as a "docudrama," they were entitled to special "leeway to interpret historical events and figures [with reckless disregard for the truth]" avoiding any liability as a threshold matter. AOB at 13. Appellants state that their "docudrama … 'rel[ies] heavily upon dramatic interpretations of events and dialogue filled with rhetorical flourishes. [citing] (*Partington v. Bugliosi* (9th Cir. 1995) 56 F.3d 1147, 1155.)" AOB at 10. *Partington* does not hold that inclusion of "dramatic interpretations" and "rhetorical flourishes" immunizes the entire work from being defamatory.

In *Partington*, the federal court, in a summary judgment context interpreting Hawaii law, held the statements at issue were not defamatory, as they were the personal viewpoint of defendant, not objectively verifiable facts. *Partington*, *supra*, 56 F.3d at 1153. The court, however, rejected any sort of blanket exception for docudramas:

> [I]t is possible that a particular statement of opinion may imply a false assertion of objective fact and therefore fall outside the scope of the First Amendment's protection …. We do not intimate [by

> our holding] that the First Amendment shields from scrutiny every assertion in a book outlining a particular author's perspective on a public controversy or every statement made in a docudrama based upon such an event….

Id. at 1155. *Partington* does not create an exception under California law for docudramas where there is substantial evidence that the statements attributed to plaintiff were false and made intentionally or recklessly. *Id.*

Appellants also urge this court to rely on the New York federal district court in *Davis v. Costa-Gavras* as "controlling" the outcome of their motion. AOB at 13. *Davis*, decided under New York law, is not controlling and does not support Appellants. *Davis v. Costa-Gavras* (S.D.N.Y. 1987) 654 F.Supp.653. Plaintiff in *Davis* sued filmmakers over his portrayal in defendants' film. *Id*. at 654. The court held that plaintiff had failed to submit any evidence that defendants had acted with malice. *Id*. Far from carving out a special exemption for docudramas, the court recognized that they are actionable where factual alterations are "made with serious doubts of truth of the essence of the telescoped composite," or where they distort historical context. *Id.* at 658.[6]

Appellants also cite *Masson v. New Yorker Magazine, Inc.* (1991) 501 U.S. 496, a U.S. Supreme Court case which is entirely supportive of Respondent's position. In *Masson*, plaintiff sued the New Yorker and its journalist for libel claiming six alleged quotations attributed to him in a

[6] *Davis* is also distinguished on its facts, as plaintiff was not directly represented in the film. "There is no person named Ray Davis referred to in the film at any time. Ray Tower, with whom the plaintiff associates himself, is a symbolic fictional composite of the entire American political and military entourage in Chile." *Id*. at 655.

lengthy article were false, defamatory, and reported with malice. *Id.* at 496. In reversing summary judgment for defendant, the court found there were triable issues of fact on each element, notwithstanding defendants' denials of intent. *Id.* at 521, 525.

The court refused to carve out any exception from libel law:

> It matters not under California law that a petitioner alleges only part of the work at issues to be false. '[T]he test of libel is not quantitative; a single sentence may be the basis for an action in libel even though buried in a much longer text,' …. [quoting *Washburn v. Wright* (1968) 261 Cal.App.2d 789, 795]
> …
> The work at issue here … provides the reader no clue that the [purported] quotations are being used as a rhetorical device or to paraphrase the speaker's actual statements…. [A] trier of fact in this case could find that the reasonable reader would understand the quotations to be nearly verbatim reports of statements made by the subject.

Id. at 510, 513.

> [P]etitioner affirms in an affidavit that he did not make the complained of statements. The record contains substantial additional evidence, moreover, evidence which, in a light most favorable to petitioner, would support a jury determination under a clear and convincing standard that [defendant] deliberately or recklessly altered the quotations.

Id. at 521.

Appellants also cite the concurring opinion in *Guglielmi*, *supra*, 25 Cal.3d 860 as controlling, claiming it created complete immunity for docudramas. AOB at 50-54. The actual holding in the published opinion of the court was simply that Valentino's heirs had no right to publicity

causes of action because such rights did not survive death. *Id*. at 861 (statute later amended). Appellants urge this Court to interpret language in the concurrence, to set a new rule, taking an extreme position that has not been adopted by the California Supreme Court or the Second District. For example, Justice Bird stated that "no distinction may be drawn in this context between fictional and factual accounts of Valentino's life" in determining whether defendants' work was protected by the First Amendment. *Guglielmi, supra,* 25 Cal.3d at 868.[7] Appellants claim this means docudramas have absolute immunity. AOB at 50-54. This Court has rejected absolute immunity even for news publications: "the First Amendment does not immunize [defendant] when the entire article is allegedly false…. [T]he deliberate fictionalization of Eastwood's personality constitutes commercial exploitation, and becomes actionable when it is presented to the reader as if true with the requisite scienter." [8] *Eastwood, supra,* 149 Cal.App.3d at 425-426.

The trial court correctly applied California law in rejecting Appellants' position that docudramas enjoy legal immunity from liability even where there is substantial admissible evidence that Appellants acted with reckless or intentional disregard for the truth or falsity of the challenged statements.

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[7] *Montana v. San Jose Mercury News, Inc.* (1995) 34 Cal.App.4th 790, also cited by Appellants is not instructive, as it did not involve false representations made about the celebrity, or false endorsement claims.
[8] *Guglielmi* involved a factual scenario where "No claim was made that respondents' fictional work defamed or invaded the privacy of either Valentino or appellant." *Guglielmi,* 25 Cal.3d at 864. *Guglielmi* does not immunize fictionalized portrayals that are defamatory or invasive.

E. Respondent's Burden of Proof on False Light

"False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed." *Price v. Operating Engineers Local Union No. 3* (2011) 195 Cal.App.4th 962, 970. California Civil Jury Instructions (CACI) (2017) No. 1802 False Light states the plaintiff's burden as follows:

> To establish this claim [of false light], [plaintiff] must prove all of the following:
>
> 1. That [defendant] publicized information or material that showed [plaintiff] in a false light;
>
> 2. That the false light created by the publication would be highly offensive to a reasonable person in [plaintiff]'s position;
>
> 3. [That there is clear and convincing evidence that [defendant] knew the publication would create a false impression about [plaintiff] or acted with reckless disregard for the truth;]
> …
> 4. [That [plaintiff] was harmed; and]
> …
>
> 5. That [defendant]'s conduct was a substantial factor in causing [plaintiff]'s harm.

The Judicial Council states: "In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a reasonable person. Although it is not necessary that the plaintiff be defamed, publicity

placing one in a highly offensive false light will in most cases be defamatory as well." *Id*. at 1030 (quoting *Fellows v. National Enquirer* (1986) 42 Cal.3d 234, 238–239).

As the trial court stated: "A 'false light' cause of action is in substance equivalent to a libel claim, and should meet the same requirements of the libel claim, including proof of malice." JA1084 [Order at 2], quoting *Aisenson v. American Broadcasting Co.* (1990) 220 Cal.App.3d 146, 161; *Reader's Digest Association, Inc. v. Superior Court* (1984) 37 Cal.3d 244, 265. "[T]he term actual malice … can confuse as well as enlighten…. In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity." *Masson, supra*, 501 U.S. at 511. A public figure plaintiff must show malice in its "constitutional sense," that is, "with knowledge that it was false or with reckless disregard of whether it was false or not. [Citation.]" *Brodeur v. Atlas Entertainment, Inc.* (2016) 248 Cal.App.4th 665, 678;[9] JA1089 [Order at 7]. Appellants contest Respondent's ability to prove falsity, defamation, and malice. AOB at 32-48; JA1084 [Order at 2].[10]

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[9] *Brodeur*, cited by Appellants, is clearly distinguishable from the situation here as the court held that plaintiff could not prevail when he did not even file a declaration saying the statements were false, and the movie in question was a "farce." *Id.* at 679-80.

[10] Here and below, Appellants challenge only some elements of Respondent's causes of action. Respondent has offered admissible evidence of each element of each of her causes of action at the trial court level. JA689-690, 699-702 [Opposition at 2-3, 12-15].

1. Falsity and Defamation

Under California law, a statement is false if it "is reasonably susceptible of an interpretation which implies a provably false assertion of fact …." *Couch v. San Juan Unified Sch. Dist.* (1995) 33 Cal.App.4th 1491, 1500. "This question must be resolved by considering whether the reasonable or 'average' reader would so interpret the material. [Citations.]" *Id*. at 1500. Appellants also assert Respondent's Complaint is based on "defamation-by-implication," and therefore argue that Respondent must prove more than knowing falsehoods – must prove that "viewers would take from the [false] scenes the implication that Plaintiff was vulgar, a gossip and a hypocrite." AOB at 31. Respondent's case is based specifically on actual false statements made with intent that put her in a false light. *Price*, *supra*, 195 Cal.App.4th at 970.

Appellants cite *Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal App.3d 991, 1102, n. 9. *Weller* does not help Appellants; rather it supports Respondent's position. There defendants appealed a jury verdict for plaintiff, claiming the challenged broadcast was protected, that no reasonable juror could have found the facts in the broadcast false, that there were no actual facts asserted, and other defenses. *Id*. at 1001-1002. The court, affirming the verdict, rejected all of ABC's assertions. The court referred to both objective facts and statements which imply a fact, and held the law is the same as to both:

> In effect, appellants contend that we should find that statements that are phrased in terms of "conjecture" or inquiry into a matter of public concern are entitled to federal constitutional protection … on the theory that these types of statements cannot reasonably be

> understood as assertions of actual fact.… Unlike hyperbole or satire, the publication of implied defamatory statements against the background of apparently objective and neutral reporting is almost certain to be understood as factual. Moreover, the implied defamatory facts in this context may be given even more credence by the listener where, as here, the reports profess to be objective….

Id. at 1003-1004.[11]

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[11] Appellants rely on federal cases in their attempt to convince the court that docudramas have special license to publish defamatory statements. AOB at 33. Neither *Davis* nor *Partington* help them. *See* Section (IV)(D), *supra*.
Appellants also cite a New York court case, *Youssoupoff v. CBS, Inc.* (N.Y. Sup. Ct. 1963) 244 N.Y.S. 2d 701. In *Youssoupoff*, plaintiff brought a right to privacy action under a New York statute on the basis that defendant used an actor to impersonate him in a broadcast containing fictionalized dialogue. *Id*. at 702-703. Plaintiff's motion for summary judgment was ultimately denied because the dialogue was "entirely innocuous as far as plaintiff's reputation, personality, or character are concerned." *Id*. at 706.
Bose Corp. v. Consumers Union of U.S., Inc. (1984) 466 U.S. 485 expressly recognized that statements made with knowledge of their falsity or with reckless disregard of the truth are actionable. *Id*. at 513.
In *Heller v. NBCUniversal, Inc.* (C.D. Cal., June 29, 2016, No. CV-15-09631-MWF-KS) 2016 WL 6583048, the court held that the challenged scenes portrayed by defendants were not actionable as "the alleged accusations made against [plaintiff] in the challenged scenes were also made in real life. Plaintiff admits that dispositive fact in his memoir …." *Id*. at *7.
Sarver v. Charier (9th Cir. 2016) 813 F.3d 891, another federal case, dealt with the issue of whether the film actually portrayed Sarver or a composite, and also involved a plaintiff who had himself given many interviews to the filmmakers. *Id*. at 896.
Appellants cite *Gang v. Hughes* (S.D. Cal. 1953) 111 F.Supp. 27, for the proposition that it is "not sufficient, standing alone, that the language is unpleasant and annoys or irks plaintiff." AOB at 37. Respondent does not claim—and the trial court did not find—that the language used by

Respondent's Complaint is based on false statements and implied falsehoods. JA642-648 [TAC at ¶¶16-31].

2. Malice

As the trial court correctly held, citing *Reader's Digest*, *supra*, 37 Cal.3d at 256-257, "[i]f the person defamed is a public figure, he cannot recover unless he proves, by clear and convincing evidence [citation], that the libelous statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'" JA1088-89 [Order at 6-7] (citing *New York Times Co. v. Sullivan* (1984) 376 U.S. 254, 279-280, 285-286); *see also Balzaga v. Fox News Network, LLC* (2009) 173 Cal.App.4th 1325, 1337. This is the standard Appellants endorse. AOB at 14, 31.

Appellants claim, contrary even to the cases they cite in their brief (many also cited by the trial court), that Respondent must show that "Defendants *intended* to create [a] negative impression or recklessly took that risk knowing that such a negative impression was likely." AOB at 39.

As the Supreme Court has elucidated: "Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will." *Masson*, *supra*, 501 U.S. at 510. And as the trial court stated in its Order:

> [I]n *St. Amant v. Thompson*, the high court [said] … [t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard

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Appellants was merely annoying or irksome. JA1088, 1091 [Order at 6, 9]. None of these cases support Appellants' position.

> for truth or falsity and demonstrates actual malice." [Citation.]
>
> The quoted language establishes a subjective test, under which the defendant's actual belief concerning the truthfulness of the publication is the crucial issue. [Citation.] This test directs attention to the "defendant's attitude toward the truth or falsity of the material published … [not] the defendant's attitude toward the plaintiff." [Citation.]

JA1089 [Order at 7].

Appellants cite a federal case interpreting Nevada law, *Newton v. Nat'l Broad. Co.* (9th Cir. 1990) 930 F.2d 662 (involving a full trial and verdict). In *Newton*, the court stated that liability can be imposed where defendant acts with "serious subjective doubt about the truth of the impression." *Id*. at 667. Here, the trial court used the "subjective" standard set forth in *St. Amant*, consistent with *Bose*. JA1089 [Order at 7].[12]

Appellants also cite *Good Government Group of Seal Beach, Inc. v. Superior Court* (1978) 22 Cal.3d 672, which does not advance Appellants' position. *Good Government* affirmed the *denial* of a motion for summary

[12] Appellants' argue that if they deny that they intended to convey a defamatory impression, their actual words and knowledge do not matter, and thus, without a confession that Appellants intended to cast Respondent in a false light, the case is over. "Plaintiff has not made, and cannot make, that showing [of actual malice] because the unrebutted evidence submitted by Defendants demonstrated that *Feud's* creators intended to create a positive impression of the de Havilland character." AOB at 39. This is absurd and is not even suggested by the holding of any case on point. Furthermore, it is not true that Appellants self-serving and self-contradictory statements of their intent were "unrebutted." JA959 [Casady Decl. ¶13].

judgment in a libel case. *Id.* *Good Government* confirms that even equivocal words, if not literally false, deliberately so cast, meet the standard for falsity and actual malice, and raise a triable issue of fact. *Id.* at 684.[13]

The law in California, including U.S. Supreme Court authority, is precisely as the trial court stated. JA1088-1089 [Order at 6-7]. A plaintiff can establish actual malice by showing a defendant acted "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.*, *supra*, 376 U.S. at 279-280; *Masson*, *supra*, 501 U.S. at 510. This is true whether the plaintiff's claim is styled as a false light violation of the right to privacy or as "defamation-by-implication." *Reader's Digest*, *supra*, 37 Cal.3d at 265 (holding the same constitutional standards apply to claims for defamation and invasion of privacy).

a. Standard of Proof Required for Malice

Appellants assert that in the context of an anti-SLAPP motion, Respondent must offer "clear and convincing proof of 'actual malice." They claim the trial court did not use this standard, even though this standard is stated expressly in its Order. JA1089 [Order at 7]. Appellants accuse the trial court of reversible error, asserting: "the trial court treated

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[13] In *Thomas v. Los Angeles Times Commc'ns, LLC* (C.D. Cal. 2002) 189 F.Supp.2d 1005, 1013, cited by Appellants, the federal district court granted an anti-SLAPP motion. However, there the court stated that plaintiff had published a biography which explored his past in Nazi Germany. *Id.* at 1010. Plaintiff claimed defendants implied he was a "liar" because the article set out plaintiff's version of facts and also reported other witness accounts. *Id.* at 1013. The court did not review actual malice. *Id.* at 1017. It was dispositive that defendants set out both sides of a story fully so that the reader could draw his own conclusions. *Id.* at 1013. Appellants did not ask for, nor explain, Respondent's side of the story in "Feud."

Feud's dramatic elements as presumptively actionable, and then applied a watered-down burden of proof and scienter standard for actual malice." AOB at 41. Appellants' basis for this is a part of a colloquy with Defense counsel at oral argument. However, when the court enters a written order, it, and not oral statements, constitute the ruling. *Diaz v. Prof'l Cmty. Mgmt., Inc.* (2017) 16 Cal.App.5th 1190, 1206 ("while a court's oral statements may be illustrative of its thinking, it is the court's written order that constitutes the ruling."); *Collins v. Hertz Corp.* (2006) 144 Cal.App.4th 64, 77-78.

Furthermore, the court did not state at oral argument that it ignored the clear and convincing evidence standard it included in its Order. JA1089 [Order at 7]. The court stated there was a difference between the clear and convincing standard at trial, and the one at summary judgment or on an anti-SLAPP motion. Counsel for Appellants agreed with the court:

> MR. ROTSTEIN: Let me start with the malice issue, because that applies to all causes of action.
> THE COURT: You're right. It does.
> MR. ROTSTEIN: And notwithstanding the minimal merit, which the courts say is a summary judgment standard … in the anti-SLAPP area.
> THE COURT:… I'm to assume all favorable evidence for the plaintiff.… [I]t does resemble parts of a summary judgment motion.
> MR. ROTSTEIN:… [T]he plaintiff still has the burden of proof by clear and convincing evidence.
> THE COURT:… That's at trial. They do not have to prove by clear and convincing evidence now….
> MR. ROTSTEIN: I agree with that, your Honor.

RT at 325:5-23.

Indeed, Appellants, citing two federal courts, one Seventh Circuit case and *Christian Research Institute v. Alnor*, (2007) 148 Cal.App.4th 71 ("*CRI*"), a First District case (none is controlling authority), also assert: "[I]n the anti-SLAPP context: the plaintiff must show 'that a *jury* could reasonably find [malice] by clear and convincing evidence….'" AOB at 40 (citations omitted) (emphasis added). This statement is consistent with Second District authority and the Order of the trial court: "The plaintiff must demonstrate that the complaint is both legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment [by a jury] if the evidence submitted by the plaintiff is *credited*. The court does not weigh the credibility or comparative probative strength of probative evidence. *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 768." JA1084 [Order at 2] (emphasis added).

Appellants cite *CRI*, but again this case does not help them. The First District, citing *Reader's Digest*, also cited by the trial court below, states that circumstantial evidence of malice can be "clear and convincing." *CRI*, *supra*, 148 Cal.App.4th at 85. The *CRI* court stated:

> Unlike the falsity requirement, plaintiffs must demonstrate "actual malice" by clear and convincing evidence…. To show actual malice, plaintiffs must demonstrate [defendant] either knew his statement was false or subjectively entertained serious doubt his statement was truthful…. "Publishing with such [serious] doubts shows reckless disregard for truth or falsity and demonstrates actual malice." … [P]laintiff may rely on inferences drawn from circumstantial evidence to show actual malice. "A failure to investigate … reliance upon sources known to be unreliable, or known to be biased against the plaintiff – such factors may … indicate that the publisher himself

> had serious doubts regarding the truth …." Thus, malice may be inferred where, for example, "a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call."

CRI, *supra*, 148 Cal. App. 4th at 84-85 (citing *Reader's Digest*, *supra*, 37 Cal.3d at 256-258; *St. Amant v. Thompson* (1968) 390 U.S. 727, 732).[14]

For example, the court in *Nguyen-Lam v. Cao* (2009) 171 Cal.App.4th 858, 862, 869, affirming the denial of an anti-SLAPP motion, stated and applied the standard correctly: "the trial court did not err in

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[14] To the extent *CRI* holds that plaintiff's evidence of malice at the anti-SLAPP stage must be something more than that which if accepted by a jury would sustain a judgment, it is inconsistent with Second District authority, including *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, which it cites. The *Robertson* court states that on independent review of proof of actual malice, plaintiff's "burden is 'met in the same manner plaintiff meets the burden of demonstrating the [other] merits of the cause of action … by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses.' [Citation.]" *Id*. at 359. *Robertson* also makes clear that the anti-SLAPP statute is constitutional only because it does not preclude the right to jury trial: "[I]t has been held that Section 425.16 does not impair the right to a trial by jury because the trial court does not weigh the evidence in ruling on the motion, but merely determines whether a prima facie showing has been made which would warrant the claim going forward." *Id*. at 356, n. 3. If *CRI* is applying a different standard which would endanger the right to trial by jury, this Court must follow *Robertson*. *Sarti v. Salt Creek Ltd.* (2008) 67 Cal.App.4th 1187, 1193. Also, the cases which discuss independent review of a jury verdict are different from the anti-SLAPP setting. After a jury trial, there has been full discovery and a trial record. *Bose Corp*, *supra*, 466 U.S. 485; *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835. No Supreme Court or Second District authority holds that a court may weigh evidence and interpret inferences in favor of the moving party on the malice element or any other on an anti-SLAPP motion. This would, as *Robertson* notes, raise constitutional issues.

concluding plaintiff demonstrated the requisite probability a jury would find defendant's baseless accusations and contradictory explanations constituted clear and convincing evidence he harbored actual malice."; *see also Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 675 ("since 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.' [Citation.]"); *Eastwood v. National Enquirer, Inc.* (9th Cir. 1997) 123 F.3d 1249, 1253 ("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."). This is the standard the trial court used, and the standard this Court must use *de novo*. *See* Sections (IV)(A)-(D) *supra*; JA1088-1089 [Order at 6-7].

And the U.S. Supreme Court has addressed this specific point:

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

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

As demonstrated below, Respondent submitted substantial direct and circumstantial, clear and convincing, evidence of Appellants' actual malice, which viewed *de novo* and by independent review, was more than sufficient to carry her burden in showing that she had a probability of success on her false light (and right to publicity claims, as discussed more fully *infra*).

F. Legal Standards Governing Statutory and Common Law Right to Publicity Claims

Under California common law, there exists a "right of publicity" in a person's name, likeness and identity. *Lugosi v. Universal Pictures* (1979) 25 Cal.3d 813, 819. This right is codified at Civil Code Section 3344, which created a right of publicity in a person's "name, voice, signature, photograph, or likeness." These protections are vital as "[t]here are a number of different means by which a celebrity's identity can be appropriated … enabling the 'clever advertising strategist' to free-ride on the commercial value associated with a celebrity's identity without being required to seek that celebrity's consent." Paul Czarnota, *The Right of Publicity in New York and California: A Critical Analysis*, 19 Vill. Sports & Ent. L.J. 481, 519 (2012).

The elements to a claim for misappropriation of the right of publicity 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 v. Hallmark Cards* (9th Cir. 2010) 599 F.3d 894, 909; *Eastwood*, *supra*, 149 Cal.App.3d at 417. Appellants do not deny that Respondent can establish all the elements of a right to publicity claim. Appellants admit they knowingly used Respondent's name, identity, image and likeness (collectively "Identity") in a commercial production, without consent or compensation. *See* JA193-202 [Minear Decl. ¶¶7-15]; JA189-190 [Zam Decl. ¶¶11-14]; JA181-185 [Murphy Decl. ¶¶7, 14-20]; JA208 [Gibbons Decl. Exs. 4-9]; JA237 [Berkley Decl. Ex. 54].

As the trial court correctly found, "here we have no compensation given despite using her name and likeness …. for the purposes of this motion, which requires … [only] minimal merit, plaintiff has adequately met her burden." RT at 319:9-13; RT at 319:14-16.

Appellants do not contest this showing on appeal; rather they argue that Respondent's right to publicity claim is barred by affirmative defenses, that it is protected under the First Amendment, is a transformative use, and is within the public interest. *See* AOB at 49-60. A defendant advancing affirmative defenses "bears the burden of proof on the defense …." *Peregrine Funding, Inc. v. Sheppard Mullin* (2005) 133 Cal.App.4th 658, 676. 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*, *supra*, 599 F.3d at 910; Sections (IV)(A)-(B), *supra*.

1. First Amendment Defense

Appellants bear the burden of showing their First Amendment affirmative defense eliminates as a matter of law Respondent's chance of prevailing on her right to publicity causes of action. Appellants claim docudramas enjoy virtually unlimited protection under the First Amendment. *See* AOB at 50-54. As discussed extensively in Section (IV)(D), *supra*, this is wrong under controlling law. Docudramas are afforded no blanket immunity from defamation or right to publicity actions and are not entitled to any greater protection under the First Amendment than any other medium. *Comedy III*, *supra*, 25 Cal.4th at 387; *Eastwood*, *supra*, 149 Cal.App.3d at 422. Television broadcasts may come under Constitutional protection, but it is not unlimited. For example, in *Browne v. McCain* (C.D. Cal. 2009) 611 F.Supp.2d 1062, the court denied an anti-

SLAPP motion challenging a right to publicity claim by singer Browne, who asserted that the use of his voice singing in the background in a political commercial for John McCain. *Id.* at 1065-67. Browne claimed this use of his voice and song constituted a false endorsement of McCain. *Id.* at 1067. The court held that neither the First Amendment nor the public interest doctrines exempt false statements from a right to publicity claim. *Id.* at 1071.

> Generally, political expression and speech uttered during a campaign for public office enjoys broad First Amendment protection. [Citation.] If, however, such speech is false or misleading, it enjoys diminished protection. [Citation.]
>
> …. RNC has not shown that political expression's broad First Amendment protection bars, as a matter of law, all actions based on allegedly improper use of a person's identity in campaign-related materials. Such a proposition does not seem warranted, particularly in light of Browne's allegation that the Commercial gave the misleading impression that Browne endorsed Senator McCain's candidacy.
>
> Thus, RNC has not met its burden of establishing that the First Amendment bars, as a matter of law, Browne's claim.

Id. at 1072; *see also Melvin v. Reid* (1931) 112 Cal. App. 285.

In the only U.S. Supreme Court case to consider the constitutionality of a right to publicity statute, *Zacchini v Scripps-Howard Broadcasting* (1977) 433 U.S. 562, the court reversed the Ohio Supreme Court, which held the statute violated the First and Fourteenth Amendments. *Zacchini* involved a broadcast of plaintiff's 15-second act. Zacchini sued the station

for violation of his right to publicity. The court rejected defendants' argument that the Constitution prohibited Ohio's right to publicity statute:

> There is no doubt that entertainment, as well as news, enjoys First Amendment protection.… But it is important to note that neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized.… We conclude that although the State of Ohio may as a matter of its own law privilege the press in the circumstances of this case, the First and Fourteenth Amendments do not require it to do so.

Id. at 576, 578.[15]

Appellants cite *Polydoros v. Twentieth Cent. Fox Film Corp.* (1997) 67 Cal.App.4th 318. *Polydoros* turned on whether plaintiff's identity had been used at all. The court stated that movies have as much right to First Amendment protection as news reporting, but do not have a right to more protection. *Id*. at 323. As noted by the trial court below, *Polydoros* is distinguishable as the case was "discussing negligence" and "the film at issue in *Polydoros*, was 'a fanciful work of fiction and imagination.' Here, by contrast, the defendants attempted to make the program 'consistent with the historical record.'" JA1093 [Order at 11]. The court further correctly stated that *Polydoros* did not make a finding that compensation is not required when a person's name and likeness is used "but, rather, simply

[15] Appellants again rely heavily on the concurrence in *Guglielmi, supra*, 25 Cal.3d at 862, which is not controlling and in so far as it can be interpreted to immunize docudramas, is not the law. *See* discussion at Section (IV)(D), *supra*.

held that '[i]t simply was not necessary to do so in this case." JA1094 [Order at 12].[16]

2. Appellants Cannot Meet their Burden in Showing that "Feud" was Transformative

Because "Feud" is not entitled to special immunity, it must be judged under the analysis set forth by the California Supreme Court in *Comedy III*. In *Comedy III*, reversing summary judgment below, the court rejected a claim that drawings of the "Three Stooges" on t-shirts were protected transformative art. Instead, the court held that the heirs had a right to publicity claim against the defendant. 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 …. When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.

Comedy III, *supra*, 25 Cal. 4th at 400, 405; JA1094-1096 [Order at 12-14]. The court went on to find that the drawings were not protected:

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[16] Appellants string cite a number of out-of-state, mostly federal, cases, which deal with the law of other states, including statutes which differ significantly from California law. AOB at 53-54. To the extent that any of these foreign cases contradict controlling law, they are not authoritative; to the extent that they deal with different statutory language, they are irrelevant.

> We can discern no significant transformative or creative contribution [in use of the celebrities' likenesses]. [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.

Id. at 409.

Appellants claim their motion should be granted because "Feud" is a docudrama which transformed the Respondent's character. AOB at 54-56. Appellants claim Respondent's identity was only "raw material" the value of which did "not derive from [her] celebrity fame …." *Id*. at 54. Appellants miss the mark.

No Doubt, *supra*, 192 Cal.App.4th at 1018, is directly on point. In that case, the band No Doubt licensed the use of its images for use in a video game where their avatars sing their songs. No Doubt sued under the right to publicity laws, claiming Activision used their identities outside the scope of the license.[17] The Second District affirmed the denial of the defendants' anti-SLAPP Motion, rejecting the claim that the work was transformative:

> The avatars perform those songs as literal recreations of the band members. That the avatars can be

[17] "[V]ideo games are expressive works entitled to as much First Amendment protection as the most profound literature. [Citation.] 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, supra,* 192 Cal.App.4th at 1029.

> 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.

Id. at 1034. Appellants admit they wanted to make the Respondent's character in "Feud" as much like Respondent as possible in order to give the docudrama authenticity. JA182-183 [Murphy Decl. ¶¶14-15]. They use Respondent's name and identity, doing what she did as a celebrity, capitalizing on her fame. 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 Respondent. *See No Doubt*, *supra*, 192 Cal.App.4th at 1034.

Appellants argue that Feud was a transformative work because it was a television show produced by several different professionals. AOB at 55. This is precisely the argument that the court rejected in *No Doubt* and *Comedy III*. *No Doubt*, *supra*, 192 Cal.App.4th at 1034; *Comedy III*, *supra*, 25 Cal. 4th at 408. This depiction of Respondent was not transformative as a matter of law. *Id.*[18] As the trial court correctly stated, "because the

[18] In *Winter v. DC Comics* (2003) 30 Cal.4th 881, the Supreme Court used the *Comedy III* transformative test in evaluating half-worm creatures from outer space which resembled two country singers. *Id.* 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. *Winter* confirms that where the identity of the celebrity is a literal imitation, the First Amendment does not protect it.

Defendants admit that they wanted to make the appearance of Plaintiff as real as possible … there is nothing transformative about the docudrama." JA1095 [Order at 13]; *see Comedy III*, *supra*, 25 Cal. 4th at 409.

Appellants also assert Respondent's claims must fail because "Feud's" economic value does not derive "primarily" from her fame. AOB at 57. Appellants are wrong again.

In support of their interpretation that any celebrity depicted in a movie with many characters can recover only if she can show that her fame was the "primary" marketing factor, Appellants cite to *Comedy III*. AOB at 57-58. *Comedy III* made no such holding. Rather, the court stated, "courts *may* find useful a *subsidiary* inquiry, particularly in close cases: does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted?" *Comedy III*, *supra*, 25 Cal. 4th at 407 (emphasis added). It is irrational to claim that *Comedy III* required the work to be primarily derived from each separate plaintiff. That would mean Larry, Mo and Curly each would have to show that their own fame provided the "primary" economic value. This is not a necessary element that Respondent must satisfy, but an optional test that the trial court could have used if the case was close and if it were useful. *Id*. This is not a close case.[19]

Furthermore, courts have rejected Appellants argument where a work involves the likenesses of multiple individuals. In *In re NCAA*

[19] Appellants' reliance on *Winter*, *supra*, 30 Cal.4th 881 is similarly misguided, as the court in *Winter* simply quoted verbatim the discussion from *Comedy III* which held that this test was optional and not dispositive. *Id*. at 889-890.

Student-Athlete Name & Likeness Licensing Litig. (9th Cir. 2013) 724 F.3d 1268, the court expressly rejected the argument that the "sheer number of virtual actors" and absence of "any evidence as to the personal marketing power of [plaintiff]" demonstrated that defendant's First Amendment rights outweighed plaintiff's rights. *Id*. at 1277, fn. 7. The court held, "Having chosen to use the players' likenesses, [defendant] cannot now hide behind the numerosity of its potential offenses or the alleged unimportance of any one individual player." *Id*. Nor can Appellants here hide behind the numerosity of the celebrity likenesses they have incorporated into "Feud."

The trial court here correctly held "Plaintiff has met her burden on this motion by showing that the use of her likeness in the television program resulted in economic benefit to the Defendants." JA1096 [Order at 14]. Appellants have not borne their burden of proof on a First Amendment defense.

3. Public Interest/Public Affairs Affirmative Defense

There are exceptions to right to publicity claims which public affairs and public interest broadcasts. Cal. Civ. Code §3344(d); *Browne*, *supra*, 611 F.Supp.2d at 1071-1072. However, those defenses are 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. This defense does not preclude right to publicity causes of action where the broadcast includes false statements, particularly fake interviews and endorsements. *Id*.; *Eastwood, supra,* 123 F.3d 1249.

As the trial court correctly recognized, the Second District discussed the limits on public interest in *Eastwood*, *supra*, 149 Cal.App.3d at 409. RT at 321:18-322:9. In *Eastwood,* actor Clint Eastwood brought an action

against a newspaper for false light and infringement of his right to publicity when it published a false article about a love triangle involving Eastwood. This Court held that celebrities, as a consequence of their fame, relinquish some, but not all, of their rights to privacy and publicity:

> Often considerable money, time and energy are needed to develop the ability in a person's name or likeness to attract attention … 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 … [here], 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 when it is presented to the reader as if true with the requisite scienter.

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

Similarly, in the case involving Senator McCain's bid for president, the court held that the public interest exception did not preclude a cause of action based on the misuse of Browne's identity and the song he wrote, in the political broadcast. *Browne*, *supra*, 611 F.Supp.2d at 1071. Defendants, simply by using Browne's voice singing his song, falsely suggested that Browne, a lifelong Democrat, endorsed McCain and required denial of the anti-SLAPP motion. *Id*. at 1065.[20]

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[20] Appellants cite *Dora v. Frontline Video* (1993) 15 Cal.App.4th 536, which is inapposite. AOB at 59. *Dora* involved a true documentary, featuring filming of actual surfing on a public beach. There was no falsity issue in *Dora*, simply the broadcast of an actual historical event. *Id.* at 546.

There is no case, and Appellants cite none, holding that having some truthful statements in a published medium allows commercial exploitation of a celebrity through knowing or recklessly false representations. Both *Eastwood* cases, where there was truthful information salted among the falsehoods, are to the contrary. *Eastwood, supra*, 123 F.3d at 1249; *Eastwood, supra*, 149 Cal.App.3d at 424-425; *see also Solano v. Playgirl* (9th Cir. 2002) 292 F.3d 1078, 1089; *see also* Section (IV)(F)(1), *supra*.[21]

Appellants concede that *Eastwood* applies where defendants act "with knowledge of their falsity or with reckless disregard for the truth." AOB at 59. As set forth in Sections (V)(C)(1)-(3), *infra*, Respondent has presented clear and convincing evidence that Appellants acted with knowledge or reckless disregard of the falsity of their portrayal of Respondent, and thus the public affairs exception does not apply, and the public interest defense fails. *Eastwood, supra*, 149 Cal.App.3d at 424-425.

V. THE EVIDENCE SUPPORTS A PROBABILITY OF SUCCESS ON FALSE LIGHT

A. Falsity

The statements attributed to Respondent are "reasonably susceptible of an interpretation which implies a provably false assertion of fact …." *Couch, supra*, 33 Cal.App.4th at 1500. Appellants admit they publicized "Feud," using Respondent's character as if she made the statements and took the actions they attribute to her. JA188-90 [Zam Decl. ¶¶11-14];

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[21] 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.* (C.D. Cal. 1998) 5 F.Supp.2d 823.

JA181-85 [Murphy Decl. ¶¶7, 14-20]; JA193-203 [Minear Decl. ¶¶7-15]; JA220 [Berkley Decl. Ex. 54]; JA208-09 [Gibbons Decl. ¶¶10-13]. "Feud" places Respondent in an interview at the 1978 Academy Awards discussing Davis and Crawford's private relationship, which never happened. AOB at 43-44; JA193, 195-203 [Minear Decl. ¶¶7, 15]; JA188-89 [Zam Decl. ¶¶9, 11]; JA208 [Gibbons Decl. ¶10]; JA731-32 [Ladd Decl. ¶17]; JA955-58 [Casady Decl. ¶11]; *Partington*, *supra*, 56 F.3d at 1155 (authors "must attempt to avoid creating the impression that they are asserting objective facts rather than merely stating subjective opinions.").

Respondent provided direct evidence that she never gave such an interview and did not authorize "Feud" to portray her as it did. JA962 [ODH Decl. ¶¶4-5]. In that fake interview, Respondent gossips and makes negative comments about Davis and Crawford's personal lives. JA955-58 [Casady Decl. ¶11]; JA731-32 [Ladd Decl. ¶17]; JA220 [Berkley Decl. Ex. 54]. Respondent never said these things. JA955-58 [Casady Decl. ¶11]; JA962 [ODH Decl. ¶5]; JA971 [ODH Decl. ¶3]; JA193, 195-203 [Minear Decl. ¶¶7, 15]. The trial court held: the "facts … are sufficient to meet her burden of showing that there was no interview at the 1978 Academy Awards and that the sentiments expressed in this interview were not factually accurate." JA1085 [Order at 3]. Evidence that defendant made up a fake interview that never happened is grounds for a defamation claim. *Eastwood*, *supra*, 123 F.3d at 1249.

The Court may not compare the weight of Appellants' evidence on an anti-SLAPP motion.[22] However, even if it could, Appellants' contention

[22]*See* Sections (IV)(B)-(D) *supra*.

that there is a "clear factual basis" for the fake interview is contradicted by their own statements. AOB at 35-36. Respondent giving other interviews during her career about other subjects does not make the statements attributed to Respondent' any less false. Mixing fact and falsehood makes the conduct worse, not better. *Partington*, *supra*, 56 F.3d at 1155.

"Feud" has Respondent's character call her sister, Fontaine, a "bitch" to others in the profession. JA195-203, 204 [Minear Decl. ¶¶15, 19]; JA183-84 [Murphy Decl. ¶¶16-18]. She did not do this. JA962 [ODH Decl. ¶6]; JA971 [ODH Decl. ¶5-6]. Appellants admit Respondent did not call Fontaine a bitch. JA962 [ODH Decl. ¶6]; JA971 [ODH Decl. ¶¶5-6]. The trial court found: "[f]or purposes of this motion, Plaintiff has sufficiently met her burden in showing that the use of the term 'bitch' and 'bitches' in the television show were not factually accurate." JA1086-87 [Order at 4-5].

Appellants assert that because Respondent referred to her sister as "Dragon Lady," in an interview on her 100th birthday, that the court should find this is a synonym to "bitch." They also claim an unverified comment that Respondent once said "I hate to play bitches[,]" makes the "bitch" sister comment true. AOB at 45-46; JA184 [Murphy Decl. ¶17]. This argument is certainly not sufficient to justify dismissal of Respondent's case under the proper standard for an anti-SLAPP motion. *Masson*, *supra*, 501 U.S. 503, 522 (whether "intellectual gigolo" is false if plaintiff said he was "a private asset but a public liability" was a jury question).

Respondent, the only living witness to the alleged conversation with Aldrich, denies ever making the statement about playing "bitches." JA971 [ODH Decl. ¶6]. Moreover, Appellants' assertion that "Dragon Lady" is

equivalent to "bitch" is wrong. JA171 [Motion at 9]; JA700 [Opposition at 13 n.15]; JA967 [Casady Decl. ¶8]; Merriam Webster, https://www.merriam-webster.com/. "[T]hese expressions do not have the same meaning and are not considered to be of equal vulgarity and offensiveness." JA967 [Casady Decl. ¶8]. There is a vulgar "F word" for "intercourse," but no one would reasonably suggest that the two have the same implication.

"Feud" has Respondent sniping to Davis about Sinatra's drinking habits. JA955-58 [Casady Decl. ¶11]; JA195-203 [Minear Decl. ¶15]; JA220 [Berkley Decl. Ex. 54]. This is not true. JA195-203 [Minear Decl. ¶15]; JA971 [ODH Decl. ¶4]; JA949 [Galante Decl. ¶5]; JA988 [Reply at 6]. As the trial court stated, "the actual line about Frank Sinatra does not appear to have been a true event. As implicitly admitted in the declaration of Timothy Minear …. Accordingly, for purposes of this motion, Plaintiff has sufficiently met her burden of showing that the comments about Frank Sinatra were false." JA1087 [Order at 5].

"Feud" and its promotional material is designed to give the impression that Respondent participated in and endorsed "Feud," and the hurtful things her character says in the show. JA955-59 [Casady Decl. ¶¶11, 13]; JA731-32 [Ladd Decl. ¶17]. Respondent did not endorse "Feud" and does not approve of its content, particularly with respect to herself. JA971-72 [ODH Decl. ¶¶2, 9-10].

Appellants "dressed up" the false statements in the guise of real, historical events to make the false statements appear authentic. JA183-84 [Murphy Decl. ¶16]; JA195-203 [Minear Decl. ¶¶14-15]; JA955-58 [Casady Decl. ¶11] ("There is an interview set at the 1978 Academy

Awards ceremony, where Miss de Havilland did present an award…. great attention [is] paid to [her] character … to give the film extra realism ….").

The statements attributed to Respondent are false. Respondent did not say these things, did not endorse "Feud," did not publicly discuss Davis and Crawford's relationship, and never gave an interview at the 1978 Academy Awards about it. JA962 [ODH Decl. ¶¶4-5]; JA971 [ODH Decl. ¶¶2-3]. An alleged endorsement which is false is actionable. *Eastwood, supra,* 123 F.3d at 1249; *Browne, supra,* 611 F.Supp.2d at 1070. Appellants claim that because "Feud" is a docudrama, it is "necessarily fictional" and the story "must necessarily be altered." AOB at 33. However, as discussed *supra* in Section (IV)(D), docudramas are not entitled to special protections. In fact, the Supreme Court has recognized that the audience of a docudrama may understand statements made in the work to be statements actually made by the individual portrayed. The court has refused to carve out exceptions to libel law for any medium. *Masson, supra,* 501 U.S. at 496. Thus, "Feud" must be held to the same standard as any other fictional or non-fictional work. *Id.* Appellants do not have a license to falsify historical events merely because they choose to classify their work as a docudrama.

B. Defamation

The statements attributed to Respondent here are clearly defamatory; there is substantial evidence that *a reasonable person in the position of respondent* would be highly offended by the false statements. *Solano, supra,* 292 F.3d at 1082-1084; CACI (2017) No. 1802; JA962 [ODH Decl. ¶¶5-7]; JA971-72 [ODH Decl. ¶¶3-7, 9-10]; JA949 [Galante Decl. ¶5]. The statements cast Respondent 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. JA955-59 [Casady Decl. ¶¶11-13]; JA744-45, 747-50 [Roesler Decl. ¶¶15, 20-21]; JA193, 195-203 [Minear Decl. ¶¶7, 15]; JA188-89 [Zam Decl. ¶¶9, 11]; JA731-32 [Ladd Decl. ¶17]; [23] *Eastwood*, *supra*, 123 F.3d at 1249 (claim that Eastwood was humiliated by the suggestion that he would give an interview to a sensationalist publication was sufficient for damages award for defamation). Such a portrayal of Respondent by Appellants is defamatory, as the trial court stated, "[f]or a celebrity, this could have a significant economic impact for the reasons set forth in the declaration of C[o]rt Casady at ¶12." JA1088 [Order at 6].

Appellants' contention that they intended to portray Respondent overall as a good friend and counselor to Davis does not change the damning facts, even if the Court could weigh the evidence, which it cannot.[24] AOB at 37; *see also* Sections (IV)(E)(1)-(2), *supra*. It does not

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[23] Appellants improperly ask this court to accept their evidence and make inferences in their favor. For example, Appellants filed outtakes showing celebrities using expletives when missing a line or making a mistake. JA234-35 [Berkley Decl. Exs. 44, 46, 48]. Included is Respondent as a young actress privately using expletives directed to herself when she missed a line. This tasteless use of private moments, never meant to be made public, obviously does not show that Respondent is vulgar, and or that she would ever use such a term to refer to her sister or other actors. JA966 [Casady Decl. ¶5]. This is no evidence Respondent called Fontaine a bitch, and she did not. JA962 [ODH Decl. ¶6]; JA971 [ODH Decl. ¶¶5-6]. Indeed, even Appellants claim that is not the impression they know to be true of her real reputation at the time of "Feud," decades later. JA203-04 [Minear Decl. ¶18]; JA183-84 [Murphy Decl. ¶¶15, 19]; JA189-90 [Zam Decl. ¶14]. The outtakes are irrelevant and were not used in "Feud."

[24] *See* Section (IV)(B), *supra*.

assist Appellants that they mix in flattering scenes among the disparaging ones. *Masson*, *supra*, 501 U.S. at 520.

Furthermore, Respondent was not merely irked by Appellants' false portrayal of her. Appellants' conduct here clearly has a tendency to injure Respondent and cause special damages.[25] AOB at 37; JA749-59 [Roesler Decl. ¶¶21-25]; JA955-59 [Casady Decl. ¶¶11-13]. Respondent has also incurred costs in attempting to mitigate the false statements. JA705 [Smith Decl. ¶¶4-5].

Appellants' reliance on *Balzaga* is misplaced. AOB at 37. There plaintiffs alleged that portions of a news report created the incorrect impression that they were wanted fugitives. *Balzaga*, *supra*, 173 Cal.App.4th at 1340. The court held the broadcast made it clear that it was not law enforcement who was searching for them. *Id.* No analogous situation is presented here.[26] *Seale v. Gramercy Pictures* (E.D. Pa. 1997), 964 F.Supp. 918, involves a judgment for defendants after a full trial and is not analogous to this case.

Appellants clearly made false statements about a living celebrity

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[25] Appellants cite *Gang*, *supra*, 111 F.Supp. at 29 and *Summit Bank*, *supra*, 206 Cal.App.4th at 699 for this proposition. In *Summit Bank*, plaintiff brought suit against defendant who posted allegedly defamatory messages on an online message board. *Id.* at 677. The court held plaintiff failed to show a probability of prevailing on defamation, because the reasonable viewer would not attribute defamatory meaning to the statement "problem bank," a term of art in the banking industry. *Id.* at 698-700. *Summit Bank* is inapplicable here as no such terms of art were used. *Gang* is also inapplicable, as addressed in Section (IV)(E)(2), *supra*.

[26] Appellants also cite *Sarver*, *supra*, 813 F.3d at 891 for the same proposition which likewise is not applicable as addressed in Section (IV)(E)(1), *supra*.

with a reputation for dignity and integrity. These statements not only offended her, but there is admissible evidence that a reasonable person would be offended, and there is evidence of damage to her reputation. JA957-959 [Casady Decl. ¶¶11-13]. Respondent has met her burden of proof as to falsity and defamation.

C. Malice

Respondent has presented legally sufficient, clear and convincing evidence showing Appellants' actual malice, *i.e.*, their knowing or reckless disregard for the falsity of their depiction of Respondent in "Feud." Not only does she deny the statements made in "Feud," but her reputation is based on not engaging in such gossip. JA957-958 [Casady Decl. ¶11]; JA962 [ODH Decl. ¶¶4-5]; JA971 [ODH Decl. ¶¶3-7]. Appellants admit Respondent has such a reputation for not being a gossip. JA203-204 [Minear Decl. ¶18]; JA189-190 [Zam Decl. ¶14]; JA181 [Murphy Decl. ¶7]; JA184 [Murphy Decl. ¶19].

It is a standard protocol in the film industry to obtain consent from a living celebrity before using her identity. JA957; 959 [Casady Decl. ¶¶11, 13]; JA730-731 [Ladd Decl. ¶¶15-16]. Appellants never obtained consent or talked to Respondent to verify any statements. JA194-202 [Minear Decl. ¶¶11, 15]; JA182-183 [Murphy Decl. ¶¶14-15]; JA962 [ODH Decl. ¶4]; JA164 [Motion at 2]; JA188-189 [Zam Decl. ¶¶9-11]; RT at 313:13-17 (THE COURT: "Remember, Ms. De Havilland was alive. She could have answered questions."); RT at 333:14-15. Appellants did ask one living celebrity, who was used in a minor way, for his consent. JA735 [Bachardy Decl. ¶5]. Appellants chose not to contact Respondent to obtain her input, contradicting their position that they wanted the character to be "consistent

with the historical record." JA183 [Murphy Decl. ¶15].

Respondent is not asserting that "[p]ublishing a dramatization" is "of itself evidence of actual malice." AOB at 41. Respondent's claims are based on Appellants' knowing use of her identity to suggest falsely that she endorsed "Feud," and intentional attribution of false statements which they admit she did not make. JA971 [ODH Decl. ¶¶2, 7]. Mixing truth and falsity does not eliminate malice. *Masson, supra* 501 U.S. at 520, *Partington, supra,* 56 F.3d at 1155.[27] Appellants' sworn admissions and Respondent's evidence provide sufficient showing of actual malice.

1. Fake Interview and False Endorsement of "Feud"

The interview of Respondent at the 1978 Academy Awards did not happen. JA971 [ODH Decl. ¶3]; JA962 [ODH Decl. ¶5]; RT at 323:24-26. Respondent never gave *any* interview where she discussed the personal relationship of Davis and Crawford. *Id.* Appellants themselves admit they knew this did not actually occur, and that they made it up. JA193 [Minear Decl. ¶7]; JA195 [Minear Decl. ¶15] ("Many of the de Havilland character's scenes take place during imagined interviews at the 1978 Academy Awards …. to my knowledge, [she] was not actually interviewed at the 1978 Academy Awards …."); JA188-189 [Zam Decl. ¶9-11]; JA208 [Gibbons Decl. ¶10].

At minimum, Appellants acted with reckless disregard as to the falsity of the statements made by Respondent in this "imagined" interview. Appellants cite no support for the statements regarding Davis and Crawford

[27] In *Eastwood,* the newspaper mixed true facts about the actor with the falsehoods. This did not mean the false statements were not actionable. *Eastwood, supra,* 123 F.3d at 1249.

in this interview. AOB at 42-44. Instead, Appellants refer to "research showing that Plaintiff had conducted interviews in which she *talked about Davis* …." AOB at 44 (emphasis added). These interviews do not show Respondent discussing *Davis and Crawford's relationship*, instead they show her discussing Davis as an actress and their friendship. *Id.*

Appellants intentionally structured "Feud" to appear as real as possible. JA195 [Minear Decl. ¶14]; JA195 [Minear Decl. ¶15]; JA182-183 [Murphy Decl. ¶14]. Such treatment would reasonably have lead viewers into understanding the statements spoken by the de Havilland character to be historically accurate. JA956-957 [Casady Decl. ¶11] ("[B]y conflating fact and fiction, the portrayal of Respondent is intended to and does convey falsely that the words delivered by her character should be believed …."); JA747-749 [Roesler Decl. ¶20] ("The authentic details are used to lead the viewers into believing that what de Havilland says and does is accurate and factual, rather than made up and false"); *Masson*, *supra*, 501 U.S. at 520; *Partington*, *supra*, 56 F.3d at 1155.

The extensive use of Respondent's identity is designed to make it appear that Respondent participated in and approved "Feud." JA731-732 [Ladd Decl. ¶17] ("'Feud' was constructed as if Respondent … endorsed 'Feud.'"); JA956-958 [Casady Decl. ¶11]. Respondent did not participate in, endorse or approve "Feud." JA971 [ODH Decl. ¶¶2, 7]. Appellants admit this. JA164 [Motion at 2] ("Plaintiff's consent was not needed."); JA194-202 [Minear Decl. ¶¶11-12, 15]; JA182-184 [Murphy Decl. ¶¶14-16]. Respondent has shown by clear and convincing evidence that Appellants knowingly or recklessly disregarded the falsity of their depiction of Respondent as giving a false endorsement and fake

interview.[28] *Browne*, *supra*, 611 F.Supp.2d at 1062; *Eastwood*, *supra*, 123 F.3d at 1257.

2. False Use of the Word "Bitch" to Describe Fontaine

Respondent has offered evidence that she did not call Fontaine a "bitch." JA971 [ODH Decl. ¶5]; JA962 [ODH Decl. ¶6]. Appellants admit that they knew this. JA183-184 [Murphy Decl. ¶¶16-18]; JA198-199, 204 [Minear Decl. ¶¶15(d)(iii); 19]; JA164 [Motion at 2]. Appellants claim they have license to have Respondent call Fontaine a "bitch," even if this was false. AOB at 44-47. They cite no authority for this proposition. The references cited for Respondent's alleged use of "bitch" include two books, which mention Respondent only in passing. AOB at 45. These books have Respondent use "bitch" to describe a role in a movie and a director who was mistreating actors, not Fontaine or a friend in public. JA966-967 [Casady Decl. ¶¶6-7]. Neither book has a reference to a source for use of "bitch" by Respondent. Appellants did not verify the statements with Respondent. *Id.*; JA971 [ODH Decl. ¶¶2, 7]; JA1122 [Order at 8] ("[w]hile Defendants also argue that they relied on books written about Plaintiff … the comments … have not been properly sourced."); JA966-967 [Casady Decl. ¶¶5-7]. Appellants assert they may rely on these books and did not have to "personally evaluat[e] the underlying evidence[,]" relying on *Reader's Digest*. AOB at 47. *Reader's Digest* states that "Where the

[28] Respondent's false endorsement of "Feud" has a lower level of protection; thus, even if Respondent did not offer proof of malice (which she has), her causes of action would still stand. *Comedy III*, *supra*, 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.")

publication comes from a known reliable source and there is nothing in the circumstances to suggest inaccuracy, there is no duty to investigate." *Reader's Digest*, *supra*, 37 Cal.3d at 259; *see also Jackson v. Paramount Pictures Corp.* (1998) 68 Cal.App.4th 10, 26. The lack of a source for such an assertion clearly is a "circumstance[] … suggest[ing] inaccuracy" and should have been investigated further.

Seale, *supra*, 964 F.Supp. at 91, cited by Appellants, is not on point. In *Seale*, a federal Pennsylvania case, defendants had consulted plaintiff's own book, and retained two consultants to work on the film who conducted historical analysis, one of whom had personal knowledge of the events. *Id.* at 927-29. Here Respondent's private and personal activities are portrayed, Respondent was not consulted about the events portrayed, and no one with firsthand knowledge was involved. JA962 [ODH Decl. ¶4]; JA971 [ODH Decl. ¶¶2, 7].[29] *Id.* Respondent categorically denies using the "bitch" to refer to Fontaine. JA971 [ODH Decl. ¶5]; JA962 [ODH Decl.¶6]. There is no evidence to the contrary.

Appellants admit they had no historical account of Respondent calling Fontaine a "bitch," but substituted "bitch" for "Dragon Lady" to

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[29] Further evidence of malice comes from Appellants' continued airing of "Feud" in other countries after learning of its falsity via this lawsuit. *See What time is Feud: Bette and Joan on TV?* RADIO TIMES (Dec. 17, 2017) available at http://www.radiotimes.com/news/tv/2017-12-18/what-time-is-feud-bette-and-joan-on-tv/; *Good Gov't*, *supra*, 22 Cal.3d at 685-86; RT at 353:21-25 (MR. ROTSTEIN: "[T]he Good Government of Seal Beach case did find malice. It was a case, though, where there was a malicious statement, that people found out it was false, the political campaign, I believe, and they did it again after finding out it was false. They knew it was false.").

make "Feud" more dramatic. JA204 [Minear Decl. ¶19]; JA183-184 [Murphy Decl. ¶16-18]; AOB at 22, 47.[30] "Bitch" and "Dragon Lady" do not have the same meaning. *See* Section (V)(A) *supra*; *see also* JA967 [Casady Decl. ¶8] ("it's clear to me that these expressions do not have the same meaning").

The direct and circumstantial evidence shows that Appellants knowingly published false statements about Respondent. *See* Section (V)(A) *supra*.[31] Appellants knowingly or recklessly disregarded the falsity of their depiction of Respondent, including a fake interview and false endorsement. *Browne*, *supra*, 611 F.Supp.2d at 1062; *Eastwood*, *supra*, 123 F.3d at 1257.

3. False Vulgar Statement about Sinatra

"Feud" portrays Respondent as making a false, vulgar statement about Sinatra: "DAVIS: Well, then, where's the booze? OLIVIA DE HAVILLAND: I think Frank must've drunk it all." JA200-201 [Minear Decl. ¶15(d)(vii)]; JA237 [Berkley Decl. Ex. 54]. Respondent denies this. JA971 [ODH Decl. ¶4]. Appellants do not deny this comment is not based

[30] It is unclear when Appellants' settled on the use of "bitch." The "Best Actress" script, "Feud's" basis was purchased in 2009, the "story arc" was created in March 2016, and "actual writing" began in April 2016, well before Respondent's interview referring to Fontaine as "Dragon Lady." JA181 [Murphy Decl. ¶8]; JA193 [Minear Decl. ¶6]; JA338-341 [Berkley Decl. Ex. 30]. The issue of whether "Dragon Lady" and "bitch" are substantially the same is an issue of fact for a jury. *Masson*, *supra*, 501 U.S. at 522.

[31] Appellants cite to *Leopold v. Levin* (1970) 45 Ill.2d 434. *Leopold*, an Illinois state law case, addresses right of privacy; it does not discuss the standard applicable to malice. *Id.* at 435.

on any facts, actual statements or conduct by Respondent. AOB at 47-48. Appellants state this was a joke and "[a] rhetorical flourish[]." JA988 [Reply at 6]. This is simply a false statement attributed to Respondent with knowledge that it was false. *Masson*, *supra*, 501 U.S. at 522; *Nguyen-Lam*, *supra*, 171 Cal.App.4th at 862, 868-69.

Respondent submitted extensive and substantial circumstantial evidence that Appellants presented scenes with knowledge that they were false or with reckless disregard of the truth of their content. This was more than sufficient to carry her burden. This Court should hold Respondent has demonstrated a "probability" of succeeding on showing actual malice by clear and convincing evidence. *Nguyen-Lam*, *supra*, 171 Cal.App.4th at 862.

VI. THE EVIDENCE SUPPORTS A PROBABILITY OF SUCCESS ON RIGHT OF PUBLICITY

Here and below, Appellants do not challenge Respondent's *prima facie* evidence of the elements of right of publicity. Respondent has offered admissible evidence of each element. JA689-690, 699-702 [Opposition at 2-3, 12-15]; *see also* Sections (V)(A)-(C), *supra*. Further, since Respondent made a sufficient showing of actual malice, any First Amendment defense, the public interest and public affairs exceptions to the right to publicity causes of actions fail as a matter of law. *See* Sections (F)(1)-(3), *supra*. Therefore, Respondent must be allowed to proceed with her claims on the merits. *Id.*

VII. CONCLUSION

For the foregoing reasons, given the substantial evidence here, the Court, based on its own review, should find that Appellants' Motion was properly denied and should affirm the trial court's Order below.

Dated: December 22, 2017

Respectfully submitted,

HOWARTH & SMITH

By: /s/ Suzelle M. Smith
Suzelle M. Smith
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OLIVIA DE HAVILLAND, DBE

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief of Respondent's is produced using 13-point Roman type including footnotes and contains approximately 13,662 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: December 22, 2017

Respectfully submitted,

HOWARTH & SMITH

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

No. B582629

IN THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION 3

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

v.

OLIVIA DE HAVILLAND, DBE,
Plaintiff-Respondent.

On Appeal From
Los Angeles County Superior Court Case No. BC667011
The Honorable Holly E. Kendig, Dept. 42

PROOF OF SERVICE OF RESPONDENT'S BRIEF IN OPPOSITION

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 523 W. Sixth Street, Suite 728, Los Angeles, CA, 90014.

On December 22, 2017, I served true copies of the following documents described as:

RESPONDENT'S BRIEF IN OPPOSITION

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California Court of Appeal

The Supreme Court of California

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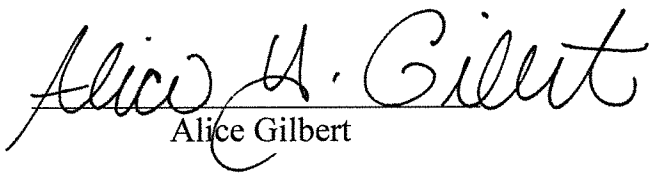
Executed on December 22, 2017, at Los Angeles, California.



Alice Gilbert