SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

OLIVIA de HAVILLAND, DBE v. FX NETWORKS, et al.
CASE No. BC667011

Ruling on Defendant's Motion to Strike (Anti-SLAPP)

Defendant's motion to strike is DENIED. Although Defendant has shown that the show arises from protected activity, Plaintiff has met her burden in showing a likelihood of prevailing on the merits, as set forth below. The court's ruling on the evidentiary objections is set forth in a separate document.

Section 425.16 posits a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).) "A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)." Braun v. Chronicle Publishing Co. (1997) 52 Cal. App. 4th 1036, 1043; Navellier v. Sletten (2002) 29 Cal. 4th 82, 88. If the first prong is met, the burden shifts to the plaintiff to establish a likelihood of prevailing on the complaint.

I. FIRST PRONG – An Issue of Public Interest in a Public Forum

The moving party asserts that the speech at issue is protected under subdivisions (3) and (4) of §425.16(e). See Moving Papers, page 7, lines 6-9. As such, the court must first determine if the speech at issue was "made in a place open to the public or a public forum" and involved an issue of public interest.

Public Forum

A public forum is a place open to the use of the general public "'for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Krishna Society v. Lee (1992) 505 U.S. 672, 679, 112 S.Ct. 2701, 2706, 120 L.Ed.2d 541, 550. The airing of a television docudrama is "an exercise of free speech" (Tamkin v. CBS Broadcasting, Inc. (2011) 193 Cal.App.4th 133, 143) that is "undoubtedly a public forum." See Damon v. Ocean Hills Journalism Club (2000) 85 Cal.App.4th 468, 476.

Public Interest

A public interest is "any issue in which the public is interested." Nygard, Inc. v. Uusi–Kerttula (2008) 159 Cal.App.4th 1027, 1042. The public interest requirement is to be construed broadly. Seelig v. Infinity Broadcasting Corp. (2002) 97 Cal.App.4th 798, 808. The court finds that there is a sufficient basis to find that a television show about Bette Davis and Joan Crawford, including those who knew and worked with them –including a "two-time Academy Award winner" like Plaintiff (see operative Complaint, ¶9) - is a matter of public interest.

Therefore, the court finds that defendant has established the first prong of the Anti-SLAPP statute.

II. SECOND PRONG – Likelihood of Prevailing

As the first prong his been met, the burden shifts to Plaintiff to show a probability of prevailing on the claim. Under CCP §425.16(b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.' Equilon Enteprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 67. The plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. The court does not weigh the credibility or comparative probative strength of competing evidence. Navellier v. Sletten (2003) 106 Cal.App.4th 763, 768. Furthermore, California's anti-SLAPP statute "poses no obstacle to suits that possess minimal merit." Navellier v. Sletten, 29 Cal. 4th 82, 93 (2002). See also Digerati Holdings, LLC v. Young Money Entertainment, LLC (2011) 194 Cal.App.4th 873, 884.

In this instance, the Court finds that Plaintiff has successfully met her burden in showing that she has a likelihood of prevailing on the merits, as set forth below and at the hearing on this motion.

3rd CAUSE OF ACTION – INVASION OF PRIVACY/FALSE LIGHT

The operative Complaint asserts that "FX DEFENDANTS used recreations of OLIVIA DE HAVILLAND in the same activities for which she is known in real life, at the same time putting false words in her mouth, knowingly or recklessly not reporting events truthfully and accurately." (¶17). Specifically, Plaintiff identifies 4 scenes that falsely portray Plaintiff:

1. In the opening scene, falsely indicating that Plaintiff gave an interview at the 1978 Academy Awards discussing the relationship between Bette Davis and Joan Crawford. (¶¶17, 18, 23, 28, 29).
2. In the fifth segment, falsely given the impression that Plaintiff referred to her sister, Joan Fontaine, as her "bitch sister." (¶¶24, 28).
3. Falsely indicating that she said that Frank Sinatra must have drunk all the alcohol because they couldn't find any. (¶25).
4. In the seventh segment, falsely indicating that she turned down a role to play a villain in the movie "Hush...Hush, Sweet Charlotte" by stating that she doesn't "play bitches" and that the director should call her sister. (¶26).

"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." Aisenson v. American Broadcasting Co. (1990) 220 Cal.App.3d 146, 161.

Defendants assert that Plaintiff cannot prevail on this cause of action because (1) the television program does not falsely portray Plaintiff, (2) it is not defamatory, and (3) there is no showing of actual malice.

FALSE PORTRAYAL

First, Defendant argues that the television program accurately portrays Plaintiff – in other words, the scenes are factual. As noted in Masson v. New Yorker Magazine (1991) 501 U.S. 496-516-517:

> California law permits the defense of substantial truth and would absolve a defendant even if she cannot "justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details." 5 B. Witkin, Summary of California Law § 495 (9th ed. 1988) (citing cases).

Regarding the interview scene at the 1978 Academy Awards, Defendants argue that the scene is substantively accurate, even if there are "slight" inaccuracies. As noted in the declaration of Timothy Minear at ¶15:

> Many of the de Havilland character's scenes take place during imagined interviews at the 1978 Academy Awards. Research indicates that Ms. de Havilland attended the 1978 Academy Awards. Although, to my knowledge, Ms. de Havilland was not actually interviewed at the 1978 Academy Awards, her dialogue for the imagined interviews was based on a number of actual interviews that she had given over the years. In some instances, as discussed below, the de Havilland character's lines were taken directly from Ms. de Havilland's interviews.

Plaintiff, by contrast, argues that the interview scene contains significant, as opposed to slight, inaccuracies. As the opposition notes:

> Specifically, Defendants admit "Feud" places de Havilland in a counterfeit interview, one which never happened....Defendants admit there was no interview of de Havilland in 1978 at the Academy Awards about the private relationship of Davis and Crawford, and that they made this up...In that fake interview, de Havilland gossips and makes negative comments about Davis and Crawford's personal life...De Havilland never said these things..."Feud" has de Havilland call her sister, actor Fontaine, a "bitch" to others in the profession...She did not do this... "Feud" also has de Havilland snipping to Davis about Sinatra's drinking habits...This is not true...[See Opposition, page 13, lines 5-17.]

These facts, which are supported by the declaration of Plaintiff (see Supplemental Declaration of Plaintiff, ¶¶4-6), 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.

Second, regarding the scenes wherein she used the term "bitch," Defendant argues that there are multiple examples of her using this type of language (Exhibits 27-29, 43-52), that she actually told director Robert Aldrich that "she doesn't play bitches" (Exhibit 19), and that she called her sister the "Dragon Lady" which, according to Defendants, is a synonym for "bitch." See Moving Papers, page 9, line 1 through page 10, line 5. As further explained in ¶18 of the declaration of

Ryan Murphy, who was the "co-creator, an executive producer, a writer, and a director of FEUD" (Decl. of Murphy, ¶1):

> Additionally, I had the de Havilland character refer to her sister as a "bitch" because it was a powerful and succinct way to convey the deep enmity between the de Havilland and Fontaine. I was familiar with the history of the sisters' fraught relationship, including the famous photograph from the 1947 Oscars that captured the moment where Ms. Fontaine unsuccessfully attempted to congratulate Ms. de Havilland. Just as a picture is worth a thousand words and can shine light on the essence of a relationship, so too I believed that having the de Havilland character refer to her sister as a "bitch" would capture decades of animosity in a single word.

As further noted in the declaration of Timothy Minear at ¶15e(i) and ¶19:

> The de Havilland character's line, which I wrote, was a near-verbatim quote of what Ms. de Havilland reportedly really said to Aldrich: "Darling, you know how much I hate to play bitches. They make me so unhappy." See Berkley Decl., Exhibit 19 at p. 403. Additionally, as discussed above, Ms. de Havilland spoke critically about her sister, Fontaine, calling her "Dragon Lady," and we had seen "blooper" reels of Ms. de Havilland curing "Oh Christ son of a bitch!" when she messed up a line. See Berkley Decl., Exhibits 30-31, 43-48.

Plaintiff, however, asserts that "Dragon Lady" is not a synonym for "bitch" (see Opposition, page 13, footnote 15 and Supplemental Declaration of Cort Casady at ¶8) and that while there are outtakes from 1944 showing that Plaintiff used the term about her own mistakes, she notes that these were private moments not directed at other individuals. See Opposition, page 14-15, footnote 17. As further noted in the supplemental declaration of Plaintiff at ¶6 and ¶8:

> I never had a conversation with director Robert Aldrich about "Hush...Hush, Sweet Charlotte," wherein I used the word "bitch," or said "you know how much I hate to play bitches; they make me so unhappy."...
>
> I am aware that Defendants filed certain outtakes from 1944, where I and a number of other actors at Warner Bros., such as Lauren Bacall, Bette Davis, Ronald Reagan, and Jimmy Stewart made mistakes and used slang type expletives expressing frustration with ourselves. These were unguarded, impulsive moments, wherein I felt I was in a confidential setting. They were not public. Looking back at my younger self, I wish I had been more guarded in my language, but these outtakes or bloopers are just that, mistakes and errors, not language that I did or would use in discussing other friends or family in a normal, polite, private or public forum.

For 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. Navellier v. Sletten, *supra*. While Plaintiff admits that she used that term in 1944, the term was not directed

at another person or project whereas "Feud" has Plaintiff using that term in regard to her sister or a movie project.

Finally, as to the Frank Sinatra scene, Defendant claims that this is a true event. See Moving Papers, page 9, lines 17-18. However, the actual line about Frank Sinatra does not appear to have been a true event. As implicitly admitted in the declaration of Timothy Minear at ¶15(d)(vii):

> Backstage at the 1978 Academy Awards, the de Havilland character gives the Davis character a private pep talk in Frank Sinatra's dressing room, where Ms. de Havilland and Davis reportedly spent most of the real Oscar night in 1963. See Berkley Decl., Exhibit 21 at p. 348. The de Havilland character praises Davis, tries to cheer her up, and reminds her how much help Davis provided at the beginning of her own career. The de Havilland character's remarks were inspired by Ms. de Havilland's own comments, such as her praise for Davis on the Merv Griffin show in 1973. At the end of their heart-to-heart, the Davis character asks, "Where's the booze?" and the de Havilland character jokes, "I think Frank must've drunk it all..."

As further noted in the Supplemental Declaration of Plaintiff at ¶4: "I never commented to Bette Davis about Mr. Frank Sinatra's drinking habits..." Accordingly, for purposes of this motion, Plaintiff has sufficiently met her burden of showing that the comments about Frank Sinatra were false.

DEFAMATORY

Alternatively, Defendants assert that even if some of the statements and scenes are not accurate (see Reply, pages 6-9), the television program is not defamatory because (1) there is nothing in the show that would expose Plaintiff to scorn or ridicule, and (2) the show does not purport to be a documentary. See Moving Papers, page 10, line 26 through page 11, line 8. As Defendants noted in the declaration of Timothy Minear at ¶18:

> Because of our awareness of Ms. de Havilland's guarded attitude toward publicly discussing Fontaine, as well as our understanding of the widely reported animus between the two sisters, we drew a deliberate distinction between Feud's portrayal of the de Havilland character in public – in the imagined 1978 interview – and its portrayal of the de Havilland character in private – in her candid conversations with Davis (and even Aldridge). In public, the de Havilland character refuses to speak ill of her sister and denies that there is even a feud with Fontaine. Furthermore, consistent with Ms. de Havilland's actual restrained approach, the de Havilland character in Feud decries gossip and counsel's her friend Davis to say "no comment" rather than speaking about Crawford. By contrast, in private conversations with her close friend, Davis, the de Havilland character is freer with her remarks about Fontaine and makes a few pointed comments about her sister. But this does not make the de Havilland character a hypocrite – it makes her human. And as discussed above, this depiction is consistent with the actual record

> and Ms. de Havilland's own most recent comments [where she purportedly called her sister "Dragon Lady" in 2016]."

However, "In determining whether a publication has a defamatory meaning, the courts apply a totality of the circumstances test to review the meaning of the language in context and whether it is susceptible of a meaning alleged by the plaintiff." Balzaga v. Fox News Network, LLC (2009) 173 Cal.App.4th 1325, 1337. As Balzaga, supra, further notes at page 1338:

> "[A] defamatory meaning must be found, if at all, in a reading of the publication as a whole." (Kaelin v. Globe Communications Corp. (9th Cir.1998) 162 F.3d 1036, 1040 (Kaelin).) "This is a rule of reason. Defamation actions cannot be based on snippets taken out of context."...
>
> "In determining whether statements are of a defamatory nature, and therefore actionable, ' "a court is to place itself in the situation of the hearer or reader, and determine the sense or meaning of the language of the complaint for libelous publication according to its natural and popular construction." ' " (Morningstar, Inc. v. Superior Court, supra, 23 Cal.App.4th at p. 688, 29 Cal.Rptr.2d 547.)

In this instance, the four scenes at issue are (1) falsely indicating that Plaintiff gave an interview at the 1978 Academy Awards discussing the relationship between Bette Davis and Joan Crawford; (2) falsely given the impression that Plaintiff referred to her sister, Joan Fontaine, as her "bitch sister;" (3) falsely indicating that she said that Frank Sinatra must have drunk all the alcohol because she couldn't find any; and (4) falsely stating to director Robert Altman that she doesn't "play bitches" and that the director should call her sister.

For purposes of this motion, and in considering the show as a whole, the Court finds that Plaintiff has sufficiently met her burden of proof in that a viewer of the television show, which is represented to be based on historical facts, may think Plaintiff to be a gossip who uses vulgar terms about other individuals, including her sister. Jackson v. Paramount Pictures Corp. (1998) 68 Cal.App.4th 10, 26. ("Moreover, when a party repeats a slanderous charge, he is equally guilty of defamation, even though he states the source of the charge and indicates that he is merely repeating a rumor.") For a celebrity, this could have a significant economic impact for the reasons set forth in the declaration of Cart Casady at ¶12:

> In order for the property rights to have value to Miss de Havilland, she must be able to control their use and limit their use to productions for which she has given consent and which are accurate. "Feud's" unauthorized and untrue portrayal, left unchecked, has and will devalue Miss de Havilland's name and identity and her ability, and the ability of her heirs, to obtain compensation for such use now and in the future.

MALICE

Finally, Defendant's assert that even if the depiction of Plaintiff is false and defamatory, there is insufficient evidence of actual malice.

As explained in Reader's Digest Assn. v. Superior Court (1984) 37 Cal.3d 244, 256-257:

> If the person defamed is a public figure, he cannot recover unless he proves, by clear and convincing evidence (see New York Times Co. v. Sullivan, supra, 376 U.S. 254, 285–286, 84 S.Ct. 710, 728–729, 11 L.Ed.2d 686), 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." (Pp. 279–280, 84 S.Ct. at pp. 725–726.) That decision did not define the phrase "reckless disregard," and its use of the term—"actual malice"—which had a different meaning in the common law of libel, engendered some confusion.
>
> Four years later, in St. Amant v. Thompson, supra, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262, the high court sought to clarify the constitutional standard. First, it explained, "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There 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 for truth or falsity and demonstrates actual malice." (P. 731, 88 S.Ct. at p. 1325.)
>
> The quoted language establishes a subjective test, under which the defendant's actual belief concerning the truthfulness of the publication is the crucial issue. (See Alioto v. Cowles Communications, Inc. (N.D.Cal.1977) 430 F.Supp. 1363, 1365–1366.) 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." (Widener v. Pacific Gas & Electric Co. (1977) 75 Cal.App.3d 415, 434, 142 Cal.Rptr. 304.)

Defendants assert that because "Feud's writers investigated and consulted numerous resources to ensure a factual basis for their dramatic narrative and to accurately depict Plaintiff's documented use of salty language, her bitter rivalry with Fontaine, and her style and approach in public interviews...Plaintiff cannot possibly meet her heavy burden of showing that Defendant's entertained "serious doubts of the truth of the essence of the telescoped composite" of the de Havilland character." See Moving Papers, page 12, lines 6-11 (citing Davis v. Costa-Gavras (S.D.N.Y. 1987) 654 F.Supp. 653, 658).

As also noted in the declaration of Timothy Minear at ¶16:

> ...the de Havilland character was scrupulously written to be nuanced, a consummate professional, and consistent with the historical record and Ms. de Havilland's real-life statements; we certainly did not mean to disparage Ms. de Havilland.

Although Defendant's argue that they were trying to portray Plaintiff in a nuanced way, Plaintiff has met her burden for purposes of this motion. Reader's Digest Assn. v. Superior Court, *supra*

("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.") Here, Plaintiff has submitted sufficient evidence that Defendants presented scenes "with knowledge that it was false or with reckless disregard of whether it was false or not." Reader's Digest Assn. v. Superior Court, supra. As Plaintiff notes in her Supplemental Declaration of Plaintiff at ¶3-6:

> I am aware that in "Feud" there is a character designed to look like me, sound like me, and do many of the things I did and do as a professional actor...I never gave an interview which I talked about the personal relationship of Miss Bette Davis and Miss Joan Crawford...
>
> I never commented to Bette Davis about Mr. Frank Sinatra's drinking habits, and to have done so would not have been my normal conduct, custom or habit.
>
> I never had a conversation with Bette Davis where I referred to my sister, Joan Fontaine, as a "bitch," and I would not have done so.
>
> I never had a conversation with Director Robert Aldrich about "Hush...Hush, Sweet Charlotte," wherein I used the word "bitch," or said "you know how much I hate to play bitches; they make me so unhappy." (I hope you will excuse the present use of the word.)

While Defendants also argue that they relied on books written about Plaintiff, the supplemental declaration of Cort Casady points out that the comments in books attributed to Plaintiff have not been properly sourced. Jackson v. Paramount Pictures Corp. (1998) 68 Cal.App.4th 10, 26 ("Moreover, when a party repeats a slanderous charge, he is equally guilty of defamation, even though he states the source of the charge and indicates that he is merely repeating a rumor.") As Casady notes at ¶6 and ¶7:

> Defendants rely on Miss de Havilland's supposed use of the word "bitch" during a private conversation she reportedly had with director Robert Aldrich...As a source of this quote, Defendants rely on a book by Shaun Considine called "Bette & Joan: The Divine Feude," attached as Exhibit 19 to the Declaration of James Berkley. This book makes no reference or citation to support this statement....
>
> The Declaration of James Bekley cites another book, "Round Up the Usual Suspects: The Making of Casablanca – Bogart, Bergman, and World War II" by Aljean Harmetz, attached as Exhibit 52 to Mr. Berkley's declaration. This book discusses an alleged private conversation between Samuel Goldwyn, Jr. and Miss de Havilland in which Miss de Havilland supposedly vented about director Michael Curtiz who was mistreating actors, stating "he was a son of a bitch when I was seventeen, and he's still a son of a bitch." Again, this book includes no reference or citation to support this statement. Further, Defendants do not state that they relied on this book while creating "Feud," rather it was obtained later for the purposes of this Motion...

Moreover, while Plaintiff may have used the word "bitch" in 1944 in outtakes directed at her own error, it was not directed at any person or project. See Supplemental Declaration of Plaintiff at ¶6 and ¶8.

Finally, while the movie is deemed to be a docudrama which, according to Defendants, is "a dramatized retelling of history" (see Declaration of Timothy Minear at ¶10), the declaration of Mark Roesler, who is the Chairman and CEO of Celebrity Valuations (¶6), notes at ¶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, and that de Havilland herself endorsed the "Feud" portrayal of her private and public remarks about other actors at the time "Feud" is set.

Here there is no attempt to show that the movie was considered a "farce." To the contrary, Ryan Murphy notes at ¶15 of his declaration that "[t]he de Havilland character was scrupulously written to be nuance and consistent with the historical record." Also, unlike the character in American Hustle, there is no evidence that Defendants sought to portray Plaintiff as unreliable, slightly unhinged, or "a font of misinformation."

In other words, because Defendants sought to portray the show "consistent with the historical record," the statements made in the show may lead a reasonable viewer to believe the statements were actually made by Plaintiff.

Accordingly, for purposes of this motion, the Court finds that on the third cause of action, Plaintiff has sufficiently met her burden by showing that although the 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." Digerati Holdings, LLC v. Young Money Entertainment, LLC (2011) 194 Cal.App.4th 873, 884.

1st AND 2nd CAUSES OF ACTION – COMMON LAW AND STATUTORY RIGHT OF PUBLICITY

As noted in Timed Out, LLC v. Youabian, Inc. (2014) 229 Cal.App.4th 1001, 1005-1006: "In this state the right of publicity is both a statutory and a common law right." (Comedy III Productions, Inc. v. Gary Saderup, Inc. (2001) 25 Cal.4th 387, 391 (Comedy III).) In 1971, California enacted Civil Code section 3344, a commercial statute that complements the common law tort of misappropriation of likeness. (Lugosi v. Universal Pictures (1979) 25 Cal.3d 813, 819 fn. 6; KNB, supra, 78 Cal.App.4th at pp. 366–367.)

Section 3344, subdivision (a) provides in relevant part: "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent ... shall be liable for any damages sustained by the person or persons injured as a result thereof." Nothing in section 3344 expressly prohibits assignment of the rights and remedies established by the statute. As Comedy III Productions, Inc. v. Gary Saderup,

Inc. (2001) 25 Cal.4th 387, 403, notes, "What the right of publicity holder possesses is not a right of censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity's fame through the merchandising of the "name, voice, signature, photograph, or likeness" of the celebrity." (§ 990.)

Defendants contend that Plaintiff cannot prevail on her causes of action for violation of Plaintiff's Right of Publicity because (1) the fictional depiction of Plaintiff in a television series is constitutionally protected, (2) the show is a matter of public interest, (3) the show is "transformative" and, thus, "especially worthy" of protection, and (4) there is no showing of falsity or actual malice.

CONSTITUTIONALLY PROTECTED

Defendants, relying on Guglielmi v. Spelling-Goldberg(1979) 25 Cal. 3d 860, note that they did not use any advertisements featuring the actual likeness of Plaintiff and that "a cause of action for appropriation of another's "name and likeness may not be maintained" against "expressive works, whether factual or fictional."" Daly v. Viacom, Inc. (N.D.Cal. 2002) 238 F.Supp.2d 1118, 1123 (citing Guglielmi, supra, at page. 871-872). As noted in the declaration of Stefanie Gibbons, who is the "President of Marketing, Digital Marketing, and On-Air Promotions for FX Networks, LLC" (¶1), at ¶6:

> In advertising and promoting Feud, FX did not use images of the actress Olivia de Havilland. On certain occasions, FX did use images of Catherine Zeta-Jones, who portrayed the de Havilland character. Consistent with this approach, FX did not use Ms. de Havilland's name in isolation, but rather only to identify the character being played by Ms. Zeta-Jones. Moreover, FX did not prominently feature Ms. Zeta-Jones in our marketing and promoting for Feud.

Plaintiff, by contrast, asserts that Defendants received a benefit from using her likeness to promote the television broadcast such that it appeared Plaintiff was endorsing the television show. In such instances, the right of publicity would trump the first amendment. As noted in Comedy III Productions, Inc., supra, at page 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. (See Waits v. Frito–Lay, Inc. (9th Cir.1992) 978 F.2d 1093; Midler v. Ford Motor Co. (9th Cir.1988) 849 F.2d 460.) Because the First Amendment does not protect false and misleading commercial speech (Central Hudson Gas & Elec. Corp. v. Public Serv. Com'n (1980) 447 U.S. 557, 563–564, 100 S.Ct. 2343, 65 L.Ed.2d 341), and because even nonmisleading commercial speech is generally subject to somewhat lesser First Amendment protection (Central Hudson, at p. 566, 100 S.Ct. 2343), the right of publicity may often trump the right of advertisers to make use of celebrity figures.

In this case, Plaintiff asserts that Defendants admit that the likeness of Plaintiff "played a key role." See Opposition, page 3, lines 10-11. As the opposition asserts:

> The use of Plaintiff's Identity was intended to increase the appeal and success of "Feud," as well as to create the impression that Plaintiff, who the audience would trust, endorsed "Feud," Defendants, and their entertainment services." [See Opposition, page 3, lines 18-21].

See Zacchini v. Scripps-Howard Broadcasting (1977) 433 U.S 562, 576.

As noted in the expert declaration of Cort Casady, who has worked in the television industry as a writer, producer and creator (¶¶3-4), at ¶11 and ¶12:

> The standard practice in the film and television industry generally...is that whenever a script or production calls for the inclusion of the name, identity, character, performance or image of a celebrity, consent from the celebrity or their legal representative must be obtained. If the use is significant, as in a supporting character role in a film, compensation needs to be paid for the value of that use. For any use without compensation, a release and waiver of compensation must be obtained...To use the name and identify of a celebrity without permission is conduct below industry standard...[¶] The writers of "Feud" clearly and intentionally capitalized on the actual character and fame of Olivia de Havilland by depicting her doing things she did...the construction of "Feud's" storyline is designed to appear to the viewer as if the still-living Miss de Havilland endorsed the product and its contents, which is not true. It is not industry practice to use a celebrity's name and identity in a commercial production without permission, and it is certainly beneath industry standards – in fact, it is production malpractice – to attribute false statements and inaccurate endorsements to a person portrayed in a production without their permission...
>
> The use of Miss de Havilland's name and identity without her permission and without compensation if allowed to occur without compensation, depreciates the property value of her name and identity, which is considerable...

Although the Defendants' reply cites Polydoros v. Twentieth Century Fox Film Corp. (1997) 67 Cal.App.4th 318, 326, for the proposition that Defendants were not required to compensate Plaintiff, the Polydoros case was discussing negligence. Moreover, Polydoros did not involve a celebrity, and the film at issue in Polydoros, was "a fanciful work of fiction and imagination." Polydoros, supra, at page 324. Here, by contrast, the defendants attempted to make the program "consistent with the historical record." (See declaration of Ryan Murphy at ¶15).

As noted in Comedy III Productions, Inc., supra, at page 399:

> But having recognized the high degree of First Amendment protection for noncommercial speech about celebrities, we need not conclude that all expression that trenches on the right of publicity receives such protection. The right of publicity, like copyright, protects a form of intellectual property that society deems to have some social utility. "Often considerable money, time and energy

> are needed to develop one's prominence in a particular field. Years of labor may be required before one's skill, reputation, notoriety or virtues are sufficiently developed to permit an economic return through some medium of commercial promotion. [Citations.] For some, the investment may eventually create considerable commercial value in one's identity." (citing Lugosi, supra, 25 Cal.3d at pp. 834-835 (dis. opn. of Bird, C. J.).)

In other words, "depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment." Comedy III Productions, Inc., supra, at page 400.

Here, Plaintiff argues that the depiction of her in the television program allegedly "depreciate[d] the property value of her name and identity..." (see Declaration of Cort Casady at ¶11) by painting her as a gossip who uses vulgar language. Such characterization, according to Casady, would depreciate the economic value of Plaintiff's name and likeness. See Declaration of Casady at ¶12. Because of this, it is standard in the industry, according to Plaintiff, to negotiate compensation prior to the use of a person's likeness. As noted in the expert declaration of David Ladd at ¶15:

> If the film suggests that the well-known person endorses or is part of the production, then of course this must be accurate and consent obtained. If the use is significant, as in a supporting character role, then if consent is obtained compensation is negotiable. In my personal experience, this issue was delegated to and handled by people who worked either for or with me, either in the legal or business affairs departments of the studios or outside counsel. Before nay project begins production, the errors and omission insurance policies were strict about the studios confirming consent from well-known living person, or well-documented authentications of previously disclosed statements or conduct by the well-known living person.

Here, because no compensation was given despite using her name and likeness, plaintiff has adequately met her burden. Zacchini v. Scripps-Howard Broadcasting (1977) 433 U.S 562, 576, ("No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.'") Although the reply argues that compensation is not required when a person's name and likeness is used (see reply, page 2, line 10 through page 3, line 7, and declaration of Casey Lalonde, ¶8), the Polydoros case did not make such a finding but, rather, simply held that "[i]t simply was not necessary to do so in this case." Polydoros, supra. Moreover, Plaintiff has submitted expert declaration indicating that this is standard in the industry and, if credited, is sufficient to meet her burden. Navellier v. Sletten (2003) 106 Cal.App.4th 763, 768.

TRANSFORMATIVE

Defendants assert that the program was transformative because "Feud is a docudrama, and therefore scenes are dramatized – i.e. transformed." See Moving Papers, page 14, lines 15-16.

The transformative issue is explained in more detail in Comedy III Productions, Inc. v. Gary Saderup, Inc., (2001) 25 Cal.4th 387, notes at page 405:

> On the other hand, when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity. As has been observed, works of parody or other distortions of the celebrity figure are not, from the celebrity fan's viewpoint, good substitutes for conventional depictions of the celebrity and therefore do not generally threaten markets for celebrity memorabilia that the right of publicity is designed to protect. (See Cardtoons v. Major League Baseball Players (10th Cir. 1996) 95 F.3d 959, 974 (Cardtoons).) Accordingly, First Amendment protection of such works outweighs whatever interest the state may have in enforcing the right of publicity. The right-of-publicity holder continues to enforce the right to monopolize the production of conventional, more or less fungible, images of the celebrity.

Specifically, Defendants contend that " The de Havilland character was written from the perspective of writers who viewed past events through the lens of present day cultural issues....Zeta-Jones used her unique talents to portray Plaintiff forty years ago in an interpretive performance that she artistically rendered under the direction of a film director and further transformed via artistic viewpoint, music, lighting, cinematography and editing. [See Reply, page 5, lines 8-15.]

By contrast, Plaintiff asserts that the docudrama was not transformative for the reasons noted in Comedy III at page 405:

> Turning to Saderup's work, we can discern no significant transformative or creative contribution. His 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 Saderup's depictions were protected by the First Amendment, we cannot perceive how the right of publicity would remain a viable right other than in cases of falsified celebrity endorsements.
>
> Moreover, the marketability and economic value of Saderup's work derives primarily from the fame of the celebrities depicted. While that fact alone does not necessarily mean the work receives no First Amendment protection, we can perceive no transformative elements in Saderup's works that would require such protection.

Similarly, here, because the Defendants admit that they wanted to make the appearance of Plaintiff as real as possible (see Ryan Murphy Decl. at ¶¶14-15), there is nothing transformative about the docudrama. Moreover, even if Defendants imagined conversations for the sake of being creative, such does not make the show transformative. Comedy III Productions, Inc., supra, 25 Cal.App.4th 387, 405 ("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.") See also No Doubt v. Activision Publishing, Inc. (2011) 192 Cal.App.4th 1018, 1034.

Additionally, Defendant argues that because "the economic value of Feud does not primarily derive from Plaintiff's fame [but] from the acclaimed writing and directing, the fame and performances of the series' Emmy-nominated stars...and the work's subject matter" (see Moving Papers, page 14, lines 24-27), there is no violation of the right of publicity.

However, 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. As noted in the expert declaration of Mark Roesler at ¶25:

> In consideration of the foregoing, it is my opinion that a [fair market value] of the FX Defendant's use of de Havilland's [right of publicity] Related Rights, assuming such use had been properly negotiated and compensated, in a television production of the instant type and caliber would be between $1.38 million to $2.1 million, conservatively. This results in losses to de Havilland per episode and a financial benefit to FX Defendants from the unauthorized and false use of her name, identity, character and image of approximately $172,500-262,500 per episode.

FALSITY OR ACTUAL MALICE

Finally, Defendant argues that "a public figure like Plaintiff may not recover in tort where the depiction is substantially true or where the creator did not act with actual malice." See Moving Papers, page 15, lines 8-10 (citing Hoffman v. Capital Cities/ABC, Inc. (9th Cir. 2001) 255 F.3d 1180, 1186-1188).

In response, Plaintiff argues that statements are false and malicious.

First, as Plaintiff notes in her Supplemental Declaration of Plaintiff at ¶3-6:

> I am aware that in "Feud" there is a character designed to look like me, sound like me, and do many of the things I did and do as a professional actor...I never gave an interview which I talked about the personal relationship of Miss Bette Davis and Miss Joan Crawford...
>
> I never commented to Bette Davis about Mr. Frank Sinatra's drinking habits, and to have done so would not have been my normal conduct, custom or habit.
>
> I never had a conversation with Bette Davis where I referred to my sister, Joan Fontaine, as a "bitch," and I would not have done so.

> I never had a conversation with Director Robert Aldrich about "Hush...Hush, Sweet Charlotte," wherein I used the word "bitch," or said "you know how much I hate to play bitches; they make me so unhappy." (I hope you will excuse the present use of the word.)

Second, Plaintiff argues that her depiction was done maliciously because Defendants never sought her consent or verified any of the statements made by her in the movie. See Opposition, page 11, lines 1-3. By contrast, the Plaintiff asserts:

> ...Defendants did ask one living celebrity, Don Bachardy, who was used in a minor way, for his consent. Decl. of Don Bachardy ¶ 5. Defendants also requested the consent of Joan Crawford's heirs. Smith Decl. Ex. 7. Defendants admit there was no interview of de Havilland at the 1978 Academy Awards about the private relationship of Davis and Crawford, and that they made this up...Further, they do not deny that Plaintiff did not comment on the drinking habits of Sinatra, that they did not contact Plaintiff, and that she did not endorse "Feud."...Defendants clearly knowingly and recklessly disregarded the falsity of their depiction of Plaintiff, including a fake interview and false endorsement. [See Opposition, page 11, lines 4-13.]

As noted in Reader's Digest Assn. v. Superior Court, supra:

> If the person defamed is a public figure, he cannot recover unless he proves, by clear and convincing evidence (see New York Times Co. v. Sullivan, supra, 376 U.S. 254, 285–286, 84 S.Ct. 710, 728–729, 11 L.Ed.2d 686), 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."

For purposes of this motion, the Court finds that Plaintiff has sufficiently met her burden of proof in showing that Defendants acted with knowledge that their portrayal of Plaintiff "was false or with reckless disregard of whether it was false or not" which, consequently, could have an economic impact on Plaintiff. See declaration of Cart Casady at ¶12 (" "Feud's" unauthorized and untrue portrayal, left unchecked, has and will devalue Miss de Havilland's name and identity and her ability, and the ability of her heirs, to obtain compensation for such use now and in the future.")

4th CAUSE OF ACTION – UNJUST ENRICHMENT

"The elements of an unjust enrichment claim are the "receipt of a benefit and [the] unjust retention of the benefit at the expense of another."" Peterson v. Cellico Partnership (2008) 164 Cal.App.4th 1583, 1593.

Defendants assert that Plaintiff cannot prevail on this cause of action because (1) it is merely derivative of the prior allegations, and (2) unjust enrichment is not a cause of action (Melchior v. New Lind Prod., Inc. (2003) 106 Cal.App.4th 779, 793). The Court finds these arguments without merit in that the prior allegations have sufficiently been pled. While unjust enrichment is not a

cause of action, Plaintiff may be able to pursue a theory of unjust enrichment which, under applicable law, "is synonymous with restitution." Melchior, supra ("The phrase 'Unjust Enrichment' does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so." [Citation omitted]. Unjust enrichment is " 'a general principle, underlying various legal doctrines and remedies,' " rather than a remedy itself. [Citation omitted]. It is synonymous with restitution. (Id. at 793, citing Dinosaur Development, Inc. v. White (1989) 216 Cal. App. 3d. 1310, 1314-1315.)

CONCLUSION

For the reasons set forth above and in the court reporter's notes, the court denies Defendant's Motion to Strike (Anti-SLAPP).

September 29, 2017

HOLLY E. KENDIG

Holly E. Kendig, Judge
Los Angeles Superior Court