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SUPREME COURT
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No. _____

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Deputy

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HARTFORD CASUALTY INSURANCE COMPANY,

Plaintiff and Respondent,

v.

**SWIFT DISTRIBUTION, INC. DBA ULTIMATE SUPPORT
SYSTEMS; MICHAEL BELITZ; ROBIN SLATON,**

Defendants and Appellants.

PETITION FOR REVIEW

After a Decision By the Court of Appeal, Second Appellate District,
Division Three, Case No. B234234, from
Los Angeles County Superior Court, Case No. BC442537
The Honorable Debre K. Weintraub

COUNSEL FOR PETITIONERS
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Systems; Michael Belitz; and Robin Slaton

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**TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND
ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME
COURT:**

Appellants Swift Distribution, Inc. dba Ultimate Support Systems, Michael Belitz, and Robin Slaton (“Ultimate”) respectfully petition the Court to review the following questions that will decide the appropriate California law among directly conflicting Appellate Opinions and settle important questions of law.

I. QUESTIONS PRESENTED

1. Is *Travelers Prop. Cas. Co. of Am. v. Charlotte Russe Holding, Inc.*, 207 Cal. App. 4th 969 (2012) good law, after being denied petition for review by this Supreme Court, in light of the decision of the Appellate Court herein declaring that the *Charlotte Russe* decision was wrongly decided?
2. Is there potentially covered “disparagement” where the claimant asserts, as a basis for claimant’s unfair competition claim, that the insured was “falsely claiming that [it was] the originator, producer, manufacturer, processor, wholesaler, or importer, or that [the insured] own[s] or control[s] the intellectual property, factory, or other source of supply of” claimant’s products and trademark? [JA Vol. 1, Ex. 11, 113-14]
3. Where the insurer acknowledges that there is an implied reference to the claimant’s product in the insured’s

statements, is the Court then barred from determining there has not been any reference to the claimant's product, implied or express?

II. WHY REVIEW SHOULD BE GRANTED

The Appellate Court has invited review by this Court by expressly stating the *Charlotte Russe* holding, a case of the same jurisdiction and district, is not good law, even after this Court denied the petition to review the *Charlotte Russe* holding. This case will decide how California interprets allegations of disparagement for every California policyholder and the controlling law of two directly adverse Appellate Opinions. Without this Court's granting a petition for review, the applicable law regarding disparagement pertaining to insurance policies cannot be determined.¹

The Court of Appeal further invited review by this Court by finding that there was not an express or implied reference to the claimant's disparaged product, even after both parties expressly acknowledged the implied reference present.

The Court of Appeal's decision, in stating that disparagement cannot be found unless there is an express reference to a claimant's product, is contrary to California coverage law, which holds that for duty to defend

¹ "*Charlotte Russe* held that the allegations in the complaint could be reasonably interpreted to allege that the insured retailer disparaged the People's Liberation brand, and that the advertising injury provision of an insurance policy provided coverage of, and the insurer had a duty to defend the insured against, this claim of disparagement. (*Id.* at p. 981.) We disagree. As discussed below, we believe such a conclusion has no objectively reasonable basis." Appellate Op. at 10, October 29, 2012.

purposes, the complaint and/or extrinsic evidence need not make specific references to the disparaged party, and that disparagement by reasonable implication is enough to trigger an insurer's duty to defend.

This Court should grant review to settle the important questions of law regarding whether product disparagement can be found through reasonable implication, and whether the *Charlotte Russe* holding is good law.

III. STATEMENT OF THE CASE

A. The Underlying Actions

Ultimate was sued in a lawsuit styled as *Dahl v. Swift Distribution, Inc., dba Ultimate Support Systems, Inc.*, U.S.D.C., C.D. of Cal., No. CV10-0551-SJO(RZx) (the "*Dahl* Action"). [Joint Appendix on Appeal ("JA") Vol. 1, Ex. 11, 102-65] The Dahl Complaint alleges that Ultimate published false material, including in advertising, which unfavorably compared Ultimate's product to Dahl's product by reasonable implication that injured Dahl's reputation and caused damage. Pertinently, Dahl alleges:

57. On information and belief, Defendants have engaged in the advertising herein with the intent to mislead the public as to origin and ownership of rights in Dahl's Mark. In doing so, Defendants intended . . . to mislead the public into believing that its products are the same as Dahl's or otherwise authorized by or related to Dahl.

58. Defendants' advertising was, and continues to be, **untrue and misleading** and likely to deceive the public in that it appears therefrom that Defendants are the originator, designer, or are otherwise authorized to manufacture and distribute . . . the "Ulti-Cart" carts, which name and cart design appear nearly identical to the Cart . . . Mark, . . .

...

72. On information and belief, Dahl has suffered injury in fact and has lost sales and money as a result of the violations alleged above in this Complaint... (bold provided)

[JA Vol. 1, Ex. 11, 111-13]

Dahl then filed an Application for Temporary Restraining Order and Motion for Preliminary Injunction on February 12, 2010, which specifically alleges:

Dahl could not believe that Slaton and Belitz had violated their respective NDA's and were now marketing a knock-off of his "MULTI-CART" brand utility carts. *Id.* To make matters even worse, Defendants adopted a name for their cart which not only creates a likelihood of confusion with his registered "MULTI-CART" trademark, but is nearly identical to it, since Defendant's merely dropped the "M" from the name.

For example, Dahl and his distributors market through websites and the exact same trade shows, such as the NAMM show at which Dahl became aware of Defendants' infringing cart. (Dahl Decl. ¶¶ 20, 21). Defendants also maintain a website and, as noted, attend music industry trade shows, where they announced the forthcoming introduction of their infringing cart – the same channels through which Dahl markets, and notably, within the same main industry which Dahl has focused on for years. (*See Id.*; Exhibit I). . . .

. . .

The goodwill Dahl has created under the "MULTI-CART" mark is of enormous value to him and his business and he has suffered and will continue to suffer irreparable harm should the infringement be allowed to continue. The Defendants' use of a near identical mark is clearly to the detriment of Dahl's trade reputation and goodwill. If not enjoined by the court, Defendants' uses of the confusingly similar and nearly identical "ULTI-CART" mark will cause confusion for the general public and pecuniary loss of sales and loss of customers for Dahl. Moreover, Defendants' "introductory" display of its infringing cart at the NAMM trade show, the largest and most popular music industry trade show in the

nation, threatens to deprive Dahl of a significant source of potential customers.

And, Dahl's own patent-protected utility cart design and the infringing "ULTICART" mark will now be used to Dahl's detriment, since he will have no control over the nature and quality of the utility carts supplied by Defendants. Any fault or objection with said services or goods will adversely affect future sales and customers of Dahl and will tarnish his name and reputation.

Likewise, Dahl's reputation will suffer severe negative ramifications if Defendants' infringing and unfair behavior is allowed to continue.

Furthermore, Dahl has invested a substantial amount of time, effort, and money in the mark, and the relevant industry and consuming public has come to recognize the "MULTI-CART" mark as being associated with Dahl. Dahl's authentic "MULTI-CART" brand utility carts have established an outstanding reputation, as acknowledged by Defendants (see Exhibit F) for excellence and high quality, as well as the revolutionary and patented design Dahl invented. Defendants' promotion and use of the "ULTI-CART" mark and name is certain to cause confusion, mistake, and/or deception to the public as to the source of origin of Defendants' goods and services and what to expect from Defendants." Together, this will result in a loss of business and support for Dahl and undoubtedly have a negative impact on Dahl's reputation and image.

[JA Vol. 1, Ex. 11, 177-84]

On February 18, 2010, Dahl filed its Reply to Opposition of Defendants to Appl. for TRO, reiterating the arguments made above in its original memorandum and further stating:

The Belitz declaration offered in evidence admits and proves the urgency of the instant motion. Defendant Belitz, in his Declaration attached to the opposition (¶¶15-19), clearly states his intent to expand into Plaintiff's markets with similar pricing and with millions of dollars worth of Chinese carts planned to be dumped in the United States with lower pricing.

This is practically a guaranty that Plaintiff will suffer price erosion damages, lost market share of a patented product, and have no control whatsoever of carts that bear confusingly similar trademarks that will be confused with Plaintiff. Moreover, Belitz stresses the critical nature of mere 10-days to the launch of products into the market. *Id.* at ¶19.

[JA Vol. 1, Ex. 11, 198]

On August 24, 2010, Dahl responded to Ultimate's Second Set of Interrogatories in the *Dahl* Action, revealing the following:

INTERROGATORY NO. 11. State the basis for YOUR claim that Defendants are liable for false advertising.

ANSWER:

...

On information and belief, Defendants are advertising and offering for sale Defendants' Infringing products which infringe the Patents-in-Suit and Dahl's Mark. Defendants' advertising efforts include, but are not limited to, various websites, such as <http://www.ultimatesupport.com/as> as well as various product catalogs and flyers distributed at industry trade shows, including the 2010 NAMM Show. Defendants' advertisements are directed toward and available to the Dahl's consumers. On information and belief, Defendants have engaged in the advertising herein with the intent to mislead the public as to origin and ownership of rights in the carts that are sold under labels that constitute false designations of origin. In doing so, Defendants intended to mislead the public into believing that its products are the same as Dahl's, affiliated with the MULTI-CART brand products or otherwise authorized by or related to Dahl. Defendants' advertising was, and continues to be, untrue and misleading and likely to deceive the public in that it appears therefrom that Defendants are the originator, designer, or are otherwise authorized to manufacture and distribute Defendants' Infringing Products (Le., the "Ulti-Cart" carts, which name and cart design appear nearly identical to the "Multi-Cart" brand carts under Dahl's Mark), and further, that Defendants own the intellectual property underlying

Defendants' Infringing Products and/or have the manufacturing rights to the patent and trademark-S protected Cart, all of which are untrue. . . . Defendants' actions constitute false designation of origin and unfair competition in commerce, in violation of the Lanham Act, 15 U.S.C. § 1125 (a) and California statutory law regarding unfair competition.

INTERROGATORY NO. 12. State the basis for Your claim that Defendants are liable for unfair competition under federal law, state law, or common law.

ANSWER:

...

In addition to all facts from the live complaint, which are hereby incorporated by reference into this answer, Dahl owns the incontestable '291 registration and common law rights to the MULTI-CART® mark. Dahl asserts that Defendants' use of a confusingly similar mark, ULTI-CART, creates a likelihood of confusion within the relevant consuming public, and that Defendants' products are associated with or approved by Dahl, which is not true. The likelihood of confusion created by Defendants' acts amounts to infringement under federal and state law, whether under the statutory or common law. Dahl asserts that Defendants' adopted the confusingly similar ULTI-CART name with knowledge of Dahl's mark and his similar product lines. Dahl asserts that Defendants adopted the confusingly similar ULTI-CART name to unfairly trade on the goodwill, notoriety associated with his mark and products by consumers. Dahl incorporates by reference into this answer his response to Interrogatory No.1, and all facts offered in application for a preliminary injunction. Dahl will identify other information as discovery progresses.

INTERROGATORY NO. 13. Identify all instances of which You are aware in which any person or entity has expressed confusion or uncertainty or inquired regarding the origin, source, sponsorship, affiliation, or approval of Ultimate's products offered under its UC-80 ULTI-CART

mark, or the origin, source, sponsorship, affiliation, or approval of Your products offered under the mark '291 registration, including, but not limited to, any and all misdirected communications. For each such instance, identify the person who was allegedly confused, the nature of the alleged confusion, uncertainty, or inquiry, the manner in which You learned of the alleged confusion, uncertainty, or inquiry, and all persons having factual knowledge thereof.

ANSWER:

....

Ken Heath was confused (see bates nos. Dahl 01176-1179) about the affiliation with the UIti-Cart product. Glenn Libby was another person who sells carts who was confused about the source of the UIti-Cart product. On information and belief, other consumers at the trade show were confused. *Id.* at pp. 4-7.

[JA Vol. 1, Ex. 11, 252-55]

All of these documents and information, along with Dahl's document productions, were forwarded to Hartford, establishing its clear defense obligations.

Hartford filed a declaratory relief action in the Los Angeles County Superior Court regarding Hartford's duties to defend and indemnify Ultimate in the *Dahl* Action, under Hartford's insurance policy no. 57 SBQ RH3077. The trial court found that Hartford was entitled to a declaration that it did not owe a defense or indemnity for the *Dahl* Action. The trial court entered judgment on May 13, 2011 in Hartford's favor and Ultimate timely appealed on July 5, 2011. The Appellate Court's ruling is styled as *Hartford Cas. Ins. Co. v. Swift Distribution, Inc.*, No. B234234, 2012 WL 5306248, at *1 (Cal. App. Ct. Oct. 29, 2012) (the "*Hartford* Action").

B. The Court of Appeal Decision

The Court of Appeal agreed that Hartford owed no defense duty to Ultimate; however, the Court of Appeal went beyond merely affirming the trial court's holding. The Court of Appeal alleges that Ultimate cannot recover, because it did not publish a disparaging statement. Appellate Op. at 9, October 29, 2012. The Court stated:

Even if the use of "Ulti-Cart" could reasonably imply a reference to "Multi-Cart," however, Ultimate's advertisement contained no disparagement of "Multi-Cart." As stated, disparagement involves "an injurious falsehood directed at the organization or products, goods, or services of another . . ." (Atlantic Mutual, *supra*, 100 Cal.App.4th at p. 1035.) The injurious falsehood or disparagement may consist of matter derogatory to the plaintiff's title to his property, its quality, or to his business in general. (*Ibid.*) The advertisements for the "Ulti-Cart" did not include any of these derogations. Ultimate's advertisements referred only to its own product, the Ulti-Cart, and did not refer to or disparage Dahl's Multi-Cart.

Id.

The Court of Appeal also reasoned that Dahl needed to specifically allege Ultimate's publications disparaged Dahl's product in order to trigger Hartford's defense obligations to Ultimate, stating:

Because Dahl did not allege that Ultimate's publication disparaged Dahl's organization, products, goods, or services, Dahl was precluded from recovery on a disparagement theory. (*Nichols v. Great American Ins. Companies* (1985) 169 Cal.App.3d 766, 774.) Thus Dahl alleged no claim for injurious false statement or disparagement that was potentially within the scope of the Hartford policy coverage for advertising injury.

Id.

Moreover, the Court held that Ultimate was precluded from relying on *Charlotte Russe*, because the *Charlotte Russe* Court purportedly applied illogical reasoning in finding that a retailer selling premium clothing at discounted prices had disparaged the premium clothing's brand or reputation. *Id.* at 10.

The Court of Appeal stated its disagreement with the logic in *Charlotte Russe* for a finding of disparagement, as follows:

In spite of the requirements that there be a publication (*Shanahan v. State Farm General Ins. Co.* (2011) 193 Cal.App.4th 780, 789) that specifically refers to the plaintiff (*Total Call Internat., Inc. v. Peerless Ins. Co.*, *supra*, 181 Cal.App.4th at p. 170), *Charlotte Russe* held that this reduced pricing was enough to constitute disparagement, which triggered the duty to defend. We fail to see how a reduction in price—even a steep reduction in price—constitutes disparagement.

...

[T]here was neither a publication nor a specific reference to the manufacturer's products. For these reasons, we reject the analysis of *Charlotte Russe*.

Id. at 10-11.

IV. DISCUSSION

A. The *Hartford* Action's Ruling Directly Conflicts with the Appellate Opinion in *Charlotte Russe*: Is *Charlotte Russe* Good Law?

The Appellate Court in the *Hartford* Action held that *Travelers Prop. Cas. Co. of Am. v. Charlotte Russe Holding, Inc.*, 207 Cal. App. 4th 969 (2012) was not good law and that the *Charlotte Russe* Appellate Court used a clearly erroneous standard in its finding of coverage for disparagement. *Id.* at 10-11. The California Supreme Court denied the

Petition for Review and Request for Depublication of the *Charlotte Russe* holding, on September 26, 2012. California Rules of Court Rule 8.500(b)(1) states that this Supreme Court may order review of a Court of Appeal decision “when necessary to secure uniformity of decision or to settle an important question of law.” The present case satisfies both grounds for review.

The Supreme Court’s denial of the Petition for Review and Depublication of the *Charlotte Russe* holding implies that *Charlotte Russe* is valid law in California; however, the Appellate Court’s ruling in the *Hartford* Action attempts to reject clear precedent and diminish the implication of the *Charlotte Russe* decision. Appellate Op. at 10-11, October 29, 2012. Thus, there is now no uniformity of California law. Furthermore, it is of the utmost importance that California insurers and insureds alike have a clear understanding of whether coverage for disparagement requires publication that expressly references another’s products or goods, or whether publication that implicitly references another’s products or goods is sufficient to trigger an insured’s defense duty.

B. Ultimate Published Injurious Falsehoods that *Implicitly* Reference Dahl’s Product

All parties agree that the Hartford policy provides coverage for disparagement; however, the dispute centers on whether Dahl made factual allegations that could be construed as alleging disparagement. Disparagement is defined as an “injurious falsehood directed at the organization or products, goods, or services of another...” *Atlantic Mutual Ins. Co. v. J. Lamb, Inc.*, 100 Cal. App. 4th 1017, 1035 (2002). Tortious

product disparagement involves publication to third parties of a false statement that injures the plaintiff by derogating the quality of goods or services. *Total Call Int'l, Inc. v. Peerless Ins. Co.*, 42 Cal. 3d 1033, 1046 (1986). Thus, to trigger Hartford's defense obligations there must be both a publication of an injurious falsehood and a reference to Dahl's goods, whether express or implied. Both are present.

1. Ultimate's publication of injurious falsehoods

Dahl alleges that Ultimate published material via its advertising on websites, catalogs, and flyers at trade shows, about Dahl's products or goods, stating in its Complaint:

55. Defendants are advertising and offering for sale Defendants' Infringing Products which infringe the Patents-in-Suit and Dahl's Mark. Defendants' advertising efforts include, but are not limited to, various websites, such as <http://www.ultimatesupport.com/>, as well as various catalogs and flyers distributed at industry trade shows, including the 2010 NAMM Show.

[JA Vol. 1, Ex. 11, 111]

Dahl's also alleges Ultimate's publications are injurious, in stating that:

57. On information and belief, Defendants have engaged in the advertising herein with the intent to mislead the public as to origin and ownership of rights in Dahl's Mark. In doing so, Defendants intended . . . to mislead the public into believing that its products are the same as Dahl's or otherwise authorized by or related to Dahl.

58. Defendants' advertising was, and continues to be, **untrue and misleading** and likely to deceive the public in that it appears therefrom that Defendants are the originator, designer, or are otherwise authorized to manufacture and distribute . . . the "Ulti-Cart" carts, which name and cart

design appear nearly identical to the Cart . . . Mark, . . . (bold provided)

Id.

71. In doing the acts herein alleged, Defendants have violated Cal. Bus. & Prof. Code §§ 17500 and 17505 by falsely claiming that Defendants are the originator, producer, manufacturer, processor, wholesaler, or importer, or that Defendants own or control the intellectual property, factory, or other source of supply of the Cart and Dahl's Mark.

Id. at 113.

COUNT VIII

(Common Law Unfair Competition)

80. Dahl realleges and incorporates by reference paragraphs 1-79 of this Complaint as though set forth fully herein.

Id. at 114.

Thus, Dahl is alleging Ultimate has published injurious falsehoods, which satisfies the first requirement of disparagement.

2. Ultimate's implicit reference to Dahl's product

In contrast to well-settled California law that allows for a finding of disparagement through "reasonable implication," the Appellate Court repeatedly states that the *Dahl* Complaint does not allege disparagement, because Ultimate did not expressly reference Dahl's product. Appellate Op. at 2; 3; 8; & 13, October 29, 2012.

In the case of *Acme United Corp. v. St. Paul Fire & Marine Ins. Co.*, 214 F. App'x 596, 599 (7th Cir. 2007) the Court utilizes *Black's Law Dictionary* 483 (7th ed. 1999) defining disparage as "to dishonor (something or someone) by comparison" or "to unjustly discredit or detract from the reputation of (another's property, product, or business)." *Acme*

was sued for making statements on its product's packaging that implied its titanium scissors were superior to its competitor's stainless steel scissors. *Id.* The *Acme* Court concluded that Acme's advertisements, by implication, sufficiently referenced its competitor's products, which constituted disparaging statements that triggered the insurer's duty to defend. *Id.* Here, Ultimate only has one competitor with respect to the Ulti-Cart: Dahl's Multi-Cart. Thus, following the *Acme* Court's reasoning, a false inference that Ultimate has the sole right to manufacture and distribute the Ulti-Cart thereby implying Dahl is producing an inferior imitation would constitute disparagement, and trigger Hartford's defense duty (discussed in detail below).

In the case of *Liberty Mut. Ins. Co. v. OSI Indus.*, 831 N.E. 2d 192 (2205) Thermodyne sued OSI and Beltec for their agent claiming sole ownership rights over the "Thermodyne Oven." The *OSI* Court held that:

[the] statements disparaged the "Thermodyne Oven" by creating confusion about the product and the technology in the marketplace because it was unclear as to which company, OSI/Beltec or Thermodyne, had the rights to and was producing an oven with the unique technology. As a result of such confusion, businesses were allegedly deterred from purchasing the "Thermodyne Oven." This disparagement triggered Liberty Mutual's duty under the "oral or written publication of material that ... disparages a person's or organization's goods, products or services" clause in the "Personal Injury" coverage. [citation] Consequently, the trial court did not err in its finding that Liberty Mutual breached its duty to defend OSI and Beltec in the Thermodyne litigation.

Id. at 199.

Similar to *OSI*, Ultimate issued a press release that includes statements about Dahl's products, where Ultimate specifically notes that Ultimate's Ulti-Cart has a patent-pending. [JA Vol. 2, Ex. 11, 322-23] This clearly implies that Ultimate is purportedly the true sole-owner of the unique Ulti-Cart and all other versions of the cart are simply imitations. When in actuality, Dahl purportedly had, at that time, sole rights to produce and distribute the Multi-Cart. [JA Vol. 1, Ex. 11, 105:¶10-11]

Accordingly, the publication of material about a competitor's goods or products element is met, because Dahl alleged Ultimate published material about Dahl's products on its website, catalogs, flyers and through the press release, which all implicitly reference Dahl's product. *See Lamb*, 100 Cal. App. 4th at 1034 ("The term 'disparagement' has been held to include statements about a competitor's goods that are untrue or misleading ...").

C. Both Parties Assert There is an Implied Reference to Dahl's Product

1. Hartford's initial assertion of a reference by implication

In Hartford's letter dated July 2, 2010, Hartford denies coverage availability, because "as discussed above, there is no stated 'comparison' of the Ulti-Cart and the Multi-Cart **except by implication;**" [JA Vol. 2, Ex. 12, 543] (bold provided) however, the Appellate Court states:

As we have explained, the *Dahl* complaint did not allege that Ultimate disparaged Dahl's products by implication [...] Ultimate's advertisements did not disparage another's product, either expressly or by implication.

Appellate Op. at 13, October 29, 2012.

Thus, the Appellate Court's conclusion is in direct opposition to both parties' acknowledgement that Ultimate's advertisements for the Ulti-Cart implicitly reference Dahl's Multi-Cart. *Id.*

2. Hartford's continued assertion that there is a implicit reference

Not only did Ultimate include the July 2, 2010 coverage denial letter in its Separate Statement of Undisputed Facts in Support of its Motion for Summary Judgment, but Hartford also included the letter in its Separate Statement of Undisputed Facts in Support of its Motion for Summary Judgment, which unambiguously reasserts its belief that Ultimate's advertisements contain an implicit reference to Dahl's product. JA Vol.1, Ex. 6, 81:¶22; JA Vol.3, Ex. 14, 656:¶24.

3. Current California law pertaining to evidence considered in evaluating summary judgment motions

California courts recognize a trial court's obligation to consider all evidence presented in deciding a motion for summary judgment, except evidence not included in the moving party's separate statement of undisputed facts; [*See San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.*, 102 Cal. App. 4th 308, 315 (2002)²] however, there does not appear

² In *San Diego Watercrafts*, 102 Cal. App. at 315, the Court cites to the following cases in support of its theory that this is now a common obligation for trial courts:

Allen v. Smith (2002) 94 Cal.App.4th 1270, 1282 [114 Cal.Rptr.2d 898]; *O'Byrne v. Santa Monica-UCLA Medical Center* (2001) 94 Cal.App.4th 797, 800, fn. 1 [114 Cal.Rptr.2d 575]; *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 472 [110 Cal.Rptr.2d 627]; *Thrifty Oil Co. v. Superior Court* (2001) 91 Cal.App.4th 1070, 1075, fn. 4 [111 Cal.Rptr.2d 253]; *Waisbren v. Peppercorn Productions, Inc.* (1995) 41 Cal.App.4th

to be any case law as to whether an appellate court must consider all of the evidence presented in both parties' Separate Statements of Undisputed Facts that were initially filed in the trial court proceeding, and then included in the appellate Joint Appendix.

The California Civil Procedure Code § 437(c) discusses what evidence must be considered in granting or denying a motion for summary judgment. In pertinent part, it specifically states:

[T]he court shall consider **all of the evidence set forth in the papers**, except that to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, **except summary judgment may not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence**, which raise a triable issue as to any material fact. (bold provided)

Cal. Civ. Proc. Code § 437c (West).

Consequently, one could logically infer that an appellate court should abide by the same rules when affirming or denying a trial court's granting of a motion for summary judgment. Thus, the Appellate Court should have to consider the evidence admitted in the Trial Court proceedings that specifically addresses whether Ultimate implicitly references Dahl's Multi-Cart in its injurious publications (i.e., Ultimate's advertisements), and not unilaterally contradict the evidence presented by both parties.

246, 263 [48 Cal.Rptr.2d 437]; *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 30-31 [21 Cal.Rptr.2d 104]; *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1563, fn. 7 [8 Cal.Rptr.2d 552].

In addition to both parties including the letter in their respective Separate Statements of Undisputed Facts, which expressly asserts Hartford's belief that there is an implicit reference to Dahl's product, Ultimate specifically addressed this precise fact in its Opening Brief to the Appellate Court. Appellant's Opening Br. at 30-31, December 19, 2011. Nonetheless, the Appellate Court ignored the evidence before it, and instead ruled that there is no reference to Dahl's Multi-Cart, expressly or **implicitly**. Appellate Op. at 13, October 29, 2012. This Supreme Court must decide the applicable rules for California Appellate Courts in order to ensure equity and uniformity in all appellate proceedings evaluating trial courts' summary judgment holdings.

CONCLUSION

For all of the foregoing reasons, Ultimate respectfully requests that this Court grant review.

Respectfully submitted,

Dated: December 6, 2012

LITTLE REID & KARZAI LLP

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Support Systems; Michael Belitz;
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CERTIFICATE OF WORD COUNT
[Cal. Rules of Court, Rule 8.504(d)(1)]

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Dated: December 6, 2012

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By: 

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Ultimate Support Systems; Michael
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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

HARTFORD CASUALTY INSURANCE
COMPANY,

Plaintiff and Respondent,

v.

SWIFT DISTRIBUTION, INC. et al.,

Defendants and Appellants.

B234234

(Los Angeles County
Super. Ct. No. BC442537)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Debre K. Weintraub, Judge. Affirmed.

Little Reid & Karzai, Eric R. Little, M. Catherine Reid and Najwa Tarzi Karzai for
Defendant and Appellant.

Tressler, David Simantob and Elizabeth L. Musser for Plaintiff and Respondent.

INTRODUCTION

The issue in this appeal is whether the “advertising injury” provision of an insurance policy required the insurer to provide a defense for its insured against a claim that the insured company’s advertisements disparaged another company’s products. In this case, Company A advertised its product, which resembled and had a name similar to the product sold by Company B. Company A’s advertisement, however, did not identify Company B’s product expressly and did not disparage Company B’s product. When Company B sued, Company A made a demand on its insurer to defend against that suit under an insurance policy provision that provided coverage for “advertising injury,” defined as injury arising out of publication of material that disparaged a person’s or organization’s goods, products, or services. Because the advertisement did not identify Company B’s product, and contained no matter derogatory to Company B’s title to its property, its quality, or its business, no disparagement occurred. Therefore the insurance policy did not provide a potential for coverage of this claim for damages because of advertising injury and the insurer did not owe the insured a duty to defend.

Specifically, in an underlying action, Gary-Michael Dahl (Dahl), who manufactured and sold the “Multi-Cart,” sued Swift Distribution, Inc., dba Ultimate Support Systems, Inc., Michael Belitz, and Robin Slaton (Ultimate), for patent and trademark infringement, unfair competition, dilution of a famous mark, and misleading advertising arising from Ultimate’s sale of its product, the “Ulti-Cart.” Ultimate tendered defense of Dahl’s action to its insurer, Hartford Casualty Insurance Company (Hartford), which refused to defend it in the *Dahl* action. In a subsequent action for declaratory relief against Ultimate, Hartford sought a declaration that it had no duty to defend or indemnify Ultimate in the *Dahl* action. The trial court granted Hartford’s motion for summary judgment and Ultimate appeals.

We find that Ultimate's advertisements did not expressly refer to Dahl's Multi-Cart and did not "disparage" Dahl's Multi-Cart product or business, and there was no coverage or potential for coverage for "advertising injury" under the Hartford insurance policy. Thus Hartford had no duty to defend Ultimate in the *Dahl* action, and the trial court correctly granted summary judgment for Hartford. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Hartford issued a liability insurance policy to Swift Distribution, Inc. dba Ultimate Support Systems for the period January 29, 2009, to January 29, 2010. The Hartford policy's insuring agreement stated: "We will pay those sums that the insured becomes legally obligated to pay as damages because of . . . 'personal and advertising injury' to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. However, we will have no duty to defend the insured against any 'suit' seeking damages for . . . 'personal and advertising injury' to which this insurance does not apply."

The policy defined "personal and advertising injury" in several ways. One definition of "personal and advertising injury" was "injury . . . arising out of . . . [o]ral, written or electronic publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services[.]"

On January 26, 2010, Dahl filed an action against Ultimate, *Dahl v. Swift Distribution, Inc.* in U. S. District Court, Central District of California. The *Dahl* complaint alleged that Dahl owned a U.S. patent to a "convertible transport cart," which he had sold as the "Multi-Cart" collapsible cart since 1997. The Multi-Cart can be manipulated into eight configurations, and is used to move music, sound, and video equipment quickly and easily. The U.S. Patent and Trademark Office issued a patent to Dahl for the "Multi-Cart" mark. The *Dahl* complaint alleged that Ultimate impermissibly manufactured, marketed, and sold the "Ulti-Cart," which infringed patents and trademarks for Dahl's Multi-Cart and diluted Dahl's trademark. The complaint attached advertisements for the Ulti-Cart, which do not name the Multi-Cart, Dahl, or any other products other than the Ulti-Cart.

Ultimate made three demands upon Hartford to defend it the *Dahl* action under the Hartford insurance policy. Hartford denied coverage to Ultimate for the *Dahl* action and stated that Hartford had no duty to defend or indemnify Ultimate. Hartford filed a complaint for declaratory relief against Ultimate seeking a declaration that it had no duty to defend or indemnify Ultimate in the *Dahl* action.

While the Hartford complaint was pending, counsel for Ultimate notified counsel for Hartford that the court in the *Dahl* action granted Ultimate's motion for summary adjudication as to Dahl's two patent infringement claims. Subsequently counsel for Ultimate notified counsel for Hartford that the *Dahl* action had settled.

Hartford and Ultimate filed motions for summary judgment or in the alternative summary adjudication. The trial court entered an order granting summary judgment in favor of Hartford and denying Ultimate's motion. The judgment entered in favor of Hartford determined that Hartford had no duty to defend or indemnify Ultimate in the *Dahl* action. Ultimate filed a timely notice of appeal.

ISSUE

Ultimate claims on appeal that the *Dahl* action alleged facts that constituted the potentially covered offense of disparagement.

DISCUSSION

1. *Standard of Review*

Any party to an action may move for summary judgment on a cause of action or defense—a plaintiff contending that there is no defense to the action, a defendant contending that the action has no merit. (Code Civ. Proc., § 437c, subd. (a); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).)

The party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that it is entitled to judgment as a matter of law. A triable issue of material fact exists only if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion. (*Aguilar, supra*, 25 Cal.4th at p. 850.) “[I]f a plaintiff who would bear the burden of proof by a preponderance of evidence at trial moves for summary judgment, he must present

evidence that would require a reasonable trier of fact to find any underlying material fact more likely than not.” (*Id.* at p. 845.)

A plaintiff moving for summary judgment has met its burden of showing that there is no defense to a cause of action if it has proved each element of the cause of action entitling it to judgment on that cause of action. Once the plaintiff has met that burden, the burden shifts to the defendant to show the existence of a triable issue of one or more material facts as to that cause of action or a defense thereto. The defendant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists, but instead must set forth specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto. (Code Civ. Proc., § 437c, subd. (p)(1); *Aguilar, supra*, 25 Cal.4th at p. 849.)

The court must grant the motion if all the papers submitted show there is no triable issue as to any material fact—that no issue requires a trial as to any fact that is necessary under the pleadings and the law—and that the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar, supra*, 25 Cal.4th at p. 843.)

2. *The Insurer’s Duty to Defend Against Third Party Claims Against the Insured*

Liability insurance imposes on the insurer both the obligation to indemnify the insured against third party claims covered by the policy and to defend such claims against its insured by furnishing competent counsel and paying attorney fees and costs. The duty to defend is generally determined from all the information available to the insurer when the defense is tendered, although later developments may also affect the insurer’s duty to defend. (*Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 519-520.)

The duty to defend is more broad than the duty to indemnify. The insurer must indemnify claims covered by the policy, but must also defend against a suit that potentially seeks damages within the coverage of the policy. The potential or possibility of coverage triggers the duty to defend. (*Howard v. American National Fire Ins. Co. supra*, 187 Cal.App.4th at p. 520.) The duty to defend arises when the insurer learns of facts giving rise to the potential for coverage. (*New Hampshire Ins. Co. v. Ridout*

Roofing Co. (1998) 68 Cal.App.4th 495, 505.) A determination whether the insurer owes a duty to defend is made in the first instance by comparing allegations of the complaint with policy terms. Facts outside the complaint may give rise to a duty to defend when they reveal a possibility that the policy may cover the claim. (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 295.) “The duty to defend is determined by reference to the policy, the complaint, and all facts known to the insurer from any source.” (*Id.* at p. 300, italics omitted.)

The duty to defend is broad, but not unlimited. The nature and kinds of risks covered by the policy define its scope. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 19.) The insurer need not defend where extrinsic facts eliminate the potential for coverage despite allegations in the complaint which suggest potential liability (*ibid.*), and where the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage. (*Montrose Chemical Corp. v. Superior Court, supra*, 6 Cal.4th at p. 300.)

In an action seeking declaratory relief on the issue of an insurer’s duty to defend, the insured must prove the existence of a potential for coverage, i.e. that the policy *may* provide coverage of the underlying claim. The insurer, by contrast, must establish the absence of a potential for coverage; it must prove that the policy *cannot* provide coverage of the underlying claim. (*Montrose Chemical Corp. v. Superior Court, supra*, 6 Cal.4th at p. 300.)

3. *Facts Known to Hartford*

Ultimate cited specific paragraphs of the *Dahl* complaint as containing elements of a claim of disparagement.

Unfair Competition Under the Lanham Act: Dahl’s claim for unfair competition under the Lanham Act (15 U.S.C. § 1125(a)) alleged that Ultimate advertised and offered for sale products that infringed two patents and the “Multi-Cart” mark owned by Dahl. The *Dahl* complaint alleged that Ultimate engaged in this advertising with intent to mislead the public as to the origin and ownership of rights in Dahl’s mark, and to mislead the public to believe that Ultimate’s products were the same as Dahl’s or were authorized

by or related to Dahl. The *Dahl* complaint alleged that Ultimate's advertising falsely made it appear that Ultimate designed, or was authorized to manufacture and sell, Ultimate's infringing products (the "Ulti-Cart," whose name and design was nearly identical to Dahl's "Multi-Cart"), and that Ultimate owned or had manufacturing rights to the patent and trademark-protected Multi-Cart.

Misleading Advertising: In a cause of action for untrue and/or misleading advertising, the *Dahl* complaint alleged that Ultimate violated Business and Professions Code sections 17500 and 17505 by falsely claiming to be the manufacturer, wholesaler, or importer, or to own or control the intellectual property, factory, or other source of supply, of the Multi-Cart and Dahl's mark. This cause of action alleged that these violations caused Dahl's potential clients to contact Ultimate to buy its infringing product. It further alleged that through the false designation of origin, Dahl's intellectual property, mark, and patents were being inaccurately associated with Ultimate.

Allegations in Dahl's Application for a Temporary Restraining Order: Dahl's application for a temporary restraining order alleged: (1) that Ultimate marketed a knock-off of Dahl's "Multi-Cart," and by dropping the "M" from "Multi-Cart," adopted a nearly identical name for its cart that created a likelihood of confusion with Dahl's "Multi-Cart" trademark; (2) that Ultimate's use of a near-identical mark was detrimental to Dahl's trade reputation and goodwill; (3) that if not enjoined by the court, Ultimate's use of the confusingly similar "Ulti-Cart" mark would cause confusion in the public and loss of sales and customers to Dahl; (4) that the infringing "Ulti-Cart" mark would be used to Dahl's detriment since he would have no control over the nature and quality of Ultimate's carts; (5) that any fault with those goods would adversely affect Dahl's future sales and would tarnish his name and reputation; (6) that industry and the consuming public recognized the "Multi-Cart" mark as associated with Dahl and as having a reputation for high quality and the patented design Dahl invented; and (7) that Ultimate's use of the "Ulti-Cart" mark and name would cause confusion or mistake, or would deceive the public as to the source of Ultimate's goods and services.

Dahl also responded to Ultimate's second set of interrogatories in the *Dahl* action. Dahl's responses essentially repeat the allegations of the complaint.

4. *Ultimate's Advertisements Did Not Disparage Dahl's Multi-Cart and Thus There Was No Coverage or Potential for Coverage for Advertising Injury Under the Hartford Insurance Policy*

To determine whether Hartford owes a duty to defend, we compare allegations of the *Dahl* complaint, Dahl's application for a temporary restraining order, and Dahl's responses to interrogatories to the terms of the Hartford insurance policy.

The Hartford policy provided insurance coverage for " 'personal and advertising injury' caused by an offense arising out of your business[.]" The policy defined "personal and advertising injury" to include "injury . . . arising out of . . . [o]ral, written or electronic publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services."

This provision provides coverage for product disparagement, which is "an injurious falsehood directed at the organization or products, goods, or services of another" (*Atlantic Mutual Ins. Co. v. J. Lamb, Inc.* (2002) 100 Cal.App.4th 1017, 1035 (*Atlantic Mutual*)). Disparagement, or injurious falsehood, may consist of publication of matter derogatory to plaintiff's title to his property, its quality, or his business. (*Ibid.*) Tortious product disparagement involves publication to third parties of a false statement that injures the plaintiff by derogating the quality of goods or services. (*Total Call Internat., Inc. v. Peerless Ins. Co.* (2010) 181 Cal.App.4th 161, 169.)

The injurious falsehood must specifically refer to the derogated property, business, goods, product, or services either by express mention or reference by reasonable implication. (*Total Call Internat., Inc. v. Peerless Ins. Co.*, *supra*, 181 Cal.App.4th at p. 170, citing *Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1046 ["plaintiff must allege that 'the statement at issue either expressly mentions him or refers to him by reasonable implication.'"]) Dahl's complaint, application for a temporary restraining order, and responses to Ultimate's discovery do not allege that Ultimate's advertisements specifically referred to Dahl by express mention.

Ultimate argues that Dahl's complaint alleged that Ultimate's use of "Ulti-Cart," a name similar to Dahl's "Multi-Cart," referred to Dahl and Dahl's product by reasonable implication. Dahl's complaint primarily alleged that because of its similarity to Dahl's "Multi-Cart," Ultimate's use of the "Ulti-Cart" name misled the public into believing that Ultimate's products were the same as Dahl's, were approved by Dahl, or were affiliated with Dahl's "Multi-Cart" products.

Even if the use of "Ulti-Cart" could reasonably imply a reference to "Multi-Cart," however, Ultimate's advertisement contained no disparagement of "Multi-Cart." As stated, disparagement involves "an injurious falsehood directed at the organization or products, goods, or services of another" (*Atlantic Mutual, supra*, 100 Cal.App.4th at p. 1035.) The injurious falsehood or disparagement may consist of matter derogatory to the plaintiff's title to his property, its quality, or to his business in general. (*Ibid.*) The advertisements for the "Ulti-Cart" did not include any of these derogations. Ultimate's advertisements referred only to its own product, the Ulti-Cart, and did not refer to or disparage Dahl's Multi-Cart. Dahl's complaint alleged that by using a product name (Ulti-Cart) that was very similar to Dahl's Multi-Cart product, Ultimate deceived the public that Ultimate was the originator, designer, or authorized manufacturer and distributor of its infringing products. This, however, was not disparagement. (*Atlantic Mutual, supra*, 100 Cal.App.4th at p. 1037; *Truck Ins. Exchange v. Bennett* (1997) 53 Cal.App.4th 75, 90; see also *Microtec Research v. Nationwide Mut. Ins. Co.* (9th Cir. 1994) 40 F.3d 968, 971-972.) Because Dahl did not allege that Ultimate's publication disparaged Dahl's organization, products, goods, or services, Dahl was precluded from recovery on a disparagement theory. (*Nichols v. Great American Ins. Companies* (1985) 169 Cal.App.3d 766, 774.) Thus Dahl alleged no claim for injurious false statement or disparagement that was potentially within the scope of the Hartford policy coverage for advertising injury.

5. *Cases Cited to Show Disparagement by Implication Do Not Apply*

A. *Travelers Property Casualty Co. of America v. Charlotte Russe Holding, Inc.*

The parties have cited the recent case of *Travelers Property Casualty Co. of America v. Charlotte Russe Holding, Inc.* (2012) 207 Cal.App.4th 969 (*Charlotte Russe*). In *Charlotte Russe*, the manufacturer of “People’s Liberation” brand apparel sued the insured retailer. The manufacturer claimed that the retailer, which had contracted to become the exclusive sales outlet for People’s Liberation apparel, breached its contract and damaged the People’s Liberation brand and trademark by marking down prices for the apparel. This advertising allegedly suggested to consumers that People’s Liberation products were of inferior quality. (*Id.* at pp. 972-973.) *Charlotte Russe* held that the allegations in the complaint could reasonably be interpreted to allege that the insured retailer disparaged the People’s Liberation brand, and that the advertising injury provision of an insurance policy provided coverage of, and the insurer had a duty to defend the insured against, this claim of disparagement. (*Id.* at p. 981.) We disagree. As discussed below, we believe such a conclusion has no objectively reasonable basis.

As a preliminary matter, we observe that the allegations in the *Dahl* complaint about Ultimate do not correspond to the facts in *Charlotte Russe*. The *Dahl* complaint did not allege that Ultimate implied, by steeply discounted pricing, that the Multi-Cart was of poor quality. Unlike in *Charlotte Russe*, Ultimate’s advertisements referred only to its own product, and did not refer to and therefore did not disparage Dahl’s product.

More importantly, we disagree with the theory of disparagement apparently recognized in *Charlotte Russe*. There the manufacturer alleged that the People’s Liberation brand was identified in the market as premium, high-end goods but the retailer’s steeply discounted prices implied that those products were not premium, high-end goods. The manufacturer “therefore pled that the implication carried by the [retailer’s] pricing was false.” (*Charlotte Russe, supra*, 207 Cal.App.4th at p. 979.) In spite of the requirements that there be a publication (*Shanahan v. State Farm General Ins. Co.* (2011) 193 Cal.App.4th 780, 789) that specifically refers to the plaintiff (*Total Call Internat., Inc. v. Peerless Ins. Co., supra*, 181 Cal.App.4th at p. 170), *Charlotte*

Russe held that this reduced pricing was enough to constitute disparagement, which triggered the duty to defend. We fail to see how a reduction in price—even a steep reduction in price—constitutes disparagement.¹ Sellers reduce prices because of competition from other sellers, surplus inventory, the necessity to reduce stock because of the loss of a lease, changing store location, or going out of business, and because of many other legitimate business reasons. Reducing the price of goods, without more, cannot constitute a disparagement; a price reduction is not “an injurious falsehood directed at the organization or products, goods, or services of another” (*Atlantic Mutual, supra*, 100 Cal.App.4th at p. 1035.) A price reduction may allegedly be injurious to the brand or its high-end, high-quality reputation, but it is not false and is thus not disparagement. Such an “injury” is a common experience in the everyday world of free market competition.

We also question whether the insured could have objectively reasonable expectations (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265) that the insurer would provide a defense and indemnity coverage for a claim made against the insured for placing goods on sale at a reduced price. The insurance policy in *Charlotte Russe* provided coverage for “ ‘publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services.’ ” (*Charlotte Russe, supra*, 207 Cal.App.4th at p. 978, italics added.) As we have already noted, there was neither a publication nor a specific reference to the manufacturer’s products. For these reasons, we reject the analysis of *Charlotte Russe*.

¹ The manufacturer in *Charlotte Russe* may well have had a breach of contract claim against the retailer, but that is not relevant to the issue before us, which is the viability of the manufacturer’s claim that the retailer’s price competition activity constituted disparagement of the manufacturer’s product for purposes of determining insurance coverage. Even though there may be a valid cause of action against an insured, that does not give rise to an insurer’s duty to defend and indemnify unless the suit potentially seeks damages within the coverage of the insurance policy.

B. Federal and Out-of-State Decisions

Ultimate cites a series of cases from federal courts and from the courts of other states. These cases do not bind California courts. (*Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 55; *US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 905.) These cases are also distinguishable or inapplicable.

In *Acme United Corp. v. St. Paul Fire & Marine Ins. Co.* (7th Cir. 2007) 214 Fed.Appx. 596, a competitor sued Acme for allegedly making false and disparaging statements about the competitor's products by stating on its product packaging that its scissors and paper trimmers were bonded with titanium, which made them superior to stainless steel scissors and paper trimmers which were not bonded with titanium. Acme's insurer denied coverage and disclaimed any duty to defend under the advertising injury liability provision of the policy, which indemnified the insured for damages for advertising that disparaged the products of others. (*Id.* at pp. 596-598.) *Acme United Corp.* concluded that the competitor's complaint sufficiently alleged that Acme's advertisements were directed at the competitor's products and that Acme disparaged the competitor's products through a false comparison. These allegations of advertising injury offense triggered the insurer's duty to defend Acme against the competitor's complaint. (*Id.* at pp. 600-601.) Dahl's complaint, by contrast, does not allege that Ultimate's advertisements falsely compared the Ulti-Cart to Dahl's Multi-Cart. Thus Dahl's complaint did not allege the disparagement by false comparison that occurred in *Acme United Corp.*

In *Liberty Mut. Ins. Co. v. OSI Industries* (2005) 831 N.E.2d 192, Thermodyne sued OSI and Beltec for advertising and selling a "Temperfect Oven," which contained flat aluminum plate shelving that Thermodyne claimed was unique and a trade secret. Thermodyne's lawsuit alleged that through an agent's statements, OSI and Beltec claimed ownership of the development of the Thermodyne oven and its flat aluminum plate shelving technology, which disparaged the Thermodyne Oven by creating confusion about which company, OSI/Beltec or Thermodyne, had the rights to and produced an oven with the unique technology. This triggered the insurer's duty to defend under the

advertising injury provision of the policy. (*Id.* at p. 199.) Dahl's complaint does not allege that Ultimate made statements claiming ownership of unique technology of the Multi-Cart or that Ultimate had the rights to and produced the Multi-Cart. Thus Dahl's complaint did not allege the disparagement by assertion of ownership of rights to another's product that occurred in *Liberty Mut. Ins. Co.*

Ultimate cites *E.piphany, Inc. v. St. Paul Fire & Marine Ins. Co.* (N.D.Cal. 2008) 590 F.Supp.2d 1244 for the proposition that disparagement by implication is actionable under California law. (*Id.* at p. 1252.) In *E.piphany Inc.*, Sigma sued E.piphany, alleging that E.piphany falsely advertised its software products as "all Java" and "fully J2EE," which gave its products an unfair and undeserved advantage over Sigma and other competitors which in fact did offer "all Java" and "fully J2EE" software. (*Id.* at pp. 1249-1250.) E.piphany sued its insurer seeking a declaration that the insurer had a duty to defend. *E.piphany, Inc.* found that Sigma's complaint alleged that E.piphany falsely stated that it was the only producer of "all Java" "fully J2EE" software and that E.piphany suggested that its competitors' technology was behind E.piphany's technology. Thus the Sigma complaint alleged that E.piphany's false claims about the superiority of its own products necessarily implied the inferiority of Sigma's competing products. (*Id.* at p. 1253.) *E.piphany Inc.* held that the Sigma complaint contained disparagement allegations potentially covered by the insurer's policy and thus triggered the insurer's duty to defend. (*Id.* at p. 1254.)

As we have explained, the *Dahl* complaint did not allege that Ultimate disparaged Dahl's products by implication. The *Dahl* complaint contained no allegations that Ultimate's advertising falsely stated it was the only producer of a product with features also available on Dahl's "Multi-Cart;" that Ultimate's advertising suggested that its competitor's technology was behind that of Ultimate; or that Ultimate made false claims about the superiority of the Ulti-Cart which necessarily implied the inferiority of Dahl's competing product. Ultimate's advertisements did not disparage another's product, either expressly or by implication; they said nothing about a competitor's product.

In *Michael Taylor Designs, Inc. v. Travelers Prop. Cas. Co. of America* (N.D.Cal. 2011) 761 F.Supp.2d 904, a furniture manufacturer, Ivy Rosequist, sued Michael Taylor Designs, Inc. (MTD) for breach of contract and violation of the Lanham Act. Rosequist's complaint alleged that MTD distributed promotional materials containing photographs of Rosequist's furniture, but displayed cheap, synthetic knock-offs of Rosequist's products in its showroom, which misled and confused customers about the origin of those products and diluted and tarnished Rosequist's trade dress. (*Id.* at pp. 907-908.) MTD sued the insurer seeking a declaration that the insurer had a duty to defend the trade dress infringement claim alleged in the original complaint.

The issue was whether the Rosequist complaint contained a claim for "disparagement" under the policy, which promised coverage where the insured "disparaged" the another's goods, products, or services. (*Id.* at p. 910.) Rosequist's complaint created a possibility of a covered claim for disparagement by alleging that defendant advertised Rosequist's products, did not sell Rosequist's products, and "steered" customers to imitation products. The term "steered" implied further statements by defendant's personnel that the imitation products were the Rosequist furniture shown in defendant's promotional materials. (*Id.* at pp. 911-912.)

The *Dahl* complaint alleges no comparable conduct by Ultimate. It does not allege that Ultimate displayed photos of the Multi-Cart in advertisements and then steered customers to purchase the Ulti-Cart, or led customers to believe the Ulti-Cart was Dahl's own product. Thus even under the analysis of *Michael Taylor Designs, Inc.*, the *Dahl* complaint did not allege disparagement and did not create a possibility of coverage under the advertising injury provision of the Hartford insurance policy.

Finally, Ultimate cites *Burgett, Inc. v. American Zurich Ins. Co.* (E.D.Cal. 2011) 830 F.Supp.2d 953 as clarifying an insurer's duty to defend a claim of disparagement by implication. In *Burgett*, Persis International and Richards (Persis) sued Burgett for falsely representing to another company, Samick, that it had valid and enforceable rights to the "SOHMER" trademark, which Persis alleged that it owned. The Persis complaint alleged that by entering into a licensing agreement with and accepting compensation from

Samick, and by holding itself out to Samick and the world as rightful owner of the SOHMER trademark, Burgett induced and was contributorily liable for Samick's acts of trademark infringement and unfair competition. Burgett's insurer, Zurich, declined to defend Burgett in the Persis action, asserting that the personal and advertising injury provision did not provide coverage and that the trademark exclusion excused Zurich from defending the action. (*Id.* at pp. 957-958.)

The *Burgett* court found that Burgett represented to Samick that it was the only holder of the SOHMER trademark (which implied that Burgett's right to use the SOHMER trademark was superior to that of Persis), represented that Persis did not have the rights to the SOHMER trademark, and created a likelihood of confusion or misunderstanding about the source, sponsorship, or approval of Persis's goods. *Burgett* held that the Persis complaint alleged sufficient facts to establish the potential for coverage of its claim of disparagement by implication, which triggered Zurich's duty to defend Burgett in the Persis action. (*Id.* at pp. 963-964.)

The *Dahl* complaint, by contrast, did not allege that Ultimate represented itself as the only holder of the Multi-Cart trademark, implied that Ultimate had a right to use the Multi-Cart trademark that was superior to that of Dahl, or represented that Dahl did not have rights to the Multi-Cart trademark. Thus the *Dahl* complaint did not allege disparagement by implication, and no potential for coverage triggered Hartford's duty to defend Ultimate in the Dahl action.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to plaintiff Hartford Casualty Insurance Company.

CERTIFIED FOR PUBLICATION

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the subject action. My business address is 3333 Michelson Dr., Ste. 310, Irvine, CA 92612.

I served the following document(s):

PETITION FOR REVIEW

on the interested parties in this action as follows and by the method listed below:

Clerk, Court of Appeal
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[BY UPS/OVERNIGHT MAIL] I placed the original or a true copy of the foregoing document in a sealed envelope or package designated by UPS with delivery fees paid or provided for, individually addressed to each of the parties on the attached service list, and caused such envelope or package to be delivered at 3333 Michelson Dr., Suite 310, Irvine, CA 92612, to an authorized courier or driver authorized by UPS to receive documents.

[STATE] I declare under penalty of perjury, under the laws of the State of California and the United States of America, that the foregoing is true and correct.

Executed on December 6, 2012, at Irvine, California.



Jeffrey A. Dress