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

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BREAKAWAY COURIER CORPORATION, d/b/a BREAKAWAY COURIER SYSTEMS

Index No.

Plaintiff,

VERIFIED COMPLAINT

-against -

BERKSHIRE HATHAWAY INC., CALIFORNIA INSURANCE COMPANY, COMMERCIAL GENERAL INDEMNITY INC., APPLIED UNDERWRITERS, INC., A NEBRASKA CORPORATION, APPLIED RISK SERVICES, INC., A NEBRASKA CORPORATION, APPLIED RISK SERVICES OF NEW YORK, INC., A NEW YORK CORPORATION, ARS INSURANCE AGENCY, INC., NORTH AMERICAN CASUALTY COMPANY, A NEBRASKA CORPORATION, CONTINENTAL INDEMNITY COMPANY, AN IOWA CORPORATION and APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC., AN IOWA CORPORATION

Defendants.

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Plaintiff, Breakaway Courier Corporation d/b/a Breakaway Courier Systems ("Breakaway") by and through its undersigned counsel, Dunnington Bartholow & Miller LLP, as and for its Verified Complaint against Defendants, alleges as follows:

PRELIMINARY STATEMENT

Breakaway is a New York City based company founded in 1988 with roughly three hundred employees that attempted to purchase legally-required workers' compensation insurance

from Defendants. Instead, Breakaway became the victim of Defendants' illegal and fraudulent scheme to steal insurance premiums and to expose Breakaway and its injured workers to unlimited risk.

In violation of multiple provisions of New York Insurance Law, Defendants developed a complex scheme, targeted at New York consumers, to cause an unlicensed foreign insurance company to divert insurance premiums to yet another entity unlicensed by New York State and to unlawfully enrich themselves by siphoning those premiums off to defendant Berkshire Hathaway, its principals and its affiliates through a web of under-collateralized shell companies described in relevant part below (the "Berkshire Hathaway Group"). On June 20, 2016, the scheme was declared illegal and void by the California Department of Insurance in *Matter of Shasta Linen Supply, Inc.* (AHB-WCA-14-31) ("Shasta").[1]

Defendants' fraudulent scheme is essentially a reverse Ponzi scheme. Defendants promise New York insureds such as Breakaway (1) discounted workers' compensation insurance; (2) a share in underwriting profits from workers' compensation insurance policies; (3) rewards for low incurred losses. Instead, the unsuspecting victims have signed a "Reinsurance Participation Agreement" ("RPA") - a complex derivative instrument that shifts all risk of losses from worker injuries back onto the insureds. Unlike the publicly-filed, facially-valid workers' compensation insurance policies, the RPAs are strictly-prohibited side agreements that materially alter the terms of the workers' compensation insurance policy. Unlike a Ponzi scheme where early victims are paid with the investments of others, Berkshire Hathaway's reverse Ponzi scheme requires insureds to cover each other's losses. During this time, victims are led to believe that their "capital" is being paid into "protected cells" which will eventually be returned

[1] Attached hereto as Exhibit "E".

to them. Instead, Berkshire Hathaway illegally siphons off premiums through an unlicensed, unregistered and undercollateralized Hawaiian entity, leaving New York employers and injured workers without the funds that New York State requires to be available to cover losses due to worker injuries.

Workers' compensation insurance in New York is highly regulated. New York law requires that insurers acquire "guaranteed-cost insurance" to protect injured workers. Over the last 100 years, actuaries have developed standards to predict how many injuries will be suffered by each type of worker with reasonable certainty. Actuaries generally calculate overall losses due to workplace injuries at 70% of each premium dollar collected. New York regulators require that licensed New York insurers collect and preserve enough premiums to cover anticipated losses. As explained below, because Defendants' illegal premium rates are calculated based on a lowball loss ratio, New York insureds will shortly be hit with crippling claims for losses and have no collateral reserved to protect injured workers.

By side-stepping New York regulations, Defendants have violated New York law and placed New York employers, injured workers and ultimately New York taxpayers at risk by causing employers such as Breakaway to enter into the RPA - an illegal, complex derivative instrument analogous to what is known on Wall Street as a "total return swap". As injured New York workers make claims, Defendants use the RPA to hit New York insureds with huge, illegal premium bills – the functional equivalent of a "margin call". As *Shasta* explains, this illegal scheme was concocted with the express goal of avoiding insurance licensing laws of the various states, including New York. Defendants' scheme relies on withholding information from state regulators. The scheme has indeed put all of New York's taxpayers at risk. Regulators in California, Vermont and Wisconsin have all condemned this scheme as illegal.

Defendants have also concentrated risk by having affiliated entities cede risk to each other in a collusive manner, known as "shadow insurance". In 2013, New York's Department of Financial Services issued a scathing report attacking similar "shadow insurance" schemes and describing how such schemes put New York taxpayers at massive risk.

Plaintiff Breakaway is a victim of this illegal nationwide scheme. Breakaway is a bicycle courier service operating mainly in Manhattan. Breakaway was induced, to sign a "Profit Sharing" "Reinsurance Participation Agreement" ("RPA") pursuant to which Defendants promised that Breakaway's premiums would be held in a "protected cell" and that Breakaway would participate in the "underwriting results" of its workers' compensation insurance. Unless Breakaway signed the RPA, it would not receive a workers compensation insurance policy.

The RPA and the proposal that accompanied it promised Breakaway that its rates for workers' compensation insurance would initially be lower than those rates required by New York's regulators for guaranteed cost workers' compensation insurance policies pursuant to rates filed by each licensed insurer. Under New York law, charging lower rates than the rates filed by a licensed insurance company with New York State is illegal. Breakaway did not know and had no reason to believe that the RPA was illegal. Under the pressure of boiler-room type tactics described in *Shasta*, Breakaway signed the RPA. As explained in *Shasta*, in violation of New York law, the RPA contained an illegal and severe penalty for termination or non-renewal. Instead of a one-year guaranteed cost policy authorized by New York law, the RPA illegally required Breakaway to make a three-year commitment to purchase workers compensation insurance through Berkshire Hathaway.

Rather than collecting Breakaway premiums through a New York-licensed entity, the

Berkshire Hathaway Group caused an unlicensed Nebraska Corporation to collect Breakaway's premiums, ostensibly for deposit into another unlicensed Berkshire Hathaway-owned British Virgin Islands "protected cell". The money literally disappeared—illegally swept into an unlicensed Hawaiian entity—and has not been accounted for, despite due demand.

Not only is it illegal to sell reinsurance to an insured in New York, it is also illegal to rebate underwriting proceeds to an insured or to make misleading statements in connection with the sale of insurance in New York. The Donnelly Act provides treble damages and forbids persons with market power in the reinsurance market such as the Berkshire Hathaway Group to tie illegal investment products such as the RPA (the tied product) or payroll processing services (another tied product) to statutorily-mandated insurance (the tying product). Because Breakaway was damaged by Berkshire Hathaway's illegal tying scheme which is an unlawful restraint of trade, treble damages are warranted.

But according to actuarial calculations, Breakaway's damages are just beginning and thus Breakaway seeks urgent relief from the Court. In New York, injured workers file claims long after the coverage period has ended. Despite its misleading and contradictory language promising "profits" and "insurance" and a "protected cell" – the RPA has been interpreted by Berkshire Hathaway as placing ALL of the risk of loss from claims back onto the insured. The RPA's terms (as interpreted by Berkshire Hathaway) provide that insureds such as Breakaway will be—and indeed have been—billed by the Berkshire Hathaway Group for every single loss their injured employees suffer, compounded by a multiplier.

As explained below, this scheme is a fraudulent broadside attack on the safety and solvency of New York's workers compensation insurance scheme. Because the RPA, through

misleading, contradictory and opaque language, shifts *all* of the risk of loss back onto the insured employer, usually targeting small businesses like Breakaway lacking in commercial sophistication, it creates a massive systemic risk of undercollateralization that threatens all New Yorkers.

Breakaway urgently requires this Court's protection from the risk to which it has been exposed. New York Insurance Law Sec. 1213(c) requires that unlicensed insurers operating in New York or collecting premiums from New York insureds post a bond prior to being permitted to assert defenses or claims in a New York State Court. Breakaway requests such a bond. In determining the reasonable amount of a bond to protect Breakaway's interests, a bond in the amount of value at risk ("VaR") which Berkshire Hathaway's RPA seeks to impose upon Breakaway is a fair measure of the required bond. As detailed below, this Court should set a bond of not less than $6,061,659.02 as a condition of the various members of the Berkshire Hathaway Group appearing in or defending this action.

A. Background

Workers Compensation Insurance – New York Law and Public Policy

1. The Triangle Shirtwaist Factory fire in Manhattan, New York City on March 25, 1911 was the deadliest industrial disaster in the history of the city, and one of the deadliest in US history. It was the greatest workplace disaster in New York until the attack on the World Trade Center on September 11.

2. The fire galvanized labor and led to many reforms in safety, health, and labor laws. It helped lead to the workers' compensation insurance system here in New York and across the country. New York enacted a no–fault workers' compensation system for nearly a century.

Before enactment of the Workers' Compensation Law, when a worker was injured, the only remedy was to sue in the courts. When that happened, the employer could always raise an objection that the worker had assumed the risk of employment, or the injury was caused by the worker's negligence or that of another worker. The “no fault” system eliminated such employer defenses.

3. Today, New York’s Workers' Compensation Law guarantees both medical care and weekly cash benefits to workers who are injured on the job. Weekly cash benefits and medical care are paid by the employer's insurance carrier, as directed by the Workers' Compensation Board. Employers pay for this insurance, and may not require the employee to contribute to the cost of compensation.

4. Importantly, there is no “cap” on liability for New York employers. If a worker reports an injury even a decade after employment, the employer is liable.

5. The paramount interest of New York in worker and workplace safety and in ensuring funds to pay for injuries has led New York to enact and maintain one of the toughest insurance laws in the nation to ensure that insurance companies operating in New York are well-collateralized.

6. When insurance companies fail, the taxpayers of New York are liable for any shortfalls by and through the New York State Insurance Fund.

7. Thus the protections of the Insurance Law of the State of New York embody a fundamental public policy choice of the people of the State of New York to adequately protect workers and closely monitor the activities of insurers.

B. <u>Parties And Jurisdiction</u>

8. Breakaway is a domestic corporation with a principal place of business at 444 West 36th Street, New York.

9. Breakaway is a New York City-based company that has been in business for more than twenty (20) years and provides courier and delivery services as well as warehousing, logistics and temporary office support services.

10. Upon information and belief, Berkshire Hathaway Inc. is a Delaware corporation with a primary place of business located at 3555 Farnam Street, Omaha, NE 68131.

11. Upon information and belief, Defendant Applied Underwriters, Inc. (herein referred to as "Applied Underwriters") is a Nebraska corporation located at 10805 Old Mill Road, Omaha, NE 68154, doing business in New York as an underwriter, issuer, reinsurer, claims handler and administrator of workers' compensation insurance policies.

12. Upon information and belief, Defendant Applied Risk Services, Inc. (herein referred to as "ARS") is a Nebraska corporation located at 10805 Old Mill Road, Omaha, NE 68154.

13. Upon information and belief, ARS is a member of Berkshire Hathaway Group, and is an affiliate and/or parent company to Co-Defendants' Applied Underwriters Captive Risk Assurance Company, Inc. ("AUCRA"), North American Casualty Company, Applied Risk Services of New York, Inc., Applied Underwriters, Inc. and Continental Indemnity Company (collectively "Berkshire Hathaway Group").

14. ARS INSURANCE AGENCY, INC. is a Nebraska Corporation registered with the New York State Department of Financial Services License Number 937411 with a business

address of 10805 Old Mill Road, Omaha, NB 68154 as the property and casualty agent of Continental Indemnity Company and California Insurance Company.

15. Upon information and belief, defendant Applied Risk Services of New York, Inc. ("ARSNY") is a domestic business corporation with an authorized agent located at 340 Broadway, Saratoga Springs, New York 12866, and at all times referenced herein was, and is, AUCRA's agent in New York serving as AUCRA's billing and auditing agent. Accordingly, ARSNY is responsible for paying any sums due to AUCRA's participants in New York State. According to New York Department of State records, ARSNY's Chief Executive Officer, Steven Menzies, and its principal executive office are located at 10805 Old Mill Road, Omaha, NE, 68154.

16. Upon information and belief, ARSNY is a third party administrator licensed by the New York State Workers' Compensation Board with offices located at 470 Park Avenue South, 12th Floor, New York, New York 10016. www.wcb.ny.gov/content/main/reps/tpalisting-sec50_3bd.pdf

17. Upon information and belief, Defendant California Insurance Company is a California-domiciled corporation with its principal place of business located at 10805 Old Mill Road, Omaha, Nebraska 68154.

18. Upon information and belief, Defendant Applied Underwriters Captive Risk Assurance Company, Inc. (AUCRA, as defined above) is a company organized under the laws of Iowa, with a principal place of business and headquarters located at 10805 Old Mill Road, Omaha, NE 68154, and at all times referenced herein was, and is, doing business in the State of New York as a reinsurer which issues illegal reinsurance policies of insurance and/or reinsurance

agreements, including those which pertain to workers' compensation.

19. According to a December 2013 California Insurance Department Examiner's Report, AUCRA is owned by a series of holding companies that are ultimately owned by Berkshire Hathaway Inc. (owned 34.41% by Warren Buffett). Commercial General Indemnity, Inc. ("CGI") and Applied Group Insurance Holdings, Inc. are Hawaii captives owned by AU Holding Company Inc. (Delaware) which is in turn owned by Sid Ferenc (holding a 7.5% interest), Steven Menzies (holding a 11.5% interest) and Berkshire Hathaway (holding an 81% interest), which in turn owns AUCRA and Continental. These holding companies receive portions of premiums paid by New York insureds, such as Breakaway.

20. Commercial General Indemnity, Inc. ("CGI") is an unlicensed, unrated Hawaii captive insurance entity located at c/o AON Insurance Managers (USA) Inc., 201 Merchant Street, Honolulu, Hawaii 96813 registration number 113368D1.

21. Upon information and belief, Marc Tract, a partner in Katten Muchin Rosenman LLP, 575 Madison Avenue, New York, New York 10022 serves on the Board of Directors of AUCRA and in that role participates in AUCRA's governance and directs AUCRA's activities from his office located in the State, County and City of New York.

22. Upon information and belief, Defendant Continental Indemnity Company ("Continental") is a company organized under the laws of Iowa, with a principal place of business and headquarters located at 10805 Old Mill Road, Omaha, NE 68154, and at all times referenced herein was doing business in the State of New York as an insurance carrier issuing policies of insurance including workers' compensation.

23. Upon information and belief, defendant North American Casualty Co. d/b/a North

American Casualty Agency ("NAC") is a Nebraska corporation licensed to do business in the State of New York. Upon information and belief, its executive office is located at 10805 Old Mill Road, Omaha, NE 68154.

24. According to a September 11, 2012 report of the Insurance Commissioner of Pennsylvania, Warren Buffet is the sole ultimate controlling person of NACC, which is 100% owned by Applied Underwriters, Inc.

25. At all times herein mentioned, Defendants were and are "doing business" in the State of New York as defined in N.Y. Ins. Law § 1101(b).

26. At all times herein mentioned, Defendants were engaged in the business of insurance in the State of New York and/or transacted business in the State of New York and/or committed tortious acts directed at and having an effect in the State of New York and are thus subject to general and specific jurisdiction in the State of New York.

27. At all times herein mentioned, Defendants were coconspirators in an illegal scheme to defraud Breakaway of insurance premiums and insurance coverage and were the agents, servants, and employees of the other named Defendants, and were acting within the scope of their agency and employment, and with the knowledge and consent of their principal and employer. As described in *Shasta* at 10-11, the corporate officers of the various Berkshire Hathaway entities are almost identical in each of the affiliated entities, with Warren Buffet having ultimate control.[2]

C. Relevant Provisions Of The New York State Insurance Law

[2] Exhibit "E" In Re Application of North American Casualty Co. in Support of the Request for Approval to Acquire Control of Pennsylvania General Insurance Company dated September 11, 2012.

28. New York Insurance Law §2102 requires insurance producers, adjusters, brokers and reinsurance intermediaries to be licensed and forbids unlicensed actors to collect fees for certain insurance-related activities.

29. New York Insurance law §2117 forbids any person, firm, association or corporation to act as agent for, to assist in any way in effectuating an insurance contract or to act as a broker for an unlicensed insurer.

30. New York Insurance Law §1101 defines "insurance contract" as "any agreement or other transaction whereby one party, the "insurer", is obligated to confer benefit of pecuniary value upon another party, the "insured" or "beneficiary", dependent upon the happening of a fortuitous event in which the insured or beneficiary has, or is expected to have at the time of such happening, a material interest which will be adversely affected by the happening of such event.

31. New York Insurance Law §1101 defines doing business in New York State as "making, or proposing to make, as insurer, any insurance contract, including either issuance or delivery of a policy or contract of insurance to a resident of this state or to any firm, association, or corporation authorized to do business herein, or solicitation of applications for any such policies or contracts."

32. New York Insurance Law §2101(k) states that an "insurance producer" means an insurance agent, title insurance agent, insurance broker, reinsurance intermediary, excess lines broker, or any other person required to be licensed under the laws of this state to sell, solicit or negotiate insurance.

33. On January 1, 2011 an Emergency Regulation came into effect in New York State requiring insurance producers to disclose compensation.

11NYCRR 30.3 ("Section 30.3"):

EMERGENCY REGULATION

(a) […] an insurance producer selling an insurance contract shall disclose the following information to the purchaser orally or in a prominent writing at or prior to the time of application for the insurance contract:

(1) a description of the role of the insurance producer in the sale;
(2) whether the insurance producer will receive compensation from the selling insurer or other third party based in whole or in part on the insurance contract the producer sells;
(3) that the compensation paid to the insurance producer may vary depending on a number of factors, including (if applicable) the insurance contract and the insurer that the purchaser selects, the volume of business the producer provides to the insurer or the profitability of the insurance contracts that the producer provides to the insurer; and
(4) that the purchaser may obtain information about the compensation expected to be received by the producer based in whole or in part on the sale, and the compensation expected to be received based in whole or in part on any alternative quotes presented by the producer, by requesting such information from the producer.

(b) If the purchaser requests more information about the producer's compensation prior to the issuance of the insurance contract, the producer shall disclose the following information to the purchaser in a prominent writing at or prior to the issuance of the insurance contract, except that if time is of the essence to issue the insurance contract, then within five business days:

(1) a description of the nature, amount and source of any compensation to be received by the producer or any parent, subsidiary or affiliate based in whole or in part on the sale;

(2) a description of any alternative quotes presented by the producer, including the coverage, premium and compensation that the insurance producer or any parent, subsidiary or affiliate would have received based in whole or in part on the sale of any such alternative coverage;
(3) a description of any material ownership interest the insurance producer or any parent, subsidiary or affiliate has in the insurer issuing the insurance contract or any parent, subsidiary or affiliate;
(4) a description of any material ownership interest the insurer issuing the insurance contract or any parent, subsidiary or affiliates has in the insurance producer or any parent, subsidiary or affiliate; and
(5) a statement whether the insurance producer is prohibited by law from altering the amount of compensation received from the insurer based in whole or in part on the sale.

(c) If the purchaser requests more information about the producer's compensation after issuance of the insurance contract but less than 30 days after issuance, then the insurance producer shall disclose to the purchaser in a prominent writing the information required by subdivision (b) of this section within five business days.

(d) If the nature, amount or value of any compensation to be disclosed by the insurance producer is not known at the time of the disclosure required by subdivision (b) or (c) of this section, then the insurance producer shall include in the disclosure:

(1) a description of the circumstances that may determine the receipt and amount or value of such compensation; and
(2) a reasonable estimate of the amount or value, which may be stated as a range of amounts or values.

(e) If the disclosure required by subdivision (a) of this section is provided orally, then the insurance producer shall also disclose the information required by subdivision (a) of this section to the purchaser in a prominent writing no later than the issuance of the insurance contract.

(f) An insurance producer shall not make statements to a purchaser contradicting the disclosures required by this section or any other misleading or knowingly inaccurate statements about the role of the insurance producer in the sale or compensation.

34. New York Insurance Law §2324 forbids an insurer to rebate premiums to an insured or to offer any valuable consideration or benefit as an inducement to enter into an insurance contract. The relevant provisions read as follows:

> 2324 (a) No authorized insurer, no licensed insurance agent, no licensed insurance broker, and no employee or other representative of any such insurer, agent or broker shall make, procure or negotiate any contract of insurance other than as plainly expressed in the policy or other written contract issued or to be issued as evidence thereof, or shall directly or indirectly, by giving or sharing a commission or in any manner whatsoever, pay or allow or offer to pay or allow to the insured or to any employee of the insured, either as an inducement to the making of insurance or after insurance has been effected, any rebate from the premium which is specified in the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or shall give or offer to give any valuable consideration or inducement of any kind, directly or indirectly, which is not specified in such policy or contract, other than any valuable consideration, including but not limited to merchandise or periodical subscriptions, not exceeding twenty-five dollars in value, or shall give, sell or purchase, or offer to give, sell or purchase, as an inducement to the making of such insurance or in connection therewith, any stock, bond or other securities or any dividends or profits accrued thereon, nor shall the insured, his agent or representative knowingly receive directly or indirectly, any such rebate or special favor or advantage,[…..].
>
> 2324 (b) Within the meaning of subsection (a) hereof, the sharing of a commission with the insured shall be deemed to include any case in which a licensed insurance agent or a licensed insurance broker which is a subsidiary corporation of, or a corporation affiliated with, any corporation insured,

received commissions for the negotiation or procurement of any policy or contract of insurance for the insured.

35. It is unlawful in New York for an insurer to issue a workers' compensation policy that varies from the policy language, endorsements and rates filed with the New York Compensation Insurance Rating Board ("NYCIRB"). New York Insurance Law §§ 2313, 2347; *see also* http://go.nycirb.org/dl/manwcel/wcel_main.cfm (a manual containing NYCIRB rules and procedures for filing forms and rates and penalties for failure to do so).

36. New York Insurance Law § 1213(c) requires that unauthorized foreign or alien insurers obtain a license or post security before appearing in a New York court. Therefore, to the extent any of Defendants are unauthorized, Breakaway requests that the Court set an appropriate bond prior to the filing of any pleading.

37. For the purposes of Insurance Law 1213(c), a Motion to Dismiss is a "pleading". *Levin v. Intercontinental Cas. Ins. Co.*, 268 A.D.2d 205, 206, 700 N.Y.S.2d 683 (1st Dept. 2000) *aff'd* 95 N.Y.2d 523, 742 N.E.2d 109 (2000).

38. Workers' compensation insurance is required in New York pursuant to the Workers' Compensation Act of 1914 codified as a New York Workers' Compensation Law.

39. Workers' compensation insurance may be purchased from New York State via the New York State Insurance Fund or through authorized private insurers.

40. New York State requires approval of workers' compensation insurance rates. Rates are computed based on the loss history for each type of job according to actuarial tables. Policies and endorsements must be filed with the New York Compensation Insurance Rating Board ("NYCIRB"). *See* New York Workers' Compensation and Employers Liability Manual

available at http://go.nycirb.org/dl/manwcel/wcel_main.cfm.

41. New York Insurance Law § 2314 provides that "[n]o authorized insurer shall, and no licensed insurance agent, no title insurance agent, no employee or other representative of an authorized insurer, and no licensed insurance broker shall knowingly, charge or demand a rate or receive a premium that departs from the rates, rating plans, classifications, schedules, rules and standards in effect on behalf of the insurer, or shall issue or make any policy or contract involving a violation thereof."

D. Facts

a. Breakaway Seeks Workers' Compensation Insurance And Enters Into The Fraudulent And Illegal Request To Bind

42. In 2009 Breakaway sought to purchase workers' compensation insurance.

43. In 2009, Breakaway was presented with a recommendation by its broker that it purchase "Premier Exclusive" workers' compensation insurance through Applied.

44. Consistent with Berkshire Hathaway's representations that Applied's services provided risk-reduction and profit sharing services, Breakaway was presented with sales materials describing a profit-sharing plan that would save Breakaway money on workers compensation insurance premiums with "maximum" and "minimum" premiums that would, at the same time, permit Breakaway to participate in underwriting profits.

45. According to the 2013 annual report of Berkshire Hathaway:

> Applied Underwriters, Inc. ("Applied") is a leading provider of payroll and insurance services to small and mid-sized employers. Applied, through its subsidiaries principally markets SolutionOne®, a product that bundles workers' compensation and other employment related insurance coverages and business services into a seamless package that is designed to reduce the risks and remove the burden of administrative and regulatory requirements

> faced by small to mid-sized employers. Applied also markets EquityComp® which is a workers' compensation–only product targeted to medium sized employers with a profit sharing component. (http://www.berkshirehathaway.com/2013ar/201310-K.pdf)

46. However, in order to purchase workers' compensation insurance from Applied Underwriters, Breakaway was required by Berkshire Hathaway Group to first enter into a coercive and illegal "Request to Bind Coverages & Services" that required Breakaway to waive rights guaranteed by New York law, such as the right to choose a deductible for a guaranteed cost workers' compensation plan. The "Request to Bind" also required that Breakaway execute a RPA with AUCRA. Attached hereto as **Exhibit A** is a true copy of the Request to Bind Coverage & Services.

47. Rather than provide the workers' compensation insurance Breakaway requested and reasonably was led to believe it had purchased, Defendants induced Breakaway to enter into an illegal "reinsurance" scheme styled as a "Profit Sharing Plan" under the brand name "Premier Exclusive" to share in "underwriting results."

48. According to the Request to Bind, the Premier Exclusive plan required a minimum commitment to purchase workers' compensation insurance of three (3) years.

49. The Request to Bind required, as a condition of participating in a "Profit Sharing Plan" in which it would be issued workers' compensation insurance, that Breakaway waive its right to select a deductible as guaranteed by New York law in the case of guaranteed cost workers' compensation insurance policies.

50. The Request to Bind's requirement of a three-year commitment is illegal and void under New York law because it purports to modify the conditions of a workers' compensation

policy and, upon information and belief, the terms of the Request to Bind have not been disclosed to NYCIRB.

51. The Request to Bind is fraudulent and misleading because Breakaway was induced to purchase Premier Exclusive based upon the representation that Breakaway would become part of a plan to share underwriting profits related to workers' compensation insurance premiums in violation of the Insurance Law.

52. In fact, by executing the Request to Bind, Breakaway was induced to enter into an illegal "reinsurance" scheme through which insurance premiums were siphoned off through AUCRA, an entity that is unlicensed to engage in the business of insurance in New York, and transferred outside the State of New York to AUCRA affiliates.

53. Breakaway does not know the location of its premium payments and the amounts being held by or under the control of AUCRA or its affiliates have not been accounted for despite demand.

b. Breakaway Is Required To Enter Into The Illegal And Void RPA

54. The aforementioned "reinsurance" scheme was presented in the form of the RPA to Breakaway as an "investment" that would permit Breakaway to pay lower insurance premiums as well as save and recoup money by receiving premium rebates if there was an underwriting profit. A true copy of the 2009 RPA is annexed hereto as **Exhibit B.**

55. As set forth in the July 2009 Plan Analysis, the premium quote estimated, for a three-year period, a "Projected 3-year Plan Maximum Cost" of $403,161 and a "Projected 3-year Plan Minimum Cost" of $105,442 (or $134,387 annual maximum and $35,147 annual minimum). Attached hereto as **Exhibit C** is a true copy of a July 1, 2009 Applied Underwriters

Premier Exclusive "Plan Analysis" issued to Breakaway. Attached hereto as **Exhibit D** is a true copy of a Plan Analysis issued to Breakaway for January 2012 to April 2012.

56. Upon information and belief, Berkshire Hathaway Group knew or should have known that these maximums and minimums were vastly understated and fraudulently used these low figures to lure Breakaway into executing the RPA with the intention of charging a much higher rate that could not be determined by Breakaway based upon the documents it was provided by Defendants.

c. The Berkshire Hathaway Group's Reinsurance Scheme Is Declared To Be Illegal

57. On June 20, 2016, the Insurance Commissioner of the State of California affirmed a decision in *Shasta Linen Supply, Inc. v. California Insurance Company* File AHB-WCA-14-13 concluding that Berkshire Hathaway Group's RPA is an illegal scheme designed to avoid state regulators and directing Applied to return funds to plaintiff Shasta Linen Supply, Inc. A copy of this decision is annexed hereto as **Exhibit E.**

58. Perhaps even more alarming than the California Department of Insurance's *Shasta* decision, a 2013 Iowa Insurance Examiner's report of AUCRA appears to indicate that AUCRA is not putting *any* client insurance premiums into "protected cells". Instead, AUCRA pays one of its affiliates an excessive and highly dubious "reinsurance" fee in excess of $120,000,000 for 2013 alone. Attached hereto as **Exhibit F** is a true and correct copy of the 2013 Iowa Insurance Examiner's Examination Report of Applied Underwriters Captive Risk Assurance Company, Inc. As set forth therein, AUCRA commenced operations in Iowa on 2011 and the 2013 Examination Report is the first report issued concerning AUCRA.

59. The 2013 Iowa report suggests that the Hawaii captive CGI gets the funds through a collusive "excess loss agreement" that siphons off the very funds that Breakaway was induced

to believe would be returned as "profit" to Breakaway.

60. Upon information and belief, in this way CGI "sweeps" all monies left in AUCRA (which should rightfully have been held in Breakaway's "protected cell") out of CGI and upon information and belief pays such monies to the shareholders of Berkshire Hathaway

d. The Berkshire Hathaway Group's Illegal Actions Harm Breakaway

61. Following execution of the RPA, workers' compensation policies were issued to Breakaway by Continental Indemnity Company between 2009 and 2013. A true copy of the 2010-2011 policy is attached hereto as **Exhibit G.** A true copy of the 2011-2012 policy is attached hereto as **Exhibit H.** A true copy of the 2012-2013 policy is attached hereto as **Exhibit I.** A true copy of the 2013-2014 policy is attached hereto as **Exhibit J.**

62. Applied billed Breakaway, and Breakaway paid workers' compensation premiums in the amount of $863,048.74 during the Policy Period.

63. As explained below, the RPA's terms were so obscure as to be unintelligible and AUCRA has interpreted the RPA's in such a manner to shift unlimited liability back onto Breakaway while retaining the funds that Breakaway believed were deposited in a protected cell as an investment. In sum, Breakaway never received the workers' compensation it sought but instead purchased an alleged investment vehicle in the form of reinsurance that reflects all risk and unlimited liability back on to the insured. Moreover, Breakaway paid more in premiums than authorized by law.

64. It is illegal to sell reinsurance to a non-insurer in New York. Despite this, defendant AUCRA—by an illegal reinsurance scheme—impermissibly sells and delivers RPAs within New York that purport to amend the terms of publicly filed and facially valid workers' compensation employment insurance policies to non-insurers, such as Breakaway.

65. At all times, AUCRA represented, and Breakaway reasonably believed that it was paying premiums for workers' compensation insurance.

66. For example, on April 16, 2012, AUCRA demanded, and Breakaway executed a promissory note to AUCRA in the amount of $110,348.40 for amounts due under the RPA. A true copy of the promissory note is annexed hereto as **Exhibit K**.

67. The promissory note states as follows at paragraph 7:

> Cancellation of Workers' Compensation Policy. Maker acknowledges that the amount due under this Note represents unpaid workers' compensation premium. As a result, in the Event of a Default under Paragraph 4(a), Holder may cause any workers' compensation policy issued to Maker to be cancelled in accordance with the insurance laws of the state in which the Maker's principal place of business is located. (**Ex. K** emphasis supplied)

68. As set forth in the Request to Bind Coverage and Services, issuance of the workers' compensation insurance policy from an affiliate of Berkshire Hathaway Group is contingent upon the applicant's execution of a RPA issued by AUCRA. (*See* **Exhibit A**).

69. Breakaway executed an RPA effective as of July 1, 2009. The RPA is also executed by:

> APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC., SOLELY FOR AND ON BEHALF OF PROTECTED CELL NO. 816280

(*See* **Exhibit B**).

70. Thus, AUCRA never executed the RPA.

71. Thereafter, AUCRA caused Continental to issue workers' compensation insurance policies to Breakaway for the years 2009-2012 (the "Policies").

72. During the Policy Period, July 1, 2009 to November 6, 2013, Breakaway paid $863,048.74 to Berkshire Hathaway Group for workers compensation premiums.

73. Upon information and belief, Breakaway paid far more in workers' compensation premiums than permitted by New York law.

74. The Premier Exclusive Policies expired on June 30, 2012.

75. In or about early June of 2012, Lloyd Ferenc of Applied Underwriters offered Breakaway two renewal options: a yearly renewal of the existing plan or a three-year renewal called "Solution One."

76. The Solution One option required Breakaway to use Berkshire Hathaway Group's payroll management service as a condition for Applied extending a discount on workers' compensation policy premiums and guaranteeing three years of workers' compensation policy renewals.

77. In New York, requiring an insured to purchase payroll management services in exchange for discounted workers' compensation insurance is illegal and also constitutes "tying" in violation of New York's antitrust laws.

78. Following the expiration of the Premier Exclusive Policies, Breakaway purchased Solution One for a three year period.

79. As a condition of receiving workers' compensation policies under the Solution One plan, however, Breakaway was required to execute another RPA in 2012. The RPA is also signed by:

> APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC., SOLELY FOR AND ON BEHALF OF PROTECTED CELL NO. 816280

A true copy of the 2012 RPA is annexed hereto as **Exhibit L.**

80. Continental issued workers compensation policies under Solution One plan for the years 2012-2014 (the "Solution One Policies").

81. The 2012 RPA was executed as of July 1, 2012 with AUCRA BVI.

82. According to a report of the California Department of Insurance, AUCRA BVI ceased to exist on December 9, 2011.

83. Thus, Breakaway signed an agreement with a non-existent entity, rendering the RPA illegal, void and unenforceable as against Breakaway.

84. Breakaway was informed by Ferenc that the maximum rate to be charged as premium would be 11.89%. However, Breakaway was charged premium rates in excess of that amount as high as 17.385%.

85. As shown in the chart below, Applied's projections of the cost of the plan

APPLIED UNDERWRITERS

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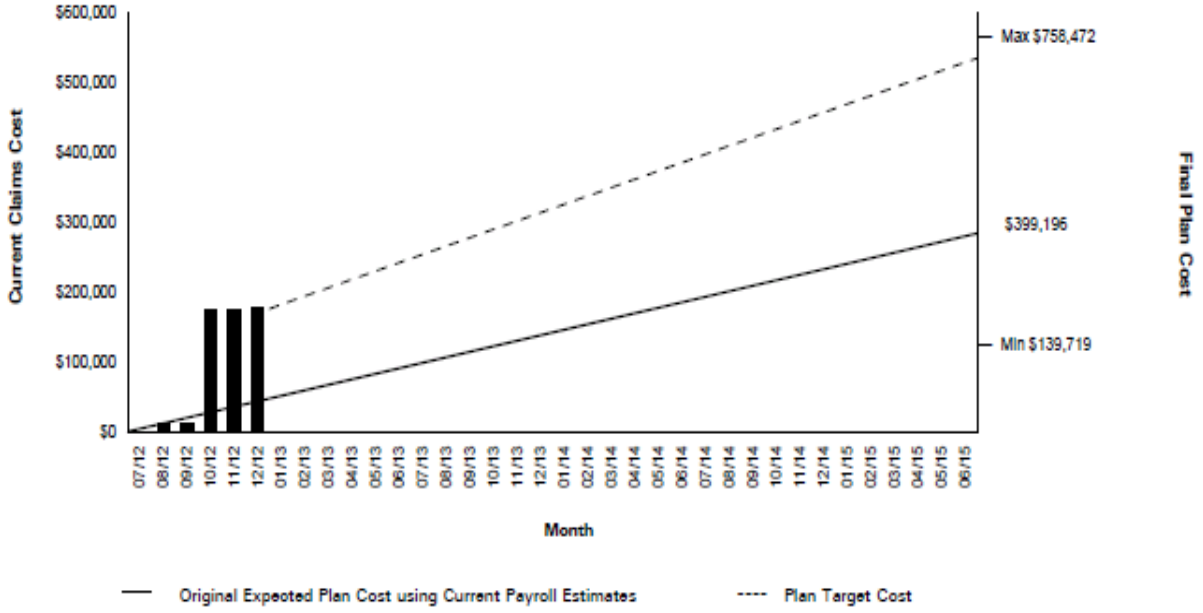
Account No. 816280
Plan Term 07/01/12 to 06/30/15
For the Period 01/01/13 to 01/31/13

Plan Overview

Plan Target Cost



You can reasonably aim for your Plan Target Cost if you continue to work to provide a safe working environment and cooperate with us in closing your claims quickly and cost effectively.

skyrocketed in early 2013 from a max of $399,196 for the entire three years to a max of $756,472.

86. Applied claims that it utilizes loss pick containment factors ("LPCF") when a claim is made against a policy in order to calculate reserves to be charged to the insured.

87. These LPCFs are nowhere defined or limited in the Premier Exclusive documents.

88. Upon information and belief, Applied LPCFs are completely arbitrary and not reasonably related to the value of a given claim.

89. Upon information and belief, Applied willfully fails to disclose its basis for calculating LPCFs to extract higher payments from its clients.

90. Thus, the "max" and "min" depicted in the above chart are completely arbitrary and self-serving fictions invented by Applied to enrich itself.

91. Upon information and belief, Applied manipulates LPCFs to artificially inflate premiums based on small claims and losses. In doing so, Berkshire Hathaway Group caused injury to Breakaway and others similarly situated who cannot operate their businesses legally without maintaining workers' compensation policies or risk suffering other damage (e.g. false credit reports) should they not comply with Berkshire Hathaway Group's unfounded demands for inflated premiums.

92. By applying fictional and self-serving LPCFs, Berkshire Hathaway Group enriches itself by rampantly overcharging its clients, including Breakaway.

93. During the first nine (9) months following its entry into the Solution One plan, Breakaway was charged $163,410 in premium even though Breakaway had previously been informed that the maximum premium that could be charged was $104,750. This represents an

overcharge of $58,660.

94. Upon information, despite representations to the contrary in sales materials presented to Breakaway prior to Breakaway executing the RPA, there is no actual fixed maximum premium under the Solution One plan because every time a claim is made, the premium amount, according to Berkshire Hathaway Group's apparent practice, can go up in excess of Breakaway's actual liabilities in the case of a worker being injured in New York State.

95. Breakaway repeatedly sought clarification from Applied concerning the increase in its premium charges. However, Applied was unable to provide a reasonable explanation as to why Breakaway's premium charges exceeded the amount stated in the Plan Analysis' and other documents.

96. Nor, despite repeated demands, has Berkshire Hathaway Group ever accounted for monies paid into the "protected cell" or provided an explanation of its fees.

97. As set forth above, New York law requires that fees and commissions be disclosed to purchasers of insurance upon request.

98. As set forth above, under New York law, reinsurance agreements (or "treaties") are lawful only between insurance companies.

99. At no time did Defendants inform Breakaway that it was illegal for Breakaway to purchase reinsurance.

100. At no time did Defendants inform Breakaway that AUCRA is not licensed to issue insurance or reinsurance in the State of New York.

101. At no time did Defendants inform Breakaway that New York Insurance Law prohibits charging insured parties insurance rates based on forms not approved by NYCIRB.

102. At no time did Defendants inform Breakaway that New York Insurance Law § 2314 prohibits charging insured rates that are not authorized.

103. Upon information and belief, neither the Request to Bind Services nor RPAs have been approved by or filed with New York State.

104. Upon information and belief, the Request to Bind Services and RPAs are not filed in order for Berkshire Hathaway Group to avoid regulation by DFS and New York State generally.

105. Accordingly, because the Request to Bind Services and the RPAs have not been filed with New York State they are illegal, void and unenforceable.

106. The Request to Bind Services and the RPAs are illegal and void because they purport to increase the rates charged to Breakaway and to unlawfully transfer all financial risk from worker injuries back to Breakaway in violation of law and public policy.

107. As a matter of law, "insurance" requires the transfer of risk.

108. Because Defendants do not assume any risk of loss in connection with the "reinsurance" scheme, they have not provided insurance to Breakaway despite collecting hundred of thousands of dollars in alleged premium.

109. At all times, Breakaway believed that it was purchasing "insurance" to reduce risk in the event of a worker's injury.

110. Breakaway is not an insurance company.

111. Defendants purport to have sold reinsurance to Breakaway.

112. Upon information and belief, Continental workers' compensation insurance policies were issued to Breakaway between November of 2009 and December of 2013 and, upon

information and belief, such policies are still facially-valid and in full force and effect.

113. However, Applied Underwriters Inc. and AUCRA were not licensed or authorized to sell reinsurance and thus any attempts—as the RPA does—to alter the facially valid Continental terms and rates are illegal, void and unenforceable.

114. The RPAs described above are therefore null, void, illegal and unenforceable.

115. On June 10, 2015, The Workers' Comp Executive reported that Applied's rates filed with the California Insurance Department were completely unrelated to the rates AUCRA charged insureds under its RPA (the "WCE Article"). A true copy of the WCE Article is annexed as **Exhibit M.**

116. The WCE article describes how Patrick Watson, Applied's sales manager who worked with AUCRA for over a decade "testified under oath that he has never participated in and has never heard of anyone else who has been involved in the return of premium or deposits to a client." (WCE article at 9).

117. Accordingly, in addition to the Request to Bind and the RPA's being illegal under New York law, Watson's testimony provides direct evidence that Berkshire Hathaway Group sold Breakaway the RPA knowingly intending to defraud Breakaway.

118. Breakaway has suffered and continues to suffer actual damages caused by the Berkshire Hathaway Group's illegal conduct as set forth above. Among other damages suffered, Berkshire Hathaway Group's conduct has (i) harmed Breakaway's ability to access credit, specifically, causing Citibank to end its credit relationship with Breakaway (ii) increasing the price and making less favorable the terms on which Breakaway has actually accessed credit, including forcing Breakaway to take out a Small Business Administration loan at an additional cost of $100,000 in expenses; (iii) providing inferior payroll management services requiring

Breakaway to allocate staff to correct constant errors by hand and to spend an inordinate amount of time on administrative issues resulting in both expenses and an actual loss of business and potential business; (iv) placed Breakaway at risk of substantial risk of suffering losses from future claims requiring it to expend additional amounts on insurance and other costs; (v) negatively impacted the overall business market value of Breakaway.

119. In light of the foregoing, Breakaway is entitled to compensatory damages, lost profits, disgorgement of fees, consequential damages, special damages and any other damages as may be available under statutory or common law together with an award of interest, costs and fees including reasonable attorneys' fees.

CAUSES OF ACTION

COUNT I

AGAINST BERKSHIRE HATHAWAY GROUP

FRAUD AND VIOLATIONS OF NEW YORK INSURANCE LAW (REGULATING WORKERS COMPENSATION INSURANCE RATES AND ANTIREBATING PROVISIONS) WARRANTING A DECLARATION THAT THE CONTRACT IS ILLEGAL AND VOID

120. Plaintiffs re-allege the foregoing paragraphs as if fully stated herein.

121. CPLR 3001 authorizes the Court to issue a declaratory judgment in connection with a justiciable controversy.

122. A justiciable controversy exists regarding the insurance products provided by Berkshire Hathaway Group.

123. New York Insurance Law Chapter 23 and regulations promulgated by the New York Compensation Insurance Board require that rates charged for Workers' Compensation

insurance policies be filed with and approved by the New York State Department of Insurance. New York Insurance Law §2347; http://go.nycirb.org/dl/manwcel/wcel_main.cfm (manual containing NYCIRB rules and procedures for filing forms and rates and penalties for failure to do so).

124. The RPAs purport to charge rates to Breakaway in amounts in excess of the rates approved by New York State Department of Insurance.

125. Under New York law, insurance agreements that purport to vary workers' compensation rates are illegal and void. *Public Service Mutual Insurance Co. v. Rosebon Realty Co.,* 39 Misc.2d 663, 664, 241 N.Y.S.2d 555, 557 (Civ. Ct. N.Y. Co. 1963) ("insurers are forbidden to charge or receive rates which deviate from those filed with the Superintendent. The filed rates thus have the force of law and any agreement changing or varying such rates would be invalid."); *American Motorists Insurance Co. v. New York Seven-Up Bottling Co.,* 18 A.D.2d 36, 238 N.Y.S.2d 80 (1st Dep't 1963) (where insurance premium rates were properly filed, insurer cannot deviate from those rates); *Stephen Peabody, Jr. & Co., Inc. v. Travelers Insurance Co.,* 240 N.Y. 511, 148 N.E. 661 (1925) (holding that rates for workers' compensation premiums must be fixed by the Superintendent of Insurance and finding it "impossible for the [insurer] to fix a rate ... which did not have the approval of the State authorities.").

126. Because the RPAs purport to deviate from the rates approved by New York State and transfer risk of loss for injured worker claims back to Breakaway, the RPAs violate numerous provisions of the New York Insurance Law, are illegal, null, void and unenforceable.

127. Accordingly, Plaintiff prays for a declaration that the RPAs violate the New York State Insurance Law, are illegal, against public policy and are therefore void pursuant to CPLR 3001 as well as an order directing that Berkshire Hathaway Group return all premiums paid by

Breakaway, to wit an amount of no less than eight hundred sixty-three thousand forty-eight dollars and seventy-four cents ($863,048.74), together with a disgorgement of all profits and damages, together with punitive damages, in an amount to be determined by a jury

COUNT II

AGAINST BERKSHIRE HATHAWAY GROUP

VIOLATIONS OF NEW YORK INSURANCE LAW §2324
(FRAUD BASED ON ILLEGAL REBATING)

128. Plaintiffs re-allege the foregoing paragraphs as if fully stated herein.

129. CPLR 3001 authorizes the Court to issue a declaratory judgment in connection with a justiciable controversy.

130. A justiciable controversy exists regarding the insurance and investment products provided by Berkshire Hathaway Group.

131. New York Insurance Law §2324 forbids rebating.

132. In offering a "Profit Sharing Plan" that offers to permit Breakaway to "participate in underwriting proceeds," Berkshire Hathaway Group committed a fraud on Breakaway in two respects. *First*, Berkshire Hathaway Group never informed Breakaway that its scheme was illegal because New York forbids rebating of insurance premiums to customers of insurance. *Second*, the scheme is not a profit-sharing plan.

133. The RPAs purport to promise to Breakaway rebates and cost savings in variance of the amounts of the policies in amounts in excess of the rates approved by New York State Department of Insurance.

134. Accordingly, the RPAs violate New York's anti-rebating provisions expressed in N.Y. Ins. Law §2324. Under New York law, insurance agreements that purport to vary Workers'

Compensation rates are illegal and void.

135. Because the RPAs purport to deviate from the rates approved by New York State and transfer risk of loss for injured worker claims back to Breakaway, the RPAs violate the New York Insurance Law, are illegal, null, void and unenforceable.

136. Accordingly, Plaintiff prays for a declaration that the RPAs violate the New York State Insurance Law, are illegal, against public policy and are therefore void pursuant to CPLR 3001 as well as an order, as authorized by N.Y. Ins. Law 4226 directing that Berkshire Hathaway Group return all premiums paid by Breakaway, to wit an amount of no less than eight hundred sixty-three thousand forty-eight dollars and seventy-four cents ($863,048.74) together with interest and attorneys fees, together with a disgorgement of all profits and damages in an amount, together with punitive damages, to be determined by a jury.

COUNT III

AGAINST BERKSHIRE HATHAWAY GROUP

VIOLATIONS OF NEW YORK INSURANCE LAW CHAPTER 23 (REGULATING WORKERS COMPENSATION INSURANCE RATES) WARRANTING DECLARATORY AND MONETARY RELIEF FOR ILLEGALITY OF UNAUTHORIZED REINSURANCE POLICIES

137. Plaintiffs re-allege the foregoing paragraphs as if fully stated herein.

138. New York State permits insurance companies to enter into reinsurance contracts with each other.

139. New York State forbids non-insurance companies or individual residents of New York State to enter into reinsurance agreements.

140. The RPAs purport to describe a “reinsurance” between Breakaway, a non-insurer, on the one hand, and AUCRA, an insurance company, on the other hand.

141. Because reinsurance contracts between a non-insurance company such as Breakaway and an insurance company like Applied, specifically AUCRA, are forbidden by New York law, the RPAs are illegal, void and unenforceable and against public policy.

142. Accordingly, Plaintiff prays for a declaration that the RPAs violate the New York State Insurance Law, are illegal, and against public policy and are therefore void, that the Premier Exclusive Policies and Solution One Policies remain effective pursuant to CPLR 3001, as well as an order directing that Berkshire Hathaway Group return all premiums paid by Breakaway, to wit an amount of no less than eight hundred sixty-three thousand forty-eight dollars and seventy-four cents ($863,048.74) together with interest and attorneys fees,, together with a disgorgement of all profits and damages in an amount, together with punitive damages, to be determined by a jury.

COUNT IV

AGAINST BERKSHIRE HATHAWAY GROUP (IN THE ALTERNATIVE)

RESCISSION OF REINSURANCE PARTICIAPTION AGREEEMENTS AND/OR RESCISSORY DAMAGES AND/OR REFORMATION

143. Breakaway re-alleges the foregoing paragraphs as if fully stated herein.

144. Berkshire Hathaway Group made knowing misrepresentations of fact concerning the alleged workers' compensation insurance it was providing to Breakaway and fraudulently induced Breakaway to enter into the relevant contracts. Specifically, the reinsurance was in fact prohibited by law.

145. Berkshire Hathaway Group made the foregoing misrepresentations with the intent to deceive, to defraud and to profit from Breakaway. In short, Berkshire Hathaway Group improperly transferred all risk back to Breakaway thus failing to provide any consideration to

Breakaway thus defeating the entire purpose of the RPAs.

146. Accordingly, to the extent declaratory, monetary and/or injunctive relief is not available, the Court should rescind the RPAs and order rescissory damages in an amount of no less than eight hundred sixty-three thousand forty-eight dollars and seventy-four cents ($863,048.74)) and/or reform the RPAs so as to make them lawful, together with a disgorgement of all profits and damages in an amount, together with punitive damages, to be determined by a jury.

COUNT V

AGAINST BERKSHIRE HATHAWAY GROUP

FRAUDULENT BUSINESS PRACTICES UNDER GEN. BUS LAW § 349

147. Breakaway re-alleges the foregoing paragraphs as if fully stated herein.

148. Section 349 of the New York General Business Law provides that "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

149. Subsection (h) of Section 349 of the General Business Law provides Plaintiffs with a private right of action.

150. Upon information and belief, Breakaway is not a licensed reinsurance intermediary.

151. Upon information and belief, Berkshire Hathaway Group is not a licensed reinsurer.

152. Berkshire Hathaway Group engages in business, trade, commerce and the furnishing of services in New York.

153. Berkshire Hathaway Group engages in such conduct even though it is, as explained above, not licensed to do so in certain cases and has failed, willfully, to comply with the New York Insurance State Law.

154. Berkshire Hathaway Group made false and deceptive representations including but not limited to the fact that it was providing legal workers' compensation to Breakaway.

155. Berkshire Hathaway Group never informed Breakaway that unauthorized producers were delivering insurance products to it in New York.

156. As set forth above, the RPAs are illegal and void and Berkshire Hathaway Group's related conduct in New York is in violation of Gen. Bus Law § 349.

157. Breakaway reasonably relied on the false and misleading representations to its detriment.

158. Accordingly, Plaintiffs are entitled to damages in an amount of no less than eight hundred sixty-three thousand forty-eight dollars and seventy-four cents ($863,048.74)), treble damages up to $1000 and reasonable attorneys' fees per Gen. Bus Law § 349(h).

COUNT VI

AGAINST BERKSHIRE HATHAWAY GROUP

COMMON LAW FRAUD (WITH PARTICULARIZED ALLEGATION PURSUANT TO CPLR 3016)

159. Breakaway re-alleges the foregoing paragraphs as if fully stated herein.

160. A New York common law fraud claim is defined as "a representation of fact, which is untrue and either known by defendant to be untrue or recklessly made, which is offered to deceive and to induce the other party to act upon it, and which causes injury."

161. Upon information and belief, Breakaway is one of the largest distributors of

Berkshire Hathaway Group products in New York.

162. Berkshire Hathaway Group engages in efforts to market and sell Applied products.

163. Under New York law, where a person without authority to act as a reinsurance intermediary brokers such a policy by misrepresenting his authority solely to gain commissions, this is a fraud and the appropriate measure of damages is the full amount of premiums paid. *Anglo-Iberia Underwriting Management Co. v. Lodderhose*, 282 F.Supp.2d 126 (2003).

164. New York Insurance Law §2102 requires reinsurance intermediaries to be licensed.

165. Upon information and belief, Breakaway is not a licensed reinsurance intermediary.

166. Upon information and belief, Berkshire Hathaway Group is not a licensed reinsurer.

167. The RPA was presented by Defendants as a "profit-sharing plan" and legitimate workers' compensation insurance product.

168. Based on the representations of Defendants, Breakaway reasonably believed that it was purchasing workers compensation insurance that would protect against losses, yet permit for repayments if it experienced low claims.

169. A reading of the RPAs as explained more fully above, however, reveals that this "profit-sharing" scheme had no element of insurance, including impossible to understand terms as well as undisclosed or misrepresented factors and fees. Indeed, rather than receiving insurance as it requested, Breakaway actually was signing on to a reverse Ponzi scheme that

exposed it to unlimited losses in a manner guaranteed to dramatically increase the cost of any claim.

170. Because the scheme contained no element of risk transfer to an insurer, the scheme was both a fraud on Breakaway, which thought it had insurance, and on the citizens of New York State whose workers were exposed to catastrophic losses limited to the creditworthiness of Breakaway itself.

171. Because Berkshire Hathaway Group knew that the scheme was a fraud and because Breakaway knew or should have known that the scheme was a fraud, Plaintiff is entitled to a disgorgement of all premiums paid, together with prejudgment interest and punitive damages in an amount to be determined at trial but in no event less than eight hundred sixty-three thousand forty-eight dollars and seventy-four cents ($863,048.74) , together with a disgorgement of all profits and damages in an amount, together with punitive damages, to be determined by a jury.

COUNT VII

AGAINST BERKSHIRE HATHAWAY GROUP

NEGLIGENT MISREPRESENTATION

172. Breakaway re-alleges the foregoing paragraphs as if fully stated herein.

173. Under New York law, the elements for a negligent misrepresentation claim are that (1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the

plaintiff reasonably relied on it to his or her detriment.

174. As set forth above, Breakaway requested a workers' compensation insurance policy based on its anticipated needs.

175. Breakaway sought, and received, Berkshire Hathaway Group's advice in determining the correct insurance policy based on its payroll, its loss history, and the type of activities that it engaged in.

176. Rather than selling an insurance product, Berkshire Hathaway Group assured Breakaway that the purported "profit-sharing" scheme would fit.

177. Berkshire Hathaway's tremendous profits were illegal and should be disgorged.

178. Because the RPA scheme effectively exposes Breakaway to unlimited risk from worker injuries and because Berkshire Hathaway Group held itself out as having special expertise in recommending Applied products to Breakaway, Berkshire Hathaway Group is liable to Breakaway for the full amount of premiums paid, together with disgorgement of any profits.

179. Based on the foregoing, Breakaway is entitled to a disgorgement of all premiums paid, together with prejudgment interest and punitive damages in an amount to be determined at trial.

180. Breakaway is therefore entitled to actual and punitive damages in an amount to be determined at trial but in no event less than eight hundred sixty-three thousand forty-eight dollars and seventy-four cents ($863,048.74), together with a disgorgement of all profits and damages in an amount, together with punitive damages, to be determined by a jury.

COUNT VIII

AGAINST BERKSHIRE HATHAWAY GROUP

BREACH OF FIDUCIARY DUTY/DUTY OF TRUST
(NEGLIGENT MISREPRESENTATION)

181. Plaintiffs re-allege the foregoing paragraphs as if fully stated herein.

182. Berkshire Hathaway Group advised Breakaway that monies paid to Applied would be placed into a "protected cell".

183. Berkshire Hathaway Group advised Breakaway that by entrusting its payroll and workers' compensation planning to Applied, the Premier Exclusive products would reduce Breakaway's risk and administrative costs.

184. Applied represented that its products were appropriate for small and medium businesses to manage risk.

185. Applied represented that its products were an "investment" that would result in "profit sharing".

186. Breakaway entrusted Applied with its premiums under circumstances giving rise to a confidential duty and a duty to speak with care. *Kimmel v. Schaefer*, 89 N.Y.2d 257 (1996).

187. Berkshire Hathaway Group knew or should have known that the Applied products passed the risk of catastrophic loss to Breakaway, would likely result in Breakaway paying excessive premiums for workers' compensation insurance and, given the structure of the Applied plan, had little to no chance of returning any profit.

188. Berkshire Hathaway Group knew or should have known that Applied would apply excessive fees, charges and "reinsurance" fees to Breakaway's premiums, thus eliminating the possibility that Breakaway would receive any profits.

189. Based on the foregoing, Breakaway is entitled to a return of principal, together with together with interest and attorneys fees, together with a disgorgement of all profits and

damages in an amount, together with punitive damages, to be determined by a jury.

COUNT IX

AGAINST BERKSHIRE HATHAWAY GROUP

BREACH OF FIDUCIARY DUTY
(SELF-DEALING/COMMINGLING TRUST ASSETS)

190. Breakaway re-alleges the foregoing paragraphs as if fully stated herein.

191. Berkshire Hathaway Group advised Breakaway that monies paid to Berkshire Hathaway Group would be placed into a "protected cell".

192. Berkshire Hathaway Group advised Breakaway that by entrusting its payroll and workers' compensation planning to Applied, the Premier Exclusive products would reduce Breakaway's risk and administrative costs.

193. Applied represented that its products were appropriate for small and medium businesses to manage risk.

194. Applied represented that its products were an "investment" that would result in "profit sharing".

195. As described above, rather than work in good faith to generate profits that it would share with Breakaway, Berkshire Hathaway Group engaged in a series of illegal and self-dealing transactions that enriched Applied at Breakaway's expense and were never disclosed to Breakaway.

196. Based on the foregoing, Berkshire Hathaway Group should account for and disgorge its profits to Breakaway, together with damages in an amount, together with punitive damages, to be determined by a jury.

COUNT X

AGAINST BERKSHIRE HATHAWAY GROUP

VIOLATIONS OF NEW YORK GENERAL BUSINESS LAW § 340 (DONNELLY ACT – ILLEGAL RESTRAINT OF TRADE, TYING AND BOYCOTTING)

197. Plaintiffs re-allege the foregoing paragraphs as if fully stated herein.

198. The Berkshire Hathaway Group has market power in the reinsurance market relevant to the allegations herein.

199. As acknowledged in Berkshire Hathaway Group's 2013 annual report, BHG engages in the practice of "bundling" investment products (insurance and reinsurance) as described above.

200. This "bundling" practice is illegal and constitutes "tying" under the antitrust laws.

201. Tying is the practice of selling one product or service as a mandatory addition to the purchase of a different product or service.

202. A *tying sale* makes the sale of one good (the *tying good*) to the *de facto* customer (or *de jure* customer) conditional on the purchase of a second distinctive good (the *tied good*).

203. Tying agreements are unlawful restraints of trade violating the Donnelly Act, N.Y. G.B.L. § 340.

204. The Donnelly Act, N.Y.G.B.L. § 340(1) provides:

> Every contract, agreement, arrangement or combination whereby
> A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby
> Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby
> For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or

> commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void.

205. Insurance products and services are subject to The Donnelly Act, N.Y.G.B.L. §340(3) which provides: "the provisions of this article shall apply to licensed insurers, licensed insurance agents, licensed insurance brokers, licensed independent adjusters and other persons and organizations subject to the provisions of the insurance law, to the extent not regulated by provisions of article twenty-three of the insurance law…."

206. An insurance policy to cover claims resulting from injury to workers in New York desired by Breakaway is the tying product.

207. The RPA is the "tied" product.

208. As set forth above, Breakaway was coerced into purchasing the non-insurance product – the RPA – as a condition of the Berkshire Hathaway Group issuing a valid workers' compensation policy.

209. The RPA is a "debt instrument" not "insurance" because the RPA does not contain a "stop loss" component.

210. Breakaway was forced by Berkshire Hathaway Group to sign a coercive "Request to Bind Coverage" before Breakaway was permitted to see the RPA.

211. Breakaway was then forced by Berkshire Hathaway Group to sign the RPA which contained onerous and illegal terms before the workers compensation policy was issued.

212. As described more fully in *Shasta,* Berkshire Hathaway Group's coercive "boiler room" tactics were part of its tying scheme.

213. Berkshire Hathaway Group had sufficient economic power in the tying product

market to coerce purchaser acceptance.

214. According to the most recent report of the Insurance Information Institute, the 2014 net premiums written by U.S. property and casualty reinsurers was $50,012,241,000 (just over fifty billion dollars). www.iii.org/fact-statistic/reinsurance (last accessed 9/7/16).

215. In the same report, the "2014 Top 10 U.S. Property/Casualty Reinsurers of U.S. Business By Premium Written" lists National Indemnity Company (Berkshire Hathaway) as number one with $26,447,145,000 (just over twenty-six billion dollars). www.iii.org/fact-statistic/reinsurance (last accessed 9/7/16).

216. Upon information and belief, Berkshire Hathaway Group is the largest direct writer of workers' compensation insurance in the United States.

217. Upon information and belief, Berkshire Hathaway Group is the largest primary writer of high hazard workers' compensation policies in New York State, achieving levels of 30% or more in certain categories.

218. According to a 2015 industry report, Berkshire Hathaway Group workers' compensation net written premium grew by 408.5% since 2009.

219. Berkshire Hathaway Group's coercive tying scheme had an anticompetitive effect on Breakaway, on injured workers in New York and on taxpayers.

220. By coercing New York businesses into signing the RPA through a threatened boycott, Berkshire Hathaway Group swindled consumers into agreeing to 70% profit margins for Berkshire Hathaway Group of each premium dollar, where New York's actuarial experience

221. Under The Donnelly Act, New York General Business Law §340 et seq., Breakaway is entitled to treble damages in an amount to be determined, but not less than three

times the value at risk to which it has been exposed.

COUNT XI

AGAINST BERKSHIRE HATHAWAY GROUP

FALSE ADVERTISING AND DECEPTIVE TRADE PRACTICES UNDER INS. LAW §§ 1102(a), 2122(a) AND GENERAL BUSINESS LAW § 350 *et. seq.*

222. Plaintiffs re-allege the foregoing paragraphs as if fully stated herein.

223. The Berkshire Hathaway Group published advertising materials including descriptive literature that represented to customers in New York, including Breakaway, that they were purchasing legally required workers' compensation insurance from entities authorized to provide insurance in the State of New York.

224. The Berkshire Hathaway Group's advertising materials did not disclose material facts about the alleged workers' compensation insurance including, among other things, the facts that (i) unauthorized producers would provide insurance products in New York; (ii) that the receipt of any alleged workers' compensation policies were contingent upon execution of the unfiled and unlawful RPA; (iii) that no insurance was being provided because all risk of loss was being reflected back onto the alleged insured by scheme detailed above; (iv) that it is illegal to require or incentivize an insured to purchase an insurance product by, among other things, offering to rebate or refund premiums or provide unlawfully tied services such as the SolutionOne payroll services to the sale of insurance.

225. New York law prohibits false advertising. *See* Gen. Bus. Law § 350 *et. seq.*

226. Advertising for insurance products is strictly regulated by New York State. *See* Ins. Law § 2122.

227. Among other things, New York law the identity of the "actual insurer" must be

provided. 11 NYCRR § 215.13.

228. In light of the scheme detailed above, it is impossible for the Berkshire Hathaway Group to comply with this mandate because no actual insurance (i.e. risk of loss) is being provided.

229. The Berkshire Hathaway Group's conduct constitutes false advertising and unfair trade practices.

230. Therefore, Breakaway is entitled to damages and equitable relief together with an award of costs and fees including reasonable attorneys' fees, together with a disgorgement of all profits and damages in an amount, together with punitive damages, to be determined by a jury.

RESERVATION OF RIGHTS AND JURY DEMAND

231. Breakaway reserves the right to assert any additional claims as may become evident during discovery or otherwise.

232. Breakaway hereby rejects any pleading filed in this action that fails to comply with Ins. Law § 1213.

233. Breakaway demands a trial by jury on all claims so triable.

WHEREFORE, Breakaway prays for judgment as follows:

A. That the Court declare the Reinsurance Participation Agreements to be in violation of the Insurance Law, illegal, null, void and unenforceable;

B. That the Court declare the Continental policies to be lawful and in full effect;

C. That, pursuant to the authority cited herein, this Court issue a Judgment awarding Breakaway all premiums paid, together with prejudgment interest and punitive damages in an amount to be determined at trial but in no event less than eight hundred sixty-three thousand forty-eight dollars and seventy-four cents ($863,048.74)

D. That Breakaway be awarded damages for Applied Underwriters' intentional and/or fraudulent misrepresentation, negligent misrepresentation and violations of The Donnelly Act] in an amount to be determined at trial but in no event less than eighteen million dollars.

E. That Breakaway be awarded compensatory damages, lost profits, disgorgement of fees, consequential damages, special damages and any other damages as may be available under statutory or common law in an amount to be determined at trial.

F. That Breakaway be awarded treble, exemplary and/or punitive damages for the intentional, fraudulent, negligent and/or malicious conduct of Applied in an amount to be determined at trial;

G. For attorneys' fees, disbursements and costs incurred for this action as available by statute or otherwise; and

H. For any such other or further relief as the Court may deem just, proper and equitable.

DATED: New York, New York
September 9, 2016

DUNNINGTON BARTHOLOW & MILLER LLP
Attorneys for Plaintiff

By: /s Raymond J. Dowd

Raymond J. Dowd
Samuel A. Blaustein
Dunnington Bartholow & Miller
250 Park Avenue, Suite 1103
New York, New York 10177
(212) 682-8811
rdowd@dunnington.com
sblaustein@dunnington.com