03-35019

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHILIPS ORAL HEALTHCARE, INC.,

Appellant,

vs.

FEDERAL INSURANCE COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

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BRIEF OF APPELLEE FEDERAL INSURANCE COMPANY

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CORPORATE DISCLOSURE STATEMENT

In compliance with Federal Rule of Appellate Procedure 26.1, Appellee makes the following corporate disclosure:

Appellee Federal Insurance Company ("Federal") and its parent and affiliated companies have not issued shares to the public, except that Federal Insurance Company's parent corporation, The Chubb Corporation, is publicly traded on the New York Stock Exchange under the ticker symbol CB.

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I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Federal disagrees with Philips' characterization of the issues below and, therefore, presents the following issues for review:

(1) Did the district court properly conclude that Philips did not settle a covered claim and was, therefore, not entitled to indemnity coverage because Gillette's underlying complaint failed to allege facts asserting that Philips had libeled Gillette, or disparaged Gillette's product, and because Gillette testified in a post-settlement deposition that it was not seeking damages for libel or product disparagement?

(2) Did the district court properly conclude that, notwithstanding Gillette's use of certain excerpted language from the Lanham Act in its complaint, Gillette was actually suing Philips only for Philips' advertised misrepresentations of Philips' product's alleged attributes, and not for libel or product disparagement?

(3) Did the district court properly consider Gillette's testimony regarding the scope of its own complaint, especially where Philips failed to address the issue in its response to Federal's Motion for Summary Judgment on Indemnity?

(4) Did the district court properly conclude that the scope of an insurer's duty to indemnify is narrower than its duty to defend, and that indemnity is owed only when the actual claims settled (not the claims which might have been brought) are covered by the subject policies?

II. STATEMENT OF THE CASE AND FACTS

Philips was sued twice in the United States District Court by Gillette for false advertising (hereinafter referred to as "G-1" and "G-2"). Philips correctly notes that it then filed suit against Federal in order to obtain defense and indemnity coverage for Philips' false advertising. The court should take note that, despite Philips' complaints about the district court's ruling on G-2 indemnity (the issue before this court), the same district court granted Philips' claims for relief regarding G-1 defense and indemnity, and G-2 defense prior to concluding that no coverage exists to indemnify Philips for the claims settled in the G-2 case.

A. The Requirements for Coverage Under Federal's Policies

Federal's policies provide the following:

> We will pay damages the **insured** becomes legally obligated to pay by reason of liability imposed by law or assumed under an **insured contract** because of:
>
> **bodily injury** or **property damage** caused by an **occurrence; or personal injury or advertising injury** to which this insurance applies.
>
> This insurance applies:
>
> 1. to bodily injury or property damage which occurs during the policy period; and
>
> 2. to **personal injury** or **advertising injury** only if caused by an offense committed during the policy period.

ER 416; ER 419.

The 1993-1996 policies define "Advertising Injury" in relevant part as follows: [1]

> **ADVERTISING INJURY**
>
> Means injury arising solely out of one or more of the following offenses committed in the course of advertising your goods, products or services:
>
> 1. oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

ER 417.

Thus, Federal agreed to indemnify Philips only if particular conditions were met: **(1)** Philips became "legally obligated to pay" **(2)** "damages" **(3)** caused **solely** by an "advertising injury" (libel or trade disparagement) and **(4)** committed by Philips "during the policy period." Philips bears the burden of proof as to these policy conditions. In its Order of November 5, 2002, and in its Order on Reconsideration dated December 13, 2002, the District court agreed with Federal and concluded that Philips' settlement with Gillette did not settle any claim by Gillette for Philips' commission of either libel or trade disparagement. ER 117-125; ER 233-238.

B. Philips' Underlying Case With Gillette

The G-2 complaint against Philips (ER 41-54) asserted that Philips (Optiva at the time of the complaint) was liable to Gillette for "false advertising in

[1] The Insuring Agreement in both the 1993-1996 and 1996-1999 policies is essentially the same, but there is no coverage for trade disparagement in the 1996-1999 policies. ER 414-420.

violation of Lanham Act § 43 (a)" (ER 47, First Claim for Relief). Philips essentially relies upon paragraph 17 (alone, and with similarly-worded paragraphs 19 and 22) to assert that it is entitled to indemnity coverage. In paragraph 17, Gillette restates, from paragraph 1, the particular advertising claims which support its false advertising claims. Specifically, Gillette states:

> Optiva's commercial advertising claims relating to alleged "sonic" or "beyond the bristles" capabilities of sonicare constitute false and misleading descriptions of fact, or false and misleading representations of fact . . . .

Philips' argument relies on the fact that paragraph 17 also includes the phrase "and the nature, characteristics, and qualities of the Braun Oral-B Plaque Removers . . . ." Notably, the only "advertising claims" referenced in paragraph 1, and in every subsequent paragraph in the G-2 complaint to use the term (including paragraphs 19 and 22), are advertising claims in which Philips made certain claims about its own product, the sonicare toothbrush. No factual allegations of libel or disparagement are asserted in the G-2 complaint against Philips. There is not a single factual reference in the G-2 complaint to any particular advertising claim made by Philips about the Gillette product, or about Gillette. This is the core reason the district court found Federal is not obligated to indemnify Philips.[2] The

[2] The district court held: "In the present case, even the most liberal reading of the complaint does not reveal that Gillette brought suit against Philips for "advertising injury" as defined in the policies." ER 120, ll. 13-15. "In the present case, in reviewing the Gillette-2 complaint, it becomes evident that Gillette was suing Optiva, Philips [sic] predecessor, for misrepresentations that Optiva was making about Optiva's own product. G-2 Compl. ¶¶ 6-7. While the ads in question may have mentioned Gillette's products, the language chosen by Gillette as the basis for its complaint only mentions Optiva's products and capabilities. ER 236 ll. 7-13. (all underlining in original)

district court also relied on the undisputed testimony of Clare Howe, a Gillette employee, who testified that Gillette's complaint did not contain allegations of libel or product disparagement.

The fact that Optiva's advertising only described its own product's attributes was also the basis for the district court's discussion in its Order of June 30, 2000 (ER 95-102), regarding the duty to defend Philips against the allegations in the G-2 complaint. That discussion, found at ER 99, l. 5 - ER 101 l. 10, will not be fully replicated here. The court is urged to note the important distinction made by the District court regarding the notable differences between the G-1 complaint, which contained a claim against Philips for libel against Gillette, and the G-2 complaint. Specifically, in initially finding for Federal on the duty to defend Philips against the G-2 suit,[3] the district court held:

> At most, Gillette alleges that Optiva's [now Philips'] advertisements imply that non-sonicare toothbrushes are inferior because they do not contain the all-important "sonic" technology. That is, the allegedly negative effects caused by Optiva's advertising stem entirely from the touting of exclusive sonicare technology rather than through the disparagement of the other products. For this reason, Optiva's contention that Gillette alleges "product disparagement" is unconvincing. Although Gillette contends that Optiva made false statements "about Braun Oral-B Plaque Removers," Gillette has been careful to

[3] Federal acknowledges the district court reversed its initial finding regarding the duty to defend G-2 on the ground that, at the duty to defend stage, coverage could be triggered by the mere possibility of a covered finding against an insured, a condition she determined was met by the broad language of paragraph 17. ER 103-105. Nothing about the district court's original conclusion was changed by the later order, however, as is evidenced by the district court's consistent treatment of the issue when presented with the same issue at the duty to indemnify stage of this matter.

> exclude from the complaint any Optiva advertising statements that directly disparage Gillette products. * * * For example, the Gillette I and Gillette II complaints list one overlapping advertisement, the "Titanic Ad." In Gillette I, Gillette challenged Optiva's Titanic Ad statement that Braun Oral-B Plaque Removers (specifically named) caused an increase in disease-causing germs. (Jones Decl., Ex. 1, at ¶9a) In Gillette II, Gillette challenges only the Titanic Ad statement that "only sonicare generates sound waves at 31,000 brush strokes per minute, cleaning below the gumline, beyond where the bristles actually touch." (Gillette II Complaint ¶ 6a.) The rationale for such a distinction between the two suits [G-1 and G-2] is clear: ***Gillette I relied upon a theory of disparagement of a competitor's product while Gillette II relies upon a theory of false statements made about one's own product.***

ER 100- 101, ll. 10-10. (underlining in original, bold/italic added)[4]

In short, while in G-1 Gillette complained Philips advertised that Gillette's products actually *caused* gum disease, G-2 is restricted to Gillette's assertions that Philips overstated the attributes of its own product. Both claims are actionable under the Lanham Act. While Philips' libelous statements in G-1 were found to be covered, however, Philips' extravagant claims in G-2 are not.

In fact, when Philips and Gillette settled the G-2 suit, the parties' settlement agreement makes clear that what was most at issue was the permitted scope of each party's *future* advertising. ER 303-321. Two key pieces of correspondence from Gillette's counsel reveal that Gillette wanted money from Philips, not for damages sustained as the result of any false advertising, but rather as partial recoupment of

[4] The jury in Gillette 1 awarded Gillette $2.5 M after finding that Philips committed multiple false advertising claims about its product and disparaging claims about Gillette's product. That jury also found Philips' advertising violated the New York Deceptive Practices Act. ER 425-434.

its attorneys' fees and costs incurred in bringing Philips to heel. ER 610, ¶10; ER 613, ¶10. Once an agreement was reached, Gillette released Philips from liability for the allegations contained in the G-2 complaint. In addition, and in exchange for the same monetary payment as that paid for release of the G-2 claims, Gillette also released Philips from liability for two separate pieces of litigation pending in Germany, the so-called "German Actions" identified at ER 303 (under seal), ¶ 2. In other words, once Philips agreed to "play fair" in its advertising and agreed to partially cover the costs of Gillette's Lanham Act case which was brought to prevent Philips' false claims for its own product, the case was settled.

C. The Proceedings Below

Philips argues that the district court was inconsistent in its final order holding Philips is not entitled to indemnity coverage, and its prior, so-called "prima facie" order (filed under seal at ER 373-380). Unlike the final order, the "prima facie" order merely held that Philips had made out a prima facie case for indemnity. The order conditioned any actual indemnity obligation upon "**the actual determination of facts**" surrounding the claimed injury relative to the policy provisions." ER 375 (emphasis added). The prima facie order did not re-write Washington coverage law to shift the burden of proof from Philips to Federal, or hold that the case was over unless Federal proved an exclusion. It

merely pointed out that Federal should come forward with evidence under one or more of its affirmative defenses.[5]

In deciding Federal's Motion for Partial Summary Judgment on Indemnity, the district court analyzed the G-2 complaint and determined in its Order of November 5, 2002, that the G-2 complaint did not contain any allegation by Gillette asserting Philips had libeled Gillette or disparaged Gillette's product, as would be required for coverage to exist under Federal's policies. ER 117-125. In reaching this conclusion, the district court also considered the undisputed testimony of Gillette's witness, Clare Howe.

Ms. Howe, who is an in-house attorney for Gillette, but who was not attorney of record in Gillette 2, was produced in response to Federal's Fed. R. Civ. P. 30(b)(6) subpoena. Ms. Howe testified that the G-2 complaint did not contain any allegations of libel or disparagement ER 208-230, and that Gillette was not seeking damages for such claims. ER 208-230. [6]

The district court was also provided with all of the "at issue" advertisements so that the court could see for itself that none of the ads libeled Gillette, or

[5] One of Federal's affirmative defenses asserted that there was no coverage for liability which did not qualify as a covered risk under the insuring agreement. ER 80-81, Affirmative Defense No. 2.

[6] Clare Howe testified that the Gillette 2 complaint did not contain a stated claim for either libel or slander (ER 219, ll. 15-21, and ER 223, ll. 3-6), that the claims contained in the Gillette 2 complaint are those which are listed, namely, the false advertising and state law claims (ER 222, ll 17-21), that the Gillette 2 complaint does not contain a claim for trade disparagement (a/k/a "trade libel") (ER 222, 223, ll. 22-2), and that Gillette was not seeking monetary damages under any other legal theories other than the Lanham Act and the New York General Business Law claims identified in the Gillette 2 complaint (ER 226, ll. 18-24).

disparaged Gillette's product, along with what the parties call "Appendix A," which is a table created by Gillette in G-2 in response to Philips' Interrogatory No. 21 which details the specific language in each ad it claimed violated the Lanham Act. ER 450-574.

Philips' Motion for Reconsideration of the November 5, 2002, Order was denied, and the district court issued its December 13, 2002, Order on Reconsideration (ER 233-238). In that Order, the court held:

> **. . . in reviewing the Gillette-2 complaint, it becomes evident that Gillette was suing Optiva, Philips' predecessor, for misrepresentations that Optiva was making about Optiva's own product. G-2 Compl. ¶¶ 6-7. While the ads in question may have mentioned Gillette's products, *the language chosen by Gillette as the basis for its complaint* only mentions Optiva's products and capabilities.**

ER 236, ll. 7-13 (underlining in original, bold/italic added)

The court went on to define "libel," "slander," "defamation" and "disparage" in footnote 3 to that Order and concluded that, "[a]s Gillette did not allege facts in the complaint that Optiva was making false statements that defamed or disparaged Gillette, the duty to indemnify for advertising injury does not arise." ER 236-237, ll. 16-3. This holding refutes Philips' repeated argument that the district court found no indemnity because Gillette did not title its claims "libel" or "disparagement."

With respect to Philips' contest of the admissibility of Gillette's testimony, the court concluded that, ". . . Philips has not presented any evidence to contradict

the testimony that Gillette did not seek monetary damages under other legal theories besides misrepresentation." ER 237, ll. 6-8.

As to the argument that the district court's November 5, 2002, ruling on indemnity is "inconsistent" with the court's prior orders, the district court held:

> Two of these orders, granting summary judgment to Philips on the duty to defend and the duty to indemnify in Gillette-1, deal with a different underlying case that did in fact allege libel and disparagement. As to this court's order on the duty to defend Gillette-2, **Philips seems to be staunchly resistant to the principle that the duty to defend and the duty to indemnify are two different duties, complete with different standards for their application**. While the complaint and surrounding facts are sufficient to trigger the duty to defend, the complaint and the facts alleged therein are not sufficient to trigger the duty to indemnify.

ER 237-238, ll. 14-7, underlining in original, bolding added. The district court's orders are entirely consistent with one another.

III. SUMMARY OF THE ARGUMENT

The district court correctly concluded that the G-2 complaint did not allege, and Philips did not settle with Gillette, any claim for "libel" or "disparagement." The G-2 complaint alleged that Gillette suffered damages because of Philips' false advertising claims made about its own product. In addition, Gillette testified that it was not seeking damages for libel or disparagement. Gillette's answer to Philips' Interrogatory No. 21 (consisting of "Appendix A" discussed below in footnote 10) identifies every word in every ad Gillette considered "at issue" in G-2, and not one referenced excerpt makes any reference (disparaging or not) to Gillette or its product. The only language identified in Gillette's Appendix A consists of Philips'

claims about its own product's alleged attributes. Finally, as discussed below, the magistrate judge who heard Philips' motion to determine the scope of the G-2 complaint did not identify a single covered claim as being at issue in G-2. In fact, Magistrate Judge Freeman's order found no ad run prior to 1998 was at issue in G-2, which means Federal's policies providing coverage for disparagement (1993-1996) are not at issue in this coverage case.

If Philips succeeds in convincing this court that the G-2 allegations qualify as either libel or indemnifiable product disparagement, retail advertising will have to stop using all comparative phrases because the businesses will otherwise be uninsurable. Advertising will no longer include such common claims as "most effective," "like a rock," "built Ford tough," "we are Company Grade," "faster," "better," "best," "new," "improved," "exclusive, must-try technology," "building on our position as the strongest," "becoming a premiere wide area network provider," "first full-size pickup ever built with a hydroformed steel front frame – an innovation that makes our frame exceptionally tough, strong and durable," "the most dependable, longest-lasting trucks on the road," only drug "proven to help protect" against various diseases, "most advanced," the "one and only GM expert," "most powerful," "ingenious," "remarkable," and "proven safe and effective in clinical trials," among many others.[7]

Under Philips' interpretation of "libel" and "disparagement," all advertising catch-phrases of this type would qualify as "libel" and/or "disparagement." No

[7] The referenced ad slogans can be found in ads contained in Federal's attached Addendum at p. 33, Document Nos. 1-14.

manufacturer would safely be able to make claims about its own product, or about how its product compares to the competition. Retail advertising, as we know it, would be doomed to benign and passive references to a product's attractive packaging, else the courts would be clogged, and the nation's businesses uninsured. Philips' interpretation is untenable and incorrect.

Federal, and the district court below, recognize the scope of the Lanham Act only potentially, but not necessarily, includes claims for trade libel. Claims must actually be plead in a complaint in order to be actionable, however. Contrary to Philips' statements, nothing in the district court's November 5 Order (ER 117-125) or the Order on Reconsideration (ER 233-238) suggests the district court was confused regarding the scope of the Lanham Act. As correctly held by the district court, Washington insurance coverage law requires indemnity only of covered claims that were actually settled, not claims that could have been settled, but were not. As the district court's G-2 "duty to indemnify" orders have consistently made clear, Gillette was seeking damages only for Philips' "false or misleading representations" of fact regarding its own product's "nature, characteristics, qualities," which false advertising Gillette asserted injured sales of its comparable product.[8]

[8] Philips' unsupported statement (p. 3 of its brief) asserting that "Gillette dominates the power toothbrush market" appears placed to suggest that Gillette, given its dominating position, would not, because of Philips' product's much smaller market share, be concerned about Philips' false advertising, thereby implying, again without support, that Gillette was concerned about Philips' libelous and/or disparaging statements. The court's review of the entire G-2 complaint, including, especially, paragraph 1, will confirm this is not the case.

In essence, Philips failed to provide the district court any proof that the underlying settlement released claims of libel or disparagement. Merely pointing to Gillette's recitation of both clauses of § 43a (paragraph 17 of the complaint) cannot overcome the complete lack of factual basis for allegations of libel or disparagement in the complaint, Gillette's own testimony, and Gillette's Answers to Philips' Interrogatory No. 21 (discussed below). Philips failed to identify to the district court a single advertisement at issue in G-2 that it asserts contain a libelous or disparaging remark. Philips attempts to reframe the issue as one of "implicit libel" to overcome the general lack of reference to Gillette or its products, but ignores the crucial prong of any claim of libel or disparagement, that of the libelous or disparaging remark. Philips' silence on this point is deafening. To trigger indemnity coverage under Federal's policies, Philips has the burden to prove that it settled covered claims.

Philips' position is untenable for another reason. If Philips prevails, then the "duty to indemnify" becomes as broad as the "duty to defend," a result which is at odds with every state's insurance law, including Washington case law. Under Philips' interpretation, so long as the mere potential for liability for disparagement is contained in a settled complaint, the settlement amount was necessarily paid to settle a covered claim, thus triggering the duty to indemnify. Of course, the court will recognize Philips' "standard" as merely a restatement of the duty to defend. In fact, the duty to indemnify is triggered only when the entire complaint is considered alongside the actual facts surrounding the settlement that were known

to the parties at the time of the settlement. That is why the testimony of Gillette's corporate representative,[9] Clare Howe, is so important to an understanding of what actual facts were available to the parties at the time of settlement. Notably, Ms. Howe testified that Gillette was not seeking damages for libel or disparagement, which is the reason Philips objects to the use of her testimony. Philips failed to question Ms. Howe, or to otherwise submit controverting evidence in order to meet its burden in order to avoid summary judgment. Philips chose to do neither and should not now be heard to complain about a factual finding on appeal.

While Philips disagrees, the district court consistently and accurately applied appropriate Washington insurance law to conclude that the G-2 complaint, alone, and coupled with the testimony of Gillette, failed to allege a claim which would be covered by Federal's policies. None of the ad content complained of by Gillette as set out in its discovery responses below reveals libelous or disparaging content. [10]

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[9] Though it suits Philips to characterize Ms. Howe as Gillette's "attorney" because it supports the argument Philips makes on page 12-13 of its brief, Ms. Howe was actually Gillette's corporate designee for the deposition. She was not attorney of record for Gillette, as suggested by Philips.

[10] Gillette originally took the position that 340 ads were at issue in Gillette 2. ER 450-574 Gillette's Appendix A, originally attached as Exhibit 4 to Decl. of CLN in support of MSJ on indemnity. This document was generated by Gillette in responding to Optiva/Philips' Interrogatory Number 21. In Appendix A, Gillette identified the advertisements and ad content that it contended constituted false and deceptive advertising by Optiva/Philips by highlighting the language it found offending, and therefore actionable under the G-2 Complaint. As part of its *de novo* review, this court will note all of the language highlighted by Gillette refers only to those claim-types identified by Gillette in paragraphs 1, 6 and 7 to the G-2 complaint. ER 41-54. None of the language highlighted is libelous of Gillette, or disparaging of Gillette's product.

Consequently, no part of Philips' settlement with Gillette is covered under Federal's policies.

IV. ARGUMENT

A. The District Court Correctly Concluded That the G-2 Complaint Did Not Trigger Federal's Duty to Indemnify.

1. The Fact That the G-2 Complaint Contained a Lanham Act Claim Does Not Compel Reversal.

Philips argues on appeal that the district court's ruling that Philips was not entitled to indemnity was erroneous because the court did not properly "interpret" (brief at p. 17) § 43(a) of the Lanham Act. For the record, Federal agrees with Philips that the scope of the Lanham Act is as described by Philips. Also, it is clear from the Record that the district court, too, was well aware of the change in scope that occurred in 1988. ER 91, fn 2, ER 98, fn 1, and ER 120-121, ll. 21-8. Therefore, Federal need not address that issue further. Federal disagrees with Philips that mere citation to, or recitation of, the Lanham Act necessarily means a litigant intended to bring a claim for "libel" or "slander."

As noted by Philips on page 11 of its brief, § 43(a)(1)(B) creates liability under two separate prongs for "any . . . false or misleading representation[s] of fact that, "in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her **or another person's goods, services, or commercial activities**.[.]" (emphasis added). The first prong of the Act extends liability to misrepresentations about **the advertiser's own product**, while the second prong provides liability for the advertiser's

misrepresentations about **another's product**. Federal also agrees that, in paragraphs 17, 19, and 22, Gillette inserted the parties' names into the language from both clauses of § 43a.

What Philips fails to address, and for good reason, is the fact that "Optiva's advertising claims" at issue in the referenced paragraphs are set out with particularity in paragraph 1 to the G-2 complaint and include only claims that Optiva had made about its own product (ER 41-54). The G-2 complaint references to the second prong are clearly mere recitations, not claims supported by facts. Paragraph 1 to the G-2 Complaint (ER 41), titled, "Nature of the Action," provides a concise summary of exactly what Gillette was complaining about. The paragraph states:

> ***This Complaint challenges Optiva's advertisements for its sonicare® electric toothbrush to the consumer concerning purported "sonic" benefits of the sonicare toothbrush. Optiva claims that, in everyday use, sonicare cleans teeth not only by brushing, but also by purported "sonic" waves that operate beyond the reach of the bristles. Optiva also claims that such "sonic" and "beyond the bristles" abilities are possessed exclusively by sonicare, and resemble ultrasonic and other "sonic" technologies used to clean diamonds, clean teeth in dentists' offices, and locate objects through earth and water.*** All such claims are literally false and misleading. Optiva's false advertising violates federal and state law, confuses Gillette's customers and harms Gillette irreparably. Even if Optiva's new false advertising stopped today, Gillette and its Braun and Oral-B brands, would already have suffered substantial damages. [emphasis added]

Therefore, the "claims" at issue in the remainder of the G-2 complaint which are the subject of the subsequent G-2 settlement and this coverage dispute are limited to the claims identified in paragraph 1.

The district court recognized in its original Order on the G-2 duty to defend (ER 95-102) that the **"false and misleading" "statements," "representations," and "descriptions of fact"** complained of by Gillette in paragraphs 17, 19, and 22 to its complaint were therefore limited to Optiva's representations about its own product, not Gillette's, regardless of how inartfully Gillette presented its allegation.[11]

As noted, Gillette limited its complaint to those false claims made by Philips about Philips' own product.

One case which is instructive on these issues because it has so similar a fact pattern to this matter is Atlapac Trading Company, Inc. v. American Motorists Ins. Co., 1997 WL 1941512 (U.S.D.C. C.D. California), in which the federal court, interpreting California law (which is not dissimilar from Washington's law on indemnity coverage), held that the insured's excessive touting of its own product

[11] The district court reconsidered its duty to defend decision in Federal's favor because the factually unsupported language in paragraph 17 allowed for the possibility that Philips could potentially be liable for a covered claim in the event the allegation that Philips had, in fact, made misrepresentations about the Gillette product were ultimately proved at trial. The court is reminded, however, that the district court took pains in its Order on Reconsideration on the **duty to indemnify** (ER 233-238) to distinguish the differences between the scope of the insurer's duties, concluding that ". . . the language chosen by Gillette as the basis for its complaint only mentions Optiva's products and capabilities" (ER 236, ll. 11-13).

(claiming its product was "pure olive oil" when it was a blend) may be actionable under the Lanham Act, but it was not covered by its insurance policy.

Just as Philips has asserted in the present case, Atlapac argued that the claimant's ("Tama") allegations of injury due to Atlapac's false statements regarding its own product constituted product disparagement, thus triggering the duty to defend. The Atlapac court disagreed, holding:

> Under the facts alleged in the underlying complaint in support of Tama's false designation of origin and false description cause of action, it is clear that Tama alleged a claim against Plaintiff for false advertising (misrepresentations about Plaintiff's own goods) under § 43(a)(1)(B) the Lanham Act. Tama complained that Plaintiff misrepresented its own goods as being "pure olive oil," when, in fact, Tama alleged, they were not. The Policy, however, does *not* provide coverage for the false advertising/false representation prong of the § 43(a). Rather, the Policy, by its clear terms, provides coverage for product disparagement.

Atlapac, 1997 WL 1941512, *5. (italics in original)

The Atlapac court concluded that the excessive touting of one's product is not covered as either defamation or disparagement under a general liability policy.[12] Federal considers it significant that Philips has directed the court to no case which holds otherwise.

Philips' attempted use of the comparison portion of the "Titanic" ad is similar to the Atlapac insured's attempted use of a "flyer" comparing the two olive

[12] The Atlapac court went on to find a duty to defend on the ground that the insured's use of the term "pure olive oil" could possibly be covered as the "misappropriation of an advertising idea." That holding does not impact Federal's conclusions regarding the impact of the holding to this matter, however.

oil producers' prices. In declining to allow the flyer to create coverage, the Atlapac court explained, "Plaintiff does not present evidence that . . . the flyer played any role in the underlying action. The documents from the underlying action, such as Tama's First Amended Complaint . . . do not make reference to the flyer." Atlapac, 1997 WL 1941512, *fn 1. Similarly, Philips has presented no evidence that the comparison portion of the "Titanic" ad relied upon by it played any role in the underlying action: it was not mentioned in the complaint, Gillette did not testify that it claimed damages for comparison ads, Gillette's discovery response (ER 450-574) and Philips discovery response in this action (ER 578-604) did not list the comparison portions of any ads, and, as will be discussed below, the underlying magistrate judge ruled the claims "at issue" in G-2 did not include comparison portions of ads. ER 381-413. In fact, the Magistrate Judge in G-2 concluded no ad run prior to 1998 was at issue in G-2, which means that the only issue on appeal is whether a post-1998 ad "libeled" Gillette, since Federal's 1998 and later policies do not cover disparagement. The "Titanic" ad is irrelevant to the issue before the Court. ER 498.

The fact remains that Gillette's complaint was limited to Optiva's false and misleading statements about its own product, which limits the inquiry to the first prong of the Lanham Act. Philips' argument that because it settled a Lanham Act claim, the settlement is covered, must fail.

2. Washington Indemnity Law Requires Indemnity Only for Settled Claims That Are Covered Under A Policy.

Philips is entitled to indemnity coverage only after it "shows" or "establishes" that the loss for which coverage is claimed is within the scope of Federal's policy's insuring agreement. Overton v. Consolidated Ins. Co., 145 Wn.2d 417, 38 P.3d 322, 329 (2002); Queen City Farms, Inc. v. Central National Ins. Co. of Omaha, 126 Wn.2d 50, 882 P.2d 703 (1994); McDonald v. State Farm Fire & Cas. Co., 119 Wn.2d 724, 837 P.2d 1000, 1003-04 (1992); Diamaco, Inc. v. Aetna Cas. & Sur. Co., 97 Wn. App. 335, 983 P.2d 707, 709 (1999).

Philips failed to meet this burden. Philips failed to controvert or even cross-examine Gillette's Fed. R. Civ. P. 30(b)(6) representative, who testified that no damages were sought by Gillette in the G-2 complaint for libel or disparagement. [ER 208-230] Philips failed to point to a single ad containing libelous or disparaging content.[13] To succeed on this front, Philips would have to demonstrate that any of the claims alleged by Gillette to be at issue (as those claims are identified in paragraph 1 to the G-2 complaint) attacked Gillette's reputation and/or brought discredit or reproach upon Gillette's product.[14] This Philips has not done.

[13] Moreover, under settled Washington law, Philips has the burden to prove that all components of the settlement relating to Gillette's complaint fall within the scope of Federal's policies. Overton, 38 P.3d at 329. See Nordstrom, Inc. v. Chubb & Son, Inc., 820 F.Supp. 530, 534 (W.D. Wash. 1992), *aff'd* 54 F.3d 1424 (9th Cir. 1995) ("Our preceding analysis reveals that Nordstrom [the policyholder] has satisfied ***its burden*** of showing that the D & O policy covered the entire settlement amount." Id. at 1436 (emphasis and bracketed material added)). Merely showing one covered ad would not create indemnity for the entire settlement.

[14] For this purpose, Federal accepts the definitions of "defamation" and "disparagement" adopted by the district court at footnote 3 to its Order on Reconsideration, at ER 236.

The best Philips has done, and can do, is to point to a single irrelevant advertisement that contains a reference and comparisons to the Gillette product, about which Gillette, itself, did not complain. The "Titanic" ad is the **only** ad specifically discussed by Philips in its Brief, although it inexplicably attaches many other advertisements, it leaves undiscussed.[15] Philips points out that the "Titanic" ad contained a comparison between the sonicare and the Braun product.[16]

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[15] Philips' inclusion of unspecified and undiscussed ads in footnote 11 of its brief (ER 323-366 under seal, ER 1-40, and ER 276-295 under seal) is troubling to Federal for several reasons. First, Federal is concerned that Philips may attempt detailed discussion of referenced ads in its Reply briefing in order to deprive Federal of an opportunity to respond. If that occurs, Federal reserves the right to sur-respond as necessary. Second, while ER 366 is one of the ads referenced by Gillette and is presumably an ad under which Philips seeks indemnity from Federal, Philips has previously stated in its Amended Answer to Federal's Interrogatory No. 51 that the ad was not covered by Federal's policies. See ER 450-574. Federal is equally troubled that Philips, in footnote 2 of its brief, tells the court it has attached its (impliedly complete) Answer to Interrogatory No. 51, however, the critical part of that Answer is the Excel spreadsheet attachment known as "Appendix A" which identifies the many ads which Philips admits are not covered by Federal's policies, one of which is ER 366. For reasons unknown, Appendix A is missing from Philips' Excerpt submission (ER 369-372), however, Federal here includes it as ER 450-574. Third, Philips has included representative advertisements from Federal's summary judgment submission within the excerpts of record (ER 1-40; ER 276-295 under seal). The court should note that, contrary to Philips' unsupported assertion in footnote 11 to its brief, (p.18) Federal did not place ER 25-40 before the district court for any reason. These articles were not complained of by Gillette (ER 450-574, Appendix A) and Philips did not bring the article to the district court's attention during the parties' briefing. Therefore, Federal objects to Philips' reference to, and inclusion of, such material on appeal. Fourth, ER 164-206 were not before the district court during the summary judgment briefing until Philips raised them during its Motion for Reconsideration. Federal objected to Philips' submission as untimely and here renews that objection. ER 421-424.

[16] The ad is also not disparaging – but even if the Titanic ad contained product disparagement, this ad ran in 1998 and the 1998 policies purchased by Philips did not cover product disparagement. ER 498. (It is undisputed that the language in the 1997 policy is identical to the language in the 1998 policy.) Philips has

Crucially, however, and a point ignored by Philips, *Gillette did not reference the comparison portion* of the "Titanic" ad in the complaint, or in Appendix A. Paragraphs 6 and 7 of the G-2 Complaint, including their respective subparagraphs (ER 43-46), which contain the only references to Gillette's complaints about Philips' "Titanic" ad, list only such claims as fall within the categories specified in paragraph 1 to the G-2 complaint (identified above). In other words, Gillette's complained-of claims are limited to the "sonic," etc. claims found in Philips' ads for its own product. The comparison proffered by Philips was not an issue for Gillette.

Confirming that Gillette did not make a claim for damages due to the comparison portion of the ad is Gillette's response to discovery detailing the exact language in each ad it contended had caused it damage, in which the comparison portion of this ad is not listed. ER 498, No. 116A. How Philips can contend this portion of the ad was "at issue" in G-2 when Gillette itself specifically and deliberately ignored it not once, but twice, is a mystery. In any event, Federal's 1998 policy does not cover disparagement and Philips does not suggest the comparison portions on the "Titanic" ad libeled Gillette.

3. The District Court Was Entitled to Consider All Available Facts Known to the Parties At the Time of Settlement, Including Gillette's Testimony.

Philips asserts the district court improperly relied on Gillette's deposition testimony regarding the scope of the G-2 complaint, arguing such testimony is

(..continued)
properly not alleged that Gillette ever claimed is was libeled by any part of the "Titanic" ad.

"irrelevant" to the issue of whether Philips settled a covered claim.[17] When determining the scope of a covered loss in the context of a settlement, as opposed to a verdict, the Nordstrom court held:

> Any allocation of the settlement amount is appropriately based on the claims that were actually settled; not on claims that could have been brought or that the class plaintiffs might have chosen to pursue, but did not. . . . Allocation is based, not on the ultimate resolution of all the factual and legal issues in the settled case, but on the court's determination of what reasonable allocations should have been made, ***considering uncertainties in both fact and law*** known at the time of the settlement.

Nordstrom Inc. v. Chubb & Son, Inc., 820 F.Supp. at 535, 536.[18] [emphasis added]

In Sherman v. Ambassador Ins. Co., 670 F.2d 251, 260 (D.C. Cir. 1981), that court held, in determining whether grounds for settlement, entered into after

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[17] In partial support for this position, Philips cites the case of Bankwest v. Fidelity & Deposit Co. of Md., 63 F.3d 974, 981 n.3 (10th Cir. 1995). That case is inapposite for the reason that the testimony at issue was given by the party's trial counsel, not, as in the present case, by the party itself. Also, while the Bankwest court's summary footnote-conclusion on this point was, itself, unsupported by authority, the same cited footnote goes on to state that even the trial counsel's testimony went to the weight of the evidence regarding the issue, thus indicating relevance and admissibility after all. While Ms. Howe happens to be an attorney, she was testifying as Gillette in response to a subpoena issued to Gillette. Nothing could be more relevant to a discussion of the scope of a party's complaint than the party, itself. Federal objects to Philips' improper efforts to characterize Ms. Howe as "counsel for plaintiff," "plaintiff's counsel," "views of opposing counsel," etc. on pages 23 and 24 of its brief in an apparent effort to make Ms. Howe "fit" into the Bankwest holding. As she testified in her capacity as Gillette (she was not attorney of record), she does not so fit.

[18] This passage from the Nordstrom case was also cited by Philips in support of its argument at page 24 of its brief, however, Philips' argument ignores the fact that Ms. Howe's testimony was nothing more than Gillette's testimony about what Gillette knew regarding the scope of its own complaint at the time of the settlement. Gillette's knowledge of what it knew at the time of the settlement is not lessened because it is elicited after the settlement, as Philips would imply.

jury trial, were outside policy coverage, that the court "may consider the specific terms of the Complaint, the nature of the proofs, jury instructions, the jury's verdict, attorney briefs (if any), and any other documents ***or testimonial statements*** related to the . . . case that might shed light on the matter." (emphasis added) Under the holdings of the referenced authorities, the district court was entitled to rely on Gillette's testimony regarding its own complaint to the same extent as it was entitled to consider Gillette complaint, itself. Philips' unsupported statement that "the scope of pleadings is a determination of law, not a factual inquiry to be ascertained by way of testimony . . . ." is not accurate. As the authorities presented by Federal confirm, determination of the complaint's scope is only one part of the factual inquiry to be made when deciding if a settlement released any covered claims.

Philips also complains that Ms. Howe's testimony does not support Federal's, and the district court's, conclusion that neither libel nor disparagement were at issue in the G-2 complaint. The portions of the Howe transcript referenced in the summary judgment briefing[19] (re-stated above in footnote 6) speak for themselves and Federal will not revisit them here. As explained above, Federal

[19] In its Motion for Reconsideration, Philips attempted to raise issues about the entire transcript it had failed to address during the summary judgment briefing period. The district court concluded it could not consider such late-tendered support. This court, too, should refrain from considering Philips' proffered opposition on this point, however, Federal is confident that, if considered alongside the entire G-2 complaint (including paragraphs 1, 6 and 7 to that complaint) ER 41-54, Gillette's Appendix A ER 450-574, and Magistrate Judge Freeman's ruling ER 381-413 (discussed below), the entire deposition transcript ER 161-230 will support Federal's position that it was Gillette's position it was not suing Philips for libel or disparagement.

considers it telling that the very "Titanic" ad identified by Philips which was attached by Gillette to its complaint contains a "comparison" reference to the Braun product which mentions Braun by name, however, Gillette chose not to list "product disparagement" as one of its many complaints about the ad in paragraphs 6 and 7 to its complaint, or in the Appendix A language excerpts identifying the complained-of ad language. ER 498. Philips fails to explain this omission from the G-2 complaint, preferring to point to the references to "false and misleading representations" found in paragraphs 17, 19, and 22 of the complaint.

Philips' final brickbat at the Howe testimony is to make the unsupported statement that Gillette is biased against Philips, in an apparent attempt to impugn Gillette's neutrality on the matters attested to. Even assuming Gillette has a bias against Philips (denied by Federal, given Gillette's trial counsel's obvious reluctance to have his client answer Federal's questions), surely that bias was at least suspected by Philips at the time of the post-settlement deposition of Gillette such that Philips would be moved to make such inquiry of Gillette when presented with the opportunity to do so. Philips, however, had no questions on this (or any) point for Gillette at the deposition, apparently preferring to safely address the matter *via* innuendo after the fact. ER 161-230. The district court's consideration and utilization of the Howe testimony was proper.

B. The November 5 Order Correctly Determined What Risks Philips Settled and Does Not Create a Disincentive to Settle

Philips reargues its contention that because it settled a Lanham Act claim it is automatically entitled to indemnity. Federal will not, itself, restate the

discussions above regarding the Lanham Act, what the Gillette 2 complaint actually complained of, and what Gillette itself set out as "at issue" in discovery, other than to reiterate that the G-2 case was limited to complaints regarding claims Philips made about its *own products*, and, therefore, did not include claims for damages from libel or disparagement.

The district court found the presence of the referenced disjunctive phrase from the Lanham Act in the G-2 complaint triggered Federal's much-broader "duty to defend," but the district court properly declined to automatically find a duty to indemnify based on the prior ruling. Under Washington law, the duty to defend is much broader than the duty to indemnify, and the two duties are considered independently from each other. See Weyerhaeuser Co. v. Aetna Cas. and Sur. Co., 123 Wash. 2d 891, 902, 874 P.2d 142 (1994) (*en banc*); Safeco Ins. Co. v. McGrath, 42 Wash. App. 58, 61, 708 P.2d 657 (1985). Under Philips' unsupported view of this issue, the duty to indemnify would be triggered whenever the duty to defend was triggered, and that is not the law of any jurisdiction. That is why the district court observed in its Order on Reconsideration:

> ***Philips seems to be staunchly resistant to the principle that the duty to defend and the duty to indemnify are two different duties, complete with different standards for their application***. While the complaint and the surrounding facts are sufficient to trigger the duty to defend, the complaint and the facts alleged therein are not sufficient to trigger the duty to indemnify. Contrary to Philips' contention, such a result does not offend public policy but is a fair, rational, and efficient result. By having the duty to indemnify be narrower than the duty to defend, this court's November 5, 2002 ruling helps ensure that only covered claims will be identified.

ER 238 (underlining in original, bolding/italics added).

In light of the clear language of the G-2 complaint, Gillette's Appendix A ER 450-574, and the Gillette testimony on the scope of that complaint ER 161-230, Philips' suggestion that it was at risk for a jury verdict of libel or disparagement is without basis. In fact, Philip's, in Gillette 2, placed its own dispute regarding the scope of the G-2 complaint in front of Magistrate Judge Debra Freeman for resolution. ER 436-449. As noted above, Gillette responded to Philips' Interrogatory No. 21 about the claims at issue by identifying a number of claims that did not, according to Philips, appear in the G-2 complaint. ER 450-574. Philips objected, desiring to limit the scope of the claims to be defended at trial and filed a Motion for Protection.

In response, Judge Freeman issued a lengthy Memorandum and Order that determined the claims that were at issue in G-2. ER 381-413. Based on the claims that were *actually delineated* in the G-2 complaint, Judge Freeman's Order specifically laid out for the parties which categories of ads and ad content (claims) were at issue between the parties in G-2 and, therefore, which claims would go to the jury. For the court's convenience, Judge Freeman's ruling concerning the determination of which ads and ad content were at issue is condensed in the following table:

"Sonic"	"Sonic" technology analogies (detect objects, locate fossils, clean diamonds, clean teeth)
"Sonic waves/technology"	
"Beyond the Bristles (and the reach of the bristles)"	"Beyond where the bristles actually touch"
"Exclusive"	

"Cleaning below the gumline (when accompanied by "beyond the bristles")" "Unlike manual/ordinary toothbrushes (when accompanied by "beyond the bristles")" "Studies" (research/laboratory/university studies show, etc.)	"Beyond the bristles" cleaning methodologies - (bacteria weakened by sonic waves/vibrations, cleaning between the teeth/below the gumline, fluid dynamics/agitation and streaming fluid, dislodge/attached/remove bacteria beyond the bristles, reducing stains/whitening, cleans beyond the bristles)

Not surprisingly, the only claims that Judge Freeman found to be at issue in the G-2 complaint are those claims which are identified in paragraph 1 to the G-2 complaint, and no others. All the claims listed above fall within the § 43a claims listed in the Complaint. Conspicuously absent, however, is reference to any claim, whether by name or factual content, for either "libel" or "disparagement." As those claims were not in the G-2 complaint, they could not have been presented to a jury without Gillette repleading to include them, something that had not occurred at the time of the G-2 settlement. Therefore, contrary to its argument, Philips was never at risk for exposure to a verdict for "libel" or "disparagement," and its settlement with, and payment to, Gillette did not extinguish that potential exposure, which is why Federal's duty to indemnify was not triggered.

As noted above, the Magistrate Judge also concluded that no ad run prior to 1998 was at issue. Therefore, Federal's policies issued for 1993-1996 are not at issue.[20] Therefore, even if Gillette had complained of disparagement in any ad (denied by Federal), Federal's policies' coverage for the post-1998 period were

[20] The district court incorrectly concluded that the limits imposed by the Magistrate Judge on the scope of the G-2 complaint were not binding on the issues to be presented at trial because Gillette had been given leave to amend its Complaint to include earlier ads. The fact remains that Gillette had not done so at the time of the G-2 settlement.

limited to coverage for libel, only, something even Philips does not suggest is in any ad. ER 420.

While Federal recognizes the public policy favoring settlement, the fact remains that such policy should not be used by Philips to overstretch the law or facts in an effort to gain undeserved coverage for an uncovered loss.

V. CONCLUSION

Federal agrees with the district court's conclusion in its November 5 Order that, **"Simply put, Philips settled a suit about false advertising, not a suit about product disparagement."** ER 124. Gillette sued Philips because Philips allegedly made exaggerated false claims about its own product that Gillette feared were causing prospective customers to purchase the Philips product. Gillette was not suing Philips because of any defamatory statements Philips made about Gillette or Gillette's product. Because the Gillette settlement did not settle claims by Gillette for either libel or disparagement, the entire settlement amount is not covered by Federal's policies and the district court's judgment in favor of Federal on the duty to indemnify should be affirmed in all respects.

For all of the foregoing reasons, Federal requests that the court affirm Judge Rothstein's ruling below.

DATED this 17th day of April, 2003.

COZEN O'CONNOR

By: _____/s/_____
Thomas M. Jones, WSBA #13141
Christopher L. Neal, WSBA #25685
Attorneys for Defendant
Federal Insurance Company

CERTIFICATE OF COMPLIANCE

I certify that the attached brief is **not** subject to the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief complies with Fed. R. App. P. 32 (a)(1)-(7) and is a principal brief of no more than 30 pages.

DATED this 17th day of April, 2003.

COZEN O'CONNOR

By: _____
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Attorneys for Defendant
Federal Insurance Company

STATEMENT OF RELATED CASE

Appellee is not aware of any related case before this court or any other court.

ADDENDUM TO BRIEF

Chevrolet Tahoe "Like a Rock" (Time Magazine Back Cover 2/10/03) – **Document No. 1.**

Pepcid Complete "You've searched high and low for the one heartburn product that's the most effective. An expert panel of doctors just found it." (Newsweek, 3/3/03, p. 7) – **Document No. 2.**

GMC Trucks "Technically [sic] Advanced Chassis. * * * We are Professional Grade." (Newsweek, 3/3/03, p. 9) – **Document No. 3.**

Canon Printers "What to look for in a photo printer. Faster ink coverage * * * That's two to three times the number of nozzles in a standard ink jet printer. * * * Canon's exclusive advanced MicroFine Droplet Technology . . . ." (Newsweek, 9/30/02, p. 7. – **Document No. 4.**

Dell Computers "The latest revolution from the company that revolutionized the PC. * * * The best value, today and over time." (Newsweek 4/7/03, p. 13) – **Document No. 5.**

Hotbot (Search Engine) "The new improved HotBot. With exclusive, must-try technology. * * * It takes searching to the fourth power." (Newsweek 1/27/03, p. 17). – **Document No. 6.**

Verizon Wireless "Building on our position as the strongest metro area network provider in our markets. * * * Becoming a premiere wide area network provider . . ." (Newsweek 1/27/03, p. 49). **Document No. 7.**

Chevrolet Silverado "That's why Silverado was the first full-size pickup ever built with a hydroformed steel front frame – an innovation that makes our frame exceptionally tough, strong and durable. * * * . . . making Silverado with QUADRASTEER the most maneuverable full-size pickup you can get. * * * The most dependable, longest-lasting trucks on the road." (Time 3/24/03, Back Cover). – **Document No. 8.**

Hyundai "America's Best Warranty" (Time 3/24/03, p. 15). – **Document No. 9.**

State Farm "We Live Where You Live" Like a Good Neighbor, State Farm is There (Time 3/3/03 p. 79) – **Document No. 10.**

Pravachol "Pravachol is the only cholesterol lowering drug proven to help protect against 1st and 2nd heart attack and stroke." (Time 4/7/03, p. 1) – **Document No. 11.**

General Motors ("Mr. Goodwrench" campaign) "Mr. Goodwrench. The one and only GM expert." (Time 4/7/03, p. 77) – **Document No. 12.**

General Electric "Haven't heard we make the world's most powerful jet engine? * * * Thanks to an ingenious, composite fan, the remarkable GE90-115B develops both more thrust and less noise." (Newsweek 3/17/03, p. 16) – **Document No. 13.**

NicoDerm CQ "Proven safe and effective in clinical trials." (Newsweek 1/20/03, 61) – **Document No. 14.**

PROOF OF SERVICE

STATE OF WASHINGTON, COUNTY OF KING

On this date I caused to be served BRIEF OF APPELLEE FEDERAL INSURANCE COMPANY, by having true and correct copies of same delivered on the interested parties in said action, by overnight delivery via Federal Express to the Ninth Circuit Court of Appeals for filing and via hand delivery upon Appellant's counsel, Steven Hale at Seattle, Washington, on the 17th day of April, 2003.

Office of the Clerk U.S. Ninth Circuit Court of Appeals 95 Seventh Street San Francisco, CA 94103	Original plus 15 copies of Brief
Steven Hale Perkins Coie 1201 Third Avenue, 40th Floor Seattle, WA 98101-3099 Attorney for Philips Oral Healthcare, Inc.	2 copies of Brief

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on the 17th day of April, 2010, at Seattle, Washington.

_____

Donna Strauss

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