NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

AIX SPECIALTY INSURANCE COMPANY, Plaintiff and Respondent, v. TIMED OUT, LLC, Defendant and Appellant.	B320255 Los Angeles County Super. Ct. No. 20STCV45538

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Affirmed.

The Casas Law Firm, Joseph N. Casas, Monica Padilla; and Teresa Bohne for Defendant and Appellant.

Smith Smith & Feeley, John E. Feeley, Ha Eun Cho; Greines, Martin, Stein & Richland, Edward L. Xanders and David E. Hackett for Plaintiff and Respondent.

Defendant Timed Out, LLC appeals a summary judgment declaring plaintiff AIX Specialty Insurance Company has no duty to defend, and thus no duty to indemnify, its insured in an action Timed Out brought against the insured. In granting summary judgment, the trial court concluded a policy exclusion for personal and advertising injuries "arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights" eliminated AIX's coverage obligations in the underlying lawsuit. We affirm.

BACKGROUND

1. *The Policy*

Godtti Entertainment operates a bar and nightclub where its patrons can "dance," see "live DJ performances," and attend "an assortment of events."

In February 2019, AIX issued a commercial general liability (CGL) insurance policy to Godtti. The policy insures against liability for damages stemming from, among other things, certain "personal and advertising injury" offenses, including: (1) publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products, or services; (2) publication of material that violates a person's right of privacy; (3) the use of another's advertising idea in Godtti's advertisements; and (4) infringing upon another's copyright, trade dress, or slogan in Godtti's advertisements.

As relevant here, the policy excludes coverage for " 'Personal and advertising injury' arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights" (the IP exclusion). Under the IP exclusion, "such other intellectual property rights do not include the use of another's advertising idea in [Godtti's] 'advertisement.' "

Additionally, the IP exclusion "does not apply to infringement, in [Godtti's] 'advertisement,' of copyright, trade dress or slogan."

2. *Timed Out's Lawsuit Against Godtti*

Timed Out describes itself as a company specializing in "the protection of privacy and publicity rights (e.g. image and likeness) of individuals in the talent and modeling industry." In February 2020, the company entered into assignment agreements with 10 professional models who had learned their "image usage may [have been] violated by Godtti." Under the agreements, the models assigned "their right to bring a lawsuit for the misappropriation of images" to Timed Out.

In August 2020, Timed Out filed a three-count complaint against Godtti for statutory misappropriation of likeness (Civ. Code, § 3344); common law misappropriation of likeness; and negligent hiring, supervision, and/or retention of employees. According to the complaint's allegations, between 2017 and 2019, Godtti knowingly used the models' "image and likeness" in "various marketing, advertising, and promotional material[s]" without the models' consent and in violation of their statutory and common law right of publicity. Godtti also allegedly failed to train and supervise its employees who "stole the [m]odels' [i]mages and used the [i]mages without [the models'] permission."

3. *AIX's Declaratory Relief Action Against Godtti and Timed Out*

In October 2020, AIX received notice of Timed Out's complaint. AIX agreed to defend Godtti under a reservation of rights and appointed *Cumis* counsel. (See *San Diego Federal Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358.)

A month later, AIX filed this declaratory relief action against Godtti and Timed Out. The complaint sought a judicial declaration that AIX had no duty to defend or indemnify Godtti against Timed Out's lawsuit.

4. *AIX's Motion for Summary Judgment*

AIX moved for summary judgment, principally asserting the IP exclusion precluded any potential for coverage for the claims asserted in Timed Out's complaint. Specifically, AIX argued all claimed injuries arose out of Godtti's alleged infringement of the models' right of publicity—an "other intellectual property right[ ]" subject to the IP exclusion.

Timed Out opposed the motion, offering declarations from each of the 10 models who had assigned their claims to the company. Timed Out maintained the IP exclusion should be narrowly construed to allow coverage for its right of publicity claims. It also argued the complaint's factual allegations supported "additional theories of liability," including claims for disparagement, libel and defamation, false light, and advertising-idea and trade-dress infringement theories.

5. *The Order Granting Summary Judgment*

The trial court granted AIX's summary judgment motion, concluding the IP exclusion precluded coverage for Timed Out's misappropriation of likeness claims. The court rejected Timed Out's contention regarding unpled claims, emphasizing the "gravamen" of Timed Out's action was the alleged infringement of the models' right of publicity.

The court entered judgment in favor of AIX. Timed Out filed a timely notice of appeal.

DISCUSSION

1. *Standard of Review and Governing Insurance Law*

"[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) "Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to the cause of action." (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar,* at p. 850.) "Where summary judgment has been granted, we review the trial court's ruling de novo. [Citation.] We consider all the evidence presented by the parties in connection with the motion (except that which was properly excluded) and all the uncontradicted inferences that the evidence reasonably supports. [Citation.] We affirm summary judgment where the moving party demonstrates that no triable issue of material fact exists and that it is entitled to judgment as a matter of law." (*Albert v. Mid-Century Ins. Co.* (2015) 236 Cal.App.4th 1281, 1289 (*Albert*).) "Our review of the interpretation of an insurance contract on undisputed facts is also de novo." (*Ibid.*, citing *State Farm General Ins. Co. v. Frake* (2011) 197 Cal.App.4th 568, 577; see also *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 288 (*Hartford*).)

"A liability insurer owes its insured a broad duty to defend against claims creating a *potential* for indemnity." (*Albert, supra,* 236 Cal.App.4th at p. 1289; accord, *Aroa Marketing, Inc. v. Hartford Ins. Co. of Midwest* (2011) 198 Cal.App.4th 781, 786 (*Aroa*); *Alterra Excess & Surplus Ins. Co. v. Snyder* (2015) 234 Cal.App.4th 1390, 1401 (*Alterra*).) "The duty to defend is broader

than the duty to indemnify, and may exist even if there is doubt about coverage." (*Albert,* at p. 1289; *Alterra,* at p. 1401.) "When determining whether a duty to defend exists, the court looks to all of the facts available to the insurer at the time the insured tenders its claim for a defense. [Citation.] Initially, the court compares the allegations of the complaint with the terms of the policy. [Citation.] The proper focus is on the facts alleged in the complaint, rather than the alleged theories for recovery. Nevertheless, the insured ' " 'may not speculate about unpled third party claims to manufacture coverage' " . . . , and the insurer has no duty to defend where the potential for liability is " 'tenuous and farfetched.' " . . . The ultimate question is whether the facts alleged "fairly apprise" the insurer that the suit is upon a covered claim.' " (*Albert,* at pp. 1289–1290.) "Facts extrinsic to the complaint may also be examined and may either establish or preclude the duty to defend." (*Id.* at p. 1290, citing *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 19.) "Any doubt as to whether the facts give rise to a duty to defend is resolved in favor of the insured." (*Albert,* at p. 1290; *Alterra*, at p. 1401; *Aroa,* at p. 786.)

An " 'insurer's duty to defend does *not* extend to claims for which there is no potential for liability coverage. This includes claims falling outside the scope of the insuring clause, or within an express exclusion from coverage . . . . "The insurer need not defend if the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage." ' " (*Alterra, supra,* 234 Cal.App.4th at pp. 1401–1402, quoting Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2014) ¶ 7:537.) "[I]f, as a matter of law, neither the complaint nor the known extrinsic

facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance." (*Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 655.)

"In determining whether a claim creates the potential for coverage under an insurance policy, 'we are guided by the principle that interpretation of an insurance policy is a question of law.' [Citation.] 'Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.)' [Citation.] In determining this intent, '[t]he rules governing policy interpretation require us to look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it.' [Citation.] We consider the ' "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," unless "used by the parties in a technical sense or a special meaning is given to them by usage." ' [Citation.] We must also 'interpret the language in context, with regard to its intended function in the policy.' " (*Hartford, supra,* 59 Cal.4th at p. 288; accord, *La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal.4th 27, 37.)

Because the foregoing determination typically is a question of law (*Hartford, supra,* 59 Cal.4th at p. 288), it is particularly amenable to resolution on summary judgment. (See, e.g., *Albert, supra,* 236 Cal.App.4th at p. 1289.) To prevail on the duty to defend issue, "the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*." (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300; *Albert,* at p. 1290; accord, *Alterra, supra,* 234 Cal.App.4th at p. 1401.) An insurer cannot obtain summary

judgment "where an exclusion arguably applies but may reasonably be interpreted to be inapplicable to the alleged facts." (*Aroa, supra,* 198 Cal.App.4th at p. 786.) Likewise, " '[i]f coverage depends on an unresolved dispute over a factual question, the very existence of that dispute would establish a possibility of coverage and thus a duty to defend.' " (*Alterra,* at p. 1401.)

2. *The IP Exclusion Precludes Coverage for Timed Out's Claims Based on Godtti's Alleged Misappropriation of the Models' Likenesses*

Consistent with the governing law, the trial court correctly focused on the factual allegations of Timed Out's complaint and the terms of Godtti's insurance policy in granting AIX's summary judgment motion. (See *Hartford, supra,* 59 Cal.4th at p. 288; *Albert, supra,* 236 Cal.App.4th at pp. 1289–1290.) Specifically, the court determined Timed Out's claimed injuries all stemmed from Godtti's alleged misappropriation of the models' likenesses and the IP exclusion unambiguously precluded coverage for those claims. In reaching this conclusion, the court relied upon *Aroa* and *Alterra*, both of which addressed substantively similar claims and coverage exclusions in affirming judgments for the respective insurer. (See *Aroa, supra,* 198 Cal.App.4th at pp. 788–790; *Alterra, supra,* 234 Cal.App.4th at pp. 1403–1410.) We agree with the reasoning of these cases and likewise conclude the IP exclusion precludes coverage for Timed Out's claims based on Godtti's misappropriation of the models' likenesses.

In *Aroa*, a model sued a marketing company, alleging the company made unauthorized use of her image and likeness, thus diminishing her marketability and depriving her of her right of publicity. (*Aroa, supra,* 198 Cal.App.4th at pp. 784–785.)

The company tendered defense to its insurer under a policy that covered " 'Personal and advertising injury' . . . defined to include ' "oral or written or electronic publication of material that violates a person's right of privacy." ' " (*Ibid.*) However, the policy excluded coverage for " 'personal and advertising injury' arising out of ' "any violation of any intellectual property rights, such as copyright, patent, trademark, trade name, trade secret, service mark, or other des[ig]nation of origin or authenticity." ' " (*Id.* at p. 785.) The insurer declined the tender, taking the position that " 'the right of publicity is derivative from a right of privacy' " and " 'is clearly considered an intellectual property right which is specifically excluded from coverage under the Policy.' " (*Ibid.*) The company settled the model's suit, then sued the insurer for breach of its duty to defend and indemnify. (*Ibid.*) The trial court sustained the insurer's demurrer without leave to amend. (*Id.* at p. 786.)

The *Aroa* court affirmed the judgment of dismissal, concluding the intellectual property exclusion precluded coverage for the model's claims based on the misappropriation of her likeness, which "was a right of publicity claim." (*Aroa, supra,* 198 Cal.App.4th at pp. 784, 788–789.) The reviewing court explained: "The insurance policy at issue excluded coverage for ' "[p]ersonal and advertising injury" ' 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.' 'The right of publicity, like copyright, protects a form of intellectual property that society deems to have some social utility.' (*Comedy III Productions*[,] [*Inc. v. Gary Saderup, Inc.* (2001)] 25 Cal.4th [387,] 399 [(*Comedy III*)]; see also Black's Law Dict. [(11th ed. 2019)]

['intellectual property' defined to include 'publicity rights'].) Thus, the right of publicity is an intellectual property right, and right of publicity claims would be excluded from coverage under the intellectual property rights exclusion." (*Id.* at p. 788.)

The *Alterra* court likewise concluded a policy exclusion for " ' "Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret *or other intellectual property rights*' " precluded coverage in a lawsuit alleging misappropriation and unauthorized commercial use of a famous inventor's name and likeness. (*Alterra, supra,* 234 Cal.App.4th at pp. 1393–1395, 1403, italics added.) Following *Aroa* and other cases addressing similar exclusion language (see *Alterra,* at pp. 1404–1407), the *Alterra* court reasoned the "policy's language 'or other intellectual property rights,' " operated "to exclude invasion of privacy and right of publicity claims," which otherwise would have been covered as a personal or advertising injury under the policy. (*Id.* at pp. 1408–1409.) The reviewing court explained: "The use of 'or' in the [insurer's] policy, like the words 'such as' in *Aroa*, indicates there are ' " 'matters of the same kind which are not specifically enumerated.' " ' [Citation.] Or, as the [*Aroa*] court earlier put it, 'The exclusion applies when the injury arises out of "any violation of any intellectual property rights." Even if this language is interpreted narrowly against the insurer, it clearly applies to bar claims based on the right of publicity, as that right has been held to be an intellectual property right.' " (*Ibid.*; accord, *Aroa, supra,* 198 Cal.App.4th at p. 788 ["the fact that the right of publicity is not specifically listed after the phrase 'any intellectual property rights' does not suggest the exclusion does not apply[;] . . . the list is expressly nonexclusive"].)

Like the policies in *Alterra* and *Aroa*, Godtti's policy insures against liability for personal and advertising injuries arising out of "written publication . . . of material that violates a person's right of privacy." (See *Alterra, supra,* 234 Cal.App.4th at p. 1403; *Aroa, supra,* 198 Cal.App.4th at p. 785; see also *Comedy III, supra,* 25 Cal.4th at p. 391.) But, also like the *Alterra* and *Aroa* policies, the policy expressly excludes coverage for " '[p]ersonal and advertising injury' arising out of the infringement of copyright, patent, trademark, trade secret *or other intellectual property rights*." (Italics added; see *Alterra,* at p. 1403; *Aroa,* at p. 785.) As both cases explain, it is settled under California law that an injury arising out of an alleged misappropriation of likeness gives rise to a "right of publicity claim" (*Aroa,* at pp. 785, 788–789), and " '[t]he right of publicity, like copyright, protects a form of intellectual property.' " (*Id.* at p. 788, quoting *Comedy III,* at p. 399.) Because each of Timed Out's claims asserts an injury stemming from Godtti's alleged misappropriation of the models' likenesses, we conclude, consistent with the reasoning in *Alterra* and *Aroa*, that these claims are subject to the IP exclusion for personal and advertising injuries "arising out of the infringement of . . . other intellectual property rights." (See *Alterra,* at pp. 1408–1409; *Aroa*, at p. 788.)

Timed Out objects to this conclusion, arguing the "scope of the [IP] exclusion should not be construed to apply to an illogical degree." Characterizing the relevant language as a "laundry list exclusion with a catchall undefined word ending," Timed Out asserts we must construe the IP exclusion "narrowly" against AIX. In support of its position, Timed Out relies exclusively upon *Crosby Estate v. Ironshore Spec. Ins. Co.*

(S.D.Cal. 2020) 498 F.Supp.3d 1242 (*Crosby*), while conspicuously ignoring that the IP exclusion's language is *identical* to the exclusion language in the *Alterra* policy. (See *Alterra, supra,* 234 Cal.App.4th at p. 1403.) *Crosby* is inapposite.

In *Crosby*, a homeowners' association sued its insurer for breach of the duties to defend and indemnify under "an entity, directors', and officers' liability insurance policy" providing coverage for claims "alleging any 'act, omission, error, . . . neglect or breach of duty' " by the association. (*Crosby, supra,* 498 F.Supp.3d at pp. 1247–1248.) The policy included an exclusion for the discharge of " 'Pollutants,' " defined to include "without limitation, solids, liquids, gaseous or thermal irritants, contaminants or smoke, vapor, soot, fumes, acids, alkalis, chemicals or waste materials [and] any other air emission, odor, waste water, oil or oil products, infectious or medical waste, asbestos or asbestos products *and any noise*." (*Id.* at p. 1257, italics added.) In concluding the exclusion did not bar coverage for claims alleging members of the association "repeatedly honked their car horns when they passed over speedbumps," the federal district court observed "the term 'any noise' '[was] not to be read literally and in isolation, but [had to] be construed in the context of how it is used in the policy, i.e., defining "pollutant," ' " and as "an 'ordinary layperson' " would understand the term, giving it its " 'common connotative meaning.' " (*Ibid.*) Because the district court reasoned "a layperson may not consider someone honking their horn while they pass over a speedbump to be a pollutant or pollution," it concluded "the exclusion did not 'plainly and clearly' exclude coverage for the allegation" against the insured homeowner's association. (*Ibid.*)

The pollution exclusion in *Crosby* is substantively different from the IP exclusion in Godtti's policy. As the *Alterra* court explained in reviewing an identical IP exclusion, the meaning of the term "intellectual property" (unlike the meaning of noise pollution at issue in *Crosby*) is not subject to reasonable dispute, and the IP exclusion's "use of" the term " 'or' " plainly "indicates there are ' " 'matters of the same kind' " ' " as the preceding list of specific intellectual property rights that " ' " 'are not specifically enumerated' " ' " but nonetheless within the exclusion's scope. (*Alterra, supra,* 234 Cal.App.4th at pp. 1408–1409.) This is not an illogical construction as Timed Out suggests. On the contrary, it is well understood that the " 'right of publicity, *like copyright*, protects a form of intellectual property' " and thus is within the scope of the IP exclusion. (*Aroa, supra,* 198 Cal.App.4th at p. 788, quoting *Comedy III, supra,* 25 Cal.4th at p. 399, italics added; cf. *Crosby, supra,* 498 F.Supp.3d at p. 1257 [reasoning horn honking might not have a " 'connotative meaning' " consistent with the other listed forms of pollution].)

Alternatively, Timed Out contends the injuries alleged in its complaint are outside the scope of the IP exclusion because the injuries arise from the "use of another's advertising idea." As discussed, the IP exclusion specifies that the term "other intellectual property rights do[es] not include the use of another's advertising idea in [Godtti's] 'advertisement,' " and injuries arising from this alleged conduct are therefore excepted from the exclusion's scope. Timed Out argues this exception applies because "[t]he 'advertising idea' here is the images of the models available by electronic means, utilized on websites and otherwise for the models as their marketing and soliciting for model[ing] business" and this idea belongs to either "the Models, and/or

another person or the Models' third-party clients." We are not persuaded.

As our Supreme Court explained in *Hameid v. National Fire Ins. of Hartford* (2003) 31 Cal.4th 16, "the term 'advertising' as used in CGL policies" means "widespread promotional activities usually directed to the public at large." (*Id.* at p. 24.) Contrary to Timed Out's contention, an electronic image of a model (or anyone or anything else) is not *itself* advertising; rather, as *Hameid* holds, only a "widespread promotional" campaign using the image constitutes "advertising" under a CGL policy like the one AIX issued to Godtti. (*Ibid.*) Timed Out's complaint alleges only that Godtti misappropriated the models' likenesses as they appeared in digital images—not that Godtti misappropriated an advertisement or advertising idea using those likenesses or images. The exception for use of another's advertising idea does not apply. (Cf. *Hyundai Motor America v. National Union Fire Ins.* (9th Cir. 2010) 600 F.3d 1092, 1095–1101 [allegations that plaintiff's patented " 'marketing methods' " and " 'marketing systems' " for a "build-your-own-vehicle module" sufficient to invoke exception for use of another's advertising idea].)

Finally, Timed Out contends the IP exclusion does not apply because the claimed injuries arise out of an "infringement, in [Godtti's] 'advertisement,' of . . . trade dress."[1] " '[T]rade dress "refers to the 'total image of a product' and may include features such as size, shape, color, color combinations, texture or graphics." ' " (*Magic Kitchen LLC v. Good Things Internat., Ltd.*

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[1] As discussed, by its terms, the IP exclusion "does not apply to infringement, in [Godtti's] 'advertisement,' of copyright, trade dress or slogan."

(2007) 153 Cal.App.4th 1144, 1155 (*Magic Kitchen*); *International Jensen v. Metrosound U.S.A.* (9th Cir.1993) 4 F.3d 819, 822.) "The purpose of trademark and trade dress protection is to enable a business 'to identify itself efficiently as the source of a given product through the adoption of a mark which may be in the form of a slogan, symbol, ornamental design or other visual insignia.' " (*Magic Kitchen,* at p. 1155.)

Timed Out argues its allegations "fall[ ] within the confines of the term 'trade dress,' " because they "involve[ ] the images of the models and the misrepresentation of same." (Boldface type omitted.) Although not explicitly stated, the argument implies that the models are the " ' " 'product' " ' " and their " ' " 'total image' " ' " therefore constitutes a protectible trade dress. (*Magic Kitchen, supra,* 153 Cal.App.4th at p. 1155.) We are not convinced. Even if we accepted the dubious premise that a person can be a *product* under our intellectual property law, there is no allegation that Godtti misrepresented the " 'source' " of the supposed product by using the models' images in its event advertising. (*Ibid.*) The complaint alleges Godtti misappropriated the models' images to promote its nightclub—not that it infringed upon the unique " ' "size, shape, color, color combinations, texture or graphics" ' " of a product to sow confusion about the product's origin. (*Ibid.*) The trade dress exception does not apply.

The trial court correctly concluded Timed Out's claims arise out of an alleged infringement of the models' right of publicity and the IP exclusion therefore unambiguously precludes coverage.

3. *Timed Out's Allegations Do Not Raise a Potential for Coverage of Unpled Claims*

Apart from its right of publicity claims, Timed Out contends the complaint alleges sufficient facts to support other personal and advertising injury claims that are not subject to the IP exclusion. Specifically, Timed Out argues its allegations support claims for disparagement/trade libel and false light injuries unrelated to the models' right of publicity. We disagree.

As our Supreme Court explained in *Hartford*, "[t]he term 'disparagement' in the context of an insurance policy . . . concerns damage to the reputation of products, goods, or services." (*Hartford, supra,* 59 Cal.4th at pp. 288–289; see also *id.* at p. 289 [explaining the tort of disparagement has " 'received various labels, such as "commercial disparagement," "injurious falsehood," "product disparagement," "trade libel," "disparagement of property," and "slander of goods" ' "].) "In evaluating whether a claim of disparagement has been alleged, courts have required that the defendant's false or misleading statement have a degree of specificity that distinguishes direct criticism of a competitor's product or business from other statements extolling the virtues or superiority of the defendant's product or business. . . . [D]isparagement involves two distinct but related specificity requirements. A false or misleading statement (1) must specifically refer to the plaintiff's product or business, and (2) must clearly derogate that product or business." (*Id.* at p. 291.) "Each requirement must be satisfied by express mention or by clear implication." (*Id.* at p. 284.) This entails "more than a statement that may conceivably or plausibly be construed as derogatory to a specific product or business. A 'reasonable implication' in this context means a clear or

necessary inference." (*Id.* at p. 295.) "What distinguishes a claim of disparagement" from other claims, like "patent or trademark infringement, false advertising, or unfair competition," is that "an injurious falsehood has been directed *specifically* at the plaintiff's business or product, derogating that business or product and thereby causing that plaintiff special damages." (*Id.* at p. 294.)

Timed Out asserts the following allegations are sufficient to state a claim for disparagement/trade libel: "(1) 'the Models earn a majority of their living by selling their images and/or advertising ideas to companies for the advertisement of products and services' [citation]; (2) 'none of the Models would have consented to the use of their Images by a night club, as doing so could be, and is, very damaging to their careers' [citation]; and [(3)] 'Defendants have diluted the value of [the] Models' Images.' "

As the trial court correctly observed, these allegations are insufficient to state a covered disparagement claim against Godtti because none of the allegations identifies a "false or misleading *statement*" by Godtti that "specifically refer[s] to the [models'] product or business," let alone "*clearly* derogate[s] that product or business." (*Hartford, supra,* 59 Cal.4th at p. 291, italics added.) Nor is such a statement apparent "by clear implication." (*Id.* at p. 284.) On the contrary, the most any reasonable person could infer from Godtti's alleged use of the models' images is that the models accepted jobs or licensed their images to appear in Godtti's promotional advertisements. While that supposition may prove to be false, we cannot say that a reasonable person would be compelled to conclude, as a "necessary inference," that the models' images were somehow of lesser quality than those of their competitors. (*Id.* at p. 295 [disapproving *Travelers Property Casualty Co. of America v.*

Charlotte Russe Holding, Inc. (2012) 207 Cal.App.4th 969 to the extent it suggested retailer discounting prices of a clothing brand carried "an implication clear enough to derogate [the brand's] product for purposes of a disparagement claim"].)

Along similar lines, Timed Out contends its allegations are sufficient to state a claim for injuries caused by portraying the models in a " 'false light in the public eye.' " " 'False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed.' " (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1264.) To support a false light claim, a plaintiff must allege "statements that are (1) assertions of fact, (2) actually false or create a false impression about her, (3) highly offensive to a reasonable person or defamatory, and (4) made with actual malice." (*De Havilland v. FX Networks, LLC* (2018) 21 Cal.App.5th 845, 865–866 (*De Havilland*).) The defendant must reasonably understand the statement will " ' "expose[ ] a person to hatred, contempt, ridicule, or obloquy and assume[ ] the audience will recognize it as such." ' " (*Id.* at p. 865.)

Timed Out's allegations are insufficient to state a false light claim for the same reason the allegations fail to support a claim for disparagement/trade libel—simply put, nothing alleged is sufficient to prove Godtti's publication of the models' images in its promotional advertisements would be "highly offensive to a reasonable person," let alone that Godtti maliciously intended to expose the models to " ' "hatred, contempt, ridicule, or

obloquy" ' " from the audience for the advertisement. (*De Havilland, supra,* 21 Cal.App.5th at pp. 865–866.)[2]

4. *The IP Exclusion Does Not Render Coverage for Personal and Advertising Injury Illusory*

Finally, Timed Out contends AIX's promise to defend and indemnify personal and advertising injury claims would be rendered "illusory" were we to apply the IP exclusion to preclude coverage in this case. However, Timed Out offers no reasoned argument to support this bald assertion, and its own proffered construction of Godtti's policy refutes its contention.

"A contract is unenforceable as illusory when one of the parties . . . assumes no obligations thereunder." (*Harris v. TAP Worldwide, LLC* (2016) 248 Cal.App.4th 373, 385; see *Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 15.) In *Safeco Ins. Co. v. Robert S.* (2001) 26 Cal.4th 758, our Supreme Court considered

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[2] AIX emphasizes a false light claim, as a species of invasion of privacy, is purely personal and cannot be assigned. (*Lugosi v. Universal Pictures* (1979) 25 Cal.3d 813, 819, 821 [discussing false light claims as privacy torts; " 'the right of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded, that is, plaintiff must plead and prove that *his* privacy has been invaded' "]; *Moreno v. Hanford Sentinel, Inc.* (2009) 172 Cal.App.4th 1125, 1129, 1131 [recognizing "false light" as part of "right of privacy"; "right of privacy is purely personal" and cannot be "asserted by anyone" besides the person whose privacy was invaded].) Thus, the insurer argues the models could not assign the claim to Timed Out, and Timed Out therefore lacks standing to assert the claim for any alleged injuries the models suffered. Because we determine the allegations are insufficient to support a false light claim (even if directly asserted by the models), we need not reach this alternative basis for affirmance.

a homeowners insurance policy exclusion for "bodily injury 'arising out of any *illegal act* committed by or at the direction of an insured' " after the policyholders' son accidentally killed his friend with a handgun he found in his mother's coat pocket. (*Id.* at pp. 761–762.) Addressing the exclusion in connection with the underlying wrongful death action, our high court determined "the phrase 'illegal act' " could not be construed "to mean violation of any law, whether criminal or civil" as doing so would render illusory the insurer's promise to defend and indemnify the insured for " 'an accident . . . which results . . . in bodily injury or property damage.' " (*Id.* at pp. 761–762, 764–765.) After rejecting other proposed constructions, the *Safeco* court ultimately declared the illegal act exclusion "invalid" as it could not "reasonably be given meaning under established rules of construction of a contract." (*Id.* at p. 766.)

Unlike the illegal act exclusion in *Safeco*, we have no trouble giving the IP exclusion a reasonable construction, consistent with its plain terms, that effectuates AIX's contractual obligation to cover personal and advertising injury liability arising out of offenses outside the exclusion's scope. For example, the policy requires AIX to cover injuries arising out of "[o]ral or written publication, in any matter, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services." As Timed Out itself emphasizes in its opening brief, the "separate offense of 'disparagement' . . . is completely outside of 'intellectual property.' " (Boldface type omitted.) Thus, when an alleged disparagement appears in an advertisement or any other written or oral publication, AIX plainly has a coverage obligation under the policy terms, notwithstanding the IP exception.

(See *Hartford, supra,* 59 Cal.4th at p. 296 ["a party's attempt to copy or infringe on the intellectual property of another's product does not, without more, constitute disparagement"].)

Similarly, the policy affords coverage for alleged personal or advertising injuries arising from "[o]ral or written publication . . . of material that violates a person's right of privacy." Misappropriation of likeness "is one of the four branches of the privacy tort," but the privacy right also protects individuals from reckless or malicious conduct that places them in a "false light" that would be highly offensive to a reasonable person. (*De Havilland, supra,* 21 Cal.App.5th at pp. 857, 865.) " ' "A 'false light' cause of action is in substance equivalent to a libel claim" ' " and, in contrast to a misappropriation of likeness claim, does not implicate an intellectual property right. (*Id.* at p. 865; cf. *Comedy III, supra,* 25 Cal.4th at p. 399.) Again, Timed Out recognizes as much, emphasizing in its opening brief that a person's right of privacy encompasses "[t]he common law tort of 'false light in the public eye' . . . *separate and apart from misappropriation [of likeness]*, and also fall[s] outside of the intellectual property exclusion." (Italics added.)

We need only construe the IP exclusion according to its plain terms to give effect to the exclusion *and* AIX's obligation to provide coverage for personal and advertising injuries. Simply put, because the IP exclusion applies only to injuries "arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights," and claims such as disparagement and false light do not necessarily arise out of intellectual property rights, the exclusion does not render illusory AIX's promise to cover personal and advertising injuries under the CGL policy issued to Godtti.

DISPOSITION

The judgment is affirmed. Plaintiff AIX Specialty Insurance Company is entitled to costs.

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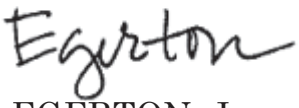

EGERTON, J.

We concur:

EDMON, P. J.

ADAMS, J.