



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 AND THE INDIVIDUAL DEFENDANTS' ANSWER TO THE VERIFIED COMPLAINT AND VERIFIED COUNTERCLAIM AND THIRD-PARTY COMPLAINT

Defendants Greg Abel, Kevin Clayton, Marc Hamburg, Mark Hewett, Scott Thon, (collectively the “Individual Defendants”) Berkshire Hathaway Inc., National Indemnity Company (“NICO,” and together with Berkshire Hathaway Inc., “Berkshire”) by and through their undersigned counsel, respond to the Verified Complaint (“Complaint” or “Compl.”) filed by Plaintiff Pilot Corporation (“Pilot” or “Plaintiff”) as follows. To avoid confusion, this Answer does not respond to the Verified Complaint’s headings, and to the extent any response to any headings is required, all the allegations of the headings are expressly denied. The numbered footnotes herein are reproduced from the Verified Complaint, and their reproduction here should not be construed as an endorsement of them. Berkshire and the Individual Defendants use defined terms solely for purposes of responding to the allegations in the Verified Complaint. Berkshire’s and Individual Defendants’ use herein of terms defined in the Verified Complaint should not be interpreted as, and is not, an admission that (i) Berkshire and Individual Defendants agree with Plaintiff’s characterization, or (ii) the defined terms are accurate. Berkshire and the Individual Defendants expressly reserve the right to seek to amend and supplement their Answer.

RESPONSES TO ALLEGATIONS

NATURE AND SUMMARY OF THE ACTION

1. In 2017, Berkshire acquired a 38.6% interest in PTC from Pilot and other entities. The agreed price for the transaction was \$2.758 billion, a figure

pertaining to Pilot’s Put Right. Berkshire and the Individual Defendants otherwise deny the allegations of the fourth sentence of Paragraph 2.

3. When Berkshire initially invested in PTC, the parties also entered into an LLC agreement governing PTC that contained protections for the minority investor—*i.e.*, Berkshire before it made the 2023 Control Purchase and Pilot thereafter. These protections included the right to veto any “select[ion]” or “change” of PTC’s “accounting policies” not required by applicable law or GAAP.

ANSWER: Berkshire and the Individual Defendants admit that the LLC Agreement gave Berkshire and Pilot the right to veto certain actions by PTC, including the “select[ion] or change [of] the accounting policies of the Company” not required by applicable law or GAAP, and respectfully refer the Court to the LLC Agreement for a complete and accurate description of those provisions. Except as admitted, Berkshire and the Individual Defendants deny the allegations of Paragraph 3.

4. Five years later, in accordance with the parties’ agreement, Berkshire made the 2023 Control Purchase, acquiring an additional 41.4% interest in PTC for a total ownership interest of 80%. The price was \$8.2 billion, determined according to the contractually agreed formula for valuing PTC.

ANSWER: Berkshire and the Individual Defendants admit the allegations of Paragraph 4, except to state that the purchase price for the 2023 Control Purchase was approximately \$8.2 billion.

5. The first monthly financial statement PTC issued after Berkshire’s assumption of control covered February 2023. The February 2023 statement was consistent with PTC’s historical accounting conventions.

ANSWER: Berkshire and the Individual Defendants admit the allegations of the first sentence of Paragraph 5. Berkshire and the Individual Defendants admit that PTC’s February 2023 income statement, like the January 2023 income statement, reported PTC’s first quarter expenses without recognizing an expense for over [REDACTED] in compensation—accounting that would be permissible only under “on-the-line” treatment of that compensation and the application of pushdown accounting. Except as admitted, Berkshire and the Individual Defendants lack knowledge sufficient to admit or deny the allegations of the second sentence of Paragraph 5.

6. The March 2023 monthly statement, however, applied—for the first time—“pushdown accounting.” Berkshire adopted this change without seeking or obtaining Pilot’s consent. Pushdown accounting is an optional accounting decision that allows an acquirer (such as Berkshire) to “push down” its own basis for the acquired company’s assets and liabilities to the financial statements of the acquired company. The acquirer’s basis is the “stepped-up basis” of assets and liabilities at the time of the acquisition, rather than their historical basis. Under accounting rules, an acquiree that maintains its own financial statements—like Pilot here—may, but is not required to, “step up” the basis of its assets and liabilities after the acquisition.

ANSWER: Berkshire and the Individual Defendants admit that the March 2023 monthly and quarterly financial statements applied pushdown accounting, and except as admitted, deny the allegations of the first sentence of Paragraph 6. Berkshire and the Individual Defendants deny the remaining allegations of Paragraph 6 and, with respect to Plaintiff’s characterization of certain accounting standards, Berkshire and the Individual Defendants respectfully refer the

Court to the relevant accounting standards for a complete and accurate description of those standards.

7. Pushdown accounting does nothing to change the value or performance of PTC's business. But the application of pushdown accounting, and the various subsidiary changes in accounting policies that necessarily result, artificially depress the reported earnings of PTC by, among other things, increasing depreciation and amortization expenses and by preventing the recognition of gains on derivative instruments and other hedges in the income statement.

ANSWER: Paragraph 7 consists of argument for which no response is necessary, and to the extent needed, Berkshire and the Individual Defendants deny these allegations.

8. Accordingly, the artificial decrease in reported earnings due to the application of pushdown accounting reduces PTC's EBIT, which in turn reduces the value of Pilot's Put Right. The economic results are dramatic. Based on PTC's projected 2023 earnings, Pilot could lose as much as [REDACTED] from the devaluation of its Put Right resulting from PTC's artificially lower earnings. Berkshire's choice to impose pushdown accounting on PTC thus risks unfairly transferring [REDACTED] or more to Berkshire, the LLC's controlling member, from the pocket of minority member Pilot.

ANSWER: Berkshire and the Individual Defendants admit that, compared to the option of accounting for the change in control without pushdown accounting, the application of pushdown accounting enabled PTC to avoid recognizing some expenses (increasing EBIT) but had other effects that reduced EBIT. Except as admitted, Berkshire and the Individual Defendants deny the allegations of Paragraph 8.

9. Pilot has not only repeatedly registered its refusal to consent to Berkshire's unilateral and self-interested imposition of pushdown accounting, but also repeatedly requested assurances that Berkshire will not apply pushdown accounting in calculating the value of the Put Right. Berkshire has refused to stop applying pushdown accounting to PTC's financial statements or to provide the assurances Pilot has sought, notwithstanding Pilot's veto rights and the duties of care and loyalty that Berkshire and its board designees owe the minority member of PTC.

ANSWER: Berkshire and the Individual Defendants admit that, after the change in control of PTC, Pilot voiced disagreement with the use of pushdown accounting and demanded assurances that Berkshire agree to value the Put Right as if pushdown accounting did not apply. Except as admitted, Berkshire and the Individual Defendants deny the allegations of Paragraph 9.

10. To remedy and prevent these continuing breaches of contract and fiduciary duties, Pilot seeks (among other relief) a declaration that the use of pushdown accounting in PTC's financial statements was and is unauthorized, as well as related injunctive relief. In addition, Pilot seeks an expedited adjudication of its entitlement to relief to ensure that Berkshire's imposition of pushdown accounting, in breach of the LLC Agreement, will not be applied to determine the value of the Put Right before Pilot's 2024 right to exercise the Put Right expires.

ANSWER: Berkshire and the Individual Defendants admit that Pilot is seeking the relief stated in Paragraph 10, but deny that Pilot is entitled to any such relief.

JURISDICTION, VENUE, AND GOVERNING LAW

11. The Court of Chancery has subject-matter jurisdiction pursuant to 6 *Del. C.* § 18-111, 10 *Del. C.* § 341, and the Delaware Declaratory Judgment Act, 10 *Del. C.* § 6501, *et seq.*

ANSWER: Berkshire and the Individual Defendants admit the allegations of Paragraph 11.

12. Under § 14.11 of the LLC Agreement and § 3.11 of the Investor Rights Agreement, the parties consented to the exclusive jurisdiction of the Courts of the State of Delaware or the United States District Court for the District of Delaware.¹ Section 14.09 of the LLC Agreement and § 3.9 of the Investor Rights Agreement provide that all issues and questions concerning the construction, validity, enforcement, and interpretation of the agreements are governed by the laws of the State of Delaware.

ANSWER: Berkshire and the Individual Defendants admit the allegations of Paragraph 12.

PARTIES

13. Plaintiff Pilot is a member of PTC and owns a 20% stake. Pilot is a party to the LLC Agreement. Its principal executive offices are located at 5508 Lonas Drive, Knoxville, Tennessee.

ANSWER: Berkshire and the Individual Defendants admit the allegations of Paragraph 13.

14. Defendant PTC is a Delaware limited liability company. Its principal executive offices are located at 5508 Lonas Drive, Knoxville, Tennessee. PTC is the largest operator of travel centers in North America (primarily under the names Pilot or Flying J) with more than 650 travel center locations across 44 U.S. states and six Canadian provinces. PTC also has 135 retail locations in the United States and Canada where it sells diesel fuel through various arrangements with third party travel centers. PTC sold over 13 billion gallons of fuel in 2022 (primarily diesel and gasoline). PTC has approximately 30,000 employees and is one of the largest privately owned companies in the United States.

¹ The LLC Agreement and Investor Rights Agreement (as defined below) are attached hereto as Exhibit A and Exhibit B, respectively.

ANSWER: Berkshire and the Individual Defendants admit the allegations of sentences one through five of Paragraph 14. Berkshire and the Individual Defendants admit that PTC has approximately 25,500 employees. Except as admitted, Berkshire and the Individual Defendants lack knowledge or information sufficient to form a belief as to the allegations of sentence six of Paragraph 14 and deny those allegations on that ground.

15. Defendant Berkshire is a Delaware corporation. Its principal executive offices are located at 3555 Farnam Street, Omaha, Nebraska. Berkshire is a holding company owning subsidiaries engaged in numerous diverse business activities. Berkshire owns a controlling 80% stake in PTC through its subsidiary, NICO. Berkshire is a party to the LLC Agreement.

ANSWER: Berkshire and the Individual Defendants admit the allegations of Paragraph 15.

16. Defendant NICO is a Nebraska insurance company. Its principal executive offices are located at 1314 Douglas Street, Suite 1400, Omaha, Nebraska. NICO is a subsidiary of Berkshire. NICO is a member of PTC, owns a controlling 80% stake in PTC, and is a party to the LLC Agreement.

ANSWER: Berkshire and the Individual Defendants admit the allegations of Paragraph 16.

17. Defendant Greg Abel, Berkshire's Vice Chairman, serves as PTC's Board Chair. Berkshire appointed Abel to the PTC Board, and used its control of PTC to name him Board Chair on March 31, 2023, replacing Jimmy Haslam, the chairman of Pilot, in that role.

ANSWER: Berkshire and the Individual Defendants admit the allegations of the first sentence of Paragraph 17. The Berkshire and Individual

Defendants admit that Berkshire appointed Abel to the PTC Board and named him Board Chair, replacing James Haslam III in that role, and otherwise deny the allegations of the second sentence of Paragraph 17.

18. Defendant Marc Hamburg, Berkshire's Chief Financial Officer, has served on the PTC Board since his appointment by Berkshire in 2018.

ANSWER: Berkshire and the Individual Defendants admit the allegations of Paragraph 18.

19. Defendant Kevin Clayton, CEO of Clayton Homes, a Berkshire company, has served on the PTC Board since his appointment by Berkshire in 2018.

ANSWER: Berkshire and the Individual Defendants admit the allegations of Paragraph 19.

20. Defendant Mark Hewett, President and CEO of Berkshire Hathaway Energy's Pipeline Group, has served on the PTC Board since his appointment by Berkshire in 2023.

ANSWER: Berkshire and the Individual Defendants admit the allegations of Paragraph 20.

21. Defendant Scott Thon, President and CEO of Berkshire Hathaway Energy, has served on the PTC Board since his appointment by Berkshire in 2023.

ANSWER: Berkshire and the Individual Defendants admit the allegations of Paragraph 21.

22. Abel, Hamburg, Clayton, Hewett and Thon are referred to herein as the "Board Defendants."

ANSWER: Berkshire and the Individual Defendants state that Paragraph 22 does not require a response.

FACTUAL ALLEGATIONS

A. The founding and history of Pilot and PTC

23. Jim Haslam II founded Pilot in 1958 with a single gas station he purchased for \$6,000 in Gate City, Virginia. Over the next two decades, Pilot developed a regional network of gasoline stations and convenience stores. In November 1981, Pilot opened its first truck stop, in Corbin, Kentucky. Through a combination of acquisitions and organic growth, Pilot evolved from a regional convenience store operator into a leading national operator of truck stops. By 1996, Pilot operated 96 travel centers and 50 convenience stores, and its total fuel sales had reached 1.2 billion gallons. That year, Jimmy Haslam was named president and chief executive officer, taking the reins from his father.

ANSWER: Berkshire and the Individual Defendants lack knowledge or information sufficient to form a belief as to the truth of Paragraph 23 and deny it on that basis.

24. In 2001, Pilot and Marathon Ashland Petroleum LLC (Speedway Truck Stops) created PTC, a nationwide network of 232 travel centers, as a joint venture. By 2018, PTC had expanded to more than 550 travel centers and created a new division called PFJ Energy, which today is one of the largest wholesalers of gasoline and diesel and the largest seller of biodiesel and renewable diesel in the United States. By 2023, PTC was the fifth-largest privately held company in the United States and the country's biggest seller of biodiesel, renewable diesel, and over-the-road diesel fuel.

ANSWER: Berkshire and the Individual Defendants lack knowledge or information sufficient to form a belief as to the truth of Paragraph 24 and deny it on that basis.

25. More than fifty years after founding Pilot, Jim Haslam II and the Haslam family considered selling a controlling interest in Pilot's travel center business for the first time. Because of their respect for Berkshire, the Haslam family chose to engage seriously only with Berkshire as a possible acquirer of PTC.

ANSWER: Berkshire and the Individual Defendants lack knowledge or information sufficient to form a belief as to the truth of Paragraph 25 and deny it on that basis.

Berkshire agrees to buy an 80% stake in PTC in two stages

26. In October 2017, Berkshire agreed to buy an 80% interest in PTC in two stages. The terms of the sale and the parties' respective rights in PTC were governed by several related agreements.

ANSWER: Berkshire and the Individual Defendants admit the allegations of Paragraph 26.

27. Pursuant to the Investment Agreement executed on October 3, 2017, NICO, a wholly owned subsidiary of Berkshire, bought a 38.6% interest in PTC for \$2.758 billion. In conjunction with the Investment Agreement, the parties entered into the Sixth Amended and Restated Limited Liability Company Agreement governing PTC (including as subsequently amended, the "LLC Agreement"), the 2023 Sale Agreement, and the Fourth Amended and Restated Investor Rights Agreement (the "Investor Rights Agreement").²

ANSWER: Berkshire and the Individual Defendants admit that pursuant to the Investment Agreement executed on October 3, 2017, and pursuant to the Equity Purchase Agreement of the same date, NICO, a wholly owned subsidiary

² The parties entered into the current Seventh Amended and Restated Limited Liability Company Agreement as of August 13, 2021, but none of the relevant contract provisions relating to this dispute were changed.

of Berkshire, bought interests in PTC totaling 38.6% for the aggregate price of \$2.758 billion, and otherwise deny the allegations of the first sentence of Paragraph 27. Berkshire and the Individual Defendants admit the allegations of the second sentence of Paragraph 27.

28. Under the 2023 Sale Agreement, NICO was obligated to buy an additional 41.4% interest in PTC, for a total interest of 80%, on January 31, 2023—the 2023 Control Purchase. Beginning on January 1, 2024, the Investor Rights Agreement gives Pilot an annual right to sell its remaining 20% interest in PTC to NICO—the Put Right. The Put Right must be exercised within 60 days of the end of a PTC fiscal year.

ANSWER: Berkshire and the Individual Defendants admit the allegations of the first sentence of Paragraph 28. Berkshire and the Individual Defendants admit that following the 2023 Control Purchase, Pilot had a Put Right governing its remaining equity share in PTC, but deny that the second sentence of Paragraph 28 accurately states all restrictions and requirements pertaining to Pilot's Put Right. Berkshire and the Individual Defendants admit that the Put Right must be exercised within 60 days after the start of a PTC fiscal year, and otherwise deny the allegations of the third sentence of Paragraph 28.

29. To set the price for NICO's initial investment, the 2023 Control Purchase, and the Put Right, Berkshire proposed, and Pilot agreed to, a single formula that was based on PTC's earnings—ten times EBIT, with adjustments for debt and cash. Accordingly, the 2023 Sale Agreement and the Investor Rights Agreement set the price of the 2023 Control Purchase and the Put Right using the same formula.

ANSWER: Berkshire and the Individual Defendants admit that following the 2023 Control Purchase, Pilot had a Put Right governing its remaining equity share in PTC, but deny that the first sentence of Paragraph 29 accurately states all restrictions and requirements pertaining to Pilot’s Put Right, and otherwise deny the allegations of the first sentence of Paragraph 29. Berkshire and the Individual Defendants admit that the price upon exercise of the Put Right is based upon ten times EBIT, with contractually specified adjustments, for the year preceding the exercise of the Put Right; and except as admitted, deny the allegations of the second sentence of Paragraph 29.

30. Section 8.08(i) of the LLC Agreement bars PTC from “select[ing] or chang[ing] the accounting policies of the Company, except as required by Applicable Law or GAAP” without the approval of the PTC Board, Berkshire, and Pilot. Unless otherwise permitted by § 8.08(i), § 1.02 of the LLC Agreement requires PTC to use the “same methodologies, principles and policies used in the preparation of the Company’s annual audited consolidated financial statements for the most recently ended Fiscal Year.” And § 7.01(a) of the LLC Agreement states that PTC’s “books of account shall be kept using the method of accounting determined by the Board of Managers, subject to Section 8.08(i).”

ANSWER: Paragraph 30 purports to characterize sections of the LLC Agreement, and Berkshire and the Individual Defendants respectfully refer the Court to the LLC Agreement itself for a complete and accurate description of that document, and deny any allegations inconsistent therewith.

31. Section 12.02 of the LLC Agreement provides that the PTC Board Representatives “shall have the fiduciary duties of loyalty and care (similar to the fiduciary duties of loyalty and care of directors of a business corporation governed

by the General Corporation Law of the State of Delaware) to each of the Members,” with certain limited exceptions. Section 12.01 of the LLC Agreement provides additional limited exceptions to fiduciary duties but does not purport to generally disclaim fiduciary duties otherwise owed by PTC’s members and directors.

ANSWER: Paragraph 31 purports to characterize sections of the LLC Agreement, and Berkshire and the Individual Defendants respectfully refer the Court to the LLC Agreement itself for a complete and accurate description of that document, and deny any allegations inconsistent therewith.

32. In accordance with the 2023 Sale Agreement, Berkshire executed the 2023 Control Purchase on January 31, 2023, paying \$8.2 billion for the additional interest in PTC.

ANSWER: Berkshire and the Individual Defendants admit the allegations of Paragraph 32, except to state that the purchase price for the 2023 Control Purchase was approximately \$8.2 billion.

33. In February 2023, Berkshire reappointed two of its representatives, and appointed three new representatives, to PTC’s seven-member board, leaving Pilot representatives in the remaining two seats. In March 2023, Berkshire removed Pilot appointees as PTC Board Chair, CEO, and CFO and installed Greg Abel, its Vice Chairman, as the PTC Board Chair, Adam Wright as the CEO, and Joe Lillo as the CFO.

ANSWER: Berkshire and the Individual Defendants admit that Berkshire reappointed two of its representatives, and appointed two new representatives, to PTC’s Board in January 2023, and appointed Greg Abel to the PTC Board in February 2023. Berkshire and the Individual Defendants otherwise deny the allegations of the first sentence of Paragraph 33. Berkshire and the

Individual Defendants admit that Berkshire appointed Greg Abel PTC Board Chair in March 2023, and that PTC’s Board appointed Adam Wright as PTC’s CEO and Joe Lillo as PTC’s CFO in March 2023 to be effective as of May 30. Except as admitted, Berkshire and the Individual Defendants deny the allegations of the second sentence of Paragraph 33.

Berkshire breaches the LLC Agreement by imposing pushdown accounting on PTC without Pilot’s consent

34. As a matter of accounting, acquisitions of controlling interests are recorded using the acquisition method, under which the acquirer recognizes the assets acquired and liabilities assumed at fair value with limited exceptions. If the acquired business prepares separate financial statements, Accounting Standards Codification 805-50-25-4 gives the acquired business a choice between using the historical basis of the acquired company or the “stepped-up basis” of the acquirer in those separate financial statements. “Pushdown accounting” refers to the use of the basis of the acquirer in the acquired company’s separate financial statements—because the acquirer’s basis is “pushed down” to the acquired company’s financial statements.

ANSWER: Paragraph 34 purports to characterize certain accounting standards and their impact on PTC’s business operations, for which Berkshire and the Individual Defendants respectfully refer the Court to the relevant accounting standards for a complete and accurate description of those standards, and deny any allegations inconsistent therewith.

35. The “step up” in basis and goodwill recognition that occurs when pushdown accounting is applied typically results in higher net assets for the acquired company, which in turn usually results in lower net income in periods subsequent to the acquisition due to higher amortization and higher depreciation, among other changes.

ANSWER: Paragraph 35 purports to characterize certain accounting standards, for which Berkshire and the Individual Defendants respectfully refer the Court to the relevant accounting standards for a complete and accurate description of those standards, and deny any allegations inconsistent therewith.

36. In March 2023, Berkshire caused PTC to adopt pushdown accounting in the preparation of PTC's separate financial statements—without obtaining Pilot's consent as required under § 8.08(i) of the LLC Agreement. The adoption of pushdown accounting did nothing to change the results, revenue, or profitability of PTC. But, as expected, the switch to pushdown accounting nevertheless resulted in lower reported income in the periods following Berkshire's acquisition of a controlling interest in PTC.

ANSWER: Berkshire and the Individual Defendants deny the allegations of Paragraph 36.

37. In the March 2023 financial statement, pushdown accounting deductions related to depreciation and amortization resulted in nearly [REDACTED] being eliminated from PTC's pre-tax income. And a further [REDACTED] related to interest rate swaps and ethanol hedges that would have otherwise been recognized as earnings was instead recognized as equity (and did not increase pre-tax income). Together, these adjustments reduced PTC's pre-tax income from approximately [REDACTED] to [REDACTED]. Accordingly, the downward adjustment resulting from Berkshire's improper imposition of pushdown accounting in March 2023 translates to a [REDACTED] reduction in EBIT [REDACTED]

ANSWER: Paragraph 37 misleadingly characterizes the effect of pushdown accounting on PTC's pre-tax income for the first quarter of 2023, and Berkshire and the Individual Defendants respectfully refer the court to the relevant financial statements for a complete and accurate description of their contents, and

deny any allegations inconsistent therewith. Berkshire and the Individual Defendants otherwise deny the allegations of Paragraph 37.

38. This exercise yields similar results looking at year-to-date performance. Pushdown accounting adjustments through September reduced PTC's earnings by roughly [REDACTED].

ANSWER: Berkshire and the Individual Defendants deny the allegations of Paragraph 38.

39. Because pushdown accounting rejects the use of the historical basis of the acquired company, the introduction of pushdown accounting also resulted in numerous changes to the "Significant Accounting Policies" as disclosed and applied in PTC's prior financial statements.

ANSWER: Berkshire and the Individual Defendants deny the allegations of Paragraph 39.

40. For example, Note 2(c) of PTC's 2022 Consolidated Financial Statements states that under PTC's accounting policy, "acquired assets and liabilities" were recorded at "fair value determined on the acquisition date," i.e., when the assets were initially acquired by PTC. PTC's shift to pushdown accounting changes this policy to instead value these acquisitions at "fair value" as of when pushdown accounting was applied. While the underlying economic value of these assets and health of the company is identical, this change in accounting policy artificially reduces EBIT through increased depreciation or amortization, or both.

ANSWER: The first sentence of Paragraph 40 purports to characterize portions of PTC's 2022 Consolidated Financial Statements, for which Berkshire and the Individual Defendants respectfully refer the Court to the relevant financial statements for a complete and accurate description of their contents, and deny any

allegations inconsistent therewith. Berkshire and the Individual Defendants deny the allegations of the second and third sentences of Paragraph 40.

41. Similarly, Note 2(h) states that PTC's accounting policy was to value property and equipment "at cost." PTC's shift to pushdown accounting changes this policy to instead value property and equipment at "fair value" as of when pushdown accounting was applied. Again, while the underlying economic value of these assets and health of the company is identical, this change in accounting policy artificially reduces EBIT through increased depreciation or amortization, or both.

ANSWER: The first sentence of Paragraph 41 purports to characterize portions of PTC's 2022 Consolidated Financial Statements, for which Berkshire and the Individual Defendants respectfully refer the Court to the relevant financial statements for a complete and accurate description of their contents, and deny any allegations inconsistent therewith. Berkshire and the Individual Defendants deny the allegations of the second and third sentences of Paragraph 41.

42. The accounting policy disclosed in Note 2(q) of PTC's 2022 Consolidated Financial Statements, governing derivative instruments, is also altered by the adoption of pushdown accounting. The policy as described in PTC's 2022 Consolidated Financial Statements required derivative instrument hedges to be accounted for under "Other Comprehensive Income," and for gains and losses resulting from those hedges to "be recognized in earnings when the hedged forecasted transactions occur." Under pushdown accounting, those gains and losses are not reflected in earnings (or EBIT), but instead are contained in the equity reported on the acquired company's balance sheet. As a result, gains (and losses) on those derivative instruments no longer increase (or decrease) EBIT on future income statements.

ANSWER: The first and second sentences of Paragraph 42 purport to characterize portions of PTC's 2022 Consolidated Financial Statements, for which

Berkshire and the Individual Defendants respectfully refer the Court to the relevant financial statements for a complete and accurate description of their contents, and deny any allegations inconsistent therewith. Berkshire and the Individual Defendants deny the allegations of the third and fourth sentences of Paragraph 42.

43. A number of other Significant Accounting Policies disclosed in PTC's prior financial statements also change based on the application of pushdown accounting, including, but not limited to, accounting policies described in Notes 2(f), 2(j), 2(k), 2(s), 2(u), 2(v), and Items 6-9 of the footnotes to PTC's 2022 audited financial statements.

ANSWER: Berkshire and the Individual Defendants deny the allegations of Paragraph 43.

44. Note 2(f), "Accounts Receivable," previously required an estimate of uncollectible amounts based on historic collections. Under pushdown accounting, the accounts receivable would be reported at current fair value, which could differ from the estimated collectible amounts reported under PTC's historic accounting policies.

ANSWER: The first sentence of Paragraph 44 purports to characterize portions of PTC's 2022 Consolidated Financial Statements, for which Berkshire and the Individual Defendants respectfully refer the Court to the relevant financial statements for a complete and accurate description of their contents, and deny any allegations inconsistent therewith. The second sentence of Paragraph 44 purports to characterize certain accounting standards, for which Berkshire and the Individual Defendants respectfully refer the Court to the relevant accounting standards for a

complete and accurate description of those standards, and deny any allegations inconsistent therewith.

45. Note 2(j), “Other Noncurrent Assets,” including “franchise fees,” “deposits,” and “interest rate swaps,” would all be updated to reflect current fair value as opposed to historical value.

ANSWER: Paragraph 45 purports to characterize both portions of PTC’s 2022 Consolidated Financial Statements and certain accounting standards, for which Berkshire and the Individual Defendants respectfully refer the Court to the relevant financial statements and accounting standards for a complete and accurate description of their contents, and deny any allegations inconsistent therewith. Except as admitted, Berkshire and the Individual Defendants deny the allegations of Paragraph 45.

46. Note 2(k), “Asset Retirement Obligations” previously allowed PTC to not recognize certain obligations when “the fair value cannot be reasonably estimated due to an indeterminate settlement date of the obligation.” After the application of pushdown accounting, PTC may be required to estimate fair value for these assets and list those obligations on the balance sheet.

ANSWER: The first sentence of Paragraph 46 purports to characterize portions of PTC’s 2022 Consolidated Financial Statements, for which Berkshire and the Individual Defendants respectfully refer the Court to the relevant financial statements for a complete and accurate description of their contents, and deny any allegations inconsistent therewith. Berkshire and the Individual Defendants deny the allegations of the second sentence of Paragraph 46.

47. Note 2(s), “Estimates,” will change as a general matter. While prior financial statements utilized historical cost to create certain estimates and assumptions, pushdown accounting will require these estimates and assumptions to consider current fair value. Section 2(u), “Purchase Price Allocation,” will change in a similar way, as the methodology used to measure “certain assets and liabilities,” including intangible assets, will look to current fair value instead of historical cost.

ANSWER: Berkshire and the Individual Defendants deny the allegations of Paragraph 47.

48. And the accounting policy described in Note 2(v), “Leases,” could change significantly if third parties who transact with PTC have lease covenants based on certain financial performance metrics or ratios, because pushdown accounting will significantly change a host of those measures.

ANSWER: Berkshire and the Individual Defendants deny the allegations of Paragraph 48.

49. Finally, Notes 6-9 to PTC’s 2022 Consolidated Financial Statements would also change: Note 6, “Goodwill and Intangible Assets,” previously valued those assets at historical cost; pushdown accounting would value those assets at current fair value, which would increase the associated amortization expense (with a corresponding drop in income). Note 7, “Equity Affiliates,” previously called for the carrying amount of equity affiliates to be calculated at cost, plus earnings, minus losses. Pushdown accounting would result in the revaluation of those affiliates at current fair value. Note 8, “Debt,” would result in debt service payments being recalculated at current (higher) interest rates. And Note 9, “Members’ Capital,” would also be recalculated at current fair value.

ANSWER: Paragraph 49 purports to characterize portions of PTC’s 2022 Consolidated Financial Statements, for which Berkshire and the Individual Defendants respectfully refer the Court to the relevant financial statements for a complete and accurate description of their contents, and deny any allegations

inconsistent therewith. Berkshire and the Individual Defendants otherwise lack knowledge or information sufficient to form a belief as to the truth of Paragraph 49, and deny the allegations of Paragraph 49 on that basis.

Berkshire's imposition of pushdown accounting threatens to grossly devalue Pilot's bargained-for Put Right

50. Berkshire's self-interested decision to switch to pushdown accounting has thus predictably and necessarily resulted in a reduction of PTC's recorded income, compared to PTC's income calculated using PTC's historical basis—but that change has nothing to do with any change in the financial performance of PTC.

ANSWER: Berkshire and the Individual Defendants deny the allegations of Paragraph 50.

51. Berkshire is intent on using the accounting change to justify grossly underpaying Pilot for its 20% interest upon Pilot's exercise of its Put Right.

ANSWER: Berkshire and the Individual Defendants deny the allegations of Paragraph 51.

52. Because the pricing formula for the Put Right utilizes PTC's recorded earnings, Berkshire's unilateral imposition of pushdown accounting for PTC's financial statements, in breach of the LLC Agreement, threatens to reduce the value of Pilot's Put Right by potentially more than [REDACTED]. Under PTC's historical accounting policies, the formula for calculating the Put Right exercise price is based on 10x multiple of EBIT. But application of pushdown accounting could, effectively result in the use of 6x multiple of EBIT in calculating the Put Right exercise price.

ANSWER: Berkshire and the Individual Defendants deny the allegations of the first sentence of Paragraph 52. Berkshire and the Individual Defendants admit that the formula for calculating the Put Right exercise price

(subject to certain other adjustments) is based on the definition of “LTM EBIT” as defined in the Investor Rights Agreement, and respectfully refer the Court to that document for a complete and accurate description of its contents, and deny any allegations inconsistent therewith. Berkshire and the Individual Defendants deny the allegations of the third sentence of Paragraph 52.

53. Based on PTC’s projected 2023 earnings, the amount in dispute from the unauthorized application of pushdown accounting to fiscal year 2023 EBIT is potentially as much as [REDACTED]. If pushdown accounting is applied, the Put Right exercise price could be as low as [REDACTED] of the price that Pilot would have obtained were the pricing formula applied based on PTC’s historical accounting policies. As much as [REDACTED] will instead be captured by controller Berkshire as an unfair and self-interested windfall.

ANSWER: Berkshire and the Individual Defendants deny the allegations of Paragraph 53.

54. PTC’s financial statements have also made clear that the Put Right is to be determined based on the contractual pricing formula, without adjustments for pushdown accounting—i.e., the same formula used for both Berkshire’s initial investment in PTC and the 2023 Control Purchase. PTC’s 2022 Consolidated Financial Statements, for example, state that Berkshire’s purchase prices were “based on a predetermined contractual formula that is intended to reflect *fair value on the date that NICO purchases the equity interest in PTC*,” and that the Put Right “allows Pilot to require NICO to purchase the remaining 20% Class A member interests in PTC *for the same formula*.”

ANSWER: Berkshire and the Individual Defendants deny the allegations of the first sentence of Paragraph 54. The second sentence of Paragraph 54 purports to characterize portions of PTC’s 2022 Consolidated Financial Statements, for which Berkshire and the Individual Defendants respectfully refer the

Court to the relevant financial statements for a complete and accurate description of their contents, and deny any allegations inconsistent therewith. Berkshire and the Individual Defendants otherwise deny the allegations of Paragraph 54.

55. This description eliminates any possible ambiguity that the parties always intended for the price of the 20% interest in PTC subject to the Put Right to be calculated in the same way as the price for Berkshire's initial investment in PTC and its subsequent 2023 Control Purchase. This same language has been consistently included in the notes appearing in PTC's prior consolidated financial statements, for as long as Berkshire has been an investor in PTC.

ANSWER: Berkshire and the Individual Defendants deny the allegations of the first sentence of Paragraph 55. The second sentence of Paragraph 55 purports to generally characterize portions of PTC's past financial statements, for which Berkshire and the Individual Defendants respectfully refer the Court to each of the relevant financial statements for a complete and accurate description of their contents, and deny any allegations inconsistent therewith. Berkshire and the Individual Defendants otherwise deny the allegations of Paragraph 55.

56. Indeed, Berkshire's Form 10-Q for the quarter ended June 30, 2023, as filed with the Securities and Exchange Commission, lists Pilot's "redeemable noncontrolling interest" at approximately \$3.2 billion. On information and belief this valuation was calculated *without* downward adjustments resulting from pushdown accounting. See Berkshire Hathaway Inc., Quarterly Report (Form 10- Q) (June 30, 2023), pp. 3, 10. The disclosure notes that the amount disclosed for the noncontrolling interest reflects "fair value as of the acquisition date." *Id.* at 10. Berkshire has thus conceded that the "fair value" of Pilot's remaining 20% interest in PTC should be calculated consistently with the calculation of the price for Berkshire's previous purchases of interests in PTC.

ANSWER: The first and third sentences of Paragraph 56 purport to characterize portions of Berkshire’s Form 10-Q for the quarter ended June 30, 2023, for which Berkshire and the Individual Defendants respectfully refer the Court to that document for a complete and accurate description of its contents, and deny any allegations inconsistent therewith. Berkshire and the Individual Defendants deny the allegations of the second and fourth sentences of Paragraph 56.

57. The unambiguous language in PTC’s consolidated financial statements and in the Berkshire Form 10-Q puts in writing what should be common sense: When Berkshire made its initial investment in PTC, the parties agreed to a consistent formula to value PTC for the purpose of pricing Berkshire’s subsequent purchases of interests in PTC, and Berkshire is not free to change that formula to its own advantage by causing PTC to adopt new accounting policies that artificially reduce EBIT.

ANSWER: Berkshire and the Individual Defendants deny the allegations of Paragraph 57.

Berkshire refuses to recognize Pilot’s repeated objections to the imposition of pushdown accounting and devaluation of its Put Right

58. Pilot has repeatedly objected to Berkshire’s unauthorized imposition of pushdown accounting in PTC’s monthly and quarterly financial statements—including in direct communications by Jimmy Haslam to Greg Abel, Berkshire Vice Chairman and recently appointed Chairman of PTC, and to Mark [sic] Hamburg, Berkshire’s CFO and a PTC Board Representative.

ANSWER: Berkshire and the Individual Defendants admit that after the change in control of PTC, Pilot has voiced opposition to the use of pushdown

accounting in the valuation of Pilot's Put Right, but otherwise deny the allegations of Paragraph 58.

59. Pilot has also specifically requested assurances that Berkshire will not impose pushdown accounting on PTC's audited financial statements for fiscal year 2023 or otherwise use pushdown accounting to value the Put Right exercise price.

ANSWER: Berkshire and the Individual Defendants admit that after the change in control of PTC, Pilot has voiced opposition to the use of pushdown accounting in the valuation of Pilot's Put Right, but otherwise deny the allegations of Paragraph 59.

60. Rather than remedy its improper imposition of pushdown accounting at PTC or provide the requested assurances, Berkshire has instead continued to cause PTC to issue financial statements using pushdown accounting and has refused to confirm that it will comply with its contractual obligation by refraining from imposing pushdown accounting on PTC's audited financial statements for fiscal year 2023. Without contractual justification, Berkshire has asserted that it need not determine the accounting policies applicable to those statements unless and until Pilot exercises its Put Right. Abel has also expressly informed Pilot that Berkshire will determine the relevant accounting and valuation issues only after Pilot exercises its Put Right.

ANSWER: Berkshire and the Individual Defendants admit that PTC has issued financial statements that utilize pushdown accounting, and otherwise deny the allegations of the first sentence of Paragraph 60. Berkshire and the Individual Defendants deny the allegations of the second sentence of Paragraph 60. Berkshire and the Individual Defendants admit that Greg Abel informed James Haslam III that Berkshire will address Pilot's position on the calculation of the Put

Right price in the context of the dispute resolution procedures provided for in the Investor Rights Agreement when Pilot exercises its Put Right. Except as admitted, Berkshire and the Individual Defendants deny the allegations of the third sentence of Paragraph 60.

61. On information and belief, Berkshire is seeking to force Pilot to exercise its Put Right before resolution of which accounting policies are applicable to PTC's audited financial statements for fiscal year 2023 so that Berkshire can avoid Court scrutiny of its conduct and instead assert that the dispute should be resolved by an accounting arbitrator under § 2.04(d) of the Form of Pilot Put Sale Agreement attached as an exhibit to the Investor Rights Agreement.

ANSWER: Berkshire and the Individual Defendants admit that the Investor Rights Agreement provides for the resolution procedure regarding disputes concerning the Put Right price, which procedure Plaintiff seems intent on avoiding. Except as admitted, Berkshire and the Individual Defendants deny the allegations of Paragraph 61.

62. The parties' dispute over Pilot's veto rights, including which accounting policies may be applied to PTC's audited financial statements, however, is governed by the LLC Agreement—and that agreement does not provide for any disputes over its terms to be decided by an arbitrator. To the contrary, § 14.11 of the LLC Agreement provides that “any and all suits, legal actions or proceedings arising out of this agreement shall be brought in the courts of the State of Delaware or the United States District Court for the District of Delaware and each party hereby submits to and accepts the exclusive jurisdiction of such courts for the purpose of such suits, legal actions or proceedings.”

ANSWER: Berkshire and the Individual Defendants admit that the LLC Agreement includes the provision quoted in Paragraph 62, and otherwise deny the allegations of Paragraph 62.

63. In another attempt to amicably and fairly resolve the parties' dispute, the two Pilot directors (Jimmy Haslam and his father and PTC founder Jim Haslam II) proposed a resolution (the "Pushdown Accounting Resolution") at a PTC Board meeting on August 24, 2023. The Pushdown Accounting Resolution provided that the financial statements of PTC, including the audited financial statements for the fiscal year ending December 31, 2023, shall be prepared in accordance with the accounting policies, practices, methods and elections used in the preparation of PTC's audited consolidated financial statements for the fiscal year ended December 31, 2022, and that pushdown accounting would therefore not be utilized for those statements, and that, in any event, pushdown accounting would not be used to calculate fiscal year 2023 EBIT for the purposes of determining the value of the Put Right.

ANSWER: Berkshire and the Individual Defendants admit that, at a meeting on August 24, 2023, the two Pilot directors proposed a resolution regarding pushdown accounting. Paragraph 63 otherwise purports to characterize that proposed resolution, which speaks for itself, and Berkshire and the Individual Defendants respectfully refer the court to that proposed resolution for its complete and accurate contents, and deny any allegations inconsistent therewith.

64. The purpose of the Pushdown Accounting Resolution was to end PTC's ongoing breach of contract related to the preparation and distribution of unauthorized financial statements and to confirm that PTC's future financial statements, including the 2023 yearly financial statements, would not improperly reduce PTC's recorded earnings and consequently dramatically undervalue the Put Right, effectuating an unfair transfer of value from minority investor Pilot to controlling investor Berkshire in breach of the LLC Agreement.

ANSWER: Berkshire and the Individual Defendants deny the allegations of Paragraph 64.

65. Without explanation, the five Berkshire representatives on the PTC Board—all of whom work for Berkshire companies—voted against the Pushdown Accounting Resolution and it was not adopted. Upon information and belief, the five Berkshire representatives on the PTC Board voted against the resolution to benefit controller Berkshire at the expense of minority investor Pilot.

ANSWER: Berkshire and the Individual Defendants admit that the proposed Pushdown Accounting Resolution was not adopted. Berkshire and the Individual Defendants otherwise deny the allegations of Paragraph 65.

66. Following the August 24, 2023 PTC Board meeting, Pilot has repeatedly sought to confirm Berkshire’s position on the application of pushdown accounting to PTC’s fiscal year 2023 financial statements and to the calculation of the value of its Put Right. After Berkshire’s Chairman, Warren Buffett, informed the elder Haslam in an October 13, 2023 phone call that Berkshire would abide by the LLC Agreement, the elder Haslam sent Buffett a letter seeking confirmation that Berkshire would not apply pushdown accounting in calculating the value of Pilot’s Put Right. Buffett refused to provide a straight answer to Haslam’s simple question. Instead, Buffett repeated: “I said that Berkshire will comply with the terms of the contract. That’s exactly what will happen,” and that “when and if the Haslam family decides to exit, we will do exactly what the contract says.” Buffett’s refusal to even disclose Berkshire’s position on the proper method of valuing Pilot’s Put Right has not only made litigation inevitable, but also made clear that Berkshire and the Board Defendants will not commit to honor their contractual obligations and fiduciary duties.

ANSWER: In a telephone call with Warren Buffett on October 13, 2023, James Haslam II sought Buffett’s agreement with the Haslam family’s position concerning pushdown accounting and its effect on the Put Right price. In response, Warren Buffett said that he could not in any way discuss accounting, that

Berkshire complies with contracts, and, when and if the Haslam family decided to exit, Berkshire would do exactly what the contract says. Haslam II wrote Buffett on October 18, 2023 and misleadingly sought to “confirm” that Berkshire would not use pushdown accounting in connection with an exercise by the Haslams of the Put Right. Buffett wrote back the same day and set the record straight. Except as admitted by facts stated in the foregoing sentences, Berkshire and the Individual Defendants deny the allegations of Paragraph 66.

CLAIMS FOR RELIEF

FIRST CLAIM: BREACH OF CONTRACT (against PTC)

67. Plaintiff repeats and incorporates by reference the above allegations as if fully set forth herein.

ANSWER: Berkshire and the Individual Defendants repeat and incorporate by reference their responses to the above allegations as if fully set forth herein.

68. The LLC Agreement is a valid contract between the parties thereto, including PTC, Pilot, and Berkshire, through its subsidiary NICO.

ANSWER: Berkshire and the Individual Defendants admit the allegations of Paragraph 68.

69. Applicable law and GAAP do not require the application of pushdown accounting to PTC’s financial statements.

ANSWER: Berkshire and the Individual Defendants admit that under GAAP, an acquired reporting entity has a choice to make: whether or not to account for the change of control using pushdown accounting. Berkshire and the Individual Defendants otherwise deny the allegations of Paragraph 69.

70. PTC has breached § 8.08(i) and § 1.02 of the LLC Agreement by issuing financial statements deploying pushdown accounting without Pilot's consent.

ANSWER: Paragraph 70 consists of a legal conclusion, to which no response is required. To the extent a response is required, Berkshire and the Individual Defendants deny the allegations of Paragraph 70.

71. PTC has also breached § 7.01(a) of the LLC Agreement by failing to maintain books of account that reflect only accounting determinations made in compliance with § 8.08(i) and § 1.02 of the LLC Agreement.

ANSWER: Paragraph 71 consists of a legal conclusion, to which no response is required. To the extent a response is required, Berkshire and the Individual Defendants deny the allegations of Paragraph 71.

72. Plaintiff is entitled to an order requiring Berkshire and the Board Defendants to cause PTC to issue financial statements that reflect only accounting determinations made in compliance with § 8.08(i) and § 1.02 of the LLC Agreement, to correct and reissue any financial statements reflecting accounting determinations made in breach of § 8.08(i) and § 1.02 of the LLC Agreement, and to correct books of account to reflect only accounting determinations made in compliance with § 8.08(i) and § 1.02 of the LLC Agreement.

ANSWER: Paragraph 72 consists of a legal conclusion, to which no response is required. To the extent a response is required, Berkshire and the Individual Defendants deny the allegations of Paragraph 72.

73. Pilot is further entitled to compensation for damages resulting from PTC's prior and ongoing breaches of the LLC Agreement.

ANSWER: Paragraph 73 consists of a legal conclusion, to which no response is required. To the extent a response is required, Berkshire and the Individual Defendants deny the allegations of Paragraph 73.

**SECOND CLAIM: BREACH OF FIDUCIARY DUTY
(against Berkshire and the Board Defendants)**

74. Plaintiff repeats and incorporates by reference the above allegations as if fully set forth herein.

ANSWER: Berkshire and the Individual Defendants repeat and incorporate by reference their responses to the above allegations as if fully set forth herein.

75. Berkshire and the Board Defendants owe Pilot fiduciary duties of care and loyalty.

ANSWER: Paragraph 75 consists of a legal conclusion, to which no response is required. To the extent a response is required, Berkshire and the Individual Defendants deny the allegations of Paragraph 75.

76. In violation of those duties, Berkshire and the Board Defendants caused PTC to issue, and voted against a resolution precluding PTC from issuing, financial statements that unfairly harm Pilot and benefit Berkshire.

ANSWER: Paragraph 76 consists of a legal conclusion, to which no response is required. To the extent a response is required, Berkshire and the Individual Defendants admit that PTC's Board voted against a resolution (offered by Pilot's representatives) precluding PTC from utilizing pushdown accounting in its financial statements, and otherwise deny the allegations of Paragraph 76.

77. Plaintiff has been damaged as a result of the fiduciary breaches by Berkshire and the Board Defendants.

ANSWER: Berkshire and the Individual Defendants deny the allegations of Paragraph 77.

78. Plaintiff is entitled to injunctive relief and compensation for damages resulting from Berkshire and the Board Defendants' breaches of fiduciary duty.

ANSWER: Paragraph 78 consists of a legal conclusion, to which no response is required. To the extent a response is required, Berkshire and the Individual Defendants deny the allegations of Paragraph 78.

**THIRD CLAIM: DECLARATORY JUDGMENT
(against all Defendants)**

79. Pursuant to Court of Chancery Rule 57 and 10 Del. C. § 6501, this Court has authority to declare the rights, status, or other legal relations of the parties before it.

ANSWER: Berkshire and the Individual Defendants admit the allegations of Paragraph 79.

80. The LLC Agreement is a valid and enforceable contract between Plaintiff and Defendants.

ANSWER: Berkshire and the Individual Defendants admit that the LLC Agreement is a valid and enforceable contract among the parties to the LLC Agreement. Except as admitted, Berkshire and the Individual Defendants deny the allegations of Paragraph 80.

81. Defendants have a contractual obligation under the LLC Agreement to seek Plaintiff's consent before adopting a change or selection of accounting policy.

ANSWER: Berkshire and the Individual Defendants admit that Section 8.08(i) of the LLC Agreement contains a consent right that requires PTC to seek member consent in certain circumstances to the selection or change of certain PTC accounting policies, respectfully refer the Court to the LLC Agreement for a complete and accurate description of its contents, and otherwise deny the allegations of Paragraph 81.

82. As set forth above, Defendants have breached and have threatened to continue to breach the LLC Agreement.

ANSWER: Berkshire and the Individual Defendants deny the allegations of Paragraph 82.

83. Plaintiff will be harmed absent the Court's declaration of rights.

ANSWER: Berkshire and the Individual Defendants deny the allegations of Paragraph 83.

84. Plaintiff accordingly requests a declaratory judgment that the LLC Agreement prohibits the adoption of pushdown accounting for PTC's past and future financial statements without Plaintiff's consent, that Berkshire and NICO are in

breach of the LLC Agreement for preparing past financial statements reflecting pushdown accounting, and that any calculation of fiscal year 2023 EBIT for the purposes of the Put Right shall be consistent with such accounting practices as utilized in the calculation of fiscal year 2022's EBIT, and shall not utilize pushdown accounting.

ANSWER: Paragraph 84 consists of a legal conclusion, to which no response is required. To the extent a response is required, Berkshire and the Individual Defendants deny the allegations of Paragraph 84.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff requests that this Court enter a judgment:

a. Declaring that the LLC Agreement requires Pilot's consent to apply pushdown accounting principles to PTC's financial statements; that PTC's prior financial statements deploying pushdown accounting were unauthorized and impermissible; directing PTC to re-prepare and redistribute its prior financial statements deploying pushdown accounting solely with financial figures not reflecting pushdown accounting; directing Berkshire, NICO and the Board Defendants to cause PTC to prepare its fiscal year 2023 financial statements without deploying pushdown accounting; and directing Berkshire, NICO, and the Board Defendants to cause PTC to calculate the exercise of Pilot's Put Right based on the same accounting principles used to calculate the financial statements for fiscal year 2022;

b. Enjoining PTC from preparing further financial statements deploying pushdown accounting without Pilot's consent, unless or until Pilot no longer possesses such a right;

c. Awarding Plaintiff damages in an amount that may be proven at trial, together with interest thereon;

d. Awarding Plaintiff the costs and disbursements of this Action, including attorneys', accountants', and experts' fees; and;

e. Awarding such other, further, and different relief as this Court may deem just, equitable, and proper.

Plaintiff's Request for Relief consists of legal conclusions to which no response is required. To the extent a response is required, Berkshire and the Individual Defendants deny that Plaintiff is entitled to any form of relief.

DEFENSES

FIRST DEFENSE

The Complaint, in whole or in part, fails to state a claim against Berkshire and the Individual Defendants upon which relief can be granted.

SECOND DEFENSE

Plaintiff's claims are barred, in whole or in part, by the LLC Agreement and the Investor Rights Agreement. The consent right contained in Sec. 8.08(i) of the LLC Agreement does not permit Plaintiff to veto the use of pushdown accounting, and the Investor Rights Agreement's formula for calculating the value of Plaintiff's Put Right does not prevent PTC from using pushdown accounting.

THIRD DEFENSE

All claims against Berkshire and the Individual Defendants are barred because Plaintiff has not suffered any actual injury, harm, or damages as a result of any action, inaction, or conduct by Berkshire and the Individual Defendants. Specifically, actions taken by PTC in advance of the 2023 Sale and Berkshire's acquisition of a majority interest in PTC necessitated the use of pushdown accounting in PTC's 2023 financial statements as a matter of accounting standards.

FOURTH DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of acquiescence. Plaintiff's conduct in causing PTC to apply "on-the-line" accounting that required PTC to utilize pushdown accounting for PTC's financial statements in connection with the 2023 Sale is inconsistent with its subsequent repudiation of pushdown accounting by purporting to assert its veto right under Section 8.08(i) of the LLC Agreement.

FIFTH DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of waiver. Plaintiff's conduct in causing PTC to apply "on-the-line" accounting that required PTC to utilize pushdown accounting for PTC's financial statements in connection with the 2023 Sale constitutes knowing waiver of any purported veto right Plaintiff possesses under Section 8.08(i) of the LLC Agreement.

SIXTH DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of estoppel. Plaintiff is estopped by its conduct in causing PTC to apply "on-the-line" accounting (which can only properly be done with pushdown accounting) to avoid recognizing compensation expenses that would otherwise have reduced EBIT. In reliance on that conduct, Berkshire acquiesced in "on-the-line" accounting.

SEVENTH DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of unclean hands. Among other acts on Plaintiff's part, Plaintiff's conduct and the conduct of Plaintiff's authorized agent (as detailed at length in the Verified Counterclaim) in promising illicit side payments to numerous PTC senior executives in order to unjustly increase the value of its Put Right, bars Plaintiff from now seeking relief that relates directly to that same Put Right.

EIGHTH DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of *in pari delicto*. To the extent the Court finds any wrongful conduct on behalf of Berkshire or any Individual Defendant, the wrongful conduct of Plaintiff and Plaintiff's authorized agent (as detailed at length in the Verified Counterclaim) bars Plaintiff from seeking relief from this Court.

NINTH DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of *in pari delicto*. To the extent the Court finds any wrongful conduct on behalf of Berkshire or any Individual Defendant, Plaintiff's conduct in causing PTC to employ "on-the-line" accounting to avoid recognizing compensation expenses that would otherwise reduce Plaintiff's proceeds from sale of its ownership interest in PTC bars Plaintiff from seeking relief from this Court.

TENTH DEFENSE

Plaintiff's claims for damages are barred, in whole or in part, because of a lack of injury in fact and a lack of causation, as Plaintiff's time to exercise the Put Right has not yet expired and Plaintiff has not yet elected whether to exercise the Put Right.

ELEVENTH DEFENSE

Plaintiff's claims are barred, in whole or in part, by the doctrine of laches. Plaintiff's conduct in asserting a new and unsupported interpretation of the LLC Agreement, in complete contradiction to its conduct in the preceding five years of operation and management of PTC while possessing a majority interest, bars Plaintiff from now announcing a self-serving interpretation of the LLC Agreement solely in order to maximize the value of its Put Right.

RESERVATION OF RIGHTS

This Answer is based on information currently available to Berkshire and the Individual Defendants. Berkshire and the Individual Defendants reserve the right to seek to assert additional affirmative defenses to the extent they become known through discovery or otherwise following the date of this Answer. Berkshire and the Individual Defendants further reserve the right to withdraw defenses that it determines are not applicable during the course of discovery and other proceedings in this action.

VERIFIED COUNTERCLAIM AND THIRD-PARTY COMPLAINT

Pursuant to Court of Chancery Rules 13 and 14, Counter-Plaintiff and Third-Party Plaintiff National Indemnity Company (“NICO”), a wholly owned subsidiary of Berkshire Hathaway Inc. (“Berkshire”), brings these claims for equitable relief and legal damages against Counter-Defendant Pilot Corporation (“Pilot”) and Third-Party Defendant James A. (“Jimmy”) Haslam III.

NATURE OF THE ACTION

1. After Pilot filed this lawsuit, Berkshire and NICO learned that Jimmy Haslam secretly promised massive side payments to over █ high-level employees of Pilot Travel Centers, LLC (“PTC”) that were structured to improperly inflate PTC’s short-term profits in 2023 at the expense of PTC’s long-term profitability and value. Haslam concealed those promised payments from PTC’s senior management and from Berkshire and NICO. Inflating PTC’s short-term profits in 2023 would in turn inflate the price that NICO is contractually obligated to pay for Pilot’s remaining 20% stake in PTC, should Pilot exercise its put option in early 2024. By secretly distorting the incentives of PTC’s employees for personal gain, Haslam breached the fiduciary duties he owes to PTC and NICO, and jeopardized PTC’s long-term profitability and value.

2. Pilot and NICO are each members of PTC, a Delaware limited liability company based in Knoxville, Tennessee. PTC’s business operations and the rights

of Pilot and NICO are governed by a Seventh Amended and Restated Limited Liability Company Agreement, dated as of August 13, 2021 (“LLC Agreement”). NICO, Pilot and certain other entities are also party to a Fourth Amended and Restated Investor Rights Agreement (“Investor Rights Agreement”). The Investor Rights Agreement sets forth Pilot’s option (the “Put Option”) to have NICO purchase its 20% stake in PTC, and provides a formula for determining the price as the acquired percentage of ten times PTC’s earnings before interest and taxes (“EBIT”), plus or minus certain adjustments as described in the Investor Rights Agreement, for the calendar year immediately before the year in which the Put Option is exercised.

3. Because the value of Pilot’s Put Option is based on PTC’s EBIT in the preceding year, inflating PTC’s short-term EBIT, even at the expense of PTC’s long-term profitability and growth, would result in a larger payout under the formula. In anticipation of Pilot exercising its Put Option in 2024, Haslam—Pilot’s CEO—concocted an illicit scheme structured to induce PTC’s employees to maximize PTC’s 2023 EBIT at the expense of PTC’s long-term value. Haslam, working at times in concert with former PTC CEO Shameek Konar, promised to personally make massive, under-the-table payments to PTC’s employees in amounts calculated

based on the size of Pilot's Put Option, incentivizing them to take actions to maximize PTC's 2023 EBIT for Haslam's benefit.

4. Pilot's and Haslam's outrageous and illegitimate scheme has harmed and threatens to further harm PTC and, by extension, NICO and Berkshire. NICO brings these claims to remedy the harm caused by Haslam's secret promised side payments and to prevent future harm by barring Pilot from exercising its Put Option based on the 2023 financials that Jimmy Haslam has illicitly influenced.

PARTIES

5. Counter-Plaintiff and Third-Party Plaintiff NICO is a Nebraska corporation with its principal place of business in Omaha, Nebraska. NICO is a wholly owned subsidiary of Berkshire. Before January 31, 2023 (the "2023 Sale"), NICO held a 38.6% interest in PTC. After the 2023 Sale, NICO held an 80% interest in PTC.

6. Counter-Defendant Pilot is a Tennessee corporation with its principal place of business in Knoxville, Tennessee. Pilot was founded by James A. Haslam II (Jimmy Haslam's father) and is wholly owned by the Haslam family. Before the 2023 Sale, Pilot held a 50.1% interest in PTC. After the 2023 Sale, Pilot held a 20% interest in PTC.

7. Third-Party Defendant Jimmy Haslam is the CEO of Pilot, was previously the Chairperson of PTC’s Board of Managers, and has been a member of PTC’s Board of Managers at all relevant times through the present.

FACTUAL ALLEGATIONS

PTC Discovers Haslam’s Scheme to Offer PTC’s Employees Illicit Side Payments

8. In early November 2023, during a routine meeting with PTC’s current CEO Adam Wright, one of PTC’s most senior executives made a shocking disclosure: “I know there is a narrative out there that I have a side deal with Jimmy [Haslam].” The executive disclosed that Haslam offered to pay him additional compensation, outside of PTC’s compensation structure, based on the price Haslam expected Pilot to receive if it exercised its Put Option in 2024. The first such overture came during a dinner that Haslam held for PTC executives in March 2023. Later in the year, more followed.

9. *March 2023 Dinner.* On March 29, 2023, Haslam hosted a dinner at the Cherokee Country Club in Knoxville, Tennessee. He invited approximately [REDACTED], including the senior executive who later spoke with Wright. Many of those executives are still employed by PTC, with the notable exceptions of PTC’s then-CEO Shameek Konar and then-CFO Kevin Wills. Konar and Haslam

were known to be particularly close, and it was understood that Haslam had hand-picked Konar to be PTC's CEO.

10. At the dinner, Haslam previewed for the assembled executives—before the news was public and contrary to his duty of confidentiality as a member of PTC's Board of Managers—that Berkshire intended to replace Konar and Wills. Haslam told the group that he would object to Konar's and Wills' dismissal at an upcoming meeting of PTC's Board. Haslam added that he and Berkshire had philosophical differences in terms of the business, and that 2023 would likely be his last year with PTC—implying that Pilot would exercise its Put Option in 2024.

11. Haslam said that, assuming Pilot exercised its Put Option in 2024, he would reward the assembled executives with large, one-time bonuses. Specifically, Haslam said that he would reward them in the same manner that they had been rewarded upon the 2023 Sale pursuant to PTC's then-existing bonus program, known as the Growth Partners Plan ("GPP"). Under the GPP, as discussed in more detail below, executives received one-time "Special Distribution" awards upon the 2023 Sale calculated based on PTC's 2022 EBIT. The Haslam family, which controls Pilot, funded those bonuses through a capital contribution to PTC, and the bonuses far exceeded the typical bonus compensation awarded to similarly situated executives in the market. [REDACTED]

[REDACTED]

[REDACTED] After the 2023 Sale, however, the GPP no longer provided for Special Distribution awards.

12. Most, if not all, of the executives who attended the Cherokee dinner had received Special Distribution awards under the GPP—meaning that everyone in the room either already had received, or was about to receive, a very large check personally funded by the Haslam family. In many cases, those payments were an order of magnitude greater than the executives’ annual salaries. [REDACTED]

[REDACTED]

[REDACTED]

13. The large and secret payments that Haslam said he would provide were not retention agreements. Many of the executives at the Cherokee dinner had already been offered retention agreements by PTC—that is, contracts to remain employed at PTC through 2025, after which they would be entitled to additional compensation. *Pilot* itself proposed the retention agreements when it was the majority owner of PTC, recommending both the size of the agreements and the employees who would be offered them. The purpose of the agreements was to incentivize key employees to remain at PTC through 2025—and, unlike Haslam’s proffered side payments, the retention agreements had been approved by PTC through proper corporate

governance. If Haslam sought only to incentivize executives to remain at PTC, his company Pilot already had an above-board means of doing so. If Haslam thought that the existing, official incentives were not enough, he could have recommended that PTC consider more. Instead, during 2023, Haslam's promises would buy something different: the executives' loyalty to him personally, at the expense of PTC. Unlike the official retention agreements approved by PTC, the secret, unofficial and unauthorized "Special Distribution" awards personally funded by Haslam in 2024 would be paid after Pilot's sale of its 20% stake and would dwarf the official retention amounts—undercutting incentives for employees to remain at PTC under NICO's 100% ownership or otherwise to act in PTC's long-term interests.

14. Haslam's illicit promise of secret bonuses thereby distorted PTC executives' financial interests to be aligned not with PTC's interests, but with those of a minority owner anticipating selling its remaining stake. Higher EBIT for PTC in 2023 would mean a higher amount paid to Pilot if it exercised the Put Option in 2024, and therefore higher illicit bonuses paid by Jimmy Haslam to PTC's executives.

15. *Follow-on Conversations.* Between June and August 2023, Haslam contacted at least [REDACTED] of the executives who attended the Cherokee dinner to repeat

his promise. Haslam again told them that he would pay them Special Distribution awards if Pilot exercised its Put Option in 2024, just as they had been paid in 2023. And, until November 2023, the executive who later spoke with Wright—and every other executive who attended the Cherokee dinner—kept it secret from executives, such as Wright and PTC’s CFO Joe Lillo, who had been hired after the 2023 Sale when NICO became the majority owner.

16. Later that same day, after Wright’s conversation with the first senior executive, another high-level executive approached Wright. That executive likewise reported that Haslam had promised to “make good” on the Special Distribution awards for 2024, even though the GPP no longer provided for such awards. The executive told Wright that Haslam “keeps his word.” Asked what he would do if Haslam wrote him a check, that executive responded that he would “put it in the bank.”

17. Haslam also deputized Konar—who, after leaving PTC, now works for Haslam in Knoxville—to extend the illicit promise to strategically selected leaders within PTC and secure their cooperation. In around April 2023, Konar contacted at least [REDACTED] senior management team members in the [REDACTED] of PTC to make the same promise on Haslam’s behalf.

18. On information and belief, Haslam’s choice to target the [REDACTED] was strategic and deliberate. The [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED].

19. Konar told these members of senior management that Haslam wanted them to know that, if Pilot exercised its Put Option in 2024, Haslam would “honor” their GPP agreements. On information and belief, this statement was intended to be understood to mean, and these employees would have understood it to mean, that Haslam would pay them another Special Distribution award—like the one they had received in 2023—but this one would be based on the amount of PTC’s 2023 EBIT and the payout Pilot received upon exercising its Put Option.

20. This promise to “honor” the GPP agreements was made against the background that, in connection with the 2023 Sale and the financial benefits that the employees would receive from that sale, the GPP had been amended to *remove*

Special Distribution awards tied to Pilot's payout upon exercising its Put Option in 2024.

21. Haslam and Konar made no similar promises to high-level executives who were new to PTC and had ties to Berkshire or NICO, such as PTC's CEO Adam Wright and PTC's CFO Joe Lillo. Rather, Haslam and Konar targeted PTC's employees who had benefitted from the 2023 Sale—and thus understood that a higher EBIT in 2023 would result in a larger payout from NICO to Pilot in 2024—and whose employment pre-dated NICO's taking control.

22. Haslam's illicit side payments were structured to incentivize some of the most senior PTC employees, and those with the most discretion to influence PTC's financial performance, to favor short-term profits—*i.e.*, Pilot's interests—over long-term stability and profitability—*i.e.*, NICO's and PTC's interests.

By Secretly Promising Side Payments, Haslam Caused Employees to Favor Haslam's Interest in Maximizing PTC's Short-Term Gain

23. Even before he heard from the two senior executives in November 2023, PTC's current CEO Adam Wright had been concerned about what appeared to be divided loyalties among PTC's employees. On the business side, he noticed an unwarranted urgency among certain employees to close deals in 2023. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

24. In another example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

25. Although Wright and others noticed and addressed these suspicious short-term earnings strategies before they could be carried out, the nature of PTC's business is such that Wright was not in a position to police the huge number of transactions that could have been influenced by Haslam's improper promise of

under-the-table compensation. In many cases, [REDACTED] have the authority to enter into transactions that have the effect of either pulling gains forward into a particular earnings period or delaying those gains to a later period. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. The decision on which course of action to take should be made based on sound business judgment, not whether the result would increase the value of Pilot's Put Option in early 2024.

26. On information and belief, Haslam's promised under-the-table bonuses to PTC's employees affected their everyday decision-making in ways large and small, and in ways that PTC could not police and cannot now effectively reconstruct. Haslam's illegitimate scheme improperly incentivized key employees to make short-term decisions to the detriment of PTC's long-term growth and value.

The 2023 Special Distributions

27. Since at least 2002, PTC has maintained an executive profit-sharing plan known as the Growth Partners Plan.

28. Initially, executives participating in the GPP received Growth Units (or "points") based exclusively on a percentage of PTC's annual net after-tax profits.

Payments were subject to a vesting schedule starting 90 days after the end of PTC's fiscal year (when 50% of each award was paid out), with an additional 25% of each award paid out one year and two years after that date.

29. In 2021, while the Haslams retained majority control of PTC through Pilot (and shortly after Jimmy Haslam stepped down as CEO and appointed Konar), the Haslams amended the GPP to introduce "Special Distribution Growth Units." The Haslams introduced these awards largely in response to NICO's obligation to increase its stake in PTC to 80% through the 2023 Sale.

30. The Special Distribution points in 2023 were one-time payments to specified employees of a portion of the proceeds Pilot would receive from NICO from the 2023 Sale. The payments were made to the employees by PTC but funded by the Haslam family, through a corresponding reduction of proceeds of the 2023 Sale distributed through PTC to Pilot.

31. PTC's Executive Plan Committee, an informal management committee established when PTC was under Pilot's control and staffed by Haslam loyalists, had sole discretion to pay Special Distribution awards to PTC's employees. No Berkshire or NICO representative ever served on PTC's Executive Plan Committee.

32. NICO's obligation to purchase a majority stake in PTC in January 2023 would result in a Special Distribution to Pilot and the Haslams. The Executive Plan

Committee made that same Special Distribution payment serve as the trigger to disburse bonuses to PTC executives through their Special Distribution Growth Units.

33. With certain contractual adjustments, the Investor Rights Agreement sets the price for the 2023 Sale as PTC's 2022 EBIT, multiplied by [REDACTED], then multiplied by the percentage of equity NICO was acquiring from Pilot and certain other entities.

34. Accordingly, while in control of PTC through Pilot, and aware that NICO was contractually obligated to complete the 2023 Sale, the Haslams amended the GPP to increase executive compensation payouts in a way precisely calibrated to maximize 2022 EBIT, thereby increasing their proceeds from the 2023 Sale.

35. PTC's 2022 EBIT was the highest in its history, exceeding its earnings projections by approximately 50%. As a result, the Special Distribution awards also were record-setting. In total, they exceeded [REDACTED].

36. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

37. In anticipation of NICO's taking control after the 2023 Sale, PTC, under Pilot's control, amended the GPP to eliminate the Special Distribution Growth Units for future transactions. So far as NICO was aware, the incentives of Pilot and NICO (and by extension, Berkshire) were aligned: The Special Distribution Growth Units would not continue after 2022. The current version of the plan does not contemplate any payments in connection with Pilot's exercise of its Put Option in any year.

38. Instead, to promote employee retention, PTC put in place retention agreements with key employees, providing for bonuses to those who remained at PTC through the end of 2025. The particular employees were recommended by Pilot, as were the amounts of the retention bonuses. PTC, like any company in its position, adopted the retention agreements based on a determination that they appropriately balanced incentives for employees to stay with the company past the transition period following the 2023 Sale. The retention bonus amounts were in many cases far lower than the employees' Special Distribution awards.

39. Accordingly, the secret side payments promised by Haslam not only would significantly increase the income that the contacted executives would receive in 2024, but also upset the incentive plan PTC had *already* put in place to retain those employees.

The Promises of Secret Side Payments Breached Haslam's and Pilot's Fiduciary and Contractual Obligations

40. By promising secret side payments to over [REDACTED] of PTC's employees, Jimmy Haslam induced those employees to prioritize PTC's 2023 EBIT over PTC's long-term financial health, to thereby enhance the value of Pilot's 2024 Put Option and enrich Haslam personally.

41. By making these illicit promises and interfering with PTC's business operations for personal gain, Haslam violated the fiduciary duties that he owes under the LLC Agreement and, acting on behalf of Pilot, violated the Investor Rights Agreement governing Pilot's Put Option.

42. Specifically, Haslam's scheme breached Haslam's fiduciary duties to PTC and NICO under the LLC Agreement as a member of PTC's Board of Managers and breached Pilot's obligations under the Investor Rights Agreement. Under Section 14.03 of the LLC Agreement and Section 3.8 of the Investor Rights Agreement, those agreements together constitute NICO's and Pilot's agreement as to the subject matter thereof. As remedies for Haslam's and Pilot's breaches, NICO is entitled to, at least, an injunction barring Pilot from exercising its now-tainted Put Option in the 2024 window; rescission and reformation; a declaration of rights; and money damages to make it whole.

CAUSES OF ACTION

COUNT I: BREACH OF FIDUCIARY DUTY

(against James A. Haslam III)

43. NICO repeats and incorporates by reference the above allegations as if fully set forth herein.

44. Haslam owed and still owes NICO fiduciary duties of loyalty and care. Section 12.02 of the LLC Agreement expressly provides that representatives serving on PTC's Board of Managers, on which Haslam has served on behalf of Pilot at all relevant times through the present, have fiduciary duties of loyalty and care to PTC and its members, including NICO.

45. In violation of those duties, Haslam offered illicit, secret side payments to PTC's employees, improperly influencing them to favor the interests of Pilot and Haslam over the interests of PTC and NICO. Haslam also skewed PTC's approved incentive plan for employee retention, harming PTC itself.

46. NICO has been harmed as a result of Haslam's breaches of fiduciary duties. Haslam's corrupting promises to over [REDACTED] employees, from [REDACTED] traders, all with substantial day-to-day discretion, has, on information and belief, influenced their business and operational decisions in a way that has harmed PTC's profitability and value, while it has also denied NICO the ability to discern which business and operational decisions at PTC during 2023 improperly favored Pilot's

and Haslam's interests over PTC's interests. Quantifying the full extent of the harm to NICO from nearly a year's accumulation of compromised decision-making is not reasonably possible, leaving no adequate damages remedy.

47. NICO is entitled to injunctive relief barring Haslam from compensating PTC's employees outside PTC's official retention plan and barring Pilot from exercising the Put Option in 2024; rescission or reformation of the Put Option in 2024; and compensation for damages resulting from Haslam's breaches of fiduciary duties.

COUNT II: BREACH OF CONTRACT – IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

(against Pilot)

48. NICO repeats and incorporates by reference the above allegations as if fully set forth herein.

49. The Investor Rights Agreement is a valid and enforceable contract between NICO and Pilot.

50. Implied in the Investor Rights Agreement is an obligation not to take illicit and improper actions to suborn PTC's employees with promises of secret side payments that incentivize them to distort EBIT to increase the value of Pilot's Put Option. This obligation was so obvious, and so fundamental to the price term that

NICO should not have been expected to bargain for it to be incorporated expressly into the Investor Rights Agreement.

51. Pilot breached that obligation when, acting through Jimmy Haslam, it made secret promises of side payments to PTC's employees to induce those employees to artificially increase PTC's 2023 EBIT, thereby distorting the value of Pilot's Put Option.

52. The illicit promise that Haslam made to PTC's employees on behalf of Pilot influenced them to make business decisions to maximize PTC's short-term profits at the expense of PTC's long-term health and profitability, often in ways that are difficult or impossible to detect.

53. NICO has been damaged as a result of Pilot's breach of the Investor Rights Agreement, and if Pilot is allowed to exercise its Put Option in 2024, NICO will be further damaged. Haslam's corrupting promises to over [REDACTED] employees, from [REDACTED], all with substantial day-to-day discretion, have, on information and belief, caused business and operational decisions at PTC during 2023 to be made in a way that improperly favored Pilot's and Haslam's interests over PTC's interests, while at the same time denied NICO the ability to discern the full extent of the misconduct. Quantifying the full extent of the harm to NICO from

nearly a year's accumulation of compromised decision-making is not reasonably possible, leaving no adequate damages remedy.

54. NICO is entitled to injunctive relief barring Haslam from compensating PTC's employees outside PTC's official retention plan and barring exercise of the Put Option in 2024; rescission or reformation of the Put Option in 2024; and compensation for damages resulting from Pilot's breaches of the Investor Rights Agreement.

COUNT III: DECLARATORY RELIEF
(against Pilot)

55. NICO repeats and incorporates by reference the above allegations as if fully set forth herein.

56. Pursuant to Court of Chancery Rule 57 and 10 *Del. C.* § 6501, this Court has authority to declare the rights, status, or other legal relations of the parties before it.

57. The Investor Rights Agreement is a valid and enforceable contract between NICO and Pilot.

58. As set forth above, Pilot has breached and continues to breach the Investor Rights Agreement. Specifically, Pilot has breached its obligation not to artificially distort EBIT to increase the value of its Put Option, as stated above.

59. Pilot's obligation is a material term of the Investor Rights Agreement, and Pilot's breach thereof excuses NICO from performance in the event Pilot exercises its Put Option in 2024.

60. NICO will be harmed absent the Court's declaration of rights.

61. NICO therefore requests a declaratory judgment that NICO is excused from performance should Pilot exercise its Put Option in 2024.

PRAYER FOR RELIEF

WHEREFORE, Counter-Plaintiff and Third-Party Plaintiff NICO prays for relief:

A. Issuing an injunction barring Haslam from compensating PTC's employees outside PTC's official retention plan and barring Pilot from exercising its Put Option in 2024;

B. Declaring that Pilot's breach of its obligation not to artificially distort EBIT to increase the value of its Put Option is a material term of the Investor Rights Agreement, and that NICO is therefore excused from performance should Pilot exercise its Put Option in 2024;

C. Rescinding the Investor Rights Agreement in part to the extent that it entitles Pilot to exercise its Put Option in 2024;

D. Reforming the Investor Rights Agreement to the extent that it entitles Pilot to exercise its Put Option in 2024;

E. Awarding NICO damages, in an amount to be proven at trial, for Haslam's breach of fiduciary duties pursuant to the LLC Agreement and Delaware law;

F. Awarding NICO its reasonable attorney's fees and other costs and expenses, plus interest thereon; and

G. Awarding such other relief as the Court deems fair and equitable.

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November 17, 2023

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2023, a copy of the foregoing *[Public Version] Berkshire and The Individual Defendants' Answer to the Verified Complaint and Verified Counterclaim and Third-Party Complaint* was served by File & ServeXpress on the following attorneys of record:

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