PUBLIC VERSION - FILED APRIL 2, 2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

[CORRECTED] ANSWERING BRIEF ON CROSS-APPEAL AND REPLY BRIEF OF APPELLANT/CROSS-APPELLEE NEDERLANDER OF SAN FRANCISCO ASSOCIATES

OF COUNSEL:

DECHERT LLP
Matthew L. Larrabee
Benjamin M. Rose
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3500

Michael S. Doluisio
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
(215) 994-2000

YOUNG CONAWAY STARGATT & TAYLOR, LLP
Tammy L. Mercer (No. 4957)
Jack B. Jacobs (No. 000008)
Martin S. Lessner (No. 3109)
M. Paige Valeski (No. 6336)
Rodney Square
1000 North King Street
Wilmington, DE 19801
(302) 571-6600

Attorneys for Appellant/Cross-Appellee Nederlander of San Francisco Associates

Dated: March 25, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

SUMMARY OF ARGUMENT ON CROSS-APPEAL 3

ARGUMENT ON CROSS-APPEAL 5

I. THE TRIAL COURT CORRECTLY DETERMINED THAT THE HAYSES ARE AFFILIATES OF CSH AND ARE BOUND BY SECTION 7.02. 5

A. Question Presented 5

B. Scope of Review 5

C. Merits of Argument 5

1. Under The LLC Agreement's Plain Language the Shorenstein Entity Includes CSH Affiliates. 6

2. The Extrinsic Evidence Supports the Trial Court's Determination that CSH's Affiliates Are Bound by Section 7.02. 9

3. Even If The Hayses Are Not Contractually Bound by Section 7.02(a) They Owe Fiduciary Duties As Controllers of CSH. 16

REPLY ARGUMENTS 18

II. SECTION 7.02(a) PROHIBITS THE HAYSES' COMPETITIVE CONDUCT AT THE CURRAN: THE TRIAL COURT ERRED IN CONCLUDING OTHERWISE. 18

A. The Hayses' Competitive Conduct at the Curran Theatre Contravenes Their Obligations Under Section 7.02(a). 19

B. The Trial Court's Contrary Ruling is Erroneous Because Under The LLC Agreement's Plain Language Any Outside Activities

Permitted by Section 7.06 Are Subject to, and Therefore Must Satisfy, the Obligations Mandated By Section 7.02. 22

C. NSF Did Not Abandon Its Claims that 7.02(a) Bars the Hayses' Competitive Activity at the Curran. 25

III. SECTION 7.02(b) PROHIBITS THE HAYSES FROM SHOWING DEAR EVAN HANSEN AND HARRY POTTER AT THE CURRAN: THE TRIAL COURT ERRED IN CONCLUDING OTHERWISE. 33

A. The Trial Court Failed to Address the Merits of NSF's Joint Control Argument.....34

B. The Undisputed Facts Show the Hayses Had Joint Control Over the DEH and Harry Potter Productions. 35

1. The Hayses' Argument That Only Producers Control Productions Is Not Faithful to the LLC Agreement. 36

2. The Hayses' Argument That Only Producers Control Productions Is Not Faithful to the Facts 37

3. The Hayses' "Preexisting Rights" Argument Is Wrong But, In Any Event, the Hayses Obtained Such Rights. 40

C. Interpreting 7.02(b) As NSF Argues Does Not Render the Term "Control" Meaningless. 42

CONCLUSION 44

TABLE OF AUTHORITIES

Page(s)

CASES

AT&T Corp. v. Lillis,
953 A.2d 241 (Del. 2008) 5

Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC,
2009 WL 1124451 (Del. Ch. Apr. 30, 2009).....17

Brinckerhoff v. Enbridge Energy Co.,
159 A.3d 242 (Del. 2017) 16, 23, 24

CSH Theatres, LLC v. Nederlander of San Francisco Assocs.,
2015 WL 1839684 (Del. Ch. Apr. 21, 2015).....40

Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.,
702 A.2d 1228 (Del. 1997) 9

Frederick-Conaway v. Baird,
159 A.3d 285 (Del. 2017) 5

Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.,
795 A.2d 1 (Del. Ch. 2001) 17

Lechliter v. Delaware Dept. of Natural Res.,
2016 WL 878121 (Del. Ch. Mar. 8, 2016) 35

Medicalgorithmics S.A. v. AMI Monitoring, Inc.,
2016 WL 4401038 (Del. Ch. Aug. 18, 2016).....16

Mesirov v. Enbridge Energy Co.,
2018 WL 4182204 (Del. Ch. Aug. 29, 2018).....16

Microstrategy Inc. v. Acacia Res. Corp.,
2010 WL 5550455 (Del. Ch. Dec. 30, 2010).....16

NAMA Holdings, LLC v. World Market Center Venture, LLC,
948 A.2d 411 (Del. Ch. 2007) 7

Osborn ex rel. Osborn v. Kemp,
991 A.2d 1153 (Del. 2010).....23

Oxbow Carbon & Mineral Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC,
2019 WL 237360 (Del. Jan. 17, 2019) 28

Paige Capital Mgmt., LLC v. Lerner Master Fund, LLC,
2011 WL 3505355 (Del. Ch. Aug. 8, 2011) 17

Rhone-Poulene Basic Chems. Co. v. Am. Motorists Ins. Co.,
616 A.2d 1192 (Del. 1992) 5

Shawe v. Elting,
157 A.3d 152 (Del. 2017) 26

Sonitrol Holding Co. v. Marceau Investissements,
607 A.2d 1177 (Del. 1992) 5

Toth v. State,
1999 WL 66556 (Del. Feb. 4, 1999).....30

In re: USA Cafes,
600 A.2d 43 (Del. Ch. 1991) 17

In re Walt Disney Co. Deriv. Litig.,
907 A.2d 693 (Del. Ch. 2005) 21

RULES

Delaware Supreme Court Rule 8 26

OTHER AUTHORITIES

Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012) 7

PRELIMINARY STATEMENT[1]

A noted commentator famously observed that a person may be entitled to his own opinion, but not to his own facts. That principle, which should be a truism in the realm of proper legal advocacy, somehow got left behind in Appellees' Answering Brief. That monumental effort at avoidance and misdirection advances arguments that rest on "facts" that are either bereft of record support or contrary to what the record actually shows, and contentions without foundation in Delaware law.

Thus, Appellees claim that NSF "waived" its primary argument on appeal—that the Hayses' conduct actionably violated Section 7.02(a) of the LLC Agreement—because NSF's principal, Robert Nederlander, gave testimony inconsistent with that position. Relatedly, Appellees claim that NSF's counsel waived, and/or failed to preserve, his client's Section 7.02(a) argument. And, that Appellants' representations about its 7.02(b) position to the trial court are "blatantly false." In fact, those assertions, which obliquely call into question the professional integrity of NSF's counsel, are untethered to the record, to reality, and to Delaware law. In the main, Robert's trial testimony was consistent with NSF's legal position, and to the extent it was not, that is of no import legally, because lay

[1] All defined terms used herein are given the same meaning as in the Opening Brief of Appellant Nederlander of San Francisco Associates (the "NSF Opening Brief").

witness testimony cannot negate or constrain a court's power or duty to construe disputed contract provisions. Indeed, the record shows that NSF's counsel steadfastly adhered to NSF's legal position throughout the proceedings below, and that the evidence Appellees rely upon to show "abandonment" are cherry-picked, incomplete snippets from counsel's presentations at post-trial argument, that, when viewed in their proper context, refute any suggestion of abandonment and expose Appellees' false narrative. Even worse, Appellees' accusation that Appellants made "blatantly false" statements about its Section 7.02(b) argument is belied by Appellees' own supporting citations.

In short, the Answering Brief gives the epithet de jour, "alt-facts,' a bad name. It also illustrates—once Appellees' evasions and misdirections are revealed—that Appellees are willing to say and to argue anything to avoid confronting the merits of Appellant's position and the truth of this case; namely that after a failed attempt to wrest control of SHN from Robert Nederlander, Carole Hays and her controlled entities affirmatively decided to abandon SHN. In violation of their contractual and fiduciary duties to that entity, they then actively worked to harm SHN and impair its value so that the "buy-out price" of Robert's 50% share "goes down."[2]

[2] A451.

SUMMARY OF ARGUMENT ON CROSS-APPEAL

NSF would typically begin by addressing the merits of its affirmative appeal. Here, however, because the merits are closely intertwined with the issues presented by the Hayses' cross-appeal, NSF addresses the Hayses' cross-appeal first.

1. Denied. The Court of Chancery correctly determined that "Shorenstein Entity" includes the Hayses[3] as "Affiliates" of CSH. Consequently, the Hayses are bound by Section 7.02. That determination is confirmed by the contractual definition of "Shorenstein Entity," which is CSH, together with its "Permitted Transferees." CSH's Permitted Transferees are defined to include "Affiliates." The Hayses admit they are Affiliates of CSH.

The extrinsic evidence also supports the trial court's determination. The drafting history of the Nederlanders' and the Shorensteins' predecessor agreements shows that the language that ultimately evolved into Section 7.02 was originally inserted to address Walter Shorenstein's concerns of competition by the Nederlander family—and not just by the single Nederlander entity that was then Walter's partner. When the LLC Agreement was drafted in 2000, Carole insisted that that predecessor language be retained, because she was "very concerned"

[3] As set forth in NSF's Opening Brief, for ease of reference the Hayses and the entities they control, including all Appellees, are referred to collectively as "the Hayses." NSF Opening Br. at 10 n.26.

about the "Nederlanders" competing against SHN. The parties intended for the terms "Shorenstein Entity" and "Nederlander Entity" in Section 7.02 to encompass persons besides the signatory CSH and NSF Members, and the trial court agreed. It observed that the drafters of the LLC Agreement used the term "Members" in certain provisions and "Shorenstein Entity" and "Nederlander Entity" in others, evidencing that those terms were intended to have different meanings. The Court of Chancery's interpretation gave meaning to both terms—"Members" and "Shorenstein Entity"—and should be affirmed.

ARGUMENT ON CROSS-APPEAL

I. THE TRIAL COURT CORRECTLY DETERMINED THAT THE HAYSES ARE AFFILIATES OF CSH AND ARE BOUND BY SECTION 7.02.

A. Question Presented

Did the Court of Chancery correctly determine that the Hayses are bound by Section 7.02 of the LLC Agreement because Section 7.02 applies to the defined term "Shorenstein Entity," which includes the Hayses as "Affiliates" of CSH?

B. Scope of Review

"This Court reviews questions of law, including the Court of Chancery's interpretation of written agreements, *de novo*."[4] "To the extent the trial court's interpretation of contract language rests on findings concerning extrinsic evidence, however, this Court must accept those findings unless they are unsupported by the record and are not the product of an orderly and logical deductive process."[5]

C. Merits of Argument

"[This Court's] task on *de novo* review . . . is to determine 'what a reasonable person in the position of the parties would have thought' the term ["Shorenstein Entity"] meant."[6] Both the plain language of the LLC Agreement

---

[4] *Frederick-Conaway v. Baird*, 159 A.3d 285, 293 (Del. 2017).

[5] *Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1181 (Del. 1992).

[6] *AT&T Corp. v. Lillis*, 953 A.2d 241, 253 (Del. 2008) (quoting *Rhone-Poulene Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992)).

and the extrinsic evidence both support the trial court's well-reasoned conclusion that the contractual term "Shorenstein Entity" includes "Affiliates" of CSH. As Affiliates of CSH, the Hayses are therefore bound by Section 7.02.

1. Under The LLC Agreement's Plain Language the Shorenstein Entity Includes CSH Affiliates.

The LLC Agreement specifically defines the terms "Shorenstein Entity" and "Nederlander Entity." The "Shorenstein Entity" is defined as CSH Theatres, LLC "together with any Permitted Transferees."[7] A "Permitted Transferee" includes an "Affiliate,"[8] which in turn is defined as "a Person that, directly or indirectly through one or more intermediaries, Controls, is Controlled by or is under common Control with the subject Person."[9]

The Hayses admit that they are Affiliates of CSH.[10] Even so, they contend that the "Shorenstein Entity" does not include Affiliates of CSH. That claim cannot pass the blush test and the trial court rightly rejected it.

---

[7] A285.

[8] A288.

[9] A286.

[10] Trial Op. at *23 n.263. *See also id.* at *23 (finding that "the Hayses are Permitted Transferees of CSH because, through a series of intermediaries, they ultimately control [CSH]" and "CSH Curran is a Permitted Transferee of CSH [] because, through a series of intermediaries, CSH Curran and [CSH] are under shared control[]"). Thus, Carole has effective control over the CSH entities.

"Contractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court."[11] Invoking that canon, the Hayses urge that "reading 'Shorenstein Entity' to include Affiliates of CSH Theatres would 'render . . . part[s] of the contract mere surplusage.'"[12] They insist that "Shorenstein Entity" must be read as coextensive and synonymous with CSH, and that "Nederlander Entity" must be interpreted as coextensive and synonymous with NSF. That construction, however, would effectively excise "Shorenstein Entity" and "Nederlander Entity" from the LLC Agreement by making them to synonymous and coextensive with "Members."[13] The Hayses' interpretation flunks even their own imperative—avoiding the creation of surplusage.

NSF has consistently claimed that "Member" must be interpreted to mean something distinct from "Shorenstein Entity" and "Nederlander Entity." As the trial court noted, "[t]he drafters of the LLC Agreement used 'Members' in certain

---

[11] *NAMA Holdings, LLC v. World Market Center Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007).

[12] Appllees' Answering Brief on Appeal and Cross-Appellants' Opening Brief on Cross-Appeal ("Answ. Br.") at 58 (internal citation omitted).

[13] "If a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision, or that deprives another provision of all independent effect, and (2) another meaning that leaves both provisions with some independent operation, the latter should be preferred." Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012).

provisions, and 'the Shorenstein Entity and the Nederlander Entity' in other provisions, which suggests the terms mean different things."[14] Although the trial court did not give "Member" a specific defined meaning, it did properly conclude that "Member" must have a meaning distinct from "Shorenstein Entity" and "Nederlander Entity."[15] To give meaningful effect to the LLC Agreement's critical terms, the most logical and natural construction is that "Members" means the SHN's current members, *i.e.*, NSF and CSH. That interpretation gives meaning to all the LLC Agreement's critical terms—"Shorenstein Entity", "Nederlander Entity," "Permitted Transferees," "Member" and "Affiliate." That construction also avoids creating redundancy in the phrase "Member or Affiliate" as that phrase is used in various sections of the LLC Agreement.[16] And lastly, it eliminates the so-called "absurd" results that (the Hayses say) flow from the trial court's interpretation.[17] If the drafters of the LLC Agreement intended for Section 7.02 to

---

[14] Trial. Op. at *25.

[15] *Id.*

[16] *See* Answ. Br. at 59 n.26. The separate use of the phrase "Member or Affiliate" supports the interpretation of "Member" as including only NSF or CSH.

[17] *See* Answ. Br. at 59. The provisions that the Hayses claim are absurd are anything but. "Member(s)" is read to mean the current members, NSF and CSH. *See* A287 ("'Membership Interest' means a *Member's* aggregate rights in the company, including . . . such *Member's* share of the profits and allocation of losses of [SHN], the right to receive distributions from [SHN] and the right to participate in the management of [SHN]." (emphasis added); A291 ("Each *Member* shall appoint two representatives to the Board of Directors") (emphasis added); A292

apply only to CSH and NSF, then they could have chosen to refer to those entities by name or simply used the term "Member." They did not. Instead, they created and defined the terms "Shorenstein Entity" and "Nederlander Entity" and used those terms (and not "Member") in Section 7.02.

The trial court correctly gave meaning to the term "Shorenstein Entity" as the LLC Agreement textually defines it, and it properly determined that the Hayses are bound by Section 7.02 as Affiliates of CSH. That determination should be affirmed.

2. The Extrinsic Evidence Supports the Trial Court's Determination that CSH's Affiliates Are Bound by Section 7.02.

In applying Section 7.02 to the Hayses' conduct, the trial court acknowledged that their interpretation of "Shorenstein Entity" "at most . . . raised an ambiguity in the [LLC Agreement]" that permitted the court to consider extrinsic evidence.[18] "In construing an ambiguous contractual provision, a court may consider evidence of prior agreements and communications of the parties as well as trade usage or course of dealing."[19] Having considered the extrinsic evidence, including the related predecessor agreements and trial testimony, the

---

("one Co-President shall be appointed solely by the Shorenstein Entity so long as the Shorenstein Entity is a *Member*.") (emphasis added).

[18] Trial Op. at *25.

[19] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228 (Del. 1997).

Court of Chancery correctly determined that that evidence supported NSF's position.[20]

The predecessor agreements between the Nederlander and the Shorenstein families support NSF's interpretation of Section 7.02. Jimmy Nederlander and Walter Shorenstein formed SHN's predecessor partnership in 1978.[21] Their partnership operated harmoniously until the early 1990's, when the Shorensteins brought litigation against the Nederlanders, claiming that the Nederlanders were "[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."[22] In settling that litigation, Walter and Jimmy entered into a second letter agreement in 1992. That 1992 Agreement added Section 4, which became the predecessor to Section 7.02 of the current LLC Agreement. Section 4 provided:

> Both partners will devote their efforts to maximize the economic success of the Partnership and avoid conflicts of interest. Neither party will stage any production within 100 miles of San Francisco unless (i) it has first played in a Partnership theatre, or (ii) it has been rejected for booking by the other party, or (iii) the Partnership

[20] Trial Op. at *26.

[21] A183-86.

[22] A250.

> share in the profits and/or losses of such booking pursuant to agreement.[23]

At trial, Robert testified that "Walter was adamant that [Section 4] be included" and that it "was the 'most important thing in the settlement between [Walter] and [Jimmy.]'"[24]

When the parties revised their 1992 Agreement in 2000, the Section 4 language was carried over into Section 7.02 of the LLC Agreement, except that the term "partners" was replaced by "Shorenstein Entity" and "Nederlander Entity."[25] At trial, Carole testified that she "insist[ed] that a [non-compete] clause be put in the operating agreement [in 2000] to prevent competition by the Nederlanders" because she "was very concerned" about the Nederlander family competing against SHN.[26] The only construction that can satisfy Carole's expressed concerns is to read the term "Nederlander Entity"—defined as NSF "together with any Permitted Transferees"—to encompass parties other than NSF. Otherwise, under the Hayses' interpretation, the human principals of CSH and NSF, who own and control those entities, could circumvent Section 7.02 and compete with SHN with impunity, by merely creating separate entities to accomplish that specific purpose. The Hayses'

[23] A277.

[24] Trial Op. at *26; AR239.

[25] *Compare* A277 to A304-05.

[26] AR234.

proffered interpretation defeats Walter's and Caroles' shared concerns about the threat of competition by the Nederlander family. It also defeats the core purpose of Section 7.02 that was crafted to address those concerns.

To defeat the trial court's construction of "Shorenstein Entity" on appeal, the Hayses rely heavily on handpicked soundbites of Robert's trial testimony to support their false assertion that "NSF admitted at trial that both parties always understood that Section 7.02 imposed obligations on the Members alone."[27] Only by disregarding the record can Appellees bring themselves to argue that. Robert's testimony largely supports NSF's (and the trial court's) interpretation of "Shorenstein Entity." Robert testified that although Section 4 of the 1992 Agreement only referred to the partners, the parties' "understanding was[] it included the Nederlander family and the Shorenstein family."[28] Contrary to the Hayses' repeated claims, Robert did not testify that Section 7.02 "carried forward identically" from the 1992 Agreement. Rather, when asked that very question, Robert disagreed with the Hayses' counsel, explaining instead that "the agreement in 2000 broadly expanded what was to be covered. Walter wanted to be sure that Nederlander – Nederlanders were bound by this noncompetition agreement. . . .

[27] Answ. Br. at 18.

[28] B269.

That's the whole point."[29] Further, Robert testified that he understood that "Shorenstein Entity" and "Nederlander Entity" included Permitted Transferees, which for the Nederlander Entity encompassed certain Nederlander family members.[30] In short, and contrary to the Hayses' assertions, Robert plainly testified that Section 7.02 did include CSH's Affiliates.

Robert's testimony is buttressed by that of other witnesses, including even Carole Hays. Ray Harris, who has worked for the Nederlander family for over three decades, testified that Walter wanted to add the non-competition provisions to the LLC Agreement to address concerns that some new Nederlander Entity could be created specifically to compete with SHN.[31] Greg Holland, SHN's CEO, testified that he understood the LLC Agreement would prohibit a party from creating an Affiliate specifically to escape its obligations under Section 7.02.[32] And even Carole testified that she intended that members of the Nederlander family should be bound by Section 7.02.[33] Indeed, Carole understood that she

[29] B270-71.

[30] B274-75.

[31] A648-50.

[32] *See* AR231-32.

[33] AR234.

personally should not compete with SHN.[34] And if there were any further doubt, the Hayses' conceded in their post-trial brief that "both the 1992 agreement and Section 7.02(b) were meant to restrict the staging of Productions produced and controlled by Jimmy Nederlander," *i.e.*, a Person other than NSF.[35] The trial court carefully considered all of that testimony (and other evidence in the record) and properly determined that "Shorenstein Entity" includes CSH's Affiliates.

The Hayses contumaciously ignore and avoid confronting this evidence. Instead, they next ask this Court to find that the parties' course of conduct requires the conclusion that the "Affiliates" of the Members were not intended to be bound by Section 7.02. They say that if NSF's interpretation were correct, then NSF would all along been in violation of Section 7.02, because NSF's alleged Affiliate, the Broadway San Jose theater (co-owned by James L. Nederlander), has been staging Broadway-style productions within 100 miles of San Francisco without complying with Section 7.02(b)'s restrictions. That argument is fact-free and misleading. JN California, the entity that operates Broadway San Jose, is not an Affiliate of NSF. The owners of JN California (James L. Nederlander and Nick

[34] A484; *see also* A485 (testifying she would never compete with SHN at the Curran).

[35] AR285. The Hayses cannot credibly argue that the term Shorenstein Entity as used in Sections 7.02(a) and (b) can encompass Affiliates in one section and not the other.

Scandalios) have no control over NSF, and NSF has no control over JN California.[36] Nor is JN California a Nederlander Controlled Entity, another type of entity included within the definition of the "Nederlander Entity," because it is not 51% owned by a Nederlander family member.[37] In short, the Hayses' reliance on Broadway San Jose to prove a course of conduct that is inconsistent with NSF's and the trial court's interpretation of the Shorenstein Entity founders on the facts. Any staging of shows by Broadway San Jose did not run afoul of the trial court's interpretation of Section 7.02 of the LLC Agreement.

Finally, the Hayses argue, as a legal matter, that because only CSH and NSF were parties to the LLC Agreement, Section 7.02 "could not have bound either Member's Affiliates."[38] That claim also fails. That interpretation (to reiterate) ignores both the express language of the LLC Agreement and the extrinsic evidence showing that the parties intended for "Affiliates" of Members to be bound by the LLC Agreement. Sections 7.02(a) and 7.02(b) expressly bind the "Shorenstein Entity," which include Affiliates of CSH. Although the Affiliates were not signatories to the LLC Agreement, that does not matter. It is established

[36] A1015.

[37] *Id.* In relevant part, the LLC Agreement defines "Nederlander Controlled Entity" as "A corporation in which a member or members of the Nederlander Family jointly or severally own at least fifty-one (51%) percent of the issued and outstanding voting stock." A287.

[38] Answ. Br. at 57.

Delaware law that "an affiliates' lack of signatory status is 'not a basis for [the affiliate] to escape liability.'"[39] This is especially so where, as here, the LLC Agreement imposes obligations on affiliated non-signatories and provides for indemnification to those parties.[40] The trial court's determination that the "Shorenstein Entity" includes "Affiliates" is correct and should be affirmed.

3. Even If The Hayses Are Not Contractually Bound by Section 7.02(a) They Owe Fiduciary Duties As Controllers of CSH.

Even if this Court were to determine that the Hayses are not contractually bound by Section 7.02(a), the Hayses do not escape liability for their conduct, because they owe fiduciary duties to SHN.[41] The Hayses concede, as they must, that at least CSH (as a Member) owes SHN and NSF the duties mandated in

---

[39] *Medicalgorithmics S.A. v. AMI Monitoring, Inc.*, 2016 WL 4401038, at *18 (Del. Ch. Aug. 18, 2016) (citing *Microstrategy Inc. v. Acacia Res. Corp*., 2010 WL 5550455, at *12 (Del. Ch. Dec. 30, 2010) (holding that a non-signatory affiliate was bound to a contractual provision that applied to affiliates)).

[40] A305-07 (providing for indemnification for any officer, director, employee, shareholder, member, partner or representative of any Member); *see Mesirov v. Enbridge Energy Co*., 2018 WL 4182204, at *9-10 (Del. Ch. Aug. 29, 2018) (holding that non-signatories to a limited partnership agreement could be liable where the agreement includes provisions that impose duties on those non-signatories and where the indemnification provision in the limited partnership agreement provides indemnification to those non-signatories and citing to *Brinckerhoff v. Enbridge Energy Co*., 159 A.3d 242, 255 (Del. 2017) for implicit support for such a conclusion.).

[41] NSF raised this argument in its post-trial briefing in the Trial Action. A872-73. The trial court did not reach this issue because it determined (correctly) that the Hayses were contractually bound as part of the "Shorenstein Entity."

Section 7.02(a), *i.e.* the duty to maximize the economic success of SHN.[42] That contractual duty mirrors the Members' fiduciary duty to act loyally to SHN. Thus, as the human controllers of CSH, the Hayses owe a fiduciary duty to act loyally to SHN.[43] The trial court itself noted that the Hayses through their membership on the CSH Investment Committee, "ultimately control [CSH]."[44] Therefore, CSH's contractual fiduciary duties extend to the Hayses and prevent them from engaging in disloyal competitive conduct that is harmful to SHN.

In short, even were this Court to reject the trial court's determination that the Hayses as members of the Shorenstein Entity are bound by Section 7.02(a), this Court should remand the matter to the trial court to decide whether they are liable as fiduciaries for their disloyal conduct.

---

[42] *See* Answ. Br. at 45 (arguing that 7.02(a) only applies to CSH).

[43] *See In re: USA Cafes*, 600 A.2d 43, 49 (Del. Ch. 1991) (holding that human controllers of entity fiduciaries owe fiduciary duties to the entity). *See also Paige Capital Mgmt., LLC v. Lerner Master Fund, LLC*, 2011 WL 3505355, at *30 (Del. Ch. Aug. 8, 2011) (determining that the managing member of a hedge fund's general partner owed fiduciary duties); *Bay Ctr. Apartments Owner, LLC v. Emery Bay PKI, LLC*, 2009 WL 1124451, at *9-10 (Del. Ch. Apr. 30, 2009) (applying the *USACafes* doctrine in the LLC context); *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 795 A.2d 1, 34 (Del. Ch. 2001), *aff'd in part, rev'd in part*, 805 A.2d 882 (Del. 2002), *opinion corrected and superseded*, 817 A.2d 160 (Del. 2002), *rev'd in part on other grounds*, 817 A.2d 160 (Del. 2002) (determining that contractual fiduciary duties owed by a corporate General Partner extended to its directors and controlling stockholders).

[44] Trial Op. at *23.

REPLY ARGUMENTS

II. SECTION 7.02(a) PROHIBITS THE HAYSES' COMPETITIVE CONDUCT AT THE CURRAN: THE TRIAL COURT ERRED IN CONCLUDING OTHERWISE.

As demonstrated in NSF's Opening Brief, the Hayses have violated Section 7.02(a) by engaging in disloyal competitive conduct that undermines SHN's economic success. Nowhere do the Hayses even attempt to explain how operating their competing theater, located only blocks away from SHN's theaters, can possibly satisfy their contractual obligation to devote their efforts to maximize the economic success of SHN and avoid conflicts of interest. How could they, since the Hayses concede that they are actively competing with SHN?[45] Instead, the Hayses adopt a strategy of avoidance by arguing that: (1) only the signatory entity CSH is contractually bound by Section 7.02(a); (2) that provision does not bar any competition, but even if it did, the Hayses discharged any duties owed under Section 7.02(a); (3) Section 7.06 supersedes and controls Section 7.02(a) with the result that the Hayses' competition is allowed; and (4) in any event, NSF abandoned its Section 7.02(a) claim post-trial.[46] None of these arguments has merit.

---

[45] A703; *see 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).

[46] Answ. Br. at 38-47.

A. The Hayses' Competitive Conduct at the Curran Theatre Contravenes Their Obligations Under Section 7.02(a).

In its Opening Brief NSF established that the Hayses' competitive conduct violated Section 7.02(a). Specifically, the Hayses "actively started planning a new venture at the Curran" after Robert refused to give Carole the control of SHN she demanded.[47] Carole and her affiliates then presented multiple competing Productions at the Curran,[48] which is located less than two miles from SHN's theaters. That competitive conduct benefits the Hayses at the expense of SHN, and bespeaks a genuine and direct conflict of interest, all in derogation of their duties under Section 7.02(a).

Unable to reconcile their competition with their duties under Section 7.02(a), the Hayses engage in avoidance. First, they argue that there is no evidence that they violated Section 7.02(a). That response, however, is premised entirely on their claim that Section 7.02(a) applies to CSH *only* in its capacity as a "Member" of SHN. As earlier shown (see Section I above), that premise is legally wrong, and the trial court properly so recognized. Once that smokescreen is brushed aside, one searches in vain for any evidence that the Hayses have not violated Section 7.02(a).

Second, the Hayses next contend that even if they had duties under Section 7.02(a), those duties evaporated once SHN was offered the opportunity to purchase

[47] Trial Op. at *11.

[48] A703.

the Curran itself and declined to do so. But, the argument misconstrues NSF's claim. NSF does not assert a claim for usurpation of a corporate opportunity based upon Carole's *purchase* of the Curran. Rather, NSF claims that the Hayses breached their duties of loyalty (embodied in Section 7.02(a)) and also violated Section 7.02(b) by using the Curran to improperly compete with SHN. The fact that SHN was offered and declined to purchase the Curran is irrelevant to the issue being presented here.

Relatedly, the Hayses assert that Robert acquiesced in their competition when he gave his "consent[] *unconditionally* to CSH Curran's purchase of the Curran."[49] That claim is plainly wrong. Robert conditioned his consent to Carole's purchase of the Curran upon her verbal promise to continue leasing the Curran to SHN beyond the expiration of the then current lease.[50] The trial court found Carole's oral promise to be not legally binding. But that court did not judicially determine that Robert ever consented "unconditionally" to Carole's purchase of the Curran. Indeed, Carole herself testified that when she sought Robert's permission to buy the Curran personally, she had no intention of

[49] Answ. Br. at 46 (italics added).

[50] B239; B241.

competing against SHN and was buying the Curran for SHN's benefit.[51] CSH's "consent" claim fails for lack of proof.

The Hayses next assert that, in any event Section 7.02(a) does not bar competition, because the word "competition" does not appear in that Section—an argument that is also meritless. Section 7.02(a) imposes on the Shorenstein Entity a duty to "devote its efforts to maximize the economic success of [SHN] and avoid any conflicts of interest between the members."[52] That Section further 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."[53] Thus, Section 7.02(a) imposes both contractual and fiduciary duties of loyalty to SHN, which, in this factual setting, logically and necessarily proscribe competitive conduct by either Member (or Affiliate) that harms SHN.[54] The Hayses have made no attempt to show how they can engage in competitive conduct that harms SHN and at the same time satisfy a duty of loyalty

[51] B200; AR003; AR004; AR237; *see also* B189; AR235.

[52] A304.

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

[54] *See In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 755 (Del. Ch. 2005) (a fiduciary breaches a duty of loyalty by "intentionally act[ing] with a purpose other than that of advancing the best interests of the corporation.").

and an express obligation to "devote [their] efforts to maximize the economic success" of SHN and avoid conflicts of interest.[55]

B. The Trial Court's Contrary Ruling is Erroneous Because Under The LLC Agreement's Plain Language Any Outside Activities Permitted by Section 7.06 Are Subject to, and Therefore Must Satisfy, the Obligations Mandated By Section 7.02.

As demonstrated in NSF's Opening Brief, by its express terms Section 7.06 is "subject to" Section 7.02 in its entirety. At trial the Hayses never disputed that. Nor did they ever claim that the specific language of Section 7.06 superseded or controlled over the more general language of Section 7.02. Instead, their trial position was that "[*a*]*lthough Section 7.06 is subject to Section 7.02*, the latter section applies only to the Members of SHN—CSH Theatres and NSF."[56] On appeal, the Hayses have changed course. They now adopt the trial court's (we contend erroneous) interpretations that Section 7.06 generally allows competition[57]

---

[55] A304. The Hayses argument that their breach of Section 7.02(a) is inconsequential because SHN has not suffered damages is a red herring. In the First Action, NSF sought a permanent injunction barring the Hayses competitive activities at the Curran. The trial court's determination that NSF had not proven damages related only to Section 7.02(b) and only as to one show – Fun Home. Trial Op. at *25.

[56] B409; AR069.

[57] Trial Op. at *24.

and operates as "an exception" to (i.e. as "subject' only to) Section 7.02(b).[58] That interpretation of Section 7.06 is legally erroneous.

As NSF demonstrated in its Opening Brief, the drafters of the LLC Agreement expressly made Section 7.06 "subject to" Section 7.02 *in its entirety*. That language compels the conclusion that where Sections 7.02 and 7.06 conflict, Section 7.02—in its entirety—will control.[59] By interpreting the LLC Agreement in a manner directly contrary to its plain language, the trial court's construction turned the drafters' express intent on its head and impermissibly stripped Section 7.02(a) of any meaning or force in the case of outright harmful competition—perhaps the most nefarious form of disloyalty.[60] On this basis alone, the trial court's judgment in the First Action constitutes reversible error.[61]

---

[58] *Id.*

[59] NSF Opening Br. at 30-32. Although the trial court characterizes Section 7.02 and Section 7.06 as "irreconcilable" (Trial. Op. at *24 n.269), to the contrary the two sections operate in harmony when a Member or Affiliate's outside activity has no impact on the operations of SHN. But, where an outside activity directly harms SHN, such as operating a competing theater within blocks of SHN's theaters, the two provisions do come into conflict and in these circumstances Section 7.06 must yield to Section 7.02.

[60] *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.'").

[61] The Hayses rely on *Brinckerhoff v. Enbridge Energy*. 159 A.3d 242 (Del. 2017). There, a limited partner brought an action for breach of a limited partnership agreement in a dispute between the partnership and an Affiliate. *Id*. at 246. The limited partnership agreement contained both a provision that set forth a general contractual good faith standard of care and a provision governing "Contracts with

The Hayses also argue that NSF's interpretation of Section 7.02(a) would deprive Section 7.06 of any meaning. Not so. Even if Section 7.06 permits competition, it never uses the word "competition" to express that intent. Instead, Section 7.06 makes clear that certain outside activities are permitted only where those activities will not violate Section 7.02, *i.e.*, by harming SHN or involving staging of controlled Productions within 100 miles of the SHN theaters. As thus understood, Section 7.06 does exactly what it was intended to do. It permits the Shorenstein Entity and the Nederlander Entity to participate in the theater industry outside of SHN without having to share profits from those outside activities with SHN or the other Member, so long as the activity does not violate Section 7.02(a) or (b).

Affiliates," which mandated that such transactions must be "fair and reasonable to the Partnership." *Id*. at 253-54. This Court determined that in the specific context of contracting with Affiliates, the "fair and reasonable" standard of care applied, and that the contractual good faith standard of care only "operate[d] in the spaces of the LPA without express standards." *Id*. at 254. The Hayses' reliance on *Brinckerhoff* is misplaced. The Hayses argue that here, as in *Brinckerhoff*, Section 7.02(a) "provides at most a general standard of care for Members." Answ. Br. at 43-44. But, Section 7.06 does not (as was the case in *Brinckerhoff*) set forth a separate or more specific standard of care for Outside Activities. Rather, it expressly states that any Outside Activities are subject to Section 7.02 in its entirety. Therefore, the Hayses are subject to the obligation under Section 7.02(a) to "devote their efforts to maximize the economic success of [SHN] and avoid any conflicts of interests between the Members" when participating in Outside Activities otherwise allowed by Section 7.06. In concluding otherwise, the trial court reversibly erred.

C. NSF Did Not Abandon Its Claims that 7.02(a) Bars the Hayses' Competitive Activity at the Curran.

In a last-ditch effort to avoid the application of 7.02(a) the Hayses argue that NSF abandoned its Section 7.02(a) claim. That contention, born of desperation, is totally unfounded.

As a procedural matter, NSF properly preserved its Section 7.02(a) argument. NSF relied upon Section 7.02(a) in the First Action and in the PI Action. In the First Action, NSF asserted counterclaims for breaches of fiduciary duties and breach of Section 7.02(a).[62] In its Opening Post-Trial Brief, NSF claimed that the fiduciary duty of loyalty was "mirrored" in Section 7.02(a) and that the Hayses breached those duties by actively competing at the Curran.[63] The Hayses also squarely addressed NSF's Section 7.02(a) arguments in their post-trial briefing.[64] All parties—NSF, CSH, and SHN—addressed Section 7.02(a) in their numerous other submissions to the trial court.[65] Not surprisingly, the trial court responded by making explicit determinations of Section 7.02(a)'s legal import in

[62] A423. Even before the First Action was commenced, NSF made clear in a letter to Carole and Jeff its position that Carole's refusal to lease the Curran to SHN unless she was given control of SHN was directly contrary to her duty to "devote [her] efforts to maximize the economic success of [SHN]." A362.

[63] A810-12.

[64] *E.g.*, B362-64; B402-03.

[65] *See* A569; A615; A762-63; A785; A810-12; A840; B362-64; AR031; AR098; AR101; AR155-58; AR106-62.

the Trial Opinion, including that "[u]nder [the] definitions in the LLC Agreement, the Hayses and any entities they control are Affiliates and part of the Shorenstein Entity and, therefore, bound by Section 7.02(a)."[66] NSF also cited Section 7.02(a) as a basis for its claims in the PI Action.[67] NSF specifically alleged that the Hayses "breached the contractual anti-competition provisions set forth in Sections 7.02(a) [and] 7.02(b) by staging DEH and Harry Potter at the Curran."[68]

Without deigning to address this indisputable record, the Hayses insist that NSF abandoned its Section 7.02(a) argument in the First Action[69] because Robert Nederlander conceded at trial in the First Action that Section 7.02(a) only applies to the Members and that, based on that testimony, NSF's counsel abandoned his client's Section 7.02(a) claim at post-trial argument. Only by misleadingly and flagrantly mischaracterizing the record are the Hayses able to advance these contentions.

---

[66] Trial Op. at *23.

[67] *See* B467; B468; B471; B484; A1094.

[68] B484.

[69] The Hayses make this abandonment argument for the first time on appeal. The Hayses never made this argument to the trial court in either the First Action or the PI Action. As such, the argument was not fairly presented and on that basis alone should be rejected by this Court. *See Shawe v. Elting*, 157 A.3d 152, 168 (Del. 2017) ("Under Supreme Court Rule 8, this Court only considers questions fairly presented to the trial court.").

First, the Hayses argue that, through Robert's testimony, "NSF admitted at trial that Section 7.02 imposed obligations on the Members alone."[70] This argument has no record support. Robert testified numerous times that the 1992 Partnership Agreement and the 2000 LLC Agreement were intended to include not only the Members, but also their principals and controllers.[71] The few cherry-picked snippets from Robert's trial testimony that the Hayses cite show that the Hayses' counsel was pummeling Robert with questions that were confusing and, that at best made Robert's answers unclear.[72] When afforded unpressured opportunity to respond to questions, Robert testified unequivocally that Section 7.02 applied to the parties and their Affiliates because that was Walter's and Carole's expressed intentions.[73] Given the plethora of testimony by Robert consistent with NSF's position, the snippets of his testimony selectively cited by

[70] Answ. Br. at 18.

[71] *See* B266-69; B270; B271; B274-75.

[72] *See* B280-83.

[73] *See* B266-68 ("[paragraph 4 of the 1992 Agreement] was an obligation, basically, in the Nederlander family and Shorenstein family"); B268 ("[I]n the year 2000, it was expanded to include everybody from David Nederlander. That was part of our agreements in New York and around the country, that Nederlanders would be bound."); B269 ("[T]he understanding was, it included the Nederlander family and the Shorenstein family, even though it doesn't directly say so there."); B270 ("the agreement in 2000 broadly expanded what was to be covered. Walter wanted to be sure that . . . Nederlanders were bound by this noncompetition agreement."); B271 ("[T]he Nederlanders always felt like the Shorensteins, that they could not compete with us in a 100-mile radius.").

the Hayses do not come close to factually foreclosing NSF from pursuing its Section 7.02(a) claim.[74]

Moreover, as a legal matter, Robert's trial testimony does not and cannot constitute a waiver of NSF's arguments on appeal. Robert testified as a fact witness, and his testimony was limited to his personal understanding of the LLC Agreement. As the Hayses' counsel acknowledged during Robert's direct examination, Robert was not testifying as an expert and could not competently offer a legal conclusion, specifically, the legal meaning of Section 7.02.[75] The

[74] Appellees cite *Oxbow Carbon & Mineral Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 2019 WL 237360 (Del. Jan. 17, 2019) to support its argument that Robert's unfavorable trial testimony forecloses our arguments on appeal. Its strained application of *Oxbow* is incorrect. In *Oxbow*, the appellees had argued in the trial court that that court should invoke the implied covenant of good faith and fair dealing to fill a contractual gap, to supply a seller's top-off right. *Id*. at *14. Then, for the first time on appeal, the appellees changed their argument. Rather than asking this Court to invoke the implied covenant to supply the contractual gap, they now argued that the Court should "imply a Top-Off based upon the LLC Agreement's plain language." *Id*. at *20. This Court rejected the argument, finding it was inherently inconsistent with the appellees' position at trial. *Id*. To demonstrate the inconsistency, this Court cited the trial testimony of one of the principals who acknowledged that no right to a top-off payment existed in the contract. *Id*. Thus, the waiver found to exist in *Oxbow* was the inconsistency of arguing in the trial court the existence of a gap in the contract and then arguing on appeal the contract's plain language required implying a new term. Although the fact witness's testimony helped illustrate the inconsistency, that testimony was not a basis for the *Oxbow* Court's decision. To the extent the Hayses suggest that it was, they mischaracterize *Oxbow*.

[75] During Robert's direct examination, he was asked "With respect to the reach of Section 7.02, does it reach all Nederlander-affiliated companies?" AR240. Counsel to the Hayses objected, stating "Sounds like this is calling for a legal

testimony of a fact witness has no bearing on the Court's legal construction of an unambiguous contract provision. The trial court noted itself noted in its Trial Opinion that "[n]one of the witnesses are experts on Delaware law, and even if they were, questions of legal interpretation are reserved for the Court."[76] Accordingly, the Court "d[id] not allocate weight to the legal opinions of fact witnesses."[77]

The Hayses next argue that "NSF expressly abandoned any Section 7.02(a) claim post-trial."[78] This argument also rests on a mischaracterization of the record. The Hayses assert that "at oral argument, NSF's lawyer unambiguously conceded that, in light of Robert Nederlander's testimony, the 'Section 7.02(a) Duty to Maximize the Success of SHN Applies to Members, Not Affiliates.'"[79] That argument is disingenuous and wrong.

---

conclusion, Your Honor. And although Mr. Nederlander is a lawyer, I don't think his testimony is being presented as expert legal testimony. Even if it were, that would be for the Court." *Id*.

[76] Trial Op. at *22 n.248. The Hayses' counsel is well aware of this rule and cited it to the trial court during the testimony of SHN's CEO. *See* AR230. ("The operating agreement says what it says. . . . To ask a lay witness to give his interpretation of what it means is to usurp the function of the Court.")

[77] Trial Op. at *22 n.248.

[78] Answ. Br. at 40.

[79] *Id*.

For support the Hayses point to a cherry-picked quote from a single slide used during NSF's presentation at post-trial oral argument. That slide acknowledged that "Mr. Nederlander Testified that Section 7.02(a) Duty to Maximize the Success of SHN Applies to Members, Not Affiliates."[80] What the Hayses fail to tell this Court, however, is that the same slide goes on to say that Robert's testimony:

- "Does Not Comport with [the] Plain Language [of the LLC Agreement], But Reflects Practicality";
- "Does Not Change: "[The] Plain Language of the LLC Agreement";
- "Does Not Change: "[The] Testimony of All Parties that They Owe Fiduciary Duties."[81]

Given what the slide actually says, it is mystifying how the Hayses can argue, consistent with their duty of candor,[82] that NSF's counsel "unambiguously conceded" that Section 7.02(a) does not apply to Affiliates.[83]

Along the same lines, the Hayses next urge that during the same post-trial argument, NSF took the position that "'Shorenstein Entity' and 'Nederlander

---

[80] B431.

[81] *Id*.

[82] "On appeal, counsel has an obligation to be candid with the Court in the presentation of the facts of record." *Toth v. State*, 1999 WL 66556, at *2 (Del. Feb. 4, 1999).

[83] Answ. Br. at 40.

Entity' mean different things in Section 7.02(a) and 7.02(b)" and "*only* Section 7.02(b) was intended 'to reach permitted transferees.'"[84] Again, the cited "support" for this attributed "position" is one page of the post-trial argument transcript wherein NSF's counsel acknowledged that Robert testified that "[Section 7.02(a)] did not, as he interpreted the language and as he applied it, reach his family members."[85] But, again, that same transcript reflects that NSF's counsel next went on to clarify that Robert's testimony "is *inconsistent with* our interpretation."[86] Thus, the slides and corresponding post-trial argument of counsel make abundantly clear that NSF was steadfastly adhering to its claim that Section 7.02(a) applies to Affiliates, despite a few potentially conflicting snippets of testimony from Robert. NSF has *always and consistently* maintained the position that the term "Shorenstein Entity," which appears in both Sections 7.02(a) and (b), applies to "Affiliates" as well as "Members." Nor has NSF ever claimed that "Shorenstein Entity" means something different in Section 7.02(a) than in Section 7.02(b). The Hayses' contrary argument lacks any support and should be rejected out of hand.

---

[84] *Id*.

[85] B438.

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

To summarize, NSF preserved its Section 7.02(a) argument and has never waived it. NSF relied upon Section 7.02(a) in the First Action and in the PI Action and the Hayses arguments about abandonment and waiver should be viewed for what they are: a misleading mischaracterization of the record. The Hayses' waiver argument, made to distract any inquiry into how their competition with SHN could possibly be consistent with their duty to maximize SHN's economic success and avoid conflicts of interest, should be rejected.

III. SECTION 7.02(b) PROHIBITS THE HAYSES FROM SHOWING DEAR EVAN HANSEN AND HARRY POTTER AT THE CURRAN: THE TRIAL COURT ERRED IN CONCLUDING OTHERWISE.

In its Opening Brief on appeal from the adverse judgment in the PI Action, NSF demonstrated that the trial court reversibly erred because it never considered the merits of NSF's argument that the contracts between the Hayses and the producers of DEH and Harry Potter gave the Hayses joint control over those Productions. Instead, the court misapprehended NSF's argument to be that "any staging" of a Production, without more, establishes the requisite "control" under Section 7.02(b). Had the trial court properly considered the merits of NSF's control-related arguments control, the undisputed facts NSF presented showed that the Hayses had contractually obtained rights that conferred "control" over the DEH and Harry Potter productions.

The Hayses concede that the trial court construed NSF's argument to be that "any staging" provides "control."[87] Inconsistently, however, they further argue that the trial court considered all of the facts and decided that those facts showed the Hayses did not control DEH or Harry Potter. Lastly, the Hayses urge that only

[87] Answ. Br. at 51. The Hayses accuse NSF of making a "blatantly false" representation about NSF's position on joint control at the trial court in the PI Action. *Id*. But the Hayses' citations to support this accusation explicitly support NSF and show that NSF consistently argued joint control. NSF's accusation is unfounded. *Id*. (citing to arguments by NSF that theater owners have control with producers by negotiating agreements for such control).

a show producer or owner can control a Production. The Hayses' arguments fail on both the facts and the law.

A. The Trial Court Failed to Address the Merits of NSF's Joint Control Argument.

The parties agree that the contractual standard applicable to determining "control over production" as used in Section 7.02(b) is "the ability to determine where the Production plays and the terms and conditions of said engagement."[88] The parties further agree that that NSF argued in the below PI Action—and to this Court in its Opening Brief—that a theater owner and producer may both have *joint* control over a production, *i.e.*, that the theater owner/operator may obtain rights that provide it, together with the producer, with concurrent control over a Production.[89] Regrettably, the trial court never addressed the merits of NSF's joint control argument. The reason is that the trial court misapprehended NSF's argument as "staging—*i.e.*, presenting—a play equals control."[90] Appellees so concede.[91]

---

[88] A305.

[89] Answ. Br. at 51.

[90] Answ. Br. at 51 (citing PI Op. at *8).

[91] This concession alone requires a reversal and remand. By misapprehending the merits of NSF's joint control argument as "*any*" staging equals control or that the Hayses "control *every* play that is staged (*i.e.* presented) at the Curran" (PI Op. at *8), the trial court avoided having to address whether the actual staging arrangements of DEH and Harry Potter constituted joint control.

B. The Undisputed Facts Show the Hayses Had Joint Control Over the DEH and Harry Potter Productions.

NSF argued in its Opening Brief that the undisputed facts show that the Hayses had joint control over DEH and Harry Potter.[92] Specifically, the Hayses contractually obtained significant control over both Productions and their respective terms, including (as to DEH) control over ticket prices, performance times, scheduling of shows and ticket sales, guarantees of minimum weekly revenue, and guarantees to the Producers to cover any losses arising from this litigation.[93] As to Harry Potter, the Hayses have control over hiring the Managing Director, sole discretion to approve modifications to the Curran to stage Harry Potter and the right to insist that the Curran's name appear in all advertising and promotional materials for Harry Potter.[94] Indeed, the producers of DEH and Harry Potter admitted that the Hayses have joint control.[95] The Hayses do not challenge

---

[92] NSF Opening Br. at 42-44. NSF does not dispute any of the trial court's factual findings. NSF's procedural decision to seek a final judgment on those facts does not, as Appellees suggest, waive its right to argue that the court misinterpreted NSF's legal theory based on those facts. *See Lechliter v. Delaware Dept. of Natural Res.*, 2016 WL 878121, at *2-3 (Del. Ch. Mar. 8, 2016) (stating that where a trial court "fundamentally misunderst[ands]" a litigant's argument, the proper course of action is to "appeal that point after a final judgment" rather than move for reargument).

[93] A688-91; A718-20; A722-41; A911-14; A995-98; A1071-73; A1076-77.

[94] A920; A929-30; A934; A943-44; A950; A973-94; A1082-83; A1090.

[95] A955-72; A1121-25; A1233; A1128-29; A1230.

any of this evidence. Rather, they argue that that evidence—which the trial court failed to address—is beside the point, because as a legal matter only a show owner/producer controls the show.[96] The Hayses' argument is wrong for the reasons next discussed.

1. The Hayses' Argument That Only Producers Control Productions Is Not Faithful to the LLC Agreement.

The Hayses argue that "control" means only the "control that producers and show owners have over their own productions;"[97] more specifically that the relevant "control" is control over "the show itself."[98] But that interpretation is not faithful to the language of the LLC Agreement. If (as the Hayses argue) Section 7.02(b) applies only to show owners/producers, the parties to the LLC Agreement could have simply stated that a "producer" or "show owner" cannot stage a show within 100 miles of San Francisco. But they did not. Instead, those parties agreed that control rests in *any* person having the ability to determine "where" the Production plays and the "terms and conditions of said engagement." By focusing on the location of the Production and the "terms and conditions" of the "*engagement*"—*i.e.*, an arrangement that must be jointly reached by producers and theater operators—the parties made plain their intent that Section 7.02(b) apply

[96] Answ. Br. at 21.

[97] *Id.*

[98] *Id.*at 49.

more broadly than just to "producers." Nor does the definition turn on who owns the "show itself." Rather, it turns on who controls where the show will be staged and the terms and conditions of the "engagement." Thus, the Hayses' extreme argument that only producers and show owners can control a Production is not supported by the LLC Agreement's express language.

2. The Hayses' Argument That Only Producers Control Productions Is Not Faithful to the Facts

Not only does the Hayses' position run afoul of the language of the LLC Agreement, it contradicts the undisputed facts regarding the staging of DEH and Harry Potter. For example, the Hayses claim that "DEH's lead producer (Stacey Mindich) alone controlled where and on what terms the show would be staged."[99] That claim is not supported by the evidence presented in the PI Action.

As to DEH, Carole and Greg Backstrom, the Curran's managing Director and COO, agreed that the numerous terms of the deal between DEH's producers and the Curran required the Hayses' agreement.[100] With that, Jeffrey Wilson of 101 Productions – DEH's General Manager – *agreed*. He confirmed that the Hayses and DEH jointly had control over the terms of the engagement:

> Q. Do you agree that Dear Evan Hansen's producers and Curran Live jointly negotiated the terms under which the show will be staged at the Curran?

[99] Answ. Br. at 32.

[100] AR312-13; AR314-15; AR316; AR320.

A. Yes.

* * *

Q. Do you agree that the producers and the Curran have ***joint control over the final terms that were agreed upon***?

* * *

A. ***Yes***.[101]

The record is similar with regard to *Harry Potter*. In that regard, the Hayses' significant control is reflected in: (1) the MOU and draft long-form lease between the Hayses and ATG; and (2) the Show License between ATG and *Harry Potter*'s producers. The MOU gives the Hayses control over multiple terms and conditions of the engagement, including the production that will play, the duration of the run, theater alterations, ticket access, Curran/*Harry Potter* branding, and approval over the show's Managing Director.[102] Indeed, the MOU expressly obligated ATG to ensure that the Show License conformed to the MOU, and the Show License would not be effective unless and until ATG first executed the MOU.[103] ATG's General Counsel, John Rogers, confirmed that the Hayses had

[101] A1128-29 (emphasis added).

[102] A920; A929-30; A934; A940; A943-44; A950-51; A973-94; A1082-83; A1090.

[103] A932.

control over every term in the ATG lease, as well over the terms they "required" to be included in the Show License.[104] He testified as follows:

> Q. You mentioned that the Curran had requested certain terms appear in the show license agreement.
>
> * * *
>
> A. I said that ***they required certain terms from us that naturally we would have to work into the show license agreement***.
>
> * * *
>
> Q. And [CSH] had control over picking which of those certain terms it was going to request ATG to have inserted into the show license?
>
> * * *
>
> A. It can pick and choose what it wants to fight for and not fight for. That's correct.[105]

Given this evidence, the Hayses' claim that only producers control a Production is not supportable. The facts show (we contend) that had the trial court properly considered NSF's joint control argument, the Hayses' contrary argument would have been rejected and NSF would have prevailed. Indeed, the trial court recognized joint control in its opinion denying Counterclaim Defendants' Motion to Dismiss, "[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

---

[104] A1123-24.

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

overbearing producer, the theater owner still would have to acquiesce to the terms; otherwise, the play would not be performed at that venue."[106]

3. The Hayses' "Preexisting Rights" Argument Is Wrong But, In Any Event, the Hayses Obtained Such Rights.

The Hayses next insist that the extensive facts presented to the trial court do not establish control because "no Appellee 'had any preexisting rights to force DEH or Harry Potter to play at the Curran.'"[107] That argument also fails legally and factually. It fails legally because it ignores the contractual definition of "control over production." And it fails factually because it ignores the reality of the rights the Hayses obtained under the contracts executed in connection with the staging of those Productions.

First, the Hayses' argument injects into the definition of "control over production" terms that are found nowhere in the LLC Agreement. That definition does not include *any* requirement that there be "preexisting rights" to force a Production to play at a theater. Nor can reading any such requirement into the definitional text be justified.

Second, the Hayses' position improperly reduces the "control over production" analysis to a single crabbed inquiry about whether a theater owner

---

[106] *CSH Theatres, LLC v. Nederlander of San Francisco Assocs.*, 2015 WL 1839684, at *13 (Del. Ch. Apr. 21, 2015).

[107] Answ. Br. at 49.

obtained a legal right to acquire a production to play at its theater. But as defined, "control over production" is not so limited. That definition is much broader and turns on who has the right to determine (i) where the Production plays *and* (ii) the terms and conditions of the "engagement." The Hayses conveniently ignore the "terms and conditions" element of the contractual definition. Once that element is confronted, their arguments collapse.

Here, the undisputed facts demonstrate that the Hayses have significant control over the terms and conditions of DEH and Harry Potter.[108] That control, plus the decision by the producers and the Hayses to perform DEH and Harry Potter at the Curran, is what establishes the Hayses' *joint* control over those Productions. The trial court erred by concluding otherwise.

But, the Hayses position fails also because, even if a "preexisting right" were pertinent to the issue of control, the Hayes obtained a "preexisting right" to force DEH or Harry Potter to perform at the Curran.[109] The contracts for those two shows were signed months before those Productions were to be staged. Thus, if a

[108] NSF Opening Br. at 42-44; A1094-99.

[109] *See* A718-25; A931-72.

preexisting right were required (and it isn't), the Hayses had a preexisting right to require these Productions to be staged at the Curran.[110]

C. Interpreting 7.02(b) As NSF Argues Does Not Render the Term "Control" Meaningless.

Finally, the Hayses argue that to give proper meaning to the term "control" in Section 7.02(b), this Court must, as a legal matter, reject the concept of joint control.[111] For the term "control" to have meaning (they argue), that term must encompass something more than "staging." So far we agree: indeed, NSF's joint control argument is entirely consistent with that premise. By its terms, Section 7.02(b) prohibits the "staging" of a Production that a party "controls." But, we do not agree with the proposition that the two terms are synonymous or preclude the possibility of joint control. A theater operator may choose to either stage a production it does not control, or to stage a production that it does control. The former choice does not fall within the prohibition of Section 7.02(b). The latter does. "Stage" and "control" become duplicative only if those terms are construed

[110] For these and for the reasons outlined in NSF's Opening Brief, the trial court's finding in the PI Opinion that the Hayses did not control DEH and Harry Potter cannot be squared with the court's decision in the Trial Opinion that the Hayses controlled Fun Home. In its Trial Opinion, the court analyzed whether the Hayses had breached the LLC Agreement by staging Fun Home. Trial Op. at *25. Its analysis and conclusion constituted a merits ruling and was not *dictum*, as the Hayses blithely suggest. Answ. Br. at 53 n.24.

[111] Answ. Br. at 53.

to be synonymous. As explained in its Opening Brief, NSF never argued that they are synonymous. NSF argued only that in some circumstances a bundle of specific rights, that include staging at a specific theater, may constitute joint control. Accepting NSF's concept of joint control does not render either "stage" or "control" surplusage.

For the foregoing reasons, the trial court reversibly erred in not granting relief to NSF in the PI Action.

CONCLUSION

For the foregoing reasons, NSF respectfully requests that the Court (i) reverse the trial court's determination in the First Action that Section 7.02(a) does not prohibit the Hayses' competitive conduct at the Curran, (ii) reverse the trial court's determination in the PI Action that the Hayses did not breach Section 7.02(b) by showing the Productions DEH and Harry Potter at the Curran and remand the matter to the trial court for a proper consideration of whether the Hayses "control" those Productions and (iii) affirm the trial court's interpretation of the term "Shorenstein Entity" in the First Action.

Respectfully submitted,

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Tammy L. Mercer

Tammy L. Mercer (No. 4957)
Jack B. Jacobs (No. 000008)
Martin S. Lessner (No. 3109)
M. Paige Valeski (No. 6336)
Rodney Square
1000 North King Street
Wilmington, DE 19801
(302) 571-6600

Attorneys for Appellant/Cross-Appellee Nederlander of San Francisco Associates

OF COUNSEL:

DECHERT LLP
Matthew L. Larrabee
Benjamin M. Rose
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3500

Michael S. Doluisio
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
(215) 994-2000

Dated: March 25, 2019

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

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This certifies that the [Corrected] Answering Brief on Cross-Appeal and Reply Brief of Appellant-Cross Appellee Nederlander of San Francisco Associates (the "Brief") complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2010.

2. The Brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 9,648 words, which were counted by Microsoft Word 2010.

YOUNG CONAWAY STARGATT
& TAYLOR, LLP

/s/ M. Paige Valeski
Tammy L. Mercer (No. 4957)
Jack B. Jacobs (No. 0008)
Martin S. Lessner (No. 3109)
M. Paige Valeski (No. 6336)
Rodney Square
1000 North King Street
Wilmington, DE 19801
(302) 571-6600

Attorneys for Appellant/Cross-Appellee Nederlander of San Francisco Associates

OF COUNSEL:

DECHERT LLP
Matthew L. Larrabee
Benjamin M. Rose
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3500

Michael S. Doluisio
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
(215) 994-2000

Dated: March 25, 2019

CERTIFICATE OF SERVICE

I, M. Paige Valeski, Esquire, hereby certify that on April 2, 2019, a copy of the foregoing document was served on the following counsel in the manner indicated below:

BY FILE & SERVEXPRESS

Raymond J. DiCamillo, Esq.
Susan M. Hannigan, Esq.
Sarah A. Galetta, Esq.
RICHARDS, LAYTON
& FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, DE 19801

Elizabeth Wilburn Joyce, Esq.
Joanne P. Pinckney, Esq.
PINCKNEY, WEIDINGER, URBAN
& JOYCE LLC
3711 Kennett Pike, Suite 210
Wilmington, DE 19801

/s/ M. Paige Valeski
M. Paige Valeski (No. 6336)