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Timo Posern and Julie Posern,
10 as Trustees of the Posern Family Trust,
and all others similarly situated
11

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 (SAN FRANCISCO DIVISION)

16 TIMO POSERN and JULIE POSERN, as
Trustees of The Posern Family Trust and on
17 behalf of all others similarly situated

18 Plaintiffs,

19 vs.

20 PRUDENTIAL SECURITIES, INC., a
Delaware corporation,

21 Defendant.
22

) Case No. C 03-0507 SC
)
) FIRST AMENDED COMPLAINT:
)
) CLASS ACTION CLAIMS FOR DAMAGES
) FOR VIOLATION OF SECURITIES LAWS,
) RESTITUTION AND INJUNCTIVE RELIEF;
)
) POSERN TRUST INDIVIDUAL CLAIMS
) DECLARATORY RELIEF, DAMAGES FOR
) VIOLATION OF SECURITIES LAWS,
) NEGLIGENCE, INTENTIONAL AND
) NEGLIGENT MISREPRESENTATION,
) BREACH OF FIDUCIARY DUTY;
) RESTITUTION AND UNFAIR
) COMPETITION/BUSINESS PRACTICE

23 DEMAND FOR JURY TRIAL
24

25
26 Individual and Representative Plaintiffs TIMO and JULIE POSERN, as Trustees of the
27 Posern Family Trust dated January 4, 2000, in that individual capacity and also on behalf of all
28 others similarly situated, complain against Defendant Prudential Securities, Inc., as follows:

NATURE OF THE CASE

1
2 1. This class action is brought on behalf of all California residents who, while customers of
3 Defendant Prudential Securities, Inc., and in the course of that relationship, engaged at Prudential
4 Securities' behest in the investment process known as "writing put options."

5 2. Plaintiffs Timo and Julie Posern, as Trustees of the Posern Family Trust, formed an
6 investment relationship with Prudential Securities, Inc., for the husbanding and growth of the
7 investment capital owned by their Family Trust. Investment policy decisions were left to
8 Defendant Prudential Securities, Inc., which represented itself as being an investment expert and
9 Financial Advisor. The Plaintiffs were not financially "sophisticated investors"

10 3. Prudential Securities' representatives promoted to these Plaintiffs, and others similarly
11 situated, and thereafter engaged in, an ongoing strategy of placing their invested assets in writing
12 put options ("*writing puts*") as their main and only minimally diversified investment strategy,
13 which is an extreme high risk investment technique.

14 4. The investor who "*writes*" a *put* agrees, in return for a small fee (the "premium"), to
15 purchase a stock from any investor who purchases said *put* during a period of specified duration in
16 the future and at a specified price (the "strike price"), at the purchaser's option, even if the stock
17 then sells for a lower price on the open market. As a result, the selling investor profits only if the
18 market price at the time the *put* can be exercised exceeds the strike price minus the premium, and
19 the investor's profit is at most the amount of the premium. If the market price at the time the *put*
20 can be exercised is less than the strike price minus the premium, the investor's potential loss can
21 be as much as the entire strike price minus the premium. *Writing puts* is thus an investment
22 strategy with a small upside potential, and a large downside risk. It is an exceptionally dangerous
23 form of investment during a falling stock market, such as existed at the time Prudential Securities
24 engaged in this process with Plaintiffs' funds.

25 5. While the writing of *puts* is always a high risk strategy, the purchase of such *puts* is not in
26 comparison always a high risk strategy. To the contrary, this is commonly undertaken by
27 institutions as a "hedge" investment strategy to protect the owner of a stock against possible
28 downward movement in the value of that stock.

1 6. Plaintiffs are informed and believe, and thereon allege, that as a matter of corporate policy,
2 Prudential Securities, recklessly encouraged or allowed its brokers to promote the writing of *puts*
3 by customers who were not sophisticated investors, such as Plaintiffs and the members of the
4 Class, for the benefit of itself and of its parent company.

5 7. Plaintiff Trustees sustained severe losses of Trust assets as a result of following Prudential
6 Securities' recommended investment "*put writing*" strategy, in an amount in excess of \$75,000.
7 Plaintiffs' losses, and the losses of similarly situated persons comprising the Class, arise from
8 Prudential Securities' strategy of promoting the practice of "*writing puts*" to its clients.

9 8. In addition, at the same time it was writing *puts* on behalf of Plaintiffs, and unknown to
10 Plaintiffs, both Prudential Securities, Inc., and its parent company, Prudential Insurance Company
11 of America, which was then a mutual company, were buying *puts* as a means of hedging against
12 potential losses from market price declines in equities which they held for their own accounts.

13 Plaintiffs are informed and believe, and thereon allege, that at all times relevant herein, Prudential
14 Securities, Inc., was wholly owned by and controlled by PICA, and that the *put writing* strategy
15 was implemented at the direction of PICA, in order to improve the overall profitability of PICA.

16 9. As a result Prudential Securities' corporate practice of buying of *puts*, there was an
17 undisclosed conflict of interest between Prudential Securities, Inc., and the Plaintiff Trustees and
18 other similarly situated investors. Prudential Securities, Inc., was, in effect, protecting itself and
19 its parent company by transferring their own investment risks to those, like Plaintiffs, whom they
20 had convinced to *write puts*, by representing to them that the *writing of puts* was a favorable
21 investment strategy, although Prudential's own strategy was the exact opposite.

22 10. These facts justify an award of compensatory damages to the Plaintiffs, and also justify an
23 award of substantial punitive damages to the Plaintiffs and the members of the Plaintiff Class so as
24 to dissuade Defendant from engaging in similar practices in the future. These facts also justify
25 compensatory and punitive damages to Plaintiffs on their individual claims.

26 11. These facts also justify injunctive relief requiring Prudential Securities, Inc., to cease
27 promoting and practicing its integrated investment strategy of simultaneously promoting the high-
28 risk practice of *writing puts* to its clients while engaging in the undisclosed practice of purchasing

1 of *puts* as a conservative “hedge” against market value loss as to PSI and PICA’s own investment
2 portfolio.

3 **JURISDICTION AND VENUE**

4 12. Jurisdiction in this court is proper under the general Federal Question jurisdiction of 28
5 U.S.C. 1331; the specific Federal Question jurisdiction of 15 U.S.C. §§ 77v, 78aa and 80b-14.
6 Jurisdiction of this Court is also based on diversity of citizenship between the parties pursuant to
7 28 U. S. C. § 1332, in which the matter in controversy, exclusive of interest and costs, exceeds
8 \$75,000.00.

9 13. The claims involved in this action arose in the Northern District of California, in that the
10 events described below took place in the City of Menlo Park, County of San Mateo, California,
11 and, in particular, the damages to the Plaintiffs were sustained through the actions of Prudential
12 personnel situated for their business purposes in Menlo Park, California. Venue is therefore
13 proper in this Court pursuant to 28 U. S. C. § 1391.

14 **INTRA-DISTRICT ASSIGNMENT**

15 14. This action arose in San Mateo County, California and is therefore properly assigned to
16 either the San Francisco Division or the Oakland Division of the Northern District of California
17 pursuant to Civil Local Rule 3-2(d).

18 **PARTIES**

19 15. Plaintiffs Posern, as Trustees of the Posern Family Trust, are residents of the City of San
20 Carlos, County of San Mateo California, and for all purposes the Posern Family Trust is also
21 situated in San Carlos, California.

22 16. Defendant Prudential Securities Inc., is a New Jersey corporation, headquartered in New
23 York City, New York, and conducting business in Menlo Park, CA, among other locations in this
24 District.

25 **FACTS**

26 16. On or about July 3, 2000, TIMO POSERN and JULIE POSERN, as Trustees of The
27 Posern Family Trust, met with a Prudential Securities (PSI) Financial Advisor from the Menlo
28 Park, Prudential Securities branch office, to seek advice regarding investment of their proceeds

1 from the one-time sale of certain securities obtained through employment profit sharing. Those
2 initial securities, gained as a benefit of employment, and the money derived from their sale,
3 constituted the primary family asset. The Poserns are unsophisticated investors, lacking in
4 background necessary to understand or appreciate the risks of options trading, particularly the
5 nature of *puts*, the distinctions between trading in puts and writing puts, the distinction between
6 naked and covered puts, or other knowledge which a sophisticated options investor would have.
7 Indeed, it was precisely because they lacked this degree of knowledge that they sought the
8 assistance of Prudential Securities Inc, as their financial advisor. A person with sufficient
9 knowledge to engage in options trading would have had no need for a financial *adviser*.

10 17. At that time, a Prudential Securities Financial Adviser, Mr. Ryan Silva interviewed the
11 plaintiffs to ascertain their investment profile. Information was recorded by Financial Adviser
12 Silva on a form provided by Prudential. The Poserns did not themselves fill out the form.
13 Financial Advisor Silva informed them that he, and Prudential Securities, Inc.,(PSI), were experts
14 in the area of investments, and could appropriately advise them as to appropriate strategies for
15 achieving their investment goals. Based upon this representation, Plaintiffs decided to open an
16 account with PSI, to place their money with PSI, and to follow the investment advice that PSI
17 would give them. Since Plaintiffs were not professional investors, but sought out PSI to act as their
18 Financial Advisor, and PSI held itself and its employees out as having expert knowledge, Plaintiffs
19 were justified in relying upon this expertise in deciding to open the account with PSI, to place their
20 money with it, and to rely upon the investment strategy expertise of Prudential Securities, Inc.

21 18. Plaintiffs informed Silva and PSI that they had opened a family trust to handle their assets,
22 and that this account would be for the trust, to oversee the investment of trust funds. It was or
23 should have been known to PSI that trusts of this nature require that investments be limited by the
24 "prudent investor rule" and this trust was so limited.

25 19. Mr. and Mrs. Posern informed Financial Adviser Silva and PSI that their primary
26 investment objectives were "growth" of the trust res, along with "preservation of capital" and
27 "income". As a secondary objective, some "speculation" would be acceptable. The account was
28 expressly to be for trade in "securities", and expressly not in "speculative futures" and "hedge

1 futures”. Financial Adviser Silva was aware that the money being invested was the Plaintiffs' main
2 asset, and would not be able to be replaced if it was lost.

3 20. This intake information was reviewed by the Branch Manager of the Menlo Park
4 Prudential Securities office, William J. Ryan, who signed the form. On or about July 6, 2000,
5 William J. Ryan sent the Poserns a formal “investment profile” which purported to re-state the
6 information gathered at the prior meeting. In this dense form document the plaintiffs’
7 “investment objective” was stated as being primarily “growth” and secondarily, “speculation,”
8 with no mention of the prior and primary “preservation of capital” and “income” objectives.

9 21. Financial Adviser Silva and PSI advised Plaintiffs that an appropriate strategy for their
10 investment objectives would be having the bulk of their trust res invested in *writing naked puts*.
11 Beginning immediately thereafter, and for the period in which Plaintiffs continued to retain
12 Prudential Securities Inc., as their Financial Adviser, PSI advised Plaintiffs to engage in *writing*
13 *naked puts* as the main and only minimally diversified investment vehicle of the account, and
14 carried out numerous transactions of this nature on their behalf, involving most of the trust
15 assets. At no time did Silva or PSI *adequately* explain the nature of the put market, the risks
16 involved, nor specifically the risks of *writing naked puts*, or the need to cover these investments
17 by purchasing the underlying securities, such that unsophisticated investors such as the Plaintiffs
18 would have sufficient understanding of the risks they were undertaking.

19 22. Writing *puts* was, in fact, an extremely risky investment strategy for Plaintiffs, and,
20 objectively, an absolutely inappropriate investment for Plaintiffs or any unsophisticated
21 investors, particular for trust funds they held. Defendant knew at the time it made this
22 recommendation to Plaintiff that *writing puts* was in fact, an extremely risky investment strategy
23 for investors like Plaintiffs, but they nonetheless with deliberate recklessness, and in conscious
24 disregard of the likelihood that Plaintiff's would suffer substantial losses, gave this advice, and
25 then continually repeatedly this advice with respect to individual investment decisions for the
26 duration of Plaintiffs’ relationship with PSI .

27 23. At the time they made that the above untrue or misleading representations and non-
28 disclosures, Defendant and its employees acted with deliberate recklessness as to whether said

1 representations were false or that the matters not disclosed were material and should have been
2 disclosed. Defendant intended to induce Plaintiffs to rely upon and follow its recommendations
3 by representing itself and its employees as experts in investment strategy, or with deliberate
4 recklessness made such untrue or misleading statements and non-disclosures although it should
5 have known Plaintiffs would rely thereon. Plaintiffs reasonably relied upon the recommendation
6 due to their own lack of financial sophistication and the represented expertise of Defendant, their
7 Financial Adviser

8 24 Furthermore, during the same period that Prudential Securities, Inc., advised Plaintiffs to
9 *write naked puts*, it, for itself and for the benefit of its parent company, PICA, and under its
10 direction and control, was buying puts in the same markets in which it was encouraging
11 Plaintiffs to *write puts*, for the purpose of hedging their own investments. It was also thus giving
12 the opposite advice it was itself following for its own portfolio, so that it did not believe the
13 advice it was giving. Yet, at no time did PSI disclose these facts to Plaintiffs. Said conduct and
14 failure to disclose were deliberately reckless, and in conscious disregard of the likelihood that
15 Plaintiffs would suffer substantial losses. Had Plaintiffs been informed that PSI and PICA would
16 be buying puts in the same market, they would not have followed the advise to write naked puts,
17 not have allowed PSI to be its financial adviser.

18 25. Furthermore, on several occasions, PSI and/or PICA exercised the Plaintiffs' puts, thus
19 requiring Plaintiffs to purchase the shares of stock on which they had written *puts*, even when
20 the *puts* were "out of the money", but then failed to cover Plaintiffs' position by immediately
21 selling the shares at the market price.

22 26. Prudential Securities, Inc., is liable on the basis of respondeat superior for the conduct of
23 its branch manager and financial advisers, and directly because PSI acts through its employees.
24 Furthermore, PSI is directly liable because it failed to adequately supervise the activities of its
25 brokers in its employ to assure that they were, in fact, making appropriate recommendations to
26 Plaintiffs, and were not engaging in conduct in violation of the securities laws. Prudential
27 Securities, Inc., also ratified the conduct of its brokers in making inappropriate investment
28 recommendations to Plaintiff, and in particular their recommendations that writing puts was an

1 appropriate investment strategy for Plaintiffs, by allowing them to continue for approximately
2 eighteen months, and by engaging in the purchase of *puts* in the same markets in which it and its
3 brokers were advising clients to *write naked puts*.

4 27. Furthermore, Prudential Securities, Inc., and its employees were acting as financial
5 advisers to Plaintiffs and had fiduciary duties to Plaintiffs, as well as duties to conform their
6 conduct to the dictates of laws regarding financial advisers, including 15 U.S.C. 80b-6.

7 Defendant breached its fiduciary duties to Plaintiffs by advising an investment strategy knowing
8 it to be inappropriate for investors like Plaintiffs, failing to disclose the risks of this strategy,
9 failing to disclose that it was purchasing the puts for the benefit of itself and its parent company
10 as a hedge against their investment risk, executing *puts* and requiring Plaintiffs and members of
11 the Class to purchase the shares of stock on which they had written *puts* even when the *puts* were
12 “out of the money,” i.e., when the put was in fact financially worthless to its owner because the
13 share price on the open market at the time exceeded the strike price of the *put*.

14 28. Plaintiffs were financially damaged as a result of Defendant's conduct as set forth above,
15 by the loss of approximately \$324,329.00 through investing money in accordance with
16 Defendant's recommendations, have lost the fees they paid to Defendant for worthless service,
17 and have been consequentially damaged in an amount according to proof, but including
18 expenditure of attorneys fees and costs

19 29. Plaintiffs and members of the Class were retail customers of Prudential Securities, Inc.,
20 Prudential Securities, Inc., represented itself to Plaintiffs and members of the Class as being
21 experts in investment strategies for investors such as the members of the Class.

22 30. Plaintiffs and the members of the Class were not professional investors, and
23 were justified in relying upon the alleged investment strategy expertise of Prudential Securities,
24 Inc.

25 31. Prudential Securities, Inc., represented to Plaintiffs and members of the Class that
26 writing *puts* in stocks was an appropriate investment strategy for them. Writing *puts* was, in fact,
27 an extremely risky and inappropriate investment strategy for Plaintiffs and the members of the
28 Class.

1 32. Also, Prudential Securities, Inc., for itself and as agent for PICA, was buying *puts* in the
2 same markets in which it was encouraging Plaintiffs and members of the Class to write *puts*, at
3 the same time it was making those recommendations to Plaintiffs and members of the Class. It
4 never informed Plaintiff nor any class member that it was so doing. Furthermore, since PSI was
5 thus itself following the opposite strategy of what it was advising its clients to do, it knowingly
6 or recklessly was giving advice it did not believe.

7 33. The facts as alleged herein compel a strong inference that the Defendant was deliberately
8 reckless with regard to the e above representations and non-disclosures, whether said
9 representations and misleading statements were false or that the matters not disclosed were
10 material and should have been disclosed; Defendant knowingly or with deliberate recklessness
11 substantially participated in or acquiesced in the making of said representations, misleading
12 statements and non-disclosures and knowingly or with deliberate recklessness disregarded the
13 untrue or misleading nature of the representations, and material nature of the non-disclosures;
14 Defendant intended to induce Plaintiffs and the members of the Class to rely upon and follow
15 that recommendation by representing themselves as experts in investment strategy, or with
16 deliberate recklessness made such statements and non-disclosures although they knew or should
17 have known Plaintiffs and Class members would rely thereon. Plaintiffs and the members of the
18 Class reasonably relied upon the recommendation due to their own lack of financial
19 sophistication and the represented expertise of Defendant.

20 34. Prudential Securities, Inc., failed to adequately supervise the activities of its brokers and
21 branch managers to assure that they were, in fact, making appropriate recommendations to
22 Plaintiffs and the members of the Class.

23 35. Prudential Securities, Inc., ratified the conduct of its brokers and branch managers in
24 making inappropriate investment recommendations to Plaintiffs and the members of the Class,
25 and in particular their recommendations that *writing puts* was an appropriate investment strategy
26 for Plaintiffs and the members of the Class.

27 36. Prudential Securities, Inc., breached its fiduciary duties to Plaintiffs and the members of
28 the Class by advising an investment strategy knowing it to be inappropriate for investors like

1 Plaintiffs and other members of the class, failing to adequately disclose the risks of this strategy,
2 failing to disclose that it was purchasing the puts for the benefit of itself and its parent company
3 as a hedge against their investment risk, executing *puts* and requiring Plaintiffs and members of
4 the Class to purchase the shares of stock on which they had written *puts* even when the *puts* were
5 “out of the money,” i.e., when the put was in fact financially worthless to its owner because the
6 share price on the open market at the time exceeded the strike price of the *put*.

7 37. Plaintiffs and the members of the Class were financially damaged as a result of
8 Defendant's conduct as set forth above.

9 **CLASS ACTION ALLEGATIONS**

10 38. Plaintiffs bring this action on behalf of themselves and all others similarly situated,
11 as members of the proposed Plaintiff class (the “Class”) defined as follows:

12 All California residents who, while customers of Defendant Prudential Securities, Inc.,
13 and in the course of that relationship, engaged in the investment process known as
14 writing put options. Specifically excluded from the proposed Class is Defendant, any
15 entity in which the Defendant has a controlling interest, the officers, directors,
16 employees, affiliates, legal representatives, successors, subsidiaries and/or assigns of
17 Defendant.

18 39. This action is brought and may be properly maintained as a Class action pursuant to the
19 provisions of Federal Rules of Civil Procedure, Rules 23(a)(1)-(4) and 23(b)(1)-(3). This action
20 satisfies the numerosity, typicality, adequacy, predominance and superiority requirements of
21 those provisions.

22 40. [Fed. R. Civ. P. 23(a)(1)] The Class is so numerous that the individual joinder of all of
23 its members is impractical. While the exact number and identities of Class members are
24 unknown to Plaintiffs at this time and can only be ascertained through appropriate discovery,
25 Plaintiffs are informed and believe the Class includes many thousands of members.

26 41. [Fed. R. Civ. P. 23(a)(2)] Common questions of fact and law exist as to all members of
27 the Class which predominate over any questions affecting only individual members of the Class.
28 These common legal and factual questions, which do not vary from Class member to Class

1 member, and which may be determined without reference to the individual circumstances of any
2 Class member, include, but are not limited to, the following:

- 3 a. Whether Prudential Securities encouraged or allowed its brokers to promote the
4 *writing of puts* by customers who were not sophisticated investors, such as
5 Plaintiffs and the members of the Class, for the benefit of itself and of its parent
6 company, Prudential Insurance Company of America
- 7 b. Whether Prudential Securities encouraged or allowed its brokers to write
8 investment profiles in a manner which made clients who should not have been
9 encouraged to *write puts* appear to be more wealthy, sophisticated and
10 knowledgeable regarding the writing of puts than they actually were.
- 11 c. Whether, in fact, the writing of naked puts was or was not an appropriate
12 investment strategy for Plaintiffs and other similarly situated;
- 13 d. Whether Prudential Securities, Inc., adequately supervised the brokers who were
14 recommending that members of the Class *write puts* as an investment strategy;
- 15 e. Whether Prudential Securities, Inc, for its own benefit and PICA's, was
16 purchasing puts in the same market it was advising Plaintiff and class members to
17 *write puts* in;
- 18 f. Whether, since PSI was thus itself following the opposite strategy of what it was
19 advising its clients to do, it was recklessly was giving advice it did not believe;
- 20 g. Whether Defendant's conduct was in violation of the securities laws cited herein;
- 21 h. Whether Defendant had scienter sufficient under the applicable laws, and Plaintiff
22 and class members reasonably relied upon Defendant's representations,
23 misleading statements and non-disclosures.
- 24 I. Whether Defendant has breached its fiduciary duty and 15 USC 80b-6 by
25 the aforesaid conduct;
- 26 j. Whether the Class members are threatened with irreparable harm and whether
27 they are entitled to injunctive and other equitable relief;
- 28 k. Whether the Class is entitled to compensatory damages, and the nature of such

- 1 damages;
- 2 l. Whether the Class is entitled to punitive damages, and if so, the amount of such
- 3 punitive damages;
- 4 m. Whether Defendant violated the law by other conduct alleged herein or by other
- 5 conduct not yet known to Plaintiff.
- 6 42. [Fed. R. Civ. P. 23(a)(3)] Plaintiffs' claims are typical of the claims of the members of
- 7 the Class. Plaintiffs and all members of the Class have incurred damage and are facing
- 8 irreparable harm arising out of Defendant's course of conduct as complained of herein. The
- 9 losses of each member of the Class were caused directly by Defendant's wrongful conduct as
- 10 alleged herein.
- 11 43. [Fed. R. Civ. P. 23(a)(4)] Plaintiffs will fairly and adequately protect the interests
- 12 of the members of the Class. Plaintiffs have retained attorneys experienced in the prosecution
- 13 and defense of Class actions, including complex consumer and mass tort litigation.
- 14 44. [Fed. R. Civ. P. 23(b)(3)] A Class action is superior to other available methods of
- 15 fair and efficient adjudication of this controversy, since individual litigation of the claims of all
- 16 Class members is impracticable. Even if every Class member could afford individual litigation,
- 17 the court system could not. It would be unduly burdensome to the courts in which individual
- 18 litigation of numerous issues would proceed. Individualized litigation would also present the
- 19 potential for varying, inconsistent, or contradictory judgments and would magnify the delay and
- 20 expense to all parties and to the court system resulting from multiple trials of the same complex
- 21 factual issues. By contrast, the conduct of this action as a Class action, with respect to some or
- 22 all of the issues presented herein, presents fewer management difficulties, conserves the
- 23 resources of the parties and of the court system, and protects the rights of each Class member.
- 24 45. [Fed. R. Civ. P. 23(b)(1)(A)] The prosecution of separate actions by thousands of
- 25 individual Class members would create the risk of inconsistent or varying adjudications with
- 26 respect to, among other things, the need for and the nature of proper notice which Defendant
- 27 must provide to all Class members.
- 28 46. [Fed. R. Civ. P. 23(b)(1)(B)] The prosecution of separate actions by individual

1 Class members would create a risk of adjudications with respect to them that would, as a
2 practical matter, be dispositive of the interests of the other Class members not parties to such
3 adjudications or that would substantially impair or impede the ability of such non-party Class
4 members to protect their interests.

5 47. [Fed. R. Civ. P. 23(b)(2)] Defendant has acted or refused to act in respects
6 generally applicable to the Class, thereby making appropriate final and injunctive relief with
7 regard to the members of the Class as a whole.

8 **CLASS CLAIMS FOR RELIEF**

9 **FIRST CLAIM FOR RELIEF**
10 **(Violation Of Securities Laws-CLASS)**
11 **(Breach Of Financial Advisers Fiduciary And Statutory Duty)**

12 48. Plaintiffs incorporate herein the allegations of paragraphs 1 through 47 above.

13 49. At all relevant times herein, Prudential Securities, Inc., was acting as Financial Advisor to,
14 and agents of, Plaintiffs and other class members, such that they owed a fiduciary to them, to
15 avoid misrepresentation and provide full disclosure, to exercise prudence, to give at least as
16 much care for the interests of Plaintiffs and other class members as for the interests of itself and
17 its parent company.

18 50. At all relevant times herein, Prudential Securities, Inc., was acting as Financial Advisor to,
19 and agents of, Plaintiffs and other class members, and so owed duties under 15 USC § 80b-6,
20 which regulates the conduct of financial advisors, including but not limited to, forbidding
21 financial advisors from employing fraud or deceptive devices, engage in fraudulent or deceitful
22 practices or transactions, or acting as principal for the account of itself or another undisclosed
23 principal.

24 51. Defendant breached its fiduciary duty and duties under 15 USC § 80b-6, to Plaintiffs and
25 the members of the Class by conduct including but not limited to:

- 26 a Advising that the *writing of naked puts* was an appropriate investment strategy for
27 Plaintiffs and others similarly situated, when in fact it was not, but was rather an
28 extremely risky and complex investment strategy which should not be employed
by any but the most sophisticated investors;

- 1 b. For its own benefit and PICA's, purchasing puts in the same market it was
2 advising Plaintiffs and class members to write puts in; Encouraging or
3 allowing its brokers to promote the writing of *puts* by customers who were not
4 sophisticated investors, such as Plaintiffs and the members of the Class, for the
5 benefit of itself and of its parent company, Prudential Insurance Company of
6 America;
- 7 c. Encouraging or allowing its brokers to write investment profiles in a manner
8 which made clients who should not have been encouraged to *write puts* appear to
9 be more wealthy, sophisticated and knowledgeable regarding the *writing of puts*
10 than they actually were;
- 11 d. Failing to adequately supervise the brokers and branches who were
12 recommending
13 that members of the Class sell *puts* as an investment strategy;
- 14 e. Following the opposite strategy of what it was advising its clients to do for its
15 own portfolio, and thus recklessly giving advice it did not believe;
- 16 f. Failing to make disclosures adequate under the securities laws and its fiduciary
17 duty, including but not limited to, failing to disclose the risks of this strategy,
18 failing to disclose that it was purchasing the puts for the benefit of itself and its
19 parent company as a hedge against their investment risk, failing to disclose
20 that it was following the opposite strategy of what it was advising its clients to do
21 for its own portfolio;
- 22 g. By extracting substantial additional broker fees by advising their clients to *write*
23 *puts* when the amount it could charge for *writing puts* was a premium fee in
24 excess of the amount it could charge for similar, but more conventional,
25 transactions; plaintiffs are also informed and believe and thereupon allege that
26 some or all of these puts were not traded on any national exchange, so that the
27 basis for the premium fees did not exist, and thus was an overcharge, and that PSI
28 otherwise profited thereby;

- 1 h. Defendant had scienter sufficient under the applicable laws, and Plaintiffs and
2 class members reasonably relied upon Defendant’s representations, misleading
3 statements and non-disclosures were such that Defendant’s conduct was violation
4 of the securities laws cited herein;
- 5 I. By executing *puts* and requiring Plaintiffs and members of the Class to purchase
6 the shares of stock on which they had written *puts* even when the *puts* were “out
7 of the money”;
- 8 j. By other conduct otherwise alleged herein;
- 9 k. By other conduct not yet known to Plaintiffs.

10 **SECOND CLAIM FOR RELIEF**
11 **(Violation Of Securities Laws-CLASS)**

12 52. Plaintiffs incorporate herein the allegations of paragraphs 1 through 51 above.

13 53. Section 10b of the Securities Exchange Act of 1934, 15 U.S.C. §78(j), makes it
14 unlawful to use or employ, in connection with any securities transaction, any manipulative or
15 deceptive device or contrivance. As implemented by SEC Rule 10b-5, 17 CFR § 240.10b-5,
16 section 10b also makes it unlawful, in connection with any securities transaction, to employ any
17 device, scheme, or artifice to defraud, to make untrue statements regarding or failing to disclose
18 material facts, or to engage in any act, practice or course of business which would operate as a
19 fraud or deceit. This is actionable by individuals in a civil proceeding pursuant to 15 USC § 78u,
20 et seq. Defendant’s conduct as alleged herein was in violation of these provisions.

21 54. The conduct alleged herein was also in violation of numerous other Federal statutes,
22 including, but not limited to, 15 USC §78i, which regulates option transactions involving
23 undisclosed self-dealing or acting for undisclosed principals, and 15 USC §78k, which forbids
24 fraud, self-dealing or acting for undisclosed principals.

25 55. Furthermore, since Prudential Securities, Inc., and its employees were acting as financial
26 advisers to Plaintiffs and class members, and thereby had fiduciary duties to them, it owed an
27 even higher, fiduciary, duty to avoid misrepresentation and provide full disclosure, as well as the
28 duty to conform their conduct to the dictates of laws regarding financial advisers, including 15

1 U.S.C. 80b-6.

2 56. Defendant with deliberate recklessness made untrue or misleading representations, failed
3 to disclose material facts, employed manipulative or deceptive devices or contrivances, and with
4 deliberate recklessness engaged in acts, practices and course of business which would and did
5 operate as a fraud or deceit, regarding securities transactions with Plaintiff and members of the

6 Class by:

- 7 a. Advising that the *writing of naked puts* was an appropriate investment strategy for
8 Plaintiffs and others similarly situated, when in fact it was not, but was rather an
9 extremely risky and complex investment strategy which should not be employed
10 by any but the most sophisticated investors;
- 11 b. For its own benefit and PICA's, purchasing *puts* in the same market it was
12 advising Plaintiffs and class members to write *puts* in; Recklessly Encouraging or
13 allowing its brokers to promote the writing of *puts* by customers who were not
14 sophisticated investors, such as Plaintiffs and the members of the Class, for the
15 benefit of itself and of its parent company, Prudential Insurance Company of
16 America;
- 17 c. Encouraging or allowing its brokers to write investment profiles in a manner
18 which made clients who should not have been encouraged to *write puts* appear to
19 be more wealthy, sophisticated and knowledgeable regarding the *writing of puts*
20 than they actually were;
- 21 d. Failing to adequately supervise the brokers and branches who were
22 recommending
23 that members of the Class sell *puts* as an investment strategy;
- 24 e. Following the opposite strategy of what it was advising its clients to do for its
25 own portfolio, and thus recklessly giving advice it did not believe.
- 26 f. Failing to make disclosures adequate under the securities laws and its fiduciary
27 duty including but not limited to failing to disclose the risks of this strategy,
28 failing to disclose that it was purchasing the puts for the benefit of itself and its

1 parent company as a hedge against their investment risk, failing to disclose
2 that it was following the opposite strategy of what it was advising its clients to do
3 for its own portfolio;

4 g. By extracting substantial additional broker fees by advising their clients to *write*
5 *puts* when the amount it could charge for *writing puts* was a premium fee in
6 excess of the amount it could charge for similar, but more conventional,
7 transactions; plaintiffs are also informed and believe and thereupon allege that
8 some or all of these puts were not traded on any national exchange, so that the
9 basis for the premium fees did not exist, and thus was an overcharge;

10 h. By executing *puts* and requiring Plaintiffs and members of the Class to purchase
11 the shares of stock on which they had written *puts* even when the *puts* were “out
12 of the money”;

13 I. By other conduct otherwise alleged herein;

14 j. By other conduct not yet known to Plaintiffs.

15 57. Additionally, because Defendant knew that the puts being written by their clients were to
16 be purchased by PSI and PICA, which was not disclosed to clients, they were therefore aware of,
17 and acted upon, inside information, in violation of securities laws including, but not limited to
18 the provisions cited herein above, as well as 15 USC § 78t, and 15 USC section 78t-1.

19 58. The facts as alleged herein compel a strong inference that, at the time it made the above
20 representations and non-disclosures, Defendant was deliberately reckless with regard to whether
21 said representations and misleading statements were false or that the matters not disclosed were
22 material and should have been disclosed. Defendant with deliberate recklessness substantially
23 participated in or acquiesced in the making of said representations, misleading statements and
24 non-disclosures and with deliberate recklessness disregarded the untrue or misleading nature of
25 the representations, and material nature of the non-disclosures. Defendant intended to induce
26 Plaintiffs and the members of the Class to rely upon and follow that recommendation by
27 representing themselves as experts in investment strategy, or with deliberate recklessness made
28 such statements and non-disclosures although they knew or should have known Plaintiffs and

1 Class members would rely thereon. Plaintiffs and the members of the Class reasonably relied
2 upon the recommendation due to their own lack of financial sophistication and the represented
3 expertise of Defendant.

4 59. Furthermore, Defendant breached its fiduciary duties to Plaintiffs and class members by
5 advising with deliberate recklessness an investment strategy knowing it to be inappropriate for
6 investors like Plaintiffs and class members, failing to disclose the risks of this strategy, failing to
7 disclose that it was purchasing the puts for the benefit of itself and its parent company as a hedge
8 against their investment risk, executing *puts* and requiring Plaintiffs and members of the Class to
9 purchase the shares of stock on which they had written *puts* even when the *puts* were “out of the
10 money”.

11 **THIRD CLAIM FOR RELIEF**
(Restitution-CLASS)

12 60. Plaintiffs incorporate herein the allegations of paragraphs 1 through 59 above.

13 61. Defendant charged Plaintiffs and the members of the Class commissions for
14 writing the *puts* which it wrongfully induced Plaintiffs and the members of the Class to write, and
15 were thereby unjustly enriched.

16 **FOURTH CLAIM FOR RELIEF**
(Injunctive Relief-CLASS)

17 62. Plaintiffs incorporate herein the allegations of paragraphs 1 through 61 above.

18 63. Plaintiffs are informed and believe, and thereon allege, that Defendant is continuing to
19 engage in the wrongful conduct alleged above and intend to continue to do so in the future.

20 64. Unless Defendant is enjoined from continuing to represent to investors such as
21 the members of the Class that *writing puts* is an appropriate investment strategy for them,
22 members of the Class and other members of the public will suffer further financial losses, and
23 Defendant will continue to collect wrongfully earned commissions.
24

25 **POSERN TRUST CLAIMS FOR RELIEF**

26 **FIFTH CLAIM FOR RELIEF**
(Declaratory Relief- POSERN TRUST only)

27 65. Plaintiffs incorporate herein the allegations of paragraphs 1 through 28 herein above.
28

1 66. A dispute exists between Plaintiffs and Defendant as to whether this dispute must
2 be resolved through mandatory arbitration.

3 67. Defendant contends that an alleged written contract between the Plaintiffs and
4 Defendant Prudential Securities, Inc., requires the action to be submitted to mandatory binding
5 arbitration. A copy is attached hereto as Exhibit "A". Plaintiffs dispute that they are bound by
6 the arbitration provisions in the alleged contract.

7 68. Plaintiffs allege that this dispute is not properly subject to the arbitration provisions
8 contained in Exhibit "A" on the following grounds:

9 **A. The arbitration clause is in unlawfully small "fine print."**

10 69. The print size and format of the arbitration provision in the attached "form" Exhibit "A"
11 is too small and not adequately distinguished to satisfy the standards applicable in this
12 jurisdiction (*See, Conservatorship of Link*, 158 Cal. App. 3d 138 (1984), *Leon v. Family Fitness*
13 *Center (#107) Inc.*, 61 Cal. App. 4th 1227 (1998)) for a form document, the enforcement of which
14 would force the party against whom the sought provisions are enforced to give up a material legal
15 right;

16 **B. The arbitration clause is unenforceable due to impossibility of performance.**

17 70. Plaintiffs allege that the arbitration provisions of Exhibit "A" have been rendered
18 unenforceable (and impossible of performance) by the recent (July 2002) decision of the National
19 Association of Securities Dealers that it will not comply with California law as it applies to the
20 neutrality of arbitrators. The contractual language in Exhibit "A" allows the parties to resort to
21 the arbitration services of the National Association of Securities Dealers ("NASD"). In 2001, the
22 California Legislature passed Code Civ. Proc. § 1281.85, requiring the California Judicial
23 Council to adopt ethical standards for all neutral arbitrators. Section 1281.85 states:

24 Beginning July 1, 2002, a person serving as a neutral arbitrator
25 pursuant to an arbitration agreement shall comply with the ethics
26 standards for arbitrators adopted by the Judicial Council pursuant to
27 this section. The Judicial Council shall adopt ethical standards for
28 all neutral arbitrators effective July 1, 2002. These standards shall
be consistent with the standards established for arbitrators in the
judicial arbitration program and may expand but may not limit the
disclosure and disqualification requirements established by this
chapter. The standards shall address the disclosure of interests,

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relationships, or affiliations that may constitute conflicts of interest, including prior service as an arbitrator or other dispute resolution neutral entity, disqualifications, acceptance of gifts, and establishment of future professional relationships.

71. Effective July 1, 2002, the Judicial Council adopted Division VI of the Appendix to the California Rules of Court, entitled "Ethics Standards for Neutral Arbitrators in Contractual Arbitration." A true and correct copy of these Standards is attached hereto as Exhibit "B". The Court is requested to take judicial notice of these standards pursuant to Fed R. Ev. 201.

72. The new standards require disclosures of neutral arbitrators and apply to NASD arbitrations in California. The NASD has objected to the application of these standards to its arbitrators and filed a lawsuit in the Northern District of California, Case No. C 02 3486 SBA, seeking declaratory relief. A true and correct copy of the Complaint is attached as Exhibit "C".

73. On July 22, 2002, after filing its complaint, the NASD announced that it was refusing to appoint arbitrators in California cases because of the newly-adopted disclosure requirements. The NASD offered investors in cases over \$25,000 the following alternatives: (1) arbitrations could be venued in states outside California or (2) the NASD would waive fees for mediations although such did not guarantee any binding result.

74. On August 30, 2002, the NASD amended the alternatives to state that Claimants could require that cases be heard in neighboring states (Oregon, Washington, Nevada and Arizona) and that parties would not be charged for the travel expenses of the arbitrators.

75. On October 1, 2002, the NASD amended the alternatives again to add that Claimants could waive all "rights and remedies" afforded by the new California standards. If a Claimant is so willing, the NASD will appoint arbitrators. The NASD reiterated its stance that it will not otherwise appoint arbitrators in California cases.

76. Thus, the NASD will not appoint arbitrators in California cases unless a Claimant is willing to arbitrate the case outside of California or waive all rights and remedies granted by the new Legislative standards. A Claimant who is not willing to travel outside of California or who is not willing to waive rights and remedies conferred by the California Legislature will not have arbitrators appointed or the opportunity to be heard.

1 77. Plaintiffs contend that as the contract alleged by the Defendant to be controlling
2 to this dispute predominantly features the NASD as an arbitration alternative, and as that
3 alternative has been rendered unavailable by the actions of the NASD as outlined above, the
4 arbitration provisions of Exhibit “A” have been rendered unenforceable because of impossibility
5 of performance.

6 78. Compelling arbitration would thus force these Plaintiffs to arbitrate under terms
7 materially different from the terms encompassed in the arbitration language in the alleged
8 contract upon which Defendant seeks to rely, in violation of the “protections” built into the
9 arbitration provisions.

10 79. Plaintiffs therefore seek a Declaration that since the arbitration provisions of the
11 alleged contract specifically provide for the NASD as an arbitration forum, and since that forum
12 has been rendered unavailable by the actions of NASD, that the alleged arbitration agreements are
13 void and unenforceable.

14 **C. The arbitration clause is against Public Policy.**

15 80. California statutory law pertaining to the validity and enforceability of arbitration
16 agreements does not define “arbitration.” (Code of Civil Procedure Section 1280, et seq).
17 However, courts attempting to define what constitutes an arbitration agree that the arbitration
18 must include: (1) a third party decision maker; (2) a mechanism for insuring neutrality with
19 respect to the rendering of the decision; (3) a decision maker who is chosen by the parties; (4) an
20 opportunity for both parties to be heard, and a binding decision. *Cheng-Canindin v. Renaissance*
21 *Hotel Associates*, 50 Cal. App. 4th 676, 684 (1996); *Elliott & Ten Eyck Partnership v. The City of*
22 *Long Beach*, 57 Cal. App. 4th 495, 503 (1997).

23 81. The arbitration clause at issue runs contrary to the requirements for arbitration in
24 three critical aspects: 1) the clause fails to provide for a decision maker, 2) fails to allow the
25 statutorily required mechanism for insuring neutrality of the arbitrator , and 3) fails to afford
26 Plaintiffs the opportunity to be heard. The refusal of the NASD to appoint arbitrators for
27 California Claimants runs contrary to the definition of what constitutes an arbitration and contrary
28 to California public policy. Simply, the Defendant seeks to compel Plaintiffs and others similarly

1 situated to arbitrate in a forum where they know they cannot be heard by an arbitrator who cannot
2 be assured to be neutral. Such would be inconsistent with applicable substantive law and public
3 policy.

4 //

5 **D. The arbitration clause is unlawful.**

6 82. Contracts contrary to express statutes or to the policy of express statutes are
7 illegal. Such illegality voids the entire contract including the arbitration clause. *Green v. Mt.*
8 *Diablo Hospital Dist.*, 207 Cal. App. 3d 63, 73 (1989). The substantive law applied to Plaintiffs'
9 claims should be California law, as this is the State in which this Court is situated, and in which
10 Plaintiffs live and the purported contract was entered.

11 83. The arbitration clause which Defendant seeks to impose is inconsistent with
12 California substantive law. As set forth above, California substantive law requires specified
13 disclosures by the arbitrator to assure neutrality. Compelling arbitration in this matter runs
14 contrary to the new Legislative guidelines and contrary to public policy because the arbitration
15 could proceed only if Plaintiffs waived their statutory rights as to disclosures of potential bias by
16 the arbitrator. If arbitration is compelled in this matter, Plaintiffs and similarly situated claimants
17 would be left to file their claim with the NASD and then will be left with no ability to receive
18 arbitrators, no outlet to air their grievances, no availability of a remedy and no opportunity to be
19 heard. Such a result is contrary to California public policy.

20 **E. Enforcement of the arbitration clause would be unconscionable.**

21 84. Exhibit "A", containing the arbitration language, is a contract of adhesion. A
22 contract of adhesion is a standardized contract drafted by a party of superior bargaining power
23 and presented to the weaker party on a "take it or leave it" basis. Plaintiffs recognize that, by
24 itself, the sole fact that a contract is one of adhesion does not, per se, render the arbitration clause
25 unenforceable. However, a provision in an adhesion contract which, when considered in its
26 context, is "unduly oppressive or unconscionable, may be held unenforceable"; *Stirlen v.*
27 *Supercuts, Inc.*, 51 Cal. App. 4th, 1519, 1530 (1997). The facts and legal situation in this action
28 are congruent with those in *Darcy Ting et al v. A T & T* [C 01-02969], in which a court in the

1 District recently held the legal remedies provisions in A T & T's Consumer Service Agreement
2 illegal and unconscionable and enjoined A T & T from including and/or enforcing those
3 provisions in its Consumer Service Agreement.

4 **G. Enforcement of the arbitration clause would produce inconsistent results.**

5 85. Enforcement of the arbitration provisions of Exhibit "A" would inevitably lead to
6 differing and inconsistent legal results, as different arbitrators made different interpretations of
7 the law and facts which are alleged by Plaintiffs to apply to all members of the Class. Plaintiffs
8 allege that there should be a pan-Class uniformity of standards, as was held in *Burns v. Prudential*
9 *Securities Inc.*, 145 Ohio App. 3d 425 (2001)

10 86. For all of the above reasons (A - G), Plaintiffs request a Declaratory Judgment that
11 the arbitration language upon which Defendant seeks to rely are unenforceable, and that these
12 Plaintiffs, are entitled to pursue their claims in this Court.

13 **SIXTH CLAIM FOR RELIEF**
14 **(Violation Of Securities Laws- POSERN TRUST only)**

15 87. Plaintiffs incorporate herein the allegations of paragraphs 1 through 28, and 65-86,
16 herein above.

17 88. Section 10b of the Securities Exchange Act of 1934, 15 U.S.C. §78(j), makes it
18 unlawful to use or employ, in connection with any securities transaction, any manipulative or
19 deceptive device or contrivance. As implemented by SEC Rule 10b-5, 17 CFR § 240.10b-5,
20 section 10b also makes it unlawful, in connection with any securities transaction, to employ any
21 device, scheme, or artifice to defraud, to make untrue statements regarding or failing to disclose
22 material facts, or to engage in any act, practice or course of business which would operate as a
23 fraud or deceit. This is actionable by individuals in a civil proceeding pursuant to 15 USC § 78u,
24 et seq. Defendant's conduct as alleged herein was in violation of these provisions.

25 89. The conduct alleged herein was also in violation of numerous other Federal statutes,
26 including, but not limited to, 15 USC §78i, which regulates option transactions involving
27 undisclosed self-dealing or acting for undisclosed principals, and 15 USC §78k, which forbids
28 fraud, self-dealing or acting for undisclosed principals.

1 90. Furthermore, since Prudential Securities, Inc., and its employees were acting as Financial
2 Advisers to Plaintiffs, and thereby had fiduciary duties to them, it owed an even higher, fiduciary,
3 duty to avoid misrepresentation and provide full disclosure, as well as the duty to conform their
4 conduct to the dictates of laws regarding financial advisers, including 15 U.S.C. section 80b- 6.

5 91. Defendant with deliberate recklessness made untrue or misleading representations, failed to
6 disclose material facts, employed manipulative or deceptive devices or contrivances, and with
7 deliberate recklessness engaged in acts, practices and course of business which would and did
8 operate as a fraud or deceit, regarding securities transactions with Plaintiffs by:

- 9 a Advising that the *writing of naked puts* was an appropriate investment strategy for
10 Plaintiffs and others similarly situated, when in fact it was not, but was rather an
11 extremely risky and complex investment strategy which should not be employed
12 by any but the most sophisticated investors;
- 13 b. For its own benefit and PICA's, purchasing puts in the same market it was
14 advising Plaintiffs and class members to write puts in; Encouraging or allowing its
15 brokers to promote the writing of *puts* by customers who were not
16 sophisticated investors, such as Plaintiffs and the members of the Class, for the
17 benefit of itself and of its parent company, Prudential Insurance Company of
18 America;
- 19 c. Encouraging or allowing its brokers to write investment profiles in a manner
20 which made clients who should not have been encouraged to *write puts* appear to
21 be more wealthy, sophisticated and knowledgeable regarding the *writing of puts*
22 than they actually were;
- 23 d. Failing to adequately supervise the brokers and branches who were recommending
24 that members of the Class sell *puts* as an investment strategy;
- 25 e. Following the opposite strategy of what it was advising its clients to do for its
26 own portfolio, and thus recklessly giving advice it did not believe;
- 27 f. Failing to make disclosures adequate under the securities laws and its fiduciary
28 duty including but not limited to failing to disclose the risks of this strategy,

1 failing to disclose that it was purchasing the puts for the benefit of itself and its
2 parent company as a hedge against their investment risk, failing to disclose
3 that it was following the opposite strategy of what it was advising its clients to do
4 for its own portfolio;

5 g. By extracting substantial additional broker fees by advising their clients to *write*
6 *puts* when the amount it could charge for *writing puts* was a premium fee in
7 excess of the amount it could charge for similar, but more conventional,
8 transactions; plaintiffs are also informed and believe and thereupon allege that
9 some or all of these puts were not traded on any national exchange, so that the
10 basis for the premium fees did not exist, and thus was an overcharge;

11 h. Defendant had scienter sufficient under the applicable laws, and Plaintiffs and
12 class members reasonably relied upon Defendant's representations, misleading
13 statements and non-disclosures were such that Defendant's conduct was violation
14 of the securities laws cited herein;

15 i. By executing *puts* and requiring Plaintiffs and members of the Class to purchase
16 the shares of stock on which they had written *puts* even when the *puts* were "out
17 of the money";

18 j. By other conduct otherwise alleged herein;

19 k. By other conduct not yet known to Plaintiffs.

20 92. Additionally, because Defendant knew that the puts being written by their clients were to
21 be purchased by PSI and PICA, which was not disclosed to clients, they were therefore aware of,
22 and acted upon, inside information, in violation of securities laws including, but not limited to the
23 provisions cited herein above, as well as 15 USC § 78t, and 15 USC, section 78t-1.

24 93. The facts as alleged herein compel a strong inference that the Defendant knew, or was
25 deliberately reckless with regard to, at the time it made that the above representations and non-
26 disclosures whether said representations and misleading statements were false or that the matters
27 not disclosed were material and should have been disclosed; Defendant knowingly or with
28 deliberate recklessness substantially participated in or acquiesced in the making of said

1 representations, misleading statements and non-disclosures and knowingly or with deliberate
2 recklessness disregarded the untrue or misleading nature of the representations, and material
3 nature of the non-disclosures; Defendant intended to induce to rely upon and follow that
4 recommendation by representing itself and its employees as experts in investment strategy, or
5 with deliberate recklessness made such statements and non-disclosures although they knew or
6 should have known Plaintiffs and Class members would rely thereon. Plaintiffs reasonably relied
7 upon the recommendation due to their own lack of financial sophistication and the represented
8 expertise of Defendant.

9 94. Furthermore, Defendant breached its fiduciary duties to Plaintiffs by advising an
10 investment strategy knowing it to be inappropriate for investors like Plaintiffs, failing to disclose
11 the risks of this strategy, failing to disclose that it was purchasing the puts for the benefit of itself
12 and its parent company as a hedge against their investment risk, executing *puts* and requiring
13 Plaintiffs to purchase the shares of stock on which they had written *puts* even when the *puts* were
14 “out of the money”.

15 **SEVENTH CLAIM FOR RELIEF**
16 **(Violation Of Securities Laws-Financial Advisers Breach of Fiduciary Duty**
POSERN TRUST only)

17 95. Plaintiffs incorporate herein the allegations of paragraphs 1 through 28, and 65-94,
18 herein above.

19 96. At all relevant times herein, Prudential Securities, Inc., was acting as financial advisors to,
20 and agent of, Plaintiffs, such that it owed a fiduciary to them, to avoid misrepresentation and
21 provide full disclosure, to exercise prudence, to give at least as much care for the interests of
22 Plaintiffs as for the interests of itself and its parent company.

23 97. Defendant breached its fiduciary duty to Plaintiffs and the members of the Class by
24 advising an investment strategy knowing it to be inappropriate for unsophisticated investors such
25 as Plaintiffs and members of the class, failing to disclose the risks of this strategy, failing to
26 disclose that it was purchasing the puts for the benefit of itself and its parent company as a hedge
27 against their investment risk, executing *puts* and requiring Plaintiffs and members of the Class to
28 purchase the shares of stock on which they had written *puts* even when the *puts* were “out of the

1 money.”

2 98. Said conduct which is in breach of fiduciary duty violates 15 U.S.C. §78(j), SEC Rule 10b-
3 5, 17 CFR § 240.10b-5, 15 U.S.C. §78i and 15 U.S.C. §78k, which operate as heretofore
4 described.

5 99. Said conduct also violates 15 USC § 80b-6, which regulates the conduct of financial
6 advisors, including but not limited to, forbidding financial advisors from employing fraud or
7 deceptive devices, engage in fraudulent or deceitful practices or transactions, or acting as
8 principal for the account of itself or another undisclosed principal.

9 **EIGHTH CLAIM FOR RELIEF**
10 **(Negligence- POSERN TRUST only)**

11 100. Plaintiffs incorporate herein the allegations of paragraphs 1 through 28, and 65-99,
12 herein.

13 101. In doing the conduct as herein above alleged at length Defendant was acting as financial
14 adviser and broker to Plaintiffs, and was required to conduct itself with the requisite skill, care,
15 trust and confidence required of a fiduciary and professional financial adviser and broker.
16 Defendant was also contractually bound to perform its duties required of it under the account
17 contract.

18 102. Defendant’s conduct as herein above alleged at length was inadequate under the
19 appropriate standard of care of a fiduciary and profession financial adviser and broker, and was
20 inadequate performance of its obligations under contract. This inadequacy includes, but is not
21 limited to, promoting the writing of *puts* by customers who were not sophisticated investors, self
22 dealing by purchasing puts in the same market it was advising Plaintiffs to write puts in, failing to
23 disclosure the risks of *writing puts*, failing to disclose that it was purchasing puts in the same
24 market it was advising Plaintiffs to write puts in; failing to disclose that PSI was itself following
25 the opposite strategy of what it was advising its clients to do; it knowingly or recklessly was
26 giving advice in which advice it did not believe, and failing to conduct adequate intake
27 procedures to assure it had an accurate picture of the investment needs of Plaintiffs and failing to
28 supervise brokers and branch offices.

1 103. As a proximate result of Defendant's negligent conduct as stated, Plaintiffs have been
2 suffered damages in the approximate amount \$324,329.00 through investing money in accordance
3 with Defendant's negligent recommendations; have lost the fees they paid to Defendant for
4 worthless service, and have been consequentially damaged in an amount according to proof, but
5 including expenditure of attorneys fees and costs

6 **NINTH CLAIM FOR RELIEF**
7 **(Negligent Misrepresentation- POSERN TRUST only)**

8 104. Plaintiffs incorporate herein the allegations of paragraphs 1 through 28, and 65-103,
9 herein.

10 105. Defendant herein at all relevant times was acting as Financial Adviser, broker, fiduciary
11 and agent of Plaintiffs, and held itself out to be expert in investment matters, and was required to
12 make no misrepresentations, but to make full and complete disclosure of all material facts in
13 connection with the services it was performing for Plaintiffs.

14 106. As herein above alleged at length, Defendant made untrue or misleading representations,
15 failed to disclose material facts, employed manipulative or deceptive devices or contrivances, and
16 engaged in acts, practices and course of business which would and did operate as a fraud or deceit
17 upon Plaintiffs, including, but not limited to representing that the writing of *naked puts* was an
18 appropriate investment for Plaintiffs, by misrepresenting Plaintiffs' situation on intake forms, to
19 make it appear that this was an appropriate investment for them and that Plaintiffs had directed to
20 make these investments, by failing to disclose the risks of naked put writing, failing to disclose
21 that it was purchasing puts in the same market it was advising Plaintiffs to write puts in, and that
22 it was following the opposite strategy than what it was advising Plaintiffs to do, thus giving
23 advice it did not believe.

24 108. The true facts were that the writing of *naked puts* was an inappropriate investment for
25 unsophisticated investors Plaintiffs, particularly as their the main and non-diversified investment,
26 that it was extremely complex and risky strategy which in the long run would of necessity involve
27 losses that far outweighed the gains, that Plaintiffs situation was not that reflected on intake
28 forms, that Plaintiffs had not instructed them to make these investments, and that Defendant was

1 purchasing puts in the same market it was advising Plaintiffs to write puts in for the benefit of
2 itself and its parent company, and following the opposite strategy of what it was advising its
3 clients to do, thus giving advice it did not believe..

4 109. Because Defendant herein was Plaintiffs' Financial Adviser, broker, fiduciary and agent,
5 and held itself out to be expert in investment matters, Plaintiffs relied upon and reposed trust and
6 confidence in the statements of Defendant and its employees and that Defendant and its
7 employees had fully disclosed all relevant matters.

8 110. In justified reliance upon the statements of Defendant PSI and belief that it had fully
9 disclosed all relevant matter, Plaintiffs opened their account with PSI, entrusted their money to
10 PSI, followed the investment advice given by PSI, including the investment in naked puts as the
11 main and non-diversified investment of their funds, and continued to maintain their account and
12 investment with Defendant for the period July 2000 to February 2001.

13 111. As a proximate result of said justified reliance, Plaintiffs have been injured by the loss
14 of approximately \$324,329.00 through investing money in accordance with Defendant's negligent
15 recommendations; have lost the fees they paid to Defendant for worthless service, and have been
16 consequentially damaged in an amount according to proof, but including expenditure of attorneys
17 fees and costs.

18 **TENTH CLAIM FOR RELIEF**
19 **(Intentional Misrepresentation- POSERN TRUST only)**

20 112. Plaintiffs incorporate herein the allegations of paragraphs 1 through 28, and 65-111,
21 herein above.

22 113. The facts as alleged herein above disclose that Defendant PSI made untrue or misleading
23 representations, failed to disclose material facts, employed manipulative or deceptive devices or
24 contrivances, and engaged in acts, practices and course of business which would and did operate
25 as a fraud or deceit upon Plaintiffs.

26 114. The facts as alleged herein above compel a strong inference that the Defendant knew, or
27 was deliberately reckless with regard to, at the time it made he above representations and non-
28 disclosures, whether said representations and misleading statements were false or that the matters

1 not disclosed were material and should have been disclosed; Defendant knowingly or with
2 deliberate recklessness substantially participated in or acquiesced in the making of said
3 representations, misleading statements and non-disclosures and knowingly or with deliberate
4 recklessness disregarded the untrue or misleading nature of the representations, and material
5 nature of the non-disclosures; Defendant intended to induce Plaintiffs to opened their account
6 with PSI, entrust their money to PSI, follow the investment advice given by PSI, including the
7 investment in naked puts as the main and non-diversified investment of their funds, and
8 continued to maintain their account and investment with Defendant for a period of approximately
9 18 months.

10 115. As a proximate result of Plaintiffs' justified reliance, Plaintiffs have been injured by the
11 loss of approximately \$324,329.00 through investing money in accordance with Defendant's
12 negligent recommendations, have lost the fees they paid to Defendant for worthless service, and
13 have been consequentially damaged in an amount according to proof, but including expenditure
14 of attorneys fees and costs.

15 116. Defendant's conduct was fraudulent, malicious and oppressive, done with conscious
16 disregard of the rights of Plaintiffs and in conscious disregard of Defendant's duties, fiduciary
17 and otherwise, to Plaintiffs, and is therefore deserving of punishment, so that an award of punitive
18 damages to Plaintiffs, in an amount sufficient to punish and deter, is appropriate fees and costs

19 **ELEVENTH CLAIM FOR RELIEF**
20 **(Common Law Breach Of Fiduciary Duty- POSERN TRUST only)**

21 117. Plaintiffs incorporate herein the allegations of paragraphs 1 through 28, and 65-116,
22 herein above.

23 118. Defendant herein at all relevant times was acting as financial adviser, broker, fiduciary
24 and agent of Plaintiffs, held itself out to be expert in investment matters, and owed and duty of
25 utmost care and the highest good faith, trust and confidence.

26 119. In acting as herein above alleged in great detail, Defendant breached this duty by conduct
27 including, but not limited to making untrue and misleading representations, undisclosed self-
28 dealing, acting for an undisclosed principal, employing manipulative or deceptive devices or

1 contrivances, and engaging in acts, practices and course of business which would and did operate
2 as a fraud or deceit upon Plaintiffs.

3 120. As a proximate result of Defendant's breach of fiduciary duty, Plaintiffs have been injured
4 by the loss of approximately \$324,329.00 through investing money in accordance with
5 Defendant's negligent recommendations; have lost the fees they paid to Defendant for worthless
6 service, and have been consequentially damaged in an amount according to proof, but including
7 expenditure of attorneys fees and costs.

8 121. Defendant's conduct was fraudulent, malicious and oppressive, done with conscious
9 disregard of the rights of Plaintiffs and in conscious disregard of Defendant's duties, fiduciary
10 and otherwise, to Plaintiffs, and is therefore deserving of punishment, so that an award of punitive
11 damages to Plaintiffs, in an amount sufficient to punish and deter, is appropriate.

12 **TWELFTH CLAIM FOR RELIEF**
13 **(Restitution- POSERN TRUST only)**

14 122. Plaintiffs incorporate herein the allegations of paragraphs 1 through 28, and 65-121,
15 herein above.

16 123. Defendant charged Plaintiffs commissions for writing the *puts* which it wrongfully
17 induced Plaintiffs to write, and were thereby unjustly enriched.

18 **THIRTEENTH CLAIM FOR RELIEF**
19 **(Unfair Competition- POSERN TRUST only)**

20 124. Plaintiffs incorporate herein the allegations of paragraphs 1 through 28, and 65-123,
21 herein above.

22 125. California Business & Professions Code § 17200, et seq., forbids any unlawful, unfair or
23 fraudulent business practice, and provides for restitution and disgorgement of any gains Defendant
24 obtained through such unfair practices

25 126. Defendant charged Plaintiffs commissions for writing the *puts* which it wrongfully induced
26 Plaintiffs to write, and were thereby unjustly enriched.

27 Wherefore, Plaintiffs pray for relief as follows:

28 **PRAYER FOR RELIEF**

ON THE CLASS CLAIMS

1 1. For an Order certifying this action as a class action;

2 On Plaintiff's First and Second Claims for Relief:

- 3 2. a. Damages in the amount of all financial losses incurred by Plaintiffs and the members
4 of the Class as a result of *writing puts* on the recommendation of Defendant;
- 5 b. Prejudgment interest on those damages;
- 6 c. Punitive damages;
- 7 d. Reasonable attorney's fees;
- 8 e. Costs of suit;
- 9 f. Any other relief the court deems proper.

10 On Plaintiffs' Third Claim for Relief:

- 11 a. Damages in the amount of restitution of all commissions charged to Plaintiffs and the
12 members of the Class by Defendant as a result of *writing puts* on the recommendation
13 of Defendant;
- 14 b. Prejudgment interest on those damages;
- 15 c. Reasonable attorney's fees;
- 16 d. Costs of suit;
- 17 e. Any other relief the court deems proper.

18 On Plaintiffs' Fourth Claim for Relief:

- 19 a. An injunction enjoining Defendant from any further representations to its retail clients
20 that the writing of *puts* is an appropriate investment strategy, other than as hedges for
21 highly sophisticated investors.
- 22 b. Reasonable attorney's fees;
- 23 c. Costs of suit;
- 24 d. Any other relief the court deems proper.

25 **ON THE POSERN TRUST CLAIMS**

26 On Plaintiffs' Fifth Claim for Relief:

- 27 a. For a declaration that the arbitration clause is unenforceable or does not apply to
28

- 1 Plaintiffs' claims
- 2 b. Reasonable attorney's fees;
- 3 c. Costs of suit;
- 4 d. Any other relief the court deems proper.

5 On Plaintiffs' Sixth, Seventh, Tenth and Eleventh Claim for Relief:

- 6 a. Damages in the amount of all financial losses incurred by Plaintiffs and the
- 7 members of the Class as a result of *writing puts* on the recommendation
- 8 of Defendant;
- 9 b. Prejudgment interest on those damages;
- 10 c. Punitive damages;
- 11 d. Reasonable attorney's fees;
- 12 e. Costs of suit;
- 13 f. Any other relief the court deems proper

14 On Plaintiffs' Eighth and Ninth Claims for Relief

- 15 a. Damages in the amount of all financial losses incurred by Plaintiffs as
- 16 result of *writing puts* on the recommendation of Defendant;
- 17 b. Prejudgment interest on those damages;
- 18 c. Reasonable attorney's fees;
- 19 d. Costs of suit;
- 20 e. Any other relief the court deems proper.

21 On Plaintiffs' Twelfth and Thirteenth Claims for Relief:

- 22 a. Damages in the amount of restitution of all commissions charged to Plaintiffs by
- 23 Defendant as a result of *writing puts* on the recommendation of Defendant;
- 24 b. Prejudgment interest on those damages;
- 25 c. Reasonable attorney's fees;
- 26 d. Costs of suit;
- 27 e. Any other relief the court deems proper.

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DATED: May 22, 2003

KIRTLAND & PACKARD LLP

By: s/Michael L. Kelly
MICHAEL L. KELLY
Attorneys for Plaintiffs Timo Posern and
Julie Posern, and all others similarly situated

DATED: May 22, 2003

LEHMANN LAW OFFICES

By: s/Harry V. Lehmann
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DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury.

DATED: May 22, 2003

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