

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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PRUDENTIAL FINANCIAL, INC.,

Plaintiff,

Index No.

-against-

COMPLAINT

AIG SPECIALTY INSURANCE
COMPANY; EVEREST INDEMNITY
INSURANCE COMPANY; PARTNERRE
IRELAND INSURANCE DAC; NATIONAL
FIRE & MARINE INSURANCE
COMPANY; QBE SPECIALTY
INSURANCE COMPANY; and GREAT
AMERICAN E&S INSURANCE
COMPANY,

JURY TRIAL DEMANDED

Defendants.

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Plaintiff Prudential Financial, Inc. ("Prudential"), by way of Complaint against Defendants
AIG Specialty Insurance Company ("AIG"); Everest Indemnity Insurance Company ("Everest");
PartnerRe Ireland Insurance DAC ("VALE"); National Fire & Marine Insurance Company
("Berkshire"); QBE Specialty Insurance Company ("QBE"); Great American E & S Insurance
Company ("Great American," together with AIG, Everest, VALE, Berkshire, and QBE,
"Defendant Insurers"), alleges as follows:

NATURE OF THE ACTION

1. In October 2019, Prudential bought a tower of representations and warranties
insurance policies ("R&W Policies") from Defendant Insurers in connection with its \$2.35 billion
acquisition of Assurance IQ, Inc. ("Assurance" or the "Company"), which provided up to \$300
million in coverage if it was later discovered that Assurance's representations and warranties to
Prudential were inaccurate. Defendant Insurers marketed to M&A buyers, including Prudential,

that their insurance product provided: (a) a solution to sticky seller indemnification issues that can derail deals, (b) the ability to avoid involving pre-closing management, who remain with the target after closing, in a claim, and (c) a streamlined and commercial claim investigation process that will result in coverage determinations being made shortly after receiving a claim.

2. Defendant Insurers diligenced the acquisition alongside Prudential during their underwriting process, and received the same information from Assurance that was the subject of its representations and warranties prior to issuing their insurance policies to Prudential.

3. In early 2020, Prudential learned that certain of Assurance's representations and warranties were untrue. Most glaringly, Assurance misrepresented its financial statements and wrongly represented itself during the sale process as modestly profitable (and EBITDA positive), when in reality it was running at a significant loss. The errors underlying Assurance's financial statements stemmed from, among other things, the Company's failure to use current information to inform its revenue calculation, despite (as Prudential later learned) that information being readily available to Assurance. These misrepresentations overstated Assurance's value by more than \$300 million dollars.

4. Further, after the transaction's closing, Assurance also became subject to legal proceedings targeting Assurance's alleged pre-acquisition business practices (together, the "Third Party Claim"). The allegations of the Third Party Claim, which were disputed, if true, would constitute a breach of, or inaccuracy in, Assurance's representation that its business complied with applicable law.

5. Thus, starting in July 2020, Prudential, in good faith, turned to Defendant Insurers to honor their insurance policies, and reimburse Prudential for the loss it incurred by Assurance's misrepresentations. Prudential presented Defendant Insurers with documentation of Assurance's

breaches: the predicate for triggering coverage. To Prudential's dismay, Defendant Insurers have refused to provide the coverage Prudential paid for, including withholding payment on Prudential's Financial Statement Claim (as defined herein) and certain losses arising from the Third Party Claim.

6. While Defendant Insurers, in pursuit of millions of dollars in premiums, underwrote their policies in a *matter of weeks*, those Defendant Insurers, when obligated to pay covered loss, have subjected Prudential to *over five years* of "whack-a-mole" concerning that same acquisition, with unceasing serial information requests (now at nearly 200 requests), deposition-style questioning of senior management and representatives, and phony barriers – to which Prudential nevertheless responded – looking for any basis by which they could decline to honor their policies. Yet, having found *no such basis* in their five-plus-year "investigation," they have simply refused to provide *any coverage position* to Prudential regarding the Financial Statement Claim, even though the policies require such a position within *60 days* of making a claim.

7. Defendant Insurers' failure to provide a coverage position as required under their insurance policies or pay out under their policies is a material breach of their obligations.

8. Because Defendant Insurers have deprived Prudential of its rights and benefits under the R&W Policies, Prudential is left with no choice but to bring this suit to force Defendant Insurers to honor their commitments and to recover damages caused by Defendant Insurers' bad faith delay in providing coverage as well as prejudgment interest.

PARTIES

9. Prudential is incorporated under the laws of New Jersey and has a principal place of business in Newark, New Jersey.

10. Upon information and belief, AIG is incorporated under the laws of the State of Illinois with its principal place of business in New York, New York.

11. Upon information and belief, Everest is incorporated under the laws of the State of Delaware, with its principal place of business in Liberty Corner, New Jersey.

12. Upon information and belief, VALE is a corporation incorporated under the laws of Ireland with its principal place of business in Dublin, Ireland.

13. Upon information and belief, Berkshire is incorporated under the laws of the State of Nebraska with its principal place of business in Omaha, Nebraska.

14. Upon information and belief, QBE is incorporated under the laws of the State of North Dakota, with its principal place of business in Sun Prairie, Wisconsin.

15. Upon information and belief, Great American is incorporated under the laws of the State of Ohio, with its principal place of business in Cincinnati, Ohio.

JURISDICTION AND VENUE

16. Defendant Insurers are subject to jurisdiction in New York pursuant to CPLR 301 because: (i) Section 9(a), (b) of the Buyer-Side Representation and Warranties Insurance Policy (the “Primary Policy”) that AIG issued to Prudential (and to which all other Defendant Insurers’ R&W Policies follow form) contains a forum selection clause that requires the parties to submit to the exclusive jurisdiction of courts in New York County, New York in connection with “any action or proceeding, whether in law or in equity, whether in contract or in tort or otherwise, arising out of or relating to this Policy;” (ii) pursuant to Section 9(d) of the Primary Policy, “[t]he construction, validity and performance of this Policy shall be interpreted under the laws of the State of New York,” and therefore, under General Obligations Law 5-1402, Defendant Insurers agreed to a New York forum applying New York law and the amount in controversy exceeds \$1

million; and (iii) the dispute that is the subject of this Complaint arises out of business conducted by the parties in New York.

17. Venue is proper in this Court pursuant to CPLR 503 and 509 because: (i) Defendant Insurers have designated this County as the proper forum for this action; (ii), AIG, the insurance company that issued the Primary Policy to Prudential, is located in New York County; (iii) all Defendant Insurers conduct business in this County; and (iv) a substantial part of the events giving rise to Prudential's claims took place in this County.

FACTS COMMON TO ALL COUNTS

A. Prudential Acquires Assurance through a Competitive Bidding Process

18. Prudential is a company that provides a variety of insurance, retirement planning, and investment management services to retail and institutional customers.

19. Assurance was a Seattle-based startup founded in 2016 that was a direct-to-consumer distributor of, among other things, health insurance products, through an online platform—essentially, a digital healthcare marketplace.

20. Assurance's business model centered on distributing insurance plans and products underwritten by third-party insurance companies to persons looking for healthcare coverage, and receiving commissions from the insurers whose products Assurance sold.

21. In or around 2017, Assurance primarily sold insurance plans and products on behalf of Health Insurance Innovations, Inc. ("HII"). One of the key products Assurance sold for HII was its Under 65 ("U65") health insurance products.

22. In 2019, Prudential engaged in, and ultimately won, a competitive auction to acquire Assurance. Through an Agreement and Plan of Merger dated September 4, 2019 (the "Acquisition Agreement"), Prudential agreed to pay \$2.35 billion to acquire Assurance. The

transaction closed on October 10, 2019. As part of the Acquisition, Prudential intended to, and did, carry-over senior management personnel from Assurance to continue operating the business.

B. Assurance Makes Representations Concerning Its Finances and Business Practices

23. As part of the acquisition process, Assurance supplied Prudential with information concerning Assurance's finances and business practices, including certified financial statements for 2017 and 2018, and financial statements for the period of January 1 to June 30, 2019 (the "1H 2019 Financial Statements"). Defendant Insurers also received this information before placing the R&W Policies.

24. In the 1H 2019 Financial Statements, Assurance represented to Prudential that its health revenue was \$45.2 million for the period of January 1 to June 30, 2019 ("1H 2019"). In addition, Assurance's reported EBITDA from that same period was \$728,691.

25. Assurance further represented that it accounted for revenue reflected in its financial statements by recognizing revenue when the insurer whose product Assurance sold billed the customer for that product, not when Assurance received commissions from those sales. For purposes of recognizing revenue for a U65 product sale, Assurance calculated the Lifetime Value ("LTV") of that product based on an estimate of how many months the customer was expected to pay for his or her insurance product (*i.e.*, the duration), and then multiplied by the monthly commission payment. Assurance then made adjustments to that amount based on whether Assurance owed "chargebacks" to an insurer for a given insurance product sale.

26. In Section 3 of the Acquisition Agreement, Prudential secured representations and warranties from Assurance relevant to Assurance's disclosures during diligence, including, without limitation, that:

- "The Financial Statements have been prepared in accordance with GAAP, consistently applied during the periods involved and fairly

present, in all material respects, the consolidated financial position, the results of operations and cash flow of the Company as of the dates, and for the periods, presented there in” (Section 3.7(a));

- “Neither the Company nor any of its subsidiaries has any liabilities or obligations of any nature (whether accrued, absolute, contingent or otherwise), whether or not required to be reflected on, reserved against or otherwise described on a consolidated balance sheet of the Company prepared in accordance with GAAP or the notes thereto, except liabilities (i) reflected on, reserved against or described on the balance sheet of the Company and the Company Subsidiary as of December 31, 2018 (the “Balance Sheet Date”), including the notes thereto, included in the Financial Statements, (ii) incurred after the Balance Sheet Date in the ordinary course of business consistent in scope, nature and amount with past practice, (iii) incurred by the Company in connection with the transactions contemplated hereby and not in breach of this Agreement, or (iv) as would not reasonably be expected to be material to the Company and its subsidiaries, taken as a whole.” (Section 3.7(c), with Section 3.7(a), the “Financial Statement Representation”).
- “The Company and its subsidiaries are, and have been since January 1, 2017, in compliance in all material respects with all Laws (including insurance Laws) and Orders applicable to the Company or its subsidiaries, respectively, or their respective business operations” and “[n]o event has occurred that with notice or lapse of time would constitute a material violation or failure to comply with any applicable Law relating to the Company or any of its subsidiaries, and no condition or state of facts exists that is reasonably likely to give rise to a material violation of, or a material default under, any applicable Law.” (Section 3.10); and
- “[I]n the past three (3) years, . . . no Producer has violated in any material respect any term or provision of applicable Law relating to the soliciting, negotiating, placing, writing, selling, marketing or producing of such business for the Company, any of its subsidiaries or any non-affiliated company with which the Company or any of its subsidiaries has selling.” (Section 3.22, with Section 3.10, the “Compliance with Law Representation”).

27. By representing that its financial statements, including the 1H 2019 Financial Statements, were prepared in accordance with GAAP, Assurance confirmed it followed accounting principles that would ensure that the information it presented to Prudential was accurate.

28. In addition, by Assurance promising to make sure that those financial statements “fairly present[ed], in all material respects, the consolidated financial position, the results of operations and cash flow of the Company,” (Section 3.7), Assurance affirmed that the information it presented to Prudential reflected the true state of its business.

29. Assurance knew that Prudential was relying on its financial disclosures when valuing Assurance. However, as discussed herein, Assurance’s financial statements, in particular the 1H 2019 Financial Statements, were not in accordance with GAAP and did not fairly present Assurance’s financial condition.

C. Prudential Purchased R&W Policies from Defendant Insurers to Insure Against Misrepresentations By the Company

30. As part of the Acquisition, Prudential purchased the R&W Policies from Defendant Insurers.

31. Defendant Insurers marketed (and continue to market) their R&W Policies as a means for M&A buyers to achieve transactional goals that aligned with Prudential’s aims for the Acquisition. Those aims included insuring against the risk that Assurance’s statements about its finances or business practices were inaccurate and allowing Prudential to avoid potential post-closing disputes with Assurance’s management, who would continue operating the business, over any breaches of representations and warranties. For example:

- AIG states that its R&W insurance product “[h]elps protect buyers or sellers in merger and acquisition transactions from financial loss in the event of a breach of representations and warranties made by the sellers.”¹

¹ [https://www.aig.com/home/risk-solutions/business/management-and-professional-liability/mergers-and-acquisitions#:~:text=Representations%20and%20Warranties%20\(R%26W\),warranties%20made%20by%20the%20sellers.](https://www.aig.com/home/risk-solutions/business/management-and-professional-liability/mergers-and-acquisitions#:~:text=Representations%20and%20Warranties%20(R%26W),warranties%20made%20by%20the%20sellers.)

- Everest provides representations and warranties policies to meet its “clients’ risks and insurance needs” and “deliver comprehensive solutions” based on Everest’s “[i]ntimate customer knowledge,” “holistic view of the Transactional Risk market,” and “understanding [of] the larger transaction and context for each opportunity.”²
- Berkshire promises a “[c]ollaborative, constructive philosophy where customers have direct access to decision makers,” a “customer service focus,” and that R&W insurance “preserves relationships with management sellers.”³
- Great American similarly touts that “R&W insurance . . . help[s] your clients walk away from closing with confidence.” Great American notes that “[c]ommon risks that R&W insurance covers include errors in tax returns and/or financial statements”⁴
- VALE explains the risk-shifting function its R&W Policies are designed to accomplish: “In a typical transaction without RWI insurance, where these reps or warranties turn out to be untrue or inaccurate and, as a result, the buyer suffers financial loss, the seller may be liable to pay damages as compensation for breaches. However, on a deal with a RWI policy in place, the risk is instead transferred to VALE who insures the buyer . . . for loss resulting from such breach of reps or warranties RWI benefits all parties to a deal; providing buyers meaningful protection and an artful advantage in the bidding, negotiation, and/or lending processes while allowing sellers a limited indemnity or true ‘walk away’ opportunity.” Further, according to Vale, a representations and warranties policy “[a]llows a buyer to protect relationships with sellers where the management team is rolling over or where the sellers may be commercial business partners post-transaction.”⁵

² <https://www.everestglobal.com/us-en/our-offer/products-and-services/insurance/products/everest-specialty-underwriters/transactional-risk>

³ <https://www.bhspecialty.com/wp-content/uploads/2023/01/BHSI-Transactional-Liability-Overview-2023-01-18-A.pdf>.

⁴ https://www.greatamericaninsurancegroup.com/docs/default-source/mergers-acquisitions-liability/representations-warranties-insurance.pdf?sfvrsn=fa8a72b1_10.

⁵ <https://valeinsurancepartners.com/products-services/representation-warranty-insurance/#:~:text=In%20a%20typical%20transaction%20without,damages%20as%20compensation%20for%20breaches.>

- QBE states that its R&W Policies “[p]rotect[] business relationships: Where the sellers will continue to be a part of the business following the sale, the RWI coverage protects the business relationships of all parties.”⁶

32. Prior to Defendant Insurers issuing the R&W Policies to Prudential, Defendant Insurers engaged in an underwriting process in which they participated in and vetted Prudential’s due diligence and findings. During that process, Defendant Insurers had access to the same information that Prudential had, including (i) Prudential’s due diligence reports prepared by its third-party advisors, and (ii) the virtual data room for the Acquisition, containing documents shared by Assurance. In addition to the review of those materials, Defendant Insurers’ underwriting process included: an underwriting call, attended by Defendant Insurers and their advisors, with Prudential representatives and its advisors to question Prudential about the transaction and due diligence, follow-up written questions to ask questions about due diligence, reviewing the financial statements disclosed by Assurance, undertaking to understand how Prudential valued Assurance to determine the purchase price, and conducting their own independent assessment of the Acquisition and purchase price. Prudential paid Defendant Insurers an underwriting fee to fund their participation in the Acquisition’s diligence process.

33. Prudential also shared with Defendant Insurers how it reached its valuation of Assurance, based on the financial statements, including the 1H 2019 Financial Statements, and quality of earnings report that Assurance produced.

34. Thus, Defendant Insurers were satisfactorily informed about all aspects of the Acquisition, as confirmed by Defendant Insurers agreeing, at the conclusion of their underwriting

⁶ <https://www.qbe.com/media/qbe/north-america/usa/files/coverage/management-liability/representations-and-warranties-insurance.pdf>.

of the transaction, to provide Prudential with a \$300 million tower of insurance coverage consisting of a primary layer and six excess layers of coverage. Prudential also entered into confidential settlements with certain (non-party) upper-layer insurers as noted below.

6	AIG \$15,000,000			
5	Great American \$25,000,000	Vale \$20,000,000	[Settled Insurer] \$15,000,000	Everest \$10,000,000
4	[Settled Insurer] \$30,000,000		[Settled Insurer] \$30,000,000	
3	Berkshire Hathaway \$35,000,000		QBE \$30,000,000	
2	Vale \$30,000,000			
1	Everest \$30,000,000			
0	AIG \$30,000,000			

The Primary Policy

35. AIG issued Prudential a Primary Policy numbered 27739532 with a \$30 million limit. The Primary Policy has a policy period of September 4, 2019 to October 10, 2022 (provided that the expiration date for Fundamental Representations and the Pre-Closing Tax Indemnity was October 10, 2025).

36. The Primary Policy is subject to a \$17.625 million aggregate self-insured retention. AIG confirmed that the retention has been fully eroded by Defense Costs incurred by Prudential and Assurance in connection with the Third Party Claim. AIG has paid the full Primary Policy limit in connection with the Third Party Claim. AIG, however, has failed and refused to pay its \$15 million excess policy limit.

37. The Primary Policy promises that “the Insurers shall indemnify the Insureds [Prudential and Assurance] for any Loss in excess of the Retention,” including, without limitation,

Loss and Defense Costs associated with Third Party Demands, reported within the policy period.
(Primary Policy § 2.)

38. Loss is defined as “any losses, liabilities, damages, demands, judgements, claims, deficiencies, penalties, fines, taxes, costs and expenses, suffered or paid by any Insured to the extent arising out of or resulting from a Breach (including any Defense Costs payable hereunder).” (*Id.* § 1(w).) The Primary Policy does not exclude consequential damages from its definition of Loss and, in fact, Prudential successfully rejected AIG’s attempt to include such a limitation when the R&W Policies were purchased.

39. Breach means “any breach of, or inaccuracy in, the representations and warranties set forth in Article III of the Acquisition Agreement.” (*Id.* § 1(g).)

40. Third Party Demands are defined to mean “any claim notice, complaint, demand made or legal action or similar action brought against . . . any Insured . . . which, if successful, could result in Loss (other than Losses that would be Defense Costs).” (*Id.* § 1(kk).)

41. When determining the existence of a Breach or the amount of Loss, the Primary Policy contains a full materiality scrape: “[f]or the purposes of determining whether a Breach has occurred and the amount of Loss arising therefrom, any qualifications as to materiality . . . or other similar qualifications in such representations and warranties shall be disregarded.” (*Id.* § 1(g).)

42. Upon receipt of a Claim Notice, Defendant Insurers are required to respond “as soon as reasonably practicable . . . and in all instances within sixty (60) days after such receipt.” (*Id.* § 5(c).) If a Defendant Insurer believed that it did “not possess sufficient information to formulate its position on coverage, the Insurer shall provide an explanation to the Insured as to why it is unable to do so and request such additional information as it may reasonably require . . .

to fully assess the Breach . . . and following receipt of which” the Defendant’s sixty day period for providing a response to Prudential would reset. (*Id.* § 5(c).)

43. The Primary Policy also contains a “Failure to Comply” provision stating that “[a]ny failure of the Insureds to comply with any of the provisions of this (sic) Sections 6, 7, 8, and 9^[7] shall not relieve the Insurer of its obligations under this Policy except to the extent that the Insurer’s interests are actually prejudiced thereby.” (*Id.* § 7(g).)

44. To ensure that the factors that impacted Defendant Insurers’ decision to provide Prudential with insurance coverage did not change without Defendant Insurers’ knowledge or input, Defendant Insurers secured the right to have Prudential seek their written consent to “(i) amend, supplement or rescind the Acquisition Agreement (or enter into any agreement or arrangement that would have such an effect), (ii) give any consent or waiver thereunder or (iii) grant any authority to take any of the actions in clauses (i) or (ii) above, . . . if such amendment, supplement, rescission, agreement, arrangement, consent, waiver or grant would reasonably be expected to actually prejudice the Insurer or its rights or liability under this Policy.” (*Id.* § 7(c).)

The Excess R&W Policies

45. The excess R&W Policies Prudential obtained from Everest, VALE, Berkshire, QBE, Great American, and AIG (the “Excess Policies,” together with the Primary Policy, the “R&W Policies”), “provide[] coverage in accordance with and subject to the same terms, conditions and limitations of the Followed Policy [*i.e.*, the Primary Policy], as modified by and subject to the terms, conditions and limitations of this policy,” or contain substantially similar

⁷ These sections refer to the following provisions: Section 6: “Defense Costs, Third Party Demands and Claims Participation; Settlements and Judgments”; Section 7: “Certain Covenants of the Insureds”; Section 8: “Subrogation”; and Section 9: Submission to Jurisdiction; Mediation; Jury Trial; Choice of law; Interpretation and Rules of Construction.”

language following form to the terms of the Primary Policy and affording Prudential the same rights and scope of coverage provided to it under the Primary Policy for the same policy period. Because those Excess Policies follow form to the Primary Policy, all Defendant Insurers are bound by the Primary Policy's terms.

46. The Excess Policies also provide that the respective excess insurers' obligation to pay covered Loss attaches once underlying insurers have paid Loss *or* the Insured has paid or incurred Loss that exceeds the Primary Policy retention amount and the applicable underlying R&W Policy limits of liability. Thus, the Excess Policies are triggered because Prudential has suffered covered Loss in an amount that reaches each such policies' limits of liability.

47. Everest sold Prudential a first layer excess insurance policy, numbered RWBX000237, with a \$30 million limit of liability. Everest paid the full limit of its first layer excess policy limit in connection with the Third Party Claim, subject to a purported right of recoupment. Everest, however, has failed and refused to pay under its fifth layer excess policy limit.

48. VALE sold Prudential a second layer excess insurance policy, numbered 19BC1-7774-0071, with a \$30 million limit of liability. VALE paid the full limit of its second layer excess limit in connection with the Third Party Claim, subject to a purported right of recoupment. VALE, however, has failed and refused to pay under its fifth layer excess policy limit.

49. Berkshire and QBE sold Prudential a quota share third layer excess insurance coverage with a \$65 million limit of liability. Berkshire agreed to pay \$35 million of this quota share under policy number 42-XMA-151250-01. QBE agreed to pay \$30 million of this quota share under policy number QPL-1554465. Berkshire and QBE have failed and refused to pay any

amount of their respective limits, including after the exhaustion of all underlying limits, even though Berkshire and QBE are now in the “first dollar” position.

50. Non-party and settled insurers sold Prudential a quota share fourth layer excess insurance coverage with a \$60 million limit of liability.

51. Great American, VALE, Everest, and a non-party and settled insurer sold Prudential a quota share fifth layer excess insurance coverage with a \$70 million limit of liability. Great American agreed to pay \$25 million of this quota share under policy number BRX4126975. VALE agreed to pay \$20 million of this quota share under policy number 19BC1-2568-0072. Everest agreed to pay \$10 million of this quota share under policy number RWBX000238. These Defendant Insurers have failed and refused to pay any amount of their fifth layer excess limits.

52. AIG sold Prudential a sixth layer of excess insurance coverage under policy numbered 27739533, with a \$15 million limit of liability. AIG has failed and refused to pay any amount of its sixth layer excess limit.

D. Prudential Learns that Assurance Made Inaccurate Representations About its Financial Statements

53. The Acquisition closed in October 2019. During the first quarter of 2020, Prudential undertook an investigation that uncovered that Assurance had breached its Financial Statement Representation in the Acquisition Agreement and caused Prudential to incur a Loss in excess of its \$300 million R&W Policy limit, *i.e.*, the Financial Statement Claim.

54. Prudential learned that Assurance used inaccurate durations to determine the LTVs from its product sales and, in turn, recorded revenue for products in its 1H 2019 Financial Statements based on these inaccurate durations. Contrary to GAAP, from 2018 through June 30, 2019, Assurance did not update those durations periodically based on data about actual experience specific to those products, which was available to Assurance. Assurance’s continued use of stale,

incorrect durations materially undermined the accuracy of the 1H 2019 Financial Statements, in contravention of the representations it made in the Acquisition Agreement.

55. Because Assurance used improperly inflated duration data to calculate LTVs, Assurance's representation in its 1H 2019 Financial Statements that its health revenue for 1H 2019 was \$45.2 million was likewise inflated and inaccurate. This, in turn, impacted Prudential's valuation of Assurance to arrive at the purchase price for the Acquisition, which was based on the financial information Assurance shared. Prudential incurred substantial Losses based on Assurance's breach of the Financial Statement Representation.

56. Post-closing, when Prudential recalculated the commission revenue based on accurate, product-specific duration data (which was available to Assurance pre-closing), Assurance's correct health revenue for 1H 2019 decreased by approximately \$10 million.

57. At the time of the Acquisition, Assurance represented that it had a positive EBITDA for the 1H 2019 period and thus that the company was profitable and on a growth trajectory. However, once the correct health revenue was recalculated for the same time period, Assurance's EBITDA dropped from \$728,691 to below negative \$9 million and thus showed that the Company was operating at a significant loss.

58. Accordingly, Assurance breached the Financial Statement Representation in the Acquisition Agreement because the 1H 2019 Financial Statements were not prepared "in accordance with GAAP" and because those financial statements did not "fairly present, in all material respects" the financial condition of Assurance. As a result of Assurance's breaches, Prudential incurred substantial Losses that are covered by the R&W Policies.

59. When Prudential recalculated Assurance's value using accurate financial data predicated on updated durations for Assurance's U65 products, Prudential paid over \$300 million

more for Assurance than it would have otherwise paid had Assurance not breached its representations and warranties. Defendant Insurers have never disputed or challenged that Assurance breached the Financial Statement Representation or Prudential's quantification of Loss.

E. Prudential Tendered the Financial Statement Claim to Defendant Insurers and Defendant Insurers Failed to Provide, or Even Take a Position, on Coverage

60. On July 17, 2020, Prudential provided Defendant Insurers with a Claim Notice for the Financial Statement Claim, and submitted a comprehensive statement of that claim on September 15, 2020, as revised on October 5, 2021.

61. Since the outset, Prudential repeatedly requested that Defendant Insurers undertake a commercially reasonable claims investigation and deliver on their promises for prompt coverage determinations and payment of claims. Instead, Defendant Insurers elected to make serial and duplicative information requests; failed and refused to issue coverage determination letters either accepting coverage or challenging the existence of a Breach and Loss under the R&W Policies; and improperly withheld payments required by the R&W Policies and applicable law.

62. In response, Prudential: (i) provided Defendant Insurers with detailed statements of the claims and supporting documentation; (ii) made Prudential and Assurance senior management available for deposition-style questioning by Defendant Insurers on multiple occasions, with those calls and meetings only concluding when Defendant Insurers had no further questions; and (iii) provided fulsome narrative responses and accompanying document productions with additional source information (amounting to thousands of pages of documents and spreadsheets and over 4.8 gigabytes of electronic data) in response to numerous sets of information requests consisting of approximately 200 individual requests (not counting numerous subparts within those requests).

63. Despite the volumes of information provided to Defendant Insurers over the prolonged history of the Financial Statement Claim, in over five years, no Defendant Insurer has

taken the position that Assurance's use of static durations to calculate U65 health revenue in 2018 and 1H 2019, untethered from actual experience of those products, was in accordance with GAAP and allowed for the fair presentation of the Company's financial position.

64. Nevertheless, Defendant Insurers have never acknowledged coverage or provided any position on coverage for the Financial Statement Claim, in breach of the R&W Policies' requirement to provide their position within 60 days of receiving sufficient information, which Prudential provided years ago.

F. Certain Defendant Insurers Fail and Refuse to Confirm Coverage the Third Party Claim.

65. In addition to Assurance's inaccurate Financial Statement Representation, after the Acquisition closed, Assurance became the subject of the Third Party Claim. The allegations in that proceeding, if true (which Prudential and Assurance dispute), give rise to a breach of Assurance's Compliance with Law Representation, thereby triggering coverage under the R&W Policies.

66. Prudential tendered the Third Party Claim to Defendant Insurers on July 29, 2021, seeking defense and indemnity coverage for the litigation fees, expenses, and settlements that have been incurred to resolve all of those asserted liabilities. Assurance has also provided Defendant Insurers with substantial information regarding the Third Party Claim, included making defense counsel available on multiple occasions for questioning by Defendant Insurers (and those conference calls only concluded when Defendant Insurers had no further questions).

67. Assurance settled the Third Party Claim for \$100 million, which is covered Loss: it arises out of Assurance's alleged pre-closing failure to comply with applicable laws. AIG, Everest, and VALE contributed their respective primary, first layer, and second layer limits to the

settlement (with Everest and VALE reserving a purported right to recoup their payments).⁸ However, additional Loss in excess of those insurers' contributions remains, which is within the third layer excess policies issued by Berkshire and QBE. Berkshire and QBE have failed and refused to contribute any amount of their limits to the settlement. Further, because Prudential has incurred Loss with respect to the Financial Statement Claim, which reaches all policy layers, all the other Defendant Insurers have a current obligation to cover the unreimbursed settlement amount under their respective fourth, fifth, and sixth layer excess policies.

G. Defendant Insurers have improperly withheld from Prudential the coverage to which it is entitled.

68. Because of the disputes between Prudential and Defendant Insurers about coverage for the Financial Statement Claim and coverage for the Third Party Claim, pursuant to the R&W Policies, Prudential and Defendant Insurers participated in mediation of those claims.

69. The parties did not resolve the claims at mediation and the mediation was terminated on November 14, 2024. As a result, the requisite sixty-day cool-off period under the Primary Policy has passed.

70. While Prudential has honored its obligations under the R&W Policies from inception to date, including paying Defendant Insurers more than \$6 million in premium and fees for those policies, Defendant Insurers have done just the opposite. They have not conducted a reasonable or expeditious claims investigation, reduced the burdens on Prudential's business, or helped preserve Prudential's relationship with Assurance's leadership. They have instead improperly withheld and delayed coverage benefits to which Prudential is entitled. And they have diluted the value of the R&W Policies by burdening Prudential with significant legal expenses to

⁸ In any event, Everest and VALE have an obligation to pay their full limits under their respective first and second layer Excess Policies because of the Financial Statement Claim.

access the coverage to which it is entitled and demanded repeated access to Prudential's senior management team without making any good faith offer of payment or even disclosing the reasons why payment has been withheld.

71. In sum, Defendant Insurers have violated the terms of their R&W Policies and misrepresented the benefits those policies would offer Prudential in the first instance.

COUNT ONE

(Breach of Contract – Failure to Pay Covered Loss for Financial Statement Claim)

72. Prudential repeats, realleges, and incorporates by reference all the allegations in the preceding paragraphs as if set forth here at length.

73. The R&W Policies constitute valid contracts of insurance coverage between Prudential and Defendant Insurers.

74. Under the R&W Policies, Defendant Insurers are required to indemnify Prudential, up to the R&W Policies' limit of liability, for all "any losses, liabilities, damages, demands, judgements, claims, deficiencies, penalties, fines, taxes, costs and expenses, suffered or paid by any Insured to the extent arising out of or resulting from a Breach (including any Defense Costs payable hereunder)." (Primary Policy § 1(w).)

75. Defendant Insurers agreed to provide Prudential with a coverage determination within 60 days of receiving notice of a claim. (*Id.* § 1(c).)

76. Prudential has sustained covered Loss under the R&W Policies because Assurance, among other things, breached the Financial Statement Representation because the 1H 2019 Financial Statements (a) were not prepared in accordance with GAAP and (b) did not fairly present the financial condition of the Company.

77. While the R&W Policies eliminate the requirement of materiality in determining whether Prudential suffered covered Loss as a result of Assurance's breaches, Assurance's

breaches of its representations and warranties were material. With respect to the Financial Statement Claim, Assurance's misstatements caused it to overstate its health revenue in its 1H 2019 Financial Statements and report a positive EBITDA, when, in fact, its health revenue for 1H 2019 was millions of dollars less than reported and its EBITDA was negative.

78. As a result, Prudential incurred a \$300 million Loss caused by Assurance's breaches of the Financial Statement Representation. That Loss is covered by the R&W Policies and is not excluded.

79. Prudential has complied with all terms, conditions, or requirements set forth in the R&W Policies, including paying the premiums for the R&W Policies, tendering claims to Defendant Insurers for coverage within the policy period, responding to Defendant Insurers' requests for information about the claims, mediating the claims with Defendant Insurers, and keeping Defendant Insurers informed about developments relevant to the claims.

80. Defendant Insurers have breached their obligations under the R&W Policies by refusing to timely acknowledge and provide coverage for Prudential's Losses.

81. As a result of Defendant Insurers' breach of their obligations under the R&W Policies, Prudential has incurred, and continues to incur, damages in an amount to be determined at trial.

82. Prudential is entitled to recover the full policy limits under Defendant Insurers' R&W Policies for its Loss.

83. In addition to receiving full payout under Defendant Insurers' R&W Policies, Prudential is entitled to pre-judgment and post-judgment interest, at the statutory rate of 9% per annum, for the coverage that Defendant Insurers improperly have withheld, running from the date of Defendant Insurers' breaches through the conclusion of this action.

COUNT TWO**(Breach of Contract – Failure to Pay Covered Loss for Third Party Claim)**

84. Prudential repeats, realleges, and incorporates by reference all the allegations in the preceding paragraphs as if set forth here at length.

85. The R&W Policies constitute valid contracts of insurance coverage between Prudential and Defendant Insurers.

86. Under the R&W Policies, Defendant Insurers are required to indemnify Prudential, up to the R&W Policies' limit of liability, for all "any losses, liabilities, damages, demands, judgements, claims, deficiencies, penalties, fines, taxes, costs and expenses, suffered or paid by any Insured to the extent arising out of or resulting from a Breach (including any Defense Costs payable hereunder)." (Primary Policy § 1(w).)

87. Defendant Insurers agreed to provide Prudential with a coverage determination within 60 days of receiving notice of a claim. (*Id.* § 1(c).)

88. Prudential settled the Third Party Claim on behalf of Assurance for \$100 million, but a substantial and covered portion of the settlement amount remains unreimbursed by Defendant Insurers.

89. Therefore, Prudential has sustained covered Loss under the R&W Policies because Defendant Insurers are required to indemnify Loss arising out of breaches of the Compliance with Laws Representations, including Third Party Claim alleging non-compliance with laws.

90. Prudential has complied with all terms, conditions, or requirements set forth in the R&W Policies, including paying the premiums for the R&W Policies, tendering claims to Defendant Insurers for coverage within the policy period, responding to Defendant Insurers' reasonable requests for information about the claims, mediating the claims with Defendant Insurers, and keeping Defendant Insurers informed about developments relevant to the claims.

91. Defendant Insurers have breached their obligations under the R&W Policies by refusing to timely acknowledge and provide coverage for Prudential's Losses.

92. As a result of Defendant Insurers' breach of their obligations under the R&W Policies, Prudential has incurred, and continues to incur, damages in an amount to be determined at trial.

93. In addition to receiving coverage under Defendant Insurers' R&W Policies, Prudential is entitled to pre-judgment and post-judgment interest, at the statutory rate of 9% per annum, for the coverage that Defendant Insurers improperly have withheld, running from the date of Defendant Insurers' breaches through the conclusion of this action.

COUNT THREE

(Declaratory Judgment – Financial Statement Claim and Third Party Claim)

94. Prudential repeats, realleges, and incorporates by reference all of the allegations in the preceding paragraphs as if set forth here at length.

95. Under the R&W Policies, Defendant Insurers have a duty to indemnify Prudential for Loss, including "any breach of, or inaccuracy in, the representations and warranties set forth in Article III of the Acquisition Agreement" and Third Party Claim concerning Loss.

96. Prudential's claims constitute covered Loss under Defendant Insurers' R&W Policies. Specifically, Assurance breached the Financial Statement Representation that its financial statements had been prepared in accordance with GAAP and also fairly presented the financial state of the Company. Likewise, Assurance is alleged to have breached the Compliance with Law Representation because the Third Party Claim makes allegations which, if true, would constitute a Breach.

97. Despite Prudential's repeated requests for coverage, Defendant Insurers have failed and refused to indemnify Prudential for the full, or any, amount of its Loss for the Financial

Statement Claim and/or confirm they will honor any indemnity obligation without reservation in connection with a pending Third Party Claim.

98. Defendant Insurers' refusal to honor, or confirm, their obligation to indemnify and reimburse Prudential in connection with the claims has resulted, and may in the future result, in substantial Loss, expense and cost to Prudential.

99. By reason of the foregoing, an actual and justiciable controversy exists between Prudential and Defendant Insurers regarding Defendant Insurers' obligation to indemnify and reimburse Prudential for its claims.

COUNT FOUR
(Breach of the Implied Covenant of Good Faith and Fair Dealing - Bad Faith Refusal of Coverage)

100. Prudential repeats, realleges, and incorporates by reference all the allegations in the preceding paragraphs as if set forth here at length.

101. The R&W Policies constitute valid contracts of insurance coverage between Prudential and Defendant Insurers.

102. New York law imposes on Defendant Insurers an implied covenant of good faith and fair dealing to perform under the R&W Policies in a manner that does not, *inter alia*, (i) place Defendant Insurers' financial interests ahead of their insured's interests or (ii) withhold the promised benefits of the insurance contract based on misrepresentations or pretextual positions that are not supported by fact or law.

103. Contrary to Defendant Insurers' representations in their marketing materials and the terms of their R&W Policies, Defendant Insurers have frustrated the purpose of their R&W Policies by: (i) refusing to indemnify Prudential for the very harms resulting from Assurance's breach of the Financial Statement Representation and Compliance with Law Representation that

their policies cover; (ii) failing and refusing to provide a definitive coverage position in favor of inundating Prudential with never-ending information requests that were designed only to withhold coverage from Prudential and dilute the value of the R&W Policies; (iii) failing and refusing to honor any indemnity obligation in the Third Party Claim; (iv) baselessly reserving the right to claw back the funds they agreed to pay out for the Third Party Claim; and (v) subjecting Prudential's management (including personnel Prudential transitioned over from Assurance) to the types of interrogation that Defendant Insurers claim their policies are intended to avoid and that are unreasonable under the terms of Defendants Insurers' R&W Policies.

104. In doing so, Defendant Insurers have deprived Prudential of the benefit of its bargain, including, without limitation, the peace of mind Defendant Insurers' claim their R&W Policies offered. Defendant Insurers have not provided Prudential (nor Assurance) with the clean "walk away" from the Acquisition that their R&W Policies were intended to facilitate, nor shouldered the risk Defendant Insurers agreed to assume through their underwriting of the Acquisition and for which Prudential has paid them millions of dollars in premiums. Instead, Defendant Insurers have caused Prudential to incur substantial legal fees in responding to baseless information requests and compelling Defendant Insurers to honor their coverage obligations.

105. Thus, Defendant Insurers have breached the implied covenant of good faith and fair dealing in the R&W Policies in one or more of the following ways: (i) by arbitrarily, and with reckless disregard for the rights of Prudential, refusing to acknowledge coverage and effectuate prompt, fair, and equitable settlement of Prudential's claim for coverage; (ii) knowingly or recklessly disregarding that Defendant Insurers were acting unreasonably in failing to honor their obligations under the R&W Policies; (iii) placing their own financial interests ahead of their insured's by withholding payment for clearly covered Loss; (iv) issuing incessant information

demands and ignoring the voluminous backup documentation provided by Prudential demonstrating the nature, extent, and cause of its Loss; and (v) forcing Prudential to sue for coverage, thereby diluting the insurance protection that Prudential purchased in connection with the Acquisition.

106. Prudential has been damaged by Defendant Insurers' breach of the implied covenant of good faith and fair dealing in an amount to be determined at trial.

107. Prudential is entitled to consequential damages flowing from Defendant Insurers' violation of the implied covenant of good faith and fair dealing, including, without limitation, attorneys' fees and other costs incurred in responding to Defendant Insurers' baseless information requests, lost investment opportunities as a result of the money Prudential has paid out-of-pocket in the defense and settlement of covered claims and Defendant Insurers' failure to pay Prudential the full amount of their R&W Policies, and the attorneys' fees, costs, and disbursements incurred by Prudential in enforcing its rights as a consequence of Defendant Insurers' bad faith conduct.

PRAYER FOR RELIEF

WHEREFORE, Prudential respectfully demands judgment against Defendant Insurers as follows:

a) Awarding Prudential compensatory, consequential, and other damages for all Loss Prudential incurred in connection with Assurance's breaches of the Financial Statement Representation in an amount to be determined at trial, but in no event less than the remaining \$135 million limits of liability of the R&W Policies;

b) Declaring that Defendant Insurers must indemnify Prudential for all Loss incurred in connection with Assurance's breach of the Financial Statement Representation and alleged

breach of the Compliance with Law Representation to the fullest extent of their remaining Policy limits;

c) Awarding Prudential compensatory, consequential, and other damages that Prudential has suffered as a result of Defendant Insurers' bad faith breach of the R&W Policies and refusal to honor their coverage obligations, in an amount to be determined at trial;

d) Awarding Prudential pre- and post- judgment interest;

e) Awarding Prudential attorneys' fees, costs, and expenses incurred in this action;

f) Awarding Prudential such other and further relief as this Court may deem just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all claims so triable.

Respectfully submitted,

BARNES & THORNBURG LLP

*Attorneys for Plaintiff Prudential
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Dated: New York, New York
June 18, 2026

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