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.

REPLY 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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I. INTRODUCTION

This case seeks re-affirmance of an abundance of cases which have found that an insurer's defense duty is triggered when complaint allegations and extrinsic evidence allege disparagement by implication.

California law is clear that an insurer's defense obligation is **not** determined by the labeled causes of action, but by the allegations within the complaint and extrinsic evidence. *CNA Cas. of Ca. v. Seaborad Sur. Co.*, 176 Cal. App. 3d 598, 607 (1986). In fact, "California courts have repeatedly found that **remote facts buried within causes of action** that may potentially give rise to coverage are sufficient to invoke the defense duty." *See Pension Trust Fund for Operating Eng'rs v. Fed. Ins. Co.*, 307 F.3d 944, 951 (9th Cir. 2002).

The Court of Appeal in its decision styled as, *Hartford Cas. Ins. Co. v. Swift Distribution, Inc.*, [previously 210 Cal. App. 4th 915 (2012), 148 Cal. Rptr. 3d 679, *no longer considered published pursuant to* Cal. Rules of Court Rule 8.1105(e)(1)] (the "*Hartford* Decision") ignored well settled principles of California law, ignored the complaint allegations and the extrinsic evidence provided to it by Ultimate evidencing allegations of disparagement by implication. The *Hartford* Decision disagreed with a recently published decision, *Travelers Prop. Cas. Co. of Am. v. Charlotte Russe Holding, Inc.*, 207 Cal. App. 4th 969 (2012), which found an insurer's duty to defend was triggered by allegations of price reductions to a premium brand in a manner which implied the brand was inferior and ordinary, which created the potential for coverage for disparagement by implication. The *Hartford* Decision erroneously concluded that disparagement by implication is not potentially covered. *Hartford*

Decision, 148 Cal. Rptr. 3d at 689. This position, however, is not supported by California coverage law.

Although Hartford's brief takes the Court in numerous directions and addresses issues not in the petition for review granted by this court, when the superfluous layers of Hartford's brief are set aside, Hartford's main argument is that coverage for disparagement requires a disparaging statement that specifically names Dahl or its Multi-Cart product, and that the numerous courts that have found coverage for disparagement by implication were all wrongly decided and should be overruled, including *Charlotte Russe*.

Hartford's relies on *Total Call Int'l, Inc. v. Peerless Ins. Co.*, 181 Cal. App. 4th 161, 169 (2010) in support of its erroneous position. Hartford's reliance on *Total Call* is misplaced, as explained by numerous courts that have distinguished *Total Call* or declined to follow it.[1] The few remaining cases cited by Hartford in support of its position are all distinct.

Both California state and federal courts have come down on the side of policyholders, holding that for coverage purposes, an insurer's duty to defend is triggered if the underlying action alleges disparagement by

[1] *Travelers Prop. Cas. Co. of Am. v. Charlotte Russe Holding, Inc.*, 207 Cal. App. 4th 969, n.8 (2012); *Infor Global Solutions, Inc. v. St. Paul Fire & Marine Ins. Co.*, 686 F. Supp. 2d 1005, 1007 (N.D. Cal. 2010); *Burgett, Inc. v. American Zurich Ins. Co.*, 830 F. Supp. 2d 953, 963 (E.D. Cal. 2011); *JAR Labs. LLC v. Great Am. E&S Ins. Co.*, --F. Supp. 2d--, 2013 WL 1966386, n.6 (N.D. Ill. May 10, 2013); and *Tria Beauty, Inc. v. National Fire Ins. Co.*, No. C1205465, 2013 WL 2181649, at *4 (N.D. Cal. May 20, 2013).

implication.[2] Yet, Hartford would have this Court conclude that all these cases are an "aberration." Resp't Answering Br. at 1, Aug. 12, 2013.

Hartford's defense duty is triggered because the allegations of the Underlying *Dahl* Action and extrinsic evidence reveal that Dahl alleges Ultimate advertised its "Ulti-Cart" product which is very similar in name, style and functionality, as Dahl's "Multi-Cart," as superior and claimed to hold proprietary rights to Dahl's product. The reasonable implication of such statements is Dahl's Multi-Cart is inferior and Dahl must not hold the proprietary rights to its own product and thus Dahl is misleading its consumers. Dahl also alleges that Ultimate advertised its product in such a way that consumers were falsely advised the Ultimate's Multi-Cart product was sponsored by or affiliated with Dahl's "Multi-Cart," influencing customers purchasing resulting in damage to Dahl's reputation, goodwill and loss of business. These allegations are sufficient to trigger Hartford's defense duty.

Hartford's attempts to distract this Court by arguing that Ultimate has relied on contrived facts or is speculating about facts so as to create

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[2] *See e.g., E.piphany, Inc. v. St. Paul Fire & Marine Ins. Co.*, 590 F. Supp. 2d 1244, 1253-54 (N.D. Cal. 2008); *Infor Global Solutions, Inc. v. St. Paul Fire & Marine Ins. Co.*, 686 F. Supp. 2d 1005, 1007 (N.D. Cal. 2010); *Burgett, Inc. v. Am. Zurich Ins. Co.*, 830 F. Supp. 2d 953 (E.D. Cal. 2011); *Michael Taylor Designs, Inc. v. Travelers Prop. Cas. Co. of Am.*, 761 F. Supp. 2d 904, 911-912 (N.D. Cal. 2011); *Travelers Prop. Cas. Co. of Am. v. Charlotte Russe Holding, Inc., et al.*, 207 Cal. App. 4th 969, 978 (2012), *reh'g denied* (July 31, 2012); *Tria Beauty, Inc. v. National Fire Ins. Co. of Hartford*, 2013 WL 2181649, at *4 (N.D. Cal. May 20, 2013); *JAR Labs. LLC v. Great American E&S Ins. Co.*, --F. Supp. 2d--, 2013 WL 1966386, at *5 (N.D. Ill. May 10, 2013); *Pennifield Oil Co. v. American Feed Indus. Ins. Co. Risk Retention Grp., Inc.*, No. 8:05CV315, 2007 WL 1290138, at *8 (D. Neb. Mar. 12, 2007); *Liberty Mut. Ins. Co. v. OSI Indus., Inc.*, 831 N.E.2d 192, 199 (Ind. Ct. App. 2005).

coverage fails. Notwithstanding Ultimate's reliance on facts solely derived from the *Dahl* Action as evident by Ultimate's briefing, Hartford's inability to provide one example of a fictitious fact in Ultimate's briefing establishes that Hartford's assertions are meritless.

Hartford's brief, moreover, does not address, acknowledge or distinguish the vast number of cases that have found that an insurer's defense duty can be triggered if there is disparagement by implication. Instead, Hartford asserts **all** these decisions were wrongly decided.

The Court of Appeal and Hartford, both refused to address extrinsic evidence, which included Ultimate's advertisement about the product at issue, stating, "Ultimate Support designs and builds **innovative, superior products**," Ultimate's products are "**unique** support solutions that are crated with **unparalleled innovation and quality and accompanied by superior customer service**," and that the Ulti-Cart has "**patent-pending** folding handles and levers." (JA Vol. 1, Ex. 11, 152 & 241; Vol. 2, Ex. 11, 281 & 292-93); *Hartford* Decision, 148 Cal. Rptr. 3d at 685. Collectively, Ultimate unambiguously asserts that its products are better than those provided by the only other competitor (i.e., Dahl) and are exclusively available through Ultimate due to the "patent-pending" product parts and design. These statements constitute disparaging statements that implicitly reference Ultimate's one and only competitor, Dahl, triggering Hartford's defense obligations.

Hartford also asserts that its defense duty is barred by application of several exclusions. Even if the Court of Appeal had ruled on the issue of exclusions and said issues were before the Supreme Court, which they are not, none of the exclusions cited by Hartford bar its defense duty.

Lastly, by wrongfully refusing to defend Ultimate in the *Dahl* Action, Ultimate is entitled to reimbursement of defense costs incurred defending the *Dahl* Action, which are presumed reasonable and necessary.

This case provides an opportunity for the Court to:

- Re-affirm the plethora of cases which have recognized that an insurer's duty to defend is broad and as long as there is a "bare 'potential' or 'possibility' of coverage," an insurer's defense duty is triggered. *Montrose Chem. Corp. v. Superior Court*, 6 Cal. 4th 287, 299-300 (1993);

- Conclude that coverage under a liability insurer's policy's "disparagement" offense is triggered when the complaint allegations and/or extrinsic evidence, no matter how "groundless, false or fraudulent" *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 19 (1995), allege disparagement by implication, where the claimant asserts the insured is falsely claiming in its advertising, that its product is superior, that it is the originator, producer, or importer of said product, or holds proprietary rights to said product, and which then results in consumer confusion, reputational injury and loss of business;

- Affirm that the *Charlotte Russe*, 207 Cal. App. 4th at 969 decision is good law; and

- Conclude that where an insurer acknowledges there is an implied reference to the claimant's product in the insured's statements, the Court cannot ignore the insurer's admission and can rely on same to find in favor of coverage.

II. UNDER CALIFORNIA LAW, AN INSURER OWES A BROAD DUTY TO DEFEND ITS INSURED

An insurer owes a broad duty to defend its insured. *CNA Cas.*, 176 Cal. App. 3d at 610. In *Montrose*, 6 Cal. 4th at 299-300, this court confirmed that "a bare 'potential' or 'possibility' of coverage" is enough to trigger a defense duty and "any doubt as to whether facts give rise to a duty to defend is resolved in the insured's favor." The insurer "bears a duty to defend its insured **whenever** it ascertains facts which give rise to the **potential** of liability under the policy." *Paramount Props. Co. v. Transamerica Title Ins. Co.*, 1 Cal. 3d 562, 571 (1970). (Bold provided). *See also, Scottsdale Ins. Co. v. MV Transp.*, 36 Cal. 4th 643, 654 (2005) ("That the precise causes of action pled by the third-party complaint may fall outside policy coverage does not excuse the duty to defend where, under the facts alleged, **reasonably inferable**, or otherwise known, the complaint could fairly be amended to state a covered liability."); *Waller*, 11 Cal. 4th at 19 (An insurer has a duty to defend even if the claims against the insured are "'groundless, false, or fraudulent.'").

For Hartford to deny coverage, it bears the burden of establishing that the *Dahl* Action "can by no conceivable theory raise a single issue which could bring it within the policy coverage." *Montrose*, 6 Cal. 4th at 300.

The labels given to particular causes of action in the underlying complaint are not determinative as to the duty to defend, rather the core inquiry is whether the alleged facts or extrinsic facts could potentially support a claim within the terms of the policy. *CNA Cas.*, 176 Cal. App. 3d at 605 & 607. In *Hudson Ins. Co. v. Colony Ins. Co.*, 624 F.3d 1264, 1267 (9th Cir. 2010) the Ninth Circuit confirmed that California law does not

require an underlying plaintiff to plead all elements of a cause of action in order to trigger a duty to defend.

Hartford claims *Charlotte Russe* and all other cases cited by Ultimate that stand for the proposition that an insurer's defense duty is triggered when the underlying action and/or extrinsic evidence allege disparagement by implication, have "unmoor[ed]" the duty to defend and should be overruled, is illogical. Resp't Answering Br. at 3, Aug. 12, 2013. These decisions have not "strayed from bedrock principles that have governed the duty to defend for decades," *Id.* because each decision is based on well-settled principles of duty to defend law.

As long as Dahl has made **factual allegations** that could **possibly** trigger Hartford's defense duty, which it has, Hartford had a contractual obligation to defend Ultimate. In order to avoid its defense obligation, Hartford must establish—through **undisputed, conclusive evidence**—that the *Dahl* Action can, by no conceivable theory, raise a single issue which could bring the *Dahl* Action within policy coverage.

III. THE *DAHL* ACTION ALLEGES FACTS WHICH TRIGGER POTENTIAL COVERAGE FOR DISPARAGMENT BY IMPLICATION

A. A Potentially Covered "Disparagement" Claim Does Not Require a Disparaging Statement Specifically Naming the Disparaged Party or Product; Disparagement by Implication is Enough to Trigger Coverage

The crux of Hartford's argument is that for an insurer's defense duty to be triggered under the "disparagement" offense, "publication of injurious material that makes 'specific reference' to a person's products or services" is required. *Id.* at 2 & 10 citing to *Total Call.* Hartford, however, misunderstands California law and portrays the holding in *Total Call* over-

broadly: every Court that has subsequently addressed *Total Call* has explained that *Total Call* applies where there is **no** reference, either explicitly or implicitly, to the plaintiff.

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 or its product. The Court in *Total Call* merely held that under the facts of that case, a phone card company's false advertisements regarding its own cards' number of minutes per dollar did not explicitly or implicitly disparage competitors' phone cards. *Total Call,* 181 Cal. App. 4th at 169.

The Court explained that the underlying plaintiff IDT alleged that "TCI's offending advertisements and voice prompts falsely 'communicate[d] to consumers that they [would] receive [a] certain number[ ] of minutes for a certain cost.'" *Id.* at 171. The Court found that this type of communication by itself with no other facts or allegations, "carries *no* implication that IDT's comparable cards cost more or less than TCI's cards..." *Id.* (Bold provided) In *Total Call* 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 defendant was claiming its product was better than a specific competitor, since that industry has a large number of competitors and there was no comparative statement. *Id.* at 170.

Here, Dahl and Ultimate are the only two competitors of a specialized product that markets to and sells to the same purchasers. Thus, when Ultimate advertises a proprietary product that is similar to Dahl's product in name, style, functionality, and Ultimate claims its product is

superior, and it has proprietary rights to the product, resulting in reputational damage, confusion in the marketplace, and loss of business to Dahl, disparagement by implication is alleged.

The inapplicability of *Total Call* to the facts of this case is illustrated in *Infor Global Solutions, Inc. v. St. Paul Fire & Marine Ins. Co.*, 686 F. Supp. 2d 1005, 1007 (N.D. Cal. 2010), wherein the Court distinguished *Total Call*, stating:

> **In contrast to *Total Call*, the Court here found that the allegations in the underlying complaint referred disparagingly to a competitor by clear implication.** . . . 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....

Likewise, the facts of this case are different from *Total Call* and more analogous to the facts in *Infor Global.* Despite failing to name Dahl or Multi-Cart specifically, the reasonable implication here is that Ultimate's statements referred to Dahl because Dahl alleges that it, as the only direct competitor of Ultimate, has been financially damaged as a result of Ultimate's false statements that Ultimate's products superior and are sponsored, approved or connected with Dahl's products. Further, Dahl alleges Ultimate's comparative statements have caused confusion in the marketplace, damage to its reputation and pecuniary damages.

Another case that distinguished *Total Call* is *Burgett, Inc. v. American Zurich Ins. Co.*, 830 F. Supp. 2d 953, 962 (E.D. Cal. 2011),

where the Court clarified that an insurer has a duty to defend where there is 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***....
>
> ...
>
> 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**. In both cases, the underlying plaintiff alleged that the party seeking defense falsely advertised the benefits of their products, which, in turn, deceived consumers, detrimentally affecting the reputation and goodwill of the market for that product type generally and the underlying plaintiffs specifically.... *Total Call,* 181 Cal.App.4th at 165–166, 104 Cal.Rptr.3d 319. [...]
>
> ...
>
> 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]

Likewise here, Ultimate's advertisement claims its Ulti-Cart is superior: "Ultimate Support designs and builds **innovative, superior products**," Ultimate's products are "**unique** support solutions that are crated with **unparalleled innovation and quality and accompanied by superior customer service**," and that the Ulti-Cart has "**patent-pending** folding handles and levers." (JA Vol. 1, Ex. 11, 152 & 241; Vol. 2, Ex. 11, 281 & 292-93). The clear implication of these statements is that Dahl's

Multi-Cart is inferior, and that Dahl does not have proprietary rights to its product. These statements are not puffery but can be proved or disproved.

Hartford accuses Ultimate of speculating about facts, when in fact, Hartford's brief is replete with unsupported claims and conclusions that have no basis in fact or law. For example, Hartford's declaration that Ultimate's advertisements created a "favorable impression of Dahl's cart by deeming it worthy of copy" is contrary to Dahl's allegations. (JA Vol. 1, Ex. 11, 110-114). Harford cites to *Homedics, Inc. v. Valley Forge Ins. Co.*, 315 F.3d 1135 (9th Cir. 2003) for the proposition that copying a competitor's product is not disparagement but a form of flattery. Hartford does not attempt to reconcile its position with the facts of the case. If, as Hartford claims, Ultimate's copying of Dahl's product is a positive thing for Dahl and a form of flattery, why is Dahl alleging reputational injury? A company or product's reputation can only be injured by negative [disparaging] statements, not positive and flattering statements.

Further, *Homedics* is distinct because it is a patent infringement case where Homedics allegedly imitated Nikken's products and was accused of patent infringement for offering to sell the allegedly imitated products. *Id.* at 1137. The only two disparagement cases that have cited to *Homedics,* have both distinguished it. *Michael Taylor Designs*, 761 F. Supp. 2d at 911 explained the inapplicability of *Homedics* in disparagement coverage cases:[3]

> Relying first on a *patent* infringement case, Travelers asserts that the very nature of a claim based on imitation of another's

[3] *Hyundai Motor Am. v. National Union Fire Ins. Co.*, 600 F.3d 1092, 1100 (9th Cir. 2010) (Court distinguished *Homedics* finding in favor of coverage where there are allegations of violation of a method patent involving advertising ideas).

> product forecloses any disparagement. "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." *Homedics, Inc. v. Valley Forge Ins. Co.*, 315 F.3d 1135, 1142 (9th Cir.2003). There was no suggestion in *Homedics,* however, that the defendant had ever advertised its "imitation" products in a way that would lead consumers to believe that they were the originals. Thus, the imitation in *Homedics* indeed could only have been "flattery" that in no way reflected badly on the reputation of the plaintiff's products.

Here, Ultimate is accused of publishing advertising that depicts the competing products in such a way as to mislead the consumer into believing that Ultimate's products are superior to Dahl's and/or affiliated with or sponsored by Dahl. Explicit in the allegations against Ultimate is the claim that such publications are untrue and that the statements implicitly disparage Dahl's products by comparison, causing reputational injury and monetary damages. This is enough to trigger a potential for coverage.

The remaining cases relied upon by Hartford are likewise distinct:

- *Nichols v. Great American Ins. Cos.*, 169 Cal. App. 3d 766 (1985):

Nothing in *Nichols* suggests a disparaging statement must expressly name a particular product or company in order to constitute trade libel. In *Nichols*, while the Court did not find coverage for trade libel under the specific facts of that case, its definition of trade libel is instructive:

> '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....'

Id. at 773.

The Court also stated:

> In such circumstances, it is incumbent upon the plaintiff to plead by **innuendo** the facts showing the defamatory meaning of the statements.

Id. at 775.

- *Atlantic Mut. Ins. Co. v. J. Lamb*, 100 Cal. App. 4th 1017 (2002):

This case does not aid Hartford, which cites the decision for the proposition that "'disparagement' has been held to include statements *about* a competitor's goods that are untrue or misleading...." Resp't Answering Br. at 10, Aug, 12, 2013. The Court does not state that the statement must specifically name the competitor. A statement may impliedly be "about" a competitor or its products.

- *Microtec Research, Inc. v. Nationwide Mut. Ins. Co.*, 40 F.3d 968, 972-73 (9th Cir. 1994):

The *Microtec* decision does not establish that a disparaging statement must expressly mention a competitor or its product. Instead, the case supports the proposition that a false statement touting one's own product is not actionable as trade label if it neither directly nor impliedly disparages the quality of a competitor's products. *Microtec* is factually distinguishable because therein the plaintiff specifically chose not to include allegations of potentially covered wrongful conduct, did not produce advertisements which were arguably disparaging and did not produce any evidence of suffering damages because of the advertisements. *Microtec*, 40 F.3d at 970.

The Ninth Circuit in *Hudson,* 624 F.3d at 1269, **distinguished** *Microtec,* stating:

> Contrary to Colony's assertion, however, *Microtec* does not

> "stand [ ] for the principle that where the plaintiff acknowledges the existence of facts that could give rise to a cause of action but consciously avoids asserting that cause of action," there is no duty to defend. Rather, we relied once again on the absence of any *factual* allegations in the complaint. See *Microtec*, 40 F.3d at 971. We noted that the third-party plaintiff "did not aver that [the insured] had said anything negative about Green Hills" and that "[t]he complaint conspicuously and carefully omit[ted] to allege any wrongdoing with respect to the[ ] [disparaging] advertisements." Id. There was extrinsic evidence about disparaging advertisements, but the third-party plaintiff did not refer to those advertisements in its complaint at all-including any factual allegations. *See id.* at 970-71.

Even more recently, *Michael Taylor*, 761 F. Supp. 2d at 911-12, distinguished *Microtec* stating that in *Microtec* there were no allegations of damage to the reputation of the goods.

- *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1046 (1986):

This case is not an insurance coverage action interpreting policy language. *Blatty* supports Ultimate's position, because it requires that the injurious falsehood either expressly refer to the person or product or refer to the person or product **by reasonable implication**.

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

Stands for the relatively narrow proposition that "palming off" or simply copying another company's goods, even if the copies are of an inferior quality, does not comprise disparagement. The *Aetna* court had no occasion to consider whether a statement indirectly disparaging a competitor might give rise to coverage.

Hartford also cites to a number of cases that are clearly inapplicable and inapposite:

Kazi v. State Farm Fire & Cas. Co., 24 Cal. 4th 871 (2000)(property damage case); *Lindsey v. Admiral Ins. Co.*, 804 F. Supp. 47 (N.D. Cal. 1992)(court found no disparagement for allegations of sexual harassment); *Tinseltown Video, Inc. v. Transportation Ins. Co.*, 61 Cal. App. 4th 184 (1998)(allegations of trespass did not trigger personal injury coverage); *American Motorists Ins. Co. v. Allied-Sysco Food Services, Inc.*, 19 Cal. App. 4th 1342 (1993)(allegations of gender discrimination not disparagement).

B. Cases Decided Since The *Charlotte Russe* and *Hartford* Decisions Continue to Find That An Insurer Has A Duty To Defend Where The Underlying Complaint And Extrinsic Evidence Allege Potentially Covered Disparagement By Implication

Hartford summarily disregards state and federal cases that continue to find that that an insurer has a duty to defend where the underlying complaint alleges potentially covered disparagement by implication, by boldly and without support, concluding that each one of these decisions have disregarded "core duty-to-defend principals and should be disapproved."[4] Resp't Answering Br. at 32-33, Aug. 12, 2013.

On the contrary, in each case, the Court found in favor of coverage for potentially covered disparagement by implication, basing its reasoning on sound and settled California law. None of these cases have been overruled. Hartford would have this Court believe that over a dozen state and federal cases were all wrongly decided, all the courts disregarded "core duty-to-defend principals" and that only *Total Call* (which is factually

[4] The decisions Hartford is referring to are the same as referenced in footnote 2.

distinct but also acknowledges that disparagement by implication triggers a defense) was correctly decided.

A summary of recent cases confirms that Courts continue to find in favor of coverage where there are allegations of disparagement by implication.

In *Tria Beauty, Inc. v. National Fire Ins. Co. of Hartford*, No. C1205465, 2013 WL 2181649, *1 (N.D. Cal. May 20, 2013), decided after Ultimate submitted its opening brief, the Northern District of California, when confronted with conflicting authority, and facts very similar to this case, followed the reasoning in *Charlotte Russe* and found in favor of coverage under the policies' disparagement offense and declined to follow *Total Call*.

In *Tria,* the underlying plaintiff, Radiancy, a competitor of the insured, Tria Beauty, alleged:

> Tria made false and misleading statements in advertisements about *its own* Tria Hair and Tria Skin products, and that these statements damaged Radiancy. Radiancy challenged Tria's advertising claims that:...The Tria Hair product is equivalent to professional laser hair removal, The Tria Hair producut is the "first" and "only" at-home laser hair removal device cleared by the FDA, The Tria Skin product is "faster," "superior," "more powerful" and more "advanced" than other acne treatment products on the market...

Id. at *3.

The insurers denied coverage, arguing "...that Radiancy only objected to Tria's claims about its own products, and thus did not allege that Tria 'referred to' or **'disparaged'** Radiancy's products." *Id.* This is the same argument Hartford is making herein. The Court disagreed, finding in

favor of the insured:

> Whether this language applies to implied disparagement depends on the outcome of a battle of authorities evaluating the same language. Tria cites *Travelers Prop. Cas. Co. v. Charlotte Russe Holding, Inc.*, 207 Cal.App.4th 969, 976–80, 144 Cal.Rptr.3d 12 (2012), for the proposition that an insurer's duty to defend is triggered by an underlying complaint alleging disparagement by implication, even when claims of superiority are made by an insured about its own product. Travelers cites *Total Call Int'l, Inc. v. Peerless Ins. Co.*, 181 Cal.App.4th 161, 104 Cal.Rptr.3d 319 (2010), for the proposition that the duty to defend is triggered by an underlying complaint alleging facts which would support a tort claim for trade libel, and that trade libel requires a statement "that specifically refers to the plaintiff and derogates the quality of its products or services."...
>
> ...
>
> This order finds in favor of Tria on this issue. The question raised by the conflicting authorities is whether the policy language included coverage for claims that sounded in disparagement in the broader sense of injurious falsehoods, as opposed to a narrower category of claims that met the pleading requirements for trade libel....
>
> ...
>
> The insurers' assertion of *Total Call,* moreover, is unpersuasive for two reasons. *First, Total Call* is distinguishable on its facts. *Total Call* found that the insured's advertisements did not implicitly comment on the third-party's products in the underlying action. Thus, *Total Call's* reasoning falls outside the implied disparagement context. *See* 181 Cal.App.4th at 171, 104 Cal.Rptr.3d 319.
>
> *Second, Total Call* reached its holding by drawing on the California Supreme Court's decision in *Blatty v. New York Times Co.* ., 42 Cal.3d 1033, 1042, 232 Cal.Rptr. 542, 728 P.2d 1177 (1986). *Blatty* held that, due to First Amendment concerns, torts that turn on an injurious false statement require that the statement specifically refer to, or be 'of and concerning' the plaintiff in some way. *Total Call* therefore reasoned that disparagement in the policy did not apply to an advertisement that did not (impliedly or otherwise)

specifically refer to the third party. *See* 181 Cal.App.4th at 171, 104 Cal.Rptr.3d 319. *Blatty,* however, was not an insurance coverage action interpreting policy language. Rather, it ruled on the sufficiency of a complaint against a general demurrer. By applying *Blatty* in the insurance coverage context, *Total Call* imported an exclusion into the policy language that the underlying claim must be meritorious. There was no such limitation the policy language in *Total Call,* nor is there here.

Charlotte Russe recognized that a non-meritorious underlying action does not preclude coverage:

> [E]ven if it were true that [the third party] claim against the [insured] parties could not be viable without alleging all the elements of a trade libel cause of action, as Travelers argues ... the result here would be no different. The insurer's duty to defend is not conditioned on the sufficiency of the underlying pleading's allegations of a cause of action; that is an issue for which the policy entitled the [insured] parties to an insurer-funded defense. The fact that [the insurer] may have known of a good defense, even an ironclad one, to the [underlying] claim did not relieve it of its obligation to defend its insured.

207 Cal.App.4th at 979–80, 144 Cal.Rptr.3d 12 (citations and quotation marks omitted). As the above-cited quotation reflects, Travelers has lost this same battle before. **This order adopts *Charlotte Russe's* reasoning and finds that the disparagement policy language at issue here covered implied disparagement claims based on statements about the insured's own products.**

Id. at *4-6. (Bold provided).

Under the *Tria* Court's reasoning, Ultimate's claims of superiority, as reflected in its advertisement along with allegations of consumer confusion, reputational injury, and loss of business are sufficient to allege disparagement by implication and trigger Hartford's defense duty.

In *JAR Lab. LLC v. Great Am. E&S Ins. Co.*, --F. Supp. 2d--, 2013 WL 1966386 (N.D. Ill. May 10, 2013), the Court again found in favor of coverage under facts relevant to this case. Therein, TPU, the underlying plaintiff, "created and manufactured a product called "Lidoderm." *Id.* at *2. JAR's advertising introduced JAR's product as a:

> [n]ew over-the-counter pain relief patch, LidoPatch, which contains the same active ingredients as the leading prescription patch. . . . Like the prescription brand, LidoPatch will provide relief for up to 24 hours. . ."

Id. at *3.

The Court stated:

> The question turns on whether the underlying complaints can reasonably be read to allege that plaintiff published statements "disparaging" Lidoderm. Defendant insists that they cannot, arguing that the statements on which TPU bases its claims relate only to plaintiff's own product....

Id. at *4.

The Court found that coverage did exist, reasoning:

> To begin, on its face the underlying complaint alleges that plaintiff's statements communicated "false/misleading messages" *about Lidoderm.* . . . **That plaintiff's statements did not identify Lidoderm by name is immaterial,** a point underscored by TPU's allegations about plaintiff's "messages." **Whatever words plaintiff used, TPU clearly understood (and alleges that "a substantial segment of consumers" would likewise believe**, GAIC App. 065) **that plaintiff's implicit "message" was *about* Lidoderm.**
>
> . . .
>
> This does not end the question, of course, since the alleged statements must also portray Lidoderm in a negative light to qualify as disparagement. Plaintiff argues that statements portraying LidoPatch—an allegedly inferior product—as equivalent to Lidoderm meet this test, citing *Acme United Corp. v. St. Paul Fire & Marine Ins. Co.*, 214 Fed.App. 596, 2007 WL 186247 (7th Cir.2007) ("[d]isparage means 'to discredit or bring reproach upon by comparing with

> something inferior.' " (citations) ("a misleading comparison to a specific competing product necessarily diminishes that product's value in the minds of the consumer."). Defendant strains to distinguish *Acme* on the ground that the underlying complaint in that case asserted statements that the insured's product was "superior" to its competitors' rather than merely "equivalent" to them, as here. I agree with plaintiff, however, that a statement equating a competitor's product with an allegedly inferior one is logically indistinguishable from, and no less disparaging than, a statement describing one's own product as "superior" to the competitors'.
>
> In addition, TPU alleges that plaintiff's statements have "damage[ed] Lidoderm's goodwill," and "divert[ed] Lidoderm sales." GAIC. App 057. This bolsters the conclusion that the allegedly misleading statements disparaged Lidoderm.

Id at *5-6.

Following the *JAR* court's reasoning, the allegations of the *Dahl* Action trigger Hartford's defense duty because Dahl' is alleging that Ultimate is claiming its product is superior to Dahl's in its advertising. Thus, it is reasonable to conclude that the consumers purchasing Ultimate and Dahl's products would believe that Ultimate's "messages" were about Dahl, as in *JAR.*[5]

In *Safety Dynamics, Inc. v. General Star Indem. Co.*, 475 F. App'x 213, 214 (9th Cir. 2012), the Ninth Circuit found:

> Because the underlying action only alleges that Safety Dynamics made misrepresentations about its own product, General Star argues, it does not satisfy the Lanham Act's requirement of "misrepresent[ing] ... another person's goods

[5] *See also, Nat'l Union Fire Ins. Co. v. Seagate Techs., Inc.*, 466 F. App'x 653, 655 (9th Cir. 2012)(Even if no superiority claims, false claims of "equivalence" is disparaging).

> [or] services." 15 U.S.C. § 1125(a)(1)(B).... **Disparagement is** "[a] derogatory comparison of one thing with another," or "[a] **false and injurious statement that discredits or detracts from the reputation of another's ... product**." Black's Law Dictionary 538 (9th ed.2009). The complaint alleges that Safety Dynamics's false claims about its own product had the result of misleading consumers because it made Safety Dynamics's product look better versus ShotSpotter's. This is sufficient to state a covered claim for product disparagement, at least in the context of the duty to defend.... (bold provided)

Likewise, here Ultimate's allegedly false claims about its product triggers coverage.

C. The *Charlotte Russe* Decision is Based on Sound Principles of California Coverage law

The Court of Appeal in *Charlotte Russe*, 207 Cal. App. 4th at 969 found that an insurer owed a duty to defend where, like this case, there was no labeled cause of action for disparagement.

The *Hartford* Court had no basis for disregarding the *Charlotte Russe* decision and concluding it was wrongly decided and illogical. The *Charlotte Russe* Court correctly acknowledged that an insurer's duty to defend is very broad and as along as any potential for coverage is evident, regardless of how groundless, false or fraudulent the claim may be, the insurer's defense duty is triggered, stating:

> 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, stating:

> 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.

Hartford's argument that *Charlotte Russe* is nevertheless distinguishable because the facts are not the same as in this case, is meritless. 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 there was no labeled cause of action for disparagement and there

were no explicit references to the disparaged products, only an implied reference.

The facts of this case are even more favorable to a finding of coverage, as here 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.

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 and ignore the *Charlotte Russe* decision.

IV. HARTFORD'S SPECULATION ARGUMENT IS NONSENSICAL AND AN ATTEMPT TO CONFUSE THE ISSUES AND MISDIRECT THE COURT

Hartford takes issue with Ultimate's use of the term "implied disparagement" by claiming it refers to an implied claim instead of implied identity in order to avoid a defense duty. Ultimate, however, used the term "implied disparagement" –as the phrase is commonly used– to refer to the fact that Dahl claims that Ultimate's statements were **about** Dahl's products by implication since Dahl and Ultimate are the only two producers of the competing products.

Ultimate uses the term "implied disparagement" to differentiate the facts here from cases where there is "express disparagement". In the duty to defend context, potential coverage for "express disparagement" claims is easily resolved. "Implied disparagement" claims, like the one at issue here, require more. Ultimate's core premise is that the Underlying Action and extrinsic evidence contain allegations and facts showing that Dahl alleged a

disparagement by implication claim that was potentially covered under the Hartford policy. Ultimate's understanding comports with well-settled California law regarding the potential for coverage standard.[6]

A review of Hartford's brief shows that Ultimate's position is well-founded and supported. Hartford admits that disparagement is found where: 1) Ultimate made statements about Dahl's product, 2) the statements derogated Dahl's product, and 3) Dahl was damaged by the statements and **not** by competing sales. Resp't Br. at 19, fn. 4, Aug. 12, 2013. This is Hartford's spin on the elements of disparagement.[7] Ultimate has shown it presented evidence that satisfied each of these while Hartford asserts that such evidence is simply speculation.

Ultimate relies on the following allegations and extrinsic evidence in support of its contention that Hartford's defense duty was triggered where Dahl alleges that Ultimate published false material, including in advertising, comparing Ultimate's product to Dahl's product by reasonable implication, thus injuring Dahl's reputation and resulting in damages:

---

[6] Hartford's claim that Ultimate misconstrues the duty to defend standard is not supported by any of the cases cited by Hartford. Hartford's citation to numerous duty to defend cases does not change the fact that Ultimate provided complaint allegations and extrinsic facts showing there was a potential for coverage because Dahl claimed the identity of its product was implied by Ultimate's statements about its own product, which resulted in disparagement of Dahl's products and damages to Dahl.

[7] Hartford must change the actual elements in order to utilize the case law it cites. Each of the cases supporting Hartford's argument address factual situations where the complaint allegations and extrinsic facts did not show that the insured faced liability for disparagement because the identity of the plaintiff could not be implied. Here, the complaint allegations and extrinsic facts show that Dahl was making a claim that Ultimate's statements were about Dahl's products by implication.

- Complaint allegations: JA Vol. 1, Ex. 11, 111-13;
- Application for Temporary Restraining Order and Motion for Preliminary Injunction and Supporting Papers: JA Vol. 1, Ex. 11, 177-84,198.
- Ultimate's advertisement for its "Ulti-Cart," which describes the product at issue: JA Vol. 1, Ex. 11, 152 & 241
- Pertinent discovery from the Underlying Action: JA Vol. 1, Ex. 11, 252-55; Vol. 2, Ex. 11 281 & 292-93.

Contrary to Hartford's assertion, Ultimate is not claiming it is entitled to a defense based on a possible amendment of the complaint or imagined facts. Every argument in favor of coverage made by Ultimate is supported by a citation to the underlying allegations and/or extrinsic evidence. Hartford, on the other hand, does not direct the court to one alleged specific unsupported allegation made by Ultimate.

Hartford cites to *Gunderson v. Fire Ins. Exch.*, 37 Cal. App. 4th 1106, 1114 (1995) for the proposition that speculation about facts cannot trigger coverage. Hartford's reliance on *Gunderson* is misplaced because the plaintiff therein never incorporated any claims for property damage into her complaint and the extrinsic evidence that may have shown a potential for coverage was not provided to the insurer.

The Ninth Circuit, in *Hudson*, 624 F.3d at 1267-70, addressed the insurer's speculation argument and the *Gunderson* case and dismissed it:

> Colony first argues that the district court should be reversed because "[n]o such claim [of slogan infringement] was made in the complaint and California law precludes a court or insured from speculating about unpled claims to manufacture a potential for coverage." ...California law "the insurer's duty is not measured by the technical legal cause of action pleaded in the underlying third party

> complaint, but rather by the potential for liability under the policy's coverage as revealed by the facts alleged in the complaint or otherwise known to the insurer." . . .
>
> Colony argues that the *Gunderson* line of narrow "speculation" cases supports its argument that the NFL complaint did not potentially state a cause of action for slogan infringement. These cases do not support Colony's argument. These cases concluded that there was no potential for coverage, not because the complaint did not list a particular legal cause of action, but because the complaint did not allege any facts supporting a covered cause of action.

Ultimate relies entirely on the fact allegations in the *Dahl* Action and extrinsic evidence, there is no speculation.

Instead of citing to case law that supports its position that allegations of disparagement by implication cannot create the potential for coverage, Hartford's brief takes the Court on a meandering journey through uncontested tenets of coverage law, unsupported speculation arguments, contrived scenarios, which do not aid its position or assist the Court with its analysis, and issues not before the court.[8]

V. THE COURT OF APPEAL SHOULD NOT HAVE IGNORED HARTFORD'S ACKNOWLEDGEMENT THAT DISPARAGEMENT BY IMPLICATION WAS ALLEGED BY DAHL

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**

[8] See e.g., Resp't Answering Br. at 7-9 & 18-23, Aug. 12, 2103.

and the Multi-Cart except by implication." (Bold provided) (JA Vol. 2, Ex. 12, P. 543).

Because Hartford's position was and still is that a specific reference to the claimant or its products is required to trigger coverage for disparagement, it acknowledged there was disparagement by implication alleged in the *Dahl* Action, but since it was not a specific reference, Hartford had no duty to defend.

Hartford now claims that what it really meant was that if there were any comparison of the Ulti-Cart and Mult-Cart, the comparison could only be by implication. Resp't Br. at 24, Aug. 12, 2013. Hartford then admits that "at most Hartford suggested there might be an implied reference to the Multi-Cart, not that there was an implied disparagement of that product." *Id.* This is enough to trigger Hartford's defense duty.

Hartford has now admitted in its briefing before this court, that there is an implied reference to the Multi-Cart, making all of Hartford's arguments to the contrary moot. Taking the implied reference to Multi-Cart and adding to that the allegations and extrinsic facts which show that Ultimate claims its product is superior, it has suffered reputational injury, consumer confusion, and loss of business, this Court can easily justify a reversal of the *Hartford* Decision.

VI. HARTFORD CANNOT MEET ITS BURDEN TO PROVE THAT THE INTELLECTUAL PROPERTY EXCLUSION ELIMINATES ITS DEFENSE DUTY

The applicability of any exclusion to bar Hartford's defense duty was not included in Ultimate's petition for review or Hartford's response to the petition for review, nor was it ruled upon by the Court of Appeal.

"An insurer that wishes to rely on an exclusion has the burden of proving, through conclusive evidence that the exclusion applies in all possible worlds." *J. Lamb*, 100 Cal. App. 4th at 1039. Hartford cannot and has not met its burden because it has provided no evidence that these exclusions apply in all possible worlds.

A. The Intellectual Property Exclusion Does Not Bar Hartford's Defense Duty

Hartford's claim that the intellectual property ("IP") exclusion precludes a defense duty ignores the fact that Dahl alleges damage due to disparagement and unfair competition which do not require violation of intellectual property rights.

The cases Hartford relies on in support of application of the IP exclusion are all clearly distinct and inapposite. *Industrial Indem. Co. v. Apple Computer, Inc.*, 79 Cal. App. 4th 817 (2000) contained an IP exclusion that specifically excluded coverage for "any Claims or Suit for Unfair Competition Based upon Infringement of Trade Mark, Service Mark, or Trade Name." The Hartford IP exclusion has no such language regarding Unfair Competition.

Palmer v. Truck Ins. Exch., 21 Cal. 4th 1109 (1999), is inapplicable because coverage was sought under the offense of infringement of title or of slogan and the IP exclusion excluded coverage for infringement of a "registered trade mark, service mark or trade name" unless that "trade mark, service mark or trade name" was a title or slogan. *Id.*

Aloha Pacific, Inc. v. California Ins. Guar. Ass'n, 79 Cal. App. 4th 297 (2000), is inapplicable because the coverage sought was for trade dress and the court found that the exclusion for trademark infringement applied

to trade dress infringement.

Nestle USA, Inc. v. Travelers Cas. & Sur. Co. of Am., 10 F. App'x 438 (9th Cir. 2001) is inapposite because it did not involve disparagement or an IP exclusion, but a breach of contract exclusion.

Here, the allegations of disparagement are distinct and not subject to the IP exclusion and none of the cases cited by Hartford state otherwise.

B. The Failure of Goods to Conform to Advertised Quality or Performance Does Not Bar Coverage

The failure of goods to conform exclusion precludes false claims about the quality or performance of the insured's own products in the insured's advertisement.

Dahl's complaint does not allege that Ultimate's Ulti-Cart did not comply with Ultimate's advertisements of the Ulti-Cart's quality or performance. Instead, Dahl alleges injury due to Ultimate's purported contention that Dahl's products are inferior and publications by Ultimate allegedly inferring Dahl's products are connected to Ultimate's. In each instance, the injury results from the statement as it references Dahl's product and not to the extent, if any, the statement refers to Ultimate's product. Dahl's injury does not have any connection to Ultimate's products conforming to their advertised quality. As one Court recently explained:

> Alpharma's alleged injury is due to Pennfield's implicit disparagement of Alpharma's product and practices. Alpharma's injury-lost sales, profits and goodwill-would not be remedied if Pennfield's products were to conform to the allegedly false advertised quality. . . .the failure to conform exclusion does not apply.

Pennifield Oil co. v. American Feed Indus. Ins. Co. Risk Retention Group, Inc., No. 8:05CV315, 2007 WL 1290138 (D. Neb. Mar. 12, 2007).

C. The Breach of Contract Exclusion Does Not Bar Coverage

The breach of contract exclusion does not bar coverage because Hartford must show that Dahl would not have any claims against Ultimate but for the breach of the confidentiality agreement. Hartford cannot meet its burden because Dahl could still have brought its claim for disparagement without the purported breach of the confidentiality agreement. Furthermore, Dahl could still prove its case without proving breach of contract, particularly, if the court finds the confidentiality agreements invalid.[9] Hartford cannot negate all potential for coverage by applying the breach of contract exclusion.

VII. ULTIMATE IS ENTITLED TO REIMBURSEMENT OF ITS DEFENSE FEES

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 unreasonable or unnecessary. Hartford has been in possession of Ultimate's defense invoices since December 2010 (JA Vol. 3, Ex. 12, pp. 614-615) and has not pointed to any defense fees that are unreasonable or unnecessary. Hartford should be precluded from using the issue of discovery of defense fees to further delay reimbursing Ultimate's defense costs.

VIII. CONCLUSION

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

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[9] *Zurich Ins. Co. v. Killer Music, Inc.*, 998 F.2d 674, 678 (9th Cir. 1993).

Respectfully submitted,

Dated: September 23, 2013

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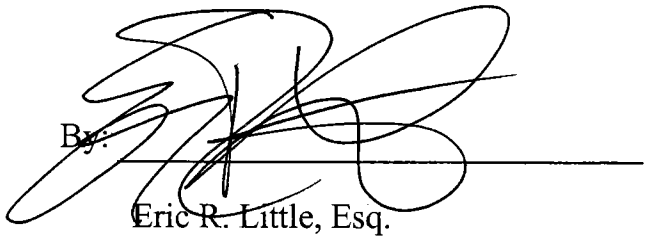
CERTIFICATE OF WORD COUNT
[Cal. Rules of Court, Rule 8.520(c)(1)]

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 8,398 words as counted by the Microsoft Word 2007 word-processing program used to generate this brief.

Dated: September 23, 2013

LITTLE REID & KARZAI, LLP



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CALIFORNIA SUPREME COURT
Hartford Cas. Ins. Co. v. Swift Distrib., Inc., et al.
No. S207172

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.

On the date below, I served the following document(s):

REPLY BRIEF ON THE MERITS

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

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[X] **[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.

[X] **[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 September 23, 2013, at Irvine, California.

Jeffrey Dress