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5 Attorneys for Defendant and Counter-claimant
 FIDELITY AND DEPOSIT
 6 COMPANY OF MARYLAND,
 incorrectly sued as Fidelity and Deposit
 7 Insurance Company of Maryland

8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA

11 E*TRADE FINANCIAL
 12 CORPORATION,

13 Plaintiff,

14 v.

15 FIDELITY AND DEPOSIT COMPANY
 OF MARYLAND, and DOES 1 through
 16 20, inclusive,

17 Defendants.

CASE NO. 10 2032 CW

**STIPULATION PERMITTING FIDELITY
 AND DEPOSIT COMPANY OF
 MARYLAND TO FILE COUNTERCLAIM
 FOR DECLARATORY RELIEF AND
 REIMBURSEMENT; ~~PROPOSED~~
 ORDER THEREON**

19
 20 TO THE COURT, AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD:
 21 THIS STIPULATION is entered into by and between plaintiff E*Trade Financial Corporation
 22 (“E*Trade”) and defendant Fidelity and Deposit Company of Maryland (“F&D”), by and through
 23 their attorneys of record.

24 WHEREAS, on April 9, 2010, E*Trade filed a complaint against F&D in the San
 25 Francisco Superior Court, asserting claims for breach of contract and declaratory relief;

26 WHEREAS, on May 10, 2010, F&D filed an answer to E*Trade’s complaint;

27 WHEREAS on May 11, 2010, F&D filed for removal of E*Trade’s action to this Court;

28 WHEREAS, F&D seeks leave to file a counterclaim for declaratory relief and

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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

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E*TRADE FINANCIAL
CORPORATION,
Plaintiff,
v.
FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, and DOES 1 through
20, inclusive,
Defendants.

CASE NO. 10 2032 CW
**COUNTERCLAIM FOR DECLARATORY
RELIEF AND REIMBURSEMENT**
**[JURY DEMAND INDORSED HEREIN;
Fed. R. Civ. P. 38]**

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
Counter-claimant,
v.
E*TRADE FINANCIAL
CORPORATION,
Counter-defendant.



1 NOW COMES defendant and counter-claimant Fidelity and Deposit Company of
2 Maryland (“F&D”), incorrectly sued as Fidelity and Deposit Insurance Company of Maryland,
3 and, for its counterclaim against plaintiff and counter-defendant E*Trade Financial Corporation
4 (“E*Trade”) alleges as follows:

5 JURISDICTION AND VENUE

6 1. This is an action containing claims by F&D for declaratory judgment and
7 reimbursement. Jurisdiction of this action is founded upon 28 U.S.C. § 1332, as the parties are
8 citizens of different states and the amount in controversy exceeds the sum of \$75,000, exclusive
9 of interest and costs.

10 2. Venue is proper in the Northern District of California under 28 U.S.C. §§ 1391(a)
11 and (c) in that the counter-defendant is subject to personal jurisdiction in this district at the time
12 the action is commenced, the insurance policies at issue were entered into in this district, and a
13 substantial part of the events or omissions giving rise to the claim occurred in this district.

14 PARTIES

15 3. F&D is a corporation organized and incorporated under the laws of the State of
16 Maryland with its principal place of business in the State of Illinois. At pertinent times, F&D
17 was authorized to transact and was transacting the business of insurance in the State of
18 California.

19 4. On information and belief, F&D alleges that E*Trade is a corporation organized
20 and incorporated under the laws of the State of Delaware, with its principal place of business in
21 the State of New York, and it is authorized to do business and is doing business in the State of
22 California.

23 GENERAL ALLEGATIONS

24 A. The F&D Policies

25 5. F&D issued to E*Trade four Commercial General Liability policies as follows:
26 (a) a policy bearing Policy No. CLP 0001076-3 for the policy period of December 31, 2002 to
27 December 31, 2003 (“02/03 CGL policy”); (b) a policy bearing Policy No. CLP 0001076-04 for
28 the policy period of December 31, 2003 to December 31, 2004 (“03/04 CGL policy”); (c) a

1 policy bearing Policy No. CLP 0001076-05 for the policy period of December 31, 2004 to
2 December 31, 2005 (“04/05 CGL policy”); and (d) a policy bearing Policy No. FIA 1002764-00
3 for the policy period of December 31, 2005 to December 31, 2006 (“05/06 CGL policy”),
4 (collectively, “the F&D CGL policies”). Each of the F&D CGL policies provides limits of \$1
5 million per occurrence, \$1 million personal and advertising injury, and \$2 million general
6 aggregate. The F&D CGL policies were issued subject to all of the terms, conditions,
7 limitations, exclusions, and endorsements contained therein.

8 6. The F&D CGL policies provide, in relevant part, in the insuring agreement under
9 Coverage B as follows:

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

16 No other obligation or liability to pay sums or perform acts or services is
17 covered unless explicitly provided for under Supplementary Payments –
18 Coverages A and B.

19 7. Under Coverage B, the F&D CGL policies provide definitions, in relevant part, as
20 follows:

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

23 * * *

- 24 e. Publication, in any manner, of material that violates a person’s
25 right of privacy [per Electronic Data Liability Amendment
26 Endorsement];

27 * * *

28 8. Under the “Exclusions” section of Coverage B, the F&D CGL policies provide, in
relevant part, as follows:

This insurance does not apply to:

- a. “Personal and advertising injury”:

1 (1) Caused by or at the direction of the insured with knowledge that
2 the act would violate the rights of another and would inflict
3 “personal and advertising injury”;

* * *

4 (4) Arising out of a criminal act committed by or at the direction of
5 any insured;

6 9. The F&D 05/06 CGL policy also contains a “Violation of Communication or
7 Information Law Exclusion” endorsement which provides, in relevant part, as follows:

8 “Bodily injury,” “property damage” or “personal and advertising injury” resulting
9 from or arising out of any actual or alleged violation of:

10 A. the federal Telephone Consumer Protection Act (47 U.S.C. §227), Drivers
11 Privacy Protection Act (18 U.S.C. §2721 — 2725) or Controlling the Assault of
12 Non-Solicited Pornography and Marketing Act (15 U.S.C. §7701, *et seq.*); or

13 B. any other federal, state or local statute, regulation or ordinance that imposes
14 liability for the:

15 (1) Unlawful use of telephone, electronic mail, internet, computer, facsimile
16 machine or other communication or transmission device; or

17 (2) Unlawful use, collection, dissemination, disclosure or re-disclosure of personal
18 information in any manner by any insured or on behalf of any insured.

19 10. F&D also issued to E*Trade four Commercial Umbrella Liability Policies as
20 follows: (a) a policy bearing Policy No. CCL 0006830-03, for the policy period of December 31,
21 2002 to December 31, 2003 (“02/03 Umbrella policy”); (b) a policy bearing Policy No. CLP
22 0006804-04 for the policy period of December 31, 2003 to December 31, 2004 (“03/04 Umbrella
23 policy”); (c) a policy bearing Policy No. UMB 4275779-06 for the policy period of December 31,
24 2004 to December 31, 2005 (“04/05 Umbrella policy”); and (d) a policy bearing Policy No. UMB
25 4275779-09 for the policy period of December 31, 2005 to December 31, 2006 (the “05/06
26 Umbrella policy”), (collectively, “the F&D Umbrella policies”). Each of the F&D Umbrella
27 policies provides limits of \$25 million per occurrence and \$25 million general aggregate. The
28 F&D Umbrella policies were issued subject to all of the terms, conditions, limitations,
exclusions, and endorsements contained therein.

11. The F&D Umbrella policies provide, in relevant part, in the insuring agreements
as follows:

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A. Coverage A - Excess Follow Form Liability Insurance

Under Coverage A, we will pay on behalf of the insured, those damages covered by this insurance in excess of the total applicable limits of underlying insurance. With respect to Coverage A, the terms and conditions of underlying insurance are made a part of this policy, except with respect to:

- 1. Any contrary provision contained in this policy; or
- 2. Any provision in this policy for which a similar provision is not contained in underlying insurance.

With respect to the exceptions stated above, the provisions of this policy will apply.

Notwithstanding anything to the contrary contained above, if underlying insurance does not apply to damages, for reasons other than exhaustion of applicable limits of insurance by payment of claims, then Coverage A does not apply to such damages.

B. Coverage B - Umbrella Liability Insurance

Under Coverage B, we will pay on behalf of the insured, sums as 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, property damage, or personal and advertising injury covered by this insurance but only if the injury, damage or offense arises out of your business, takes place during the policy period of this policy and is caused by an occurrence happening anywhere. We will pay such damages in excess of the Retained Limit specified in Item 5. of the Declarations or the amount payable by other insurance, whichever is greater.

Coverage B will not apply to any loss, claim or suit for which insurance is afforded under underlying insurance or would have been afforded except for the exhaustion of the limits of insurance of underlying insurance.

The amount we will pay for damages under Coverage A or Coverage B is limited as described in SECTION II. LIMITS OF INSURANCE.

We have no obligation under Coverage A and/or Coverage B with respect to any settlement made without our consent.

12. The F&D Umbrella policies provide definitions, in relevant part, as follows:

“Occurrence” means:

* * *

b. With respect to personal and advertising injury, a covered offense. All damages that arise from the same act, publication or general conditions are considered to arise out of the same occurrence, regardless of the frequency or repetition thereof, the number or kind of media used or the number of claimants.

* * *

“Personal and advertising injury” means injury, including consequential bodily



1 injury, arising out of one or more of the following offenses:

2 * * *

3 e. Oral or written publication, in any manner, of material that violates a
4 person's right of privacy;

5 * * *

6 B. The Greenberg Action

7 13. On or about October 11, 2006, E*Trade was named as a defendant in an action
8 entitled *Nikki Greenberg, and those similarly situated v. E-Trade Financial Corporation*, Case
9 No. BC360152, in the Superior Court of California, in and for the County of Los Angeles (the
10 "*Greenberg Action*").

11 14. The complaint in the *Greenberg Action* contained causes of action for invasion of
12 statutory right of privacy under Penal Code Sections 631, 632, 632.5, or 637, negligence,
13 violation of common law right of privacy, and violation of California Business & Professions
14 Code Section 17200. The complaint in the *Greenberg Action* alleged, in part, that E*Trade
15 "without informing consumers or obtaining their consent and permission to do so ... engaged in
16 a practice of monitoring, recording, and/or eavesdropping on consumers' telephone conversations
17 with employees" of E*Trade.

18 15. On or about November 22, 2006, E*Trade tendered the *Greenberg Action* to F&D
19 under the 05/06 CGL policy.

20 16. On or about January 29, 2007, F&D agreed to pay for a defense of E*Trade in the
21 *Greenberg Action*, with a full reservation of rights under Coverage B of the policy, because the
22 *Greenberg action* involves potential violation of the right of privacy as provided in subsection (e)
23 of the definition of "personal and advertising injury" of the policy.

24 17. E*Trade also tendered the *Greenberg Action* to F&D under the 05/06 Umbrella
25 policy.

26 18. On or about April 24, 2007, F&D sent a letter to E*Trade, stating that F&D was
27 taking the same coverage position under Coverage A of the F&D Umbrella policy as it took
28 under the F&D CGL policy subject to a full reservation of rights.

1 19. On or about September 19, 2007, Greenberg filed a first amended complaint in the
2 *Greenberg* Action alleging the same causes of action as pled in the original complaint.

3 20. On or about November 27, 2007, the court sustained a demurrer in the *Greenberg*
4 Action without leave to amend as to the alleged violation of Business & Professions Code
5 Section 17200.

6 21. On or about January 15, 2008, the court denied plaintiff's motion for class
7 certification in the *Greenberg* Action as to the alleged violation of California Penal Code Section
8 631, common law invasion of privacy, negligence and California Business & Professions Code
9 Section 17200, but the court granted the plaintiff's motion for class certification as to the
10 violation of California Penal Code Section 632 for certain calls.

11 22. On or about February 7, 2008, the court issued an order granting in part and
12 denying in part plaintiff's motion for class certification. The order, in part, provides:

13 A class is certified as to the claims for violation of California Penal Code,
14 section 632, as there are common questions of fact and law.

15 The class will be defined as follows:

16 (1) All persons in California who received telephone calls from E*Trade
17 Financial and whose calls were recorded without their consent within three years
of October 11, 2006; and

18 (2) All persons who made calls from California to the Beverly Hills branch office
19 of E*Trade Financial on August 17, 2006.

20 The motion for class certification as to claims made for violation of Penal Code,
21 sec. 631 is denied.

22 23. On or about July 23, 2008, F&D sent E*Trade a letter stating that F&D is denying
23 coverage "for any judgment or settlement for damages arising from alleged violations of Penal
24 Code § 632, on the grounds that such damages do not arise from publication of material that
25 violates a person's right or privacy, as required by the F&D policies." The letter further said that
26 "F&D continues to reserve its right to seek reimbursement of any and all costs, fees, and
27 expenses in defending the *Greenberg* lawsuit allocable to claims that were never covered under
the F&D policies."

28 24. On or about August 12, 2008, F&D sent E*Trade a letter stating that it will

1 continue to defend E*Trade in the *Greenberg* action subject to a reservation to seek
2 reimbursement of all costs and fees that can be allocated to non-covered claims, and stating that
3 there is no coverage for any judgment or settlement of damages arising from alleged violations of
4 California Penal Code Section 632 because there is no publication that would trigger coverage
5 under the F&D policies.

6 25. On or about November 17, 2008, F&D sent E*Trade a letter stating, "The class in
7 the *Greenberg* lawsuit has been certified only for damages resulting from violation of Penal Code
8 § 632. Section 632 prohibits the recording upon a confidential communication. Proof of
9 recording without consent is sufficient to establish recovery – publication is not an element and
10 there is no requirement or necessity that the class members provide that their private
11 conversation was published. *Kimmel v. Goland*, 51 Cal. 3d 202 (1990). Further, there is no
12 evidence or allegation that any publication of the phone calls has in fact taken place. As stated
13 by E*Trade in its own motion to decertify the class, the class "claims" involve the mere
14 recording of conversations, not their dissemination to others."

15 26. On or about December 19, 2008, F&D sent a letter to E*Trade stating that F&D
16 has no indemnity obligation for the class that had been certified in the *Greenberg* Action, that it
17 will not offer to contribute toward a settlement at that time, and that it reserves the right to seek
18 reimbursement of monies expended in the defense of claims that are not covered. In that letter,
19 F&D asked E*Trade to continue to advise F&D of all settlement communications and
20 negotiations. The letter further states that "[s]hould the parties reach a point in negotiations
21 where there is a small gap remaining between them, F&D does not rule out possibly agreeing to
22 make a small contribution from an economic standpoint only."

23 27. On or about February 12, 2009, E*Trade sent a letter to F&D advising that
24 E*Trade had reached an agreement to settle the *Greenberg* Action for \$7.5 million, subject to the
25 court's approval of the amount and E*Trade's payment of all related administrative fees and
26 costs. The letter demands that F&D provide full indemnification under its respective policies.

27 28. On or about February 19, 2009, F&D sent a letter to E*Trade stating that F&D
28 declined to fund the settlement for all of the reasons set forth in its November 17, 2008

1 correspondence. The letter further said that: "E*Trade made the decision to settle the lawsuit
2 without notifying F&D in advance of any settlement or offers. For example, F&D did not learn
3 of E*Trade's offer until February 3, 2009, after the offer was already made to the plaintiff class.
4 Each of the F&D policies contains a "voluntary payments" clause, which substantially provides
5 that E*Trade will not, except at its own cost, voluntarily make a payment, assume any obligation,
6 or incur any expense, without F&D consent. E*Trade's settlement in this matter was made
7 without F&D's knowledge or consent." The letter also said that, "F&D was and is defending the
8 *Greenberg* lawsuit. When a carrier is defending, even under a reservation of rights, it has a right
9 to settle or not settle a case if it wishes, and the insured cannot frustrate that right. *New*
10 *Hampshire Ins. Co. v. Rideout Roofing Co.*, 68 Cal. App. 4th 495, 501-502 (1998). See also,
11 *Dynamic Concepts v. Truck Ins. Exchange*, 61 Cal. App. 4th 999, 1012 (1998) (insured had no
12 legal business to stonewall carrier which offered a defense from settlement negotiations).
13 E*Trade's unilateral decision to settle the case is its own choice, and creates no indemnity
14 obligation under the F&D policies."

15 29. On or about October 16, 2009, the court entered a final order approving the class
16 action settlement and judgment in the *Greenberg* Action.

17 **FIRST CAUSE OF ACTION**

18 (Declaratory Judgment That No Duty to Indemnify in the *Greenberg* Action)

19 30. For its first cause of action, F&D incorporates herein by reference, as if fully
20 restated, paragraphs 1 to 29 above.

21 31. For the reasons outlined above, F&D contends that it had no duty to indemnify
22 E*Trade for the amount of the settlement and judgment entered in the *Greenberg* Action.

23 32. On information and belief, E*Trade contends that F&D had an obligation to
24 indemnify E*Trade as respect to the settlement and judgment entered into in the *Greenberg*
25 Action.

26 33. An actual controversy has arisen and now exists between F&D and E*Trade
27 concerning their respective rights and duties under the F&D CGL and Umbrella policies.

28 34. F&D desires a judicial determination of its rights and liabilities, if any, and a

1 declaration that it had no duty to indemnify E*Trade as respect to the settlement and judgment
2 entered against E*Trade in the *Greenberg* Action.

3 35. A judicial determination is necessary and appropriate at this time under the
4 circumstances in order that the parties may ascertain their rights and duties as aforementioned.
5 Such controversy is incapable of resolution without judicial adjudication. Accordingly, F&D has
6 no plain or speedy or adequate remedy at law, and requests a declaratory judgment, adjudicating
7 and declaring that F&D had no duty to indemnify E*Trade as respect to the judgment entered
8 against E*Trade in the *Greenberg* Action.

9 SECOND CAUSE OF ACTION

10 (Reimbursement)

11 36. For its second cause of action, F&D incorporates herein by reference, as if fully
12 restated paragraphs 1 to 35 above.

13 37. On or about February 7, 2008, the court certified the class in the *Greenberg*
14 Action only as to claims for violation of California Penal Code Section 632. Thus, E*Trade's
15 defense in the *Greenberg* Action from that date forward was solely attributable to defending
16 against the California Penal Code Section 632 claim. Since there is no potential for coverage for
17 violations of California Penal Code Section 632, F&D had denied coverage "for any judgment or
18 settlement for damages arising from alleged violations of Penal Code § 632."

19 38. Since the F&D CGL and Umbrella policies provide no potential for coverage for
20 the California Penal Code Section 632 claims asserted against E*Trade in the underlying action,
21 F&D is entitled to reimbursement from E*Trade of the sums paid by F&D for the defense of
22 E*Trade for those claims, in an amount in excess of \$500,000, to be proven at trial, under the
23 authority of *Buss v. Superior Court*, 16 Cal. 4th 35 (1997) and *Blue Ridge Ins. Co. v. Jacobsen*,
24 25 Cal. 4th 489 (2001).

25 PRAYER FOR RELIEF

26 WHEREFORE, counter-claimant F&D prays for judgment as follows:

27 1. For a declaration that, by reason of the terms, conditions, and exclusions in the
28 F&D CGL and Umbrella policies, no duty to indemnify is owed E*Trade for the amount of the

1 settlement and judgment entered in connection with the *Greenberg* Action.

2 2. For a declaration that the sums paid by F&D for costs and fees to defend E*Trade
3 in the *Greenberg* Action that are attributable to claims that are not potentially covered under the
4 F&D CGL and Umbrella policies must be reimbursed by E*Trade.

5 3. For reimbursement from E*Trade of the sums paid by F&D for costs and fees to
6 defend E*Trade in the *Greenberg* Action that are attributable to claims not potentially covered
7 under the F&D CGL and Umbrella policies;

8 4. On all causes of action, for interest, including prejudgment interest;

9 5. On all causes of action, for costs herein and;

10 6. For such other and further relief as the court deems to be just and proper.

11

12 DATED: August __, 2010

Respectfully submitted,

SEDGWICK, DETERT, MORAN
& ARNOLD LLP

By: _____

Brian D. Harrison
Attorneys for Defendant and Counter-claimant
FIDELITY AND DEPOSIT
COMPANY OF MARYLAND

DRAFT

19 DEMAND FOR JURY TRIAL

20 Pursuant to Rule 38 of the Federal Rules of Civil Procedure, F&D hereby demands a jury
21 trial for this action.

22

23 DATED: August __, 2010

SEDGWICK, DETERT, MORAN
& ARNOLD LLP

By: _____

Brian D. Harrison
Attorneys for Defendant and Counter-claimant
FIDELITY AND DEPOSIT
COMPANY OF MARYLAND

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