Case No. S184929

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

JAMSHID ARYEH,
*Plaintiff and Appellant,*

v.

CANON BUSINESS SOLUTIONS, INC.,
*Defendant and Respondent.*

After a Decision By the Court of Appeal,
Second Appellate District, Division Eight
Case No. B213104

Appeal from Los Angeles County Superior Court
Robert L. Hess, Judge
Case No. BC 384674

# APPLICATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER, AND BRIEF *AMICUS CURIAE* OF BEVERLY CLARK, WARREN GOLD, AND LINDA M. CUSANELLI, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, IN SUPPORT OF PETITIONER

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page

**Cases**

## TABLE OF AUTHORITIES (cont)



**Statute**

Beverly Clark, Warren Gold, and Linda M. Cusanelli, on behalf of themselves and others similarly situated, through their attorneys and pursuant to Rule 8.520(f) of the California Rules of Court, respectfully apply for leave to file the following brief *amicus curiae* in support of the petitioner's challenge to the Court of Appeal's decision holding that the statute of limitations bars his claims under California Business and Professions Code § 17200, the Unfair Competition Law ("UCL"). As explained further below, *amici* are named plaintiffs in a putative class action pending in the United States District Court for the District of New Jersey, who have asserted, on behalf of themselves and others similarly situated, claims of unfair competition under the UCL and have relied on the delayed discovery rule with respect to the statute of limitations for those claims. To assist the Court in resolving the question framed by the Court in its grant of review concerning the application of the delayed discovery rule to UCL claims, *amici* respectfully request that their application be granted.

## IDENTITY AND INTEREST OF *AMICI*

*Amici* are named plaintiffs in a putative class action pending in the federal district court in New Jersey (*Clark, et al. v. Prudential Insurance Company of America*, Civil Case No. 08-6197 (DRD)), which alleges common law fraud and tort claims against the Prudential Insurance Company of America ("Prudential"), and, as to *amici* and similarly situated California putative class members, violation of the UCL. *See* Exhibit 1 to the Declaration of Brian P. Brosnahan ("Ex.") (Fifth Amended Class Action Complaint). Plaintiffs' claims arise out of Prudential's

concealment and misrepresentations concerning what the federal court has described as a "fatal actuarial defect" in one of Prudential's individual health insurance policies. *See Clark v. Prudential Ins. Co. of Am.* (D.N.J. Mar. 15, 2011) 2011 U.S. Dist. LEXIS 27030. Specifically, Prudential failed to disclose that its decision to stop selling the policy to new customers had triggered a "death spiral" that would eventually drive premiums to astronomical levels, and that policyholders who became sick before they were forced out of the Prudential policy may not be able to obtain other coverage. *See* Ex. 1 at 9-11. In connection with their UCL claims, *amici* have invoked the delayed discovery rule because they were unable, despite reasonable diligence and investigation, to discover the facts underlying their UCL claims within four years after Prudential's concealment and misrepresentations began. *E.g., id.* at 13-14. The application of the delayed discovery rule to UCL claims is thus a significant issue in *amici's* case. In contrast, petitioners here do not have a strong interest because the delayed discovery rule is not at issue in their case. *Amici*, therefore, have a unique perspective on this question and offer an example of how the principles at issue apply in a concrete, real-world situation.

### A. Factual Background

In 1978, Ms. Clark[1] bought from Prudential an individual health insurance policy, the Coordinated Health Insurance Program ("CHIP"), in San Diego,

[1] Because the claims of Mr. Gold and Ms. Cusanelli have mostly similar factual backgrounds to those of Ms. Clark, and for the Court's convenience, the

California, where she then resided. Ex. 1 at 1, 4-5. CHIP was an individual health insurance policy that provided comprehensive medical coverage. *Id.* at 7. The CHIP policy granted the policyholder the right to continue the policy indefinitely by paying monthly premiums, and it strictly limited Prudential's right to discontinue the policy. *Id.* at 7-8. It allowed policy termination only if Prudential decided to discontinue all CHIP policies in a particular state. *Id.* Thus, as long as Ms. Clark elected and could afford to make premium payments, she expected CHIP to be a guaranteed continuable health insurance policy that would not be discontinued or terminated (absent Prudential's wholesale discontinuance of CHIP policies in force in California). The CHIP policy also prohibited Prudential from increasing a Policyholder's premium rates based upon his or her individual health condition or claims, but stated, in a standard form "welcome" letter sent to CHIP policyholders at the time of purchase, that premiums would increase on the basis of age and the costs of medical care:

> THE PREMIUMS FOR YOUR PLAN DEPEND ON THE CURRENT COSTS OF MEDICAL CARE AND TREATMENT. WE CONTINUALLY REVIEW THESE COSTS AND MAKE ADJUSTMENTS IN THE PREMIUMS YOU PAY SO THAT THEY ARE KEPT CURRENT FOR THE AGES OF THOSE INSURED UNDER YOUR PLAN AND THE AREA IN WHICH YOU LIVE. MEDICAL CARE COSTS HAVE BEEN RISING IN RECENT YEARS ALSO. THERE IS ALSO A TENDENCY FOR INDIVIDUAL COSTS TO INCREASE WITH AGE. AS A RESULT, YOU MAY EXPECT THAT THERE WILL BE AN INCREASE IN YOUR PREMIUM EACH YEAR ON THE ANNIVERSARY DATE OF YOUR POLICY. WE ASSURE YOU THAT ANY INCREASE WILL BE HELD TO THE MINIMUM

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factual background section focuses on Ms. Clark's experience as representative of *amici's* experiences generally.

> POSSIBLE THAT IS CONSISTENT WITH OUR BEING ABLE TO CONTINUE PROVIDING THIS COVERAGE.

*Id.* at 8. Ms. Clark received these representations when she bought her CHIP policy. *Id.*

In 1981, Prudential "closed the block," *i.e.*, stopped selling CHIP to new members. *Id.* at 9. The decision to close the block was a major decision affecting tens of thousands of policyholders in California and many more nationwide. Prudential knew that closing the block would trigger what it called (internally) an "anti-selection crisis." *Id.* By closing the block, Prudential prevented the entry into the insurance risk pool of new, generally healthier policyholders, whose premiums could subsidize the premiums of less-healthy policyholders with higher rates of claims. *Id.* Prudential knew that as premiums rose, healthy policyholders who could secure other insurance would terminate their CHIP policies, resulting in a steady decrease in the numbers of healthy policyholders to offset high claims, and a corresponding increase in premiums for individuals remaining in the block. *Id.* Prudential knew that the block closure necessarily would cause, and did cause, a "death spiral," where repeated cycles of higher premiums and a continually shrinking number of healthy policyholders caused premiums to become so high that eventually they forced policyholders to drop their policies.[2] *Id.* at 9-11.

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[2] One federal court has explained the dynamics of a health insurance block closure and the resulting death spiral:

> It is widely known throughout the insurance industry, but not to the general public, that closing a block of business, by ensuring that no

Although Prudential knew that the CHIP death spiral was inevitable as a result of the block closure and that Ms. Clark's premium increases were a direct result of the death spiral Prudential created, at no time between 1981 and the termination of Ms. Clark's policy did Prudential ever disclose the death spiral or its inevitable negative ramifications to Ms. Clark or other policyholders. *Id.* On the contrary, in communications with Ms. Clark, Prudential affirmatively misrepresented the reasons for her escalating premiums. *Id.* Each year from 1996 to 2000, when Prudential increased Ms. Clark's premiums, it sent her a form letter – similar to the "welcome" letter she received when she purchased her policy –

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> new insureds will enter the pool covered by the policy, inevitably leads to a decrease in the size of the pool as healthy insureds switch to cheaper policies. This in turn leads to increased premiums, as the risks and costs associated with the pool are shared by fewer and fewer people. As the premiums increase, more healthy insureds flee the policy, leaving only those unhealthy insureds who cannot find insurance elsewhere, and leading to even higher premiums.
>
> This vicious circle of higher premiums and a shrinking pool to share the increased costs is known in the insurance industry as a "death spiral" and is most common in those sectors of the industry that sell policies covering small groups and individuals. In a death spiral situation, eventually the premiums increase to the point where they become unaffordable to the vast majority of policyholders, at which point the insured fails to pay the premium and the policy lapses. Once the pool shrinks to a mere fraction of what it was, the reserves set aside by the insurance company to pay for claims filed by the pool are no longer needed, and can be retained by the company as unallocated cash assets.

*Dickerson v. Cent. United Life Ins. Co.* (M.D. Ga. 1996) 932 F.Supp. 1471, 1473.

stating that the reasons CHIP premiums were increasing were simply the general "increasing cost of medical care" and her "increase in age."[3] *Id.* at 11, 14.

As the death spiral intensified, Ms. Clark's premiums increased dramatically. *Id.* at 13. In 1982, Ms. Clark's premiums were $149.66 per month (or $1,795.92 per year). *Id.* By 2001, Ms. Clark's premiums had increased to $1,823.39 per month (or $21,880.68 per year), then climbed sharply to $4,217.65 per month (or $50,611.80 per year) by 2005. *Id.* Ms. Clark paid these exorbitant premiums in 2005, until Prudential notified her that her rate was scheduled to increase to $5,699 per month (or $68,388 per year) in September 2005. *Id.* At this point, Ms. Clark stopped making payments and the CHIP policy was terminated on September 12, 2005. *Id.* Ms. Clark filed suit on December 17, 2008, within four years of some of her payments but many years after others.

As a direct result of Prudential's misrepresentations and nondisclosures, Ms. Clark was unable to make an informed choice whether to renew CHIP or search for alternate health insurance. Since the serious, detrimental ramifications of the CHIP block closure and the ensuing death spiral were not disclosed, Ms. Clark continued to renew the policy without the knowledge of the true reasons for her premium increases, or that if she developed a serious medical problem, she

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[3] Even after Ms. Clark initiated an investigation in 2005 regarding her escalating premiums, Prudential told her, in response to an inquiry from the California Department of Insurance, that her premium increases were due to her increasing age and to the higher medical costs of the CHIP block, without ever disclosing that the higher medical costs and premiums of the insured group were due to do the block closure and resulting death spiral. *Id.* at 14.

might be unable to secure coverage for that medical condition at a time when she could no longer afford CHIP (because it would be considered a "pre-existing condition" by other health insurers). *Id.* at 9-11, 13-14. She also remained unaware that Prudential's act of closing the block guaranteed that she would inevitably be compelled to drop her policy due to unaffordability. *Id.*

While Prudential had access to relevant actuarial data regarding the CHIP policy, and knew that huge future premium increases were inevitable, Ms. Clark and similarly situated individuals had no way of accessing that information and no reason to know that factors other than those Prudential explained to them were in fact causing their premium increases. *Id.* at 9-11, 13-14. As the court noted in *Dickerson*, the death spiral phenomenon resulting from closing a block of insurance is widely known throughout the insurance industry, but it is not known to the general public. *Dickerson, supra*, 932 F.Supp. at 1473. As a result, Ms. Clark reasonably expected that she could "continue this Policy in force" and had no reason to expect Prudential intentionally to cause an "anti-selection crisis" that would ultimately result in the exorbitant premium increases she experienced and the effective termination of her policy. *Id.* at 13-14. Relying on Prudential's repeated misrepresentations about the reasons for her premium increases, Ms. Clark and the putative class members had no way of knowing about the block closure or resulting death spiral unless Prudential told them. *Id.* at 9-11, 13-14. Even after Ms. Clark questioned the California Insurance Commissioner about her premium increases, she was unable to discover the death spiral because of

Prudential's misrepresentations and omissions. *Id.* at 13-14. Only after substantial investigation by her attorneys did Ms. Clark finally discover the block closure and death spiral that caused her premium increases beginning in 1981.

**B. Procedural History**

Ms. Clark filed the original complaint on December 17, 2008. *See Clark v. Prudential Ins. Co. of Am.* (D.N.J. 2010) 736 F.Supp.2d 902, 906. Plaintiffs filed a fourth amended complaint on November 9, 2010, which added Mr. Gold and Ms. Cusanelli as named plaintiffs. The operative fifth amended complaint, which also includes named plaintiffs from states other than California, was filed on February 16, 2011. *See* Ex. 1.

In its motions to dismiss the complaints, Prudential argued that plaintiffs' UCL claims should be dismissed because they are barred by the UCL's four-year statute of limitations. Specifically, Prudential argued that plaintiffs could not invoke the delayed discovery rule because the Ninth Circuit has held that it does not apply to UCL claims. *See Clark, supra*, 736 F.Supp.2d at 921. In opposition, plaintiffs argued that, pursuant to recent California appellate authority, the delayed discovery rule does apply to UCL causes of action. *Id.*

The district court agreed with plaintiffs that the delayed discovery rule can be invoked for the purpose of delaying accrual of the statute of limitations under the UCL. *Id.* at 921-24. First, the court rejected Prudential's reliance on the Ninth Circuit case, *Karl Storz Endoscopy-America, Inc. v. Surgical Technologies, Inc.* (9th Cir. 2002) 285 F.3d 848, 857, noting that the Ninth Circuit's interpretation of

California state law is not binding. *Id.* at 921-22. It further acknowledged the recent split in authority between California Courts of Appeal as to whether the delayed discovery rule applies to unfair competition claims, which had not been decided or taken up by this Court. *Id.* at 922.

After analyzing California law on this issue and attempting to predict how this Court would resolve the conflicting authority, the district court was persuaded by the reasoning in *Broberg v. Guardian Life Insurance Co. of America* (2009) 171 Cal.App.4th 912, 920-21, and held that the delayed discovery rule could be used to delay accrual of the statute of limitations for Ms. Clark's and the California class members' claims under the UCL. *Id.* at 922-24. The district court determined that the Court of Appeal's decision in the *Aryeh* case had no effect on its analysis of *Broberg* or its decision that Ms. Clark's UCL claim, as pled, is not barred by the statute of limitations because of the delayed discovery rule. *Id.* at 923.

## ARGUMENT

### A. Petitioner Correctly Argues That The Delayed Discovery Rule Should Apply To The UCL.

Although petitioner points out that the delayed discovery rule is not applicable to the matter *sub judice*, petitioner nevertheless correctly argues that the delayed discovery rule should apply to the UCL, and that this Court should resolve the current split in appellate authority in favor of application of the delayed discovery rule to UCL claims. *See* Petitioner's Opening Brief at 27-34. In

addition to the arguments set forth herein, *amici* adopt the arguments set forth by petitioner in his Opening Brief at pages 27-34.

The delayed discovery rule is a well-recognized doctrine that allows plaintiffs to assert claims for conduct occurring outside a limitations period where, through no fault of their own, the plaintiffs are unaware of the misconduct underlying their claims until after the statutory limitations period has passed. *See, e.g., April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 826. The purpose of the delayed discovery rule is to avoid dismissing a suit on limitations grounds where a plaintiff is "blamelessly ignorant" of his cause of action. *Id.* at 826-27. The delayed discovery rule has been applied to many types of claims, including fraud, professional malpractice, personal injury, invasion of privacy, libel, latent defects in real property, breach of fiduciary duty, and breach of contract. *See* Petitioner's Opening Brief at 29 n.3. However, as the court noted in *April Enterprises*:

> A common thread seems to run through all the types of actions where courts have applied the discovery rule. The injury or the act causing the injury, or both, have been difficult for the plaintiff to detect. In most instances, in fact, the defendant has been in a far superior position to comprehend the act and the injury. And in many, the defendant had reason to believe the plaintiff remained ignorant he had been wronged. Thus, there is an underlying notion that plaintiffs should not suffer where circumstances prevent them from knowing they have been harmed. And often this is accompanied by the corollary notion that defendants should not be allowed to knowingly profit from their injuree's ignorance.

147 Cal.App.3d at 831; *see* Petitioner's Opening Brief at 30.

Accordingly, what is important to the application of the delayed discovery rule is not the exact nature of the claim at issue, but rather, the plaintiff's difficulty in detecting the wrong. Thus, there is no reason that the delayed discovery rule should not apply, as a matter of law, to the UCL. Not surprisingly, UCL plaintiffs often encounter the same difficulty in discovering the misconduct underlying their claims as plaintiffs in the other types of actions where the delayed discovery rule has been applied. Many UCL cases involve claims of active fraud, concealment, and misrepresentations by defendants, making detection by plaintiffs all the more challenging. *See, e.g., In re Tobacco II Cases* (2009) 46 Cal.4th 298, 307 (UCL claim alleging concealment and misrepresentations by defendants regarding the use of nicotine in their products); *Wise v. Pacific Gas & Elec. Co.* (2005) 132 Cal.App.4th 725, 730-31 (UCL claim alleging active concealment and misrepresentations by defendant in connection with rates charged to consumers); *Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, 1163-64 (UCL claim alleging that defendant concealed or obscured fuel service charge). The delayed discovery rule should apply equally to UCL plaintiffs who are blamelessly ignorant of their causes of action.

This is especially so in light of the well-recognized use of the delayed discovery rule in the context of fraud claims. *See* Petitioner's Opening Brief at 31-32. Numerous California cases have applied the delayed discovery rule to fraud claims, permitting plaintiffs' otherwise time-barred causes of action to accrue when the plaintiff learned or was put on notice of the fraud. *See, e.g.,*

*Brandon G. v. Gray* (2003) 111 Cal.App.4th 29, 35. The delayed discovery rule should similarly apply to causes of action implicating the UCL. *See Broberg, supra*, 171 Cal.App.4th at 920-21. The *Broberg* court found that it was the nature of the right implicated – not the form of the cause of action – that was dispositive in determining whether the delayed discovery rule should apply. *Id.* at 921. Because of the fraudulent conduct underlying the plaintiff's UCL claims, which alleged that defendants had used false marketing materials to sell life insurance, the *Broberg* court permitted the plaintiff to invoke the delayed discovery rule to pursue his UCL claim thirteen years after he purchased his policy, and long after expiration of the statutory limitations period. *Id.*

Similarly, *amici* have invoked the delayed discovery rule to delay the accrual of claims dating back to Prudential's closure of the CHIP block of business and subsequent concealment – for over twenty years – of the fact of the death spiral and its deleterious consequences. Like the plaintiff in *Broberg*, *amici* had no means of discovering Prudential's misconduct because of Prudential's use of false and misleading representations in connection with the continued sale of policies to *amici*. As Judge Debevoise correctly determined in *amici's* New Jersey federal court action, *amici* should be permitted to rely on the delayed discovery rule to bring their UCL claims because, through no fault of their own, they were unaware of Prudential's deception until more than four years had passed since most of their premium payments were made.

Accordingly, the delayed discovery rule should apply to UCL claims where plaintiffs encounter difficulty – through no fault of their own – in discovering or detecting the underlying wrong.

### B. The Delayed Discovery Rule Should Apply To The UCL Because Of The UCL's Well-Established Public Purposes Of Protecting The Public, Deterring Unfair Practices, And Enforcing The Law.

The delayed discovery rule should apply to UCL claims for an additional reason that has received little attention in the briefing to date: unlike common law fraud and other torts where the doctrine has been applied, the UCL serves not only the *private* purpose of compensating victims of unfair business practices, but also the *public* purpose of deterring those practices. Applying the delayed discovery rule to common law fraud claims but not UCL claims would be anomalous and would undermine the public purpose of the UCL.

It is well-established that the UCL "has a larger purpose of protecting the general public against unscrupulous business practices." *Tobacco II, supra*, 46 Cal.4th at 312 (citing *Fletcher v. Security Pacific Nat'l Bank* (1979) 23 Cal.3d 442, 453). The UCL's limited remedies of restitution and injunctive relief demonstrate this public purpose, focusing on the defendant's conduct instead of the plaintiff's right to recover damages. *Id.* By emphasizing the defendant's conduct, the UCL has as an express purpose to deter unfair business practices and protect the public from continued unfair practices. *Fletcher*, *supra*, 23 Cal.3d at 451. In *Fletcher*, this Court stressed the importance of both injunctive relief and restitution – the return of a defendant's ill-gotten gains – in deterring further

abuses and ensuring "adequate enforcement of the law." *Id.* Thus, although the UCL affords limited private relief to plaintiffs through restitution of money or goods unfairly acquired by defendants, the UCL's purpose is largely a public one.

In contrast, common law fraud – and other types of tort actions where the delayed discovery rule has been applied – protects only private interests. As this Court has stated, "[a] claim of fraud or deceit is essentially a private dispute seeking a monetary remedy, not an action to vindicate a broader public interest." *Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174, 1186. Nevertheless, California courts have universally broadened the protection of these private rights by permitting plaintiffs to invoke the delayed discovery rule in order to pursue fraud claims after the statute of limitations has expired. *See, e.g., Cleveland v. Internet Specialties West, Inc.* (2009) 171 Cal.App.4th 24, 33; *Brandon G., supra*, 111 Cal.App.4th at 35; *Lee v. Escrow Consultants* (1989) 210 Cal.App.3d 915, 921.

It would be illogical to permit application of the delayed discovery rule to fraud claims, which do not advance any public purpose, but not to UCL claims, which do. In determining UCL claims, courts have routinely interpreted the language of the UCL broadly in light of the statute's public purpose, to facilitate the bringing of legitimate UCL claims. *See People v. McKale* (1979) 25 Cal.3d 626, 632; *Paduano v. Am. Honda Motor Co., Inc.* (2009) 169 Cal.App.4th 1453, 1469. However, if the delayed discovery rule does not apply to UCL claims, enforcement of the law prohibiting unfair business practices would be undermined in two ways. First, plaintiffs victimized by long concealed frauds or other unfair

practices – like *amici* here – would have little or no incentive to bring UCL claims. Second, perpetrators of such wrongs would be able to retain at least a portion of their ill-gotten gains, thus undercutting the deterrent force of the UCL.

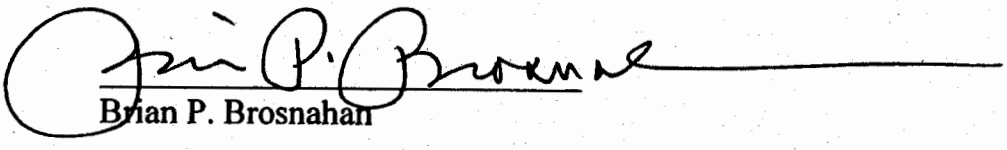
In light of the public protection and law enforcement purposes underlying the UCL, the delayed discovery rule should apply equally to UCL claims as to common law fraud claims.

## CONCLUSION

*Amici* respectfully ask the Court to permit the filing of their *amicus* brief and to hold that the delayed discovery rule applies to UCL claims as a matter of law.

Dated: March 24, 2011

Respectfully submitted,



Brian P. Brosnahan

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*Attorneys for Beverly Clark, Warren Gold, and Linda M. Cusanelli*

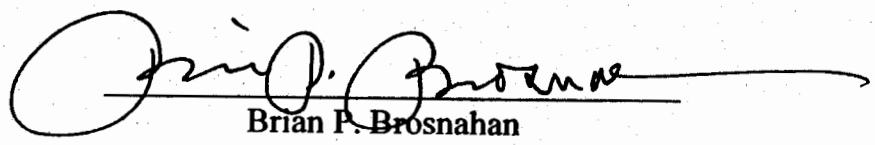
## CERTIFICATE OF WORD COUNT

**(California Rule of Court 8.504(d)(1))**

I, Brian P. Brosnahan, an attorney at law duly admitted to practice before all the courts of the State of California and a partner of the law offices of Kasowitz, Benson, Torres & Friedman LLP, attorneys for *amici* Beverly Clark, Warren Gold, and Linda M. Cusanelli, hereby certify that this Application for Leave to File Brief *Amicus Curiae* document (including the memorandum of points and authorities, headings, footnotes, and quotations, but excluding the tables of contents and authorities, and this certification) complies with the limitations of California Rule of Court 8.520(c)(1) in that it is set in a proportionally-spaced 13-point typeface and contains 3,897 words as counted by the 2007 Microsoft Office Word word-processing program used to generate this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 24th day of March, 2011 in San Francisco, California.



Brian P. Brosnahan

## CERTIFICATE OF SERVICE

I, Norma Ortega, declare that I am employed in the City of San Francisco, County of San Francisco, at the business address of 101 California Street, Suite 2300, San Francisco, California 94111. I am over the age of eighteen years and am not a party to this matter.

On March 24, 2011, I caused to be served the attached:

**APPLICATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER, AND BRIEF *AMICUS CURIAE* OF BEVERLY CLARK, WARREN GOLD, AND LINDA M. CUSANELLI, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, IN SUPPORT OF PETITIONER**

**DECLARATION OF BRIAN P. BROSNAHAN IN SUPPORT OF APPLICATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER**

on the following:

| | |
|---|---|
| R. Duane Westrup, Esq.<br>Mark L. Van Buskirk, Esq.<br>Jennifer L. Connor, Esq.<br>WESTRUP KLICK, LLP<br>444 Ocean Boulevard, Suite 1614<br>Long Beach, CA 90802-4524<br>Tel: (562) 432-2551<br>Fax: (562) 435-4856 | Linda Guthmann Krieger, Esq.<br>Terrence B. Krieger, Esq.<br>KRIEGER & KRIEGER<br>249 East Ocean Boulevard, Suite 750<br>Long Beach, CA 90802<br>Tel: (562) 901-2500<br>Fax: (562) 901-2522 |
| Kent J. Schmidt<br>John P. Cleveland<br>DORSEY & WHITNEY LLP<br>38 Technology Drive, Suite 100<br>Irvine, CA 92618-5310<br>Tel: (949) 932-3600<br>Fax: (949) 932-3601 | Richard H. Silberberg<br>Robert G. Manson<br>DORSEY & WHITNEY LLP<br>250 Park Avenue<br>New York, New York 10177<br>Tel: (212) 415-9200<br>Fax: (212) 953-7201 |

| | |
|---|---|
| Appellate Coordinator<br>Office of the Attorney General<br>Consumer Law Section<br>300 S. Spring Street<br>Los Angeles, CA 90013-1230 | |

☒ **By Federal Express**. I served such envelope or package to be delivered on the same day to an authorized courier or driver authorized by Federal Express to receive documents, in an envelope or package designated by Federal Express.

I declare under penalty of perjury that the foregoing is true and correction. Executed on March 24, 2011, at San Francisco, California.

Norma Ortega

Case No. S184929

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

JAMSHID ARYEH,
*Plaintiff and Appellant,*

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# DECLARATION OF BRIAN P. BROSNAHAN IN SUPPORT OF APPLICATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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*Attorneys for Beverly Clark, Warren Gold, and Linda M. Cusanelli*

## DECLARATION OF BRIAN P. BROSNAHAN

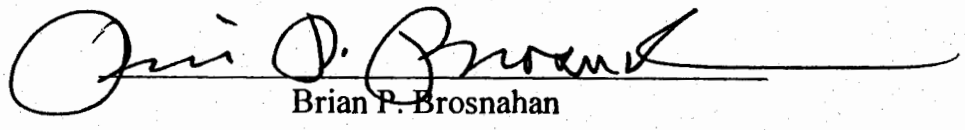
I, Brian P. Brosnahan, declare:

1. I am a partner at the firm of Kasowitz, Benson, Torres & Friedman LLP, counsel for *amici* Beverly Clark, Warren Gold, and Linda M. Cusanelli, on behalf of themselves and all others similarly situated, in *Clark, et. al. v. Prudential Insurance Co. of America*, Civil Case No. 08-6197 (DRD), a putative class action pending in the Federal District Court of New Jersey. Pursuant to California Rule of Court 8.54(a)(2), I make this declaration in support of *amici's* Application for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae*. I have personal knowledge of the facts stated herein, and if required could and would testify under oath thereto.

2. Attached as Exhibit 1 is a true and correct copy of the operative Fifth Amended Class Action Complaint in the Federal Court action, *Clark, et. al. v. Prudential Insurance Co. of America*, Civil Case No. 08-6197 (DRD), filed therein on February 16, 2011.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 24th day of March, 2011 in San Francisco, California.



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# EXHIBIT 1

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UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

| | |
|---|---|
| BEVERLY CLARK, JESSE J. PAUL, WARREN GOLD, LINDA M. CUSANELLI, CAROLE L. WALCHER, and TERRI L. DROGELL, on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>PRUDENTIAL INSURANCE COMPANY OF AMERICA, a New Jersey corporation,<br><br>Defendant. | Civil Action No.: 2:08-CV-06197-DRD-MAS<br><br>**FIFTH AMENDED CLASS ACTION COMPLAINT**<br><br>**DEMAND FOR JURY TRIAL** |

Plaintiffs Beverly Clark, Jesse J. Paul, Warren Gold, Linda M. Cusanelli, Carole L. Walcher, and Terri L. Drogell (together, "Plaintiffs"), on behalf of themselves and all others similarly situated, by and through their undersigned attorneys, allege, upon knowledge as to their own acts and otherwise upon information and belief, as follows:

## INTRODUCTION

1. This class action seeks to redress the unlawful and deceptive acts and practices of defendant Prudential Insurance Company of America ("Prudential" or "Defendant") with respect to certain of its individual health insurance policies. Prudential sold an individual health policy, sometimes known as the Coordinated Health Insurance Program ("CHIP"), to individuals throughout the United States from 1973 through 1981. In 1981, Prudential ceased selling CHIP to new policyholders (it "closed the block"). Prudential did not disclose to its policyholders that it closed the block and that the block closure would eventually and inevitably result in a "death spiral," a phenomenon which is discussed further below, in which premiums would increase to exorbitant levels. Prudential also did not disclose that if policyholders developed medical conditions and then were forced to drop CHIP because of exorbitant premiums, policyholders might not be able to secure new health coverage for their pre-existing conditions.

2. CHIP is a major medical insurance policy designed to provide policyholders with coverage for medical expenses, including high or unexpected medical expenses. The risk of high medical expenses is managed by Prudential through the creation of a risk pool, where a group shares the risk that certain policyholders will generate higher than expected claims. Large premium increases are generally not necessary in a functioning risk pool since the premiums of healthy low cost members subsidize the higher costs of less healthy members.

3. Prudential was fully aware that its block closure would make exorbitant premiums inevitable. The block closure prevented new policyholders from entering into the CHIP risk pool. New policyholders are generally healthier, and their premiums subsidize the premiums of less healthy policyholders, who have higher rates of claims. Prudential knew the result of

closing the CHIP block would be that the CHIP risk pool would face an "anti-selection crisis" where healthy policyholders who could secure alternative coverage terminated CHIP. With CHIP closed to new entrants, and an insufficient percentage of healthy policyholders remaining to subsidize the costs of unhealthy policyholders, Prudential knew the result would be an inevitable "death spiral." In a death spiral, a cycle of higher premiums and a shrinking number of healthy policyholders cause premiums ultimately to become so high that they force insureds to drop their policies.

4. Prudential knew, at the time it closed the block, that the design features of the CHIP policy made a death spiral inevitable after the block was closed. John K. Kittredge, executive vice president of Prudential, stated that Prudential should replace CHIP and "go back to the drawing board" in designing new policies. In particular, Prudential knew that flawed design features of the CHIP policy would accentuate the dynamics of the death spiral. Though Prudential knew the experience of CHIP policyholders would continue to deteriorate and that future massive premium increases were inevitable, it concealed these facts from policyholders. Prudential did not disclose to CHIP policyholders that it closed their block and pushed their policies into a death spiral.

5. Prudential never disclosed the ramifications of the block closure to CHIP policyholders. Prudential knew that the block closure would inevitably cause premiums to increase to unaffordable levels. Though policyholders were informed when premiums increased, they had no reason to know that the premium increases were a result of the block closure. Prudential made uniform written representations to policyholders about individual rate increases but in such documents it never disclosed that the reason for the rate increase was CHIP's closed block status or that the closed block status made future extreme rate increases inevitable. Policyholders reasonably relied on these representations and nondisclosures and on the expert and superior knowledge of Prudential, and they had no reason to suspect that further, extremely large premium increases were inevitable due to the block closure. For example, with respect to named plaintiff Beverly Clark, from 2002-2004, Ms. Clark's premiums increased from $1,458.71

per month to $4,217.65 per month (or from $17,504.52 to $50,611.80 per year). By way of further example, with respect to named plaintiff Jesse Paul, from 2002-2006 Prudential increased Mr. Paul's premiums from $715.99 per month to $4,284.11 per month (or from $8,591.88 to $51,409.32 per year). With respect to named plaintiff Warren Gold, from 2001-2004 Prudential increased Mr. Gold's premiums from $1,644.28 per month to $3,339.94 per month (or from $19,731.96 to $40,079.28 per year); after Mr. Gold increased his deductible to $5,000 per year, his premiums decreased initially but then resumed their upward climb. With respect to named plaintiff Linda M. Cusanelli, from 2002-2006 Prudential increased Ms. Cusanelli's premiums from $831.51 per month to over $2,600.00 per month (or from $9,978.12 to over $31,200.00 per year). With respect to named plaintiff Carole L. Walcher, Plaintiffs are informed and believe that from 2001-2008 Prudential increased Ms. Walcher's premiums from $886.52 per month to $5,554.22 per month (or from $10,638.24 to $66,650.64 per year). With respect to named plaintiff Terri L. Drogell, Plaintiffs are informed and believe that from 2000-2004 Prudential increased Ms. Drogell's premiums from $656.10 per month to $2,225.45 per month (or from $7,873.20 to $26,705.40 per year).

6. Prudential also did not disclose that the result of the block closure was that policyholders might be unable to secure comparable coverage for later developing medical conditions by the time death spiral premium increases forced them to drop the CHIP policy. Policyholders were not informed that if they developed medical conditions after the block was closed, and later were forced to switch medical coverage due to CHIP premium increases, they might not be able to secure coverage for such pre-existing conditions or might only be covered at higher premiums.

7. Prudential failed to disclose that closing the CHIP block would produce a death spiral, which inevitably would result in astronomical and unaffordable premium levels. Because Prudential failed to disclose this material information, policyholders were unable to make an informed choice whether to renew CHIP or search for alternative health insurance.

8. Policyholders reasonably expected that they would not be forced to search for

alternative health insurance since Prudential strictly limited its right to discontinue the CHIP policy. The CHIP policy states that policyholders "may continue this Policy in force...by payment of premiums." Prudential represented to CHIP policyholders that it retained a narrow and limited right to discontinue the policy "only if Prudential is then refusing to continue all policies with the same provisions and premium rate basis in the jurisdiction where you reside." This representation was false and misleading since no reasonable policyholder would expect that Prudential could effectively discontinue the CHIP plan by a decision to create a closed block death spiral.

9. Plaintiffs allege Prudential's conduct in failing to disclose the block closure and its implications violates California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200, et seq.) and constitutes common law fraud and a breach of the covenant of good faith and fair dealing implied in the CHIP policy. As a result of this conduct, Plaintiffs and the Class have suffered injury and damages, including higher premiums than would have been otherwise paid and medical costs for conditions that would have been covered by other insurance if the ramifications of the block closure had been disclosed.

## JURISDICTION AND VENUE

10. The United States District Court for the District of New Jersey has subject matter jurisdiction over this class action under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2), because one or more members of the classes defined herein are citizens of a State different from one or more defendants and the aggregate amount in controversy exceeds five million dollars ($5,000,000), exclusive of interest and costs.

11. Venue in this district is proper because Prudential transacts business in this district and Prudential is domiciled in New Jersey. Additionally, a substantial part of the events, acts, and omissions constituting consumer fraud was carried on within this district.

## THE PARTIES

12. Plaintiff Beverly Clark ("Clark") is currently a resident of Vancouver, British Columbia. Ms. Clark purchased CHIP from Prudential, with a policy date of September 13,

1978, in San Diego, California, where she then resided. Her premium in 1982 was $149.66 per month. At no time did Prudential inform Ms. Clark that it had closed the block and that this would make her policy vulnerable to an inevitable death spiral; that the reason for her premium increases was the closed block status of her policy; or that she might be unable to secure coverage for medical conditions developed subsequent to the block closure if she was forced to terminate CHIP due to high prices. Ms. Clark terminated her policy in 2005 when Prudential raised her premiums to $5,699.43 per month ($68,393.16 per year).

13. Plaintiff Jesse J. Paul ("Paul") is a resident of Indiana. Mr. Paul purchased CHIP from Prudential, effective July 2, 1980, in Indianapolis, Indiana, where he then resided. His initial premium was $25.50 per month. At no time did Prudential inform Mr. Paul that its closure of the block would make his policy vulnerable to an inevitable death spiral; that the reason for his premium increases was the closed block status of his policy; or that he might be unable to secure coverage for medical conditions developed subsequent to the block closure if he was forced to terminate CHIP due to high prices. He terminated his policy in 2007 when Prudential raised his premiums to $4,284.11 per month ($51,409.32 per year).

14. Plaintiff Warren Gold ("Gold") is currently a resident of Nevada. Mr. Gold purchased CHIP from Prudential in or about 1980 in California, where he then resided. Mr. Gold is informed and believes that his initial premium was approximately $30 per month. At no time did Prudential inform Mr. Gold that its closure of the block would make his policy vulnerable to an inevitable death spiral; that the reason for his premium increases was the closed block status of his policy; or that he might be unable to secure coverage for medical conditions developed subsequent to the block closure if he was forced to terminate CHIP due to high prices. He terminated his policy in 2006 when Prudential was about to raise his premiums to approximately $2,000 per month (approximately $24,000 per year, in addition to his $5,000 deductible and up to $1,000 coinsurance payment per year).

15. Plaintiff Linda M. Cusanelli ("Cusanelli") is currently a resident of California. Ms. Cusanelli purchased CHIP from Prudential in or about 1978 in California, where she then

resided. At no time did Prudential inform Ms. Cusanelli that its closure of the block would make her policy vulnerable to an inevitable death spiral; that the reason for her premium increases was the closed block status of her policy; or that she might be unable to secure coverage for medical conditions developed subsequent to the block closure if she was forced to terminate CHIP due to high prices. She terminated her policy in 2007.

16. Plaintiff Carole L. Walcher ("Walcher") is currently a resident of Pennsylvania. Ms. Walcher purchased CHIP from Prudential in or about 1974 in Indiana, where she then resided. At no time did Prudential inform Ms. Walcher that its closure of the block would make her policy vulnerable to an inevitable death spiral; that the reason for her premium increases was the closed block status of her policy; or that she might be unable to secure coverage for medical conditions developed subsequent to the block closure if she was forced to terminate CHIP due to high prices. She terminated her policy in 2008.

17. Plaintiff Terri L. Drogell ("Drogell") is currently a resident of Ohio. Ms. Drogell purchased CHIP from Prudential in or about 1979 in Ohio, where she then resided. At no time did Prudential inform Ms. Drogell that its closure of the block would make her policy vulnerable to an inevitable death spiral; that the reason for her premium increases was the closed block status of her policy; or that she might be unable to secure coverage for medical conditions developed subsequent to the block closure if she was forced to terminate CHIP due to high prices. She terminated her policy in 2004.

18. Defendant Prudential is, and at all relevant times was, a corporation organized and existing under the laws of the State of New Jersey with its principal place of business in Newark, New Jersey. On information and belief, Prudential Insurance Company of America is, and at all relevant times was, licensed to do business in the District of Columbia and all of the United States.

## PRUDENTIAL'S CHIP POLICY

19. Plaintiffs are informed and believe and based thereon allege that, at all relevant times, Prudential was an issuer of health insurance policies. Its policies included both individual

and group health insurance. Prior to 2001, Prudential was a mutual life insurance company organized under the laws of New Jersey.

20. Health insurance generally refers to a form of insurance that pays for a range of medical expenses. The purpose of health insurance is to offset the cost of medical bills and provide policyholders with coverage for high or unexpected medical expenses. Health insurance is designed to shift the risk of loss from the insured to the insurer, which can better manage risk through the creation of insurance risk pools. Such pools spread the risk that any individual insured will have above average costs. Insurers also can manage risk by reinsuring and/or by investing premiums now to pay later claims.

21. Plaintiffs are informed and believe and based thereon allege that, in 1973, Prudential developed, marketed, and sold an individual health insurance product known as CHIP. CHIP is a major medical insurance policy that pays benefits for expenses incurred for care and treatment of illnesses. Eligible expenses under the CHIP policy include hospital room and board; hospital services and supplies; doctor's services; anesthetics and their administration; ambulance service; professional nursing services; restoratory or rehabilitory speech therapy; treatment by a physiotherapist; x-ray and laboratory examinations; and a variety of other costs related to medical care. CHIP also provides separate benefits for mental illness and functional nervous disorders, as well as convalescent nursing home benefits.

22. Plaintiffs are informed and believe and based thereon allege that, at all relevant times, Prudential developed, marketed, and sold CHIP in the District of Columbia and all of the 50 United States.

23. Prudential sold and renewed the CHIP policy, which was meant to provide coverage for illness and medical care when the need arose, to the Class with the contractual term that Prudential could discontinue the policy only under certain conditions. The CHIP policy stated that policyholders could continue the policy at their election and, as such, Prudential strictly limited its right to discontinue the CHIP policy. The policy states:

"You may continue this Policy in force for successive premium periods of one

> month each by payment of the premiums as specified in the following paragraphs. However, Prudential may refuse to continue this Policy as of any Policy Date anniversary, but only if Prudential is then refusing to continue all policies with the same provisions and premium rate basis in the jurisdiction where you reside. If Prudential takes this action you will be notified not less than 31 days before the Policy Date anniversary."

24. At the time Plaintiff Paul purchased his CHIP policy in July 1980, Prudential made written representations in a form letter, separate and apart from the policy terms themselves, in which Prudential indicated that he could expect premiums to increase each year but that the reasons for such premium increases would be limited to policyholder age and general increases in medical costs, not discretionary acts by Prudential such as block closure. Prudential stated:

> THE PREMIUMS FOR YOUR PLAN DEPEND ON THE CURRENT COSTS OF MEDICAL CARE AND TREATMENT. WE CONTINUALLY REVIEW THESE COSTS AND MAKE ADJUSTMENTS IN THE PREMIUMS YOU PAY SO THAT THEY ARE KEPT CURRENT FOR THE AGES OF THOSE INSURED UNDER YOUR PLAN AND THE AREA IN WHICH YOU LIVE. MEDICAL CARE COSTS HAVE BEEN RISING IN RECENT YEARS ALSO. THERE IS ALSO A TENDENCY FOR INDIVIDUAL COSTS TO INCREASE WITH AGE. AS A RESULT, YOU MAY EXPECT THAT THERE WILL BE AN INCREASE IN YOUR PREMIUM EACH YEAR ON THE ANNIVERSARY DATE OF YOUR POLICY. WE ASSURE YOU THAT ANY INCREASE WILL BE HELD TO THE MINIMUM POSSIBLE THAT IS CONSISTENT WITH OUR BEING ABLE TO CONTINUE PROVIDING THIS COVERAGE.

Ms. Clark received substantially the same representations when she bought her CHIP policy, and Plaintiffs allege on information and belief that substantially the same representations were sent to Mr. Gold, Ms. Cusanelli, Ms. Walcher, Ms. Drogell, and CHIP policyholders generally at or around the time of policy delivery.

## THE CHIP CLOSED BLOCK DEATH SPIRAL

25. The CHIP policy clearly states that policyholders may continue the CHIP policy in force at their election and that Prudential could only discontinue the policy under extremely limited circumstances. No reasonable policyholder would foresee that Prudential could effectively discontinue its policy by creating a closed block death spiral.

26. Prudential's premium increases were a direct result of the composition of the

medical insurance pool under CHIP's closed block. In a dynamic, well underwritten individual insurance pool, a group of insureds shares the risk of both this year's claims and the future risk that poor health of some policyholders will generate above average costs. The healthy members of the insurance pool subsidize the unhealthy members.

27. In 1981, Prudential stopped selling CHIP to new members. Stopping sales to new members is referred to in the insurance industry as "closing the block." Closing the block caps the pool of insureds under the policy. With no new entrants, the size of the pool shrinks whenever a policyholder drops the policy because no new policyholders are accepted.

28. Prudential knew that closing the CHIP block would result in an "anti-selection crisis," especially given the design features of the policy including that the CHIP policy lacked inside limits on specific policy benefits, allowing very ill policyholders to incur massive claims. A lack of inside limits accentuates the dynamics of a death spiral.

29. The inevitable negative ramifications of the decision to close the block were never disclosed to CHIP policyholders. An anti-selection crisis occurs when low risk healthy individuals terminate their policy. When low risk policyholders switch to alternative coverage, an insufficient percentage of healthy policyholders remain to fully subsidize the costs of unhealthy policyholders. With CHIP closed to new entrants and low risk individuals opting out, Prudential knew a "death spiral" inevitably would result. In a "death spiral," less healthy individuals who cannot obtain coverage elsewhere are disproportionately represented in the risk pool, leading eventually and inevitably to astronomical premium increases, until the plan becomes unaffordable.

30. Prudential had access to the relevant actuarial data related to the CHIP policy and the risk pool, and policyholders relied on Prudential's actuarial expertise in managing the pool. Prudential did not disclose to policyholders that it closed the block and that it knew, based on expert actuarial knowledge, that the block closure inevitably would result in massive premium increases.

31. Since Prudential did not disclose to policyholders that the closed block was the

cause of the premium increases, that future massive premium increases were inevitable, and that serious potential problems could be created by the potential uninsurability of pre-existing conditions, policyholders continued to renew their policies. Expert information and actuarial knowledge concerning the existence and ramifications of the block closure was in the sole possession of Prudential and, since it was not disclosed, policyholders continued to renew their CHIP policies rather than look for alternative health insurance coverage.

32. As the death spiral intensified, more policyholders were forced to discontinue their CHIP policies because of high premiums. Contrary to Prudential's uniform written representations that it had a "limited right to discontinue the policy," requiring Prudential to "refus[e] to continue all policies with the same provisions," CHIP was effectively discontinued due to the death spiral. With Prudential seeking premium increases above an astronomical $5,000 per month, it became financially impossible for policyholders to continue premium payments. This ultimate collapse of the risk pool and discontinuance of the policy is the result of a death spiral and well known to Prudential.

33. As a result of the block closure, and Prudential's misrepresentations and nondisclosures, policyholders paid higher premiums when renewing their CHIP policies than they would have paid if they had been told about the block closure and its implications and had secured alternative coverage.

34. Policyholders who were forced to discontinue their CHIP coverage due to its cost faced financial and medical difficulties finding comparable coverage; many CHIP policyholders developed medical conditions over the lifetime of the policy; such individuals found it difficult, if not impossible, to find coverage for their pre-existing conditions on the open market; to the extent they were able to find coverage at all, they were forced to pay premium rates in excess of the rate they would have paid if they purchased prior to the development of their medical conditions; former CHIP policyholders who were unable to find equivalent coverage for their conditions, or those who "went bare" as a result of being forced to drop their CHIP policy, incurred huge medical costs as a result.

35. Prudential failed to disclose to the Class the "closed" status of the block and its negative ramifications for policyholders. At the time the block was closed, Prudential knew a death spiral would inevitably ensue. Prudential nevertheless classified CHIP as a "discontinued" or "run-off" operation without disclosing this material information to the Class. As a direct and proximate result of Prudential's unlawful and unconscionable course of conduct, the Class suffered ascertainable loss since class members were forced to pay higher premiums than would have been otherwise paid and paid medical costs for conditions that would have been covered by other insurance if the ramifications of the block closure had been disclosed.

36. Not only did Prudential fail to disclose the "closed" status of the block and its negative ramifications for policyholders; Prudential affirmatively misrepresented the reasons for the escalating premiums. For example, when Prudential increased Ms. Clark's premium rates in at least the years 1996, 1997, 1998, 1999, and 2000, Prudential sent Ms. Clark a form letter misrepresenting that the reasons that CHIP premiums were increasing were simply due to medical cost inflation and her increasing age. Mr. Paul received the identical representations in form letters sent when his premiums were increased in at least the years 1997, 1998, and 1999. Mr. Gold is informed and believes that he received the identical representations in form letters sent when his premiums were increased in at least the years 1998, 1999, 2000, and 2001. Ms. Cusanelli is informed and believes that she received the identical representations in form letters sent when her premiums were increased in at least the years 1996, 1997, 1998, 1999, and 2000. Ms. Walcher is informed and believes that she received the identical representations in form letters sent when her premiums were increased in at least the years 1996, 1997, 1998, 1999, and 2000. Ms. Drogell is informed and believes that she received the identical representations in form letters sent when her premiums were increased in at least the years 1997, 1998, 1999, and 2000. Plaintiffs are informed and believe and thereon allege that the same misrepresentations were made to Plaintiffs and other members of the Class from around 1990 to around 2001. Prudential knew that these representations were false and misleading and that an additional, extremely important reason for the increases in CHIP premiums was that the block had been

closed and the CHIP policy was in the midst of a death spiral. Not only did Prudential know that its representations were false because of its actuarial expertise and knowledge concerning the dynamics of closed blocks, but the Fifth Circuit Court of Appeals had expressly found in an earlier lawsuit against Prudential, just six years after it closed the block, that "[Prudential's] decision to terminate new sales of CHIP policies fixes with moral certitude the reality that financially the CHIP policy cannot stand on its own bottom."[1] But even after this finding against Prudential, Prudential affirmatively misrepresented the reasons for CHIP premium increases and continued its failure to disclose the closure of the CHIP block and its consequences for policyholders. The form letters stated:

> Several factors have caused CHIP premiums to increase. Briefly, they are:
>
> > Increase In Age
> >
> > You (and your dependent spouse if included under your policy) are a year older than last year. Claim experience indicates that the frequency and size of claims generally increases as one gets older
> >
> > Increasing Cost Of Medical Care
> >
> > The cost of medical care continues to rise at a rate greater than the general rate of inflation. New medical equipment and complex medical procedures have resulted in remarkable advances in medical care, but they are expensive. Your CHIP benefits automatically adjust to the higher levels of health care costs.

Prudential did not state that "increase in age" and "increase in cost of medical care" are *among* the reasons for the premium increases. It stated that these *are* the reasons for the premium increases.

37. Plaintiffs are informed and believe that in years prior to sending the form letters containing the misrepresentations described in Paragraph 36, above, Prudential sent form letters to Plaintiffs and other members of the class each year containing false and misleading statements regarding the reasons for premium increases. On information and belief, these included, without

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[1] *Tusa v. Prudential Insurance Co. of America*, 825 F.2d 69, 74 (5th Cir. 1987).

limitation: beginning in at least 1983, Prudential misleadingly informed Plaintiffs and the Class that the reason their premiums were increasing was "because of increases in the amounts of benefits provided by our policies"; and beginning in at least 1985, Prudential misleadingly informed Plaintiffs and the Class that the reasons their premiums were increasing were "increase in age," "high cost of medical care," and "high claim costs." These statements and other statements in the form letters were false and misleading for, without limitation, the reasons set forth in Paragraph 36, above.

## PLAINTIFFS' PURCHASE AND RENEWAL OF CHIP POLICIES

### Plaintiff Beverly Clark

38. On or about September 13, 1978, plaintiff Beverly Clark applied to purchase a CHIP policy from Prudential Insurance Company of America. Ms. Clark's premium was $149.66 per month on June 30, 1982.

39. In 2002, Prudential increased Ms. Clark's monthly premium from $1,823.39 to $2,141.02 (or $25,692.24 per year), a 17.42% increase. In 2003, Prudential again hiked her premiums, from $2,141.02 to $2,967.99 per month (or $35,615.88 per year), a 38.63% increase. In 2004, premiums were yet again raised from $2,967.99 to $4,217.65 per month (or $50,611.80 per year), a 42.1% increase. This represented a 131% increase in premiums over a three-year period.

40. Ms. Clark paid these exorbitant premiums in 2005, until Prudential notified her that her rate was scheduled to increase to $5,699 per month (or $68,388 per year) in September, 2005. At this point, Ms. Clark stopped making payments. Ms. Clark's CHIP policy was terminated on September 12, 2005.

41. Ms. Clark did not discover the material facts constituting the basis for her claims before three years prior to the filing of her original complaint in this action on December 17, 2008. The material facts constituting the basis for her claims include, but are not limited to, the facts that Prudential had closed the CHIP block and that such closure caused a death spiral, which creates serious adverse consequences for policyholders. Such facts are by their nature

concealed from a reasonable policyholder, who has no way to know or to learn, in the exercise of reasonable diligence, that the block has been closed unless the insurer discloses that fact, and who lacks the actuarial expertise required to understand: 1) that the block closure caused the death spiral; 2) that the death spiral causes increasing premiums; 3) that those premiums will eventually rise to astronomical levels; and 4) that a policyholder who develops a medical problem prior to being forced out of CHIP by those premium costs may be unable to secure other health insurance due to his or her pre-existing condition. But Prudential failed to disclose these material facts. Moreover, Prudential made affirmative, independent efforts to conceal the material facts constituting the basis for Ms. Clark's claims. Prudential repeatedly advised Ms. Clark (in at least 1996, 1997, 1998, 1999, and 2000) that her increasing premiums were attributable to her increasing age and to medical cost inflation. Even after Ms. Clark initiated an investigation in 2005, Prudential told her, in response to correspondence from an attorney for Ms. Clark and an inquiry from the California Department of Insurance, that her premium increases were due to her increasing age and to the higher medical costs of the insured group, without ever disclosing that the higher medical costs of the insured group were due to the block closure and the death spiral that it caused by driving relatively healthy policyholders out of the group. A reasonable policyholder would not have discovered the material facts constituting the basis for Ms. Clark's claims, or the legal basis for such claims, before three years prior to the filing of her original complaint in this action.

42. Had Prudential disclosed the block closure and its implications, Ms. Clark would have discontinued her CHIP policy and purchased less expensive alternative insurance.

**Plaintiff Jesse J. Paul**

43. On or about July 2, 1980, Plaintiff Jesse J. Paul purchased a CHIP policy from Prudential Insurance Company of America. Mr. Paul's initial monthly premium was $25.50.

44. In 2003, Prudential drastically increased Mr. Paul's monthly premium. In 2002, his monthly premium was $715.99 (or $8,591.88 per year). In 2003, Prudential raised his monthly premium from $715.99 to $1,036.66 (or $12,439.92 per year), a 45% increase. In 2004,

Prudential again raised Mr. Paul's monthly premium from $1,036.66 to $1,501.28 (or $18,015.36 per year), a 45% increase. In 2005, Prudential increased his premium from $1,501.28 to $2,156.29 (or $25,875.48 per year), a 44% increase. In 2006, Prudential again raised the monthly premium from $2,156.29 to $3,057.45 (or $36,689.40 per year), a 42% increase.

45. Finally, in 2007, Prudential informed Mr. Paul that his premium would increase from $3,057.45 to $4,284.11 (or $51,409.32 per year), a 40% increase. Shortly after this increase, Mr. Paul stopped making payments and the policy was terminated. Prudential increased Mr. Paul's premiums by 498% over a five-year period.

46. Mr. Paul did not discover the material facts constituting the basis for his claims before six years prior to the filing of his original complaint in this action on December 17, 2008. The material facts constituting the basis for his claims include, but are not limited to, the facts that Prudential had closed the CHIP block and that such closure caused a death spiral. Such facts are by their nature concealed from a reasonable policyholder, who has no way to know or to learn, in the exercise of reasonable diligence, that the block has been closed unless the insurer discloses that fact, and who lacks the actuarial expertise required to understand that 1) the block closure caused the death spiral; 2) that the death spiral causes increasing premiums; 3) that those premiums will eventually rise to astronomical levels; and 4) that a policyholder who develops a medical problem prior to being forced out of CHIP by those premium costs may be unable to secure other health insurance due to his or her pre-existing condition. But Prudential failed to disclose these material facts. Moreover, Prudential made affirmative, independent efforts to conceal the material facts constituting the basis for Mr. Paul's claims. Prudential repeatedly advised Mr. Paul (in at least 1997, 1998, and 1999) that his increasing premiums were attributable to his increasing age and to medical cost inflation. Even after Mr. Paul initiated an investigation in 2003, Prudential told him, in response to an inquiry from the Indiana Department of Insurance, that his premium increases were due to his increasing age and to the higher medical costs of the insured group, without ever disclosing that the higher medical costs of the insured group were due to the block closure and the death spiral that it caused by driving relatively

healthy policyholders out of the group. A reasonable policyholder would not have discovered the material facts constituting the basis for Mr. Paul's claims, or the legal basis for such claims, before six years prior to the filing of his original complaint in this action.

47. Had Prudential disclosed the block closure and its implications, Mr. Paul would have discontinued his CHIP policy and purchased less expensive alternative insurance.

**Plaintiff Warren Gold**

48. In or about 1980, plaintiff Warren Gold purchased a CHIP policy from Prudential. Mr. Gold was residing in California at the time his CHIP policy was issued. Mr. Gold is informed and believes that his initial premium, with a $300 deductible, was approximately $30 per month.

49. In the late 1980's or early 1990's, Mr. Gold was diagnosed with diabetes.

50. On information and belief: In 2002, Prudential began drastically increasing Mr. Gold's monthly premium. In 2001, his monthly premium was $1,644.28 (or $19,731.36 per year). In 2002, Prudential raised his monthly premium from $1,644.28 to $2,055.35 (or $24,664.20 per year), a 25% increase. In 2004, Prudential announced that his monthly premium would be increasing to $3,339.94 (or $40,079.28 per year), a 63% increase over the two-year period from 2002 to 2004. In 2004 or 2005, in an effort to decrease his premiums, Mr. Gold increased his annual deductible to $5,000. This resulted in a temporary reduction in his monthly premium: effective April 4, 2005, Prudential charged him a monthly premium of $1,502.97 (or $18,035.64 per year). Mr. Gold discontinued his policy in 2006 after Prudential advised that it would be raising his monthly premium to approximately $2,000 ($24,000 per year), an approximately 35% increase.

51. Mr. Gold did not discover the material facts constituting the basis for his claims before three years prior to the filing of the original complaint in this action on December 17, 2008. The material facts constituting the basis for his claims include, but are not limited to, the facts that Prudential's closure of the CHIP block caused a death spiral and created serious adverse consequences for policyholders. Such facts are by their nature concealed from a

reasonable policyholder, who has no way to know or to learn, in the exercise of reasonable diligence, that the block has been closed unless the insurer discloses that fact, and who lacks the actuarial expertise required to understand: 1) that the block closure caused the death spiral; 2) that the death spiral causes increasing premiums; 3) that those premiums will eventually rise to astronomical levels; and 4) that a policyholder who develops a medical problem prior to being forced out of CHIP by those premium costs may be unable to secure other health insurance due to his or her pre-existing condition. But Prudential failed to disclose these material facts. Moreover, Prudential made affirmative, independent efforts to conceal the material facts constituting the basis for Mr. Gold's claims. On information and belief, Prudential repeatedly advised Mr. Gold (in at least 1998, 1999, 2000, and 2001) that his increasing premiums were attributable to his increasing age and to medical cost inflation. A reasonable policyholder would not have discovered the material facts constituting the basis for Mr. Gold's claims, or the legal basis for such claims, before three years prior to the filing of the original complaint in this action.

52. Had Prudential disclosed the block closure and its implications, Mr. Gold would have discontinued his CHIP policy and purchased less expensive alternative insurance.

**Plaintiff Linda M. Cusanelli**

53. In or about 1978, plaintiff Linda M. Cusanelli purchased a CHIP policy from Prudential. Ms. Cusanelli was residing in California at the time her CHIP policy was issued.

54. In or about 1994, Ms. Cusanelli was diagnosed as having an invasive malignant melanoma.

55. On information and belief: In 2002, Ms. Cusanelli's monthly premium was $831.51 (or $9,978.12 per year). In 2003, Prudential raised her monthly premium to $1,080.96 (or $12,971.52 per year), a 30% increase. In 2004, Prudential raised her monthly premium to $1,459.30 (or $17,511.60 per year), a 35% increase. In 2005, Prudential raised her monthly premium to $1,970.06 (or $23,640.72 per year), a 35% increase. In 2006, Prudential raised her monthly premium to more than $2,600.00 (or $31,200.00 per year), a more than 30% increase. Thus, from 2002 to 2006, Prudential raised Ms. Cusanelli's premiums by over 200%. Ms.

Cusanelli discontinued her policy in 2007.

56. Ms. Cusanelli did not discover the material facts constituting the basis for her claims before three years prior to the filing of the original complaint in this action on December 17, 2008. The material facts constituting the basis for her claims include, but are not limited to, the facts that Prudential's closure of the CHIP block caused a death spiral and created serious adverse consequences for policyholders. Such facts are by their nature concealed from a reasonable policyholder, who has no way to know or to learn, in the exercise of reasonable diligence, that the block has been closed unless the insurer discloses that fact, and who lacks the actuarial expertise required to understand: 1) that the block closure caused the death spiral; 2) that the death spiral causes increasing premiums; 3) that those premiums will eventually rise to astronomical levels; and 4) that a policyholder who develops a medical problem prior to being forced out of CHIP by those premium costs may be unable to secure other health insurance due to her or her pre-existing condition. But Prudential failed to disclose these material facts. Moreover, Prudential made affirmative, independent efforts to conceal the material facts constituting the basis for Ms. Cusanelli's claims. On information and belief, Prudential repeatedly advised Ms. Cusanelli (in at least 1996, 1997, 1998, 1999, and 2000) that her increasing premiums were attributable to her increasing age and to medical cost inflation. A reasonable policyholder would not have discovered the material facts constituting the basis for Ms. Cusanelli's claims, or the legal basis for such claims, before three years prior to the filing of the original complaint in this action.

57. Had Prudential disclosed the block closure and its implications, Ms. Cusanelli would have discontinued her CHIP policy and purchased less expensive alternative insurance.

**Plaintiff Carole L. Walcher**

58. In or about 1974, plaintiff Carole L. Walcher purchased a CHIP policy from Prudential. Ms. Walcher was residing in Indiana at the time her CHIP policy was issued. Ms. Walcher is informed and believes that her initial monthly premium was $23.17.

59. In or about the late 1990s, Ms. Walcher was diagnosed with diabetes.

60. On information and belief: In 2001, Ms. Walcher's monthly premium was $886.52 (or $10,638.24 per year). In 2002, Prudential raised her monthly premium to $1,196.80 (or $14,361.60 per year), a 35% increase. In 2003, Prudential raised her monthly premium to $1,376.32, and raised her monthly premium a second time to $1,615.68 (for a total of $18,430.72 per year), a 28% increase. In 2004, Prudential raised her monthly premium again to $2,181.16 (or $26,173.92 per year), a 42% increase. In 2005, Prudential raised her monthly premium to $2,944.57 (or $35,934.84 per year), a 37% increase. In 2006, Prudential raised her monthly premium to $3,975.17 (or $47,702.04 per year), a 33% increase. In 2007, Prudential raised her monthly premium to $5,366.48 (or $64,397.76 per year), a 35% increase. In 2008, Prudential raised her monthly premium to $5,554.22 (or $66,650.64 per year), and shortly thereafter, Ms. Walcher discontinued her policy. Thus, from 2001 to 2008, Prudential raised Ms. Walcher's premiums by about 527%.

61. Ms. Walcher did not discover the material facts constituting the basis for her claims before six years prior to the filing of the original complaint in this action on December 17, 2008. The material facts constituting the basis for her claims include, but are not limited to, the facts that Prudential's closure of the CHIP block caused a death spiral and created serious adverse consequences for policyholders. Such facts are by their nature concealed from a reasonable policyholder, who has no way to know or to learn, in the exercise of reasonable diligence, that the block has been closed unless the insurer discloses that fact, and who lacks the actuarial expertise required to understand: 1) that the block closure caused the death spiral; 2) that the death spiral causes increasing premiums; 3) that those premiums will eventually rise to astronomical levels; and 4) that a policyholder who develops a medical problem prior to being forced out of CHIP by those premium costs may be unable to secure other health insurance due to her or her pre-existing condition. But Prudential failed to disclose these material facts. Moreover, Prudential made affirmative, independent efforts to conceal the material facts constituting the basis for Ms. Walcher's claims. On information and belief, Prudential repeatedly advised Ms. Walcher (in at least 1996, 1997, 1998, 1999, and 2000) that her

increasing premiums were attributable to her increasing age and to medical cost inflation. A reasonable policyholder would not have discovered the material facts constituting the basis for Ms. Walcher's claims, or the legal basis for such claims, before six years prior to the filing of the original complaint in this action.

62. Had Prudential disclosed the block closure and its implications, Ms. Walcher would have discontinued her CHIP policy and purchased less expensive alternative insurance.

**Plaintiff Terri L. Drogell**

63. In or about 1979, plaintiff Terri L. Drogell purchased a CHIP policy from Prudential. Ms. Drogell was residing in Ohio at the time her CHIP policy was issued. Ms. Drogell is informed and believes that her initial monthly premium was $48.52.

64. On information and belief: In 2000, Ms. Drogell's monthly premium was $656.10 (or $7,873.20 per year). In 2001, Prudential raised her monthly premium to $918.54 (or $11,022.48 per year), a 40% increase. In 2002, Prudential raised her monthly premium to $954.36 (or $11,452.32 per year), a 4% increase. In 2003, Prudential raised her monthly premium to $1,363.14 (or $16,357.68 per year), a 43% increase. In 2004, Prudential notified Ms. Drogell that her monthly premium would increase to $2,225.45 (or $26,705.40 per year), a 63% increase, at which point she discontinued her policy. Thus, from 2000 to 2004, Prudential raised Ms. Drogell's premiums by about 239%.

65. Ms. Drogell did not discover the material facts constituting the basis for her claims before four years prior to the filing of the original complaint in this action on December 17, 2008. The material facts constituting the basis for her claims include, but are not limited to, the facts that Prudential's closure of the CHIP block caused a death spiral and created serious adverse consequences for policyholders. Such facts are by their nature concealed from a reasonable policyholder, who has no way to know or to learn, in the exercise of reasonable diligence, that the block has been closed unless the insurer discloses that fact, and who lacks the actuarial expertise required to understand: 1) that the block closure caused the death spiral; 2) that the death spiral causes increasing premiums; 3) that those premiums will eventually rise

to astronomical levels; and 4) that a policyholder who develops a medical problem prior to being forced out of CHIP by those premium costs may be unable to secure other health insurance due to her or her pre-existing condition. But Prudential failed to disclose these material facts. Moreover, Prudential made affirmative, independent efforts to conceal the material facts constituting the basis for Ms. Drogell's claims. On information and belief, Prudential repeatedly advised Ms. Drogell (in at least 1997, 1998, 1999, and 2000) that her increasing premiums were attributable to her increasing age and to medical cost inflation. A reasonable policyholder would not have discovered the material facts constituting the basis for Ms. Drogell's claims, or the legal basis for such claims, before four years prior to the filing of the original complaint in this action.

66. Had Prudential disclosed the block closure and its implications, Ms. Drogell would have discontinued her CHIP policy and purchased less expensive alternative insurance.

## CLASS ACTION ALLEGATIONS

67. Plaintiffs bring this action on behalf of themselves and all others similarly situated as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3). The classes that Ms. Clark, Mr. Gold, and Ms. Cusanelli seek to represent are the Multi-State Fraud Class and the California Subclass. The class that Mr. Paul, Ms. Walcher, and Ms. Drogell seek to represent is the Multi-State Fraud Class.

68. The Multi-State Fraud Class seeks class certification for claims regarding fraudulent misrepresentations and fraudulent omissions. It is composed of and defined as follows:

a. The Multi-State Fraud Class includes all persons who renewed a CHIP policy after the time Prudential stopped selling the policy to new policyholders ("closed the block") in 1981 and who resided in any of the following states at the time their policy was initially issued: California; Indiana; New York; Ohio; and Texas.

b. Specifically excluded from the Multi-State Fraud Class are past or present officers, directors or employees of the Defendant; any agents or others who sold CHIP policies for the Defendant; any entity in which the Defendant has a controlling interest; the affiliates,

legal representatives, attorneys or assigns of the Defendant; any judge, justice or judicial officer presiding over this matter and the staff and immediate family of any such judge, justice or judicial officer.

69. The California Subclass also seeks class certification with respect to the fraudulent misrepresentation and omission claims, and it also seeks class certification with respect to the breach of the covenant of good faith and fair dealing claim and for violations of California's Unfair Competition Law. The California Subclass is composed of and defined as follows:

a. The California Subclass includes all persons who renewed a CHIP policy after the time Prudential stopped selling the policy to new policyholders ("closed the block") in 1981 and who resided in California at the time their policy was initially issued.

b. Specifically excluded from the California Subclass are past or present officers, directors or employees of the Defendant; any agents or others who sold CHIP policies for the Defendant; any entity in which the Defendant has a controlling interest; the affiliates, legal representatives, attorneys or assigns of the Defendant; any judge, justice or judicial officer presiding over this matter and the staff and immediate family of any such judge, justice or judicial officer.

70. As more fully set forth below, this action is appropriately brought as a class action pursuant to Rule 23(b)(2) and 23(b)(3) because with respect to each of the classes (the Multi-State Fraud Class and the California Subclass): the class members are so numerous that joinder of all members is impracticable; there are common questions of law and fact; the claims of the representative Plaintiffs are typical of the claims of each class they represent; and the representative Plaintiffs will fairly and adequately protect the interests of each class they represent.

**Numerosity**

71. With respect to each of the classes (the Multi-State Fraud Class and the California Subclass): the class members are so numerous that the individual joinder of all class members is

impracticable under the circumstances of this case. Plaintiffs are informed and believe that each class has thousands of members, whose identities can be determined from the records of Prudential.

**Common Questions Predominate**

72. With respect to each of the classes (the Multi-State Fraud Class and the California Subclass): common questions of law and fact exist as to all class members and predominate over any possible questions that might affect only individual class members.

73. With respect to the Multi-State Fraud Class, these common questions of law and fact include, among others:

a. Whether Prudential failed to disclose the block closure and its implications for policyholders.

b. Whether Prudential's failure to disclose the block closure and its implications was material to the decision to renew the policy.

c. Whether Prudential's practices as alleged herein constitute fraudulent misrepresentations and/or fraudulent omissions.

74. With respect to the California Subclass, these common questions of law and fact include, among others:

a. Whether Prudential failed to disclose the block closure and its implications for policyholders.

b. Whether Prudential's failure to disclose the block closure and its implications was material to the decision to renew the policy.

c. Whether Prudential's practices and its failure to disclose that a death spiral would result in exorbitant premiums and an inability to secure alternative coverage for those with pre-existing conditions, as alleged herein, violate California's Unfair Competition Law.

d. Whether Prudential's practices as alleged herein constitute fraudulent misrepresentations and/or fraudulent omissions, and/or violate its duty of good faith and fair dealing to its insureds.

e. Whether Prudential's practices as alleged herein violate its duty of good faith and fair dealing to its insureds.

**Typicality**

75. With respect to the Multi-State Fraud Class and the California Subclass: Plaintiff Beverly Clark's claims are typical of those of the class members. Ms. Clark's claims are based on the same legal theories as the claims of the other class members and are based on, as applicable, the same fraudulent misrepresentations and omissions, and the same unlawful, unfair and/or fraudulent business acts or practices, and breach of the covenant of good faith and fair dealing. Ms. Clark and class members sustained injury arising out of Prudential's common course of conduct as complained of herein.

76. With respect to the Multi-State Fraud Class and the California Subclass: Plaintiff Warren Gold's claims are typical of those of the class members. Mr. Gold's claims are based on the same legal theories as the claims of the other class members and are based on, as applicable, the same fraudulent misrepresentations and omissions, and the same unlawful, unfair and/or fraudulent business acts or practices, and breach of the covenant of good faith and fair dealing. Mr. Gold and class members sustained injury arising out of Prudential's common course of conduct as complained of herein.

77. With respect to the Multi-State Fraud Class and the California Subclass: Plaintiff Linda M. Cusanelli's claims are typical of those of the class members. Ms. Cusanelli's claims are based on the same legal theories as the claims of the other class members and are based on, as applicable, the same fraudulent misrepresentations and omissions, and the same unlawful, unfair and/or fraudulent business acts or practices, and breach of the covenant of good faith and fair dealing. Ms. Cusanelli and class members sustained injury arising out of Prudential's common course of conduct as complained of herein.

78. With respect to the Multi-State Fraud Class: Plaintiff Jesse J. Paul's claims are typical of those of the members of the class. Mr. Paul's claims are based on the same legal theories as the claims of the other class members and are based on the same fraudulent

misrepresentations and fraudulent omissions. Mr. Paul and class members sustained injury arising out of Prudential's common course of conduct as complained of herein.

79. With respect to the Multi-State Fraud Class: Plaintiff Carole L. Walcher's claims are typical of those of the members of the class. Ms. Walcher's claims are based on the same legal theories as the claims of the other class members and are based on the same fraudulent misrepresentations and fraudulent omissions. Ms. Walcher and class members sustained injury arising out of Prudential's common course of conduct as complained of herein.

80. With respect to the Multi-State Fraud Class: Plaintiff Terri L. Drogell's claims are typical of those of the members of the class. Ms. Drogell's claims are based on the same legal theories as the claims of the other class members and are based on the same fraudulent misrepresentations and fraudulent omissions. Ms. Drogell and class members sustained injury arising out of Prudential's common course of conduct as complained of herein.

**Adequacy**

81. With respect to each of the classes (the Multi-State Fraud Class and the California Subclass): Plaintiffs will fairly and adequately protect the interests of the class members for each class they represent. Plaintiffs and the other class members were injured by, as applicable, the same fraudulent misrepresentations and omissions, the same unlawful, unfair and/or fraudulent business acts or practices, the same act, use or employment by Prudential of an unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with the intent that others rely thereon, and the same breach of the covenant of good faith and fair dealing, addressed herein, and Plaintiffs have no interests that are adverse to the interests of absent class members. Plaintiffs have retained counsel with substantial experience and success in the prosecution of complex class actions, consumer protection litigation and litigation challenging the practices of insurance companies.

**Additional Class Allegations**

82. This action is appropriate as a class action under Rule 23(b)(2) and 23(b)(3).

With respect to each of the classes (the Multi-State Fraud Class and the California Subclass): questions of law and fact common to the class members predominate and a class action is superior to any other possible method for the fair and efficient adjudication of the controversy.

a. Common questions of law and fact predominate, and individual joinder of all class members is impracticable. Thus, class action treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of effort and expense that numerous individual actions would engender.

b. Class members have little interest in individually controlling the prosecution of separate actions. In light of the substantial cost of challenging Prudential's wrongful conduct and the comparatively modest, although significant, damages suffered by individual class members, it would not be feasible or desirable for individual class members to prosecute separate actions against the Defendant.

c. It is desirable to concentrate the litigation of the claims in this forum. Prudential is a New Jersey corporation with its principal place of business in Newark, New Jersey. A large number of the events constituting the claims in this case occurred in New Jersey.

d. There are no difficulties that are likely to be encountered in the management of this action that would preclude its maintenance as a class action. Rather, the expense and burden of litigation would make it difficult or impossible for individual class members to maintain individual actions. Moreover, even if such individual litigation were practicable, the cost to the court system of adjudication of individualized litigation would be substantial. This action will result in an orderly and expeditious administration of class claims. Economies of time, effort and expense will be fostered, and uniformity of decisions will be ensured.

## FIRST CLAIM FOR RELIEF

## (FOR FRAUDULENT MISREPRESENTATIONS)

(On Behalf of the Multi-State Fraud Class, including the California Subclass)

83. Plaintiffs reallege paragraphs 1-82, above, and incorporate them as if fully set forth herein.

84. Prudential's fraudulent misrepresentations include the following, without limitation: After the CHIP block was closed, Prudential misrepresented to Plaintiffs and other members of the Class that the reasons that CHIP premiums were increasing were simply due to medical cost inflation and the policyholder's increasing age. On information and belief, such misrepresentations were made numerous times, including at the time of policy renewal from around 1990 to around 2001, and other misrepresentations were made at the time of policy renewal from around 1983 to around 1989, as alleged in paragraphs 36-37, above. Prudential intended that policyholders would rely on these misrepresentations in deciding whether to renew CHIP. Prudential knew that these representations were false and misleading, particularly in light of the representations described in paragraph 24, above, and that an additional, extremely important, reason for the increases in CHIP premiums was that the block had been closed and that the CHIP policy was in the midst of a death spiral.

85. Plaintiffs relied on these misrepresentations in renewing their policies and are informed and believe that the class members likewise relied. Prudential's misrepresentations were a direct and proximate cause of Plaintiffs' injury in fact and loss of money or property. Absent Prudential's misrepresentations, Plaintiffs and the class members would have discontinued their CHIP policies and purchased less expensive alternative insurance. As a result of these misrepresentations, Plaintiffs and the Class have incurred damages, including higher premiums than would have been otherwise paid and medical costs for conditions that would have been covered by other insurance if the ramifications of the block closure had been disclosed.

86. The conduct of Prudential as alleged above was despicable conduct that was carried on by Prudential with a willful and conscious disregard of the rights or safety of Plaintiffs and the Class, that has subjected Plaintiffs and the Class to cruel and unjust hardship in conscious disregard of their rights, and that involved deceit or an intentional misrepresentation of one or more material facts known to Prudential with the intention on the part of Prudential of

thereby depriving Plaintiffs and the Class of property or legal rights or otherwise causing injury. Plaintiffs are informed and believe that Prudential authorized or ratified the wrongful conduct of its agents or employees alleged above and that such authorization or ratification was done on the part of an officer, director, or managing agent of Prudential. Plaintiffs and the Class are accordingly entitled to an award of punitive or exemplary damages.

## SECOND CLAIM FOR RELIEF

## (FOR FRAUDULENT OMISSIONS)

(On Behalf of the Multi-State Fraud Class, including the California Subclass)

87. Plaintiffs reallege paragraphs 1-82, above, and incorporate them as if fully set forth herein.

88. Prudential had a duty to disclose to Plaintiffs the block closure and its implications for the following reasons, without limitation:

a. Prudential had a duty to disclose as a result of its representations, as alleged in paragraph 24, which it reaffirmed when it sent Plaintiffs and other class members their annual notices of premium increases, and as a result of its partial disclosures, as alleged in paragraph 84, which contained only half-truths or were otherwise false or misleading. Prudential made representations at the time the policies were purchased that the reasons for any increases in premiums would be limited to policyholder age and general increases in medical costs, not discretionary acts by Prudential such as block closure. Even if Prudential intended to perform these promises at the time it made them, and thus its statements were true at the time they were made, Prudential's subsequent closure of the block rendered the statements false and gave rise to a duty to disclose the block closure and its consequences. When it sent Plaintiffs and other class members its annual notices of premium increases, it reaffirmed these representations, even though they were now false and misleading. On information and belief, Prudential also later made false and misleading representations in letters Prudential sent to Plaintiffs and the Class every year from at least 1983 through 2001. Because Prudential's representations were false and misleading, they gave rise to a duty to disclose the block closure and its implications for

policyholders.

b. Prudential additionally had a duty to disclose because it had superior knowledge about the block closure and its consequences. As between Prudential and CHIP policyholders, the block closure and its consequences were known or accessible only to Prudential, Prudential knew that policyholders were renewing their policies based on their unawareness of the block closure and its consequences, and Prudential knew that policyholders were unaware of these facts or could not reasonably discover these facts.

c. Prudential also had a duty to disclose because of the relationship of trust and confidence that existed due to Prudential's dominant position and its discretionary authority in managing the insurance pool. Prudential had access to the relevant actuarial data related to the CHIP policy and the risk pool, and policyholders relied on Prudential's actuarial expertise in managing the pool. Prudential did not disclose to policyholders that it closed the block and that it knew, based on expert actuarial knowledge, that the block closure inevitably would result in massive premium increases.

89. Prudential's fraudulent omissions include the following, without limitation:

a. Prudential did not inform, disclose to, or advise policyholders that it closed the CHIP block. In failing to disclose such information, Prudential intended that policyholders would rely on such nondisclosures in deciding whether to renew CHIP.

b. Prudential did not inform, disclose to, or advise policyholders of the ramifications of Prudential's decision to close the block. Prudential knew that closing the block would inevitably result in massive premium increases, but Prudential did not disclose this information to policyholders. Prudential also knew that many policyholders would develop medical conditions after the block closure that would not be covered by other health insurance, or would only be covered at very high premium rates, when policyholders were later forced to terminate CHIP due to the astronomical premiums they were charged. In failing to disclose the implications of CHIP's closed block status for the premiums of policyholders, Prudential intended that policyholders would rely upon such nondisclosures in deciding whether to renew

CHIP.

c. Prudential did not inform, disclose to, or advise policyholders as to the fact that the CHIP policy block was in a death spiral that guaranteed future, massive premium increases. In failing to disclose such information, Prudential intended that policyholders would rely on such nondisclosure in deciding whether to renew CHIP.

90. Plaintiffs relied on these fraudulent omissions in renewing their policies and are informed and believe that the class members likewise relied. Prudential's fraudulent omissions were a direct and proximate cause of Plaintiffs' injury in fact and loss of money or property. Since Prudential did not disclose to policyholders that the closed block was the cause of the premium increases, that future massive premium increases were inevitable, and that serious potential problems could be created by the potential uninsurability of pre-existing conditions, policyholders continued to renew their policies in reliance on these omissions. If not for Prudential's fraudulent omissions, Plaintiffs and the class members would have discontinued their CHIP policies and purchased less expensive alternative insurance. As a result of these omissions, Plaintiffs and the Class have incurred damages, including higher premiums than would have been otherwise paid and medical costs for conditions that would have been covered by other insurance if the ramifications of the block closure had been disclosed.

91. The conduct of Prudential as alleged above was despicable conduct that was carried on by Prudential with a willful and conscious disregard of the rights or safety of Plaintiffs and the Class, that has subjected Plaintiffs and the Class to cruel and unjust hardship in conscious disregard of their rights, and that involved deceit or concealment of one or more material facts known to Prudential with the intention on the part of Prudential of thereby depriving Plaintiffs and the Class of property or legal rights or otherwise causing injury. Plaintiffs are informed and believe that Prudential authorized or ratified the wrongful conduct of its agents or employees alleged above and that such authorization or ratification was done on the part of an officer, director, or managing agent of Prudential. Plaintiffs and the Class are accordingly entitled to an award of punitive or exemplary damages.

## THIRD CLAIM FOR RELIEF
## (FOR BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING)
(On Behalf of the California Subclass)

92. Plaintiffs Beverly Clark, Warren Gold, and Linda M. Cusanelli reallege paragraphs 1-82, above, and incorporate them as if fully set forth herein.

93. Contained in the CHIP policy contract between Prudential and Ms. Clark, Mr. Gold, Ms. Cusanelli, and the Class was an implied covenant of good faith and fair dealing. The implied covenant of good faith and fair dealing required Prudential to refrain from any action that had the effect of destroying or injuring the right of its policyholders to receive the full benefit of the CHIP policy.

94. The duty of good faith and fair dealing proscribes Prudential from discontinuing the CHIP policy except in the limited circumstances listed in the policy, and requires it to fully disclose material facts concerning the block closure and its implications for policyholders.

95. Prudential's failure to act in good faith and protect the interests of the Class are described in paragraphs 1-57 and 93-94, above, and include the following, without limitation:

a. Prudential did not inform, disclose to, or advise policyholders that it had closed the block and that doing so would cause a death spiral. Though Prudential knew the block closure would inevitably cause massive premium increases, and that policyholders might be forced to drop CHIP due to such exorbitant premiums after they developed medical conditions, and that such conditions might be uninsurable or only insurable at higher rates, it did not disclose this material information.

b. Prudential did not inform, disclose to, or advise policyholders that despite its limited contractual right to discontinue CHIP, and despite policyholders' right to keep CHIP in force at their election, Prudential knew that CHIP would effectively be discontinued as a result of the block closure and subsequent death spiral.

96. As a direct and proximate result of Prudential's bad faith conduct, class members will, have, and/or continue to suffer economic losses, requiring compensatory, and/or equitable

relief to be determined by the Court.

## FOURTH CLAIM FOR RELIEF
## (FOR VIOLATION OF CALIFORNIA'S UNFAIR COMPETITION LAW)
(On Behalf of the California Subclass)

97. Plaintiffs Beverly Clark, Warren Gold, and Linda M. Cusanelli reallege paragraphs 1-82, above, and incorporate them as if fully set forth herein.

98. California Business & Professions Code Section 17200, et seq., prohibits unfair competition, which includes any unlawful, unfair and/or fraudulent acts or practices and any unfair, deceptive, untrue or misleading advertising.

99. Prudential used and continues to use unlawful, unfair and/or fraudulent acts or practices in connection with the renewal of the CHIP policy. Such acts and practices have continued and will continue unabated unless enjoined.

100. Prudential's fraudulent acts or practices are described in paragraphs 1-57, above, and include the following, without limitation:

a. Prudential did not inform, disclose to, or advise policyholders that it closed the CHIP block and that doing so would cause a death spiral. Though Prudential knew that closing the CHIP block would cause a death spiral, it concealed the fact that the block was closed from policyholders. The nondisclosure of this information was material to a reasonable policyholder's decision to renew the policy, and was likely to mislead policyholders with respect to the decision to renew.

b. Prudential did not inform, disclose to, or advise policyholders of the ramifications of Prudential's decision to close the block. Prudential did not disclose that the inevitable result of the block closure was exorbitant premiums. Nor did Prudential disclose that exorbitant premium increases were likely to occur after many policyholders developed medical conditions that would not be insurable under other health insurance or, if insurable, would only be covered at very high premium rates. The nondisclosure of this information was material to a reasonable policyholder's decision to renew the policy, and was likely to mislead policyholders

with respect to the decision to renew.

c. Prudential made uniform written representations to policyholders at or around the time they purchased their policies that premiums for their CHIP policies were based only on the age of the policyholder and current costs of medical care and treatment and that future premium increases would be based on the policyholder's age and increases in the cost of medical care and treatment. After Prudential closed the block, these statements were false and misleading, because (without limitation) an additional, extremely important reason for increases in CHIP premiums was that the block had been closed and the CHIP policy was in the midst of a death spiral. Prudential further sent annual notices of premium increases to policyholders, which a reasonable policyholder would have understood to represent that the premium increase comported with Prudential's prior representation. Prudential's premium increase notices were likely to mislead a reasonable policyholder.

d. After the CHIP block was closed, Prudential misrepresented to Plaintiffs and other members of the Class that the reasons that CHIP premiums were increasing were simply medical cost inflation and the policyholder's increasing age. Prudential knew that these representations were false and misleading, and that an additional, extremely important reason for the increases in CHIP premiums was that the block had been closed and the CHIP policy was in the midst of a death spiral.

101. Prudential's unfair acts or practices are described in paragraphs 1-57, above, and include the following, without limitation:

a. Prudential did not inform, disclose to, or advise policyholders that it closed the CHIP block and that doing so would cause a death spiral. Though Prudential knew that closing the CHIP block would cause a death spiral, it concealed the fact that the block was closed from policyholders.

b. Prudential did not inform, disclose to, or advise policyholders of the ramifications of Prudential's decision to close the block. Prudential did not disclose that the inevitable result of the block closure was exorbitant premiums. Nor did Prudential disclose that

exorbitant premium increases were likely to occur after many policyholders developed medical conditions that would not be insurable under other health insurance or, if insurable, would only be covered at very high premium rates.

c. Prudential made uniform written representations to policyholders at or around the time they purchased their policies that premiums for their CHIP policies were based only on the age of the policyholder and current costs of medical care and treatment and that future premium increases would be based on the policyholder's age and increases in the cost of medical care and treatment. After Prudential closed the block, these statements were false and misleading, because (without limitation) an additional, extremely important reason for increases in CHIP premiums was that the block had been closed and the CHIP policy was in the midst of a death spiral. Prudential further sent annual notices of premium increases to policyholders, which a reasonable policyholder would have understood to represent that the premium increase comported with Prudential's prior representation. Prudential's premium increase notices were likely to mislead a reasonable policyholder.

d. After the CHIP block was closed, Prudential misrepresented to Plaintiffs and other members of the Class that the reasons that CHIP premiums were increasing were simply medical cost inflation and the policyholder's increasing age. Prudential knew that these representations were false and misleading, and that an additional, extremely important reason for the increases in CHIP premiums was that the block had been closed and the CHIP policy was in the midst of a death spiral.

e. Prudential's nondisclosures and misrepresentations are unfair because the gravity of harm to policyholders far outweighs any utility of Prudential's conduct. The injury to policyholders was substantial, including higher premiums than would have been otherwise paid and medical costs for conditions that would have been covered by other insurance if the ramifications of the block closure had been disclosed; this substantial injury was not outweighed by any benefit to consumers or competition as a result of Prudential's wrongful acts; and policyholders themselves could not reasonably avoid the injury since the facts regarding the

block closure are by their nature concealed from a reasonable policyholder, who has no way to know, in the exercise of reasonable diligence, that the block has been closed and the serious adverse consequences of that closure unless the insurer discloses those facts.

f. Prudential's nondisclosures and misrepresentations are also unfair because they offend the public policy legislatively established in the California Insurance Code, including but not limited to Cal. Ins. Code § 10176.10, which seeks to protect policyholders from the effects of block closures and prevent closed block death spirals. While Prudential is not subject to the requirements of the statute because, on information and belief, it closed the CHIP block prior to the effective date of the statute and Prudential had no open blocks of individual health insurance existing as of the effective date, Prudential's continued misrepresentations and omissions in conjunction with the renewal of CHIP violate the policy and spirit of the law, including its prohibition on dissemination of misleading information regarding the active or closed status of the block.

102. Prudential's unlawful acts or practices are described in paragraphs 1-57, above, and include Prudential's violation of its common law obligations regarding the implied covenant of good faith and fair dealing.

103. Plaintiffs Beverly Clark, Warren Gold, and Linda M. Cusanelli relied on Prudential's misrepresentations and omissions described above. Plaintiffs Beverly Clark, Warren Gold, and Linda M. Cusanelli have suffered injury in fact and have lost money or property as a result of Prudential's acts of unfair competition. Absent Prudential's acts of unfair competition, Plaintiffs Beverly Clark, Warren Gold, and Linda M. Cusanelli would have discontinued their CHIP policies and purchased less expensive alternative insurance. As a result of Prudential's acts of unfair competition, Plaintiffs Beverly Clark, Warren Gold, and Linda M. Cusanelli and the Class have suffered injuries and damages, including higher premiums than would have been otherwise paid and medical costs for conditions that would have been covered by other insurance if the ramifications of the block closure had been disclosed. Plaintiffs Beverly Clark, Warren Gold, and Linda M. Cusanelli also seek an order restoring to the Class all

money or property which may have been acquired by Prudential by means of such unfair competition.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Prudential, as follows:

a. For an Order determining that this action may be maintained as a class action and providing class certification as requested herein;

b. For compensatory damages according to proof at trial;

c. For punitive or exemplary damages;

d. For a restoration of all money or property which may have been acquired by Prudential by means of unfair competition;

e. For declaratory relief regarding the unlawful, unfair, and fraudulent practices alleged herein;

f. For reasonable attorneys fees, and all costs and disbursements, including, without limitation, filing fees and reasonable costs of suit; and

g. For such other and further relief as this Court deems just and proper.

Dated: February 15, 2011

Respectfully submitted,

NAGEL RICE LLP

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## DEMAND FOR JURY TRIAL

Plaintiffs BEVERLY CLARK, JESSE J. PAUL, WARREN GOLD, LINDA M. CUSANELLI, CAROLE L. WALCHER, and TERRI L. DROGELL, on behalf of themselves and all others similarly situated, demand a trial by jury of all issues that may be so tried as of right.

Dated: February 15, 2011

Respectfully submitted,

NAGEL RICE LLP

By: /s/ Bruce H. Nagel
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