No. S207172

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HARTFORD CASUALTY INSURANCE COMPANY,

Plaintiff and Respondent,

v.

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

Defendants and Appellants.

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

HARTFORD CASUALTY INSURANCE COMPANY'S ANSWERING BRIEF ON THE MERITS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case questions whether a liability policy's "disparagement" coverage obligates the insurer to defend a suit that alleges no disparagement claim against its insured, either in name or in substance. The Superior Court and Court of Appeal said "no," because the duty to defend must be tethered to an actual claim. Those courts were correct, and their judgment should be affirmed.

California courts have long recognized that an insurer's duty to defend arises from the assertion of facts that, if proven, would result in covered liability under its policy. An aberrational line of cases has deviated from that bedrock principle, imposing a defense obligation independent of the policy's actual coverage. Those cases should be disapproved, and the judgment of the Court of Appeal in this action should be affirmed. In doing so, this Court should (1) reaffirm that "disparagement" is a false statement about another's products or services (*Blatty v. New York Times Co. (Blatty)* (1986) 42 Cal.3d 1033, 1042 [232 Cal.Rptr. 542, 728 P.2d 1177]); (2) reaffirm that only actual facts alleged or otherwise known trigger a liability insurer's duty to defend; and (3) disapprove the line of authority, exemplified by *Travelers Property Casualty Company of America v. Charlotte Russe Holding, Inc. (Charlotte Russe)* (2012) 207 Cal.App.4th 969 [144 Cal.Rptr.3d 12], that imposes a duty to defend absent any legal or factual assertion that the insured "disparaged" the claimant.

* * *

Appellants Swift Distribution, Inc. dba Ultimate Support Systems and two of its officers (collectively, "Ultimate") manufactured and sold a cart used for transporting musical equipment, dubbed the "Ulti-Cart." In an underlying action entitled *Dahl v. Swift Distribution, Inc.* (the "Underlying Action"), claimant Gary-Michael Dahl ("Dahl") claimed the "Ulti-Cart" was a copy of his own product, the "Multi-Cart," and sued for infringement of his intellectual property rights.

Ultimate sought coverage for the Underlying Action from appellee Hartford Casualty Insurance Company ("Hartford") under a general liability insurance policy (the "Policy") that covered "personal and advertising injury," including the enumerated offense of "[o]ral, written or electronic publication of material that ... disparages a person's or organization's goods, products or services." The Superior Court and Court of Appeal agreed that Hartford had no defense obligation because Dahl never alleged "disparagement," either in form or in substance. "Disparagement," the commercial equivalent of defamation, is tantamount to trade libel and requires an alleged injurious falsehood about the victim. In the Underlying Action, Dahl never accused Ultimate of saying anything negative (or positive, for that matter) about his "Multi-Cart." Instead, he simply accused Ultimate of selling a copy of his product without permission. Because Ultimate was not sued over any statements it made

about the "Multi-Cart," it necessarily was not sued for disparaging that product.

Notwithstanding the absence of any claim of disparagement, Ultimate insists for insurance coverage purposes that its promotion of the "Ulti-Cart" was "disparaging," because it caused consumers to buy Ultimate's product instead of Dahl's. But that is not "disparagement": it is competition. The possibility that Dahl's image suffered from the rigors of competition does not mean he suffered, or pleaded a claim for, the covered offense of "disparagement."

Despite clear policy language, anomalous cases like *Charlotte Russe* have confused the lower courts and federal district courts by effectively unmooring the duty to defend from the claimant's actual allegations. Those decisions have strayed from bedrock principles that have governed the duty to defend for decades. The instant case provides an opportunity for this Court to restore order to this area of coverage law, and reaffirm that there is no duty to defend unless the third party seeks damages of the nature and kind covered by the policy.

II. FACTUAL BACKGROUND

A. The Underlying Action

On January 26, 2010, Gary-Michael Dahl commenced the Underlying Action against Ultimate, Michael Belitz (its President) and

Robin Slaton (its Director of Design & Marketing) for their infringement of patents and trademarks issued for his "Multi-Cart," a music equipment cart.

In addition to alleging that Ultimate unjustly profited from its infringing "Ulti-Cart," Dahl accused Ultimate of unfair competition, misleading advertising, and breach of two non-disclosure agreements. (Joint Appendix ["JA"] Vol. 1 at pp. JA-102—JA-123.) Dahl nowhere accused Ultimate of making any false, negative, or injurious statements about his "Multi-Cart," however. Indeed, so far as Dahl's complaint alleged, Ultimate never acknowledged that Dahl or his "Multi-Cart" even existed.

Attached to Dahl's complaint were copies of Ultimate's marketing materials, which displayed images of and information about the "Ulti-Cart." (JA Vol. 1 at pp. JA-152—JA-155.) They said nothing about Dahl's "Multi-Cart." For example, Exhibit "E," an advertisement for the "Ulti-Cart," "describe[d] the product at issue" (the "Ulti-Cart"), but never mentioned Dahl's "Multi-Cart." (Appellants' Opening Brief ["AOB"] at p. 6; JA Vol. 1 at pp. JA-152—JA-155.)

Ultimate also provided the trial court with materials outside the pleadings, including Dahl's application for a temporary restraining order and discovery responses. (AOB at pp. 4-8.) Those materials confirmed that Ultimate advertised its "Ulti-Cart," but did not indicate that Ultimate mentioned Dahl or his "Multi-Cart."

The parties to the Underlying Action entered into a non-monetary settlement on December 10, 2010, and the action was dismissed. (JA Vol. 1 at p. JA-95.)

B. The Policy

Hartford insured Ultimate from January 29, 2009 to January 29, 2010.[1] (JA Vols. 3-4 at pp. JA-671 [Ex. 17], JA-675—JA-870.) The Policy provides Business Liability Coverage, including coverage for "personal and advertising injury" arising out of certain enumerated offenses, such as "[o]ral, written or electronic publication of material that ... disparages a person's or organization's goods, products or services." (JA Vol. 3 at pp. JA-671 [Ex. 17], JA-739, JA-760—JA-761 [section G.17.d.].) The policy excludes coverage for "personal and advertising injury":

- Arising out of any breach of contract, except an implied contract to use another's "advertising idea" in Ultimate's "advertisement" [Exclusion (p)(4)];
- Arising out of the failure of goods, products or services to conform with any statement of quality or performance made in Ultimate's "advertisement" [Exclusion (p)(5)];
- Arising out of any violation of any intellectual property rights such as copyright, patent, trademark, trade name, trade secret, service mark or other designation of origin or authenticity .... [Exclusion (p)(7)].

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[1] For purposes of this appeal, and without conceding the point, Hartford assumes that Belitz and Slaton, as officers or employees of Ultimate, were entitled to the same coverage (if any) as Ultimate.

(JA Vol. 3 at pp. JA-671 [Ex. 17], JA-741, JA-746.)

C. The Tender To Hartford

Dahl commenced the Underlying Action on January 26, 2010. (JA Vol. 1 at pp. JA-102—JA-123.) Ultimate tendered the action to Hartford, which disclaimed coverage by letter dated March 29, 2010. (JA Vol. 2 at pp. JA-480—JA-491.) Ultimate's counsel contested the denial by letter dated May 12, 2010, and Hartford reiterated its position on July 2, 2010. (JA Vol. 2 at pp. JA-493—JA-504; JA Vol. 4 at pp. JA-912—JA-922.) Hartford later brought this declaratory judgment action. (JA Vol. 1 at pp. JA-1—JA-14.)

III. THE UNDERLYING ACTION DID NOT ACCUSE ULTIMATE OF "DISPARAGING" DAHL OR HIS PRODUCT

Although this dispute involves the scope of a CGL policy's "disparagement" coverage, that coverage is viewed through the prism of California principles governing the duty to defend. As discussed below, on these facts, there is simply no room to argue that Ultimate was sued for "disparaging" Dahl's product. Quite to the contrary, Ultimate allegedly *imitated* Dahl's product, thereby bestowing upon it the "highest form of flattery." (*Homedics, Inc. v. Valley Forge Ins. Co. (Homedics)* (9th Cir. 2003) 315 F.3d 1135, 1142.)

A. An Insurer's Duty To Defend Extends To, But Not Beyond, Claims Potentially Covered By Its Policy

The principles governing an insurer's duty to defend are well-settled in this state. Indeed, it is precisely those fundamental considerations that require affirmance of the Court of Appeal's ruling and disapproval of *Charlotte Russe*.

As this Court stated nearly fifty years ago in its definitive decision on the duty to defend, an insurer must defend its insured in a suit "which *potentially* seeks damages within the coverage of the policy." (*Gray v. Zurich Ins. Co. (Gray)* (1966) 65 Cal.2d 263, 275 [54 Cal.Rptr. 104, 419 P.2d 168]; *Buss v. Superior Ct. (Buss)* (1997) 16 Cal.4th 35, 62 [65 Cal.Rptr.2d 366, 939 P.2d 766].) "[T]he determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy." (*Waller v. Truck Ins. Exchange (Waller)* (1995) 11 Cal.4th 1, 19 [44 Cal.Rptr.2d 370, 900 P.2d 619].) Thus, the initial focus is the complaint itself. (*Ibid.*; *Swain v. California Cas. Ins. Co.* (2002) 99 Cal.App.4th 1, 8 [120 Cal.Rptr.2d 808] ["coverage turns not on 'the technical legal cause of action pleaded by the third party' but on the '*facts* alleged in the underlying complaint' or otherwise known to the insurer"] [quoting *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 510 [108 Cal.Rptr.2d 657]].) Information outside the complaint can also reveal a potential for coverage, but only if it

"pertains to claims actually asserted by the third party." (*Storek v. Fidelity & Guar. Ins. Underwriters, Inc.* (N.D.Cal. 2007) 504 F.Supp.2d 803, 811.) In other words, "extrinsic" evidence must shed light on the claims *actually being made* and the facts *actually alleged*, not identify other claims or facts that conceivably could be (but have not been) made. The duty to defend "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." (*Atlantic Mutual Ins. Co. v. J. Lamb, Inc. (Lamb)* (2002) 100 Cal.App.4th 1017, 1034 [123 Cal.Rptr.2d 256] [emphasis in original].)

The duty to defend is not unlimited. (*Buss, supra,* 16 Cal.4th at p. 47 ["just as obviously, [the duty to defend] is not unlimited. [Citation.] It extends beyond claims that are actually covered to those that are merely potentially so – but no further."]; *Waller, supra,* 11 Cal.4th at p. 19 ["the duty to defend, although broad, is not unlimited; it is measured by the nature and kinds of risks covered by the policy"].) An insurer may refuse to defend an insured if undisputed facts conclusively show no potential for coverage. (*Wausau Underwriters Ins. Co. v. Unigard Sec. Ins. Co.* (1998) 68 Cal.App.4th 1030, 1044 [80 Cal.Rptr.2d 688].)

This dispute concerns the Policy's "personal and advertising injury" coverage. (AOB at pp. 2-3, 27.) Unlike "occurrence"-based coverage, "personal and advertising injury" coverage is triggered by a suit that alleges

an enumerated "personal and advertising injury" offense. (*Fibreboard Corp. v. Hartford Acc. & Indem. Co. (Fibreboard)* (1993) 16 Cal.App.4th 492, 511 [20 Cal.Rptr.2d 376] ["In the world of liability insurance, personal injury coverage applies to injury which arises out of the commission of certain enumerated acts or offenses," and "[c]overage thus is triggered by the offense, not the injury or damage which a plaintiff suffers"].)

Inasmuch as Ultimate sought coverage for the offense of "disparagement," the question is whether the Underlying Action sought damages for "disparagement" or, alternatively, whether extrinsic evidence showed that Dahl sought damages for "disparagement." As discussed below, neither was the case.

B. "Disparagement" Is The Publication Of An Injurious Falsehood About A Specific Person's Products Or Services

Under California law, the enumerated offense of "disparagement" is the publication of a falsehood that derogates the claimant's goods or services. (*Nichols v. Great Am. Ins. Cos. (Nichols)* (1985) 169 Cal.App.3d 766, 773 [215 Cal.Rptr. 416]; see also 5 Witkin, Summary of Cal. Law (10th ed. 2005) §§ 640-646, pp. 944-953.) Where a policy term has been construed in case law, that construction "becomes part of the policy." (*Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 810 [26 Cal.Rptr.2d 391].)

Like the tort, the enumerated offense of "disparagement" refers to "*statements about a competitor's goods* that are untrue or misleading and are made to influence potential purchasers not to buy." (*Lamb, supra*, 100 Cal.App.4th at p. 1035 [emphasis supplied] [citing *Sentex Systems, Inc. v. Hartford Acc. & Indem. Co.* (C.D.Cal. 1995) 882 F.Supp. 930, 944].) The Court of Appeal in this case properly recognized and applied that definition:

> This [enumerated offense] provides coverage for product disparagement, which is "an injurious falsehood directed at the organization or products, goods, or services of another ... ." [quoting *Lamb, supra,* 100 Cal.App.4th at p. 1035] Disparagement, or injurious falsehood, may consist of publication of matter derogatory to plaintiff's title to his property, its quality, or, or his business. (*Ibid.*)

(*Hartford Casualty Ins. Co. v. Swift Distribution, Inc. (*Court of Appeal Decision*)* (2012) 210 Cal.App.4th 915, 923 [148 Cal.Rptr.3d 679].)

Thus, the essence of "disparagement" is a false statement about a competitor's product made to dissuade someone from buying it. In view of First Amendment concerns, "disparagement" requires publication of injurious material that makes "specific reference" to a person's products or services. (*Total Call Internat. v. Peerless Ins. Co. (Total Call)* (2010) 181 Cal.App.4th 161, 170 [104 Cal.Rptr.3d 319] [citing *Blatty, supra,* 42 Cal.3d at p. 1042].)

C. The Underlying Action Nowhere Accused Ultimate Of Disparaging The "Multi-Cart"

The critical inquiry before the Court is whether the Underlying Action sought damages from Ultimate for disparaging Dahl's "Multi-Cart." As discussed below, it did not.

1. The Underlying Complaint Accused Ultimate Of Promoting Its Own Cart, Not Of Disparaging Dahl's

In the Underlying Action, Dahl alleged that Ultimate advertised and sold the "Ulti-Cart," which was allegedly a copy of his "Multi-Cart." Dahl never alleged, however, that Ultimate "disparaged" his product.

Ultimate asserts that "disparagement" can be read into Dahl's allegations, because consumers could have thought Ultimate invented the cart and Dahl's reputation suffered as a result. But there was no factual allegation or extrinsic evidence that Ultimate said anything *whatsoever* about Dahl's cart, whether derogatory or otherwise. As the Court of Appeal noted below, "Even if the use of 'Ulti-Cart' could reasonably imply a reference to 'Multi-Cart,' ... Ultimate's advertisement contained no disparagement of 'Multi-Cart'" because there is no allegation that the "Multi-Cart" is inferior to the "Ulti-Cart," and there is no other negative allegation about the "Multi-Cart." (Court of Appeal Decision, *supra,* 210 Cal.App.4th at p. 924.)

So far as the complaint and its attachments in the Underlying Action showed, Ultimate was trying to promote and sell its own product for its own benefit. The advertisements did not mention Dahl's "Multi-Cart," did not compare the "Ulti-Cart" to the "Multi-Cart," and did not refer to or identify the "Ulti-Cart's" competitors. (JA Vol. 1 at pp. JA-152—JA-155.) In fact, if the advertisements for the "Ulti-Cart" reminded customers of the "Multi-Cart" at all, which was never alleged, Ultimate created a *favorable* impression of Dahl's cart by deeming it worthy of copying.[2] As the Ninth Circuit astutely pointed out on similar facts in *Homedics,* selling a copy of a competitor's product is the *antithesis* of disparagement:

> One cannot read Nikken's complaints and reasonably conclude that there are allegations that Homedics was disparaging its goods. Essentially, Nikken's complaints only allege that Homedics *imitated* its product, thereby infringing its patent. It does not follow that because an entity *imitated* the design of a product, it is, therefore, *disparaging* it. In point of fact, it's quite the opposite – as has been oft said: imitation is the highest form of flattery.

(315 F.3d at pp. 1141-42 [applying California law, emphasis supplied].)

Every trademark dispute involves some similarity between the plaintiff's and the defendant's marks. But the mere infringement of patents

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[2] Presumably, a policy term (here, "disparagement") should not be construed to mean its polar opposite. (*ACL Technologies, Inc. v. Northbrook Prop. and Cas. Ins. Co.* (1993) 17 Cal.App.4th 1773, 1795 [22 Cal.Rptr.2d 206] [noting that, "[w]hatever shades of meaning inhere in the word sudden, gradual is not one of them."].)

or trademarks, or "palming off" the defendant's product as the plaintiff's, does not mean the defendant has *disparaged* the plaintiff's product. (*Microtec Research, Inc. v. Nationwide Mut. Ins. Co. (Microtec)* (9th Cir. 1994) 40 F.3d 968, 972 [California law] [finding no "disparagement" coverage, even with extrinsic evidence of disparaging advertisements, because claimant never raised disparagement *as a claim in the case*]; *Homedics, supra,* 315 F.3d at pp. 1141-42; *Aetna Casualty & Surety Co. v. Centennial Ins. Co.* (9th Cir. 1988) 838 F.2d 346, 351 [no duty to defend suit by competitor for "palming off" competitor's products as insured's own].)

In its Opening Brief, Ultimate cites the following allegations as cloaked charges of "disparagement":

> 57. On information and belief, Defendants have engaged in the advertising herein with the intent to mislead the public as to the 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 [Dahl's] Mark, ...
>
> 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, or that Defendants own or control the intellectual property, factory, or other source of supply of the Cart and Dahl's Mark.
>
> 72. On information and belief, Dahl has suffered injury in fact and has lost sale and money as a result of the violations alleged above ....

(AOB at pp. 4, 32, 36-37.)

But none of these paragraphs – or anything else in Dahl's complaint – alleged that Ultimate "disparaged" the "Multi-Cart." Rather, Dahl accused Ultimate of unfairly profiting from his idea through patent and trademark infringement, false advertising, and unfair competition. Although Ultimate allegedly behaved badly, unfair business practices are not presumptively "disparaging"[3] – unless, of course, "disparaging" is arbitrarily (and unjustifiably) redefined to mean "unfair." That Ultimate may have lied about *its* product does not suggest it falsely derogated *Dahl's*. (*Total Call, supra,* 181 Cal.App.4th at p. 171 [requiring publication of an injurious statement that *disparages* the claimant].) Indeed, if the extensive block quotation at pages 4-8 of the AOB show anything, it is that Dahl assiduously *avoided* accusing Ultimate of disparagement.

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[3] Ultimate cites *Farouk Systems, Inc. v. Costco Wholesale Corp. (Farouk)* (S.D. Tex. 2010) 700 F.Supp.2d 780, 786, for the proposition that "unfair competition" is synonymous with "disparagement." Aside from the facts that *Farouk* is not an insurance case and is from Texas, the word "disparagement" does not appear in the opinion.

Ultimate then argues that, because it "claimed superiority to Dahl's products" and its "publications infer that Dahl sells inferior products," consumers were "left with the impression that Dahl's product is of an inferior quality" because "Dahl allege[d] that the use of similar names is understood to refer to Dahl." (AOB at pp. 26, 27, 30.) Those statements appear only in Ultimate's appellate briefs, not in Dahl's complaint. An insured's counsel's "self-serving legal opinion" about potentially covered claims "hardly constitutes a 'fact' known to [the insurer] which, under *Gray*, gives rise to a ... duty to defend." (*National Union Fire Ins. Co. v. Siliconix Inc.* (N.D.Cal. 1989) 726 F.Supp. 264, 272; *Sony Computer Entm't Am., Inc. v. Am. Home Assur. Co.* (9th Cir. 2008) 532 F.3d 1007, 1021 ["Further, American Home need not rely on the assertions of Sony's own counsel about potential covered claims in determining whether it has a duty to defend."].) As stated above, the complaint never alleged that Ultimate compared its products to Dahl's.

Finally, the possibility that "Ulti-Cart" sales may have caused Dahl "reputational" damage does not, without more, implicate Hartford's duty to defend. "Personal injury" coverage "is triggered by the offense, not the injury or damage which a plaintiff suffers." (*Fibreboard, supra,* 16 Cal.App.4th at p. 511.) Any reputational damage to Dahl arose from Ultimate's sale of a competing product, not because Ultimate publicly criticized the "Multi-Cart." As noted in *Total Call*, a claim for "damage to

reputation" does not connote "disparagement" where there was no allegation of a specific disparaging reference about the claimant. (181 Cal.App.4th at p. 170; *Microtec, supra,* 40 F.3d at p. 972 [California law] [requiring that there be a defamatory statement about the claimant].) Absent an allegation that Ultimate falsely insulted Dahl's product to dissuade people from buying it, any potential for coverage was at best "tenuous and far-fetched." (*Giddings v. Industrial Indemnity Co.* (1980) 112 Cal.App.3d 213, 220 [169 Cal.Rptr. 278].)

2. No Extrinsic Evidence Showed That Dahl Sought "Disparagement" Damages

Tacitly conceding Dahl's complaint itself alleged no "disparagement," either legally or factually, Ultimate argues that extrinsic evidence showed he in fact sought "disparagement" damages. But the extrinsic evidence that Ultimate submitted showed nothing of the sort.

Ultimate first cites two single-spaced pages from Dahl's Application for Temporary Restraining Order and Motion for Preliminary Injunction in the Underlying Action, including his reply papers. (AOB at pp. 5-7.) Ironically, those excerpts simply highlight the *absence* of any claim of disparagement. Like any trademark or patent plaintiff, Dahl argued the "Ulti-Cart" created a likelihood of confusion with the "Multi-Cart," that Dahl and Ultimate worked in the same industry, that Dahl had goodwill with his customers, that the "Ulti-Cart" might have siphoned off some

customers, and that Dahl's reputation may have been damaged by a competitor's theft of his idea. In his reply, Dahl speculated that Ultimate might "expand into [Dahl'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." (AOB at p. 7.) While these allegations might have supported Dahl's claims for infringement of intellectual property rights or unfair competition, they revealed no claim of "disparagement" – a false statement about the quality of Dahl's cart.

Ultimate also quoted from Dahl's interrogatory responses in the Underlying Action, which, while consuming almost two full pages of Ultimate's Opening Brief, never accused Ultimate of making a false statement about the "Multi-Cart." Instead, in explaining the basis for his trademark and unfair competition claims, Dahl simply reiterated that Ultimate "adopted the confusingly similar ULTI-CART name to unfairly trade on the goodwill, notoriety associated with his mark and products by consumers." (AOB at p. 8, Resp. to Interrogatory No. 12.) The gist of Dahl's claim was that Ultimate stole his idea, not that it disparaged his product.

In short, the extrinsic material that Ultimate cites simply confirms that Dahl sued over patent and trademark infringement and false advertising, not over any false statements about the quality of the "Multi-Cart." (AOB at pp. 4-6, 7-9; JA Vol. 5 at pp. JA-1042—JA-1058.)

D. Although A Complaint Need Not Plead A Covered Cause Of Action By Name, It Must Allege *Something* The Policy Covers To Implicate The Defense Obligation – An Insured May Not Ask The Court To "Imply" Facts That Are Not Being Asserted

Ultimate acknowledges, at least tacitly, that Dahl never actually sued it for disparagement. Instead, it argues the underlying complaint involved "implied disparagement," and thus *potentially* sought covered damages. But the word "implied" refers to the identity of the victim, not to the existence of a disparagement claim in the first instance. A court can "imply" that a disparaging comment concerns a specific person, but cannot "imply" a disparagement claim is being made. (*Total Call, supra,* 181 Cal.App.4th at pp. 170-71.)

Ultimate correctly cites, but misapplies, the standard for determining when a "potential" for coverage exists. It has long been the rule in California that the duty to defend is measured not by the formal titles of the claimant's causes of action, but by the potential for covered liability as revealed in the substance of the factual allegations. (*Hudson Insurance Company v. Colony Insurance Company* (9th Cir. 2010) 624 F.3d 1264, 1269-70 [citing *CNA Casualty of California v. Seaboard Surety Co. (Seaboard)* (1986) 176 Cal.App.3d 598, 609, fn.4 [222 Cal.Rptr. 276].) As this Court eloquently observed nearly a half century ago, this rule recognizes substance over form, and provides the insured with a defense in a suit involving a covered event even if the liability is not described in the

same language used in the policy. (*Gray, supra,* 65 Cal.2d at p. 276 ["Since modern procedural rules focus on the facts of a case rather than the theory of recovery in the complaint," the insurer "cannot construct a formal fortress of the third party's pleadings and retreat behind its walls"].) Indeed, that rule can be traced back at least another half century before *Gray*. (*Greer-Robbins Co. v. Pacific Surety Co.* (1918) 37 Cal.App. 540, 544 [174 P. 110] ["the liability of the [insurer] to defend ... is to be found in the allegations of the complaint"].)

As *Gray* and its progeny have recognized, the phrase "potential for coverage" means the third-party plaintiff is seeking relief for an event the policy covers, without necessarily using the same terminology the policy uses. That rule has never obligated an insurer to defend simply because the third-party could theoretically allege *different substantive claims* that might be covered. To the contrary, courts have repeatedly held that a potential for coverage may only be found in the claims *actually being made* – whether explicitly or as illuminated by extrinsic evidence – and not in speculation over hypothetical new claims that could be asserted through amendment of the pleaded facts.[4] (See, e.g., *Kazi v. State Farm Fire & Cas. Co. (Kazi)*

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[4] To find a claim for "disparagement" here, a court would have to supply allegations that (1) Ultimate made statements about the "Multi-Cart"; (2) the statements derogated the characteristics of the "Multi-Cart"; and (3) Dahl was damaged by Ultimate's statements (not its competing *sales*). Needless to say, this would require rewriting, not interpreting, Dahl's complaint.

(2000) 24 Cal.4th 871, 887 [103 Cal.Rptr. 2d 1, 15 P.3d 223] [where the "complaint made no allegations of damage to Parcel B, ... there was no possibility of liability coverage for third party property damage in this lawsuit"]; *Waller, supra,* 11 Cal.4th at p. 19 ["*Gray* and its progeny have made it clear that the determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the allegations of the complaint with the terms of the policy"].)

Two decisions from the Ninth Circuit Court of Appeals, applying California law, have succinctly captured the essence of the "potential for coverage." In *Olympic Club v. Those Interested Underwriters at Lloyd's, London* (9th Cir. 1993) 991 F.2d 497, 503, the court explained that a potential for coverage exists where "new *causes of action* clearly supported by the facts already pled in the complaint" would be covered, not from "[m]ere speculation that the [claimant] will allege *new facts* in its suit[.]" The same court expanded on that point a decade later in *The Upper Deck Co., Ltd. v. Federal Ins. Co. (Upper Deck)* (9th Cir. 2004) 358 F.3d 608, 614, noting that:

> It is important to distinguish between claims that raise the possibility of coverage because they are brought under an uncovered theory, . . ., and claims that do not raise the possibility of coverage because the claim alleges damages of a different nature and kind than those covered by the policy.

(See also *Friedman Prof. Mgmt. Co. v. Norcal Mut. Ins. Co.* (2004) 120 Cal.App.4th 17, 35 [15 Cal.Rptr.3d 359] ["An insured is not entitled to a defense *just because one can imagine some additional facts* which would create the potential for coverage."] [emphasis added]; *Gunderson v. Fire Ins. Exch.* (1995) 37 Cal.App.4th 1106, 1114 [44 Cal.Rptr.2d 272] [mere speculation about the "ways in which the third party claimant might amend its complaint at some future date" is insufficient to trigger coverage].)

This is particularly so in the context of "personal injury" coverage, which applies to specific enumerated *offenses*. (*Fibreboard, supra,* 16 Cal.App.4th at p. 511.) Indeed, California courts have consistently rejected attempts to manufacture coverage for commercial disputes by creatively describing them in the language of "personal injury" offenses.

In the seminal case of *Nichols, supra,* 169 Cal.App.3d at p. 774, for instance, the insured argued that a suit for theft of cable television signals triggered its disparagement coverage. Because the underlying complaint said nothing at all about disparagement, however, the Court of Appeal refused to imply that such a claim was being made:

> The Calsat complaint contains no suggestion of the defamatory meaning that appellants seek to infer. As appellants have no power to amend Calsat's complaint, they cannot insert an essential allegation where none appears. The failure of Calsat to distinctly aver a disparaging publication in its complaint precludes any recovery on a defamation theory.

(*Ibid.*)[5]

Similar rulings have found no defense obligation owed where the underlying complaint pleads no "personal injury" offense, in letter or in spirit. (*Cort v. St. Paul Fire & Marine Ins. Cos, Inc. (Cort)* (9th Cir. 2002) 311 F.3d 979, 986 [allegation that property owner covered up artists' mural "cannot be construed as a trade libel claim because, like the potential libel claim, it fails to satisfy the requirement of false publication"]; *Microtec, supra,* 40 F.3d at p. 972 [disparagement coverage not triggered where Green Hills claimed "Microtec 'palmed off' Green Hills' compilers, not that Microtec made a false or injurious statement about the quality of Green Hills' compilers"]; *Lindsey v. Admiral Ins. Co. (Lindsey)* (N.D.Cal. 1992) 804 F.Supp. 47, 52 ["The tort of disparagement has a very specific meaning under California law," encompassing "the twin torts of trade libel and slander of title," and does not include graphic sexual comments that were not alleged to be untrue]; *Tinseltown Video, Inc. v. Transp. Ins. Co.* (1998) 61 Cal.App.4th 184, 202 [71 Cal. Rptr.2d 371] ["while we conclude Tinseltown cannot show the commission of an offense that would trigger personal injury coverage, the fact that the gravamen of the Chew action is a claim for economic losses is further evidence Tinseltown cannot show a

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[5] Appellants repeatedly cite *Nichols* in their Opening Brief, yet fail to mention that *Nichols* found no duty to defend under a "disparagement" clause because the underlying plaintiff nowhere accused the insured of making a false statement about it.

potential for such coverage"]; *Shanahan v. State Farm Gen. Ins. Co.* (2011) 193 Cal.App.4th 780, 788-89 [122 Cal.Rptr.3d 572] [sexual battery suit could not be repackaged as a defamation action where "the complaint did not allege a publication, a necessary element of slander"]; *American Motorists Ins. Co. v. Allied-Sysco Food Svcs., Inc. (Allied Sysco)* (1993) 19 Cal.App.4th 1342, 1353 [24 Cal.Rptr.2d 206] [no duty to defend gender discrimination action, where "[t]he third party plaintiffs did not plead facts alleging damage to reputation or defamation or disparaging statements"].)

Here, Ultimate's core (if unstated) premise is that the Underlying Action created a "potential" for coverage because Dahl *could have* alleged disparagement of the "Multi-Cart." If that were the law, then *Nichols*, *Cort*, *Microtec*, *Tinseltown*, *Lindsey*, *Shanahan*, *Total Call, Allied-Sysco* and scores of other leading decisions would have found a duty to defend, but they did not. The lesson of those cases, then, is that an insured cannot convert a non-covered claim into a covered claim by citing theoretical allegations that were never actually asserted. Particularly in the context of "personal and advertising injury" coverage, which covers specified offenses, a reasonable insured cannot expect a defense for a suit that alleges no covered offense, either in form or in substance. Like the insured in *Nichols*, Ultimate simply "cannot insert an essential allegation where none appears." (*Nichols, supra,* 169 Cal.App.3d at p. 774).

E. The July 2010 Declination Letter From Hartford's Counsel Did Not "Admit" That Dahl Alleged "Implied Disparagement

In its Opening Brief, Ultimate argues that a coverage position letter from Hartford's counsel constituted an "admission" that the Policy covers disparagement by implication. That letter was nothing of the sort.

1. The Coverage Declination Letter Did Not Admit Dahl Alleged "Disparagement"

In a July 2, 2010 declination letter sent to Ultimate's counsel, Hartford's counsel noted that the pleadings in the Underlying Action and other tendered materials presented no explicit comparison between the "Ulti-Cart" and the "Multi-Cart." (AOB at p. 47; JA Vol. 2 at p. JA-543.) For example, the advertisements attached to the complaint showed that Ultimate promoted the "Ulti-Cart" without mentioning the "Multi-Cart." In response to Ultimate's assertion that it was accused of comparing the "Ulti-Cart" to the "Multi-Cart," Hartford responded that any comparison could only have existed "by implication."

Ultimate cites the snippet "except by implication" out of context as an admission by Hartford that the Underlying Action alleged implied disparagement (AOB at p. 47), but this seriously mischaracterizes the document. At most, Hartford suggested there might be an implied *reference* to the "Multi-Cart," not that there was an implied *disparagement* of that product. (Court of Appeal Decision, *supra,* 210 Cal.App.4th at p.

924 ["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.'"].)

In addition, Hartford's declination letter expressly stated that Hartford did not waive any coverage defenses. (JA Vol. 2 at p. JA-546.) To cite that letter as an admission of coverage is contrary to the notion of a coverage denial or reservation of rights. (*Westoil Terminals Co., Inc. v. Industrial Indemnity Company* (2003) 110 Cal.App.4th 139, 151 [1 Cal.Rptr.3d 516] [insurer's reservation of rights evidenced "its intent not to waive any defense"].)

2. In Any Event, An Opinion Regarding Policy Interpretation Is Inadmissible

There is a second reason why any statements by Hartford's counsel about coverage were not admissions: they are not even admissible.

It is well-established under California law that the interpretation of an insurance contract is a legal, rather than a factual, determination. (*Chatton v. National Union Fire Ins. Co. (Chatton)* (1992) 10 Cal.App.4th 846, 865 [13 Cal.Rptr.2d 318].) As a result, "[w]here a policy provision has a 'plain meaning', it is immaterial that the insurer's agents, employees or other representatives have misinterpreted that meaning ... because [o]pinion evidence is completely inadmissible to interpret an insurance contract." (*Prudential Ins. Co. of Am., Inc. v. Superior Court* (2002) 98

Cal.App.4th 585, 603 [119 Cal.Rptr.2d 823] [internal citations omitted] [quoting Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 1999) § 4:17.5, pp. 4-6 and citing *Chatton, supra,* 10 Cal.App.4th at p. 865]); *Indus. Indem. Co. v. Apple Computer Inc.* (2009) 79 Cal.App.4th 817, 835, fn.4 [95 Cal.Rptr.2d 528] ["the opinions of insurance company agents and employees regarding coverage issues ... are 'completely irrelevant' to the legal issues of policy interpretation"]; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1166, fn. 3 [6 Cal.Rptr.2d 554].)

Accordingly, even if Hartford's counsel suggested the Underlying Action involved implied disparagement, which it did not, counsel's opinion is irrelevant.

IV. *CHARLOTTE RUSSE* DOES NOT SUPPORT REVERSAL OF THE COURT OF APPEAL'S DECISION IN THIS ACTION

In its Petition for Review, Ultimate expressly presented as a question for this Court whether *Charlotte Russe* was correctly decided. (*See also* AOB at p. 1.) As Hartford pointed out in its response, the Court of Appeal Decision can be affirmed without regard to the correctness of *Charlotte Russe.* Because the Court has accepted review as Ultimate requested, however, it should determine that *Charlotte Russe* is wrongly decided and should be disapproved.

A. *Charlotte Russe* Is Inconsistent With California Law, And Should Be Disapproved

In *Charlotte Russe*, the Court of Appeal deviated from a century of California case law linking the duty to defend with the potential for covered damages. As a result, it should be expressly disapproved.

In *Charlotte Russe*, insured retailer Charlotte Russe allegedly breached an agreement to promote Versatile's "People's Liberation" brand of clothing by selling it at discounted prices. (207 Cal.App.4th at p. 973.) Those below-market sales allegedly devalued the "People's Liberation" brand by erroneously suggesting the clothing was not worth the lofty suggested retail price, and had to be heavily discounted to move the merchandise. (*Ibid.*) In *Charlotte Russe*, because Versatile's own products were being sold, there was no doubt that any disparaging statements by the insured referred to Versatile's products. The Court of Appeal found the complaint alleged "disparagement," because the discounted prices suggested the clothing did not live up to its "premium" image. (*Charlotte Russe, supra,* 207 Cal.App.4th at p. 980.) As a result, the court determined that Charlotte Russe published injurious material (below-market prices) that referred to Versatile's product in a derogatory fashion.

The patent flaw in *Charlotte Russe's* reasoning is the court's assumption that the underlying plaintiff need not seek damages for a covered offense – here, disparagement – to implicate an insurer's duty to

defend. As discussed above, disparagement is the publication of a *false statement* about a claimant's product in an effort to dissuade consumers from buying it. In *Charlotte Russe*, the ostensible "false statement" was an advertised *price* of an article of clothing. As noted in the Court of Appeal Decision here, a price is incapable of being true or false: it is simply a price.

Nor was there an allegation in *Charlotte Russe* that the discounted pricing was intended to dissuade consumers from purchasing the "People's Liberation" clothing. Quite to the contrary, the price discount was designed to spur sales. Consequently, the *Charlotte Russe* court simply ignored the most basic elements of a disparagement claim, and imposed a defense obligation based on a nebulous concept of "disparagement" that deprived it of any objective meaning. As the Court of Appeal recognized below, the the term "disparagement" has a specific meaning, and does not include any and all behavior that could harm a competitor's image in the marketplace:

> [W]e disagree with the theory of disparagement apparently recognized in *Charlotte Russe*. * * * In spite of the requirements that there be a publication (*Shanahan v. State Farm General Ins. Co.* (2011) 193 Cal.App.4th 780, 789 [122 Cal. Rptr. 3d 572]) 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.* Sellers reduce prices because of competition from other sellers, surplus inventory, the necessity to reduce stock because of the loss of a lease, changing store location, or going out of

> business, and because of many other legitimate business reasons. ... *Such an "injury" is a common experience in the everyday world of free market competition.*

(Court of Appeal Decision, *supra,* 210 Cal.App.4th at p. 925 [footnote omitted; emphasis added].)

The Court of Appeal Decision properly relied on *Total Call*, which held the insured's promotion of its *own* products is not disparagement of a competitor's. *Total Call*, in turn, relied on this Court's opinion in *Blatty, supra,* 42 Cal.3d at p. 1042 for the proposition that a cause of action for trade libel requires a *specific reference* to the claimant, without which the gravamen of the claim is absent. This does not require the claimant to plead a viable claim for trade libel identified as such, but it must include at a minimum the factual linchpin of the disparagement offense – a false statement about the claimant.

Despite *Total Call's* reliance on *Blatty*, *Charlotte Russe* relegated *Total Call* to a footnote and did not even mention this Court's *Blatty* decision. Instead, *Charlotte Russe* summarily dismissed the trial court's observation that "[t]here is no trade libel alleged because there is no claim that there was a false statement" with the following *nonsequitur*:

> We do not share Travelers's certainty that a claim of objective falsity is in all circumstances an essential element of the tort of trade libel. The cases it cites for this proposition involve or discuss both disparagement and trade libel – but none of them hold, in the context

> of insurance coverage for disparagement, that the concepts are interchangeable or inextricably linked.

(*Charlotte Russe, supra,* 207 Cal.App.4th at p. 980, fn.8.)

But the *Charlotte Russe* court never explained how a price tag can be "false." Moreover, *Charlotte Russe* failed to explain how its holding was consistent with existing case law, such as *Total Call*, *Homedics*, *Microtec*, *Lindsey*, and others, which uniformly recognized that the essence of disparagement is a *false statement* about another's products or services. *Charlotte Russe* also concluded that "disparagement" is not tantamount to "trade libel," an unexplained assertion at odds with existing case law that has consistently linked the two concepts. (*Lamb, supra,* 100 Cal.App.4th at p. 1035; *Nichols, supra,* 169 Cal.App.3d at pp. 773-75; *Microtec, supra,* 40 F.3d 968; *Cort, supra*, 311 F.3d at p. 986; *Lindsey, supra,* 804 F.Supp. at p. 52.) So far as *Charlotte Russe* is concerned, "disparagement" seems to be any commercial behavior that a competitor finds threatening.

Charlotte Russe also states in *dicta* that a complaint need not allege every element of trade libel to entitle the insured to a defense. (207 Cal.App.4th at p. 978.) As applied, this is an unwarranted expansion of coverage. Although a complaint need not contain a cause of action *labeled* disparagement or trade libel, it must nonetheless allege facts describing an act of disparagement. (*Seaboard, supra,* 176 Cal.App.3d at p. 609.) Indeed, *Charlotte Russe* itself focused on the facts of the underlying

complaint, which it (incorrectly) construed to plead disparagement. (207 Cal.App.4th at pp. 979-80.) To the extent *Charlotte Russe* suggests there is a duty to defend a complaint that alleges neither a covered offense nor the factual elements of the offense, the decision has no support in the law of California or any other jurisdiction.

Because of its failure to follow existing California law, *Charlotte Russe* reaches the untenable result that any retailer offering premium goods at discounted prices engages in product "disparagement." Indeed, based on the logic of *Charlotte Russe*, if a retailer sells one product at a different price from another product, it has "disparaged" the lower-priced product. The court's reasoning implies that price competition itself – the bedrock of American capitalism – is tortious. By the same analysis, moreover, Charlotte Russe could have "disparaged" Versatile's products by stocking them in the back of its store, by displaying them on a homely mannequin, or by advertising them in a seedy newspaper. If so, the concept of "disparagement" would lie exclusively in the eyes of the beholder and would be utterly meaningless.

For these reasons, *Charlotte Russe* was wrongly decided, and should expressly be disapproved to restore consistency and sensibility to the case law.

B. *Charlotte Russe* Is Factually Distinct from the Instant Action

Even if *Charlotte Russe* was decided correctly, it is factually distinguishable from this case. Here, the underlying complaint did not accuse Ultimate of selling Dahl's "Multi-Cart" at steep discounts. In fact, so far as the Underlying Action alleged, Ultimate never even acknowledged that Dahl's "Multi-Cart" existed. As the Court of Appeal stated, that fact distinguished *Charlotte Russe* from this case:

> [T]he allegations in the *Dahl* complaint about Ultimate do not correspond to the facts in *Charlotte Russe*. The *Dahl* complaint did not allege that Ultimate implied, by steeply discounted pricing, that the Multi-Cart was of poor quality. Unlike in *Charlotte Russe*, Ultimate's advertisements referred only to its own product, and did not refer to and therefore did not disparage Dahl's product.

(Court of Appeal Decision, *supra,* 210 Cal.App.4th at p. 925.)

Because the underlying complaint in *Charlotte Russe* involved a perceived disparagement of a specific product – the "People's Liberation" clothing line – it is distinguishable on that ground, and would not mandate a finding of coverage here even if it is good law.

V. THE OTHER CASES ULTIMATE CITES FOR THE PROPOSITION THAT IT DISPARAGED THE "MULTI-CART" BY IMPLICATION ARE DISTINGUISHABLE, BUT SHOW THE LAW NEEDS CLARIFICATION

Ultimate cites several cases from federal courts and other states for the proposition that there may be "disparagement by implication" where there is consumer confusion and reputational damage, but no

"disparagement" allegations in the pleadings. The decisions are factually distinguishable, but they have created confusion in the case law by disregarding core duty-to-defend principles and should be disapproved.

For example, *E.Piphany, Inc. v. St. Paul Fire and Marine Insurance Co. (E.Piphany)* (N.D.Cal. 2008) 590 F.Supp.2d 1244, 1253, found the disparagement trigger satisfied by allegations that the insured "falsely stat[ed] that [the insured] was *the 'only' producer* of 'all Java' and 'fully J2EE' software solutions" (emphasis added). (*Ibid*; *Infor Global Solutions (Michigan), Inc. v. St. Paul Fire and Marine Insurance Co. (Infor Global)* (N.D.Cal. 2010) 686 F.Supp.2d 1005, 1007 [reconsidering *E.Piphany*, and expanding upon discussion in light of *Total Call*].) According to the *Infor Global* court, the insured's claim to be the *only* producer was "disparaging," in that it suggested the competitors' products did not offer those features and thus were inferior. (*Infor Global, supra,* 686 F.Supp.2d at p. 1007.) Similarly, in *Burgett, Inc. v. American Zurich Ins. Co. (Burgett)* (E.D.Cal. Nov. 23, 2011) 2011 U.S.Dist.LEXIS 135449, at p. *20, the court found coverage for "disparagement" because the insured allegedly claimed it was the only holder of a trademark, thereby implying the underlying plaintiff (which was publicly using the trademark) was using trademarks it did not own. (See also *Tria Beauty, Inc. v. National Fire Insurance Company of Hartford* (N.D.Cal. May 20, 2013) 2013 U.S.Dist.LEXIS 71499, at p. *12 [finding insured's puffery about its own

product – stating that it was the "first" and "only" product of its kind – was "implicitly" a disparagement of the claimant's].) These decisions are distinguishable from the present case, where Dahl did not allege that Ultimate claimed to be the *only producer* of carts like the "Ulti-Cart."[6]

In *Michael Taylor Designs, Inc. v. Travelers Property Casualty Company of America (Michael Taylor)* (N.D.Cal. 2011) 761 F.Supp.2d 904, 912, the court found potential disparagement where the insured "steered" customers to its allegedly inferior products after luring them in with pictures of the claimant's allegedly superior products. (See also *Towers Ins. Co. of New York v. Capurro Enterprises Inc.* (N.D.Cal. Apr. 2, 2012) 2012 U.S.Dist.LEXIS 46443, **35-36 [emphasizing the importance of the defendant steering customers to imitation products in finding disparagement].) Here, by contrast, there was no "bait and switch," nor any depiction of Dahl's "Multi-Cart" in an effort to trick consumers into thinking they were purchasing a "Multi-Cart." The out-of-state cases that Ultimate cites likewise are distinguishable. (*Acme United Corp. v. St. Paul & Marine Ins. Co.* (7th Cir. 2007) 214 Fed.Appx. 596, 599-601 [finding Acme implicitly disparaged all manufacturers of stainless steel scissors by claiming titanium blades were superior]; *Liberty Mut. Ins. Co. v. OSI Indus., Inc.* (Ind.App. 2005) 831 N.E.2d 192, 199 [finding disparagement

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[6] Ultimate states that it "only has one competitor with respect to the 'Ulti-Cart': Dahl's 'Multi-Cart.'" (AOB at p. 34.) Ultimate cites nothing in the record supporting that assertion and, indeed, none exists.

where the insured claimed rights to the Thermodyne oven, to which the claimant had rights].)

While these cases are factually distinguishable, they evidence the confusion that Ultimate's proffered holding would create. Each of these decisions allows courts to "imply" that a suit alleges disparagement, even if the operative pleading contains no allegation of any false, injurious statement about the claimant. By introducing the concept of "implied disparagement," forcing carriers and policyholders alike to guess as to when the level or type of competition becomes "disparagement," these decisions have created an unwieldy body of law that is internally inconsistent, contrary to basic duty-to-defend principles, and difficult to apply without judicial intervention into every insurance claim.

As noted above, "disparagement has a very specific meaning under California law," and refers to "the twin torts of trade libel and slander of title." (*Lindsey, supra,* 804 F.Supp. at p. 52.) California cases like *Total Call* and *Lamb* apply a plain language reading of the "disparagement" offense, as mandated by California law. "Disparagement" is "an injurious falsehood directed at the organization or products, goods or services of another." (Court of Appeal Decision, *supra,* 210 Cal.App.4th at p. 923 [quoting *Lamb, supra,* 100 Cal.App.4th at p. 1035].) In comparison, *Michael Taylor*, *E.Piphany*, *Burgett* and their ilk create a new category of "implied disparagement," whereby an insured's puffery about its *own*

products is deemed "implied" disparagement of the claimant's, even though the claimant makes no such accusation. In effect, these decisions allow the insured to rewrite the claims against itself for the purpose of securing a defense, a tactic California courts have rejected. (*Nichols, supra,* 169 Cal.App.3d at p. 774 ["As [the insureds] have no power to amend [the underlying] complaint, they cannot insert an essential allegation where none appears."]; see also *Kazi, supra,* 24 Cal.4th at p. 887; *Waller, supra,* 11 Cal.4th at p. 19.)

It is antithetical to the basic precepts of insurance law to premise coverage not on the claimant's actual allegations, but based on a hypothetical amended complaint, divined from the imagination of the insured. (*New Hampshire Ins. Co. v. R.L. Chaides Construction Co.* (N.D.Cal. 1994) 847 F.Supp. 1452, 1459 ["the potential [for coverage] must be real and not chimerical"].) In the most basic of senses, if the duty to defend is no longer found in the allegations against the insured, then there is no objectively rational means of determining when a potential for coverage exists and, concomitantly, no perceptible limit on the duty to defend.[7] This is what the Court of Appeal Decision meant when it said,

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[7] Taken to their logical extreme, Ultimate could use these cases to seek coverage in this case for "bodily injury" caused by an "occurrence," by asserting that the complaint might be amended to allege "bodily injury" and an "occurrence." Similar attempts at coverage-by-speculation have routinely failed. (*Upper Deck, supra,* 358 F.3d at pp. 615 [finding no duty

quite justifiably, that the ruling in *Charlotte Russe* "has no objectively reasonable basis." (210 Cal. App.4th at p. 924.)

This Court has an opportunity here to create a bright-line rule reaffirming that the duty to defend must be found in the allegations of the underlying plaintiff's actual claims, not in speculation over hypothetical ones, and that thereby restores order in an increasingly unprincipled and arbitrary area of the law. (*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 887 [77 Cal.Rptr.2d 107; 959 P.2d 265] [favoring a "'bright-line rule that, by clearly delineating the scope of risk, *reduces* the need for future litigation'" [citation omitted]].)

VI. EVEN IF DAHL HAD ACCUSED ULTIMATE OF "DISPARAGEMENT," HIS CLAIMS WOULD FALL INTO EXPRESS POLICY EXCLUSIONS

For the reasons set forth above, the Underlying Action did not assert a covered "disparagement" claim. Even if it had, however, express exclusions in the Policy would preclude coverage.

A. The Intellectual Property Exclusion Eliminates Coverage for Patent and Trademark Infringement, Trademark Dilution, and Misappropriation of Trade Secrets

In the Underlying Action, Dahl asserted claims for patent and trademark infringement, trademark dilution, and misappropriation of trade secrets. (JA Vol. 1 at pp. JA-102—JA-123.) The Policy, however,

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to defend where, "[t]o support a finding of potential liability, the plaintiffs would need to allege *new facts* of bodily injury."].)

excludes personal and advertising injury "[a]rising out of the violation of any intellectual property rights such as copyright, patent, trademark, trade name, trade secret, service mark or other designation of origin or authenticity." (JA Vol. 3 at JA-671 [Ex. 17], JA-741, JA-746.)

California courts routinely uphold similar intellectual property exclusions. (*Palmer v. Truck Ins. Exch.* (1999) 21 Cal.4th 1109 [90 Cal.Rptr.2d 647, 988 P.2d 568] [holding that, if the policy excludes trademark infringement, the enumerated offense for infringement of title or slogan only covers infringement of names of literary or artistic works or names that are slogans]; *Aloha Pacific, Inc. v. Cal. Ins. Guar. Assoc.* (2000) 79 Cal.App.4th 297 [93 Cal.Rptr.2d 148] [trademark exclusion precluded coverage for trade dress]; *Nestle USA, Inc. v. Travelers Cas. & Sur. Co. of America* (9th Cir. 2001) 2001 U.S.App.LEXIS 5253, at pp. **4-5 [10 Fed.Appx. 438].)

Accordingly, the Policy excludes coverage for Dahl's claims for patent and trademark infringement, trademark dilution, and misappropriation of trade secrets.

B. The "Failure to Conform" Exclusion Eliminates Coverage for False Advertising

Dahl also claimed that Ultimate engaged in false advertising, misrepresented the value or quality of its own products, and misled consumers. (JA Vol. 1 at JA-110—JA-111, JA-113.) The Policy, however,

excludes coverage for any personal and advertising injury "[a]rising out of the failure of goods, products or services to conform with any statement of quality or performance made in your 'advertisement' ...." (JA Vol. 3 at JA-671 [Ex. 17], JA-741, JA-746.)

The *Total Call* court construed that exclusion to "preclud[e] coverage for third party claims predicated on allegations that the insured's advertising misrepresented the quality or price of the insured's own products." (181 Cal.App.4th at p. 171.) Accordingly, the Policy excludes Dahl's claims that Ultimate engaged in false advertising, misrepresented the value or quality of its own products, and misled consumers.

C. The "Breach of Contract" Exclusion Eliminates Coverage for Dahl's Contract Claims

Finally, the Policy excludes coverage for personal and advertising injury "[a]rising out of any breach of contract, except an implied contract to use another's 'advertising idea' in your 'advertisement'" (JA Vol. 3 at JA-671 [Ex. 17], JA-741, JA-746.). This provision precludes coverage for Dahl's causes of action based on Ultimate's alleged breach of the two non-disclosure agreements. (JA Vol. 1 at pp. JA-115—JA-117.)

VII. IN THE EVENT OF REVERSAL, HARTFORD SHOULD HAVE AN OPPORTUNITY TO CONDUCT DISCOVERY ON ULTIMATE'S DAMAGES

Even if it determines that Hartford had a duty to defend the Underlying Action, the Court should not award the total defense fees and

costs that Ultimate has demanded, but should remand the action for a determination of the accuracy of the amounts requested and the reasonableness of Ultimate's attorneys' fees. (Bus. & Prof. Code § 6148(b) [attorney may only charge a fee that is reasonable in light of the circumstances of the case].) Because the trial court never ruled on those issues, they are not appropriately decided by an appellate court in the first instance.

VIII. CONCLUSION

The most basic and universal principle surrounding an insurer's duty to defend is that it is triggered by a suit against the insured seeking damages the policy may cover. Where the covered offense is not at issue in the underlying action, whether as a formal cause of action or in substance, it cannot be judicially "implied" into the complaint.

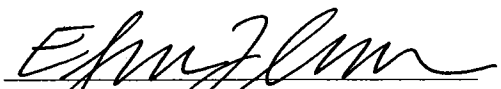
Under established California law, disparagement is the publication of a false statement about the characteristics of another's product. If an insurer's "disparagement" coverage can be invoked absent an allegedly false statement about the claimant's product, then "disparagement" has no objective meaning and there is effectively no workable standard for determining an insurer's defense obligation.

To rectify this increasingly arbitrary and unprincipled deviation from bedrock duty-to-defend principles, this Court should affirm the Court of Appeal Decision, disapprove *Charlotte Russe* and its ilk, and, in appellants'

words, "provide policyholders with clear conclusions of law with respect to when coverage for disparagement is triggered."

Date: August 12, 2013

TRESSLER LLP

By: 

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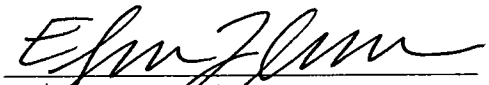
CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to California Rules of Court, Rule 8.520(c), the enclosed Answering Brief was produced using 13-point Roman type, including footnotes, and contains 9,163 words, which is fewer than the total words permitted by the Rules of Court. Counsel relied on the word count of the Microsoft Word program used to prepare this brief.

Date: August 12, 2013

TRESSLER LLP

By: 

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PROOF OF SERVICE

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

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

On August 12, 2012, I served the following document(s):

RESPONDENT'S BRIEF

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

SEE ATTACHED SERVICE LIST

☒ **BY MAIL** (CCP § 1013) - I deposited such envelope(s) for processing in the mailroom in our offices. I am "readily familiar" with the firm's practices of collection and processing correspondence for mailing. It is deposited with the U. S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of a party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

☒ **BY OVERNIGHT MAIL** (CCP § 1013(c)) - I placed said envelope(s) for collection by **FEDERAL EXPRESS** following ordinary business practices, at the business offices of Tressler LLP, for collection and processing of correspondence with said overnight mail service, and said envelope(s) will be deposited with said overnight mail service on said date in the ordinary course of business.

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

Executed this 12th day of August 2013 at Los Angeles, California.

Lisbed Espinoza

Lisbed Espinoza

SERVICE LIST

Hartford Casualty Insurance Company v. Swift Distribution, Inc.
Supreme Court of California, Case No. S207172
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Los Angeles County Superior Court – Central District Attn: Hon. Debre K. Weintraub Department 47 Stanley Mosk Courthouse 111 North Hill Street Los Angeles, CA 90012	(By U.S. Mail)
Clerk, Court of Appeal Second Appellate District, Division Three Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	(By U.S. Mail)