



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

Redacted Public Version

eFiled: October 26, 2023

VERIFIED COMPLAINT

Plaintiff Pilot Corporation (“Pilot”), by and through its undersigned counsel, brings the following complaint against Defendants Greg Abel, Kevin Clayton, Marc Hamburg, Mark Hewett, Scott Thon, Berkshire Hathaway, Inc., National Indemnity Company (“NICO,” and together with Berkshire Hathaway, Inc., “Berkshire”), and Pilot Travel Centers, LLC (“PTC”), and alleges as follows:

NATURE 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 calculated by multiplying PTC's earnings before interest and taxes ("EBIT") by ten, with adjustments for cash and debt.

2. In conjunction with that investment, the parties entered into several related agreements. These agreements obligated Berkshire to acquire an additional 41.4% interest in PTC on January 31, 2023, bringing Berkshire's interest in PTC to 80% (the "2023 Control Purchase"). They also gave Pilot an annual 60-day put right, beginning on January 1, 2024, to sell the remaining 20% interest in PTC to Berkshire (the "Put Right"). Berkshire proposed, and Pilot agreed, that the price for Berkshire's 2023 Control Purchase and for Berkshire's purchase of the 20% interest in PTC upon exercise of the Put Right would be determined by the same formula for valuing PTC used to set the price for Berkshire's initial investment.

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.

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.

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.

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.

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.

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.

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.

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.

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.*

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.

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

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