

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

HARTFORD FIRE INSURANCE COMPANY,)	
)	
Plaintiff,)	Hon. Edmond E. Chang
)	
v.)	Case No.: 1:11-cv-03008
)	
EUROMARKET DESIGNS, INC.,)	
)	
Defendant.)	
)	

**ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIM TO
FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT**

Defendant, Euromarket Designs, Inc. (hereinafter referred to as “Crate & Barrel”), for its Answer, Affirmative Defenses, and Counterclaim to the First Amended Complaint for Declaratory Judgment (“Complaint”) filed by Hartford Fire Insurance Company (“Hartford”), states as follows:

1. This is an action for declaratory judgment pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §2201, to determine an actual controversy between the parties, concerning the rights and obligations arising under a contract of insurance issued by Hartford to Crate & Barrel in Illinois.

ANSWER: Crate & Barrel admits that the Complaint purports to set forth a claim for declaratory judgment under Title 28 of the United States Code. Except as expressly admitted, Crate & Barrel denies the allegations of Paragraph 1.

2. This action seeks a declaration that Hartford owes no coverage obligations under policies of insurance with respect to the Crate & Barrel’s liability in seven pending lawsuits concerning civil penalties under California Civil Code section 1747.08, also known as the Song-Beverly Credit Card Act of 1971 (“Song-Beverly Act”). The seven lawsuits are: (1) Jason Salmonson v. Euromarket Designs, Inc. d/b/a Crate & Barrel and Does 1 to 100, filed under Case Number BC 455001 in the Superior Court of California, County of Los Angeles, California and removed to the Central District of California under Case Number 11-cv-05179 (“Salmonson suit”)(a copy of the Complaint in the Salmonson suit is attached hereto as Exhibit A); (2) Carlos Campbell v. Euromarket Designs, Inc. and Does 1 through 50, filed under Case Number 1CGC-11-508421 in the Superior Court of California, County of San Francisco, California and removed

to the Northern District of California under Case Number 11-cv-01368. (“Campbell suit”)(a copy of the Complaint in the Campbell suit is attached hereto as Exhibit B); (3) Nancy Dardarian v. Euromarket Designs, Inc. d/b/a Crate & Barrel, filed under Case Number 11-cv- 00945 in the Northern District of California (“Dardarian suit”)(a copy of the Amended Complaint in the Dardarian suit is attached hereto as Exhibit C); (4) Tiffany Heon v. Euromarket Designs, Inc. d/b/a Crate & Barrel and Does 1 through 50, filed under Case Number 37-2011-00087234-CU-NP-CTL in the Superior Court of California, County of San Diego, California and removed to the Southern District of California under Case Number 11-cv-00769 (“Heon suit”)(a copy of the Amended Complaint in the Heon suit is attached hereto as Exhibit D); (5) Jessica Shughrou v. Euromarket Designs, Inc. and Does 1 through 50, filed under Case Number 11-cv-2325 in the Northern District of California (“Shughrou suit”)(a copy of the Complaint in the Shughrou suit is attached hereto as Exhibit E); (6) Zetha Noble v. Euromarket Designs, Inc., filed under Case Number 11-cv-03329 in the Northern District of California (“Noble suit”)(a copy of the Complaint in the Noble suit is attached hereto as Exhibit F); and (7) Thomas O’Connor v. Euromarket Designs, Inc. and Does 1 through 50, filed under Case No. CGC-11-508848 in the Superior Court of California, County of San Francisco, California and removed to the Northern District of California under Case Number 11-cv-02140 (“O’Connor suit”)(a copy of the Amended Complaint in the O’Connor suit is attached hereto as Exhibit G).

ANSWER: Crate & Barrel admits that the Complaint purports to seek a declaration that Hartford owes no coverage obligations under certain policies of insurance with respect to Crate & Barrel’s alleged liability in seven pending class action lawsuits pending in California (“Underlying Lawsuits”) concerning California Civil Code § 1747.08, also known as the Song-Beverly Credit Card Act of 1971. Crate & Barrel contends that each of the Underlying Lawsuits also seeks damages for attorneys’ fees pursuant to California Civil Code § 1021.5. Answering further, Crate & Barrel admits that copies of the currently existing operative complaints in each of the Underlying Lawsuits are attached as Exhibits A through G to the Complaint. Except as expressly admitted, Crate & Barrel denies the allegations of Paragraph 2.

3. Hartford is an insurance company formed under the laws of the State of Connecticut and is principally located in Connecticut.

ANSWER: Crate & Barrel admits the allegations in paragraph 3.

4. Defendant Crate & Barrel is an Illinois Corporation and has its principal place of business in Illinois.

ANSWER: Crate & Barrel admits the allegations in paragraph 4.

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1332 as the amount in controversy exceeds \$75,000.00 exclusive of costs and interest, and the parties are citizens of different states.

ANSWER: Crate & Barrel admits that the Court has subject matter jurisdiction over this action.

6. Venue is proper in this District pursuant to 28 U.S.C. 1391 as this case involves a claim for coverage under liability insurance policies issued to Crate & Barrel within this District.

ANSWER: Crate & Barrel admits that venue is proper in this district.

7. Hartford issued a commercial general liability policy to Crate & Barrel bearing policy No. 83 UEN RZ914, with an effective policy period from August 1, 2009 to August 1, 2010, and was renewed for the effective policy period of August 1, 2010 to August 1, 2011 (hereinafter referred to collectively as “the Hartford [sic] policies”). Copies of the Hartford policies are attached hereto as Exhibit H and Exhibit I.

ANSWER: Crate & Barrel denies that Hartford issued a commercial general liability policy to Crate & Barrel bearing policy No. 83 UEN RZ914. Any allegation in the Complaint referencing policy No. 83 UEN RZ914 or the “Hartford [sic] policies,” as that term is defined in paragraph 7, is therefore denied. Hartford issued a commercial general liability policy to Crate & Barrel bearing policy No. 83 UEN RZ1914, with an effective policy period from August 1, 2009 to August 1, 2010, which was renewed for the effective policy period of August 1, 2010 to August 2011 (collectively referred to as the “Policies”). Crate & Barrel admits that copies of the Policies are attached to the Complaint as Exhibits H and I, respectively.

8. Subject to all of its terms, the Hartford policies contain liability coverage for claims for “Bodily Injury,” “Property Damage,” and “Personal and Advertising Injury,” which provides, in part:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

SECTION I - COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply.

* * *

COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

- a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of “personal and advertising injury” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “personal and advertising injury” to which this insurance does not apply.

* * *

2. Exclusions

This insurance does not apply to:

a. Knowing Violation Of Rights Of Another

“Personal and advertising injury” arising out of an offense committed by, at the direction or with the consent or acquiescence of the insured with the

expectation of inflicting “personal and advertising injury.”

* * *

q. Right Of Privacy Created By Statute

“Personal and advertising injury” arising out of the violation of a person’s right of privacy created by any state or federal act.

However, this exclusion does not apply to liability for damages that the insured would have in the absence of such state or federal act.

* * *

SECTION V - DEFINITIONS

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

- a. (1) Radio;
- (2) Television;
- (3) Billboard;
- (4) Magazine;
- (5) Newspaper; or
- b. Any other publication that is given widespread public distribution.

However, “advertisement” does not include:

- a. The design, printed material, information or images contained in, on or upon the packaging or labeling of any goods or products; or
- b. An interactive conversation between or among persons through a computer network.

2. “Advertising idea” means any idea for an “advertisement.”

* * *

5. “Bodily injury” means physical:

- a. Injury
- b. Sickness; or
- c. Disease

sustained by a person and, if arising out of the above, mental anguish or death at any time.

* * *

16. “Occurrence” means an accident, including continuous or repeated exposure to the same general harmful conditions.

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

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral, written or electronic publication of material that slanders or libels a person or organization or disparages a person’s or organization’s goods, products or services;
- e. Oral, written or electronic publication of material that violates a person’s right of privacy;
- f. Copying, in your “advertisement”, a person’s or organization’s “advertising idea” or style of “advertisement”;
- g. Infringement of copyright, slogan, or title of any literary or artistic work, in your “advertisement”; or
- h. Discrimination or humiliation that results in injury to the feelings or reputation of a natural person.

* * *

20. “Property damage” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the “occurrence” that caused it.

As used in this definition, computerized or electronically stored data, programs or software are not tangible property. Electronic data means information, facts or programs:

- a. Stored as or on;
- b. Created or used on; or
- c. Transmitted to or from;

computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

21. “Suit” means a civil proceeding in which damages because of “bodily injury”, “property damage” or “personal and advertising injury” to which this insurance applies are alleged. “Suit” includes:

- a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
- b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

* * *

(See, Exhibit H and I, Form HG 00 01 06 05).

ANSWER: Crate & Barrel denies that paragraph 8 contains an accurate or complete summary of the terms of the Policies.

9. The Hartford policies contain the following Endorsement:

EXCLUSION — VIOLATION OF STATUTES THAT GOVERN E-MAILS, FAX, PHONE CALLS OR OTHER METHODS OF SENDING MATERIAL OR INFORMATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

- A. The following exclusion is added to Paragraph 2., **Exclusions of Section I - Coverage A - Bodily Injury And Property damage Liability:**

2. Exclusion

This insurance does not apply to:

DISTRIBUTION OF MATERIAL IN VIOLATION OF STATUTES

“Bodily injury” or “property damage” arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- a. The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or
 - b. The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
 - c. Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.
- B. The following exclusion is added to Paragraph 2., **Exclusions of Section I - Coverage B Personal And Advertising Injury Liability:**

2. Exclusions

This insurance does not apply to:

DISTRIBUTION OF MATERIAL IN VIOLATION OF STATUTES

“Personal and advertising injury” arising directly or indirectly out of any action or omission that violates or is alleged to violate: ...

- a. The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or
- b. The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
- c. Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

* * *

(See, Exhibit H and I, Form CG 00 67 03 05).

ANSWER: Crate & Barrel denies that paragraph 9 contains an accurate or complete summary of the terms of the Policies.

10. On February 14, 2011, Salmonson filed a class action suit seeking civil penalties for violations of the Song-Beverly Act. Allegedly, Crate & Barrel violated the Song-Beverly Act by intentionally requesting and then recording customers’ zip code information during credit card transactions. The Salmonson complaint seeks class certification, civil penalties of up to \$1,000 per violation under the Song-Beverly Act, attorneys’ fees and costs. (See, Ex. A).

ANSWER: Crate & Barrel admits that on February 14, 2011, Salmonson filed a class action complaint against Crate & Barrel for purported violations of the Song-Beverly Act, therein seeking class certification, civil penalties of up to \$1,000 per purported violation under the Song-Beverly Act, and attorneys’ fees and costs pursuant to California Civil Code § 1021.5. Crate & Barrel further admits that a copy of the *Salmonson* complaint is attached as Exhibit A to the

Complaint. Except as expressly admitted, Crate & Barrel denies each and every allegation in paragraph 10 on the basis that it contains an incomplete and inaccurate characterization of the allegations of the *Salmonson* complaint. Crate & Barrel also denies that Salmonson is entitled to any recovery on its complaint.

11. On February 18, 2011, Campbell filed a class action suit also seeking civil penalties for violations of the Song-Beverly Act alleging that Crate & Barrel intentionally requested and recorded customers' zip code information during credit card transactions. The Campbell complaint seeks class certification, civil penalties under the Song-Beverly Act, attorneys' fees, costs, and interest. (See, Ex. B).

ANSWER: Crate & Barrel admits that on February 18, 2011, Campbell filed a class action complaint against Crate & Barrel for purported violations of the Song-Beverly Act, therein seeking class certification, civil penalties, and attorneys' fees and costs pursuant to California Civil Code § 1021.5, and interest, a copy of which is attached as Exhibit B to the Complaint. Except as expressly admitted, Crate & Barrel denies each and every allegation in paragraph 11 on the basis that it contains incomplete and inaccurate characterizations of the allegations of the *Campbell* complaint. Crate & Barrel also denies that Campbell is entitled to any recovery on his complaint.

12. On March 1, 2011, Dardarian filed a class action lawsuit seeking civil penalties for violations of the Song-Beverly Act. Specifically, the Dardarian amended complaint alleges that Crate & Barrel intentionally requested and recorded customers' zip code information during credit card transactions. The Dardarian complaint seeks class certification, civil penalties under the Song-Beverly Act, attorneys' fees, costs and interest. (See, Ex. C).

ANSWER: Crate & Barrel admits that on March 1, 2011, Dardarian filed a class action complaint against Crate & Barrel for purported violations of the Song-Beverly Act, therein seeking class certification, civil penalties, and attorneys' fees and costs pursuant to California Civil Code § 1021.5, and interest, which was amended on April 29, 2011. Except as expressly admitted, Crate & Barrel denies each and every allegation in paragraph 12 on the basis that it

contains incomplete and inaccurate characterizations of the allegations of the *Dardarian* complaint. Crate & Barrel also denies that the *Dardarian* complaint filed on March 1, 2011 is attached as Exhibit C to the Complaint, but admits that Exhibit C contains the *Dardarian* first amended complaint. Crate & Barrel also denies that Dardarian is entitled to any recovery on her complaint.

13. On March 9, 2011, Heon filed a class action complaint alleging that Crate & Barrel violated the Song-Beverly Act by requesting and then recording customers' zip code information. The Heon amended complaint seeks class certification, civil penalties under the Song-Beverly Act, attorneys' fees, costs and interest. (See, Ex. D).

ANSWER: Crate & Barrel admits that on March 9, 2011, Heon filed a class action complaint against Crate & Barrel for purported violations of the Song-Beverly Act, therein seeking class certification, civil penalties, and attorneys' fees and costs pursuant to California Civil Code § 1021.5, and interest, which was amended on April 28, 2011. Except as expressly admitted, Crate & Barrel denies each and every allegation in paragraph 13 on the basis that it contains incomplete and inaccurate characterizations of the allegations of the *Heon* complaint. Crate & Barrel also denies that the *Heon* complaint filed on March 9, 2011 is attached as Exhibit D to the Complaint, but admits that Exhibit D contains the *Heon* first amended complaint. Crate & Barrel also denies that Heon is entitled to any recovery on her complaint.

14. On May 11, 2011, Shughrou filed a class action complaint seeking civil penalties for violations of the Song-Beverly Act. The Shughrou complaint alleges that Crate & Barrel violated the Song-Beverly Act by requesting and then recording customers' zip code information during credit card transactions. The Shughrou complaint seeks class certification, civil penalties of up to \$1,000 per violation under the Song-Beverly Act, restitution and disgorgement of any ill-gotten profits, an injunction to prohibit further violation of the Song-Beverly Act, attorneys' fees, costs and interest. (See, Ex. E).

ANSWER: Crate & Barrel admits that on May 11, 2011, Shughrou filed a class action complaint against Crate & Barrel for purported violations of the Song-Beverly Act, therein

seeking class certification, civil penalties, and attorneys' fees and costs pursuant to California Civil Code § 1021.5, and interest, a copy of which is attached as Exhibit E to the Complaint. Except as expressly admitted, Crate & Barrel denies each and every allegation in paragraph 14 on the basis that it contains incomplete and inaccurate characterizations of the allegations of the *Shughrou* complaint. Crate & Barrel also denies that Shughrou is entitled to any recovery on her complaint.

15. On July 7, 2011, Noble filed a class action complaint seeking civil penalties for violations of the Song-Beverly Act. The Noble complaint alleges that Crate & Barrel intentionally requested and then recorded customers' zip codes during credit card transactions. The Noble lawsuit seeks class certification, civil penalties of up to \$1,000 per violation under the Song-Beverly Act, an injunction to prohibit further violation of the Song-Beverly Act, attorneys' fees, costs and interest. (See, Ex. F).

ANSWER: Crate & Barrel admits that on July 7, 2011, Noble filed a class action complaint against Crate & Barrel for purported violations of the Song-Beverly Act, therein seeking class certification, civil penalties, and attorneys' fees and costs pursuant to California Civil Code § 1021.5, and interest, a copy of which is attached as Exhibit F to the Complaint. Except as expressly admitted, Crate & Barrel denies each and every allegation in paragraph 15 on the basis that it contains incomplete and inaccurate characterizations of the allegations of the *Noble* complaint. Crate & Barrel also denies that Noble is entitled to any recovery on her complaint.

16. On May 26, 2011, O'Connor filed an Amended Complaint in the Northern District of California. The O'Connor suit alleges that Crate & Barrel violated the Song-Beverly Act by requesting and then recording customers' zip code information during credit card transactions. The O'Connor suit seeks class certification, civil penalties under the Song-Beverly Act, an injunction to prohibit the use of an "Information Capture Policy" in violation of the Song-Beverly Act, attorneys' fees, costs, and interest. (See, Ex. G).

ANSWER: Crate & Barrel admits that on or about March 4, 2011, O'Connor filed a class action complaint against Crate & Barrel alleging violation of the Song-Beverly Act, negligence, invasion of privacy, and unlawful intrusion, and therein seeking class certification, civil

penalties, and attorneys' fees and costs pursuant to California Civil Code § 1021.5, and interest. Crate & Barrel further admits that on May 26, 2011, O'Connor voluntarily amended his complaint to dismiss all causes of action except his claim for violation of the Song-Beverly Act, while keeping the same factual allegations. Crate & Barrel further admits that a copy of the May 26, 2011 amended *O'Connor* complaint is attached as Exhibit G to the Complaint. Except as expressly admitted, Crate & Barrel denies each and every allegation in paragraph 16 on the basis that it contains incomplete and inaccurate characterizations of the allegations of the *O'Connor* complaint. Crate & Barrel also denies that O'Connor is entitled to any recovery on his complaint.

17. Crate & Barrel tendered its defense and indemnity in the Campbell, Salmonson, Heon, Dardarian, Shughrou, Noble and O'Connor suits to Hartford.

ANSWER: Crate & Barrel admits that it tendered its defense and indemnity of the Underlying Lawsuits to Hartford.

18. Hartford denies that it owes Crate & Barrel any defense or indemnity obligation for the Campbell, Salmonson, Heon, Dardarian, Shughrou, Noble, and O'Connor suits.

ANSWER: Crate & Barrel admits the allegations in paragraph 18. Crate and Barrel further alleges that by letter dated May 6, 2011, Hartford admitted its defense obligation, subject to a reservation of rights, to the original *O'Connor* complaint filed on or about March 4, 2011 based on the pendency of the negligence, invasion of privacy and unlawful intrusion causes of action alleged therein. Hartford agreed to defend Crate & Barrel (through independent counsel) until such time as this Court finds that this obligation is extinguished by the filing of the first amended complaint in the *O'Connor* action on May 26, 2011, which voluntarily removed from the *O'Connor* complaint the admittedly covered causes of action.

19. Hartford has been defending O'Connor subject to a reservation of rights. Hartford seeks a declaration that it owes no duty to defend the O'Connor suit after the Amended Complaint was filed on May 26, 2011. Hartford also seeks a declaration that it owes no duty to defend or indemnify Crate & Barrel for the O'Connor suit since May 26, 2011.

ANSWER: Crate & Barrel admits that Hartford has previously agreed to defend subject to a reservation of rights and further contends that Hartford agreed to pay independent counsel defense costs for Crate & Barrel in the *O'Connor* suit filed on or about March 4, 2011. Crate & Barrel lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 19 and therefore denies the same. Crate & Barrel denies that Hartford is entitled to any recovery on its suit for declaratory judgment.

20. An actual controversy exists between the parties with respect to their respective duties and obligations under the subject policies. This Court has the power to make binding declarations of the rights and duties of the parties herein, and to adjudicate the dispute between the parties herein.

ANSWER: Crate & Barrel admits the allegations in paragraph 20.

COUNT I
No "Bodily Injury" or "Property Damage"

21. Plaintiff incorporates and restates the allegations of paragraphs 1 through 20 above as if fully set forth herein.

ANSWER: Crate & Barrel adopts and incorporates by reference as though fully set forth herein its answers to paragraphs 1 through 20, as and for its answer to this paragraph 21.

22. Subject to all of its terms, Section 1(A) of the Hartford policies provide coverage for claims for "damages" because of "bodily injury" or "property damage" caused by an "occurrence."

ANSWER: The allegations in paragraph 22 state a legal conclusion to which no response is required. To the extent a response is required, Crate & Barrel admits the allegations in paragraph 22.

23. The Campbell, Salmonson, Heon, Dardarian, Shughrou, Noble, and O'Connor complaints do not concern a claim for “damages” because of “bodily injury” or “property damage” caused by an “occurrence.”

ANSWER: The allegations in paragraph 23 state a legal conclusion to which no response is required. To the extent a response is required, Crate & Barrel admits the allegations in paragraph 23 as to the existing operative complaints in the Underlying Lawsuits, but denies that there is no potential that the plaintiffs in these suits may assert claims for “damages” because of “bodily injury” or “property damage” caused by an “occurrence.”

24. Accordingly, Hartford does not owe any defense or indemnity obligations to Crate & Barrel under the “bodily injury,” or “property damage” liability coverage of the Hartford policies for the Campbell, Salmonson, Heon, Dardarian, Shughrou, Noble, and O'Connor suits.

ANSWER: The allegations in paragraph 24 state a legal conclusion to which no response is required. To the extent a response is required, Crate & Barrel admits that Hartford does not owe any defense or indemnity obligations to Crate & Barrel under the “bodily injury,” or “property damage” liability coverage of the Policies for the *Campbell*, *Salmonson*, *Heon*, *Dardarian*, *Shughrou*, *Noble*, and *O'Connor* suits as to the existing operative complaints in those matters, but denies that there is no potential that the plaintiffs in these suits may assert claims for “damages” because of “bodily injury” or “property damage” caused by an “occurrence.”

COUNT II
No “Personal and Advertising” Injury

25. Plaintiff incorporates and restates the allegations of paragraphs 1 through 20 above as if fully set forth herein.

ANSWER: Crate & Barrel adopts and incorporates by reference as though fully set forth herein its answers to paragraphs 1 through 20, as and for its answer to this paragraph 25.

26. Subject to all of its terms, Section 1(B) of the Hartford policies provide coverage for claims for “damages” because of “personal and advertising injury.”

ANSWER: The allegations in paragraph 26 state a legal conclusion to which no response is required. To the extent a response is required, Crate & Barrel admits that the Policies provide coverage for claims for “damages” because of “personal and advertising injury.”

27. The Campbell, Salmonson, Heon, Dardarian, Shughrou, Noble, and O’Connor complaints do not concern a claim for “damages” because of “personal and advertising injury” as defined in the policies.

ANSWER: The allegations in paragraph 27 state a legal conclusion to which no response is required. To the extent a response is required, Crate & Barrel denies the allegations in paragraph 27.

28. Accordingly, Hartford owes no defense or indemnity to Crate & Barrel under the “personal and advertising injury” coverage of the policies for the Campbell, Salmonson, Heon, Dardarian, Shughrou, Noble, and O’Connor suits.

ANSWER: The allegations in paragraph 28 state a legal conclusion to which no response is required. To the extent a response is required, Crate & Barrel denies the allegations in paragraph 28.

COUNT III
No Covered “Damages”

29. Plaintiff incorporates and restates the allegations of paragraphs 1 through 20 above as if fully set forth herein.

ANSWER: Crate & Barrel adopts and incorporates by reference as though fully set forth herein its answers to paragraphs 1 through 20, as and for its answer to this paragraph 29.

30. Subject to all of its terms, the Hartford policies only require that the insurer pay “damages” which the insured becomes legally obligated to pay.

ANSWER: The allegations in paragraph 30 state a legal conclusion to which no response is required. To the extent a response is required, Crate & Barrel denies the allegations of paragraph 30.

31. The Campbell, Salmonson, Heon, Dardarian, Shughrou, Noble, and O'Connor complaints seek civil penalties under § 1747.08(e), and accordingly, the lawsuits do not seek covered “damages” under the Hartford policies. Further, based on public policy, Hartford owes no duty to provide coverage for the civil penalties claimed in those suits.

ANSWER: The allegations in paragraph 31 state a legal conclusion to which no response is required. To the extent a response is required, Crate & Barrel admits that the *Campbell*, *Slamonson*, *Heon*, *Dardarian*, *Shughrou*, *Noble*, and *O'Connor* complaints seek civil penalties under § 1747.08(e) of the Song-Beverly Act. Crate & Barrel further admits that the complaints seek additional covered damages in the form of attorneys’ fees pursuant to California Civil Code § 1021.5, among others. Except as expressly admitted, Crate & Barrel denies the allegations in paragraph 31.

32. Accordingly, Hartford has no duty to defend or indemnify Crate & Barrel in the underlying Campbell, Salmonson, Heon, Dardarian, Shughrou, Noble, and O'Connor suits.

ANSWER: The allegations in paragraph 32 state a legal conclusion to which no response is required. To the extent a response is required, Crate & Barrel denies the allegations in paragraph 32.

COUNT IV
Right of Privacy Created by Statute Exclusion Applies

33. Plaintiff incorporates and restates the allegations of paragraphs 1 through 20 above as if fully set forth herein.

ANSWER: Crate & Barrel adopts and incorporates by reference as though fully set forth herein its answers to paragraphs 1 through 20, as and for its answer to this paragraph 33.

34. The Hartford policies exclude coverage for “personal and advertising injury” that arises out of a person’s right of privacy created by statute.

ANSWER: The allegations in paragraph 34 state a legal conclusion to which no response is required. To the extent a response is required, Crate & Barrel admits that the Policies exclude

coverage for “personal and advertising injury” that arises out of a person’s right of privacy created by statute, but further states that this exclusion does not apply to liability for damages that the insured would have in the absence of such state or federal act. Crate & Barrel denies that this exclusion applies to the Underlying Lawsuits. Except as expressly admitted, Crate & Barrel denies the allegations of Paragraph 34.

35. To the extent that any “personal and advertising injury” is alleged in the Campbell, Salmonson, Heon, Dardarian, Shughrou, Noble, and O’Connor complaints, the complaints are barred from coverage by the Right of Privacy Created by Statute Exclusion in the Hartford policies.

ANSWER: The allegations in paragraph 35 state a legal conclusion to which no response is required. To the extent a response is required, Crate & Barrel denies the allegations in paragraph 35.

36. Accordingly, Hartford has no duty to defend or indemnify Crate & Barrel in the underlying Campbell, Salmonson, Heon, Dardarian, Shughrou, Noble, and O’Connor suits.

ANSWER: The allegations in paragraph 36 state a legal conclusion to which no response is required. To the extent a response is required, Crate & Barrel denies the allegations in paragraph 36.

COUNT V
Violation of Statutes Exclusion Applies

37. Plaintiff incorporates and restates the allegations of paragraphs 1 through 20 above as if fully set forth herein.

ANSWER: Crate & Barrel adopts and incorporates by reference as though fully set forth herein its answers to paragraphs 1 through 20, as and for its answer to this paragraph 37.

38. The Hartford policies exclude coverage for “personal and advertising injury” arising out of any action that is alleged to violate any statute “that prohibits or limits the sending, transmitting, communicating or distribution of material or information.”

ANSWER: The allegations in paragraph 38 state a legal conclusion to which no response is required. To the extent a response is required, Crate & Barrel admits that the Policies exclude coverage for “personal and advertising injury” arising out of any action that is alleged to violate any statute “that prohibits or limits the sending, transmitting, communicating or distribution of material or information,” but denies that this exclusion is applicable to the Underlying Lawsuits. Except as expressly admitted, Crate & Barrel denies the allegations of Paragraph 38.

39. To the extent that the Campbell, Salmonson, Heon, Dardarian, Shughrou, Noble, and O’Connor complaints allege claims for “personal and advertising injury,” the complaints claim relief based on violations of the Song-Beverly Act, a statute that prohibits and/or limits the recording, transmission, communication and/or distribution of personal information. Accordingly, the complaints fall within the Violation of Statutes Exclusion.

ANSWER: The allegations in paragraph 39 state a legal conclusion to which no response is required. To the extent a response is required, Crate & Barrel denies the allegations in paragraph 39.

40. Therefore, Hartford has no duty to defend or indemnify Crate & Barrel in the underlying Campbell, Salmonson, Heon, Dardarian, Shughrou, Noble, and O’Connor suits.

ANSWER: The allegations in paragraph 40 state a legal conclusion to which no response is required. To the extent a response is required, Crate & Barrel denies the allegations in paragraph 40.

COUNT VI

The Knowing Violation of Right of Another Exclusion Applies

41. Plaintiff incorporates and restates the allegations of paragraphs 1 through 20 above as if fully set forth herein.

ANSWER: Crate & Barrel adopts and incorporates by reference as though fully set forth herein its answers to paragraphs 1 through 20, as and for its answer to this paragraph 41.

42. The Knowing Violation of Rights of Another Exclusion in the Hartford policies precludes coverage for “personal and advertising injury” that arises out of “an offense committed by, at the direction or with the consent or acquiescence of the insured with the expectation of inflicting ‘personal and advertising injury.’”

ANSWER: The allegations in paragraph 42 state a legal conclusion to which no response is required. To the extent a response is required, Crate & Barrel admits that the Policies preclude coverage for “personal and advertising injury” that arises out of “an offense committed by, at the direction or with the consent or acquiescence of the insured with the expectation of inflicting ‘personal and advertising injury,’” but denies that this exclusion is applicable to Hartford’s coverage obligations in the Underlying Lawsuits. Except as expressly admitted, Crate & Barrel denies the allegations of Paragraph 42.

43. Any injury or damage for “personal and advertising injury” that is alleged in the Campbell, Salmonson, Heon, Dardarian, Shughrou, Noble, and O’Connor complaints is barred from coverage by the Knowing Violation of Right Exclusion under the Hartford policies.

ANSWER: The allegations in paragraph 43 state a legal conclusion to which no response is required. To the extent a response is required, Crate & Barrel denies the allegations in paragraph 43.

44. Accordingly, Hartford has no duty to defend or indemnify Crate & Barrel in the underlying Campbell, Salmonson, Heon, Dardarian, Shughrou, Noble, and O’Connor suits.

ANSWER: The allegations in paragraph 44 state a legal conclusion to which no response is required. To the extent a response is required, Crate & Barrel denies the allegations in paragraph 44.

FIRST AFFIRMATIVE DEFENSE

Hartford’s claims are barred in whole or in part by the doctrine of estoppel.

SECOND AFFIRMATIVE DEFENSE

Hartford's claims are barred in whole or in part by the doctrine of unjust enrichment, as Hartford's retention of the premiums paid by Crate & Barrel for insurance coverage would be unjust if Hartford refuses to acknowledge its obligations to Crate & Barrel under the Policies.

WHEREFORE, Defendant/Counter-Plaintiff, Euromarket Designs, Inc., respectfully requests that this Court enter an order:

- A. Dismissing with prejudice Counts II through VI of Hartford's First Amended Complaint for Declaratory Judgment and all claims asserted therein against Crate & Barrel; and
- B. Declaring that Hartford has owed and continues to owe a duty to defend to Crate & Barrel in each of the Underlying Lawsuits.

COUNTERCLAIM OF EUROMARKET DESIGNS, INC.

Counterclaim Plaintiff, Euromarket Designs, Inc. (hereinafter referred to as "Crate & Barrel"), for its Counterclaim for Declaratory Judgment and other relief against Hartford Fire Insurance Company ("Hartford"), states as follows:

NATURE OF THE ACTION

1. This is an action by Crate & Barrel to seek a declaration that Hartford is obligated to defend Crate & Barrel in connection with seven lawsuits pending in the United States District Courts of the Northern, Central, and Southern Districts of California: (1) *Jason Salmonson v. Euromarket Designs, Inc. d/b/a Crate & Barrel and Does 1 to 100*, Case No. 11-cv-05179 (C.D. Cal.); (2) *Carlos Campbell v. Euromarket Designs, Inc. and Does 1 through 50*, Case No. 11-cv-01368 (N.D. Cal.); (3) *Nancy Dardarian v. Euromarket Designs, Inc. d/b/a Crate & Barrel*, Case No. 11-cv-00945 (N.D. Cal.); (4) *Tiffany Heon v. Euromarket Designs, Inc. d/b/a Crate & Barrel and Does 1 through 50*, Case No. 11-cv-00769 (S.D. Cal.); (5) *Jessica Shughrou v.*

Euromarket Designs, Inc. and Does 1 through 50, Case No. 11-cv-2325 (N.D. Cal.); (6) *Zetha Noble v. Euromarket Designs, Inc.*, Case No. 11-cv-03329 (N.D. Cal.); and (7) *Thomas O'Connor v. Euromarket Designs, Inc. and Does 1 through 50*, Case No. 11-cv-02140 (N.D. Cal.) (collectively referred to herein as “Underlying Lawsuits.”)¹

2. This action also seeks damages for Hartford’s failure to defend Crate & Barrel in all but one of the Underlying Lawsuits, a failure that constitutes a breach of Hartford’s obligations under certain policies of insurance issued by Hartford to Crate & Barrel bearing policy No. 83 UEN RZ1914, with effective policy periods from August 1, 2009 to August 1, 2010, and August 1, 2010 to August 2011, respectively (the “Policies”).

PARTIES

3. Crate & Barrel is a corporation organized and existing under the laws of the State of Illinois, having a principal place of business in Northbrook, Illinois.

4. Hartford is an insurance company formed under the laws of the State of Connecticut and is principally located in Connecticut.

JURISDICTION AND VENUE

5. This Court has diversity jurisdiction over each of Crate & Barrel’s claims pursuant to 28 U.S.C. §1332 as the amount in controversy exceeds \$75,000.00 exclusive of costs and interest, and the parties are citizens of different states.

6. Venue is proper in the Northern District of Illinois pursuant to 28 U.S.C. § 1391(a), in that a substantial part of the events or omissions giving rise to the claims in this litigation occurred in this district.

¹ Copies of the currently existing operative complaints in each of the Underlying Lawsuits are attached as Exhibits A through G to Hartford’s First Amended Complaint for Declaratory Judgment. Attached hereto as Exhibit 1 is a true and correct copy of the initial complaint filed in the *O’Connor* action on March 4, 2010.

BACKGROUND

I. The Policies

7. The Policies provides coverage for those sums Crate & Barrel becomes legally obligated to pay as damages because of “personal and advertising injury” to which the Policies apply as follows:

COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “personal and advertising injury” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for “personal and advertising injury” to which this insurance does not apply.

(Policies, § I, Coverage B, ¶ 1(a).)

SECTION V - DEFINITIONS

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

* * *

- e. Oral, written or electronic publication of material that violates a person’s right of privacy;

(*Id.* at § V(17)(e).)

8. The Policies do not define the term “damages,” except that the Employee Benefits Coverage Form of the Policies (which is not applicable to the Underlying Lawsuits) defines “damages” to specifically exclude “penalties.” (EBL Policy, § VI(7).)

9. Hartford contends that the Policies contain the following exclusions that preclude coverage:

2. Exclusions

This insurance does not apply to:

a. Knowing Violation Of Rights Of Another

“Personal and advertising injury” arising out of an offense committed by, at the direction or with the consent or acquiescence of the insured with the expectation of inflicting “personal and advertising injury”.

* * *

q. Right Of Privacy Created By Statute

“Personal and advertising injury” arising out of the violation of a person’s right of privacy created by any state or federal act.

However, this exclusion does not apply to liability for damages that the insured would have in the absence of such state or federal act.

(*Id.* at Coverage B, ¶ 2(a), (q).)

EXCLUSION — VIOLATION OF STATUTES THAT GOVERN E-MAILS, FAX, PHONE CALLS OR OTHER METHODS OF SENDING MATERIAL OR INFORMATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

* * *

B. The following exclusion is added to Paragraph 2., Exclusions of Section I - Coverage B Personal And Advertising Injury Liability:

2. Exclusions

This insurance does not apply to:

DISTRIBUTION OF MATERIAL IN VIOLATION OF STATUTES

“Personal and advertising injury” arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- a. The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or
- b. The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
- c. Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

(CGL Policy, Coverage B, ¶ 2, as amended by Endorsement.)

II. The Underlying Lawsuits

10. Crate & Barrel has been named in seven class action lawsuits in various federal district courts in California (“Underlying Lawsuits”). Each of the Underlying Lawsuits alleges that Crate & Barrel violated the Song-Beverly Credit Card Act of 1971 (“Song-Beverly Act”)—which prohibits a party from requesting, or requiring as a condition of accepting credit card payment, the card holder to provide personal information that will be recorded—by requesting and recording zip codes from the plaintiffs in the Underlying Lawsuits. *See* Cal. Civ. Code § 1747.08(a). The Underlying Lawsuits seek class certification, civil penalties, and attorneys’ fees and costs pursuant to California Civil Code § 1021.5, which provides for an award of attorneys’ fees to a successful party in any action “which has resulted in the enforcement of an important right affecting the public interest.” *See* Cal. Civ. Code § 1021.5.

11. The complaint originally filed in the *O’Connor* action also asserted three additional causes of action for negligence, invasion of privacy, and unlawful intrusion based on the same factual allegations giving rise to the claims for violation of the Song-Beverly Act in each of the Underlying Lawsuits – i.e., requesting zip codes during credit card transactions. The

original *O'Connor* complaint was voluntarily amended on May 26, 2011. The amended *O'Connor* complaint contains the same factual allegations as before, but no longer contains the causes of action for negligence, invasion of privacy, and unlawful intrusion. These claims were dropped without prejudice and can be re-added to the *O'Connor* complaint any time up to final adjudication.

12. The facts alleged in the Underlying Lawsuits give rise to claims for negligence, invasion of privacy, and unlawful intrusion. As long as those facts remain in the Underlying Lawsuits, Hartford owes a duty to defend Crate & Barrel regardless of whether the claims for negligence, invasion of privacy, and unlawful intrusion are actually stated.

III. Hartford's Denial of Coverage and Failure to Defend Crate & Barrel

13. Crate & Barrel timely tendered each of the Underlying Lawsuits to Hartford as those complaints and amended complaints were filed.

14. Hartford denied coverage in each of the Underlying Lawsuits except as it relates to the original *O'Connor* complaint, where it agreed, under a reservation of rights, to pay independent defense counsel to defend Crate & Barrel by letter dated May 6, 2011. A true and correct copy of Hartford's May 6, 2011 letter is attached hereto as Exhibit 2.

15. To date, Hartford has refused to pay Crate & Barrel's defense expenses in the Underlying Lawsuits, with the exception of the *O'Connor* action. While Hartford previously agreed to pay Crate & Barrel's defense expenses in the *O'Connor* action, it has yet to actually pay any such expenses.

16. On May 5, 2011, before it alerted Crate & Barrel that it was denying coverage, Hartford filed its complaint for declaratory judgment against Crate & Barrel. On August 31, 2011, Hartford filed an amended complaint to include a declaration of no coverage as to all of

the Underlying Lawsuits, including *O'Connor* as of the date that the *O'Connor* amended complaint was filed, May 26, 2011.

COUNT I: DECLARATORY JUDGMENT
(Duty to Defend)

17. Crate & Barrel adopts and repeats the allegations contained in Paragraphs 1-16 as and for Paragraph 17 of this Counterclaim as though fully set forth herein.

18. The Policies require Hartford to provide coverage for claims for “damages” because of “personal and advertising injury.”

19. The Policies define “personal and advertising injury” to mean injury arising out of “oral, written or electronic publication of material that violates a person’s right of privacy.”

20. The Underlying Lawsuits allege that Crate & Barrel improperly requested and recorded zip code information during credit card transactions.

21. The requesting and recording of zip code information during credit card transactions gives rise to claims for negligence, invasion of privacy, and unlawful intrusion, as well as a claim for violation of the Song-Beverly Act.

22. Hartford’s obligation to defend Crate & Barrel is based on the conduct as alleged in the Underlying Lawsuits and is not circumscribed by the legal theories asserted in the Underlying Lawsuits.

23. Hartford contends that the Policies exclude from coverage “personal and advertising injury” that arises out of the violation of a person’s right of privacy created by any state or federal act. However, this exclusion does not apply for damages that the insured would have in the absence of such state or federal act. This exclusion also does not apply to attorneys fees awarded under California Civil Code § 1021.5.

24. Hartford contends that the Policies exclude from coverage “personal and advertising injury” that arises out of any action that violates or is alleged to violate any statute “that prohibits or limits the sending, transmitting, communicating or distribution of material or information.” However, this exclusion does not apply because the Underlying Complaints allege claims for “personal and advertising injury” that are based on the collecting and recording of information, not the sending, transmitting, communicating or distribution of material or information.

25. Hartford also contends that the Policies exclude from coverage “personal and advertising injury” that arises out of “an offense committed by, at the direction or with the consent or acquiescence of the insured with the expectation of inflicting “personal and advertising injury.” However, this exclusion does not apply because Crate & Barrel did not act with the subjective expectation of inflicting personal and advertising injury as it concerns the alleged offenses in the Underlying Lawsuits.

26. No other exclusions in the Policies apply to Hartford’s coverage obligations as they relate to the Underlying Lawsuits.

27. Because no exclusions applied to preclude coverage, Hartford owed Crate & Barrel a duty to defend the original *O’Connor* action.

28. For the same reasons, Hartford owes Crate & Barrel a duty to defend each of the Underlying Lawsuits.

29. Hartford agreed, under a reservation of rights, to pay independent defense counsel to defend Crate & Barrel as it related to the original *O’Connor* action.

30. The damages claimed in the Underlying Lawsuits include civil penalties, attorneys’ fees, costs, and, in some cases, prejudgment interest.

31. The California Civil Code § 1021.5 does not give rise to “advertising and personal injury” that arises out of the violation of a person’s right of privacy created by any state or federal act, but rather, arises from an “award [of] attorneys’ fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest” Cal. Civ. Code. § 1021.5.

32. Accordingly, Hartford owes a duty to defend Crate & Barrel under the “personal and advertising injury” coverage of the Policies for each of the Underlying Lawsuits.

WHEREFORE, Defendant/Counter-Plaintiff, Euromarket Designs, Inc., respectfully requests that this Court enter an order:

- A. Declaring that Hartford has owed and continues to owe a duty to defend to Crate & Barrel in each of the Underlying Lawsuits;
- B. For such other and further relief this Court deems just and equitable.

COUNT II: BREACH OF DUTY TO DEFEND

33. Crate & Barrel adopts and repeats the allegations contained in Paragraphs 1-16 as and for Paragraph 33 of this Counterclaim as though fully set forth herein.

34. Hartford had a duty to defend Crate & Barrel in connection with the Underlying Lawsuits.

35. Despite Crate & Barrel’s requests for a defense, Hartford refused to defend Crate & Barrel in the *Salmonson*, *Campbell*, *Heon*, *Dardarian*, *Shughrou*, and *Noble* actions.

36. Hartford breached its contractual duty to defend when it refused to defend Crate & Barrel in the *Salmonson*, *Campbell*, *Heon*, *Dardarian*, *Shughrou*, and *Noble* actions.

37. Hartford has yet to pay Crate & Barrel the defense fees that it admittedly owes in the *O’Connor* action.

38. Hartford is obligated to pay Crate & Barrel for all damages arising from Hartford's breach of its duty to defend.

WHEREFORE, Defendant/Counter-Plaintiff, Euromarket Designs, Inc., respectfully requests that this Court enter an order finding and declaring:

- A. Hartford breached its duty to defend Crate & Barrel the Policies (No. 83 UEN RZ1914) with respect to the *Salmonson, Campbell, Heon, Dardarian, Shughrou,* and *Noble* actions;
- B. Hartford must pay Crate & Barrel for all damages arising from Hartford's breach of the duty to defend, including all monies paid by Crate & Barrel to defend the *O'Connor, Salmonson, Campbell, Heon, Dardarian, Shughrou,* and *Noble* actions, prejudgment interest, and any attorneys' fees and costs incurred in the present action;
- C. Crate & Barrel is entitled to a trial by jury on all issues so triable; and
- D. For such other and further relief this Court deems just and equitable.

Dated: September 28, 2011

EUROMARKET DESIGNS, INC.

By: /s/ Tonya G. Newman
One of Its Attorneys

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CERTIFICATE OF SERVICE

Tonya G. Newman, an attorney, hereby certifies that she caused a copy of **Euromarket Designs, Inc.'s Answer to First Amended Complaint for Declaratory Judgment** to be served on:

Michael J. Duffy, Esq.
Ashley L. Christensen, Esq.
Tressler, LLP
233 S. Wacker Drive
22nd Floor
Chicago, IL 60606

via electronic mail and by causing the same to be deposited in the U.S. Mail, postage prepaid, at 2 North LaSalle Street, Chicago, Illinois, on the 28th day of September, 2011.

By: /s/ Tonya G. Newman
One of Its Attorneys