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by Suzelle M. Smith and Don Howarth



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Hollywood *Grande Dame's* Legal Legacy

“The fact that a law may be enacted in order to confer benefits upon an employee group, far from shutting out the public interest, may be strong evidence of it... Without their labors the activities of the entire country would stagnate.”

(*De Havilland v. Warner Bros. Pictures, Inc.*, 67 Cal. App. 2d 225, 235-36 (1944))

ON JULY 26, 2020, at 104 years old, Dame Olivia de Havilland (“Dame Olivia” or “Dame O,” as she came to call herself) died peacefully of natural causes at her home in Paris, France.¹ Many U.S. and international newspapers prominently featured the news of the death of this living legend and Hollywood icon.² The two-time Best Actress Academy Award winner was the last major surviving star of the Golden Era of Hollywood, and she is best known for her Academy Award-nominated role as Melanie Hamilton Wilkes in the 1939 epic, *Gone with the Wind*.³ All obituaries and media accounts extoll Dame Olivia’s extraordinary beauty, intelligence, character, and exquisite skill as a movie star, but most also comment on her impact on entertainment law.⁴

The authors first represented Olivia de Havilland, after being introduced to her in Paris by then U.S. Ambassador to the Organization for Economic Cooperation and Development, Amy Bondurant. She was then 81 years old, and the royalties from a movie she starred in many years before had stopped coming with no explanation. One theory for this lapse was that the studio accounting department had a program that automatically cut off checks when the recipient turned 80, perhaps to test whether anyone would complain. It only took one letter from her counsel verifying Miss de Havilland was alive and well and expecting her next check to get the money flowing again. From these beginnings,

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a close personal and professional relationship developed that lasted until her death. During the last two plus decades, over champagne and canapes at her Paris home, Miss de Havilland told the authors stories of her life, including her experiences with the law. She also was a sincerely interested listener, always asking to be brought current on the latest interesting cases her attorneys were handling for other clients. She evidenced quick understanding not only of the legal concepts but also of the right and wrong in every case. Dame O cared about the struggles of others and the ways in which the law could be used to right wrongs.

Hollywood Legal Clashes

Early in her career, when Dame O was 27 years old, in August 1943, she filed a lawsuit in Los Angeles Superior Court against her employer, Warner Bros. Studios, *De Havilland v. Warner Bros.*,⁵ seeking relief from the standard movie services contract in use at the time. Later, near the end of her career, on her 101st birthday, July 1, 2017, she filed suit in Los Angeles Superior Court against FX Studios, *De Havilland v. FX Networks, LLC*,⁶ for false light invasion of privacy and unauthorized use of her name and identity in the FX blockbuster series, *Feud: Bette and Joan*. Dame O won her first case against Warner Bros. and changed the Hollywood contract system forever.⁷ She won the first round of her 2017 case at the trial court level, defeating the FX anti-SLAPP motion to dismiss but was reversed by the court of appeals on First Amendment grounds.⁸ Both cases remain significant in the law, and Dame Olivia's legal legacy may well outlast her Hollywood fame.

In the 1930s, when Olivia de Havilland signed her first contract with Warner Bros. for the making of *A Midsummer's Night Dream*, the standard industry contract allowed studios to extend the employment term length by using a number of devices, including suspensions, time working on loan to another studio, and time spent in the military after being drafted. The Golden Age contract system has been described by commentators almost uniformly as follows: “[S]tudios had all the power. Stars were signed to long-term and asked to work six days a week, for long hours.... [T]hey could be suspended without pay. The length of the suspension was added to that of the contract.”⁹ “‘It was essentially a form of indentured servitude,’ says Howard Suber, professor emeritus of film history at UCLA, who goes on to tell how] [t]hese contracts gave all of the advantages

to the studio and made it nearly impossible for stars to have a say in their careers.”¹⁰

Without permission from the studio, a signed actor could not make a film for another studio, period. To do so would be a breach of the contract, potentially subjecting the actor to an injunction and damages awards. Also, the power of the studio executives to blacklist an actor was equally daunting. A few intrepid stars like Bette Davis, wanting freedom from the studio exclusive contracts, as their careers developed and their box office power increased, tried to circumvent the contracts—unsuccessfully. When Davis went to London in the mid-1930s and tried to make films for a studio there, Warner Bros. sued her in London and obtained an injunction prohibiting her from making any film for any other studio in the British Empire while under contract to Warner Bros.¹¹

Under her exclusive contract, Warner Bros. famously cast Olivia as a beautiful damsel constantly being rescued by then-unknown actor Errol Flynn. The most well remembered of the nine de Havilland/Flynn films is *The Adventures of Robin Hood*, which was not only a huge box office success but also was nominated for a Best Picture Oscar.¹² De Havilland, while enjoying the public and financial success these romantic action films brought her, wanted more. She longed for richer, deeper, more complex roles that would challenge her abilities as an artist. Jack Warner, then head of Warner Bros., however, was having none of that, essentially confining de Havilland under her contract to the “arm candy” roles suited to the image the studio wanted to exploit. She became beyond frustrated.¹³

Receiving much personal pressure, including from his wife, in 1939, Mr. Warner finally allowed de Havilland to work at Selznick International Studios as Melanie in *Gone with The Wind*.¹⁴ She received an Oscar nomination for the role. After returning to Warner Bros., she looked forward to the expiration of her contract in 1943.¹⁵ She made eight more pictures for Warner Bros.¹⁶ However, as she was preparing to leave the studio, she learned that Warner Bros. interpreted her seven-year contract to mean seven years of “actually” working for it. Since de Havilland had been loaned to other studios, had refused certain roles, and had been ill during the term of her contract, Warner Bros. took the position she had another six months left. For de Havilland, enough was enough. Moreover, at 27, in Hollywood culture, she was close to entering the stage where top roles would be increasingly hard

to obtain. As Dame Olivia later put it: “In those days [1940’s], Hollywood producers utterly worshipped youth and beauty.”¹⁷ If she was to have her chance for more nuanced, challenging roles, she was going to have to break Warner’s hold on her, and soon.

In 1943, de Havilland filed suit against Warner Bros., seeking to declare her contract unenforceable because it violated California Labor Code Section 2855.⁹ The Labor Code stated that no contract, even one for extraordinary and unique personal services, could have a term beyond seven years. Warner Bros. argued that the seven-year period meant “actual” service for it, and that de Havilland had waived any such limitation in the Labor Code by signing her contract with the conditions spelled out.¹⁸

At the bench trial before the Honorable Charles S. Burnell, there was only one witness, de Havilland herself. She took her appearance in court every bit as seriously as she did any of her on-screen roles:

I took particular care with my wardrobe and make up. I needed to appear attractive, but not overdone. I wore a high-collared dress and pearls, and minimal rouge and mascara. I had my hair done. Marty Ganz [her lawyer] had told me that when either he or the opposition lawyer asked me a question, I was to listen carefully, then turn and speak directly to the judge. I would look up at the judge through my eyelashes as I spoke. I made quite a point of the unfairness of Jack Warner’s position and his lack of concern for my career goals. I answered all questions directly and honestly.¹⁹

No doubt partly susceptible to her charms, Judge Burnell gave de Havilland everything she asked for, and more, in his judgment in her favor.²⁰

Warner Bros. appealed the judgment. De Havilland was prominently featured at the oral argument, sitting right behind counsel table.²¹ Warner Bros. argued on appeal that Labor Code Section 2855 should not be interpreted as restricting the rights of actors to enter freely into these contracts and waiving their rights to legislation designed to benefit them. To do so, it urged, would be against public interest.²² However, the Court of Appeal affirmed the judgment for Dame O with very minor modifications. The court’s holding was significant not just for Hollywood stars but for anyone with a personal services contract. The court stated:

The fact that a law may be enacted

in order to confer benefits upon an employee group, far from shutting out the public interest, may be strong evidence of it.... Without their labors the activities of the entire country would stagnate. Their welfare is the direct concern of every community. Seven years of time is fixed as the maximum time for which they may contract for their services without the right to change employers or occupations.... As one grows more experienced and skillful there should be a reasonable opportunity to move upward and to employ his abilities to the best advantage and for the highest obtainable compensation.... [R]ights created in the public interest may not be contravened by private agreement.²³

The de Havilland Law, as the case came to be called, still retains its vitality.²⁴ For example, Jared Leto successfully used the de Havilland Law in 2009 in a case involving his band, “30 Seconds to Mars,” and a record company contract. He came to meet with Dame O in Paris to personally thank her. She was “enchanted.”²⁵ *De Havilland v. Warner Bros.* has been cited many times in other cases, and as recently as 2019 by the Ninth Circuit.²⁶

De Havilland v. FX

Fast forward 73 years to 2017. Now Dame O is 100 and still living in Paris. Since 1944, she has starred in 24 movies, winning two Best Actress Academy Awards for her roles in *To Each his Own* (1946) and *The Heiress* (1949). She was nominated for five Academy Awards.²⁷ She was the first woman president for the Jury of the Cannes Film festival.²⁸ She has been awarded a damehood by Queen Elizabeth II, the National Medal of the Arts by President George W. Bush, and the Légion d’honneur by President Nicholas Sarkozy.²⁹

Meanwhile, in Hollywood, a miniseries was being filmed titled *Feud: Bette and Joan*.³⁰ The series, very popular and financially successful,³¹ was written and produced by Ryan Murphy for FX.³² It focused primarily on the allegedly acrimonious relationship between Bette Davis and Joan Crawford, particularly in the making of the 1962 horror film, *What Ever Happened to Baby Jane?*³³ It was structured around a series of life-like interviews with Catherine Zeta-Jones portraying de Havilland. Zeta-Jones, as de Havilland, commented, sometimes viciously, on sequences involving de Havilland, Bette

Davis, Joan Crawford, Joan Fontaine, and others.³⁴ Dame O was the only living person with a major role in the series. Zeta-Jones, as de Havilland, was featured prominently in the pre-release publicity, trailers, and other marketing devices by FX.³⁵ The producers spared no expense creating the actual world of the 1960s, which de Havilland and the other stars inhabited.³⁶ Everything possible was done to make the actors resemble their real-life counterparts and to place them in settings in which they had actually lived and

worked.³⁷ The historical aspect of the film was as critical as the dramatic parts.³⁸ Zeta-Jones, as de Havilland, uses vulgar language, gossips, and appears disloyal, calling her sister, Academy Award winning actress Joan Fontaine, a “bitch” to directors and others in the industry.³⁹ Many who knew the real Dame O and watched the series, including her friends and lawyers, wondered if Dame O really said and did the things *Feud* portrayed, particularly with respect to her sister, about whom she almost never spoke.⁴⁰

On her 101st birthday, July 1, 2017, Howarth & Smith filed a lawsuit against FX in Los Angeles Superior Court on behalf of Olivia de Havilland for false light and unauthorized use of her name and image for profit in violation of California law.⁴¹ The case immediately became international news.⁴² Almost as quickly, FX hired counsel and called on industry supporters both in the business and in academia to weigh in on its side.⁴³

In California, when a living public person’s name and identity are used without that person’s consent, there are two primary causes of action that can be brought: common law false light invasion of privacy⁴⁴ and violation of the statutory right to publicity under Civil Code Section 3344.⁴⁵ The right to publicity statute is a potentially more potent weapon for a plaintiff than common law defamation because it allows a prevailing party to obtain not only damages to reputation but also defendants’ profits from the unauthorized use and punitive damages, as well as attorneys’ fees and costs.⁴⁶ Similar to the law of false light, libel, and defamation, Section 3344 has a provision exempting

liability for publications regarding a public figure.⁴⁷ However, like a defamation-based cause of action, if there is knowing or reckless publication of a falsehood, even as to a public figure, the exception does not apply.⁴⁸

In California, during the 1980s and 1990s, actor Clint Eastwood had paved the way for other actors to protect their reputations in two successful cases against the *National Enquirer*. The first case, *Eastwood v. Superior Court*, involved an *Enquirer* article using Eastwood’s name

“It is essential not to give up in any struggle one undertakes.... It is only natural for me to take on these institutions because they are in error.”

and image and relating allegedly false statements about his stormy relationship with his partner, actress Sondra Locke. Eastwood sued under common law false light and also under the right to publicity. The *Enquirer* filed a demurrer on the basis that Section 3344 completely exempted a news article about a public figure from liability. While the trial court sustained the demurrer, the Court of Appeal issued a writ of mandate reversing: “[W]e do not believe that the Legislature intended to provide an exemption from liability for a knowing or reckless falsehood under the canopy of ‘news.’ We therefore hold that Civil Code section 3344, subdivision (d), as it pertains to news, does not provide an exemption for a knowing or reckless falsehood.”⁴⁹

A few years before the 1983 *Eastwood* case, the U.S. Supreme Court, deciding its only right to publicity case in history, reversed the Ohio Supreme Court’s decision holding that the First Amendment rendered its right to publicity statute (similar to the California statute) unconstitutional. In *Zacchini v. Scripps-Howard Broadcasting Co.*,⁵⁰ the Supreme Court held that the “human cannonball,” Zacchini, could sue a local news station for broadcasting his one minute act performed at the country fair without his permission.⁵¹ “The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. 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....”⁵²

The second Eastwood case, *Eastwood*

v. National Enquirer, Inc., involved an article about the birth of Eastwood's son.⁵³ The piece, purporting to quote Eastwood himself, was entirely flattering. The rub was that Eastwood had never given such an interview, and so the implication that he endorsed the *Enquirer's* article was false.⁵⁴ Eastwood sued for false light invasion of privacy and for violation of the right to publicity under section 3344, among other causes of action, in federal court. The jury awarded him \$150,000 in damages, and the trial judge awarded approximately \$650,000 in attorneys' fees. The Ninth Circuit affirmed.⁵⁵ De Havilland's original pleading against FX included both causes of action for false light and violation of the right to publicity.⁵⁶ The case was assigned to the Honorable Holly E. Kendig of the Los Angeles Superior Court.⁵⁷

In a case that raises issues of freedom of speech or the right to petition the court or other branches of government, Code of Civil Procedure Section 425.16 (anti-SLAPP) allows a special motion for early dismissal after the complaint is filed, with a two-step process. If the defendant proves the case involves free speech about a public issue, then the plaintiff must demonstrate a probability of prevailing on the claim. In theory, anti-SLAPP "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.'"⁵⁸ Almost immediately, FX filed an anti-SLAPP motion to dismiss Dame O's case.

Dame O is clearly a public figure, so the first prong of the anti-SLAPP statute was satisfied.⁵⁹ Prong two of the anti-SLAPP statute requires the plaintiff to offer proof that she will succeed on her claims more probably than not.⁶⁰ Anti-SLAPP motions have been compared with motions for summary judgment,⁶¹ but a key distinction is that the plaintiff is generally not allowed discovery to prepare the opposition to the potentially dispositive motion.⁶²

Before the case was filed, three experts were retained for Dame O, who were tasked with reviewing *Feud* and forming opinions as to whether or not the series depicted Dame O falsely, harmed her reputation, was done intentionally, and caused her damages. The experts were Cort Casady, a film script writer and producer, David Ladd, writer, actor and former President of MGM Studios, and Mark Roesler, a lawyer and agent specializing in the value of celebrity endorsement and the licensing

of celebrity names and identities.⁶³ These three experts testified that FX had used the de Havilland name without permission, in a false way, designed to make it appear that Dame O endorsed *Feud*, that the false depiction was harmful to her professional reputation and had caused her damages.⁶⁴ Like Clint Eastwood, Dame O testified that she had never given an interview at the Academy Awards or elsewhere discussing personal opinions about either Bette Davis or her sister, Joan Fontaine. Dame O also testified that she had not called her sister Joan a "bitch" to members of the industry or ever,⁶⁵ and that she had not said or done many of the things *Feud* had her say and do, for that matter.⁶⁶ Her daughter, Gisele Galante-Chulak, testified that she had never heard her mother use the vulgar language portrayed in *Feud*.⁶⁷

In its anti-SLAPP motion, relying heavily on *Guglielmi v. Spelling-Goldberg Productions*, FX argued that the First Amendment permits a docudrama to mix fact and fiction, which is by definition false.⁶⁸ FX argued that, even with the expert and percipient testimony offered in opposition to its motion, Dame O could not prove that she would probably prevail on the merits, and therefore, she should not be allowed to conduct discovery or try her case to a jury.

In her lengthy opinion, Judge Kendig recited the legal standard for a plaintiff's burden on anti-SLAPP⁶⁹ and ruled that Dame O had met that standard based on her own proffered evidence and the admissions of Murphy and the other writers at FX that the scenes and challenged dialogue were made up. FX admitted it had not sought permission from de Havilland for use of her identity. The court also found that FX admitted that de Havilland had not called her sister a bitch and that to claim that she had done so was both defamatory and a violation of the right to publicity.⁷⁰ The trial court rejected FX's argument that the docudrama was protected under the First Amendment because it transformed de Havilland into something other than her own real life persona, citing the California Supreme Court in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*: "[D]epictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment."⁷¹ Judge Kendig denied FX's motion to strike the complaint under the anti-SLAPP statute, lifted the stay on discovery, and set an accelerated trial date due to Dame O's age.⁷²

A ruling denying an anti-SLAPP motion is immediately appealable,⁷³ and FX did

just that. Oral argument was held at USC law school, and there were so many spectators that an extra room was required for the overflow. Many female fans of de Havilland wore a string of pearls in her honor. The court of appeal reversed the trial court's ruling.⁷⁴ The court relied on the legal standard set forth, in a concurring opinion, in *Guglielmi*:

Valentino was a Hollywood star.

His life and career are part of the cultural history of an era.... His lingering persona is an apt topic for poetry or song, biography or fiction. Whether [the producers'] work constitutes a serious appraisal of Valentino's stature or mere fantasy is a judgment left to the reader or viewer, not the courts.⁷⁵

The court of appeal found as a matter of law that de Havilland was "transformed" in *Feud* by the fictions about her on which she based her suit.⁷⁶ This court also found that "Zeta-Jones's portrayal of de Havilland is overwhelmingly positive.... *Feud's* portrayal of de Havilland is the most favorable of any character in the docudrama. The work itself belies de Havilland's contention that Zeta-Jones portrays de Havilland as a 'vulgar gossip' and 'hypocrite.'"⁷⁷ The court of appeal also found that the word "bitch" and "dragon lady" (a literary term de Havilland had used) are synonymous, quoting Ryan Murphy: "the terms dragon lady and bitch generally have the same meaning, but 'bitch' would be more recognizable to the audience than 'Dragon Lady.'"⁷⁸ The court of appeal dismissed the case and awarded attorneys' fees against de Havilland.⁷⁹ The opinion did not explain its refusal to give any weight to the content of the contrary testimony of de Havilland's expert industry witnesses or of de Havilland herself.

Dame O asked the California Supreme Court to review the court of appeal opinion because of the implications for First Amendment law and application of the anti-SLAPP statute.⁸⁰ Despite over 80 amicus letters being filed in support⁸¹ of her petition, the state supreme court did not accept her case.⁸²

The only forum left was the U.S. Supreme Court, and a petition for certiorari was filed. Again, the case was receiving enormous press attention.⁸³ Dame O was as determined as ever: "It is essential not to give up in any struggle one undertakes.... It is only natural for me to take on these institutions because they are in error."⁸⁴ The Court denied certiorari in 2019.⁸⁵ The opinion in *De Havilland v. FX Networks* has been cited in at least 12

cases since it was published.⁸⁶

Given the success of docudramas such as *Feud*, it is no surprise that similar productions have followed. However, not all courts have agreed with the court of appeal's decision in *de Havilland*. For example, the New York Supreme Court recently denied summary judgment for the industry in a right to publicity case involving the use of names and identities in a docudrama.⁸⁷ As for Dame O, her view of the case was that it was a victory because the truth was on the public record and her legacy was protected. This view is shared by her recent biographers.⁸⁸

In 2020, FX released a blockbuster miniseries about the Equal Rights Amendment, called *Mrs. America* in which Gloria Steinem is portrayed throughout.⁸⁹ Ms. Steinem wrote a letter that was published on the front page of the *Los Angeles Times*, stating that the show contained mostly falsehoods about the ERA's history, as well as the interactions of the women characters, including herself.⁹⁰ Will this be the next case to test the limits of false speech dressed up as history by the entertainment industry? Dame O is watching. ■



Authors with Olivia de Havilland at her Paris home. (Photo provided by her daughter, Gisele Galante Chulack.)

¹ See, e.g., Tim Gray, *Olivia de Havilland, 'Gone With the Wind' Star, Dies at 104*, VARIETY, July 26, 2020; David K. Li, *Olivia de Havilland, last surviving cast member of "Gone With the Wind," dead at age 104*, NBC NEWS, July 26, 2020.

² See, e.g., Dennis McLellan, *Olivia de Havilland, 1916-2020*, L.A. TIMES, July 27, 2020, A1 & A10; Robert Berkvist, *Olivia de Havilland, 104, Who Starred in 'Gone With the Wind,' Dies*, N.Y. TIMES, July 27, 2020, A 24; Muriel Godeau, *Hollywood legend Olivia de Havilland is dead*, LE MONDE, July 26, 2020, available at https://www.lemonde.fr/disparitions/article/2020/07/26/olivia-de-havilland-legende-du-cinema-hollywoodien-est-morte_6047336_3382.html.

³ Li, *supra* note 1. Dame O was nominated for an Academy Award for her performance in *Gone with the Wind* (1939), but she won her two best leading actress Oscars for *To Each His Own* (1946) and *The Heiress* (1949).

⁴ "She took on the Hollywood studio system... and won." Nick Levine, *British Icon of the Week: Dame Olivia de Havilland, the Actress Who Took on the Hollywood Studio System and Won*, BBC AMERICA, July 2, 2020 [hereinafter Levine]; "Miss de Havilland made history in 1944 by successfully suing Warner Brothers for peonage." Carrie Rickey, *'Gone With the Wind' actress Olivia de Havilland, 104, dies*, PHILA. INQUIRER, July 26, 2020, available at <https://www.inquirer.com/obituaries/olivia-de-havilland-obituary-gone-with-the-wind-20200726.html>; "Her 1940s lawsuit against Warner Bros., her home studio, changed the course of her career and that of countless others long at the mercy of film executives, who held nearly all the power in long-term contracts." Adam Bernstein, *Olivia de Havilland, two-time Oscar winner and last surviving star of 'Gone With the Wind,' dies at 104*, WASH. POST, July 26, 2020, available at <https://www.washingtonpost.com/local/obituaries/olivia-de-havilland-two-time-oscar-winner-and-last-surviving-star-of-gone-with-the-wind-dies-at-104/2020/07/26>

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⁵ *De Havilland v. Warner Bros. Pictures, Inc.*, 67 Cal. App. 2d 225 (1944).

⁶ *De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845 (2018).

⁷ Thomas J. Stipanowich, *Olivia de Havilland: The Actress Who Took on the Studio System and Won*, L.A. TIMES, July 1, 2016, available at <https://www.latimes.com/opinion/op-ed/la-oe-stipanowich-de-havilland—20160701-snap-story.html>.

⁸ *De Havilland, LLC*, 21 Cal. App. 5th 845.

⁹ Brent Lang, *How Olivia de Havilland Took on the Studio System and Won*, VARIETY, July 27, 2020 [hereinafter Lang]; see also Thomas J. Stipanowich, *Olivia de Havilland: The Actress Who Took on the Studio System and Won*, L.A. TIMES, July 1, 2016, available at <https://www.latimes.com/opinion/op-ed/la-oe-stipanowich-de-havilland—20160701-snap-story.html>.

¹⁰ Lang, *supra* note 9.

¹¹ *Warner Bros. v. Nelson*, 1 KB 209 (U.K. 1939).

¹² INTERNET MOVIE DATABASE (IMDB), *The Adventures of Robin Hood* (1938), <https://www.imdb.com/title/tt0029843/awards> (last visited Sept. 1, 2020).

¹³ Personal communication with Olivia de Havilland, Suzelle Smith and Don Howarth, Paris, France (2005).

¹⁴ *Id.*

¹⁵ Bill Higgins, *Hollywood Flashback: Olivia De Havilland Went to War With Warner Bros. and Won*, HOLLYWOOD REPORTER, Aug. 1, 2020.

¹⁶ IMDB, *Olivia de Havilland* (1916-2020), <https://www.imdb.com/name/nm0000014/> (last visited Sept. 1, 2020).

¹⁷ Personal communication with Olivia de Havilland, Suzelle Smith and Don Howarth, Paris, France (2005).

¹⁸ *De Havilland v. Warner Bros. Pictures, Inc.*, 67 Cal. App. 2d 225, 230 (1944).

¹⁹ Personal communication with Olivia de Havilland, Suzelle Smith and Don Howarth, Paris, France (2010).

²⁰ The court of appeal, while affirming the judgment, cut back on some of the language enjoining Warner Bros. on the basis that the only witness, de Havilland, had not even addressed certain facts, which were necessary for an injunction against Warner Bros. De

Havilland, 67 Cal. App. 2d at 237.

²¹ Personal communication with Olivia de Havilland, Suzelle Smith, and Don Howarth, Paris, France (2010).

²² *De Havilland*, 67 Cal. App. 2d at 236.

²³ *Id.* at 235-36.

²⁴ *De Havilland*, 67 Cal. App. 2d 225, *cert. denied* (Feb. 1, 1945).

²⁵ ELLIS AMBURN, *OLIVIA DE HAVILLAND AND THE GOLDEN AGE OF HOLLYWOOD 310-11* (2018) [hereinafter AMBURN].

²⁶ *Blair v. Rent-A-Ctr., Inc.*, 928 F. 3d 819 (9th Cir. 2019); *Wikle v. Boyd*, 297 So. 3d 1255 (Ala. Civ. App. 2019).

²⁷ IMDB, *Olivia de Havilland, Awards*, <https://www.imdb.com/name/nm0000014/awards> (last visited Sept. 4, 2020).

²⁸ Henry Chu, *Olivia De Havilland Remembers Being the First Female Cannes Jury President*, VARIETY, May 2, 2018.

²⁹ *Obituary: Olivia de Havilland, star of Hollywood's Golden Age*, BBC, July 26, 2020; Levine, *supra* note 4. Olivia de Havilland was given the female equivalent of a knighthood, a damehood, in 1997. Valentine Low, *Honours: arise Dame Olivia, star of film's golden age*, THE TIMES, June 17, 2017, available at <https://www.thetimes.co.uk/article/honours-arise-dame-olivia-de-havilland-star-of-films-golden-age-cbfvjqhm>.

³⁰ Leah Greenblatt, *Feud: Bette and Joan premiere recap: 'Pilot'*, ENTERTAINMENT WEEKLY, March 5, 2017.

³¹ Brian Lowry, *'Feud: Bette and Joan' serves up delicious dish on old Hollywood*, CNN, March 3, 2017.

³² Murphy is heralded by some as the most powerful man in Hollywood today. Emily Nussbaum, *How Ryan Murphy Became the Most Powerful Man in TV*, THE NEW YORKER, May 14, 2018.

³³ Caroline Framke, *FX's Feud makes a bittersweet cocktail of Bette Davis and Joan Crawford's famous rivalry*, VOX, Mar. 5, 2017.

³⁴ "Can somebody say, 'Cat Fight?'" Rrrreow." Spencer Kornhaber, *Feud: Bette and Joan Deconstructs a Rivalry for Tragedy, Not Comedy*, THE ATLANTIC, Mar. 3, 2017.

³⁵ FX Networks, *FEUD: Bette and Joan* | Season 1: Official Trailer | FX, YOUTUBE (Feb. 14, 2017), <https://>

www.youtube.com/watch?v=nZpANeIWXXI.

³⁶ John Jurgensen, *Designing the 1960s Battleground for 'Feud: Bette and Joan,'* WALL ST. J. (June 25, 2020), available at <https://www.wsj.com/amp/articles/designing-the-1960s-battleground-for-feud-bette-and-joan-01593098761>.

³⁷ *Id.*

³⁸ See *id.* See also Minear Decl. ¶¶14, Sept. 15, 2017, No. BC667011 (“[W]e made sure not to put the de Havilland character in places where de Havilland did not actually appear in reality.”); Murphy Decl. ¶15, *id.* (“[I]t was important that viewers trust the de Havilland character....”); Brief for Respondent at 17, *De Havilland v. FX Networks, LLC*, No. B285629, 21 Cal. App. 5th 845 (2018); Kyle Munzenrieder, *The First Preview of Feud: Bette and Joan is Finally Here*, W MAGAZINE, Feb. 2017.

³⁹ Yohana Desta, *Feud: Why Olivia de Havilland's Suit Against FX Now May Hinge on the Word "Bitch,"* VANITY FAIR, Mar. 2018.

⁴⁰ Ladd Decl., ¶¶4-5, Sept. 15, 2017, No. BC667011; Galante Chulack Decl., ¶1, *id.*; AMBURN, *supra* note 25.

⁴¹ Piya Sinha-Roy, *Olivia de Havilland Sues FX Networks Over Depiction in 'Feud,'* JAKARTA GLOBE (July 3, 2017), available at <https://jakartaglobe.id/culture/olivia-de-havilland-sues-fx-networks-depiction-feud/#:~:text=Los%20Angeles.&text=Lawyers%20for%20de%20Havilland%2C%20whose,in%20the%20eight%2Dpart%20miniseries>.

⁴² Paul Brownfield, *At 101, Olivia de Havilland Sued Hollywood—Again*, N.Y. TIMES, Mar. 3, 2018, available at <https://www.nytimes.com/2018/03/03/style/olivia-de-havilland-fx-ryan-murphy-lawsuit.html>; Rory Carroll, *Olivia de Havilland, 101, on suing Feud: TV show 'put false words in my mouth,'* THE GUARDIAN (Mar. 16, 2018), available at <https://www.theguardian.com/film/2018/mar/16/feud-olivia-de-havilland-sues-fx>; Daniel Holloway, *Olivia De Havilland, FX Argue Over the Word 'Bitch' in 'Feud' Hearing*, VARIETY, Mar. 2018.

⁴³ Saul S. Rostamian et al., *Olivia de Havilland's lawsuit against FX raises questions about docudramas precisely because the genre exists somewhere between fact and fiction*, L.A. LAWYER, May 2018, at 16, 19 [hereinafter Rostamian].

⁴⁴ In California, a false light cause of action, is virtually identical to libel and defamation. “False light invasion of privacy requires a public disclosure, which places plaintiff in a false light in a manner highly offensive to a reasonable person. See *Fellows v. National Enquirer*, 721 P.2d 97, 99-100 (Cal. 1986); “[I]n California, false light invasion of privacy is equivalent to libel.” *Lorenzo v. United States*, 719 F. Supp. 2d 1208, 1213 (S.D. Cal. 2010); *Masson v. New Yorker Magazine*, 501 U.S. 496, 499 (1991).

⁴⁵ CIV. CODE §3344 (“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....”).

⁴⁶ *Id.* There is also a cause of action under the federal Lanham Act for false endorsement and association. 12 U.S.C. 1125; *Browne v. McCain*, 611 F. Supp. 2d 1062 (C.D. Cal. 2009). However, pleading a federal cause of action enables defendants to remove the case to federal court, and at the time of filing, state court appeared to be a slightly more favorable forum for plaintiffs.

⁴⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). (The Court held that constitutional guarantees required a rule that prohibited a public official from recovering damages for a defamatory falsehood unless the official proved that the statement was made with

actual malice. The Court defined actual malice as knowledge that the defamatory statement was false or made with reckless disregard of whether it was false or not.); CIV. CODE §3344(d) (“For purposes of this section, a use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a).”).

⁴⁸ *Eastwood v. Superior Ct.*, 149 Cal. App. 3d 409, 415 (1983). Part of the *Eastwood* Court’s holding was superseded by statute to broaden the proscribed uses by adding the language “on or in products, merchandise, or goods....” Cal. Stat. 1984, Ch. 1704, §2.

⁴⁹ *Id.* at 425; see also *No Doubt v. Activision Pub’g, Inc.*, 192 Cal. App. 4th 1018 (2011) (holding that right to publicity violated when celebrity names and identities used in fictional context in story line of video game).

⁵⁰ *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

⁵¹ *Id.* at 576.

⁵² *Id.* at 576, 578-79.

⁵³ *Eastwood v. National Enquirer, Inc.*, 123 F. 3d 1249 (9th Cir. 1997).

⁵⁴ *Id.* at 1250.

⁵⁵ *Id.* at 1249

⁵⁶ *De Havilland v FX, Compl.* at 9-12, *De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845 (2018); Jennifer E. Rothman, a fierce proponent of the entertainment industry’s absolute right to publish under the First Amendment, followed the *De Havilland* case from the beginning. Rothman claimed that *de Havilland* had not pled a defamation cause of action until after she pointed out on her blog that defamation was available as well as the right to publicity cause of action. Jennifer E. Rothman, *Olivia de Havilland Back in the Spotlight*, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY (July 5, 2017), <https://www.rightofpublicityroadmap.com/news-commentary/olivia-de-havilland-back-spotlight>. However, the original complaint did plead false light and the causes of action never substantially changed when the complaint was amended at the request of defendants to correct corporate names and to drop Ryan Murphy as an individual defendant. First Am. Compl., *De Havilland*, 21 Cal. App. 5th 845; Second Am. Compl., *id.* Rothman filed an amicus brief on behalf of FX and was allowed extra time to argue when FX appealed the ruling denying its motion to dismiss. Brief for Intellectual Property and Constitutional Law Professors in Support of Defendants-Appellants as Amicus Curiae, *id.* Rothman writes that she is a defender of the right to publicity, but she is a frequent amicus in support of the film industry. Compare JENNIFER ROTHMAN, THE RIGHT OF PUBLICITY, PRIVACY REIMAGINED FOR A PUBLIC WORLD (2018) with Brief of 31 Constitutional Law and Intellectual Property Professors as Amici Curiae in Support of Petitioner, *Electronic Arts, Inc. v Davis, cert. denied*, 136 S. Ct.1448 (2016) (defense motion to dismiss right to publicity claims denied); Stacey Dugan, *A Response to Jennifer Rothman’s Right of Publicity*, 42 COLUMBIA J.L. & ARTS, 321 (2019).

⁵⁷ The Honorable Holly E. Kendig was elected to Phi Beta Kappa at DePauw University where she obtained her B.A. She is a graduate of Yale Law School and was the head of the litigation department at O’Melveny and Myers in Los Angeles, before being appointed to the bench in 2003. See TRELIS, <https://trellis.law/judge/holly.e.kendig> (last visited Sept. 8, 2020).

⁵⁸ *Un Hui Nam v. Regents Univ. of Cal.*, 1 Cal. App. 5th 1176, 1189 (2016).

⁵⁹ *De Havilland*, 21 Cal. App. 5th 845, Br. in Opp’n to Pet. for Writ of Cert. at 17 (No. 92-212).

⁶⁰ *Id.*

⁶¹ *Hanson Bridgett LLP, Summary Judgment &*

Hearsay Objections: Viable Since Sweetwater?, JD SUPRA (May 11, 2020), available at <https://www.jdsupra.com/legalnews/summary-judgment-hearsay-objections-81371/>.

⁶² Depositions of Ryan Murphy (producer and writer), Catherine Zeta Jones, Susan Sarandon (who portrayed Bette Davis and owned an interest in the series), and Jessica Lange (who portrayed Joan Crawford and owned an interest in the series) were noticed, but the anti-SLAPP statute imposes an automatic stay of discovery. *Britts v. Superior Ct.*, 145 Cal. App. 4th 1112, 1124-25 (2006).

⁶³ Getting experts willing to even consider testifying against the industry was a challenge. The authors spoke with many actors, writers, and producers who said they knew Dame O’s work and reputation, had seen *Feud*, knew she had been wronged but would not testify against FX or Murphy for fear of professional retribution. Cort Casady, a Harvard College classmate of Mr. Howarth, said he had to do the right thing. Dame O called David Ladd, who had known her since he was a child starring with her in *The Proud Rebel* (1958). Given the facts, he could not refuse her. Mark Roesler is frequently adverse to the industry on questions of the value of a celebrity’s image and name.

⁶⁴ *De Havilland*, 21 Cal. App. 5th at 851, 857, 861.

⁶⁵ The words “drop it bitch[,]” ascribed to plaintiff, a character in a novel, were sufficient to support a claim of defamation by a well-known psychologist. *Bindrim v. Mitchell* 92 Cal. App. 3d 61, 76-78 (1979) (disapproved on other grounds by *McCoy v. Hearst Corp.* 92 Cal. App. 3d 61 (1986)).

⁶⁶ *De Havilland*, 21 Cal. App. 5th at 854.

⁶⁷ Galante Chulack Decl., ¶1 (Sept. 15, 2017), No. BC667011.

⁶⁸ *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860 (Cal. 1979).

⁶⁹ “The court does not weigh the credibility or comparative probative strength of competing evidence. *Navellier v. Sletten*, 106 Cal. App. 4th 763, 768 (2003). 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 Entm’t, LLC*, 194 Cal. App. 4th 873, 884 (2011). “In this instance, the Court finds that the 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.” *Olivia de Havilland, DBE v. FX Networks, et al.*, No. BC667011 (Superior Ct. of L.A. Sept. 29, 2017) (Ruling on Defendant’s Motion to Strike (Anti-SLAPP)).

⁷⁰ “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.... 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.” *De Havilland v. FX Networks, LLC, Pet. for Writ of Cert.* at 49a, 53a (App. B) (internal citations omitted), available at https://www.supremecourt.gov/DocketPDF/18/18-453/66094/20181005191748809_18-%20Petiton%20for%20Writ.pdf; The Court also found that the plaintiff was likely to prevail on the claim that FX acted with malice: “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.’” *Id.* at 56a (citing *Reader’s Digest Assn. v. Superior Ct.*, 37 Cal. 3d 244, 250 (1984)).

⁷¹ *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 400 (2001).

⁷² CODE CIV. PROC. §36; Rice v. Superior Ct., 136 Cal. App. 3d 81 (Cal. Ct. App. 1982).

⁷³ CODE CIV. PROC. §425.16(i), 904.1.

⁷⁴ Justice Egerton, who authored the opinion, had previously been a partner at Munger, Tolles & Olson, the firm representing FX in the de Havilland case. She had also been the West Coast General Counsel for the National Broadcasting Company. CALIFORNIA COURTS: THE JUDICIAL BRANCH OF CALIFORNIA, <https://www.courts.ca.gov/38280.htm> (last visited Sept. 8, 2020).

⁷⁵ Guglielmi v. Spelling-Goldberg Prods., 25 Cal. 3d 860, 869-870 (Cal. 1979).

⁷⁶ De Havilland v. FX Networks, LLC, 21 Cal. App. 5th 845, 850 (2018).

⁷⁷ *Id.* at 867.

⁷⁸ *Id.* at 869.

⁷⁹ *Id.* at 871.

⁸⁰ Ashley Cullins, *Olivia de Havilland Takes FX 'Feud' to California Supreme Court*, HOLLYWOOD REPORTER, May 2018; Rostamian, *supra* 43, at 16, 19.

⁸¹ There is a fairly obscure rule of court in California that anyone may file a letter in support of a petition for review to the California Supreme Court without using a lawyer. CAL. R. CT. 8.500(g). Biographers, independent film makers, priests, news reporters, lawyers, and fans wrote in support of Dame O.

⁸² There was one published dissenting vote. Justice Mariano-Florentino Cuéllar voted to grant review. David Ettinger, *Olivia De Havilland petition for review gets only one vote at the Wednesday conference*, AT THE LECTERN: PRACTICING BEFORE THE CALIFORNIA SUPREME COURT (July 12, 2018), *available at* <http://www.atthelectern.com/olivia-de-havilland-petition-for-review-gets-only-one-vote-at-the-wednesday-conference/>.

⁸³ Dominic Patten, *Olivia de Havilland Vows To "Persevere" In Getting 'Feud' Feud Before SCOTUS*, DEADLINE (Nov. 26, 2018), <https://deadline.com/2018/11/olivia-de-havilland-supreme-court-feud-case-petition-plea-1202509219/>.

⁸⁴ Andrea Park, *Olivia de Havilland Is Trying to Take Her Feud: Bette and Joan Lawsuit to the Supreme Court*, W MAGAZINE, Dec. 2018.

⁸⁵ David Ng, *Olivia de Havilland denied hearing by Supreme Court*, L.A. TIMES (Jan. 7, 2019), <https://www.latimes.com/business/hollywood/la-fi-ct-olivia-de-havilland-decision-20190107-tory.html#:~:text=The%20high%20court%20denied%20De,favor%20of%20FX%20last%20year.&text=Miss%20D%20Havilland%20hopes%20she,when%20such%20justice%20is%20done.%E2%80%9D>.

⁸⁶ Brown v. Showtime Networks, Inc., 394 F. Supp. 3d 418, 438 (2019); Taylor v. Board of Trs. of Cal. State Univ., No. B300449, 2020 WL 2845765 (Cal. Ct. App. June 2, 2020).

⁸⁷ Decision and Order, Porco v. Lifetime Entertainment Servs., Index No. 2013-0190, RJI No. 09-1-2013-0080 (N.Y. Sup. Ct., May 15, 2020; *see also* Balla v. Hall, 59 Cal. App. 5th 652 (2021), *review filed* (Feb. 16, 2021) (affirming denial of anti-SLAPP motion and distinguishing de Havilland, where plaintiff offered similar types of evidence of falsity, malice and harm to reputation)).

⁸⁸ Personal communications with Olivia de Havilland, Suzelle Smith and Don Howarth, Paris, France (2019). AMBURN, *supra* note 25, at 310-311; VICTORIA AMADOR, OLIVIA DE HAVILLAND: LADY TRIUMPHANT, Introduction (2019).

⁸⁹ IMDB, *Mrs. America* (2020), <https://www.imdb.com/title/tt9244556/> (last visited Sept. 8, 2020).

⁹⁰ Eleanor Smeal, Gloria Steinem, *Steinem and Smeal: Why 'Mrs. America' is bad for American women*, L.A. TIMES (July 30, 2020), <https://www.latimes.com/entertainment-arts/tv/story/2020-07-30/steinem-and-smear-why-mrs-america-is-bad-for-american-women>.