No B285629

IN THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION 3

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

vs.

OLIVIA DE HAVILLAND, DBE,
Plaintiff-Respondent.

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

APPLICATION OF SCREEN ACTORS GUILD – AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-RESPONDENT OLIVIA DE HAVILLAND, DBE

SAG-AFTRA
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APPLICATION OF *AMICI* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PLAINTIFF-RESPONDENT

Pursuant to Rule 8.200(c) of the California Rules of Court, Screen Actors Guild-American Federation of Television and Radio Artists ("SAG-AFTRA") respectfully requests permission to file a brief *amicus curiae* in support of Plaintiff-Respondent.[1]

Additionally, pursuant to Rule 8.200(c)(3), Applicant states that no counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief.

1. The Nature of Applicant's Interest

Applicant Screen Actors Guild-American Federation of Television and Radio Artists ("SAG-AFTRA") is the nation's largest labor union representing working media artists. SAG-AFTRA represents more than 165,000 actors, announcers, broadcasters, journalists, dancers, DJs, news writers, news editors, program hosts, puppeteers, recording artists, singers, stunt performers, voiceover artists and other media professionals. SAG-AFTRA members like Dame Olivia de Havilland, one of our longest-tenured members, are the faces and voices that entertain and inform America and the world. SAG-AFTRA collectively bargains the wages, hours, and working conditions of its members, including on entertainment projects such as *Feud: Bette and Joan*, and exists to secure strong protections for media artists.

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[1] The brief of *amicus curiae* is submitted herewith, pending action on the request that the Court permit its filing.

The professionals represented by SAG-AFTRA invest their entire lives in building their careers. While many may never be as famous as Dame de Havilland, their names, voices, images or likenesses have or will attain commercial value. For some, this value will continue long after their death, providing an important source of income for their families and beneficiaries. These individuals and their beneficiaries rely on right of publicity laws to protect and prevent misappropriation of one of their greatest assets – their persona.

SAG-AFTRA and its predecessor unions have long fought to preserve the rights of performers and others in their personas, including through nationwide legislative efforts. The union strongly supported the enactment of and amendments to California's right-of-publicity statutes and has filed amicus briefs in other right-of-publicity cases.

Accordingly, SAG-AFTRA has a fundamental interest in ensuring these rights are not eroded and therefore has an interest in this litigation.

2. Points to Be Argued in the Brief

The Applicant's brief will provide additional argument on the threats positions taken by Defendants-Appellants pose to the right of publicity and to the professionals represented by Applicant. Specifically, the brief will address the following issues:

(i) The First Amendment, while broad, is not absolute and the rights of filmmakers to create entertainment content must be balanced against those of the individual in her reputation. This premise is supported by longstanding jurisprudence.

(ii) The transformative use defense is not satisfied where a docudrama depicts an actual, living individual. Docudramas, which recount true-life events and actual people with some dramatic license, by their very nature, will not be transformative.

(iii) The news and public interest defenses to California's right of publicity do not protect a filmmaker when the content presents false or defamatory depictions of an individual.

3. Request

Applicant is familiar with the questions involved in this case and the scope of their presentation, and believes there is a necessity for additional argument on the points specified above. Accordingly, Applicant respectfully requests the Court's permission to file the accompanying brief.

Dated: January 25, 2018

Respectfully submitted,

SCREEN ACTORS GUILD-AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS
Duncan W. Crabtree-Ireland
Danielle S. Van Lier

By: /s/ Duncan W. Crabtree-Ireland
Duncan W. Crabtree-Ireland
Attorney of Record for Applicant

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INTRODUCTION

Amicus notes at the outset its agreement that entertainment is entitled to robust First Amendment protection just as with any other form of speech. But the First Amendment has never been absolute and the protections it grants must be balanced against other rights. *Amicus* does not take a position on the specific facts of this case, but seeks primarily to address assertions made by Defendants-Appellants regarding the breadth of protection granted by the First Amendment and regarding the defenses they raise to the right of publicity.

The instant case deals with a so-called "docudrama" – a dramatized retelling of a fact-based story; it is not a documentary nor is it a purely fictional work. It exists in a gray area between fact and fiction, embodying both and neither at the same time. Unlike a documentary, a docudrama tells its fact-based story through the performance of actors. Some docudrama characters depict actual individuals, such as Dame de Havilland, while others may be composite characters based loosely upon an actual individual or individuals but bearing fictional names and not specifically depicting any real person. Defendants-Appellants refer throughout their brief to the "de Havilland character" claiming it was dramatized and used as a framing device. But Dame de Havilland is a real, living individual, not a fictional character.

It is undisputed that *Feud: Bette and Joan* ("Feud") is a project that has garnered critical acclaim, including multiple Screen Actors Guild Award nominations for members of its cast. It goes without saying that the actors' talent, the writing and the work of the entire production team, was integral to the portrayal of the iconic women depicted in the show, including the depiction of Dame de Havilland. But where the "character" is a living individual, there is an expectation creators will exercise caution to ensure the depiction does not unjustifiably invade the individual's rights or falsely dishonor the individual's reputation. If that caution is cast aside with

a reckless disregard for the individual, it is reasonable to expect that an individual may turn to the courts for redress.

ARGUMENT

I. The First Amendment, Although Broad, Is Not Absolute

Amici agree that a project such as *Feud* undisputedly involves free speech. *See Dyer v. Childress* (2007) 147 Cal. App. 4th 1273 at 1280 (internal citations omitted). But it is well understood that this right is not absolute nor is it free from punishment or redress at all times and under all circumstances. *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568 at 572. The courts have made clear that "not all speech in [an entertainment project] is of public significance and therefore entitled to protection under the anti-SLAPP statute. The issue turns on the specific nature of the speech rather than generalities abstracted from it." *Dyer*, 147 Cal. App. 4th at 1280 (internal citations omitted).

First Amendment jurisprudence is replete with cases that mandate the careful balancing of the right to express ideas with the right of the individual in her reputation. The Supreme Court has repeatedly reiterated this point, noting that the individual's right to dignity and protection from invasions of her rights is fundamental to our very concepts of liberty. Of course, "tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury." *Gertz v. Robert Welch* (1974) 418 U.S. 323, 341-342. But that tension reflects a proper and necessary balance between these important, and sometimes conflicting, rights.

Half a century ago, the Supreme Court made clear that while the First Amendment provides broad protection, "[s]ociety [also] has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt v. Baer* (1966) 383 U.S. 75 at 86. In his concurring opinion in *Rosenblatt*, Justice Stewart acknowledged that the "destruction

that defamatory falsehood can bring is… often beyond the capacity of the law to redeem" and acknowledged that damages are an imperfect yet appropriate form of redress for one whose reputation has been falsely dishonored." *Id*. at 92-93 (Stewart, J. concurring). He explained that the individual's right "to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty." *Id*.

The "uninhibited, robust, and wide-open" debate on public issues protected by the *New York Times v Sullivan* line of cases is not furthered by false statements of fact, whether intentional lie or careless error, and such statements should be of no constitutional value. *Gertz*, 418 U.S. at 340 (citing *New York Times Co. v. Sullivan*, (1964) 376 U.S. 254). Words which, "by their very utterance inflict injury… are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572.

II. Docudramas, Which Seek to Recount True Events and Depict Actual Individuals, Do Not Satisfy the Transformative Use Test

Defendants-Appellants raise the transformative use test as a defense, claiming their depiction of Dame de Havilland in *Feud* is transformative. Their argument is a red herring that bears little resemblance to how the test has been applied by California courts in the past. The public interest defense, also raised by Defendants-Appellants is a more appropriate test in addressing depictions of individuals. But if the court is to apply the transformative test, the burden cannot be met in most docudramas where the challenged depiction is an actual individual.

While courts have often made reference to whether a "work" is transformative, when audiovisual works include depictions of actual individuals, the court's analysis frequently focuses on how the individual is

depicted in context, rather than the work as a whole. Any other interpretation would defeat its very purpose and would be inconsistent with past precedent, as nearly every audiovisual work would, by its very nature, be transformative.

Docudramas, generally, are not likely to satisfy the transformative use test and *Feud* certainly does not. The point of a docudrama is not to transform the individual – it is to depict them as themselves. A composite character that is not intended to depict a specific individual might be transformative, as would be a caricature of parody of an individual. But a depiction of a living individual in a docudrama should not be considered transformative. Transformation is not the point of docudramas, which seek to tell the story of real life events and individuals.

The cases interpreting the transformative use test exist on a broad spectrum. At one end of the spectrum, the California Supreme Court stated that an artist's "undeniable skill" was "manifestly subordinated to the overall goal of creating literal, conventional depictions" of the Three Stooges in lithographs and on t-shirts. *Comedy III Productions, Inc. v. Gary Saderup, Inc*. (2001), 25 Cal. 4th 387, 409. At the other end of the spectrum, was a case involving a comic book. The court noted that, "[t]o the extent the drawings of the [characters] resemble plaintiffs at all, they are distorted for purposes of lampoon, parody, or caricature [a]nd the Autumn brothers are but cartoon characters – half-human and half-worm – in a larger story, which itself is quite expressive." *Winter v. DC Comics* (2003) 30 Cal. 4th 881, 890. The court went on to further clarify that "[t]he characters and their portrayals do not greatly threaten plaintiffs' right of publicity. Plaintiffs' fans who want to purchase pictures of them would find the drawings of the Autumn brothers unsatisfactory as a substitute for conventional depictions." *Id*. Most works, including *Feud*, fall somewhere between these two extremes.

California courts have applied the transformative use test in two cases involving video game characters that bear some resemblance to the depiction at issue. In *Kirby v. Sega of America, Inc.* (2006) 144 Cal.App.4th

47, the appellate court undertook a thorough comparison of a singer and a character – a singing, dancing reporter from outer space – alleged to depict her. The court concluded that "notwithstanding certain similarities, [the character of] Ulala is more than a mere likeness or literal depiction… Ulala contains sufficient expressive content to constitute a 'transformative work' under the test…" *Id*. at 59. To support its conclusion, the court described several ways in which the character was transformative. *Id*.

The character of Ulala is similar in many ways to the typical "composite" character – bearing similarities to a living individual, but clearly fictionalized and typically not bearing the individual's name. She can also be compared to a fictional character whose name and likeness simply bear similarity to a living individual, such as the "Michael 'Squints' Palledorous" character in *The Sandlot* – a fictional character in a "fanciful work of fiction and imagination." *Polydoros v. Twentieth Century Fox Film Corp.* (1997) 67 Cal. App. 4th 318, 324. *Feud* is not, nor is it intended to be, a fanciful work of fiction and imagination.

On the opposite end of the spectrum are the more recent *No Doubt v. Activision Publishing* (2011) 192 Cal. App. 4th 1018 and *Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)* (9th Cir. 2013) 724 F.3d 1268. Both *No Doubt* and *Keller* depicted the plaintiffs as themselves, in settings pertinent to their real life activities.

In *No Doubt*, the California Court of Appeal held that "nothing in the creative elements of [the game] elevates the depictions of [the band] to something more than 'conventional, more or less fungible, images' of its members that [the band] should have the right to control and exploit." 192 Cal. App. 4th at 1034 (citing *Comedy III*, 25 Cal.4th at 405). The court noted that in Kirby "the pop singer was portrayed as an entirely new character" while in the Band Hero game, No Doubt's avatars were literal depictions that "perform rock songs, the same activity by which the band achieved and maintains its fame." *Id*. at 1034.

In *Keller*, which involved college athletes, the Ninth Circuit noted that use of avatars based upon the athletes was "clearly aligned with *No*

Doubt, not with *Winter* and *Kirby*," and that "*No Doubt* offer[ed] a persuasive precedent that cannot be materially distinguished from Keller's case." *Keller*, 724 F.3d at 1277. The *Keller* court held that EA's use of athletes' likenesses, did "not contain significant transformative elements such that EA is entitled to the defense as a matter of law." *Id*. at 1276. The Ninth Circuit reiterated its *Keller* holding in a subsequent case involving professional athletes. *See Davis v. Elec. Arts, Inc.* (9th Cir. 2015) 775 F.3d 1172. And the Third Circuit reached the same conclusion in a related case. Rejecting arguments that the inclusion of other creative elements should render the work transformative, it noted that "[a]cts of blatant misappropriation would count for nothing so long as the larger work, on balance, contained highly creative elements in great abundance." *Hart v. Elec. Arts, Inc.* (3d Cir 2013) 717 F.3d 141.

Defendants-Appellants' Opening Brief ("AOB") point to production elements such as makeup and hairstyling, historical costuming, and production design as evidence of "transformation." (AOB 55.) No matter how much labor and art went into this, its purpose was to transform the appearance of the actress portraying Dame de Havilland to better resemble Dame de Havilland. It was not done to transform a loose depiction of Dame de Havilland into something new.

By Defendants-Appellants' own arguments, the dramatizations of Dame de Havilland were "minor" and "within the '[l]eeway' authors are afforded when they 'attempt[] to recount a true event.'" (AOB 36, *internal citations omitted.*) *Feud* is not the outer space fantasy worlds of *Kirby* or the phantasmagorical setting of *Winters*, but an attempt to retell a dramatized version of a life story. And no matter how talented an actress is, or how much she imbues a role with her own performance, an actor's depiction of a living individual is not sufficient to transform the individual into something new for purposes of the transformative use test.

This case clearly illustrates both why the analysis must focus on the individual rather than the work as a whole, and why the transformative test, while possibly applicable to a fictionalized composite character, is not

appropriate to a depiction of a living individual. Any other interpretation would all but eradicate the careful balance the transformative use defense was intended to recognize. An infringer would only need to add minimal creative expression to avoid liability, even with a painstakingly literal depiction of the individual. Under that formulation, by simply adding a decorative background, even Mr. Saderup's drawings of the Three Stooges would be transformative.

The irony of Defendants-Appellants' argument that the depiction of Dame de Havilland is transformative is that it has potential to bolster plaintiff's claim that the character casts her in a false light.

III. Defendants-Appellants' Public Interest Defense to Dame de Havilland's Right of Publicity Claim Is Dependent on the False Light Claims

As discussed above, a court must strike a proper accommodation between the competing concerns involving the rights protected under the First Amendment and those of the individual, "since 'the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy'" and the right of publicity. *Eastwood v. Superior Court* (1983) 149 Cal. App. 3d 409 (quoting *Briscoe v. Reader's Digest Association, Inc.* (1971) 4 Cal.3d 529, 541). While the Constitution guarantees robust freedom and there is a public interest in famous peoples' lives, the "spacious interest in an unfettered press is not without limitation" and the freedom must "not be so exercised as to abuse the rights of individuals." *Id.* at 425. In *Eastwood*, the California Supreme Court made clear that a right of publicity case can stand where "deliberate fictionalization… constitutes commercial exploitation, and [it] becomes actionable when it is presented to the reader as if true with the requisite scienter." *Id.* at 425. Filmmakers are afforded a great deal of leeway under the First Amendment to tell stories about famous people; however, care must be taken to prevent defamation or an offensive, false impression.

As acknowledged by Defendants-Appellants, *Eastwood* created an exception to the public interest defense to California's right of publicity. (AOB 59.) Whether defamatory or not, knowing or reckless falsehoods are not protected as "news" or by the public interest defense. *Eastwood*, 149 Cal. App. 3d at 425. Accordingly, if Plaintiff-Appellee can prevail on her false light claims, Defendants-Appellants' defenses based upon newsworthiness or public interest necessarily fail.

CONCLUSION

It is clear from past precedent that an entertainment creator's rights under the First Amendment must necessarily take into consideration the rights of actual individuals depicted in the creator's work. Some degree of fictionalization is necessary and appropriate to tell a compelling story that will attract audiences. But when depicting a living individual, such as Dame de Havilland, care must be taken that dramatization does not give way to reckless or malicious falsification that results in unjust harm to the individual's reputation. While we do not take a position on the facts of this case, *Amici* urge the court to keep these premises in mind. Additionally, Amici urge the court either not to apply the transformative use test in this case or to clarify that the burden is not met in a case such as this.

Dated: January 25, 2018

Respectfully submitted,

SCREEN ACTORS GUILD-AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS
Duncan W. Crabtree-Ireland
Danielle S. Van Lier

By: /s/ Duncan W. Crabtree-Ireland
Duncan W. Crabtree-Ireland
Attorney of Record for Applicant

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I certify that the attached amicus brief is proportionally spaced, has a typeface of 13 points and contains approximately 2,558 words, which is less than the total permitted by the rules.

DATE: January 25, 2018 By: /s/ Duncan W. Crabtree-Ireland
DUNCAN W. CRABTREE-IRELAND

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 5757 Wilshire Blvd, 7th Floor, Los Angeles, CA 90036.

On January 25, 2018, I served true copies of the following documents described as:

APPLICATION OF SCREEN ACTORS GUILD – AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PLAINTIFF-RESPONDENT OLIVIA DE HAVILLAND, DBE

BRIEF OF AMICUS CURIAE SCREEN ACTORS GUILD – AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS IN SUPPORT OF PLAINTIFF-RESPONDENT OLIVIA DE HAVILLAND, DBE

On the interested parties in this action on the attached Service List.

BY ELECTRONIC TRANSMISSION VIA TRUEFILING: I caused a copy of the document(s) to be sent via TrueFiling to the persons at the e-mail addresses listed in the Service List. According to the TrueFiling website, these persons are registered TrueFiling users who have consented to receive electronic service of documents in this case. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 25, 2018.