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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TIMOTHY D. REASE,

Civil Action No. 13-CV-5342

Plaintiff,

ECF CASE

vs.

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA AND KPMG,
LLC,

**AMENDED
COMPLAINT**

Defendants.

Plaintiff, TIMOTHY D. REASE, a resident of the State of New York at 235 West End Avenue, New York, New York, by way of Complaint against the Defendants alleges as follows:

1. Plaintiff is an American citizen and currently domiciled in Amsterdam, The Netherlands. Plaintiff is a permanent resident at 235 West End Avenue, New York, New York 10023. At all relevant times, Plaintiff was employed by KPMG, L.L.C. as a senior manager.

2. Defendant, Prudential Insurance Company of America (hereinafter referred to as "Prudential"), is an insurance company organized and existing under the laws of the United States, with a principal place of business at 290 West Mount Pleasant Avenue,

Livingston, New Jersey 07039. Prudential is authorized to do business in the State of New York.

3. Defendant KPMG, LLC, is a Delaware Limited Liability Company and an international accounting and consulting firm, registered to do business in the State of New York, with a principal place of business at 345 Park Avenue, New York, New York 10154.

4. Defendant KPMG is one of the largest professional services companies in the world and one of the “Big Four” auditors, with global headquarters located in Amstelveen, The Netherlands. KPMG provides audit, tax and advisory services within three service groups: Management Consulting, Risk Consulting and Transactions & Restructuring. . KPMG states “With the enormous trust our clients and the capital markets place in us, our conduct must hold itself to the highest standards of integrity and transparency. Our Ethics and Compliance program focuses on preventing and detecting violations of law and policy and promotion our ethical culture.” KPMG’s combined revenues in 2011 were reported to be \$22.7 billion.

5. Defendant Prudential is a Fortune 500 company whose subsidiaries provide insurance, investment management and other financial products to retail and institutional customers in over 30 countries worldwide, with operations in the United States, Asia, Europe, and Latin America. Prudential reportedly holds more than \$2 trillion in outstanding insurance commitments.

6. Jurisdiction and venue are proper in this Court pursuant to 29 USC § 1001 *et seq.*, 28 USC § 1331 *et seq.* and 28 USC § 1391 *et seq.*

Essential Facts

7. At all times relevant to the within Complaint, Plaintiff Rease was employed by the Defendant KPMG, LLC as a senior manager. As such Plaintiff was a participant in the Employee Welfare Benefit Plans sponsored by Defendant KPMG. One such plan was the KPMG Long Term Disability Plan insured by the Defendant Prudential, under Policy No. 14240 (hereinafter “the plan”), which was issued to KPMG’s predecessor in interest, Peat, Marwick, Main & Co. at its New York City headquarters at 345 Park Avenue, New York, New York 10154, in 1992. Defendant KPMG is the plan administrator of the said plan, and Defendant Prudential is the claim fiduciary of the said plan. (See Plan attached as Exhibit “A”).

8. In June 2000, Rease became totally disabled due to complications associated with HIV virus. As a result, Plaintiff applied for disability benefits under the plan.

9. Plaintiff began receiving monthly disability benefit payments from the Defendant Prudential, but Defendant Prudential terminated such payments in 2001, alleging that Plaintiff was no longer “totally disabled within the meaning of the plan.”

10. After administrative appeals, the Defendant Prudential modified its decision, agreeing that Plaintiff was in fact still totally disabled within the meaning of the plan, but contending that such disability was due to a “mental, psychoneurotic or personality disorder” and as a result his benefits would be limited to 24 months. Those benefits ceased in December of 2002.

11. As a result of this determination, Plaintiff filed suit in the United States District Court for the Northern District of Georgia in the matter of *Rease v KPMG, L.L.P. and Prudential Insurance Company of America*, Civil Action No. 1:02-CV-797-ODE.

12. On September 26, 2003, United States District Court Judge Orinda D. Evans granted Summary Judgment to the Plaintiff, ordering and adjudging that Plaintiff's long term disability benefits were not subject to the 24-month mental illness limitation. Notwithstanding, Defendant Prudential did not reinstate Plaintiff's LTD benefits until March of 2004, after Plaintiff sought intervention of the State Insurance Commission.

13. Thereafter, Plaintiff was reinstated to his long term disability benefits under the said plan.

14. On March 28, 2003, Plaintiff was awarded Social Security Disability. He continues to be disabled within the meaning of the Social Security Act, to the current time.

Second Termination of Benefits

15. On October 28, 2010, the Defendant Prudential again terminated Plaintiff's long term disability claim, although Plaintiff's physical and cognitive condition had not improved.

16. Defendant Prudential alleged again that he did not meet the definition of disability under the policy. Prudential's decision is a result of its own financial conflict of interest, and is contrary to Defendant's obligations as a fiduciary.

17. Plaintiff timely filed an administrative appeal of that decision in April 2011 claiming Prudential's termination of benefits was wrongful and should be reversed because, *inter alia*:

- i. the decision did not provide conclusive reasoning or specific statements of how its decision was made;

- ii. the decision did not cite sufficient evidence to support its conclusion that Rease was able to perform the material and substantial duties of his previous occupation;
- iii. Prudential provided no competent analysis of the complex material and substantial duties of his previous position as KPMG Senior manager;
- iv. Prudential performed no analysis of how the duties of his previous occupation were affected by the complications and effects of Rease's illness over the past 10 years;
- v. Prudential performed no analysis of his previous employer KPMG's incurred risk and liability in performance of his duties to their clients, nor the internal and external business consequences to KPMG resulting from an impaired decision by Plaintiff;
- vi. Prudential performed no analysis of the impact of the past 10 years of not working – both in the loss of a business network to meet the occupation's revenue objectives and the loss of market intelligence and a performance record necessary to secure client engagements;
- vii. Prudential had utilized the wrong benefits contract in its benefits determination; and

viii. Prudential wrongly limited the benefits of the contract by failing to reference the plan in whole and only referenced the language regarding Total Disability.

18. Defendant denied the appeal on November 15, 2011 finding that even if Plaintiff were disabled, such disability was the result of a mental illness which, under the terms of the plan, precluded benefits beyond 24 months - - the same position which had been previously overturned by the District Court in the Georgia litigation in 2003. Further, Defendant failed to consider or give any weight to the decision of the Social Security Administration, which found Plaintiff to be totally disabled within the meaning of the Social Security Act.

19. Defendant's denial was also improperly based upon a different rationale. Notwithstanding, Defendant incorrectly continued with the administrative appeal process limiting Rease of his administrative rights.

20. Plaintiff complained to Defendant KPMG as to Prudential's conduct but Defendant KPMG failed to take action, leaving Plaintiff no recourse other than an additional administrative appeal, timely filing same on May 10, 2012.

21. Plaintiff claimed in the second administrative appeal that:

- i. Prudential had changed the reasons for its initial termination of benefits without acknowledgement, violating ERISA procedure and plan appeal administrative processes;
- ii. Prudential again relied on insufficient, unreasoned conclusions in its assessment of Rease's performance, in its assessment of his previous occupation, and without considering the actual

- comprehensive performance requirements of these duties in the face of his current medical illness and residual impairments;
- iii. Prudential wrongly dismissed Plaintiff's medical diagnosis without providing any reasonable discussion of the illness diagnostic criteria or supporting medical facts by competent medical authorities;
 - iv. Prudential claimed that Rease suffered from a serious psychiatric somatoform condition without providing supporting medical facts or competent diagnosis by a qualified medical authority; and
 - v. Prudential appeared to be referring to a more current benefit plan rather than the plan in effect at the time of Plaintiff's disability, which wrongly limited benefits. Prudential also failed to provide historically complete and properly executed plan documents when requested.

22. Defendant Prudential again denied Plaintiff's second administrative appeal on October 2, 2012 upholding its decision that Plaintiff's primary medical diagnosis was incorrect, asserting the existence of multiple psychological disorders (absent actual diagnosis), and claiming that Plaintiff was capable of performing the material and substantial duties of his occupation on a full time basis. Defendant stated its decision was final and could not be further appealed, and that Plaintiff must file a lawsuit for further consideration.

The Administrative Record

23. As part of Plaintiff's administrative appeals of the second wrongful termination of his long term disability claim, Plaintiff sought and ultimately obtained a copy of the Administrative Record purportedly maintained by Prudential in connection with his claim. A review of that information reflected that Defendants KPMG and Prudential, either individually, or in concert, engaged in multiple wrongful acts constituting a breach of fiduciary duty or illegal conduct. For example:

24. Defendants KPMG and Prudential, either individually, or in concert, engaged in wrongful collection, administration and handling of protected sensitive and personal private data, constituting a breach of the previously court established fiduciary duties owed to Rease, unlawful conduct within the European Union and the Netherlands, and a violation of Rease's fundamental human rights within the European Union. Defendants systematically engaged third parties to accomplish their scheme.

25. Rease was lawfully domiciled within Amsterdam, Netherlands of the European Union and had fully disclosed to Defendants that he was lawfully and legally domiciled as a temporary resident within the Netherlands. As a lawful Dutch and European Union resident, Rease was granted and personally expected the same protections and freedoms as European citizens in the areas of fundamental rights of privacy and data protection. As an American citizen, Rease had a reasonable expectation as to his privacy in Amsterdam.

26. Beginning in 2008, Defendants secured and commissioned covert surveillance, disregarding their fiduciary responsibilities of loyalty and prudence, and in violation of Dutch law and the European Union. Defendants retained American and

British agents to conduct covert surveillance as no Dutch agency would undertake such overtly illegal behavior;

27. In 2008, Defendants contracted British agency, James Harris Investigations to conduct surveillance operations. Defendant's agents traveled from the United Kingdom to Amsterdam, Netherlands and entered into a secured apartment complex to spy into the windows of Plaintiff's previous address, and into the homes of unrelated mentally handicapped residents in violation of Dutch law and the European Union fundamental right of personal privacy.

28. This surveillance was conducted into Rease's protected personal privacy without license as required by Dutch law and without approval from the Dutch Ministry of Justice for such invasive acts.

29. Defendants' agents continued to systematically violate Dutch and EU law and invade Plaintiff's reasonable expectation of privacy through four days of covert surveillance. This surveillance described the interior of Plaintiff's home, his dog, his spouse, and his daily activities.

30. Defendants' agents made photographs and videotapes of Plaintiff, monitoring his exit and entry to his apartment building from early in the morning until late in the evening for multiple days.

31. In 2010, in a second surveillance event, Defendants utilized G4S, an American multinational security agency, which contacted neighbors and interviewed same in violation of Dutch law.

32. Defendants' agents made contact with Plaintiff under false pretenses by allegedly speaking to Plaintiff's Polish housekeeper - - though he never had a Polish housekeeper.

33. Defendants' agents made contact with Plaintiff under false pretense by contacting Plaintiff by telephone and claiming they were interested in a purchase of furniture through Marktplaats, a Dutch company similar to Ebay - a scheme falsely constructed only to conceal their contact with Rease. These agents spoke in the Dutch language in an attempt to determine Plaintiff's ability to speak the Dutch language.

34. Defendants and Defendants' agents failed to provide a complete copy of all personal data collected, even after multiple attempts by Rease's lawyer.

35. Defendant KPMG was notified by Plaintiff of these acts. Defendant KPMG refused to take any action to restrain its fiduciary Defendant Prudential, stating that Prudential was fulfilling the terms of its contract with KPMG.

36. Defendant KPMG has ignored all requests by Plaintiff that it address and correct the abusive and outrageous claims handling practices utilized in this case.

37. Despite notice and repeated complaints by Plaintiff, Defendant Prudential has asserted that it had engaged in no misconduct or illegal activities, and that if such misconduct has occurred, it was the responsibility of its subcontractors - - thus completely shirking its fiduciary responsibilities to the Plaintiff.

38. Plaintiff has been and continues to be disabled within the meaning of the said plan. As such, he is entitled to continued disability benefits thereunder.

39. In addition, the Defendant Prudential has wrongfully discontinued Waiver of Premium benefits with respect to both his Group Disability Policy and his Group Life Insurance Policy.

40. Such conduct is a further breach of contract with respect to Plaintiff's rights thereunder, as he continues to be disabled and therefore entitled to a Waiver of Premium with respect to the said insurance coverage.

41. By virtue of the foregoing, the Defendant Prudential Insurance Company of America has breached the terms of Policy No. 14240 under which the Plaintiff Rease is a beneficiary, and has violated the requirements of the Employee Retirement Income Security Act, 29 USC § 1132 *et seq.* and applicable regulations promulgated thereunder.

Non Compliance with U.S. – E.U. Safe Harbor Framework

42. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of the European Union ("EU") that is consistent with the requirements of the European Union Data Protection Directive ("Directive"). The Directive sets forth EU requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission ("EC") has made a determination that the recipient jurisdiction's laws ensure the protection of such personal data. This determination is commonly referred to as meeting the EU's "adequacy" standard.

43. To satisfy the EU's adequacy standard for certain commercial transfers, the U.S. Department of Commerce ("Commerce") and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The Safe Harbor is a voluntary

framework that allows U.S. companies to transfer personal data lawfully from the EU to the U.S. To join the Safe Harbor, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

44. The Safe Harbor privacy principles, issued by Commerce on July 21, 2000, include the following:

45. NOTICE: An organization must inform individuals about the purposes for which it collects and uses information about them, how to contact the organization with any inquiries or complaints, the types of third parties to which it discloses the information, and the choices and means the organization offers individuals for limiting its use and disclosure. This notice must be provided in clear and conspicuous language when individuals are first asked to provide personal information to the organization or as soon thereafter as is practicable, but in any event before the organization uses such information for a purpose other than that for which it was originally collected or processed by the transferring organization, or before it's disclosed for the first time to a third party.

46. CHOICE: An organization must offer individuals the opportunity to choose (opt out) whether their personal information is (a) to be disclosed to a third party or (b) to be used for a purpose that is incompatible with the purpose(s) for which it was originally collected or subsequently authorized by the individual. Individuals must be provided with clear and conspicuous, readily available, and affordable mechanisms to exercise choice.

47. ONWARD TRANSFER (Transfers to Third Parties): To disclose information to a third party, organizations must apply the notice and choice principles. Where an organization wishes to transfer information to a third party that is acting as an agent, it

may do so only if it makes sure that the third party subscribes to the Safe Harbor Privacy Principles or is subject to the Directive or another adequacy finding. As an alternative, the organization can enter into a written agreement with such third party requiring that the third party provide at least the same level of privacy protection as is required by the relevant principles.

48. ACCESS: Individuals must have access to personal information about them that an organization holds and must be able to correct, amend, or delete that information where it is inaccurate, except where the burden or expense of providing access would be disproportionate to the risks to the individual's privacy in the case in question, or where the rights of persons other than the individual would be violated.

49. SECURITY: Organizations must take reasonable precautions to protect personal information from loss, misuse and unauthorized access, disclosure, alteration and destruction.

50. DATA INTEGRITY: Personal information must be relevant for the purposes for which it is to be used. An organization should take reasonable steps to ensure that data is pertinent to its intended use, and that it is accurate, complete, and current.

51. ENFORCEMENT: In order to ensure compliance with the Safe Harbor Principles, there must be (a) readily available and affordable independent recourse mechanisms so that each individual's complaints and disputes can be investigated and resolved and damages awarded where the applicable law or private sector initiatives so provide; (b) procedures for verifying that the commitments companies make to adhere to the Safe Harbor Principles have been implemented; and (c) obligations to remedy problems arising out of a failure to comply with the Principles. Sanctions must be

sufficiently rigorous to ensure compliance by the organization. Organizations that fail to provide annual self-certification letters will no longer appear in the list of participants and Safe Harbor benefits will no longer be assured.

52. Defendant KPMG has maintained a current self-certification to Commerce and has appeared on the list of Safe Harbor companies on the Commerce website.

53. KPMG makes the following statement in its Privacy Policy regarding its participation in the U.S.-EU Safe Harbor Framework: KPMG LLP, the U.S. member firm ("KPMG"), as part of its privacy policy, complies with the U.S.-EU Safe Harbor Framework and the U.S.-Swiss Safe Harbor Framework as set forth by the U.S. Department of Commerce regarding the collection, use, and retention of personal information from European Union member countries and Switzerland. KPMG has certified that it adheres to the Safe Harbor Privacy Principles of Notice, Choice, Onward Transfer, Security, Data Integrity, Access, and Enforcement.

54. In truth and in fact, as described herein, Defendant KPMG did not adhere to the US Safe Harbor Privacy Principles of Notice, Choice, Onward Transfer, Access, Data Integrity, and Enforcement.

55. In particular, Defendant KPMG did not give Plaintiff: (i) Notice of the data collection, or (ii) provide information about how Rease could contact the organization with any inquiries or complaints, or (iii) notice of the parties to which the information was disclosed, and (iv) the choices and means the organization implemented for limiting the data use and disclosure.

56. Defendant KPMG also did not give Rease the opportunity to opt out of the data use, and

57. Defendant KPMG did not apply the notice and choice principles to the onward transfer, from the collection within the European Union to the United States. Defendant KPMG did not enter into written agreement with its agents requiring privacy protection as required by the relevant principles.

58. Defendant KPMG and Defendant's agents did not apply the Access principle by providing access to Rease for all collected personal information.

59. Defendant KPMG did not apply the Data Integrity principle and collected additional personal information not relevant and reliable for its intended use. No steps were taken to ensure the collected data was accurate or complete.

60. Defendant KPMG and Defendant's agents did not apply the Enforcement principle by failing to apply or to follow an independent recourse mechanism in response to Rease's complaints and dispute.

61. Therefore, the representations set forth in paragraph 53 were, and are false or misleading, and constitute a deceptive act or practice. Defendant KPMG has maintained a systematic course of deceptive and fraudulent behavior violating Dutch and European Union Personal Data protection laws to gain access to privileged medical and personal data.

62. These acts and practices of Defendant KPMG as alleged constitute unfair or deceptive acts or practices, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

63. These deceptive, fraudulent and illegal acts and practices of Defendant KPMG as alleged are a gross violation of Defendant's fiduciary duties of loyalty and prudence to

Rease and beyond the intent of protection provided to Defendants under ERISA provisions.

64. Clearly, if the Defendants KPMG and Prudential have engaged in such behavior with respect to Plaintiff's claim, they have likely done so with respect to other claims and other claimants. It is Plaintiff's belief and he so alleges that discovery into Prudential and KPMG's internal records and specifically with regard to wrongfully denied and/or terminated long term disability claims, will reflect a systematic course of deception and a clear violation of their fiduciary responsibilities.

AS AND FOR A FIRST CAUSE OF ACTION
(Against Prudential)

1. Plaintiff repeats and realleges each and every allegations set forth in Paragraphs 1 through 64 of this Complaint, as if fully set forth again herein.

2. Defendants conduct as set forth above in once again wrongfully terminating disability benefits to the Plaintiff is contrary to law and against the substantial weight of the evidence.

3. Moreover, Defendant Prudential failed to provide a full and fair review to Plaintiff during his administrative appeals, violated the administrative appeals process and failed to give due consideration to the evidence provided by Plaintiff's physicians, as well as the findings of the Social Security Administration.

4. In sum, the medical and vocational support for Defendant Prudential's termination of benefit under this policy is both inconsistent and self-serving. It does not meet the "substantial evidence" requirement of the Courts in this Circuit. *McCauley v. First Unum Life Insurance Company*, 551 F. 3d 126 (2d Cir. 2009).

5. Plaintiff is and continues to be disabled within the meaning of the terms of the said policy.

6. By virtue of the foregoing, Defendant Prudential has breached the terms of the subject policy and has violated the requirements of the Employee Retirement Income Security Act, 29 USC§1132(a)1(B), §502(a)1(B) and applicable regulations promulgated thereunder.

AS AND FOR A SECOND CAUSE OF ACTION
(Against KPMG)

Plaintiff repeats and realleges each and every allegation set forth in Paragraphs 1 through 64, and in the First Cause of Action as if fully set forth again herein.

1. By virtue of the foregoing, the Defendant KPMG has breached its fiduciary duty owed to the Plaintiff, in violation of §502(a)(3), 29 USC§1132(a)(3).

2. Defendant KPMG failed to adequately monitor Prudential's conduct in processing Plaintiff's claim, and failed to respond to legitimate complaints by Plaintiff, and his requests for assistance in correcting such conduct.

3. Specifically, Defendant KPMG failed to adequately monitor its co-fiduciary Defendant Prudential in violation of 29 USC§1105(a)(3).

4. The conduct of KPMG was committed intentionally.

5. By virtue of the foregoing, the Plaintiff is entitled to equitable relief against Defendant KPMG, including but not limited to, enjoining Defendant KPMG from continuing to breach its fiduciary duties to Plaintiff and others similarly situated.

§ 502(a)(3)(A), 29 USC § 1132(a)(3)(A).

WHEREFORE, Plaintiff demands that this Honorable Court enter an Order as follows:

1. Declaring Plaintiff continuously disabled within the meaning of the Prudential Policy No. 14240;

2. Ordering Defendant Prudential to immediately place the Plaintiff back on claim for disability under the terms of the said policy, retroactive to November 1, 2010, and to make payment to Plaintiff of all retroactive benefits from that date forward;

3. Ordering Defendant Prudential to immediately reinstate the Waiver of Premium benefits to which Plaintiff is entitled in connection with his group life and group disability insurance policy retroactive to the date of wrongful termination of said benefits and to reinstate Plaintiff as a covered employee thereunder;

4. Ordering Defendant Prudential to reimburse to Plaintiff all wrongfully billed premiums for long term disability coverage and life coverage;

5. Awarding to Plaintiff equitable remedies, as deemed appropriate by the Court, against Defendant KPMG, for breach of its fiduciary duties to Plaintiff and enjoining Defendant KPMG from further violations against Plaintiff and others similarly situated;

6. Awarding to Plaintiff his costs of suit including reasonable attorney's fees;

7. Awarding to Plaintiff interest on all unpaid benefits to date; and

8. Granting such other and further relief as this Court may deem just and proper.

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Dated: November 1, 2013

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