No. S207172

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.

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

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This action addresses a liability insurer's duty to defend under the "disparagement" clause of its general liability policy. Contrary to petitioners' assertion, this Court's review is unnecessary to ensure uniformity of decision under California Rule of Court 8.500(b)(1) because existing appellate decisions are reconcilable. In particular, the panels in this case and in *Travelers Property Casualty Co. of America v. Charlotte Russe (Charlotte Russe)* (2012) 207 Cal.App.4th 969 [144 Cal.Rptr.3d 12] endorsed and applied the very same precedent to reach different conclusions based on the unique facts of each case. That different appellate panels reached different results on different facts does not reflect a conflict in the authorities. As a result, the petition for review should be denied.

* * *

In its published decision in this case, the Court of Appeal applied existing California law to conclude that Hartford Casualty Insurance Company ("Hartford") had no duty to defend an underlying patent and trademark infringement action (the "Underlying Action") filed against its insureds, Swift Distribution, Inc. d/b/a Ultimate Support Systems and two of its officers (collectively, the "Ultimate Appellants").

In so holding, the Court of Appeal relied on a line of California cases dating from at least 1985, which hold that a duty to defend exists under a general liability policy's "disparagement" enumerated offense

where the insured is sued over a false and derogatory statement that refers to the aggrieved claimant, either directly or by reasonable implication. (*Blatty v. New York Times Co. (Blatty)* (1986) 42 Cal.3d 1033, 1046 [232 Cal.Rptr. 542, 728 P.2d 1177]; *Total Call Internat. v. Peerless Ins. Co. (Total Call)* (2010) 181 Cal.App.4th 161, 170-71 [104 Cal.Rptr.3d 319]; *Atlantic Mut. Ins. Co. v. J. Lamb, Inc. (Atlantic Mutual)* (2002) 100 Cal.App.4th 1017, 1035 [123 Cal.Rptr.2d 256]; *Nichols v. Great Am. Ins. Cos. (Nichols)* (1985) 169 Cal.App.3d 766, 773 [215 Cal.Rptr. 416].) Construing the new fact pattern in the Underlying Action based on these established cases, the appellate court found the Underlying Action alleged no "disparagement" because it alleged no false and derogatory statement about the claimant or anyone else: the insureds' advertisements referenced only their own product, not the claimant's. The appellate court distinguished *Charlotte Russe*, in which a different division applied *Atlantic Mutual*, *Nichols*, and other California cases to find that price discounting may constitute covered "disparagement," on the ground there was no allegation of price discounting in this action, but only allegations of product imitation. Although the Court of Appeal in this case took issue with *Charlotte Russe*'s analysis of the facts before it, the Court of Appeal applied well-established California law to the new facts alleged in the Underlying Action. The Court of Appeal did not differ with the court in *Charlotte Russe* about governing California law, but, applying the same

legal precedents, determined that no "disparagement" was alleged in *this* case. Accordingly, this case does not undermine uniformity of law among the appellate courts.

Fundamentally, the Ultimate Appellants urge this Court to accept review of this case because they dislike the Court of Appeal's ruling. However, disliking a result is not a basis for California Supreme Court review under Rule of Court 8.500(b)(1).

Even more implausibly, the Ultimate Appellants ask this Court to accept review of this action for the purpose of affirming that *Charlotte Russe* is good law. But this Court already declined to review *Charlotte Russe* when that case was before it; this Court certainly should not retroactively issue an advisory opinion on the validity of *Charlotte Russe* at the request of a stranger in a different action. Because *Charlotte Russe* and the decision in this case can coexist without this Court's intervention, the differing results in the two cases provide no excuse to revisit *Charlotte Russe*.

In short, review is unnecessary to ensure uniformity in the appellate court decisions or to settle an important question of law as permitted by Rule of Court 8.500(b)(1). Rather, because the Court of Appeal simply applied existing case law to the new fact pattern presented by this case, the Ultimate Appellants provide no basis for this Court to review the appellate court's decision.

II. FACTUAL BACKGROUND

In the Underlying Action, claimant Gary-Michael Dahl ("Dahl") sought damages from the Ultimate Appellants on the grounds they (1) impermissibly manufactured, marketed, sold, and profited from the "Ulti-Cart," which allegedly infringed Dahl's patented and trademarked "Multi-Cart"; (2) engaged in unfair competition and misleading advertising; and (3) breached two non-disclosure agreements. (*Hartford Cas. Ins. Co. v. Swift Distrib., Inc. (Swift)* (2012) 210 Cal.App.4th 915, 922 [148 Cal.Rptr.3d 679].) Dahl attached marketing materials for the Ultimate Appellants' "Ulti-Cart" to his complaint in the Underlying Action, but, as noted by the Court of Appeal, the advertisements do not mention Dahl, his "Multi-Cart," or any products other than the Ultimate Appellants' own "Ulti-Cart." (*Id.* at p. 923.)

Under its applicable insurance policy, Hartford provided coverage for (among other things) suits alleging enumerated "personal and advertising injury" offenses, including "[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." (*Ibid.*) This "disparagement" offense is the only policy provision under which the Ultimate Appellants seek coverage.

III. LEGAL DISCUSSION

A. The Ultimate Appellants Provide No Basis for this Court's Review

The Ultimate Appellants claim they are asking this Court to accept review of this matter to ensure uniformity of decision among California appellate courts and to settle important questions of law. (Cal. R. Ct. 8.500(b)(1).) But because the decision on appeal is consistent with – and explicitly applies – existing California case law, as discussed in section III.B. below, there is no basis for review.

In reality, the Ultimate Appellants want this Court to apply the out-of-state cases cited in their petition for review, to reverse the Court of Appeal's ruling in Hartford's favor, and to provide an advisory opinion embracing the holding in *Charlotte Russe* – a decision this Court already declined to review. The appellate court correctly determined that the out-of-state cases are distinguishable and, in any event, are not binding on California courts. (*Swift, supra,* 210 Cal.App.4th at pp. 926-27 [citing *US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 905 [28 Cal.Rptr.3d 894]].) As for *Charlotte Russe*, as discussed further below, the appellate court here criticized the earlier case's application of law to fact, but that disagreement was not the basis for the *Swift* ruling; in fact, *Charlotte Russe* and *Swift* applied the same California law regarding the availability of coverage for "disparagement." Accordingly, because any

philosophical disagreement with *Charlotte Russe's* outcome was irrelevant to the actual decision in this case, the Ultimate Defendants cannot use this action as a stalking horse to achieve approval of *Charlotte Russe* when this Court already deemed that case unworthy of review.

B. The Appellate Court's Decision Is Consistent with California Law

In its October 29, 2012 decision, the Court of Appeal in this case affirmed summary judgment entered in favor of Hartford, finding the complaint in the Underlying Action alleged no "disparagement" within the meaning of Hartford's policy. (*Swift, supra,* 210 Cal.App.4th at p. 918.) In fact, the underlying complaint alleged that the Ultimate Appellants manufactured an "Ulti-Cart," a device for moving audio-visual equipment, which was a direct copy of Dahl's own patented "Multi-Cart." As the appellate court found, the mere duplication of another's product is not a false and derogatory statement about the original product or its manufacturer, either expressly or by reasonable implication, as required under established California law. (*Id.* at pp. 923-24 [citing *Blatty, supra,* 42 Cal.3d at p. 1046, *Total Call, supra,* 181 Cal.App.4th at p. 170; *Atlantic Mutual, supra,* 100 Cal.App.4th at p. 1035; *Nichols, supra,* 169 Cal.App.3d at p. 773.)

In *Total Call*, for instance, the insured was alleged to have falsely advertised its own products to the detriment of the claimant. (181

Cal.App.4th at pp. 170-71.) The court found no allegation of "disparagement," because the insured's advertisements made no false or derogatory statement about the claimant, either explicitly or by implication. (*Ibid.*) By contrast, *Atlantic Mutual* found "disparagement" coverage triggered where Continental, a competitor of the insured, alleged that "[the insured] had communicated with a number of Continental's customers and falsely stated that Continental was infringing a patent owned by [the insured] ...." (100 Cal.App.4th at p. 1024.) That is, the complaint in *Atlantic Mutual* was based on a *specific negative comment* about the claimant Continental (that Continental engaged in patent infringement), which was intended to dissuade customers from dealing with Continental.

Here, unlike *Atlantic Mutual*, the underlying complaint nowhere made any specific negative comment about Dahl or his "Multi-Cart," either implicitly or explicitly. Indeed, it neither mentioned nor alluded to Dahl or his cart – or to any other competitor, for that matter – in any fashion whatsoever. If anything, the Ultimate Appellants implicitly *endorsed* the "Multi-Cart" by copying its design and selling an identical product. (*Homedics, Inc. v. Valley Forge Ins. Co.* (9th Cir. 2003) 315 F.3d 1135, 1141-42 [noting that copying a patented product is not disparagement, but "the highest form of flattery"].) As a result, the appellate court correctly found no allegation of "disparagement" here.

The Ultimate Appellants attempt to suggest this case is about the scope of "implicit disparagement," but it is not. There is no dispute that "implicit disparagement" can exist under California law: indeed, the court in *Total Call* acknowledged that a "specific [false and derogatory] reference" to the claimant or the claimant's products may "expressly mention[]" the claimant, or may "refer[] to him by reasonable implication." (*Total Call, supra,* 181 Cal.App.4th at p. 170.) But there is a difference between a "reasonable implication" and a conclusion drawn solely from thin air. "Implicit disparagement" exists where a disparaging statement was made that *implicitly* referred to the underlying plaintiff. (*Ibid.* [quoting *Blatty, supra,* 42 Cal.3d at p. 1046].)

For example, in *Total Call*, an advertisement that mentioned only the insured did not refer to the claimant, even by "reasonable implication," because a consumer reviewing it would need independently to seek out information about the unnamed claimant. (*Total Call, supra,* 181 Cal.App.4th at p. 171.) Similarly, the court in *Blatty* found that a list of book sales "could not reasonably be viewed as specifically referring to [the claimant] or his novel by implication, as nothing in the list distinguished him and his novel from the large number of other omitted authors and novels." (*Blatty, supra,* 42 Cal.3d at p. 1046.)

The court in *Nichols* similarly explained that an "implicit" disparagement cannot exist where there is no disparagement at all: that is,

where the most crucial element of a disparagement claim (a defamatory statement) is absent, it "cannot be supplied by reference to reports in which the defamatory innuendo appears only inferentially." (*Nichols, supra,* 169 Cal.App.3d at p. 773.)

Accordingly, California case law is clear in recognizing that disparagement of the claimant may be either express or implied, but in either case there must be a disparagement in the first instance. In this case, the appellate court simply found that Dahl's complaint contained no disparaging statement at all: it just accused the Ultimate Appellants of copying Dahl's product and making money off the purloined design. With no specific reference to Dahl or his "Multi-Cart," either "by express mention or reference by reasonable implication," there was no disparagement. (*Swift, supra,* 210 Cal.App.4th at p. 923.)

In sum, under existing California law – most notably *Total Call* and *Atlantic Mutual* – the fundamental question is whether an insured has been sued for making a false and derogatory statement about the claimant, expressly or impliedly. As in cases like *Total Call*, there is no "disparagement" coverage where the insured said nothing disparaging about *anyone*.

According to the appellate court's analysis, this action is more like *Total Call*, because Dahl nowhere accused the Ultimate Appellants of making any false and derogatory statement (explicit or implied) about him

or his "Multi-Cart." Indeed, so far as the underlying complaint revealed, the Ultimate Appellants disparaged no one at all: they only *copied* the "Multi-Cart.". The appellate court deviated from no existing case law to arrive at its decision, but merely applied existing law (notably, *Total Call* and *Atlantic Mutual*, but also *Blatty*, *Nichols*, and other California cases) to new facts to find Dahl alleged no "disparagement," either of himself or anyone else. Inasmuch as the appellate court's decision did not rest on its disagreement with *Charlotte Russe*, but simply applied existing California decisional law to new facts, this Court need not intervene to ensure uniformity of appellate decisions.

C. *Charlotte Russe* Provides No Basis to Accept Review, Because the *Swift* Court's Rejection of Its Holding Was Not Essential to Its Decision Here

As the first "Question Presented" in their petition for review, the Ultimate Appellants, somewhat curiously, ask this Court to opine on whether *Charlotte Russe* "[i]s . . . good law." (Pet., at 1.) Although the *Swift* court disagreed with *Charlotte Russe*'s analysis of the facts *of that case*, the *Swift* ruling did not rest on that disagreement or depart from *Charlotte Russe*'s statement of California law. Rather, like other California decisions (including *Total Call* and *Atlantic Mutual*), *Charlotte Russe* required a disparaging statement about the claimant's products, and simply concluded that, under the unique facts of the underlying action, the insureds

impliedly disparaged the product at issue. As a result, *Charlotte Russe* is factually distinguishable from the decision here.

In the first place, *Charlotte Russe* did not abrogate *Total Call*'s and *Atlantic Mutual*'s requirement that covered "disparagement" involve a false and derogatory statement (i.e., a "disparaging" statement) about the claimant's products, whether explicit or implicit. In fact, *Charlotte Russe* cited and relied on *Atlantic Mutual* to find a duty to defend because, in the panel's view, the insureds' pricing strategy constituted a false and derogatory statement about the claimant's products. (*Charlotte Russe, supra,* 207 Cal.App.4th at p. 973.) In other words, the *Swift* court and the *Charlotte Russe* court did not disagree over the law: they disagreed over their interpretation of the underlying complaint in *Charlotte Russe*. That *Swift* disagreed with *Charlotte Russe*'s application of established law to the facts of *Charlotte Russe* hardly justifies review *of this decision*. Rule of Court 8.500(b) lists the exclusive grounds for granting review, and they do not include policing whether one appellate panel fairly criticized another panel's characterization of the factual record before it.

In any case, *Charlotte Russe* is factually distinct from this action. There, as here, the insureds sought coverage under the enumerated CGL offense of "disparagement." (*Id.* at p. 974.) In *Charlotte Russe*, however, the insureds allegedly sold the claimant's clothing line at discounted prices, thereby allegedly devaluing the claimant's clothing line by suggesting it did

not warrant its "premium" pricing. The appellate court held that Charlotte Russe had implicitly disparaged the claimant's brand by selling its clothing at deeply-discounted prices. (*Id.* at pp. 979-80.)

Here, the appellate court disagreed that selling clothing at a discount constitutes a disparaging statement, and thus disagreed with *Charlotte Russe*'s characterization of the underlying pleading in that case. (*Swift, supra,* 210 Cal.App.4th at pp. 925-26.) That criticism, however, was not necessary to the *Swift* court's decision, which found the Dahl complaint made no mention of Dahl or his "Multi-Cart" whatsoever, even by implication. The two panels did not disagree over the applicable law, but simply had different views of the allegations at issue in *Charlotte Russe*. *Charlotte Russe* did not purport to alter the applicable legal standard applied by California courts to evaluate coverage of "disparagement" claims. Because the underlying pleadings in *Charlotte Russe* had no bearing on Hartford's duty to defend the Ultimate Appellants against the Dahl complaint, the *Swift* court's interpretation of the underlying complaint in *Charlotte Russe* was immaterial to the outcome in this case, and this case does not create disharmony in the law governing the interpretation of "disparagement" clauses in liability insurance policies.

In short, this Court accepts review of cases to ensure uniformity of case law or to settle an important question of law. The fact that one appellate panel criticizes another's thought process is not a basis for review

if the law remains uniform. Because the actual ruling in this case is reconcilable with *Charlotte Russe*, in that it simply applied the same legal authorities to reach a different outcome on different facts, the criteria for review under California Rule of Court 8.500(b)(1) are absent.

IV. CONCLUSION

This Court need not accept – and should not accept– review of this action simply because two appellate panels interpreted an underlying pleading differently. Just as this case did not address the sale of discounted clothing, *Charlotte Russe* did not address whether the wrongful copying of another's product constitutes "disparagement" of that product. As the appellate court here specifically noted, the Underlying Action did not accuse the Ultimate Appellants of selling Dahl's products at discounted prices, but, in fact, only alleged that the Ultimate Appellants advertised and sold their own products. (*Swift, supra,* 210 Cal.App.4th at pp. 923-24.) As a result, the Court of Appeal took pains to distinguish *Charlotte Russe* on its facts while, at the same time, expressing skepticism over the earlier panel's characterization of the record before it. For these reasons, Hartford respectfully submits that the Ultimate Appellants' petition for review should be denied.

Date: December 27, 2012 TRESSLER LLP

By: _____

David Simantob
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HARTFORD CASUALTY
INSURANCE COMPANY

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to California Rules of Court, Rule 8.204(c)(1), the enclosed Answer to Petition for Review was produced using 13-point Roman type, including footnotes, and contains 2,869 words, which is fewer than the total words permitted by the Rules of Court. Counsel relied on the word count of the Microsoft Word program used to prepare this brief.

Date: December 27, 2012 TRESSLER LLP

By: _____

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INSURANCE COMPANY

PROOF OF SERVICE

Hartford Casualty Insurance Company v. Swift Distribution, Inc.
Supreme Court of California, Case No. S207172
Second Appellate District, Division 3, Case No. B234234
Los Angeles County Superior Court, Case No. BC442537
Tressler File No. 240-299

I am over the age of eighteen years and not a party to the within action. I am employed at TRESSLER LLP, whose business address is 1901 Avenue of the Stars, Suite 450, Los Angeles, California 90067.

On December 27, 2012, 2012, I served the following document(s):

ANSWER TO PETITION FOR REVIEW

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

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Executed this 27th Day of December, 2012 at Los Angeles, California.

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