

No. S207172

Second District Court of Appeal, Division Three, Case No. B234234

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.

SUPREME COURT
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APPELLANTS' OPENING BRIEF ON THE MERITS

On Appeal from the Superior Court of Los Angeles County
Case No. BC442537
Honorable Debre K. Weintraub

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TO THE HONORABLE CHIEF JUSTICE AND THE
HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT

Petitioners Swift Distribution, Inc. DBA Ultimate Support Systems;
Michael Belitz; and Robin Slaton (collectively “Ultimate” or “Appellants”),
hereby submit their Opening Brief on the Merits.

I. ISSUES FOR REVIEW

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. INTRODUCTION

Appellants respectfully seek reversal of the Court of Appeal's ruling, styled as *Hartford Cas. Ins. Co. v. Swift Distribution, Inc.*, 148 Cal. Rptr. 3d 679 [previously 210 Cal. App. 4th 915, *no longer considered published pursuant to* Cal. Rules of Court Rule 8.1105(e)(1)] (the "*Hartford Decision*").

The *Hartford Decision* affirmed the Superior Court's granting of Respondent Hartford Casualty Insurance Company's ("Hartford" or "Respondents") Motion for Summary Judgment or, Alternatively, Summary Adjudication, finding that Hartford did not owe a duty to defend Ultimate in an underlying action styled as: *Dahl v. Swift Distribution, Inc., dba Ultimate Support Systems, Inc.*, U.S.D.C., C.D. of Calif., Case No. CV10 0551 SJO (RZx) (the "*Dahl Action*").

Ultimate contends that Hartford had a duty to defend Ultimate in the *Dahl Action* because the allegations in the *Dahl Action* and extrinsic evidence provided to Hartford state a potentially covered claim for disparagement. Dahl alleges Ultimate advertised its product in such a way that consumers were falsely advised the Ultimate's product, which Dahl claimed was inferior, was affiliated with Dahl's product and that such advertisements influenced customers' purchasing decisions which resulted in damage to Dahl's reputation and a loss of business. These allegations are sufficient to trigger Hartford's defense duty under the "personal and advertising injury" offense of disparagement.

The Court of Appeal's decision created a conflict with existing law from the same jurisdiction, which requires resolution by this Court. Specifically, the *Hartford Decision* concludes that *Travelers Prop. Cas. Co. of Am. v. Charlotte Russe Holding, Inc.*, 207 Cal.App. 4th 969 (2012), a

decision from the same jurisdiction, with its petition for review being denied by this Court on September 26, 2012, is not good law. Hartford cannot assert the *Hartford* Decision and the *Charlotte Russe* decisions are “reconcilable” (Resp’t Answer to Pet. For Review at 1, Dec. 28, 2012), when the Court of Appeal expressly stated that *Charlotte Russe* “has no objectively reasonable basis.” *Id.* at 924.

Furthermore, the *Hartford* Decision, states that disparagement cannot be found unless there is an express reference to a claimant’s product, is contrary to California coverage law. Under California law, for duty to defend purposes, the complaint and/or extrinsic evidence need not make specific references to the disparaged party, instead, disparagement by reasonable implication is enough to trigger an insurer’s duty to defend.

Lastly, the Court of Appeal states that coverage may have been triggered if there was an express or implied reference to the claimant’s disparaged product. Yet, the Court of Appeal disregarded extrinsic evidence submitted by **both parties**, wherein Hartford expressly acknowledges that the required implied reference was present.

Ultimate respectfully requests this Supreme Court reverse the Court of Appeal’s holding, and find that: *Charlotte Russe* is valid California case law; Hartford breached its insurance contract by failing to provide Ultimate a defense in the *Dahl* Action for the covered offense of disparagement; and courts of appeal are estopped from disregarding evidence mutually agreed upon and submitted by all parties to an action. Reversal of the *Hartford* Decision is necessary to ensure uniformity of decision, and provide policyholders with clear conclusions of law with respect to when coverage for disparagement is triggered.

III. STATEMENT OF THE FACTS

A. The *Dahl* Action

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 thus injuring Dahl's reputation and resulting in damages. 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 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 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)

Also, Dahl attached to its Complaint as "Exhibit B," a copy of Ultimate's advertisement for its "Ulti-Cart," which describes the product at issue as:

The UC-80 Ulti-Cart can be configured as a two-wheel hand cart or a four-wheel equipment truck easily and quickly thanks to the **patent-pending folding handles and levers**.

(JA Vol. 1, Ex. 11, 152 & 241) (bold provided)

Additionally, Dahl produced in discovery an Ultimate brochure, which states in pertinent part:

For over three decades, Ultimate Support Systems has provided musicians with **unique support solutions that are crafted with unparalleled innovation and quality and accompanied by superior customer service**.

...

THREE REASONS TO BUY ULTIMATE SUPPORT

1. Innovative Products

Ultimate Support designs and builds innovative, superior products with the working musician in mind. We're just trying to make your life easier!

...

(JA Vol. 2, Ex. 11, 281 & 292)

On February 18, 2010, Dahl filed its Reply to the Opposition of Defendants Application for Temporary Restraining Order, further stating:

Defendant Belitz, . . . , 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. *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:

...

... Defendants' advertising efforts include, but are not limited to, various websites, such as <http://www.ultimatesupport.com/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 (i.e., 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-protected Cart, all of which are untrue. . . . (bold provided)

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:

...

...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. . . .

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, . . .

ANSWER:

...

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

B. The Insurance Policies

Hartford issued to Ultimate a Business Liability Policy (“Policy”), effective January 29, 2009 to January 29, 2010, bearing policy number 57 SBQ RH 3077 (JA Vol. 2, Ex. 11, 325-373), containing the following coverage grants:

G. LIABILITY . . . DEFINITIONS

17. “Personal and advertising injury” means injury, including consequential “bodily injury”, arising out of one or more of the following offenses:

...

- d. Oral, 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;

(JA Vol. 2, Ex. 11, 357, 359-360)

The policy is endorsed with the **CYBERFLEX COVERAGE for, SS4026 (04/05)**, which reads in part:

“Advertisement” means the widespread public dissemination of information or images that has the purpose of inducing the sale of goods, products or services through:

...

- b. The Internet.

(JA Vol. 2, Ex. 11, 373)

C. Hartford’s Declaratory Relief Action

On July 27, 2010, 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. (JA Vol. 1, Ex. 1, 1-14) The trial court found that Hartford was entitled to a declaration that it did not owe a

defense or indemnity obligation to Ultimate for the *Dahl* Action, and entered judgment on May 13, 2011 in Hartford's favor (JA Vol. 6, Ex. 29, 1432-33). Ultimate timely appealed on July 5, 2011 (JA Vol. 6, Ex. 30, 1442-43).

D. The Court of Appeal Decision

The Court of Appeal affirmed the Superior Court's decision that Hartford owed no defense duty to Ultimate. However, the Court of Appeal's decision was not supported by California coverage law. The Court of Appeal disregarded *Charlotte Russe*, a published decision from the same jurisdiction, which also addressed the availability of coverage for disparagement. The Court also ignored extrinsic evidence which supported Ultimate's argument that Hartford owed a duty to defend Ultimate in the *Dahl* Action.

The Court of Appeal found that Ultimate is not entitled to a defense from Hartford because Ultimate did not publish a disparaging statement about Dahl. 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.

Hartford Decision, 148 Cal.Rptr.3d at 685-86.

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:

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.

...

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. at 685-686.

Surprisingly, the most recent (and published) case addressing an insurers defense duty for implied disparagement under policy language identical to Hartford's is the *Charlotte Russe* Decision which was decided during the pendency of the *Hartford* Decision. The Court of Appeal held that Ultimate was precluded from relying on *Charlotte Russe*, a published decision from the same jurisdiction, because the *Charlotte Russe* Court 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 686-87. The Court of Appeal stated its disagreement with the logic in *Charlotte Russe*, 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***. (Bold provided)

Id.

The Court of Appeal chose to “reject the analysis of *Charlotte Russe*” because under the *Charlotte Russe* Court’s reasoning, potential coverage is triggered in the *Dahl* Action.

The Court of Appeal then stated that it would have found Ultimate had disparaged Dahl or Dahl’s product, thereby triggering Hartford’s duty to defend Ultimate, if:

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.

Id. at 688.

Ultimate provided Hartford and the Court with factual allegations and extrinsic evidence satisfying the requirements outlined above by the Court of Appeal. However, the Court chose to ignore said evidence.

IV. LEGAL DISCUSSION

A. **The *Hartford* Decisions’ Ruling Directly Conflicts with the Appellate Opinion in *Charlotte Russe***

While Ultimate was seeking a reversal of the Superior Court’s decision in the Court of Appeal, the *Charlotte Russe* Decision was litigated

and decided in the same appellate district as the *Hartford* Decision.

Both the *Hartford* Decision and *Charlotte Russe* Decision involved an insurer's obligation to provide its insured with a defense where allegations of implicit disparagement were made in the underlying action. The *Charlotte Russe* Decision found in favor of potential coverage with facts much more tenuous than those present in the *Hartford* Decision. Pursuant to California Rules of Court Rule 8.254(a), Ultimate submitted the *Charlotte Russe* holding to the Court of Appeal as supplemental authority to Ultimate's Reply Brief. The Parties also submitted letter briefs regarding the *Charlotte Russe* Decision in response to the Court of Appeal's Order requiring supplemental letter briefs pursuant to Cal. Gov't Code § 68081.

On September 26, 2012, this Supreme Court denied the insurer's Petition for Review and Request for Depublication of the *Charlotte Russe* holding, thereby maintaining *Charlotte Russe* as valid case law. However, the Appellate Court in the *Hartford* Decision rejected the *Charlotte Russe* Decision and its analysis.

1. The Charlotte Russe Decision

The Court of Appeal in *Charlotte Russe* found that an insurer owed a duty to defend, under policy language identical to Hartford's, where, like this case, there was no labeled cause of action for disparagement.

In *Charlotte Russe*, Versatile owned the "People's Liberation" brand, which it identified as a "premium," "high end" brand. *Charlotte Russe*, 207 Cal. App. 4th at 972. Versatile claimed to have invested millions of dollars developing the brand so it could be associated in the marketplace as high-end apparel. *Id.* Versatile contracted with Charlotte Russe, a retailer, to promote the sale of the "People's Liberation" brand in

its stores at a high price point. *Id.* Versatile alleged that Charlotte Russe began selling the “People’s Liberation” branded apparel at “close-out” prices. *Id.* at 973. Versatile alleged that the sale of its premium brand clothing at “close out” prices “will also certainly result in significant and irreparable damage to and diminution of the People’s Liberation Brand and trademark.” *Id.* Versatile alleged that Charlotte Russe had public displays throughout its stores, advertising the sale at “close out” prices. *Id.*

Charlotte Russe sought coverage for the underlying *Versatile* Action from its insurer, Travelers, under its “personal injury” and “advertising injury” coverage for claims arising out of “oral, written, or electronic publication of material that . . . disparages a person’s or organization’s goods, products or services.” *Id.* Travelers denied coverage, arguing that a reduction of a product’s price is not a disparagement of the product, stating:

[t]hat a cause of action for trade libel or disparagement requires an allegation of the publication of a false statement and resulting loss of business, and that Versatile's claims against the Charlotte Russe parties alleged neither. *Id.* at 975.

...

According to Travelers, coverage therefore is defeated as a matter of law by the underlying pleadings' failure to allege “an injurious false statement disparaging Versatile's products....”

Id. at 979.

The *Charlotte Russe* Court disagreed with Travelers and held that the price discounting of a product is sufficient to trigger coverage under the disparagement offense of general liability policies because the “underlying claims may trigger a duty to defend if the conduct which the policies provide coverage is charged by implication . . .” *Id.* at 978.

The *Charlotte Russe* Court found coverage under the disparagement offense for allegations that are much more plausible than the allegations in this case. In *Charlotte Russe*, there was no labeled cause of action for disparagement; there was no publication; there was no comparison of the products at issue with a competitor; there were no explicit/specific false or derogatory statements about the products at issue. *Id.* Yet, the Court of Appeal still found that Travelers' defense obligation was triggered because there was a potential for coverage. Specifically, the Court stated:

However, if Versatile's allegations can reasonably be interpreted to encompass claims that the Charlotte Russe parties disparaged its goods, within the meaning of the Travelers' policies, there was a potential for coverage under the policies' personal injury coverage, and therefore a duty to defend the Charlotte Russe parties against Versatile's claims in the underlying litigation. Because we conclude that the allegations of the Versatile pleadings could be reasonably interpreted to allege that the Charlotte Russe parties disparaged the People's Liberation brand and led potential purchasers to believe that it was **not** a "premium," "high end" brand, we will reverse the summary judgment.

Id. at 975.

By finding that the discounting of premium goods by a retailer can be potentially covered disparagement, the Court of Appeal in *Charlotte Russe* clarified that Courts broadly interpret the disparagement offense and that a covered disparagement claim does not require a publication or disparaging statement that specifically references the disparaged party. Instead, coverage is triggered where there are mere allegations of implied disparagement.

Specifically, the *Charlotte Russe* Court stated:

We cannot rule out the **possibility** that Versatile's pleadings could be understood to charge that the dramatic discounts at which the People's Liberation products were being sold communicated to potential customers the implication—false, according to Versatile—that the products were not (or that the Charlotte Russe parties did not believe them to be) premium, high-end goods. (Bold provided)

Id. at 980.

In holding that there was a possibility of the underlying plaintiff's allegations being interpreted as disparagement because of the implication communicated to customers, the *Charlotte Russe* Court, relying on California law, found in favor of coverage. *Id.* at 976-81. The cases relied upon by the Court in *Charlotte Russe* were the same cases Ultimate relied upon in the *Hartford* Decision.

Had the Court of Appeal in the *Hartford* Decision followed the *Charlotte Russe* Court's reasoning, it would have easily found in favor of coverage. If the Court in *Charlotte Russe* could reach the conclusion that price reductions on a premium brand of apparel constitutes potentially covered disparagement, there is no question that the allegations of the *Dahl* Action constitute potentially covered disparagement.

2. The Court of Appeal's Attempt to Overturn *Charlotte Russe* was Improper Because the *Charlotte Russe* Court's Duty to Defend Analysis is Based on Sound California Case Law

The *Charlotte Russe* Court correctly begins its analysis with well-established principles of California coverage law:

A liability insurer's duty to defend arises when a suit against its insured seeks damages that are **potentially** within the policy's coverage. (citation) An insurer has no duty to defend its insured only if the claim against it cannot, by any

conceivable theory, raise an issue that would bring it within policy's coverage. (*Ibid.*) **The duty does not depend on the labels given to the causes of action in the underlying claims against the insured; “instead it rests on whether the alleged facts or known extrinsic facts reveal a possibility that the claim may be covered by the policy.”** (citation))

A liability insurer's duty to defend is broader than its duty to indemnify; it therefore may owe a duty to defend its insureds even when a trier of fact might ultimately determine that the policy does not entitle them to indemnity for the claims against them. (citation) Whether the insurer owes a duty to defend turns not on whether the insured proves to be actually entitled to be indemnified for the underlying claim, but only on “ ‘those facts known by the insurer at the inception of a third party lawsuit,’ ” along with facts extrinsic to the complaint that may also “ ‘**reveal a possibility that the claim may be covered by the policy.**’ ” (*Id.* at p. 295, 24 Cal.Rptr.2d 467, 861 P.2d 1153.) (Bold provided)

Id. at 976-77. (bold provided)

Thus, in determining whether Travelers had a duty to defend Charlotte Russe, the *Charlotte Russe* Court needed only to find that the underlying Versatile claims merely triggered a **potential** for coverage. The Court correctly ruled that there was a **possibility** that the Versatile claims could be **potentially** interpreted as alleging disparagement. *Id.* at 980.

Likewise, in the *Hartford* Decision, the Court only had to determine whether Dahl's allegations could be interpreted as alleging potentially covered disparagement. The Court of Appeal, however, erroneously concluded that there was no potential for coverage, despite factual allegations and extrinsic evidence to the contrary.

As the *Charlotte Russe* Court correctly articulates, the duty to defend does not depend on the labels given to the causes of action, but depends on whether the factual allegations reveal a possibility of coverage. *Charlotte*

Russe, 207 Cal. App. 4th at 976, citing to *Atlantic Mutual Ins. Co. v. J. Lamb, Inc.*, 100 Cal. App. 4th 1017, 1034 (2002).

Thus, in *Charlotte Russe*, for the purpose of analyzing Travelers' defense obligations to Charlotte Russe, it was irrelevant whether Versatile explicitly alleged a disparagement cause of action against Charlotte Russe. Similarly here, it is irrelevant whether Dahl alleged a labeled cause of action for disparagement. As long as Dahl has made factual allegations that support a potential for coverage, which it has, Hartford has a duty to defend Ultimate.

Furthermore, the Court of Appeal in *Lamb*, upon which *Charlotte Russe* relies, acknowledged that extrinsic evidence could establish an insurer's duty to defend, holding:

“[A]n insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. [Citations.] . . . The **scope of the duty** does not depend on the labels given to the causes of action in the third party complaint; instead it **rests on whether the alleged facts or known extrinsic facts reveal a possibility that the claim may be covered by the policy**. (See *Hurley Construction Co. v. State Farm Fire & Casualty Co.* (1992) 10 Cal.App.4th 533, 538 [12 Cal.Rptr.2d 629].) (Bold provided)

Id. at 1034.

Since an insurer's duty to defend its insured “rests on whether the alleged facts or known extrinsic facts reveal a possibility that the claim may be covered by the policy,” *Id.* the extrinsic evidence provided by Ultimate to Hartford should have been considered by the Court of Appeal and not disregarded.

Charlotte Russe also relies on established California law which states that coverage for a disparagement claim does not require a specific disparaging statement referencing the disparaged party; implicit disparagement is enough to trigger coverage:

Versatile's pleadings alleged that the People's Liberation brand had been identified in the market as premium, high-end goods; and that the Charlotte Russe parties had published prices for the goods implying that they were not. It therefore pled that the implication carried by the Charlotte Russe parties' pricing was false. That is enough. (*Atlantic Mutual, supra*, 100 Cal.App.4th at pp. 1034–1035, 123 Cal.Rptr.2d 256; *Nichols v. Great American Insurance Companies* (1985) 169 Cal.App.3d 766, 774, 215 Cal.Rptr. 416 [statement may constitute product disparagement if plaintiff pleads facts showing the statements' defamatory meaning “by innuendo”]; *E.piphany, Inc. v. St. Paul Fire & Marine Ins. Co.* (N.D.Cal.2008) 590 F.Supp.2d 1244, 1253–1254 [insured's claim of superiority of its products necessarily implied inferiority of competitor's products].)

Charlotte Russe, 207 Cal.App.4th at 979.

The *Charlotte Russe* Court, as noted above, held that there was a possibility that the Versatile Complaint could be interpreted as alleging disparagement, which the court could not entirely “rule out” and Travelers had failed to eliminate. *Id.*

The implicit allegations of disparagement in the Dahl Complaint were more straightforward in comparison to those originating from the Versatile Complaint in *Charlotte Russe*. The Court of Appeal erred in finding no coverage in the *Hartford* Decision.

3. The Court of Appeal in *Hartford* Decision Erred in Refusing to Follow the *Charlotte Russe* Decision

The Court of Appeal in *Charlotte Russe* ruled in favor of coverage because it correctly applied and analyzed California coverage law. The

Court of Appeal in the *Hartford* Decision, however, disregarded *Charlotte Russe* and concluded that the *Charlotte Russe* Court had applied illogical reasoning in finding that a retailer selling premium clothing at discounted prices had disparaged the premium clothing's brand or reputation. *Hartford* Decision, 148 Cal. Rptr. 3d at 686. Hartford's claim that the Court's "philosophical disagreement with the *Charlotte Russe* outcome was irrelevant to the actual decision in this case" is absurd. Resp't Answer to Pet. For Review at 6, Dec. 28, 2012.

Hartford argues that the *Charlotte Russe* Decision and the decision in the *Hartford* Decision are inconsistent because the facts are not the same. This argument lacks merit. While no two cases have identical facts, the legal principles applied to the facts must conform. Further, the facts in the *Hartford* Decision, while not identical to *Charlotte Russe*, are similar because: in both actions, an insured is seeking a defense under the covered disparagement offense; in both actions, there was no labeled cause of action for disparagement; and in both actions, there are no specific references to the disparaged products, only an implied reference.

The facts, however, in the *Hartford* Decision are even more favorable to a finding of coverage because in the *Hartford* Decision there is a "publication" of material that disparages, in the form of Ultimate's advertising, whereas the *Charlotte Russe* case had no similar "publication" but the Court still found in favor of coverage. Further, in the *Hartford* Decision, there are numerous allegations of implied references to Dahl's product.

Because the *Charlotte Russe* Court relied on California case law in arriving at the correct holding and this Supreme Court denied the insurer's

Petition for Review and Request for Depublication, Hartford and the Court of Appeal should not be allowed to attempt to overturn the *Charlotte Russe* decision.

In the case of *Opsal v. United Services Auto. Assn.*, 2 Cal. App. 4th 1197, 1203-04 (1991), when an insurer attempted to reargue the invalidity of the logic applied in a different case of the same Court of Appeal district, the Court stated:

Even if we disagreed with *Davis*, however, we decline to allow USAA to reargue that case here. Respect for our colleagues and the orderly administration of justice—as well as the need of the trial bench, bar and litigants for certainty in the development of the common law—dictate that there be a compelling reason before we overrule a decision of another panel of this court. Mere disagreement with the result or reasoning of an earlier decision does not, in our view, constitute a compelling reason.

Similarly here, the Court of Appeal did not have the proper basis to attempt to overrule the *Charlotte Russe* Court's holding. Consequently, the Court of Appeal erred in its holding that the *Charlotte Russe* Court applied illogical reasoning. *Hartford Decision*, 148 Cal. Rptr. 3d at 686-87.

The Supreme Court's denial of the Petition for Review and Depublication of the *Charlotte Russe* holding confirms that *Charlotte Russe* is valid law in California; however, the Appellate Court's ruling in the *Hartford Decision*, rejecting *Charlotte Russe*, has resulted in a lack of uniformity of California law with respect to coverage for implied disparagement. It is important for California policyholders to 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. If the Court of Appeal in the *Hartford* Decision Had Followed *Charlotte Russe*, it Would Have Ruled in Favor of Ultimate

The impact of the *Charlotte Russe* Decision on the *Hartford* Decision is significant. In *Charlotte Russe*, Versatile owned the "People's Liberation" brand, which it identified as a "premium," "high end" brand. Versatile claimed to have invested millions of dollars developing the brand so it could be associated in the marketplace as high-end apparel. Versatile contracted with Charlotte Russe to promote the sale of the "People's Liberation" brand in its stores at a high price point. Versatile alleges that Charlotte Russe began selling the "People's Liberation" branded apparel at "close-out" prices. Versatile alleged that the sale of its premium brand clothing at "close out" prices "will also certainly result in significant and irreparable damage to and diminution of the People's Liberation Brand and trademark." *Charlotte Russe*, 207 Cal.app.4th at 973. Versatile alleged that Charlotte Russe had public displays throughout its stores, advertising the sale at "close out" prices. *Id.*

Similarly, in this appeal, Dahl claims its cart, the Multi-Cart, has been identified in the market as the superior (premium, high-end) cart in a specific market and Dahl has invested a substantial amount of time, effort and money in its brand, just like Versatile.¹ Ultimate, the only other

¹ "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

competitor in this market produced a nearly identical cart in appearance with lower published prices, which was in fact inferior to Dahl's cart,² but led the consumer to conclude that the inferior Ultimate cart was associated with or produced by Dahl, resulting in loss of business, consumer confusion, and a negative impact on Dahl's reputation and image.³

The *Dahl* Action alleges:

71. [D]efendants have . . . falsely claim[ed] that Defendants are the originator, producer, manufacturer, processor, wholesaler, or importer, or that Defendants own or control the intellectual property, factory, or other service of supply of [Dahl's] Cart and Dahl's mark.. (JA Vol. 1 Ex. 11, p. 113:9-13)

The *Dahl* Action defines "the Cart" as Dahl's Multi-Cart.⁴ Paragraph 71 is incorporated by reference into the common law unfair

(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." (JA Vol. 1, Ex. 11, p. 184:22-28; p.185:1-2).

² "Defendant Blitz, . . ., clearly states his intent to expand into Plaintiff's markets with ... millions of dollars worth of Chinese carts planned to be dumped in the United States with lower pricing." (JA Vol. 1, Ex. 11, p. 198:22-24).

³ "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, p.185:3-4).

⁴ ". . . Dahl is in the business of marketing and selling products by, *inter alia*, the Patents-in-Suit, namely the Multi-Cart collapsible cart ("the Cart")." (JA Vol. 1 Ex. 11, p. 105:13-14)

competition cause of action.⁵ As a result, Paragraph 71 alleges “reverse passing off.” “Reverse passing off” occurs when a party misrepresents someone else’s goods as their own.⁶ Here, Dahl alleges that Ultimate is representing itself as the source of Dahl’s Multi-Cart (falsely claiming to be the “originator, producer, manufacturer, processor, wholesaler, or importer, . . . of the Cart”) and Dahl alleges that Ultimate is representing itself as the owner of Dahl’s intellectual property (falsely claiming to “own or control the intellectual property, factory, or other source of supply of [Dahl’s] cart”).⁷

Charlotte Russe sought coverage from Travelers for the *Versatile* Action from its insurer, Travelers, under its “personal injury” and “advertising injury” coverage for claims arising out of “oral, written, or electronic publication of material that . . . disparages a person’s or organization’s goods, products or services.” Travelers’ denied coverage, arguing that a reduction of a product’s price is not a disparagement of the

⁵ “**COUNT VII** (Common Law Unfair Competition) - 80. Dahl realleges and incorporates by reference paragraphs 1-79 of this Complaint as though set forth fully herein.” (JA Vol. 1 Ex. 11, P. 114:16-17)

⁶ *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1188 (C.D. Cal. 2002) (“Reverse passing off occurs when someone markets a product as their own, although the product was created by someone else.”)

⁷ These latter allegations are notably similar to the allegations which triggered potential disparagement coverage in *Atlantic Mutual Ins. Co. v. J. Lamb, Inc.*, 100 Cal.App.4th 1017 (2nd Dist. 2002) (the competitor alleged that the insured intentionally communicated with was the competitor’s customers and falsely stated to them that the insureds owned the intellectual property for the competitors’ products.)

product because there was no publication of false statement resulting in loss of business. *Id.* at 975.

Likewise, Ultimate sought coverage from its insurer, Hartford, under policy language identical to Travelers in *Charlotte Russe*. However, Hartford, while admitting that the *Dahl* Action alleged comparison by implication,⁸ erroneously argued that for a disparagement claim to be covered there must be disparaging statements that make specific reference to the aggrieved party's products.

The Court in *Charlotte Russe*, relying on the same cases that Ultimate relied on in its discussion of coverage for disparagement, ruled in favor of the insured and found coverage under the disparagement offense even though there was no comparison of Versatile's "People's Liberation" brand with Charlotte Russe's product since Charlotte Russe is a retail store chain, and not a competitor of Versatile that is in the business of making apparel; Charlotte Russe did not make any specific disparaging statements specifically about Versatile's brand; and there were no allegations of actual consumer confusion about the Versatile brand or loss of business.

A similar result is warranted regarding the *Dahl* Action since its facts favor coverage more than the facts in *Charlotte Russe*. The *Dahl* Action and extrinsic evidence allege that Dahl and Ultimate are competitors that produce the cart at issue. Dahl calls its cart the "Multi-Cart" and Ultimate calls its cart the "Ulti-Cart." Dahl's "Multi-Cart" is a superior cart and recognized in the industry as a high-end superior product. Ultimate's "Ulti-Cart" is of inferior quality, yet it looks similar to Dahl's cart and has a name that is off by one letter from Dahl's cart's name,

⁸ (JA Vol. 2, Ex. 12, P. 543)

leading to confusion in the marketplace as to whether the cheaper, lower quality cart is associated with or produced by Dahl. Consumers that confuse Ultimate's cart with Dahl's cart are left with the impression that Dahl's product is of an inferior quality,⁹ just as in *Charlotte Russe*, wherein Versatile contends that the price reductions' effect on its brand is an impression of inferior quality. See, *Charlotte Russe*, 207 Cal.App.4th at 973.

Dahl also alleges that Ultimate's advertisements claim that Ultimate owns the intellectual property rights to manufacture the "Ulti-Cart" which consumers confuse as being associated with Dahl's "Multi-Cart" when in fact Dahl is the patent and trademark holder of the cart at issue.¹⁰

These allegations by Dahl reveal a potential for coverage under Hartford's policy because the allegations of the *Dahl* Action and the extrinsic evidence could be reasonably interpreted to allege that Ultimate disparaged, by implication, Dahl's product.

The *Charlotte Russe* decision is the most recent California published case addressing coverage for disparagement, and is from the same district as the *Hartford* Decision. Since the Court in *Charlotte Russe* found that price reductions on a premium brand of apparel constitute potentially covered disparagement, it is remarkable that the *Hartford* Decision, likewise, did not rule in favor of coverage when the *Dahl* Action alleges that Ultimate's advertisements referenced Dahl's products by implication and claimed superiority to Dahl's products, implied affiliation with Dahl,

⁹ (JA Vol. 1, Ex. 11, pp. 177-84; 198; 252-55)

¹⁰ (JA Vol. 1, Ex. 11, pp.252-55)

implied ownership of intellectual property rights, claimed to be “originator, producer, manufacturer, processor, wholesaler, or importer . . . of [Dahl’s] Cart,” caused consumer confusion, loss of business and damage to reputation. Ultimate need prove no more than the potential for coverage, which it has done.

The allegations of disparagement in the *Dahl* Action are far more compelling than the allegations of disparagement in *Charlotte Russe* that were found to be potentially covered disparagement by the Court in *Charlotte Russe*.

C. The *Dahl* Action Alleges Facts Which Constitute the Potentially Covered Offense of “Disparagement”

1. Courts Broadly Interpret the “Disparagement” Offense, Not Limiting it to a Specific Tort

Coverage under Hartford’s “disparagement” offense is not limited to any specific tort. *J. Lamb, Inc.*, 100 Cal. App. 4th at 1035 (holding “disparagement” coverage not limited to trade libel, but includes an “injurious falsehood”). Other courts agree.

In *Acme United Corp. v. St. Paul Fire & Marine Ins. Co.*, 214 Fed.Appx. 596, 599 (7th Cir. (Wis.) 2007), the Seventh Circuit found the offense of “disparagement” to be clear, unambiguous, and include the following allegedly wrongful conduct which is not limited to a specific tort:

Disparage means “to discredit or bring reproach upon by comparing with something inferior.” *Webster’s Third New International Dictionary* (unabridged) 653 (1981); see also *Black’s Law Dictionary* 483 (7th ed.1999) (**defining disparage as “[t]o dishonor (something or someone) by comparison” or “[t]o unjustly discredit or detract from the reputation of (another’s property, product, or business)”**). Further, as we have noted in previous cases,

“disparagement [could] result[] from false comparisons” between products in which the comparison dishonors the product being compared. (citation) We find the term “disparage” as it is used in the policy, to be clear and unambiguous. (Bold provided)

The court in *Liberty Mut. Ins. Co. v. OSI Industries, Inc.*, 831 N.E.

2d 192, 199 (Ind. App. 2005) found a defense owed under similar facts:

. . . OSI and Beltec were alleged to have disparaged the “Thermodyne Oven,” Thermodyne technology, and the ownership of the developments of the oven or technology in that Liebermann, as OSI and Beltec's agent, in oral or written form claimed “absolute ownership not only in the developments and improvements in the Thermodyne oven but in the” flat, solid aluminum plate shelving as well. [citation] Thermodyne, however, claimed that the flat, solid aluminum plate shelving and technology in the “Thermodyne Oven” was Thermodyne's “exclusive, secret technology.” [citation] **Thus, Liebermann's 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. (bold provided)

In *Nichols v. Great American Ins. Companies*, 169 Cal.App.3d 766,

773 (1985), the court found:

‘Injurious falsehood, or disparagement, then, may consist of the publication of matter derogatory to the plaintiff's title to his property, or its quality, or to his business in general, . . . [T]he plaintiff must prove in all cases that the publication has played a material and substantial part in

inducing others not to deal with him, and that as a result he suffered special damages. . . .’

Distinct acts which constitute the offense of “disparage[ment]” of the products or goods of others are alleged in *Dahl’s* complaint as the actionable conduct is “the publication of material” that “disparage[s]” the products of Dahl in order to influence Dahl’s customers not to deal with its product. “Disparagement” relates to the goods, products or services emanating from their source: Dahl. Those goods, products or services are tarnished in the marketplace by Ultimate’s alleged statements regarding Dahl’s products. *Polygram Records, Inc. v. Superior Court*, 170 Cal.App.3d 543, 550 (1985) .

As the courts in *Lamb*, *Acme* and *Nichols* have clarified, the “disparagement” offense is not limited to a specific tort but is clear and unambiguous and can result from false comparisons between products or services that result in damage to the discredited party’s reputation and causes the party to lose business as a result. Here, Ultimate has provided additional evidence to show that Dahl claims disparagement, including Dahl’s discovery responses and Dahl’s briefing related to its request for a temporary restraining order. (JA Vol. 1, Ex. 11, Pp. 167-192, 201-277; Vol. 2, Ex. 11, Pp. 279-320)

Dahl asserts that Ultimate’s publications about its products cause damage to Dahl’s business reputation because Ultimate, in its use of “Ulti-Cart” in advertising and publications, falsely communicates to a confused public that Ultimate’s cart is actually a product of Dahl’s and Dahl claims Ultimate’s product is inferior thus the publications infer that Dahl sells inferior products.

Dahl alleges that Ultimate's use of "Ulti-Cart" implicates comparison with Dahl's "Multi-Cart" products. While Ultimate does not mention Dahl directly, Dahl alleges that the use of similar names is understood to refer to Dahl. *See Total Call Int'l, Inc. v. Peerless Ins. Co.*, 181 Cal.App.4th 161, 170 (2010) (Disparagement not alleged unless plaintiff referred to specifically or by reasonable implication). All of these facts show Hartford has a duty to defend. Further, consumer confusion and loss of business cannot result unless there was publication via the advertisements, which were viewed by consumers.

2. The elements of a Claim of "Disparagement" are Satisfied

In analyzing the type of policy language found in Hartford's policies, courts have defined the "disparagement" offense as satisfied where there is: (1) a statement about a competitor's goods; (2) that is untrue or misleading; and (3) made to influence customers not to deal with the competitor's goods or services.¹¹ California coverage law does not require Dahl to plead all of the elements of a cause of action for "disparagement" in order to trigger Hartford's obligation to defend Ultimate. *See, Hudson Insurance v. Colony Insurance Company, Supra*, 624 F.3d 1264,1269-1270 (9th Cir. (Cal.) 2010). In this matter, however, all three elements are met.

Dahl's complaint alleges a claim for unfair competition pursuant to 15 U.S.C. §1125(a). Disparagement is often found in cases where unfair competition claims are made pursuant to 15 U.S.C. §1125(a). As one court recently elucidated:

¹¹*Aetna Cas. & Sur. Co., Inc. v. Centennial Ins. Co.*, 838 F.2d 346, 351 (9th Cir. (Cal.) 1988).

The Fifth Circuit has listed five elements to be proven in a claim arising from this provision: (1) The defendant made a false or misleading statement of fact about its product or service; (2) the statement either deceived or had the capacity to deceive a substantial segment of potential consumers; (3) the deception was material, in that it was likely to influence consumers' purchasing decisions; (4) the product or service is in interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the statement at issue. *See Pizza Hut v. Papa John's Intern.*, 227 F.3d 489, 495 (5th Cir.2000). “[A] false designation of origin case is very often one of “passing off” or “reverse passing off”: a defendant markets and sells its product under the trade name or dress of a competitor (to capitalize on the goodwill and brand loyalty the competitor has built up) or markets and sells the competitor's products under defendant's trade name and dress.” *Heartbrand Beef, Inc. v. Lobel's of New York, LLC*, 2009 WL 311087, at *2 (S.D.Tex. Feb. 5, 2009).

Farouk Systems, Inc. v. Costco Wholesale Corp., 700 F.Supp.2d 780, 786 (S.D.Tex. 2010).

Here, Dahl alleges a potential claim for disparagement. Dahl alleges Ultimate advertised its product in such a way that consumers were falsely advised that Ultimate’s product, which Dahl claimed was inferior, was affiliated with Dahl’s products and that such advertisements influenced customers’ purchasing decisions which injured Dahl. These allegations are sufficient to trigger Hartford’s defense duty under the “personal and advertising injury” offense of disparagement.

a. Publication of Statements About a Competitor’s Goods, Products or Services

The Court in the *Hartford* Decision held that Ultimate cannot recover because it did not publish a disparaging statement. *Hartford* Decision, 148 Cal. Rptr. 3d at 685-86. 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.

A review of the Complaint allegations and extrinsic evidence, however, proves otherwise. Dahl alleges that Ultimate published material via its advertising, throughout websites, catalogs, and flyers distributed at trade shows, which pertain to Dahl’s products or goods.

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. (Bold provided)

(JA Vol. 1, Ex. 11, 111)

In *Acme*, 214 F. App’x at 599, the Court found in favor of coverage under facts very similar to the *Hartford* Decision. In *Acme*, the underlying Plaintiff, Fiskars, a competitor of Acme, sued Acme, alleging that Acme made false statements on its products’ packaging. Specifically, Fiskars alleged that Acme falsely stated its scissors and paper trimmers were bonded with titanium, which made them superior to stainless steel scissors.

Acme claimed it was entitled to coverage because Fiskars allegations amount to a potential disparagement claim. The Court stated:

Fiskars alleged that Acme's products' packaging stated that Acme's products are "3 times harder than stainless steel," that they "stays (sic) sharper longer" and are "non-corrosive" ... that the "blades stay sharp, longer" ... and that "Acme uses a process that bonds titanium to a stainless steel core to produce a sharper, more durable and longer lasting cutting edge." (Underlying Compl. ¶ 7.) These allegations clearly alleged that Acme's advertisements drew a comparison between its products and stainless steel products and asserted that Acme's products were superior because they contain titanium. Fiskars' underlying complaint also alleged that Acme's comparison was false, because Acme's "scissors and paper trimmers blades have only a negligible and immaterial amount of titanium, which is not on the cutting edge, and does not make the scissors harder, sharper, more durable, or longer lasting." (Underlying Compl. ¶ 9.) We, . . . conclude that these allegations sufficiently alleged that Acme disparaged stainless steel scissors and paper trimmers.

Id. at 599-600.

The lower court, however, like the Court of Appeal for the *Hartford* Decision, denied coverage, claiming:

[b]ecause the Policy defined an "advertising injury offense" as "disparag[ing] the ... products ... of others," the advertisement must identify specifically the other brand and not merely other types or classes of products. *Id.* at 600.

The Court of Appeal, however, disagreed, stating:

While Fiskars did not allege that Acme actually named Fiskars' products in the text of its advertisements, Fiskars' underlying complaint specifically alleged that Acme's advertisements were directed at Fiskars' products and that Fiskars lost sales to Acme as a result. For example, Fiskars alleged that Acme's "false advertisements were calculated and likely to influence purchasers' decisions on *whether to*

purchase scissors and paper trimmers manufactured by Fiskars, or scissors or paper trimmers manufactured by Acme.” (Underlying Compl. ¶ 10 (emphasis added).) Fiskars also alleged that “Acme made the Scissors False Advertisement and Trimmer False Advertisement *intending to divert trade away from Fiskars, which has occurred.*” (Underlying Compl. ¶ 12 (emphasis added).) Finally, Fiskars alleged that “[b]ecause of the Scissors False Advertisements and Trimmer False Advertisements, *Fiskars has suffered and will continued to suffer a loss of sales and profits that it would have otherwise made.*” (Underlying Compl. ¶ 13 (emphasis added).) Based on these allegations, and resolving all doubts in favor of Acme, we conclude that Fiskars’ underlying complaint sufficiently alleged that Acme’s advertisements were directed at Fiskars’ products and that Acme disparaged Fiskars products through a false comparison between its products and Fiskars’ products.

Id. at 600-601.

Similarly, in the *Hartford* Decision, while Dahl does not allege that Ultimate’s advertising specifically names Dahl or its Multi-Cart, like in *Acme*, Dahl alleges that Ultimate’s false advertising was directed at Dahl’s product and has resulted in lost sales and damage to its reputation.¹² Like in *Acme*, Dahl alleges that Ultimate’s false and misleading advertisements have resulted in consumer confusion.¹³

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

¹² See ¶¶ 57, 58 & 72 of Dahl’s Complaint (JA Vol. 1, Ex. 11, Pp. 111, 113.)

¹³ (JA Vol. 1, Ex. 11, Pp. 252-254).

and distribute the “Ulti-Cart,” statements implying that Ultimate’s product is superior, thus implying Dahl is producing an inferior imitation, and allegations of consumer confusion, and lost sales and profits is enough to constitute potential disparagement, and trigger Hartford’s defense duty.

Likewise, in *OSI*, 831 N.E. 2d at 199, the Court stated that when a manufacturer falsely alleges in its advertisements that it has the sole rights to utilize “unique technology,” implying that a competitor does not have the right to utilize said technology, the result is a finding of disparagement, which triggers the insurer’s duty to defend under similar language to that contained in the Hartford Policy.

One of Ultimate’s brochures, which was forwarded to Hartford, stated in pertinent part:

For over three decades, Ultimate Support Systems has provided musicians with **unique support solutions that are crafted with unparalleled innovation and quality and accompanied by superior customer service.**

...

THREE REASONS TO BUY ULTIMATE SUPPORT

2. Innovative Products

Ultimate Support designs and builds innovative, superior products with the working musician in mind. We’re just trying to make your life easier!

...

(JA Vol. 2, Ex. 11, 281 & 292)

Another advertisement for Ultimate’s “Ulti-Cart,” describes the product as:

The UC-80 Ulti-Cart can be configured as a two-wheel hand cart or a four-wheel equipment truck easily and quickly thanks to the **patent-pending folding handles and levers.**

(JA Vol. 1, Ex. 11, 152 & 241) (bold provided)

Thus, similar to OSI, Ultimate by claiming that Ultimate's "Ulti-Cart" has a patent-pending, is implying that Ultimate is the sole-owner of the "Ulti-Cart" and all other versions are imitations, when in fact, Dahl alleges it has patent and trademark protections for the Multi-Cart. Like in *OSI*, this causes consumer confusion as to which party holds the rights to the cart, which Dahl alleges, has resulted in loss of business and profits.

Accordingly, the publication of material about a competitor's goods or products element is met, because Dahl alleges that Ultimate's various advertisements implicitly reference Dahl's product.

b. The Statement Referencing a Competitor's Goods or Products Must Be Untrue or Misleading

The second element of disparagement, requiring the statement pertaining to the competitor's product or goods be untrue or misleading, is easily met. Dahl explicitly alleges in its complaint that the statements made by Ultimate in Ultimate's advertisements are false and deceptive.

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 and Dahl's Mark . . .**

(JA Vol. 1, Ex. 11, 111) (Bold provided)

...

71. Defendants have violated Cal. Bus. & Prof. Code §§ 17500 and 17505 by falsely claiming that Defendants are the originator, producer, manufacturer, processor, wholesaler, or importer . . . of the Cart...

(JA Vol. 1 Ex. 11, 113)

Dahl alleges that Ultimate's advertisements which state that Ultimate is the originator, designer or the authorized manufacturer and distributor of a cart that is nearly identical to Dahl's cart, are untrue and misleading. These allegations are very similar to the allegations in *OSI Industries, Supra*, 831 N.E.2d at 199, where OSI was alleged to have disparaged the "Thermodyne Oven" by making "oral and written" statements claiming ownership in the developments and improvements in the Thermodyne Oven. The Court found that such statements disparaged the Thermodyne Oven by creating confusion about the product and who held the rights to it. *Id.* Likewise, here Dahl is alleging that Ultimate made untrue and misleading statements about having rights to Dahl's products, which has created confusion about Ultimate's product and has misled the public. These allegations sufficiently allege the second element for disparagement.

c. Made To Influence Customers Not To Deal With a Competitor's Products or Services

Dahl alleges that Ultimate published the materials in order to influence customers to buy Ultimate's products and not Dahl's.

57. . . . 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. (JA Vol. 1, Ex. 11, P. 111)

...

72. . . . Dahl has suffered injury in fact and has lost sales and money as a result of the violations alleged above in this Complaint... (JA Vol. 1. Ex. 11, P. 113)

In *E.piphany, Inc. v. St. Paul Fire & Marine Ins. Co*, 590 F. Supp.

2d 1244, 1252 (N.D. Cal. 2008), the court stated:

In California, a disparaging statement about a competitor's product that causes the competitor to suffer pecuniary damages is actionable as trade libel. *See Microtec Research, Inc. v. Nationwide Mut. Ins. Co.*, 40 F.3d 968, 972-73 (9th Cir.1994). California courts have held that to state a disparagement claim within the meaning of the Policy here at issue, the underlying plaintiff must allege that defendant made false, injurious, or derogatory statements about a plaintiff's products, which caused it to suffer pecuniary damages. *See, e.g., id.; Truck Ins. Exchange v. Bennett*, 53 Cal.App.4th 75, 89, 61 Cal.Rptr.2d 497 (1997). Trade libel and product disparagement are "injurious falsehoods that interfere with business."

Here, Dahl has alleged that it has lost sales and money as a result of Ultimate's allegedly disparaging statements.

Further, in *E.piphany*, the Court held that the insured had been falsely advertising its product as "all Java" and "fully J2EE," which its product was not, and as such, gave E.piphany an "unfair and undeserved advantage over competitors, some of which do offer, "all Java" and "fully J2EE" software solutions." *Id.* at 1249. E.piphany's advertising lead to "unfair product comparisons and reviews." *Id.* Likewise, Dahl alleges that Ultimate represented to its customers that Ultimate was the innovator and manufacturer of the "Ulti-Cart," which resulted in a purportedly unfair and undeserved advantage in the marketplace.

3. Contrary to the Court of Appeal's and Hartford's Assertion, California Law Does Not Require a Disparaging Statement Specifically Referencing the Disparaged Party to Trigger Coverage for Disparagement; Implicit Disparagement is Enough

The Court of Appeal 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.

That is contrary to California coverage law. For duty to defend purposes, the Complaint and extrinsic evidence need not make specific allegations of disparagement: mere allegations of implied disparagement are sufficient. Aside from *Charlotte Russe*, many other courts agree. In *Infor Global Solutions (Michigan), Inc. v. St. Paul Fire and Marine Ins. Co.*, 686 F.Supp.2d 1005 (N.D.Cal. 2010), the Court ruled that disparagement may be found where statements can be shown to be about the underlying plaintiff by **reasonable implication**. In this published decision, the Court stated:

In *Total Call*, the court found that a general liability insurance carrier did not owe a duty to defend where the underlying complaint against the policy holder alleged that the policy holder, a seller of phone card services, did not provide the number of calling minutes promised in its advertisements. (*Id.* at *4.) The court relied on the California Supreme Court's holding in *Blatty v. New York Times Co.* for the proposition that the torts of product disparagement, trade libel, and defamation, which were covered under the general liability policy at issue, all "require that the injurious false statement 'specifically refer to,' or be 'of and concerning,' the plaintiff in some way." *Total Call Int'l Inc.*, 181 Cal.App.4th at 170, 104 Cal.Rptr.3d 319. Since the allegation that the policy holder "communicate[d] to customers that they [would] receive [a] certain number of minutes for a certain cost" **did not refer**

to the plaintiffs specifically or by reasonable implication, the court found that the suit was not covered under the policy. *Id.* at 168, 104 Cal.Rptr.3d 319.

... In contrast to *Total Call*, the Court here found that the allegations in the underlying complaint referred disparagingly to a competitor by clear implication. (*See* December 16 Order at 9.) Specifically, the Court found significant the allegations that Plaintiff falsely stated that it was the “only” producer of “all Java” and “fully J2EE” software solutions, which was an “important differentiator” between competing products, even though some competitors offered products with these exact features. (*Id.*) In *Total Call*, however, the complaint only alleged that the policy holder did not provide the service it promised in its advertisements, which by itself “carrie [d] no implication” that one company's phone cards cost more or less than another's. *Total Call Int'l Inc.*, 181 Cal.App.4th at 171, 104 Cal.Rptr.3d 319. Since the *Total Call* court applied the same legal standard that this Court applied in its December 16 Order, but to a different set of factual circumstances, the Court finds that *Total Call* does not represent a material change in governing law. (Emphasis added, footnote omitted).

Id. at 1007.

In *Michael Taylor Designs, Inc. v. Travelers Property Cas. Co. of America*, 761 F.Supp.2d 904 (N.D. Cal. 2011), the Court found the insurer had a duty to defend its insured under the original complaint which did not specifically allege disparagement, but implied the comparison:

[t]he very essence of the injury they were alleging was damage to the reputation of Rosequist's products that would result from consumers encountering “cheap synthetic knock-offs” and believing them to be products manufactured and marketed by Rosequist.

...

Because Rosequist was expressly alleging that the reputation of her goods was harmed by MTD's conduct, the mere fact that it was labeled as trade dress infringement

does not preclude the possibility of a disparagement claim.

...
Accordingly, even the factual allegations of the original *Rosequist* complaint were sufficient to reveal the possibility of a covered claim, ...

Id. at 911-12.

In *Burgett, Inc. v. American Zurich Ins. Co.*, No. 2:11-cv-01554-MCE-JFM, 2011 WL 5884251, *6-8 (E.D. Cal. November 23, 2011), the Court again clarified an insurer's defense duty where there is only a claim for disparagement by implication:

... Defendant's contention that there is no potential for coverage under the disparagement provision of the policy because the underlying complaint does not allege that Plaintiff specifically references Persis is unavailing. ... the underlying complaint makes sufficient allegations that could potentially establish a claim for disparagement by *implication*. ...

...
Similarly to the facts underlying *E.pihphany*, in this case, Burgett represented to Samick that it was the *only* holder of the SOHMER trademark. In the underlying complaint, similar to the underlying complaint in *E.pihphany*, Persis alleges that Plaintiff made false representations that harmed Persis "by implying to the marketplace that Burgett had the superior right to use the SOHMER trademark," and thus, by implication, represented that Persis did not have the rights to the SOHMER trademark. (UF ¶ 11.) Persis further alleges that Plaintiff's "willfull statements to Samick and others regarding [Plaintiff's] use of the SOHMER trademark, created a likelihood of confusion or of misunderstanding as to the source, sponsorship or approval of [Plaintiff's] and/or Persis goods, as well as ... confusion of or misunderstanding as to affiliation, connection or association of [Plaintiff] and Persis." (UF ¶ 11.)

... The Court concludes that these allegations, taken as a whole, create potential liability and thus, potential coverage for disparagement of Persis' product—the alleged ownership

of the SOHMER trademark.

While *E.piphany* properly supports the finding of a potential claim for disparagement by implication, the cases relied on by Defendant— *Jarrow Formulas v. Steadfast Ins. Co.*, 2011 WL 1399805 (C.D.Cal.2011); *Total Call*, 181 Cal.App.4th 161, 104 Cal.Rptr.3d 319.—are easily distinguishable. . . .

. . .

Given the factual and legal similarities between this case and *E.piphany*, and since **there is established precedent upholding claims for disparagement by implication** in the district in which that action is pending, Plaintiff is potentially liable for disparagement by implication. (Bold provided)

The factual circumstances here are analogous to the facts in the *Infor Global* and *Burgett* cases. Dahl's responses to the insured's interrogatories further clarified that even if Dahl did not claim in the complaint that Ultimate named its goods, products or services specifically, the reasonable implication is that Ultimate's statements referred to Dahl because Dahl claims reputational injury and damage resulting from the alleged comparative statements. Further, in response to Requests for Admissions, No. 11, Dahl denies that Ultimate never made negative or false statements directly naming Dahl's products, which intimates that Dahl believes Ultimate has made specific references to its products. (JA Vol. 1, Ex. 11, P. 268)

On August 24, 2010, Dahl responded to Ultimate's Second Set of Interrogatories, No.11, in the *Dahl* Action, declaring the following:

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. . . .**

JA Vol. 1, Ex. 11, 252-55. (bold provided)

Dahl clearly alleged its business was being harmed by the disparaging statements implicitly contained in Ultimate's advertisements. Dahl's response to interrogatory No. 1 shows that the *Dahl* Action included claims that Ultimate allegedly published advertisements on its website and engaged in various other forms of advertising that confused the public about whether the ULTI-CART products were Dahl's products. This resulted in injury to Dahl's reputation and damages. The only way for Dahl to suffer damage and injury to its reputation is if Ultimate's advertisements resulted in Dahl's products being disparaged by the publication. The allegedly false statement is that ULTI-CART products are the same as Dahl's MULTI-CART products or superior. Dahl also alleges that Ultimate's product is inferior and Dahl alleges that it is the only other producer of carts in this market. Thus, it is reasonable to conclude that Dahl is claiming implicit disparagement. It is unreasonable for either Hartford or the Court of Appeal to conclude that this is not sufficient to trigger coverage.

The Respondents would like this Court to believe that the implications was drawn out of thin air, and erroneously compares it to the holding of *Total Call Internat v. Peerless Ins. Co.*, 181 Cal. App. 4th 161 (2010). *Total Call* does not stand for the proposition that coverage for

“disparagement” is only available if there is a specific reference to the injured competitor. *Id.* The Court in *Total Call* merely held that a phone card company’s false advertisements regarding its own cards’ number of minutes per dollar did not implicitly disparage the competitors’ phone cards. *Id.* at 169. In *Total Call*, the product at issue, phone cards, was not a specialty item that was only manufactured by two companies, as the “Ulti-Cart” and “Multi-Cart” products. In fact, in *Total Call*, the Court states that the phone card industry generates over \$2 billion in annual retail sales revenue by a number of companies. *Id.* at 168. It was not possible for the Court to find coverage for disparagement because the underlying defendant falsely advertised its own product, and from that advertisement, it was not clear that it was claiming its product was better than a specific competitor, since that industry has a large number of competitors.

Here, Ultimate and Dahl are the only competitors in manufacturing and distributing this specific cart. Consequently, when Ultimate advertises a product that is similar to Dahl’s product in name, style, functionality, yet purportedly is of inferior quality, and all these factors combined result in confusion in the marketplace and loss of business by Dahl, it is evident that Ultimate’s advertisements implicitly reference Dahl’s products.

Dahl stated the “Defendants’ advertising was, and continues to be, **untrue and misleading.**” (bold provided) (JA Vol. 1, Ex. 11, 111) Dahl went on to state in Count IV of its Complaint for “Unfair Competition Under the Lanham Act – 15 U.S.C. § 1125(a)” that the misleading advertising would cause compensable damage, asserting that Ultimate’s advertisements were unlawful and “**all to the detriment and damage of Dahl’s reputation, goodwill and sales.**” (bold provided) (JA Vol. 1, Ex.

11, 111-12) Thus, Dahl clearly and unambiguously alleged that beyond infringing any purported patent rights, Ultimate's advertisements were injurious falsehoods that were causing damage to Dahl's business, which undeniably qualifies as disparagement and triggers Hartford's duty to defend Ultimate in the *Dahl* Action.

D. The Court of Appeal Set Out The Criteria Under Which It Would Have Found Implicit Disparagement, But Then Ignored The Evidence Which Supported A Finding Of Implicit Disparagement

Ironically, the Court of Appeal in the *Hartford* Decision, after finding in favor of Hartford, stated that it would have found Ultimate had disparaged Dahl or Dahl's product, thereby triggering Hartford's duty to defend Ultimate, if:

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.

Hartford Decision, 148 Cal.Rptr.3d at 688.

Although the Court of Appeal intimates that if any one of the above outlined criteria was met, it would have found in Ultimate's favor, what makes this statement ironic is that all three criteria are in fact met, but the Court ignored it. The Court states that if "Ultimate's advertising falsely stated it was the only producer of a product with features also available on Dahl's 'Multi-Cart', it would have found in favor of Ultimate.

Dahl's allegations and supporting extrinsic evidence allege that Ultimate's advertising is false and misleading, implies it's the only producer of the "Ulti-Cart" which is a product with features "available on Dahl'd 'Multi-Cart'." Specifically, Dahl alleges:

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, . . . (JA Vol. 1, Ex. 11, 111-113)

...

The Court next states that if 'Ultimate's advertising suggested that its competitor's technology was behind that of Ultimate's" or if "Ultimate made false claims about the superiority of the Ulti-Cart which necessarily implied the inferiority of Dahl's competing product" it would have found in favor of Ultimate.

Dahl's allegations and supporting extrinsic evidence allege that Ultimate, by claiming to have the more superior product, is implying that its competitor's product and technology is inferior. As an example, Dahl refers to an Ultimate advertisement which states:

For over three decades, Ultimate Support Systems has provided musicians with **unique support solutions that are crafted with unparalleled innovation and quality and accompanied by superior customer service.**

...

THREE REASONS TO BUY ULTIMATE SUPPORT

3. Innovative Products

Ultimate Support designs and builds innovative, superior products with the working musician in mind.

We're just trying to make your life easier!

...

(JA Vol. 2, Ex. 11, 281 & 292)

If the Court of Appeal in the *Hartford* Decision had followed *Charlotte Russe*, other California case law similarly in favor of coverage where there was implied disparagement, and its own criteria, it should have reversed the trial court's ruling in favor of Hartford.

E. The Court of Appeal Should Not Have Ignored Extrinsic Evidence Which Supported Ultimate's Argument that Disparagement by Implication was Alleged and Acknowledged by Hartford

Ultimate, presented to the trial court and the court of appeal, additional extrinsic evidence in the form of Hartford's July 2, 2010 denial letter, wherein Hartford **admits** that Dahl's complaint contains alleged disparagement by implication. Specifically, Hartford states in its letter "... **As discussed above, there is no stated 'comparison' of the Ulti-Cart and the Multi-Cart except by implication.**" [bold provided] (JA Vol. 2, Ex. 12, P. 543) Thus, Hartford's own denial letter admits the existence of disparagement by implication which triggers Hartford's defense duty.

The California Civil Procedure Code § 437(c) dictates the 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.

Cal. Civ. Proc. Code § 437(c) (West). (bold provided)

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)¹⁴] however, there does not appear to be any case law directly on point mandating an appellate court to 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.

It is logical to conclude that an appellate court should also abide by the same rules when affirming or denying a trial court's granting of a motion for summary judgment that governed the initial trial court's granting of the motion for summary judgment. Accordingly, the Appellate Court should have considered the evidence admitted in the trial court proceedings that specifically addressed whether Ultimate implicitly references Dahl's "Multi-Cart" in its injurious publications (i.e., Ultimate's advertisements), and the Appellate Court should not have unilaterally contradict the evidence presented by both parties.

Hartford conceded that "implicit disparagement" triggers coverage; however, in both the *Hartford* Decision and Hartford's Answer to the Petition for Review it asserts that Ultimate does not implicitly reference Dahl's products in its advertisements. Resp't Answer to Pet. For Review at 9, Dec. 28, 2012. Hartford conveniently ignores its previously held position where Hartford explicitly noted there was only an implied

¹⁴ In *San Diego Watercrafts*, 102 Cal. App. at 315, the Court cites to a number of cases in support of its theory that this is now a common obligation for trial courts.

reference. This deliberate oversight by Hartford and the resulting actions of the Court of Appeal in ignoring said evidence is critical, especially in light of the Appellate Court's ruling:

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.

Hartford Decision, 148 Cal. Rptr. 3d at 688.

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

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. Thus, by relying on its July 2, 2010 coverage denial letter throughout the Superior Court and Court of Appeal proceedings, Hartford has reasserted its original position that there is a comparison in Ultimate's advertisements of its "Ulti-Cart" to Dahl's "Multi-Cart," by implication, which is sufficient to trigger Hartford's defense obligations.

Where both Hartford and the Court of Appeal agree that for coverage purposes, the alleged disparagement can be by implication the Court of Appeal is required to rule in Ultimate's favor when the insurer specifically admits that the stated comparison is by implication, especially

when the Court of Appeal's main reason for ruling against Ultimate was that there was no comparison of the two products, either "expressly or by implication?" *Id.* at 688.

Had the Court of Appeal given this evidence the deference it deserved, along with all the other allegations and evidence presented to the court, and in light of the *Charlotte Russe* decision, the Court should have ruled in Ultimate's favor. Consequently, Ultimate respectfully requests this Supreme Court estop the Court of Appeal from disregarding the evidence presented by both parties, which favors coverage and a ruling in Ultimate's favor.

F. Hartford Owes Ultimate Damages in the Form of Defense Costs and Prejudgment Interest

Ultimate respectfully requests that if the Supreme Court rules in its favor, it also award Ultimate damages in the form of defense costs and prejudgment interest. Hartford, as a breaching insurer, is obligated to pay all reasonable and necessary defense fees and costs. Ultimate's burden is to show the existence and amount of the defense expenses, which Ultimate has done by forwarding copies of all defense invoices to Hartford. Ultimate's expenses are presumed reasonable and necessary to the defense. Hartford has the burden of proving that the defense fees are in fact unreasonable or unnecessary. *See State of Cal. v. Pacific Indem. Co.*, 63 Cal. App. 4th 1535, 1548-49 (1998); *Arenson v. National Auto & Cas. Ins. Co.*, 48 Cal. 2d 528, 538 (1957).

Hartford had the opportunity to present evidence regarding this issue in the lower court, in its opposition to Ultimate's motion for summary judgment, but failed to do so. Issues not presented to the trial court are deemed waived. *See Steele v. Totah*, 190 Cal.App.3d 545, 551-52 (1986)

("We note that appellant has raised the issue of the warning language placement for the first time on appeal, despite the opportunity to address this issue in the lower court. Generally, issues not presented to the trial court are deemed waived.")

By failing to present evidence regarding this issue in the trial court, Hartford has waived the issue on appeal. Thus, Hartford is obligated to pay all reasonable and necessary defense fees and costs incurred by Ultimate in the *Dahl* Action.

Ultimate is also entitled to prejudgment interest. Under California law, the right to prejudgment interest is established by Cal. Civ. Code § 3287(a).¹⁵ Hartford breached its contract with Ultimate by failing to defend immediately and completely. As a result, Ultimate is entitled to prejudgment interest for the amount claimed that is certain or capable of being made certain. In the insurance context, the amount claimed by Ultimate was certain or made certain on the date each invoice was presented to Ultimate for payment. *See Longs Drug Stores Calif., Inc. v. Federal Ins. Co.*, No. C03-01746 JSW, 2005 WL 2072296, *4 (N.D. Cal. August 26, 2005) (the court ruled that the measure of Long's damages included prejudgment interest.). *See also Copart, Inc. v. Travelers Indem. Co.*, No. C-97-1862-VRW, 1999 WL 977948, *3 (N.D. Cal. October 22, 1999), *aff'd* by 11 F. App'x 815 (9th Cir. 2001) (the Court awarded prejudgment interest to the insured on its defense costs beginning on the date the insured first incurred the payment obligations.)

¹⁵Cal. Civ. Code § 3287(a): "Every person who is entitled to recover damages certain or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day." (bold provided)

V. CONCLUSION

For all of the foregoing reasons, Ultimate respectfully requests that this Supreme Court reverse the holding of the *Hartford* Decision Court.

Respectfully submitted,

Dated: May 14, 2013

LITTLE REID & KARZAI, LLP

By. _____

A large, stylized handwritten signature in black ink, appearing to be 'ER Little', is written over a horizontal line. The signature is highly cursive and loops around the line.

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**CERTIFICATE OF WORD COUNT
[Cal. Rules of Court, Rule 8.520(c)(1)]**

Counsel of Record hereby certifies that pursuant to California Rules of Court, Rule 8.520(c)(1), the enclosed Brief on the Merits was produced using 13-point Roman Style, including footnotes, and consists of 13,814 words as counted by the Microsoft Word 2007 word-processing program used to generate this brief.

Dated: May 14, 2013

LITTLE REID & KARZAI, LLP

By: 

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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.

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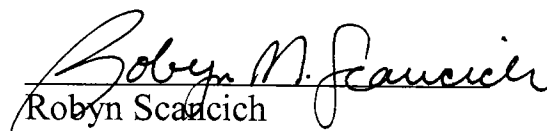
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[BY USPS MAIL] I placed the original or a true copy of the foregoing document in a sealed envelope or package designated by USPS with delivery fees paid or provided for, individually addressed to each of the parties on the attached service list, and 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 USPS 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 May 14, 2013, at Irvine, California.


Robyn Scancich