IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE SHORENSTEIN HAYS-NEDERLANDER THEATRES LLC APPEALS	§	Nos. 596, 2018 and 620, 2018
	§	CONSOLIDATED
	§	Court Below—Court of Chancery of the State of Delaware
	§	C.A. Nos. 9380 and 2018-0701

OPENING BRIEF OF APPELLANT NEDERLANDER OF SAN FRANCISCO ASSOCIATES

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NATURE OF THE PROCEEDINGS

This consolidated appeal from final judgments in two Court of Chancery actions involves a dispute between the 50% members of a Delaware limited liability company, Shorenstein-Hays Nederlander Theatres, LLC ("SHN"). Formed in 2000, SHN is the successor to a partnership founded in 1978, and for many decades has operated theaters in San Francisco. One member is Appellant/Cross-Appellee, Nederlander of San Francisco Associates ("NSF"), which is controlled by Robert E. Nederlander ("Robert").[1] The other member is Appellee/Cross-Appellant CSH Theatres LLC ("CSH"), which is controlled by Carole Shorenstein-Hays ("Carole"), her husband, Jeffrey Hays (together, "the Hayses") and members of their family. Carole is the daughter, and Robert is the brother, of the original founders, Walter Shorenstein and James Nederlander, respectively.

For almost 50 years both founders' families operated SHN by presenting Broadway shows in the three theaters they operated in San Francisco. Central to this dispute is the historic Curran Theatre (the "Curran"), which SHN had leased from its owners since 1980. The parties' dispute originated with the purchase, by Carole, of the Curran in 2010, when the then-owners decided to sell the theater.

[1] Because this action involves persons having the same last names, this Brief refers to them by their first names. No disrespect is intended.

Robert approved Carole's individual purchase of the Curran because he understood Carole had promised to extend SHN's lease for the lifetime of the venture. Trusting Carole's word, Robert did not get that agreement in writing. After Carole acquired the Curran, she soon showed her true intention—to use the Curran to gain control of SHN. Carole demanded a new LLC agreement that would give her control, and until she got that, she refused to consent to distributions of profits or approve the renewal of a subscription series that had been a major source of company revenue. The Court of Chancery found that that (and related) conduct by Carole constituted breaches of her fiduciary duty of loyalty to SHN.

Ultimately, Robert refused to transfer control to Carole or accede to her other demands. In response, the Hayses effectively declared total war, using the Curran as a cudgel to actively compete against SHN. When the Curran lease expired on December 31, 2014, the Hayses did not renew it. Then, after making renovations to the Curran, they booked highly profitable Productions there, thereby violating their contractual and fiduciary duties under the LLC Agreement not to compete.

In 2014, the Hayses filed an action (C.A. No. 9380) (the "First Action") against NSF for a determination that they had no legal obligation to lease the Curran to SHN. NSF filed counterclaims seeking to prohibit the Hayses from offering any Productions at the Curran. Those Productions, NSF claimed, would

violate the LLC Agreement and fiduciary duties owed to SHN and NSF. In its July 31, 2018 post-trial Opinion (the "Trial Opinion" or "Trial Op."),[2] the trial court found that the Hayses were competing with SHN at the Curran and had not acted in good faith with respect to SHN and its business. The trial court also held that the Hayses and all entities they control are all bound by the non-compete obligations in the LLC Agreement.

The trial court nonetheless rejected NSF's breach of contract claims, refused to grant any relief on those claims, and awarded NSF only nominal damages on its breach of fiduciary duty claims. The court held that the LLC Agreement permitted the Hayses to compete at the Curran subject only to one narrow exception that the court found did not apply. Therefore, the Hayses' competition did not violate any contractual or other duties. NSF contends that the Court of Chancery reversibly erred and appealed to this Court from the final judgment entered in the First Action.

In September 2018, NSF filed a separate action (C.A. No. 2018-0701) (the "Second Action"), seeking to enjoin preliminarily the staging of two Productions at the Curran—*Dear Evan Hansen* ("DEH") and *Harry Potter and the Cursed Child*

[2] *CSH Theatres LLC v. Nederlander of San Francisco Assocs.*, 2018 WL 3646817 (Del. Ch. July 31, 2018) (attached as "Exhibit A"), *judgment entered*, 2018 WL 4522728 (Del. Ch. Sept. 20, 2018) (FINAL ORDER) (attached as "Exhibit B"), *fees and costs awarded*, C.A. No. 9380-VCMR, Montgomery-Reeves, V.C. (Nov. 1, 2018) (Letter Order) (attached as "Exhibit C").

("Harry Potter"). NSF claimed that the staging of those Productions constituted enjoinable competition prohibited by the LLC Agreement, based on the trial court's interpretation of the LLC Agreement in the First Action. In an opinion issued on November 30, 2018 (the "PI Opinion" or "PI Op."), the trial court denied NSF's request for injunctive relief on merits-related grounds.[3] On NSF's motion, the court entered partial final judgment against NSF.[4] NSF contends that the trial court reversibly erred and appealed to this Court from the trial court's final judgment in the Second Action. These appeals were consolidated by Order of this Court.[5]

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Appellant's position on this appeal is straightforward. In Argument I, Appellant shows that the trial court denied relief in the First Action based upon a legally erroneous interpretation of the LLC Agreement. If this Court credits that Argument and reverses on that basis, that would dispose of both appeals.

[3] *Nederlander of San Francisco Assocs. v. CSH Theatres LLC, et. al.*, 2018 WL 6271655 (Del. Ch. Nov. 30, 2018) (attached as "Exhibit D").

[4] On December 21, 2018, the Court of Chancery issued an order entering partial final judgment as to Count I of NSF's Complaint (Breach of Contract) under Court of Chancery Rule 54(b). The court stayed further proceedings pending this Court's decision on this appeal. *CSH Theatres LLC v. Nederlander of San Francisco Assocs.*, 2018 WL 6790280 (Del. Ch. Dec. 21, 2018) (ORDER) (attached as "Exhibit E").

[5] *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, Nos. 596, 2018 and 620, 2018 (CONSOLIDATED), Valihura, J. (Jan. 9, 2019) (ORDER).

Argument II is made on the alternative assumption that, even if this Court were to reject Argument I, the court nonetheless reversibly erred in denying the injunctive relief sought in the Second Action.

SUMMARY OF ARGUMENT

1. The trial court reversibly erred in the First Action by declining to enforce Section 7.02(a) of the LLC Agreement, which imposes contractual and fiduciary non-competition and cooperation obligations. Specifically, the trial court erroneously concluded that Section 7.06: (i) allows competition and has primacy over Section 7.02(a); and (ii) is subject only to, and limited only by, Section 7.02(b), but not Section 7.02(a). Because that interpretation reads Section 7.02(a) out of the LLC Agreement, the judgment in the First Action cannot stand and must be reversed.

2. Alternatively, the trial court reversibly erred by misapplying Section 7.02(b) in the Second Action. Specifically, the court erroneously mischaracterized NSF's argument to be that *any* "staging" equals "control." That mischaracterization caused the trial court not to consider the merits of the argument that NSF actually made. Had the trial court considered NSF's actual argument, the court would have found a breach of the LLC Agreement. Therefore, the final judgment in the Second Action cannot stand and must be reversed.

STATEMENT OF RELEVANT FACTS

A. SHN and its History

In 1978, James M. Nederlander ("Jimmy") and Walter H. Shorenstein ("Walter") formed a partnership (memorialized in a two page letter agreement) called Shorenstein-Nederlander Productions of San Francisco – the predecessor to SHN.[6] The partnership's initial and sole purpose was to operate the Curran,[7] which the Lurie family owned and leased to the partnership.[8] That partnership agreement documented the parties' intent to act cooperatively and in good faith to make the enterprise a success.[9]

The partnership business quickly grew. In 1979, the partnership purchased the Golden Gate Theatre and in 1980 it purchased the Orpheum Theatre, both located in San Francisco within blocks of the Curran.[10]

After years of successful cooperation between the families in operating all three theaters, the families had a falling out in the early 1990's. The Shorensteins brought litigation against the Nederlanders in the Superior Court of California.[11]

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[6] A183-86.

[7] A184.

[8] A187-237.

[9] A186.

[10] A241-42.

[11] A241-75.

They alleged that the Nederlanders had "repeatedly engaged . . . in a wrongful course of conduct . . . to promote the separate financial interests of [Jimmy], [the Nederlanders] and other theaters or theatrical productions owned or controlled, directly or indirectly, for [Jimmy's] benefit at the direct expense of the partnership" and thereby breached fiduciary and contractual duties owed to the partnership.[12] This wrongful course of conduct, the Shorensteins alleged, included "[b]ooking productions to play in competing geographic locations" and "[s]cheduling productions to play in nonpartnership theaters on the most advantageous and profitable dates."[13]

The parties settled that litigation in 1992.[14] In that settlement, they revised the partnership agreement by adding language regarding "Cooperation and Competition" that would ultimately become the LLC Agreement provisions at issue in this appeal.[15]

The parties operated under the revised partnership agreement until November 6, 2000,[16] when they converted the partnership to a Delaware limited

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[12] A249-50.

[13] A250.

[14] Trial Op. at *4.

[15] A277-78.

[16] Trial Op. at *3.

liability company, and the current members of SHN (CSH and NSF) signed the Plan of Conversion and Operating Agreement of [SHN] (the "LLC Agreement").[17] Eventually, Jimmy's and Walter's interests in SHN passed to other members of their families.[18] The Shorenstein interest ultimately passed to the Hayses and their representatives,[19] and Jimmy's interest ultimately passed to his brother Robert.[20]

B. The LLC Agreement

Article VII of the LLC Agreement, entitled "Relationship Among Members," outlines the parties' respective relationships and obligations, including the contractual and fiduciary duties the parties owe to SHN.

Central to this dispute is Section 7.02—"Cooperation and Non-Competition," which has two subsections.[21] *First*, Section 7.02(a) codifies the parties' express contractual intention to devote their efforts to maximize the success of SHN.[22] Section 7.02(a) contained the language the parties added to the

[17] *Id.*; A281-327.

[18] Trial Op. at *2.

[19] *Id.*

[20] *Id.*

[21] A304-05.

[22] A304.

partnership agreement to address the competitive concerns raised in the prior litigation.[23] It provides:

> The Shorenstein Entity and the Nederlander Entity hereby agree to devote their efforts to *maximize the economic success of the Company* and to *avoid any conflicts of interests between the Members*. All actions of the Members and their representatives with regard to the Company and theater matters will be carried out in good faith and in a prompt and expeditious manner.[24]

The LLC Agreement broadly defines "Shorenstein Entity" as CSH Theatres LLC and any of its Affiliates which includes (as the trial court held) the Hayses and any entities they control.[25] Accordingly, all Appellees herein, are subject to the cooperation and non-compete obligations imposed by Section 7.02(a).[26]

Second, Section 7.02(b) articulates a more specific obligation that governs the staging of Productions[27] that either the Shorenstein Entity or the Nederlander Entity "controls." Section 7.02(b) prohibits the parties from staging any such

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[23] A250; A277-78.

[24] A304 (emphasis added).

[25] Trial Op. at *23; A285.

[26] For simplicity purposes, because the Hayses and the entities they control are bound by the LLC Agreement (including all Appellees) this Brief will use the term "the Hayses" to collectively refer the actions taken by the Hayses via those affiliates to compete.

[27] "Production" is defined in the LLC Agreement as "plays, musicals or other events that typically play at any of the [SHN theatres]." A289.

controlled Productions within 100 miles of San Francisco unless one of three conditions is satisfied: "(i) [the] Production has first played in [an SHN theater], (ii) [the] Production has been rejected for booking at one of the [SHN theaters] by the other Member's representative on the Board of Directors; or (iii) [SHN] shares in the profits and/or losses of any booking pursuant to an agreement mutually acceptable to the Members."[28]

Also implicated in this appeal are Sections 7.03, 7.04 and 7.06. Section 7.03 defines "control over production" as "the Person having the ability to determine where the Production plays and the terms and conditions of said engagement."[29] Section 7.04, "Nature of Obligations Among Members," directs that, except where provided otherwise in the LLC Agreement, that Agreement shall not create any fiduciary relationship among the Members.[30] Neither Section 7.04 nor any other provision of the LLC Agreement eliminates fiduciary duties.

Section 7.06, "Outside Activities" separately addresses the Members' and their affiliates' rights (and the rights of SHN officers and directors) to have business interests other than their interests at SHN. Section 7.06 pertinently provides:

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[28] A305.

[29] *Id.*

[30] *Id.*

> ***Subject to the other provisions of this Article VII, including Section 7.02***, any Member, any Affiliate of any Member or any officer or director of the Company shall be entitled to and may have business interests and engage in business activities in addition to those relating to the Company, and may engage in the ownership, operation and management of businesses and activities, for [their] own account and for the account of others, and may . . . own interests in the same properties as those in which the Company or the other Members own an interest, without having or incurring any obligation to offer any interest in such properties, businesses or activities to the Company or any other Member . . . . Neither the Company nor any Member shall have any rights in or to any independent ventures of any Member or the income or profits derived therefrom.[31]

Nothing in Section 7.06 expressly permits outside activities that *compete* with SHN. Rather, Section 7.06, by its own terms, is expressly made "subject to" the non-compete and cooperation provisions of Article VII, including Sections 7.02(a) and (b).

C. The Hayses Purchase the Curran for SHN

As noted, for decades SHN operated a successful enterprise by staging Productions at three theaters in San Francisco—the Golden Gate, Orpheum and Curran. SHN owned the Golden Gate and the Orpheum but it leased the Curran from the Lurie family.[32]

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[31] *Id*. (emphasis added).

[32] Trial Op. at *4.

In 2009, the Lurie family decided to sell the Curran,[33] which was then under lease to SHN through December 31, 2014. The Lurie family offered to sell the Curran to SHN, but Robert objected to the purchase price.[34] Ultimately, SHN did not purchase the Curran.[35] Carole had a personal attachment to the Curran, however, and desired to purchase it for herself.[36] She sought Robert's consent, which Robert gave on the condition that Carole agree to lease the Curran to SHN for the life of SHN.[37] Carole agreed to that condition, but only orally.[38] On December 15, 2010, Carole purchased the Curran and rebranded it the "SHN Curran Theatre."[39] SHN began booking shows at the Curran for dates after the existing lease expired on December 31, 2014.[40]

At that point, the parties expected that Carole's purchase of the Curran would lead to SHN's continued use. Tom Hart, the Hayses faithful servant,

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[33] *Id*. at *5.

[34] *Id*.

[35] *Id.* at *6.

[36] *Id*. at *5

[37] *Id*.

[38] *Id*. Robert trusted Carole at her word and never documented their agreement in writing. The trial court refused to enforce Carole's oral promise. *See id.* *13-21. The disputed oral promise is not a subject of NSF's appeal.

[39] *Id*. at *6.

[40] *Id*.

testified at trial that Carole purchased the theater to avoid its being owned by a competitor of SHN.[41] Carole testified that when she purchased the Curran her intentions were that she "never would ever compete[] with SHN, ever."[42] These expectations and intentions, however, soon took a back seat to the Hayses' desire to control SHN themselves.

D. The Hayses Use the Curran to Attempt to Wrest Control of SHN

After Walter died in 2010, Carole decided that she wanted and should have control over the operations at SHN. She was frustrated with what she perceived as Robert's refusal to form a satisfactory relationship with her.[43] In 2012 and 2013, the Hayses sought legal advice on Section 7.02 and other provisions of the LLC Agreement. Their counsel, Sullivan & Cromwell, LLP, addressed the issue of whether "[Section 7.02] could limit the ability of [the Hayses] to lease the [Curran] other than to [SHN] upon the expiration of the current lease."[44] Counsel advised the Hayses that there could be "litigation risk" if they "attempted to use the [Curran] to put on [their] own productions."[45]

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[41] *Id*. at *6 n.87.

[42] A485.

[43] Trial Op. at *7.

[44] A341.

[45] *Id*.

Heedless of that advice, in 2014 the Hayses undertook a course of conduct designed to force Robert to cede control over SHN to the Hayses. Specifically—and as the trial court found—the Hayses: (1) instructed the CEO of SHN not to communicate with the NSF board members, (2) tied the renewal of the Curran lease to amending the LLC Agreement to cede control of SHN to Carole, (3) refused to allow a profit distribution until such agreements were in place, and (4) physically blocked the exit to a board meeting until their demands for control were met.[46]

At trial, the evidence established that the Hayses felt no inhibitions against jeopardizing SHN's economic success.[47] The Hayses held SHN hostage by threatening to withhold the Curran lease to obtain control of SHN.[48] As Carole admitted at trial, she would have approved a new lease of the Curran "in a heartbeat" had Robert agreed to a new LLC agreement that gave her control of SHN.[49]

Ultimately, however, Robert refused to give Carole control and Carole made good on her threats. She refused to renew SHN's lease of the Curran beyond

[46] Trial Op. at *7-8.

[47] *See*, *e.g.*, A329; A331-37; A355-59; A369-77; A693-94, A699; A705, A707-09; A712.

[48] *See* A331; A348-52; A486-89; A494-97; A695; A706; A711-12.

[49] Trial Op. at *9; A706.

December 31, 2014.[50] She resigned her position as co-president and director of SHN on June 2, 2014 and began actively planning to compete against SHN at the Curran, including soliciting SHN employees to quit SHN and work for her at the Curran.[51] Carole's husband Jeff knowingly participated in her plan by remaining a director at SHN and disclosing confidential information about SHN's activities to Carole after each board meeting.[52] Jeff eventually resigned as a director on October 27, 2014.[53]

The Hayses have operated the Curran for their exclusive benefit since January 1, 2015.[54] After being renovated, the Curran re-opened in 2017.[55] Multiple competing Productions have been staged there, including Bright Star, Fun Home, Eclipsed and DEH.[56] The Curran has recently announced that it will begin

[50] Trial Op. at *11-12; s*ee* A346-47; A353-54, A360-63.

[51] Trial Op. at *11. As Carole relayed her plan to Jeff, she wanted to go at SHN and Robert with "guns ablaze." A449.

[52] Trial Op. at *12; A378-79.

[53] Trial Op. at *12.

[54] Carole initially denied competing with SHN at the Curran or taking any action to jeopardize the success of SHN. A484-85; A490. By the time of trial in the First Action, however, she conceded that she had started competing with SHN in 2014 by going after shows she felt were appropriate for the Curran. A703.

[55] Trial Op. at *12.

[56] *Id.*; PI Op. at *3.

showing the blockbuster Harry Potter in the Fall of 2019.[57] None of those Productions or any profits derived therefrom have been offered to SHN.

E. The First Action

On February 21, 2014, the Hayses sought to have their decision to terminate SHN's lease of the Curran judicially validated in the First Action.[58] NSF asserted counterclaims for, among other things, breaches of the LLC Agreement and fiduciary duty, and sought a permanent injunction against the Hayses from competing against SHN at the Curran.[59] These claims were tried to the Court of Chancery in October and November 2017.

On July 31, 2018, that court issued its Trial Opinion. As a threshold matter, the court held that the defined term "Shorenstein Entity" in the LLC Agreement encompassed not only CSH (the 50% member of SHN) but also its Affiliates.[60] Therefore, the trial court found, the Hayses and their controlled entities were obligated to "devote their efforts to maximize the economic success of [SHN]" under Section 7.02(a) of the LLC Agreement.[61]

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[57] Trial Op. at *12.

[58] A364-68.

[59] A380-429.

[60] Trial Op. at *23-24.

[61] *Id*. at *23.

The trial court held, however, "that Section 7.06 contain[ed] an exception to [Section 7.02(a)]" and that the scope of Section 7.06 was limited by Section 7.02(b).[62] As the court read those provisions, even though Section 7.02(a) obligated the parties and their affiliates to devote their efforts to maximize the economic success of SHN, Section 7.06 allowed them (and SHN's directors and officers) to compete with SHN, so long as they did not violate Section 7.02(b) by staging a Production they controlled within 100 miles of San Francisco.[63] In a nutshell, the court held that Sections 7.06 and 7.02(b) effectively narrowed the parties' broader non-competition obligations under Section 7.02(a), to the limited prohibition of Section 7.02(b).

Even under that narrow interpretation of the non-competition obligations, the trial court determined that the Hayses had violated Section 7.02(b)'s prohibition by staging Fun Home at the Curran.[64] The court held that Carole "controlled" Fun Home because she had invested money in Fun Home and, in exchange, had obtained the right to present Fun Home at the Curran.[65] That right

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[62] *Id*. at *24.

[63] *Id*.

[64] *Id*. at *25.

[65] *Id*.; A430-48.

enabled Carole "to determine where [Fun Home] play[ed] and the terms and conditions of said engagement."[66]

The court also held that Carole had breached her fiduciary duty of loyalty to SHN by placing her own interests above those of SHN and playing "hardball" with SHN, including by (i) threatening to withhold her approval of profit-generating actions unless she was given control over SHN and (ii) instructing the CEO of SHN not to communicate with NSF board members.[67] The court held that Jeff had violated his fiduciary duties by funneling confidential SHN information to Carole after she began competing with SHN and by attempting to lure SHN employees to join the Hayses at the Curran.[68]

F. The Second Action

Just weeks after the trial court issued its Trial Opinion, NSF commenced the Second Action to preliminarily enjoin the staging at the Curran of two Productions—DEH and Harry Potter. The trial court expedited proceedings and issued its PI Opinion on November 30, 2018. Disregarding its analysis of

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[66] Trial Op. at *25. The court ultimately held that the Hayses did not breach the LLC Agreement by showing Fun Home because NSF had not proven that the Hayses failed to satisfy one of the three exceptions in 7.02(b) and because NSF had not proven that it suffered damages. *Id.* NSF has not appealed that ruling.

[67] *Id*. at *27.

[68] *Id*. The court awarded nominal damages of $1 for these breaches of fiduciary duty. *Id*. at *30.

"control" in the Trial Opinion, the trial court refused to preliminarily enjoin either DEH or Harry Potter. The court did, however, make several findings implicating the Hayses' involvement in each of the Productions.

First, the trial court found that Carole had offered many economic incentives to induce the producers of DEH to perform at the Curran.[69] These included (i) donating hundreds of thousands of dollars to a non-profit entity affiliated with DEH; (ii) guaranteeing the producers of DEH a minimum level of revenue if they showed DEH at the Curran; and (iii) providing a personal guaranty from Carole to cover any losses arising from litigation with the Nederlanders.[70] These incentivizing terms were memorialized in writing in two documents that (NSF contended) gave the Hayses the legal right to stage DEH at the Curran and prescribed the terms and conditions of that engagement.[71]

With respect to Harry Potter, the trial court found that Carole negotiated an agreement with the Ambassador Theatre Group ("ATG") to allow ATG to stage Harry Potter at the Curran as a "sit down production."[72] Although crafted by the

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[69] PI Op. at *3.

[70] *Id*.

[71] *Id*.; A718-20; A722-24.

[72] PI Op. at *4. In theater vernacular a "sit down production" is a show that is intended to play at the same theater for several years. *Id*. Harry Potter is currently set to begin in the Fall of 2019 and run through December 31, 2022. *Id*.

Hayses and ATG to resemble a "lease," the parties' agreement contained many non-customary, operational concessions from ATG that the Hayses had negotiated to obtain joint control over the Production Harry Potter. Those terms caused the agreement to be more akin to a joint venture agreement rather than a "lease."[73] These concessions included ATG's agreement to: (i) show only Harry Potter or a replacement production specifically approved by the Hayses; (ii) guarantee certain levels of revenue for the Hayses; (iii) hire Curran personnel for the duration of the "lease;" (iv) give the Hayses control over each of the extensive physical alterations to the theater specifically required for Harry Potter; (v) give the Hayses the right to consent to the show license agreement that ATG had signed with Harry Potter's producers;[74] and (v) [redacted].[75]

Despite the foregoing factual showing, the trial court held that NSF had not carried its burden of showing that the Hayses had "control" over either DEH or Harry Potter.[76] Therefore, Section 7.02(b)'s prohibition was not triggered and the

[73] A910 (Carole explaining that Harry Potter is "deeply spiritual" to her and not "the type of linear real estate deal of easy normal"); A931-54.

[74] A941-43; A950.

[75] PI Op. at *4; A950.

[76] PI Op. at *9-11.

Hayses could compete with SHN to show DEH and Harry Potter free from any obligation to SHN or NSF.[77]

[77] *Id.*

ARGUMENT

I. THE TRIAL COURT ERRONEOUSLY DECLINED TO ENFORCE SECTION 7.02(a), WHICH PROHIBITED THE HAYSES' COMPETITIVE CONDUCT AT THE CURRAN.

A. Question Presented

Whether the Court of Chancery erred by declining to enforce Section 7.02(a) of the LLC Agreement by holding instead that Section 7.06 allowed "'[a]ny Member, any Affiliate of any Member or any officer or director of [SHN]' . . . to compete with [SHN]"[78] except as limited by Section 7.02(b). This issue was preserved below at A546; A549, A615-16; A809-11; Trial Op. at *24-25.

B. Scope of Review

The Delaware Supreme Court "review[s] questions of law and contract interpretation, including the interpretation of LLC Agreements, *de novo*."[79]

C. Merits of Argument

1. The Hayses Competitive Conduct At the Curran Was Proscribed by Section 7.02(a), Which Expressly Obligated the Hayses to Avoid Conflicts of Interest and Maximize the Economic Success of SHN.

No party disputes that the Hayses have been actively competing with SHN at the Curran since 2014. This competition grew out of Carole's failed attempt to gain control over SHN after she purchased the Curran in 2010. Carole refused to

[78] Trial Op. at *24.

[79] *CompoSecure, L.L.C. v. CardUX, LLC*, 2018 WL 5816740, at *6 (Del. Nov. 7, 2018).

extend the SHN lease for the Curran unless and until the LLC Agreement was changed to give her control of SHN. When that gambit failed, Carole used her ownership of the Curran to compete with SHN while still a member of the SHN board.[80] The Hayses' competitive conduct at the Curran directly violated their express duty under 7.02(a), to "devote their efforts to maximize the economic success of SHN and avoid any conflicts of interest between the Members." The Hayses have not done that. Indeed, they have done the precise opposite.

Besides imposing on the parties an affirmative duty to "devote their efforts to *maximize* the economic success of [SHN] and *avoid* any conflicts of interest between the Members," Section 7.02(a) requires that "[a]ll actions of the Members and their representatives with regard to [SHN] and theater matters will be carried out in good faith and in a prompt and expeditious matter." [81] That language expressly imposes upon the parties a contractual and fiduciary duty of loyalty to SHN.[82] Those duties necessarily prohibit the parties from conduct that would

[80] A703.

[81] A304 (emphasis added).

[82] *See Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 362 (Del. 2013) (holding language requiring a General Partner to "reasonably believe that its ultimate course of action is not inconsistent with [the LP's] best interests," created contractual fiduciary duties); *see also Mesirov v. Enbridge Energy Co., Inc.*, 2018 WL 4182204, at *12 (Del. Ch. Aug. 29, 2018) (holding language that required that the General Partner take actions that it reasonably believed "to be in the best interests of the Partnership," created contractual fiduciary duties).

defeat the economic success of SHN and *create* a conflict of interest.[83]

It should be axiomatic that a party that owes a duty of loyalty, specifically an obligation to "devote [its] efforts to maximize the economic success" of an entity, may not engage in competitive conduct to that entity's detriment. Delaware's jurisprudence interpreting "best efforts" provisions supports that self-evident proposition. A party that contractually agrees to devote its "efforts" to accomplish a goal cannot then take active steps to defeat that goal.[84]

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[83] *See, e.g.*, *Thorpe by Castleman v. CERBCO, Inc.*, 676 A.2d 436, 442 (Del. 1996) (holding "[t]he fundamental proposition that directors may not compete with the corporation mandate[d]" a finding of a breach of the duty of loyalty); *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) (expressing Delaware's "public policy [that] a [fiduciary] . . . not only affirmatively [] protect the interests of the corporation . . . , but also refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it"); *Fitzgerald v. Cantor*, 2000 WL 307370, at *4 (Del. Ch. Mar. 13, 2000), *overruled on other grounds, Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 686 (Del. 2013) (holding that where parties' limited partnership agreement imposed a contractual duty of loyalty it would be a breach of that duty to sell a product that competed directly against the company in its core business).

[84] *See, e.g.*, *Williams Companies, Inc. v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 273 (Del. 2017) (holding that efforts provisions "not only prohibited the parties from preventing the merger, but obligated the parties to take all reasonable actions to complete the merger"); *Narrowstep v. Onstream Media Corp.*, 2010 WL 5422405, *8 (Del. Ch. Dec. 22, 2010) (finding a party failed to use best efforts to file a document where it "deliberately took actions to delay its filing."); *Pegasystems Inc. v. Carreker Corp.*, 2001 WL 1192208, at *1 (Del. Ch. Oct. 3, 2001) (finding that the defendant breached its agreement to "exercise [its] best efforts to market and sell" certain jointly-developed products by making no effort to market those products and instead marketing its own directly competing products).

Thus, the Hayses were at all times required to devote their efforts to *maximize* the economic success of SHN. The Hayses have made no effort to maximize, and have been making every effort to defeat, SHN's success. A clearer violation of Section 7.02(a) would be hard to fathom.

2. Motivated By a Self-Created Conflict of Interest, the Hayses Violated Their Section 7.02(a) Obligations by Engaging in Conduct at the Curran That Defeated, Rather Than Maximized, SHN's Economic Success.

The record demonstrates that the Hayses' competitive conduct at the Curran detracted from, not maximized, SHN's economic success. As Carole testified in the First Action, she purchased the Curran fully expecting to negotiate a new lease with SHN after the then-existing lease expired on December 31, 2014.[85] But Carole's self-interest shortly eclipsed her fiduciary obligations. She refused to agree to renew the Curran lease until she secured a revised LLC Agreement that guaranteed her control of SHN.[86] She contemplated "refus[ing] to have a distribution [un]til this is all worked out to our satisfaction."[87] And, at a January 14, 2013 board meeting, she physically blocked the door and refused to allow anyone to depart until she received control of SHN.[88] Carole further threatened to

[85] Trial Op. at *6.

[86] *Id*. at *8-9.

[87] *Id*. at *8 n.104; A332; *see also* A334; A337.

[88] Trial Op. at *8; A694.

withhold approval of next year's subscription series unless the LLC Agreement was amended to give her control.[89]

When Robert refused to give Carole control, she decided to deprive SHN of the economic benefit from the Curran that SHN had enjoyed since 1980. In refusing to renew SHN's Curran lease, Carole sabotaged the economic success of SHN for the sole purpose of obtaining control. She admittedly would have approved a new lease of the Curran "in a heartbeat" had Robert agreed to give her control of SHN.[90]

The record shows, and the trial court found, that thereafter, the Hayses "actively started planning a new venture at the Curran."[91] Carole resigned as co-president and director of SHN and solicited SHN employees to follow her and work at the Curran.[92] In an August 2, 2014 email to Jeff, Carole shamelessly stated that she wanted to "Go[] at [SHN] and [Robert] with 'guns ablaze' from others."[93]

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[89] Trial Op. at *9; A706.

[90] Trial Op. at *9; A706.

[91] Trial Op. at *11.

[92] *Id*.

[93] *Id*.; A449.

Since then, Carole has actively competed against SHN and so conceded.[94] After completing its renovation, Carole re-opened the Curran in 2017. Since then, Carole (via entities she controls) has presented multiple competing Productions and continues to actively solicit others.[95]

To repeat the obvious, the Hayses can hardly be satisfying their obligations to "devote their efforts to maximize the economic success of [SHN]" while simultaneously engaging in conduct that harms SHN.[96] The Curran is located within a mile or two from the SHN theaters in San Francisco. As Mr. Harris testified in the First Action, without the Curran, SHN no longer controls the three most prominent Broadway-style theaters in San Francisco or the economic leverage that comes with having three theaters.[97] The Hayses' hostile competition forced SHN to spend [redacted] to refurbish the Golden Gate to "mitigate the loss of the Curran and compete against the Curran."[98] SHN must now face competition

[94] A703; s*ee also* Trial Op. at *12 ("Despite the animosity between the parties, and *Carole actively competing with* [*SHN*], Jeff remained a director of [SHN.]") (emphasis added).

[95] Tr. Op. at *12.

[96] Indeed, the Hayses' expressed plan is to withhold their managerial involvement from SHN and maintain their interest in SHN as an "asset" in hopes that the "value of SHN" and the corresponding "buy-out price (of the Nederlanders) goes down." A451.

[97] A681.

[98] A684.

from the Hayses to persuade producers who want to bring shows to San Francisco to book those shows with SHN. Competition between the SHN theaters and the Curran inescapably triggers a bidding war that inflicts higher costs for SHN to secure a production.[99] Carole, who has access to "incredible financial resources"[100] and is not motivated by profit, has no compunction against undercutting SHN to win that war.[101] Her refusal to negotiate a renewed Curran lease has cost SHN substantial additional revenue SHN would have earned had it retained access to the Curran. A prime example is the loss of the opportunity to show Fun Home.[102] SHN also lost [redacted].[103]

The Hayses also breached their duty under Section 7.02(a) to avoid conflicts of interest by *creating* the conflict of interest that drives this dispute. By owning and operating the Curran in competition with SHN, Carole is engaging in the exact

[99] A696-97; A713; A454.

[100] A449.

[101] A699. ("Carole didn't understand about show deals, whenever she would push me to do a deal that I didn't think that favorable, her response to me would be, 'Well, I'm not really worried about money or profit. I just really want you to get the show.'").

[102] A697.

[103] A519; A522-23; A697-98; A700-02.

business as SHN less than two miles from both of the theaters owned by SHN. Whenever the Hayses stage shows at the Curran, by definition that deprives SHN of opportunities and customers, and benefits the Hayses at SHN's expense. Because the conflict is one that the Hayses created, their competitive conduct violates Section 7.02(a) for this reason as well.

3. The Trial Court Committed Reversible Error by Refusing to Enforce Section 7.02(a) Against the Hayses.

In determining that Section 7.06 generally permits competition and is limited only by Section 7.02(b), the trial court reversibly erred because that interpretation deprives Section 7.02(a) of any meaningful effect. That interpretation erroneously gives Section 7.06 primacy over Section 7.02, and improperly treats Section 7.02 as the subordinate provision. Precisely the reverse construction is required. By its plain language, Section 7.06 is "subject to" Section 7.02 in its entirety, including Section 7.02(a)'s express obligation to "maximize the economic success of [SHN]." On that basis alone, reversal of the judgment in the First Action is required.

a. The Trial Court Erroneously Held that Section 7.06, Which By its Express Terms Is "Subject to" Section 7.02, Operated as an "Exception" to Section 7.02(a) and Therefore Generally Allows the Hayses to Compete.

In the First Action, the trial court erroneously held in its post-trial Memorandum Opinion that "[w]hile Section 7.02(a) requires the 'Shorenstein

Entity' to 'devote their efforts to maximize the economic success of [SHN] and avoid any conflicts of interest between the Members,' Section 7.06 contains an exception to this broad provision."[104] That ruling is palpably wrong. There is not, nor can there be, any such "exception."

Traditional principles of contract interpretation require a court to "give effect to the plain meaning of a contract's terms and provisions when the contract is clear and unambiguous."[105] Here, Section 7.06, by its own terms, is "subject to" Section 7.02, which necessarily includes Section 7.02(a). Section 7.06 is not and cannot be an exception to 7.02(a). "A dependent phrase that begins with *subject to* indicates that the main clause it introduces or follows does not derogate from the provision to which it refers."[106] Section 7.06's "subject to" introductory language limits its scope such that the entire balance of Article VII, when inconsistent with Section 7.06, must subordinate or "trump" that Section.[107] Thus, the LLC

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[104] Trial Op. at *24.

[105] *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68-69 (Del. 2011).

[106] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 126 (2012).

[107] *See Penn Mut. Life Ins. Co. v. Ogelsby*, 695 A.2d 1146, 1150 (Del. 1997) (holding that where a policy provision was subject to other provisions the other provisions would always "sublimate - or 'trump' - the first manifest provision."); *see also Supermex Trading Co., Ltd. v. Strategic Solutions Grp., Inc.*, 1998 WL 229530, at *6 (Del. Ch. May 1, 1998) (finding that where one paragraph of a debenture was "subject to" another, the former was sublimated by the latter).

Agreement's unambiguous language expresses the contracting parties' intent "to establish supremacy and subservience" between Section 7.06 and the balance of Article VII so that Section 7.06 is always subordinate should the provisions come into conflict.

What follows is that (i) the Hayses may not engage in "other activities" under Section 7.06 that run contrary to their obligations under Section 7.02(a), and (ii) if that occurs, Section 7.02(a) prevails over Section 7.06.[108] The court's determination that Section 7.06 allows competition, without regard to the obligations expressed in Section 7.02(a), contravenes the plain language of the LLC Agreement and deprives Section 7.02(a) of meaningful effect. For this additional reason the judgment in the First Action cannot stand and should be reversed.

b. The Trial Court Erroneously Misconstrued Section 7.06, Which is Expressly Subject to Section 7.02 in its Entirety, As Limited Only By Section 7.02(b).

The trial court deprived Section 7.02(a) of any force and effect for another reason. The court erroneously held that

> [The Section 7.06 exception] is itself limited by Section 7.02(b), which disallows either the Nederlander or Shorenstein Entities from staging "any Production that it controls (as defined in Section 7.03) within 100 miles of

[108] *See* Scalia & Garner *supra* n.106, at 126 ("[*S*]*ubject to* often introduces a provision that contradicts some application of what it modifies.").

> San Francisco" unless that production had played at one of the Company's theaters, the other Member's representative had turned down the play, or "the Company shares in the profits and/or losses of any booking pursuant to an agreement mutually acceptable to the Members."[109]

The court thus read the LLC Agreement's plain language globally to allow "'[a]ny member, any Affiliate of any member or any officer or director of [SHN]' . . . to compete with [SHN], except that they cannot stage a production within 100 miles of San Francisco if they have 'the ability to determine where the [p]roduction plays and the terms and conditions of said engagement.'"[110] The result was to eclipse Section 7.02(a)'s broad prohibition against competition by subordinating it to Section 7.06, limited only by Section 7.02(b). That misreads the plain language of the LLC Agreement.

The trial court reached that construction by applying the maxim *generalia specialibus non derogant*, *i.e.*, where there are two irreconcilable contract provisions, the specific provision will control the general.[111] The court reversibly erred for two reasons. *First*, as discussed *infra* at Section I.C.3, its construction rests on the trial court's incorrect premise that Section 7.06 generally allows

[109] Trial Op. at *24.

[110] *Id*.

[111] *Id*. at *24 n.269 ("At first glance Section 7.02 and Section 7.06 may appear irreconcilable, but maxims of interpretation allow the two to be harmonized.").

competition. It does not. *Second*, that reading ignores the opening sentence of Section 7.06 which makes that section expressly "subject to" Section 7.02 in its entirety, which necessarily includes both Sections 7.02(a) and (b). Therefore, under the trial court's *generalia specialibus non derogant* interpretation, Section 7.06 is limited only by Section 7.02(b). That is not what the LLC Agreement says or what the parties intended. Under Delaware law, a contract must be read to give effect to all its provisions.[112] A court will not read a contract so as to "nullify the requirements specifically outlined in it."[113] Because the court's holdings effectively eliminate, and fail to give meaningful effect to, Section 7.02(a), the Court of Chancery erred. Its judgment in the First Action should be reversed.

[112] *Katell v. Morgan Stanley Grp., Inc.*, 1993 WL 205033, at *5 (Del. Ch. June 8, 1993).

[113] *Id.* at *4; *see also Kuhn Const., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 396-97 (Del. 2010) ("We will read a contract as a whole and we will give each provision and term effect, so as not to render any part of the contract mere surplusage."); *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) ("We will not read a contract to render a provision or term 'meaningless or illusory.'") (citations omitted).

II. ALTERNATIVELY,[114] THE TRIAL COURT ERRED BY DECLINING TO ENFORCE SECTION 7.02(b), WHICH PROHIBITS THE STAGING OF CONTROLLED PRODUCTIONS AT THE CURRAN.

A. Question Presented

Whether the Court of Chancery reversibly erred by declining to enforce Section 7.02(b) of the LLC Agreement by misinterpreting NSF's argument to be that *any* "staging" constitutes "control" and, thereby causing the court not to consider NSF's control arguments on the merits. This issue was preserved below at PI Op. at *9-11; A1274-76.

B. Scope of Review

The Delaware Supreme Court "review[s] questions of law and contract interpretation, including the interpretation of LLC Agreements, *de novo*."[115]

C. Merits of Argument

1. Section 7.02(b) Prohibits the Staging of Controlled Productions Within 100 Miles of San Francisco.

No one disputes that Section 7.02(b) of the LLC Agreement prohibits a party from staging a Production that it controls within 100 miles of San Francisco, unless

[114] As stated earlier (*supra* pages 4-5), this Court need not reach or address this Argument II if it accepts Argument I and reverses on that basis.

[115] *CompoSecure, L.L.C.*, 2018 WL 5816740, at *6.

one of the three conditions in Section 7.02(b) is satisfied.[116] Nor is it disputed that the Hayses did not satisfy any of those conditions as to DEH or Harry Potter.[117] Finally, the Hayses unquestionably are staging DEH and Harry Potter at the Curran which is located in downtown San Francisco.[118]

Even so, the trial court held that Section 7.02(b) does not prohibit the staging of those Productions, because they are not "controlled" by the Hayses. NSF contends that the trial court erred. Thus, the question is whether, as to DEH and Harry Potter, the Hayses are staging "Production[s] that [they] control[]," which Section 7.02(b) proscribes.

2. "Control Over Production" Includes Any Rights That Enable a Party to Determine Where the Production Plays and the Terms and Conditions of the Production.

Section 7.02(b) prohibits the parties from staging "any Production that it controls." Control is an element of the phrase "control over production" in Section 7.03 and is defined to exist where a Person has the "ability to determine where the Production plays and the terms and conditions of said engagement."[119] Applying

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[116] *Viz.*, that the Production has played at one of SHN's theaters, or the other Member has turned down the Production or SHN shares in the profits or losses of the Production pursuant to agreement. A305.

[117] PI Op. at *8.

[118] *See* A1141-42.

[119] A305.

this definition in its Trial Opinion, the court properly concluded that the Hayses had "control" over Fun Home, because Carole had obtained a binding promise from the producers to stage Fun Home first at the Curran if the show toured in the San Francisco Bay area.[120] The court held that that legal right—to have the show play first at the Curran—gave Carole the ability to determine "where the Production plays and the terms and conditions of said engagement."[121] NSF agrees with the trial court's interpretation of "control over production" in the Trial Opinion. It faults the court only for not consistently applying that interpretation to DEH and Harry Potter, which also resulted from the Hayses' obtaining the legal right to show productions at the Curran, albeit cloaked in a different garb.

3. The Court of Chancery Mischaracterized NSF's Argument, Which Led to the Court Not Properly Confronting or Addressing Its Merits.

Despite finding that Carole controlled Fun Home, in its PI Opinion, the trial court changed course and held that the Hayses did not "control" DEH or Harry Potter. The court reached that contrary result because it misunderstood, and consequently mischaracterized, NSF's argument. In its PI Opinion, the trial court erroneously regarded NSF's argument to be that, as a categorical matter, *any*

[120] Trial Op. at *25.

[121] *Id.*

"staging" equals "control,"[122] and its entire legal analysis flowed from that flawed premise.

Where an owner/operator of a theater seeks to stage a Production, it will do so under arrangements whose specifics terms will vary across a spectrum. On one end of the spectrum, the theater owner may contract away all control over the operations of the theater, giving a third party complete freedom to operate and stage productions with no involvement from the theater owner. This paradigm includes the "long-term, passive lease" that described the terms of SHN's lease of the Curran from the Lurie family.[123] On the opposite end of the spectrum, the theater owner maintains complete control over all theater operations, including the right to operate the theater to stage all productions that the owner itself produces. Under the former paradigm arrangement, the owner has no control over any production staged at the theater, because the owner has contracted away any right to determine where that production plays or any terms and conditions of the production. Under the latter paradigm arrangement, the theater owner has complete control over every production staged at the theater. That is because the owner, as the theater owner, wearing its hat as the proprietor, operator and

[122] PI Op. at *8.

[123] *Id.*; A1011; A1035-36.

producer, would incontestably have the ability to determine where each production plays and its terms and conditions.

In between those two abstract scenarios at opposite ends of the spectrum there lies a broad middle space where the issue of control over production becomes highly fact dependent.[124] In this middle area, the theater owner may acquire specific contract rights that influence how productions will be staged at the theater.[125] At some point, the grant of such rights to the theater owner reaches a tipping point where the owner, together with the producer, obtains joint control over the production.[126] DEH and Harry Potter fall in that middle ground. The question presented here is whether the Hayses acquired rights sufficient to confer joint control over those Productions.

NSF contended that the undisputed facts established that the Hayses, as both the owners and operators of the Curran, obtained joint control over DEH and Harry Potter. Although the Hayses negotiated contracts with the producers that gave

[124] A1011-13; A1036-40.

[125] A1036-40.

[126] The trial court recognized this potential for joint control in its opinion denying Counterclaim Defendants' Motion to Dismiss. The court held that "[i]t appears that neither a producer nor a theater owner unilaterally could set the terms of an engagement and pick the venue. Even with the most overbearing producer, the theater owner still would have to acquiesce to the terms; otherwise, the play would not be performed at that venue." *CSH Theatres, LLC v. Nederlander of San Francisco Assocs.*, 2015 WL 1839684, at *13 (Del. Ch. Apr. 21, 2015).

them significant influence over both Productions, the trial court never considered the facts supporting NSF's claim or the merits of the claim. The reason is that the court misapprehended NSF's argument, and then categorically rejected it out-of-hand on purely abstract, conceptual grounds.

The trial court characterized NSF's position thusly:

> Now Plaintiff asserts a new argument about control. Plaintiff essentially argues that staging – i.e. presenting a play equals control. . . . Plaintiff effectively argues that *any* exercise of Hays's ownership of the Curran beyond a long-term, passive lease with no influence over programming is equal to control. Under Plaintiff's interpretation, Defendants control every play that is staged (i.e. presented) at the Curran if they engage in the "making of the agreement" or if they retain any influence over programming. . . . Thus, in essence, Plaintiff argues that Defendants control any production that they stage.[127]

Any such argument, the trial court held, must fail because it would render portions of Section 7.02(b) and 7.06 unnecessary surplusage:

> If, as Plaintiff contends, to stage a production is to control it, Section 7.02's limits on a member or affiliate's ability to "stage a Production that it controls (as defined in Section 7.03)' is repetitive because 'that it controls (as defined in Section 7.03)" adds nothing to the sentence. This interpretation creates surplusage.
>
> Plaintiff's interpretation would reduce Section 7.06 to only allowing competition when the member or affiliate is a passive, uninvolved investor. This interpretation

[127] PI Op. at *8 (emphasis added).

> would make large parts of Section 7.06 . . . unnecessary surplusage.[128]

The problem is that NSF never argued that *any* "staging," *per se* and without more, constitutes control. What NSF did argue is that the specific rights the Hayses had obtained for themselves in connection with staging DEH and Harry Potter were sufficient to give the Hayses joint control over those Productions.[129] Stated differently, the trial court mischaracterized NSF's argument as essentially falling on either one extreme of the control spectrum or the other. Having done that, the court understandably failed to address the argument where it actually fell—within the fact-specific middle ground.[130] Had the trial court correctly perceived NSF's argument, it would not have rejected NSF's position so categorically and would have considered the merits of the issue—whether the rights that the Hayses obtained were sufficient to confer joint control over DEH and Harry Potter. For this reason alone, the judgment in the Second Action must be reversed.

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[128] PI Op. at *10.

[129] *See, e.g.*, A1070-91; A1095-1100; A1275-76.

[130] As NSF explained, the control analysis is "a facts and circumstances test." A1275; *see also Basho Tech. Holdco B, LLC v. Georgetown Basho Investors, LLC*, 2018 WL 3326693, at *29 n.327 (Del. Ch. July 6, 2018) (observing that a "finding of control requires a fact-specific analysis of multiple factors").

4. Had The Trial Court Properly Considered the Merits of "Control" Over DEH and Harry Potter the Hayses Would Have Been Found to Control the Those Productions.

Separate and apart from its first error, had the trial court confronted the merits of NSF's argument the court, it would have concluded that the Hayses have joint control over both DEH and Harry Potter. The Hayses negotiated for and obtained the legal right to stage those shows at the Curran and, by contract, obtained critically significant influence over their terms and conditions. Indeed, the record shows that the Hayses obtained more controlling involvement in DEH and Harry Potter than they had over Fun Home, and the producers of DEH and Harry Potter agreed that the Hayses had control.

Specifically, as to DEH:

- [redacted].
- Carole donated hundreds of thousands of dollars to a charity affiliated with DEH's lead producer resulting in DEH's offer to play at the Curran.[132]
- The Hayses guaranteed a minimum weekly revenue to DEH of $1.3 million because it was "necessary to bring [DEH] to the Curran."[133]
- [redacted]

[131] A1230; A1128-29.

[132] A497-510; A641-43; A995-1002; A1070-71.

[133] A718; A995-98; A1071-72.

- [redacted][135]
- [redacted][136]

As to Harry Potter:

- [redacted]
- [redacted][138]
- [redacted][139].
- The Hayses retained sole discretion to approve the extensive modifications to the Curran that would be made to stage Harry Potter. [redacted]

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[134] PI Op. at *3; A688-91; A722-24; A1071-73.

[135] A718-20.

[136] A718-20; A726-41; A911-14; A1076-77.

[137] A955-72; A1121-25; A1233.

[138] A950-51.

[139] A920; A950.

[140] A929-30; A943-44; A973-94; A1082-83.

- The MOU that ATG signed with the Hayses permitted ATG to show only Harry Potter, with any other Productions requiring the approval of the Hayses.[141]
- [redacted].[142]

Viewed collectively, NSF submits that these contracted-for rights establish that the Hayses obtained joint control over both where DEH and Harry Potter played and the terms and conditions of those engagements. Unfortunately, because the trial court never engaged in this "fact-specific analysis of multiple factors," [143] it never truly confronted the merits of NSF's control argument and thus never reached this issue.

5. The Court of Chancery's "Surplusage" Analysis is Legally Flawed.

Starting from the faulty premise that NSF believes that any "control" equals "staging," the trial court determined that NSF's argument would render the term "control" in Section 7.02(b) meaningless. That argument (as thus characterized) would also impermissibly limit the scope of Section 7.06 so as to render certain of its parts unnecessary surplusage. This legal analysis fails, however, when scrutinized through the lens of the argument that NSF actually made.

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[141] A940.

[142] A934; A1090.

[143] *See Basho Tech.*, 2018 WL 3326693, at *29 n.327.

First, there is no surplusage in Section 7.02 under NSF's interpretation. "Staging" means to present a production.[144] Under the LLC Agreement, "control" means the "ability to determine where the Production plays and the terms and conditions of said engagement."[145] As discussed above, NSF never argued that stage and control mean the same thing. What NSF did argue is that certain rights obtained to stage, *i.e.* present a production, may, in some circumstances, provide a theater owner with joint control over that Production. Thus, under NSF's actual argument, the terms "staging" and "control" in Section 7.02 have separate and independent meanings, but evidence of staging may also constitute evidence of control.

This interpretation sensibly recognizes that parties are bound by the prohibition of Section 7.02(b) only if they have the rights to determine both whether the show will be staged within 100 miles of San Francisco and the terms and conditions of the engagement. Indeed, in its Trial Opinion, the court read Section 7.02(b) in just this way. With respect to Fun Home, Carole paid money to acquire the right to have the Production first play at the Curran. That is, Carole

[144] Merriam Webster defines "staging" as "the act of putting on a play." Merriam-Webster, https://www.merriam-webster.com/dictionary/staging (last visited on January 21, 2019).

[145] A305.

obtained control over Fun Home by obtaining the right to have it play at her theater.

Second, the court's holding that NSF's "control" argument would impermissibly limit Section 7.06 and render certain of its provisions "unnecessary surplusage" also flows from the court's misunderstanding of NSF's position. Viewed properly, the argument creates no surplusage at all. To reiterate,[146] Section 7.06 is expressly made "subject to" Article VII and Section 7.02, and must, therefore, give way in circumstances where Section 7.02 prohibits certain harmful conduct. But even as limited by Section 7.02(b), Section 7.06 retains meaning and its terms are not rendered surplusage. So long as a party does not stage a Production that it controls in San Francisco, Section 7.06 is not violated and allows the Members and their affiliates to: (1) engage in business activities in addition to SHN; and (2) own or manage other businesses or properties, without having to offer an interest in those other businesses to SHN. Given that all parties participate in the theater industry outside of, and apart from their interests in SHN, these rights are significant and anything but "surplusage."

For these reasons, the trial court's legal analysis in its PI Opinion is independently flawed and cannot stand.

[146] *Infra* at I.C.3.

6. The Court of Chancery's Interpretations of "Control" in its PI Opinion and Trial Opinion Cannot Be Reconciled.

Finally, the trial court's interpretations of "control over production" are inconsistent and cannot be reconciled. In the PI Opinion, the trial court attempted to distinguish Carole's control over Fun Home from DEH and Harry Potter. Fun Home, the court held, was distinguishable from DEH or Harry Potter, because in Fun Home, the Hayses' had a "preexisting right[] to force [Fun Home] to play at the Curran."[147] But, (the court held), no such preexisting right existed in the case of either DEH or Harry Potter, because the producers of both shows had openly considered multiple theater venues including those owned by SHN, and then elected the Curran without constraint.[148]

The court's analysis misses the mark. That the producers of DEH or Harry Potter considered other theaters before agreeing to stage their productions at the Curran is irrelevant. The producers of Fun Home may have undertaken the same considerations. The relevant point is that once any of the producers gave Carole the right to show the Productions at the Curran and control over the terms and conditions of the Productions, Carole had control, *i.e.*, the ability to determine

[147] PI Op. at *9.

[148] *Id*. at *11.

where the Production plays and the terms and conditions of the Production.[149] When considered thusly, Carole's right to show DEH and Harry Potter "preexisted" the staging of those shows because upon signing the contracts for those two shows, Carole had acquired the "right[] to force" the producers to stage the shows at the Curran. Because the trial court's conception of control in the Trial Opinion cannot be reconciled with the different conception in the PI Opinion or with the extensive evidentiary record, the trial court's PI Opinion cannot stand.

[149] Trial Op. at *25.

CONCLUSION

For the foregoing reasons, NSF respectfully requests that this Court reverse the decisions of the Court of Chancery.

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CERTIFICATE OF SERVICE

I, M. Paige Valeski, Esquire, hereby certify that on February 5, 2019, a copy of the foregoing document was served on the following counsel in the manner indicated below:

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