



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PILOT CORPORATION, a Tennessee corporation,

Plaintiff,

v.

GREG ABEL, KEVIN CLAYTON, MARC HAMBURG, MARK HEWETT, SCOTT THON, BERKSHIRE HATHAWAY, INC., a Delaware corporation, NATIONAL INDEMNITY COMPANY, a Nebraska corporation, and PILOT TRAVEL CENTERS, LLC, a Delaware company,

Defendants.

C.A. No. 2023-1068-MTZ

**PUBLIC VERSION  
filed November 28, 2023**

NATIONAL INDEMNITY COMPANY, a Nebraska corporation,

Counter-Plaintiff and Third-Party Plaintiff,

v.

PILOT CORPORATION, a Tennessee corporation,

Counter-Defendant,

and

JAMES A. HASLAM III,

Third-Party Defendant.

**BERKSHIRE’S MOTION TO EXPEDITE PROCEEDINGS**

National Indemnity Company (a subsidiary of Berkshire Hathaway Inc. and referred to herein as “Berkshire”) respectfully moves for expedited proceedings and trial of the claims in Berkshire’s Verified Counterclaim and Third-Party Complaint (“CC”), filed November 17, 2023.

### **PRELIMINARY STATEMENT**

1. Pilot Corporation (“Pilot”) filed this case to stop Pilot Travel Centers, LLC (“PTC”) from recording its assets at their fair value at the time of Berkshire’s acquisition of a controlling stake in 2023—an outcome that would increase Pilot’s payout upon selling its minority stake to Berkshire in early 2024.

2. Berkshire has since discovered, however, that Pilot and its CEO James A. (“Jimmy”) Haslam III have done far worse to inflate Pilot’s payout than file this lawsuit.

3. After Berkshire took control of PTC in January 2023, Jimmy Haslam secretly promised massive side payments, from his own pocket, to at least ■ high-level PTC employees to induce them to prioritize PTC’s short-term 2023 earnings over PTC’s long-term value. The purpose and effect of Haslam’s disloyal scheme was to artificially boost PTC’s 2023 earnings, which dictate Pilot’s 2024 payout—and to do so in an insidious and largely undetectable way.

4. Haslam’s promises to PTC employees—promises by a former majority owner with a lingering put option tied to short-term performance—were concealed

from PTC's senior management and from Berkshire, PTC's majority owner. The payments that Haslam promised the employees would be made outside of PTC's official employee compensation plan, and would exceed the employees' annual salaries by an order of magnitude.

5. If Pilot is allowed to exercise its put option in 2024 based on PTC's 2023 earnings, the harm to Berkshire would be irreparable. Haslam's corrupting promises to at least [REDACTED] employees, from [REDACTED], all with substantial day-to-day discretion, have denied Berkshire the ability to untangle which of countless business and operational decisions at PTC during 2023 improperly favored Pilot and Haslam's interests over PTC's interests. Berkshire therefore seeks injunctive relief barring Pilot from exercising its put option in the 2024 window based on PTC's corruptly influenced 2023 earnings, and in the alternative, equitable rescission or reformation of that option for 2024 and declaratory relief.

6. Berkshire's claims against Pilot and Haslam should be tried alongside Pilot's expedited claims.

7. First, Berkshire's claims are colorable. Berkshire expects to introduce evidence from multiple PTC employees confirming Haslam's illicit promises of side payments, which Haslam personally delivered and disseminated through his deputy, PTC's former CEO Shameek Konar. At all relevant times, Haslam owed fiduciary

duties of loyalty and care to PTC and Berkshire as a member of PTC's Board of Managers. By diverting employees' loyalty for personal gain, Haslam breached his fiduciary duties. In addition, Pilot—of which Haslam is CEO, and which the Haslam family controls—breached the implied covenant of good faith and fair dealing by suborning PTC's employees to distort the agreed-upon formula for determining Pilot's 2024 payout.

8. Second, Berkshire faces imminent, irreparable harm because absent relief, Pilot can exercise its put option in January 2024 and lock in illegitimate gains delivered by beholden employees. Quantifying the harm to Berkshire from nearly a year's accumulation of compromised decision-making is not reasonably possible, leaving no adequate damages remedy. In addition, as the Court noted in expediting Pilot's claims, Pilot and Berkshire already have stipulated that contractual breaches cause irreparable harm.

9. As a practical matter, the parties and the Court already are incurring the burdens of expedited proceedings sought by Pilot, and the upcoming trial already will address Pilot's and Haslam's illicit scheme insofar as it establishes defenses to Pilot's claims such as unclean hands. Berkshire's claims cover the same terrain and should be expedited as well.

## **BACKGROUND**

10. Pilot agreed to sell its majority stake in PTC to Berkshire in a two-step transaction. Berkshire acquired 38.6% of PTC in 2017 and an additional 41.4% on January 31, 2023 (the “2023 Sale”). Since the 2023 Sale, PTC has been owned 80% by Berkshire and 20% by Pilot.

11. Under an Investor Rights Agreement, Pilot can exercise a put option (the “Put Option”) to sell its 20% interest in PTC to Berkshire in the first 60 calendar days of any year, starting in 2024. *See* Compl. Ex. B § 2.4(a). If Pilot exercises its Put Option, the Investor Rights Agreement sets a price formula based on ten times PTC’s prior-year earnings before interest and taxes (“EBIT”), with certain adjustments. *Id.* § 2.4(b).

12. On October 23, 2023, Pilot filed this action challenging PTC’s use of pushdown accounting upon the change in control that occurred on January 31, 2023. On November 3, 2023, the Court granted Pilot’s motion for expedited proceedings.

13. In early November 2023, a senior PTC executive revealed to PTC’s current CEO (who was appointed after Berkshire took control) that Jimmy Haslam had promised personally to pay the executive a bonus linked to the amount Pilot would receive upon exercising its Put Option in 2024. CC ¶ 8. Haslam made that same promise to approximately 15 senior PTC executives at a March 2023 dinner at Knoxville’s Cherokee Country Club. CC ¶¶ 9-14.

14. Haslam’s promised payments were illicit because they were not called for or contemplated in any way by PTC’s employment agreements or compensation plans. CC ¶¶ 11, 37. Indeed, after the change in control, at Pilot’s urging, PTC undertook distinct efforts to retain key employees through individual retention agreements—foreclosing any legitimate role for covert generosity from a minority owner standing by with an EBIT-based Put Option. CC ¶¶ 13, 38-39.

15. Between June and August 2023, Haslam repeated the illicit promises made at the Cherokee dinner in secret conversations with at least four high-level PTC executives. CC ¶ 15.

16. Haslam’s deputy, Shameek Konar, further spread the under-the-table promises. Around April 2023, Konar relayed Haslam’s promises to at least ten additional PTC employees. CC ¶ 17. This second wave of suborned employees worked in PTC’s Fuel Division, which buys and sells fuel for retail and wholesale. CC ¶¶ 18-20. These employees were targeted because they have an extraordinary amount of everyday discretion to make trading decisions with significant cumulative effects on PTC’s short-term and long-term profitability. CC ¶ 18.

17. Haslam’s promised payments were hidden from PTC’s CEO and CFO, who assumed their roles after Berkshire took control, and from the five Berkshire designees on PTC’s Board of Managers. CC ¶ 1. Haslam made no similar promises to senior management at PTC appointed by Berkshire. CC ¶ 21. Despite being

PTC's majority owner, Berkshire was unaware of Haslam's actions until November 2023, after this action was filed. CC ¶ 1.

### **ARGUMENT**

18. Expedition is appropriate when a party “has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury’ to justify the additional costs of an expedited proceeding.” *Gaines v. Narachi*, 2011 WL 4822551, at \*2 (Del. Ch. Oct. 6, 2011) (quoting *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at \*2 (Del. Ch. Nov. 15, 1994)). “This court traditionally has acted with a certain solicitude for plaintiffs in this procedural setting and thus has followed the practice of erring on the side of more hearings rather than fewer.” *Giammargo*, 1994 WL 672698, at \*2. “The burden on a plaintiff in seeking an expedited proceeding is not high” and expedition is “routinely granted.” *Renco Grp., Inc. v. MacAndrews AMG Hldgs. LLC*, 2013 WL 209124, at \*1 (Del. Ch. Jan. 18, 2013).

#### **I. Berkshire's Claims Are Colorable**

19. “[T]he standard for expedition, colorability, which simply implies a non-frivolous set of issues, is even lower than the ‘conceivability’ standard applied on a motion to dismiss.” *In re BioClinica, Inc. S’holder Litig.*, 2013 WL 5631233, at \*1 n.1 (Del. Ch. Oct. 16, 2013); see *Reserves Dev. Corp. v. Wilmington Tr. Co.*, 2008 WL 4951057, at \*2 (Del. Ch. Nov. 7, 2008) (“a colorable claim for relief ... is

essentially a non-frivolous cause of action”). In assessing colorability, the Court “accept[s] the complaint’s assertions at face value” and is “not obliged to opine on the probability of success.” *TCW Tech. Ltd. P’ship v. Intermedia Commc’ns, Inc.*, 2000 WL 1478537, at \*2 (Del. Ch. Oct. 2, 2000).

20. Berkshire’s claims against Pilot and Haslam are well beyond colorable and are supported by detailed factual allegations of the secret promises Haslam made and how they fell outside PTC’s employee compensation plans.

21. With respect to breach of fiduciary duty, Jimmy Haslam has been a member of PTC’s Board of Managers continuously since the 2023 Sale. Under PTC’s Limited Liability Company Agreement (“LLC Agreement”), members of the Board of Managers “shall have the fiduciary duties of loyalty and care (similar to the fiduciary duties of loyalty and care of directors of a business corporation [under Delaware law]) to each of the Members [including Berkshire] with respect to the business and operations of the Company, and to the Company.” Compl. Ex. A § 12.02. The LLC Agreement further requires Haslam to “exercise good faith, fairness and loyalty to the Company and to each of the Members [including Berkshire].” *Id.*

22. Haslam breached his fiduciary duties by promising millions of dollars of under-the-table payments to at least [REDACTED] employees of the company of which he is a fiduciary. Haslam made those promises to induce the employees to favor his and



Pilot's interests over PTC's interests. Haslam's conduct was disloyal by definition. Loyal fiduciaries do not promise to personally fund parallel compensation schemes for a company's employees while concealing those promises from the company's senior management and majority owner. Haslam did just that, to serve his parochial interest in boosting PTC's short-term 2023 EBIT.

23. Pilot likewise breached the implied covenant of good faith and fair dealing in the Investor Rights Agreement. When agreeing to base Pilot's 2024 payout on PTC's 2023 EBIT, the parties could not reasonably have anticipated that Haslam would undertake an illicit scheme to suborn at least [REDACTED] PTC employees through secret side payments far exceeding their annual salaries. It would upend the expectations of parties contracting under Delaware law to impose the obligation of bargaining expressly to preclude conduct so outrageous.

24. Finally, injunctive relief or, in the alternative, equitable rescission or reformation are appropriate remedies where, as here, damages cannot reasonably be calculated. *See, e.g., Endowment Rsch. Grp., LLC v. Wildcat Venture P'rs, LLC*, 2021 WL 841049, at \*7 (Del. Ch. Mar. 5, 2021) (“[I]rreparable harm warranting injunctive relief is appropriate in cases where damages would be difficult to assess,’ and the inherent difficulty of assessing damages ... shows irreparable harm exists here.”); *In re MAXXAM, Inc./Federated Dev. S’holders Litig.*, 1997 WL 187317, at \*30 (Del. Ch. Apr. 4, 1997) (“One virtue of rescission is that it would eliminate the

need for the Court to determine the value of [damages], with its many pitfalls and attendant uncertainty risks.”).

## II. Berkshire Faces Imminent Irreparable Harm

25. “Harm is irreparable unless ‘alternative legal redress [is] clearly available and [is] as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.’” *In re Del Monte Foods Co. S’holders Litig.*, 25 A.3d 813, 838 (Del. Ch. 2011) (quoting *T. Rowe Price Recovery Fund, L.P. v. Rubin*, 770 A.2d 536, 557 (Del. Ch. 2000)); see *Singh v. Batta Env’tl. Assocs., Inc.*, 2003 WL 21309115, at \*9 (Del. Ch. May 21, 2003) (“inadequacy of damages as a remedy ... constitute[s] irreparable harm”).

26. In particular, harm is irreparable when damages would be difficult to calculate. See *Kallick v. Sandridge Energy, Inc.*, 68 A.3d 242, 264 (Del. Ch. 2013) (“Irreparable harm also exists because damages would be difficult to calculate.”); *Hollinger Int’l, Inc. v. Black*, 844 A.2d 1022, 1090 (Del. Ch. 2004) (“Injury is irreparable when a later money damage award would involve speculation.”), *aff’d*, 872 A.2d 559 (Del. 2005); *TCW Tech.*, 2000 WL 1478537, at \*2 (“[I]t would be extremely difficult to calculate the damages necessary .... Because of the uncertainty surrounding any potential damages remedy, I conclude that the threat of irreparable injury is substantial enough to warrant expediting these cases.”).

27. Parsing loyal from corrupted day-to-day decision-making by at least [REDACTED] PTC employees with varying responsibilities, over the course of nearly a year, would be impossible as a practical matter. By exercising its Put Option and locking in its illegitimate gains, Pilot would leave Berkshire searching for a damages remedy by investigating the state of mind of numerous employees—all beholden to Haslam—and comparing their claimed motivations against the merits of past business and operational decisions.

28. For example, PTC’s senior management observed unwarranted urgency by certain employees to close transactions in 2023, with employees recommending selling assets likely to continue appreciating, releasing hedge positions with significant, ongoing value, and divesting from businesses to yield one-time gains while sacrificing long-term income streams. CC ¶¶ 23-26. While those efforts were rejected, countless other compromised decisions on matters large and small—such as discretionary trading decisions within the Fuel Division—have almost certainly gone undetected.

29. The harm to Berkshire is analogous to the pervasive, incalculable harm caused by loss of customer relationships and employee morale. “‘Irreparable injury exists when [damages] would involve speculation,’ such as harmed ‘reputation, goodwill, customer relationships, and employee morale.’” *Mountain W. Series of Lockton Cos. v. Alliant Ins. Servs., Inc.*, 2019 WL 2536104, at \*20 (Del. Ch. June

20, 2019); *see id.* at \*21 (“Determining causation on a customer-by-customer basis is a potentially massive and complex inquiry, requiring an assessment of the mental state of each former customer.”). Likewise, calculating damages if Pilot were paid based on PTC’s corruptly influenced 2023 EBIT “would be a prodigious and uncertain task.” *Id.*; *see also Next Level Ventures, LLC v. AVID USA Techs. LLC*, 2023 WL 3141054, at \*17 (Del. Ch. Mar. 16, 2023) (“Irreparable injury exists ‘when a later money damage award would involve speculation,’ and irreparable harm to a corporation has been found to include harm to a corporation’s reputation, goodwill, customer relationships, and employee morale.”).

30. In obtaining expedition, Pilot contended that its alleged harm “can be remedied only by *timely* injunctive relief because the formula for determining the price for Pilot’s annual Put Option uses inputs drawn from PTC’s most recent full-year financial statements.” Dkt. 18 (MTE Reply) ¶ 8. For the same reason, Berkshire’s claims are far more deserving of expedition. Whereas Pilot’s alleged accounting-based harm is quantifiable, and indeed is quantified in its Complaint, Berkshire’s harm is difficult to calculate. If Pilot is allowed to exercise its Put Option in 2024 based on PTC’s 2023 EBIT, that harm will be locked in, leaving Berkshire without an adequate remedy.

31. Finally, Pilot agreed that breaches of the LLC Agreement would cause irreparable harm entitling Berkshire to injunctive relief. *See Compl. Ex. A* § 14.12.

Pilot likewise agreed that for breaches of the Investor Rights Agreement, money damages may be inadequate and Berkshire may apply for injunctive relief. *See* Compl. Ex. B § 3.2. While the Court has discretion to disregard such stipulations, they “alone suffice to establish th[e] element” of “irreparable harm.” *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 68 A.3d 1208, 1226 (Del. 2012). Indeed, in Pilot’s view, such stipulations “ought to be the beginning and the end of the analysis.” Ex. 1 (Nov. 3, 2023 Hr’g Tr.) at 9. The Court relied on the LLC Agreement’s irreparable-harm provision in expediting Pilot’s claims, *see id.* at 65, and the same result should follow here.

### **III. Berkshire Has Sought Timely Relief**

32. Unlike Pilot, which objected to pushdown accounting at PTC for eight months before filing suit, leaving just ten weeks before its 2024 window to exercise its Put Option, Berkshire has acted with the speed that Delaware law requires. Berkshire did not learn of Haslam’s illicit scheme until early November 2023, after Pilot filed this action. CC ¶¶ 8, 15.

### **IV. Expedition Is Practicable**

33. Berkshire’s claims against Pilot and Haslam can readily be tried in January 2024 alongside Pilot’s expedited claims. The parties will divide their trial time and allocate it as they see fit.

34. For its part, Pilot has represented that its claims present a “really narrow issue” that is “almost the kind of matter that one could imagine being litigated on cross-motions for summary judgment,” Ex. 1 at 26, and that is “very nearly capable of resolution in plaintiff’s favor on the pleadings or with minimal evidence,” *id.* at 9.

35. For Berkshire’s part, its claims against Pilot and Haslam cover the same factual terrain as certain of its affirmative defenses to Counts I and III of Pilot’s Complaint, such as unclean hands, which already will be tried in January 2024. Pilot has forfeited any entitlement to the relief it seeks by engaging in misconduct in relation to the very matter in controversy on its claims, namely, the value of its Put Option in 2024. In seeking expedition, Pilot represented that “we don’t have any desire to truncate the other side’s ability to make the record it thinks is appropriate.” *Id.* at 25-26. That record, which will establish Berkshire’s defenses, also establishes the affirmative relief that Berkshire seeks, and the parties already are incurring the burdens of presenting that record expeditiously.

### **CONCLUSION**

Berkshire respectfully requests that its claims against Pilot and Haslam be expedited and tried in January 2024 alongside Pilot’s claims for breach of contract and declaratory relief.

MORRIS, NICHOLS, ARSHT  
& TUNNELL LLP

OF COUNSEL:

John W. Spiegel  
George M. Garvey  
John M. Gildersleeve  
Craig Jennings Lavoie  
Sara A. McDermott  
MUNGER, TOLLES &  
OLSON LLP  
350 South Grand Avenue,  
50th Floor  
Los Angeles, CA 90071-3426

November 17, 2023

/s/ Ryan D. Stottmann

William M. Lafferty (#2755)

Ryan D. Stottmann (#5237)

Taylor A. Christensen (#7029)

1201 North Market Street

Wilmington, DE 19801

(302) 658-9200

*Attorneys for Defendants Greg Abel,  
Kevin Clayton, Marc Hamburg, Mark  
Hewett, Scott Thon, and Berkshire  
Hathaway Inc., and for Defendant,  
Counter-Plaintiff and Third-Party  
Plaintiff National Indemnity Company*

Words: 2,885 (of 3,000)

**CERTIFICATE OF SERVICE**

I hereby certify that on November 28, 2023, a copy of the foregoing *[Public Version] Berkshire's Motion to Expedite Proceedings* was served by File & ServeXpress on the following attorneys of record:

Kevin R. Shannon  
Berton W. Ashman, Jr.  
Matthew A. Golden  
Callan Jackson  
POTTER ANDERSON & CORROON LLP  
1313 N. Market Street  
Wilmington, DE 19801

Blake Rohrbacher  
Matthew W. Murphy  
John M. O'Toole  
Spencer V. Crawford  
RICHARDS, LAYTON & FINGER P.A.  
920 N King St,  
Wilmington, DE 19801

Matthew D. Stachel  
PAUL, WEISS, RIFKIND, WHARTON &  
GARRISON LLP  
500 Delaware Ave, Suite 200  
P.O. Box 32  
Wilmington, DE 19899-0032

/s/ Taylor A. Christensen  
Taylor A. Christensen (#7029)