

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
c/o Department of Justice
Washington, D.C. 20530

Plaintiff,

v.

BERKSHIRE HATHAWAY INC.
3555 Farnam Street
Omaha, NE 68131

Defendant.

Civil Action No.

COMPLAINT FOR CIVIL PENALTIES FOR FAILURE TO COMPLY
WITH THE PREMERGER REPORTING AND WAITING REQUIREMENTS
OF THE HART-SCOTT RODINO ACT

The United States of America, Plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States and at the request of the Federal Trade Commission, brings this civil antitrust action to obtain monetary relief in the form of civil penalties against Defendant Berkshire Hathaway Inc. (“Berkshire Hathaway”). Plaintiff alleges as follows:

NATURE OF THE ACTION

1. Berkshire Hathaway violated the notice and waiting requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (“HSR Act” or “Act”), with respect to the acquisition of voting securities of USG Corporation (“USG”) in December 2013.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to

Section 7A(g) of the Clayton Act, 15 U.S.C. § 18a(g), and pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355 and over the Defendant by virtue of Defendant's consent, in the Stipulation relating hereto, to the maintenance of this action and entry of the Final Judgment in this District.

3. Venue is properly based in this District by virtue of Defendant's consent, in the Stipulation relating hereto, to the maintenance of this action and entry of the Final Judgment in this District.

THE DEFENDANT

4. Defendant Berkshire Hathaway is a corporation organized under the laws of Delaware with its principal office and place of business at 3555 Farnam Street, Omaha, NE 68131. Berkshire Hathaway is engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 7A(a)(1) of the Clayton Act, 15 U.S.C. §18a(a)(1).

OTHER ENTITIES

5. USG is a corporation organized under the laws of Delaware with its principal place of business at 550 West Adams Street, Department 188, Chicago, IL 60661. USG is engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 7A(a)(1) of the Clayton Act, 15 U.S.C. §18a(a)(1).

6. Symetra Financial Corporation ("Symetra") is a corporation organized under the laws of Delaware with its principal place of business at 777 108th Avenue NE, Suite 1200, Bellevue, WA 98004. Symetra is engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 7A(a)(1) of the

Clayton Act, 15 U.S.C. §18a(a)(1).

THE HART-SCOTT-RODINO ACT AND RULES

7. The HSR Act requires certain acquiring persons and certain persons whose voting securities or assets are acquired to file notifications with the federal antitrust agencies and to observe a waiting period before consummating certain acquisitions of voting securities or assets.

15 U.S.C. § 18a(a) and (b). These notification and waiting period requirements apply to acquisitions that meet the HSR Act's thresholds, which are adjusted annually. During most of 2013, the HSR Act's reporting and waiting period requirements applied to most transactions that would result in the acquiring person holding more than \$70.9 million, and all transactions (regardless of the size of the acquiring or acquired persons) where the acquiring person would hold more than \$283.6 million of the acquired person's voting securities and/or assets, except for certain exempted transactions.

8. The HSR Act's notification and waiting period are intended to give the federal antitrust agencies prior notice of, and information about, proposed transactions. The waiting period is also intended to provide the federal antitrust agencies with an opportunity to investigate a proposed transaction and to determine whether to seek an injunction to prevent the consummation of a transaction that may violate the antitrust laws.

9. Pursuant to Section (d)(2) of the HSR Act, 15 U.S.C. § 18a(d)(2), rules were promulgated to carry out the purposes of the HSR Act. 16 C.F.R. §§ 801-803 ("HSR Rules"). The HSR Rules, among other things, define terms contained in the HSR Act.

10. Pursuant to section 801.13(a)(1) of the HSR Rules, 16 C.F.R. § 801.13(a)(1), "all voting securities of [an] issuer which will be held by the acquiring person after the

consummation of an acquisition” -- including any held before the acquisition --- are deemed held “as a result of” the acquisition at issue.

11. Pursuant to sections 801.13(a)(2) and 801.10(c)(1) of the HSR Rules, 16 C.F.R. § 801.13(a)(2) and § 801.10(c)(1), the value of voting securities already held is the market price, defined to be the lowest closing price within 45 days prior to the subsequent acquisition.

12. Section 802.21(a) of the HSR Rules, 16 C.F.R. § 802.21(a), provides generally that where a person acquired voting securities of an issuer after filing under the HSR Act and observing the waiting period, subsequent acquisitions of voting securities of the same issuer are exempt from the reporting requirements for a period of five years from the expiration of the waiting period, so long as the value of the voting securities held as a result of the subsequent acquisitions does not “meet or exceed a notification threshold . . . greater than the greatest notification threshold met or exceeded in the earlier acquisition.” Notification thresholds are set forth in section 801.1(h) of the HSR Rules, 16 C.F.R. § 801(h), and are adjusted annually.

13. Section 7A(g)(1) of the Clayton Act, 15 U.S.C. § 18a(g)(1), provides that any person, or any officer, director, or partner thereof, who fails to comply with any provision of the HSR Act is liable to the United States for a civil penalty for each day during which such person is in violation. For violations occurring on or after February 10, 2009, the maximum amount of civil penalty is \$16,000 per day, pursuant to the Debt Collection Improvement Act of 1996, Pub. L. 104-134, § 31001(s) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note), and Federal Trade Commission Rule 1.98, 16 C.F.R. § 1.98, 74 Fed. Reg. 857 (Jan. 9, 2009).

DEFENDANT'S PRIOR VIOLATION OF THE HSR ACT

14. On June 25, 2013, Berkshire Hathaway acquired Symetra voting securities by exercising warrants. The value of the Symetra voting securities acquired in the June 25, 2013 transaction was approximately \$41 million, and as a result of that acquisition Berkshire Hathaway held Symetra voting securities valued at approximately \$310 million.

15. Although it was required to do so, Berkshire Hathaway did not file under the HSR Act prior to acquiring Symetra voting securities on June 25, 2013.

16. On July 2, 2013, Berkshire Hathaway made a corrective filing under the HSR Act for the June 25 acquisition of Symetra voting securities. In a letter accompanying the corrective filing, Berkshire Hathaway acknowledged that the transaction was reportable under the HSR Act, but asserted that the failure to file and observe the waiting period was inadvertent.

17. On December 5, 2013, the Premerger Notification Office of the Federal Trade Commission sent a letter to Berkshire Hathaway indicating that it would not recommend a civil penalty action regarding the June 25, 2013 Symetra acquisition, but stating that Berkshire Hathaway "still must bear responsibility for compliance with the Act. In addition, it is accountable for instituting an effective program to ensure full compliance with the Act's requirements."

VIOLATION

18. On January 30, 2006, Berkshire Hathaway entered into an equity commitment agreement with USG. In connection with entering into the equity commitment agreement, Berkshire Hathaway filed under the HSR Act to acquire USG voting securities and observed the waiting period. On August 2, 2006, Berkshire Hathaway acquired USG voting securities

pursuant to the equity commitment agreement, which took its holdings of USG voting securities to approximately 15 percent of the outstanding voting securities. Berkshire Hathaway made additional open market purchases of USG voting securities in 2006, which took its holdings to 19 percent of the outstanding voting securities.

19. On November 26, 2008, Berkshire Hathaway purchased Contingent Convertible Senior Notes due 2018 of USG ("Convertible Notes") in an aggregate principal amount of \$300 million. The Convertible Notes could be converted into USG voting securities at the option of Berkshire Hathaway at any time prior to close of business on November 30, 2018, unless the Convertible Notes were earlier repurchased or redeemed by USG. The Convertible Notes could be converted into USG voting securities at an initial conversion price of \$11.40 per share, subject to adjustment.

20. On November 15, 2013, USG announced that it would redeem \$325 million in aggregate principal amount of Convertible Notes on December 16, 2013.

21. On December 9, 2013, Berkshire Hathaway converted its Convertible Notes into USG voting securities at the conversion price of \$11.40 per share. On December 9, 2013, the closing price of USG voting securities was \$26.02 per share.

22. As a result of its acquisition of USG voting securities on December 9, 2013, Berkshire Hathaway held approximately 28% of USG voting securities, valued at more than \$950 million.

23. Berkshire Hathaway was required to file under the HSR Act prior to acquiring the USG voting securities on December 9, 2013, because as a result of that acquisition its holdings were greater than \$283.6 million.

24. On January 3, 2014, Berkshire Hathaway made a corrective filing under the HSR Act for the USG voting securities it had acquired on December 9, 2013. In a letter accompanying the corrective filing, Berkshire Hathaway acknowledged that the acquisition was reportable under the HSR Act. The HSR waiting period expired on February 3, 2014.

25. Berkshire Hathaway was in continuous violation of the HSR Act from December 9, 2013, when it acquired the USG voting securities that resulted in it holding USG voting securities valued in excess of the HSR Act's \$283.6 million size-of-transaction threshold, through February 3, 2014, when the waiting period expired.

PRAYER

WHEREFORE, Plaintiff prays:

1. That the Court adjudge and decree that Defendant Berkshire Hathaway's acquisition of USG voting securities on December 9, 2013, was a violation of the HSR Act, 15 U.S.C. § 18a; and that Defendant Berkshire Hathaway was in violation of the HSR Act each day from December 9, 2013, through February 3, 2014.

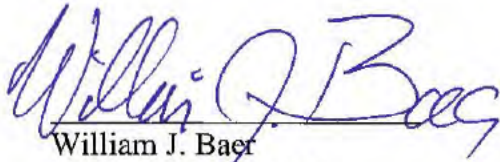
2. That the Court order Defendant Berkshire Hathaway to pay to the United States an appropriate civil penalty as provided by the HSR Act, 15 U.S.C. § 18a(g)(1), the Debt Collection Improvement Act of 1996, Pub. L. 104-134, § 31001(s) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note), and Federal Trade Commission Rule 1.98, 16 C.F.R. § 1.98, 74 Fed. Reg. 857 (Jan. 9, 2009).

3. That the Court order such other and further relief as the Court may deem just and proper.

4. That the Court award the Plaintiff its costs of this suit.

Dated: August 20, 2014

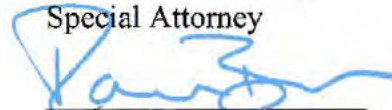
FOR THE PLAINTIFF UNITED STATES
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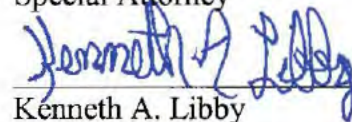
William J. Baer
D.C. Bar No. 324723
Assistant Attorney General
Department of Justice
Antitrust Division
Washington, D.C. 20530



Daniel P. Ducore
D.C. Bar No. 933721
Special Attorney



Roberta S. Baruch
D.C. Bar No. 269266
Special Attorney



Kenneth A. Libby
Special Attorney

Federal Trade Commission
Washington, D.C. 20580
(202) 326-2694