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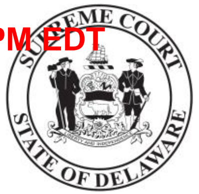

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE SHORENSTEIN HAYS-NEDERLANDER THEATRES LLC APPEALS	)))	Nos. 596, 2018 and 620, 2018 CONSOLIDATED

On Appeal from the Court of Chancery of the State of Delaware

C.A. Nos. 9380-VCMR and 2018-0701-TMR

APPELLEES'/CROSS-APPELLANTS' REPLY BRIEF ON CROSS-APPEAL

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PRELIMINARY STATEMENT

The trial court's interpretation of the contractual phrases "Shorenstein Entity" and "Nederlander Entity" to include not only SHN's two members (CSH Theatres and NSF, the only parties to the contract) but also all of their "Affiliates" and "Permitted Transferees" is erroneous as a matter of law.[1] None of those non-Members have any rights in SHN and, as NSF's principal Robert Nederlander conceded repeatedly at trial, none of them have ever had any obligation under Section 7.02 of the LLC Agreement to "devote their efforts to maximize the success" of SHN or to refrain from staging any Broadway-style production they "control" within 100 miles of San Francisco.

Indeed, the reading of the "Entity" phrase to include all Affiliates and Permitted Transferees has no basis in the plain language of the LLC Agreement and runs afoul of fundamental principles of contract construction long applied by this Court. The "Members" of SHN are expressly defined in the LLC Agreement as "the Shorenstein Entity and the Nederlander Entity and any additional Person who is admitted to the Company as a Member in accordance with this Agreement and is listed from time to time on the books and records of the Company." (A287.)

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[1] Unless otherwise noted, all capitalized terms herein have the same meaning as defined in Appellees' February 15, 2019 Answering Brief on Appeal and Cross-Appellants' Opening Brief on Cross-Appeal ("Appellees' Opening Br.").

All agree that CSH Theatres and NSF were and are the only Members. (B134; B276-77 (Tr. 920:10-921:7) (Nederlander).) The only interpretation that gives the required "effect to the plain-meaning of the contract's terms and provisions," *Osborn* v. *Kemp*, 991 A.2d 1153, 1159-60 (Del. 2010), and allows the LLC Agreement to be read "as a whole and in a manner that will avoid any internal inconsistencies," *Bank of N.Y. Mellon* v. *Commerzbank Capital*, 65 A.3d 539, 550 (Del. 2013), is that "Shorenstein Entity" and "Nederlander Entity" mean CSH Theatres and NSF and any Permitted Transferee who is admitted as a Member.

Rather than avoiding internal inconsistencies in the LLC Agreement, the trial court's interpretation creates them. The trial court ruled that the "Entities" phrase includes all "Affiliates," as well as all descendants of David T. Nederlander and all entities controlled by them. Yet the contractual definition of "Members" makes clear that the "Shorenstein Entity" and the "Nederlander Entity" mean the original Members—CSH Theatres and NSF—unless and until a transfer of Membership Interests occurs. No such transfer has ever taken place. The interpretation advocated by NSF not only ignores the LLC Agreement's distinct use (including in Section 7) of the term "Affiliate," but also would lead to all Affiliates having an entitlement to distributions from, and management rights in, SHN, in violation of the prohibition against third-party beneficiaries in Section 15.03. NSF has no answer to the illogic of interpreting the Agreement in this way,

and its March 18, 2019 Answering Brief ("NSF Answering Br.") wholly ignores the express definition of "Members" in Section 1.01.

The trial record also completely contradicts NSF's assertion about the meaning of the LLC Agreement. Robert Nederlander made binding admissions at trial that Section 7.02 applies only to the Members of SHN, not their Affiliates or Permitted Transferees. Mr. Nederlander—NSF's controlling partner and the only living signatory to the LLC Agreement—testified repeatedly that the "Entities" phrase refers only to the two Members, and that Affiliates are thus not bound by Section 7. Moreover, NSF admitted in the first action that a Nederlander Entity has for years freely operated a competing Broadway theatre within 100 miles of San Francisco, contravening the trial court's interpretation of the LLC Agreement.[2]

On this cross-appeal, the Court should reverse the Court of Chancery's declaratory judgment and hold that "Shorenstein Entity" means CSH Theatres and any Permitted Transferee to which CSH Theatres has actually conveyed a Membership Interest. Such a ruling would also require dismissal of NSF's appeal, which is in any event meritless for the reasons set forth in Appellees' Opening Brief.

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[2] Perhaps in recognition of the deficiencies of its contract claim, NSF's Answering Brief raises an argument about a breach of fiduciary duty claim that was rejected by the trial court and never appealed by NSF. NSF may not here resurrect this abandoned theory, which is in any event completely meritless.

ARGUMENT

I. UNDER THE LLC AGREEMENT'S PLAIN TERMS, THE ONLY "ENTITIES" SUBJECT TO SECTION 7.02 ARE THE TWO MEMBERS, AND NOT ANY AFFILIATES.

NSF nowhere disputes that the only entity or person that has ever been a Member on the Hays side—CSH Theatres—has never competed with SHN and thus never breached Section 7.02.[3] Thus, NSF's claims depend on the theory that the LLC Agreement binds not only the Members, but also all non-party "Affiliates" and "Permitted Transferees" of the Members' Membership Interests. The trial court's ruling endorsing that theory is erroneous.

A. The LLC Agreement Clearly Provides that the "Entities" Are the Two SHN Members—CSH Theatres and NSF.

Although NSF ignores Section 1.01 of the LLC Agreement in its Answering Brief, that provision expressly defines SHN's "Members" to mean "the Shorenstein Entity and the Nederlander Entity and any additional Person who is admitted to the Company as a Member in accordance with this Agreement and is listed from time to time on the books and records of the Company." (A287.)[4] All agree that CSH Theatres and NSF are the original and only Members of SHN (*see*

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[3] Indeed, the undisputed evidence at trial was that CSH Theatres has devoted its full efforts to SHN. (*See* Appellees' Opening Br. 45.)

[4] The LLC Agreement defines "Person" as "an individual or a corporation, all types of partnership, trust, unincorporated organization, association, limited liability company or other entity." (A288 (LLC Agreement § 1.01).)

NSF Opening Br. 1), and no "Person" or "Permitted Transferee" has ever been "admitted" to SHN as a Member or listed as such on the Company's books and records. Thus, the Shorenstein Entity has always been CSH Theatres, and the Nederlander Entity has always been NSF.

This plain reading is confirmed by the LLC Agreement's description of how SHN was formed. The Recitals to the contract, which NSF also ignores, explain that "[t]he Shorenstein Entity and the Nederlander Entity are the general partners of Shorenstein-Nederlander Productions of San Francisco," and that these two Entities "desire to convert th[at] Partnership into a limited liability company." (A285 (LLC Agreement 1).) Section 2.01(a) of the LLC Agreement—which also describes the "Conversion" of the predecessor partnership—further explains that "[t]he Shorenstein Entity and the Nederlander Entity hereby agree to convert the Partnership to a limited liability company" and that, "[a]s a result of the Conversion, the Shorenstein Entity and the Nederlander Entity will become [M]embers in the Company." (A289.) It is undisputed that CSH Theatres and NSF are (i) the two general partners of the predecessor partnership, (ii) the only entities that formed SHN and "approved" the LLC Agreement and (iii) the only Members of SHN. (*See* NSF Opening Br. 1, 8-9.) Thus, the "Entity" phrase refers only to CSH Theatres and NSF.

Moreover, the textual starting point for NSF's claim and the trial court's ruling that the parties (the two Members) "intended for 'Affiliates' of Members to be bound" (NSF Answering Br. 15)—the one-sentence preamble to the LLC Agreement—does not support NSF's interpretation:

> This Plan of Conversion and Operating Agreement (the "Agreement") of Shorenstein Hays-Nederlander Theatres LLC (the "Company") is entered into as of November 6, 2000 by and between CSH Theatres LLC, a Delaware limited liability company (together with any Permitted Transferees, as hereinafter defined, the "Shorenstein Entity"), and Nederlander of San Francisco Associates, a California general partnership (together with any Permitted Transferees, the "Nederlander Entity"), as members.

(A285 (LLC Agreement 1).) By its terms, the preamble merely identifies the parties "by and between" whom the contract was "entered into . . . as members." Indeed, the signature page of the LLC Agreement identifies the "parties hereto" that "have entered into this Agreement" as the two "Members," CSH Theatres and NSF and no one else. (A321 (LLC Agreement 37).)[5] The "Entities" cannot mean

[5] Further, Schedule I of the LLC Agreement sets forth the address of each "party" (A318 (LLC Agreement § 15.01)), and, in listing the "Names, Addresses and Telecopy Numbers of the Members," the same Schedule I identifies the "Shorenstein Entity" as CSH Theatres and the "Nederlander Entity" as NSF. (A323.)

persons who are not parties to the agreement and who have never become Members of SHN. (*See* NSF Answering Br. 15.)[6]

NSF's assertion (NSF Answering Br. 16) that Section 7.02 should apply to Affiliates of Members because "the LLC Agreement imposes obligations on affiliated non-signatories" is circular. The LLC Agreement imposes no obligations on Affiliates unless NSF's definition of the "Entities" phrase is correct. Moreover, the fact that Section 7.07(a) of the LLC Agreement (A305) grants indemnities to third parties that owe SHN no contractual duties is irrelevant. Delaware's LLC Act "defers completely to the contracting parties to create and delimit rights and obligations with respect to indemnification and advancement." *Majkowski* v. *Am. Imaging Mgmt.*, 913 A.2d 572, 591 (Del. Ch. 2006). Section 15.03 of the LLC Agreement (A319), titled "No Third-Party Beneficiaries," makes this point clear:

> [T]his Agreement and the representations, warranties and covenants made herein are made expressly and solely for the benefit of the parties hereto . . . [and] no other Person, other than an Indemnitee under Section 7.07 hereof, shall be entitled or be deemed to be entitled to any benefits or

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[6] NSF's reliance on *Medicalgorithmics S.A.* v. *AMI Monitoring, Inc.* to argue that parties may bind their affiliates is beside the point. There, the Court of Chancery held that an affiliate of the defendants was bound by a license agreement that expressly defined the "Parties" to include "Affiliates," and the trial court found that the affiliate in question "held itself out as a party to the" license agreement. 2016 WL 4401038, *18-19 (Del. Ch. Aug. 18, 2016). There is no such evidence here, and the Members' contract is also quite different.

> rights hereunder, nor be authorized or entitled to enforce any rights, claims or remedies hereunder or by reason hereof.

For these reasons, the Court of Chancery's decision in *Mesirov* v. *Enbridge Energy* is of no help to NSF. Unlike the LLC Agreement here, the *Mesirov* limited partnership agreement expressly set forth the conditions under which "the General Partner [and] any of its Affiliates" could transact with the partnership. 2018 WL 4182204, at *9 (Del. Ch. Aug. 29, 2018). By contrast, Section 7.06 of the LLC Agreement expressly permits "any Affiliate of any Member" to compete. (A305.)

B. The Correct Interpretation of the LLC Agreement Gives Independent Meaning to the Terms "Members" and "Entities."

The trial court stated that the "drafters of the LLC Agreement used 'Members' in certain provisions, and 'the Shorenstein Entity and the Nederlander Entity' in other provisions, which suggests the terms mean different things" (Trial Opinion 74-75), and NSF similarly argues that the use of the "Entity" phrases would be unnecessary if those phrases meant the two Members (as the definition of "Members" provides) (NSF Answering Br. 7). The trial court's statement, and NSF's argument, overlook the fact that Section 10.02 of the LLC Agreement allows each Member "to sell, assign, transfer or convey its Membership Interest to another Person, including, without limitation, a Permitted Transferee of such Member." (A310.)

The transfer restrictions in Article X also make plain the distinction between a transfer by the original Members to a Permitted Transferee or to a third party. The Members may freely transfer their Membership Interests in whole or in part to a Permitted Transferee, making clear that a Permitted Transferee is not a Member until assigned a Membership Interest and that Person "shall accept and adopt the provisions of this Agreement in writing." (A310 (LLC Agreement § 10.02).) A Member may also transfer its interest to any third party, but (a) only all of the Member's Interests (absent the consent of SHN's Board), and (b) subject to a "right of first refusal" by the "other Member" to acquire the Membership Interest. (A310-11 (LLC Agreement §§ 10.01-10.03).) Any transfer of a Membership Interest is effective only after "such Person first . . . ratifies and assumes in writing all of the terms of this Agreement," and thereafter the "Agreement shall be amended as necessary to reflect the addition of such new Member." (A316 (LLC Agreement § 11.01).) Thus, while any Permitted Transferee who becomes a Member in the future would qualify as one of the "Entities," all future Members do not have to be "Entities."[7]

[7] Section 15.04 refers to the parties' "respective permitted transferees, if any" as "Successors and Assigns," making clear that they are not already bound by the Agreement. (A319.)

The LLC Agreement confers on the founding Members and their successor "Permitted Transferees" who become Members (*i.e.*, the "Entities") unique rights and obligations not extended to others who may become Members. For example, Sections 4.01 and 4.02 provide that "as long as the Shorenstein Entity is a Member" and "as long as the Nederlander Entity is a Member," "at least one representative appointed by" each Entity must approve certain decisions by SHN's Board, and each Entity may appoint a Co-President. (A291-92 (LLC Agreement § 4.01(d), 4.02(a)).) Other future Members do not have those rights. In the same way, certain contractual obligations—including those in Section 7.02—apply only to the Entity Members. If, for example, NSF were to transfer its Membership Interests to an unaffiliated third party "who is admitted to the Company as a Member in accordance with this Agreement" (A287 (LLC Agreement § 1.01)), that Member would not qualify as a "Nederlander Entity" under Section 7.02.

Thus, as long as CSH Theatres and NSF are the only Members of SHN (as has been the case since SHN's formation), the "Entities" and "Members" are synonyms. This does not, however, render either term unnecessary "surplusage," as NSF contends (NSF Answering Br. 7); if and when a Membership Interest is transferred to a third party, the distinction between the Entity Members and ordinary Members has a clear and logical meaning.

C. The Idea that the "Entities" Include Affiliates Leads to Irreconcilable and Illogical Results.

NSF also fails to confront the other basic canons of contract construction under Delaware law that preclude its interpretation. *First*, NSF nowhere explains why the LLC Agreement refers to "Affiliates" throughout as distinct from both "Members" and the "Entities." (*See* Appellees' Opening Br. 58-59.) In particular, Section 7.03 of the LLC Agreement grants "'most favored nation' treatment" to productions controlled by "[t]he Shorenstein Entity or the Nederlander Entity *or any Affiliate* thereof." (A305 (emphasis supplied).) If "Shorenstein Entity" already included its Affiliates (as NSF contends), the phrase "or any Affiliate" in Section 7.03 would clearly be "mere surplusage." *Kuhn Constr.* v. *Diamond State Port Corp.*, 990 A.2d 393, 397 (Del. 2010).

Second, NSF fails to confront the illogic of its interpretation. If the "Entity" phrase includes all Permitted Transferees regardless of whether they are admitted as Members, each such hypothetical Transferee would (i) enjoy the right to appoint board members and a Co-President (A291-92 (LLC Agreement §§ 4.01(c), 4.02(a))), (ii) be entitled to "receive distributions from the Company" (A287 (LLC Agreement § 1.01)), and (iii) be eligible to "vote and participate in [Company] management" (A287 *id.*). This makes no sense, and violates Section 15.03 (A319), which rules out non-party beneficiaries. Moreover, Section 9.02 designates the "Shorenstein Entity" "as the Company's tax matters partner . . . as

defined in Section 6231(a)(7) of the [Tax] Code." (A309.) By NSF's argument, the "tax matters partner" is all of CSH Theatres' affiliated entities, but under federal law, a "tax matters partner" must be a single partner or member. *VisionMonitor Software, LLC* v. *C.I.R.*, 108 T.C.M. (CCH) 256 n.3 (Tax Court 2014) (a partnership "must designate one of its partners as the tax matters partner," so that each partnership has "a single point of adjustment"); 26 C.F.R. § 301.6231(a)(7)-2 (same for LLC).

The trial court recognized that its interpretation of the "Entity" phrase "may well" lead to "absurd" results based on the LLC Agreement's definition of the "Members" to mean the "Entities" (Trial Opinion 74), but it failed to grapple with those "absurdities," saying that doing so was "unnecessary" at that stage (Trial Opinion 75). NSF's only attempt to make sense of these illogical results on appeal is to assert that the term "Members" should mean CSH Theatres and NSF only, while the "Entities" should mean the Members and all Affiliates and Permitted Transferees, ignoring entirely the fact that the parties expressly defined "Members" to *be* the "Entities," as well as any additional Person admitted to the Company. (*See* NSF Answering Br. 8 & n.16.) NSF cannot "rewrite" the agreement simply "to yield a result [NSF] thinks more to its liking." *Appraisal of Metromedia Int'l Grp.*, 2009 WL 1509182, at *3 (Del. Ch. May 28, 2009).

II. THE EXTRINSIC EVIDENCE OVERWHELMINGLY SUPPORTS THE PLAIN READING OF THE "ENTITIES" TO MEAN CSH THEATRES AND NSF ONLY.

NSF's admissions at trial confirm beyond question that Section 7.02 does not apply to "Affiliates."

A. Robert Nederlander's Testimony at Trial Was Unequivocal: Section 7.02 Does Not Apply to Affiliates.

Robert Nederlander admitted several times at trial that Section 7.02 imposes obligations only on the Members and not on their Affiliates. These admissions are not just "handpicked soundbites" (NSF Answering Br. 12); his testimony was repeated several times over two trial days and with clarity. Indeed, at oral argument after trial, NSF conceded that Nederlander made such admissions.

All agree that Section 4 of the 1992 partnership agreement (which settled a prior lawsuit) provided that only the signatories to that contract were bound. (B269-70 (Tr. 913:19-914:8 (Nederlander)).) Section 4 provided that (i) "[b]oth partners will devote their efforts to maximize the economic success of the Partnerships and avoid any conflicts of interest," and (ii) "[n]either party [to the contract] will stage any production within 100 miles of San Francisco" unless certain conditions were met. (A277; *see also* Trial Opinion 76.) Mr. Nederlander testified at the 2017 trial that the "parties" and "partners" to the 1992 partnership agreement were only the three partner entities referenced in that agreement (CJS Trust-A, Nederlander of California, Inc. and Nederlander-Golden Gate, Inc.)

(B267 (Tr. 911:12-23 (Nederlander))), and that the 1992 agreement "was meant to create duties and obligations with respect to the parties to that contract" only (B270 (Tr. 914:4-8 (Nederlander))). Indeed, Mr. Nederlander was unequivocal that those duties and obligations did not apply to Affiliates (such as himself):

> Q. Well, let me just be clear about something. When this deal was signed in 1992 --
>
> A. Yeah.
>
> Q. -- May 22, 1992, you personally, Robert E. Nederlander, Sr., you didn't think you were required to devote your efforts to maximizing the economic success of the partnership, did you?
>
> A. Robert Nederlander personally? No. I didn't think so.

(B268 (Tr. 912:6-14 (Nederlander)).)

Contrary to NSF's contentions (NSF Answering Br. 12), Mr. Nederlander also testified that Section 4 of the 1992 agreement was "carried forward identically" to Section 7.02 of the LLC Agreement:

> Q. Okay. Fair enough. And I think you said . . . that this paragraph, paragraph 4 of Exhibit 361 [the 1992 agreement], was carried forward to the new LLC agreement that came into being in the year 2000?
>
> A. Right. It was.
>
> Q. And as far as you're concerned, it was carried forward identically. There weren't any substantive changes made when this was made part of the LLC agreement?
>
> A. Right.

> Q. Section 7.02 of the LLC agreement is meant to contain identical rights and obligations as those set forth in this paragraph; correct?
>
> A. Yes.

(B266-67 (Tr. 910:11-911:2 (Nederlander)).)[8] NSF's assertion to this Court (NSF Answering Br. 12) that Mr. Nederlander did not make those admissions at trial is utterly false.[9]

NSF's additional contention (NSF Answering Br. 13) that Mr. Nederlander never conceded that the "Entity" phrase refers only to the "Member" is equally false. At trial, Mr. Nederlander was provided with a copy of Section 7.02(a) of the LLC Agreement and asked if that provision applied to Affiliates (*i.e.*, persons other than a Member).[10] The examination went this way:

> Q. I got you. Your understanding of 7.02(a), JX 10-24, is that the first sentence, when it talks about "the

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[8] As the trial court found, Section 7.02(b) differed from the 1992 partnership agreement in that "instead of a prohibition on any production within 100 miles, there is only a prohibition on *controlled* productions within 100 miles." (Trial Opinion 77 (emphasis in original).)

[9] Nor can NSF take back its concession in its Opening Brief to this Court (NSF Opening Br. 8) that Section 4 "would ultimately become the LLC Agreement provisions at issue in this appeal."

[10] Mr. Nederlander had every reason to expect to be asked about Section 7.02(a). The two central issues in the case at that time were his contention that Mrs. Hays had made a verbal promise in 2010 to lease the Curran Theatre to SHN in perpetuity, and the meaning and applicability of Section 7.02. He was the only living signatory to the LLC Agreement and claimed familiarity with what it says and means. (B284-85, 286 (Tr. 928:10-929:9, 930:15-17 (Nederlander)).)

> Nederlander Entity," applies to NSF, and NSF only; correct?
>
> A. It applies to NSF or anybody -- it applies to NSF and -- that's what it applies to. NSF.
>
> Q. NSF?
>
> A. Yeah.

(B280-81 (Tr. 924:24-925:7 (Nederlander)).) Shortly thereafter, Mr. Nederlander was asked again whether "the phrase 'the Nederlander Entity' . . . refers to NSF and only NSF" (B283 (Tr. 927:10-12 (Nederlander))), and his answer was equally clear:

> Q. But on the Nederlander side it's just NSF? You agree?
>
> A. Nederlander side -- absolutely. It's their obligation to maximize the economic success of the company.

(B283 (Tr. 927:17-21 (Nederlander)).) Mr. Nederlander then went even further, explaining that "Nederlander San Francisco is obligated to maximize the success of the company. It doesn't mean that somebody in New York City has to do this. This only relates to the partnership." (B280 (Tr. 924:11-15 (Nederlander)).) NSF's current argument (that there was no admission by Mr. Nederlander that the "Entity" phrase means a Member only) is untrue. And there is more.

Mr. Nederlander was asked later on the same trial day whether Section 7.02 binds members of his own family (who are "Permitted Transferees"

and thus part of the "Nederlander Entity" under NSF's interpretation). (A304 (LLC Agreement § 7.02(a)).) He testified they are not bound:

> Q. Okay. So I think you and I are saying the same thing: that Jimmy Nederlander, your brother, and Jimmy Jr., your nephew, never devoted their efforts to maximizing the success of SHN?
>
> A. They didn't have to.
>
> Q. They didn't have to. They weren't required to by this contract.
>
> A. That's right. They weren't required to.
>
> Q. They didn't do it, and your understanding, always, was that they didn't have to?
>
> A. Correct.

(B282 (Tr. 926:6-17 (Nederlander)).) These admissions took place on October 25, 2017, the third day of trial.

Mr. Nederlander gave the same admissions again following a one-month break in the trial. When his testimony resumed on November 28, 2017, Mr. Nederlander was asked: "Is it correct, Mr. Nederlander, that neither of your two sons, Bob, Jr. and Eric, were ever required by Section 7.02(a) to devote their efforts to maximize the economic success of SHN?" He responded once again:

"They weren't required to do that." (B294 (Tr. 953:14-18) (Nederlander).)[11] This is the exact opposite of what NSF now advocates.

Months after the trial concluded, NSF's counsel acknowledged squarely that Mr. Nederlander had made the very admissions that NSF now tells this Court never occurred. At post-trial oral argument on April 3, 2018, counsel for NSF displayed a slide in open court with the title "Mr. Nederlander Testified that Section 7.02(a) Duty to Maximize Success of SHN Applies to Members, not Affiliates." (B431.) After making this concession about what Nederlander had said ("Section 7.02(a) . . . Applies to Members, not Affiliates"), NSF's slide argued that Nederlander's concessions could be ignored (B431), not that they never took place. Those concessions cannot now be erased.

B. The Nederlanders' Conduct Further Demonstrates That Section 7.02 Does Not Bind Affiliates or Permitted Transferees.

NSF also has no answer for the powerful evidence about the course of conduct of NSF's Affiliates—conduct that also shows that Section 7.02 applies only to the Members. (Appellees' Opening Br. 12-13, 20, 61-62.) Instead, NSF makes factual assertions for the first time on this appeal that are contradicted by

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[11] Even on re-direct examination, the most Mr. Nederlander could bring himself to say was that "the *directors* of SHN had a duty to maximize the economic success of SHN," not the Members and all of their Affiliates and families (as NSF now argues on appeal). (BR12 (Tr. 1042:21-24 (Nederlander) (emphasis supplied)).)

(i) its stipulation in the Court of Chancery and (ii) the trial court's unchallenged fact findings.

NSF argues to this Court that no Nederlander Controlled Entity or member of the Nederlander family (all of whom are "Permitted Transferees") controls Broadway San José, a competing venue that is only 50 miles from San Francisco. This is a stunning about-face: In the first case, NSF stipulated that the "Nederlander Organization" (i) "presently is controlled by members of the family of Robert Nederlander's brother, James M. Nederlander" (making it a "Nederlander Entity" under the LLC Agreement) and (ii) "operates Broadway San Jose, which stages Broadway-style productions at the San Jose Center for the Performing Arts, a venue located less than 100 miles from San Francisco." (B136-37.)

NSF's assertion to this Court that the entity that operates Broadway San José "is not an Affiliate of NSF" (NSF Answering Br. 14) is contradicted not just by its trial stipulation, but also by the Court of Chancery's factual findings. The trial court found that a "Nederlander Affiliate" "runs Broadway San Jose." (Trial Opinion 78.) This finding cannot be revisited; NSF told this Court that it "does not dispute any of the trial court's factual findings." (NSF Answering Br. 35 n.92.)

NSF's stipulation and the trial court's finding that an NSF Affiliate "runs Broadway San Jose" were compelled by the undisputed trial evidence. Robert Nederlander testified that his nephew James L. Nederlander (a "Permitted Transferee" under the contract) "owns more than 51 percent of the company that runs the San José theater." (B257 (Tr. 901:6-9 (Nederlander)).)[12] Ray Harris of NSF similarly admitted in his written direct testimony that "a Nederlander family-owned organization operates Broadway San Jose, which shows productions at the San Jose Center for the Performing Arts in San Jose, California." (A650.)[13]

In any event, NSF is judicially estopped from changing its position on appeal. *Motors Liquidation Co.* v. *Allstate Ins. Co.*, 2018 WL 3360976, at *4 (Del. July 10, 2018) ("Judicial estoppel applies when a litigant's position contradicts another position that the litigant previously took and that the Court was successfully induced to adopt in a judicial ruling."). It is irresponsible or worse for NSF now to contend that its stipulation in the Court of Chancery (that the Nederlander Organization "operates Broadway San Jose" and is "controlled" by a

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12 *See also* B262 (Tr. 906:11-17 (Nederlander) ("Q. And you told me that your nephew, Jimmy, James L. Nederlander, owns more than 51 percent of whatever the entity is -- A. That's right. Whatever the entity is. Q. -- that owns and operates Broadway San Jose? A. Yes.")).

13 Robert Nederlander also testified at trial that, in the mid-2000s, entities that the Nederlander family controlled operated two other competing theaters in San Francisco. (B232-33 (Tr. 840:14-841:14 (Nederlander)).)

Nederlander family member) should be disregarded. The stipulation cannot now be withdrawn or disowned.

In sum, at trial NSF conceded that the phrase "Shorenstein Entity" means only the Shorenstein Member (CSH Theatres), not Affiliates—Robert Nederlander repeatedly admitted at trial that Section 7.02 does not apply to Affiliates. NSF's stipulation that a Nederlander Affiliate controls Broadway San José also demonstrates that Section 7.02 of the LLC Agreement applies not at all to Affiliates.

III. CSH THEATRES AND THE OTHER APPELLEES OWE NO COMMON LAW FIDUCIARY DUTIES TO SHN OR NSF.

In a last-ditch effort to save its meritless claims, NSF argues in its Answering Brief (16-17) that Appellees owe a general duty of loyalty to SHN as the "human controllers" of CSH Theatres (the SHN Member), and that this Court "should remand the matter to the trial court to decide whether they are liable as fiduciaries for their disloyal conduct." NSF already attempted to prove that Appellees' operation of the Curran Theatre breached some fiduciary duty, and failed. The trial court rejected that claim (Trial Opinion 79-83), and NSF did not appeal from that ruling. It may not do so for the first time in response to Appellees' cross-appeal of an entirely different issue. *See Roca* v. *E.I. du Pont de Nemours & Co.*, 842 A.2d 1238, 1242 (Del. 2004) ("The failure of a party appellant to present and argue a legal issue in the text of an opening brief constitutes a waiver of that claim on appeal.").

Even if NSF had appealed from the Court of Chancery's ruling on its breach of fiduciary duty claims—and it did not—Delaware law is clear that "[w]here, as here, a contractual provision governs the specific duty to be enforced, the fiduciary duty claim is precluded by contract." *Blaustein* v. *Lord Baltimore Capital*, 2013 WL 1810956, at *13 (Del. Ch. Apr. 30, 2013), *aff'd*, 84 A.3d 954 (Del. 2014). Because the relationship of the Members is governed exclusively by the LLC Agreement, "[a]ny separate fiduciary duty claim[] that might arise out of

the Company's exercise of its contract right" is "foreclosed." *Nemec* v. *Shrader*, 991 A.2d 1120, 1129 (Del. 2010).

Moreover, NSF's argument is premised entirely on the notion that the Members owe common law fiduciary duties to SHN or each other. But, as the trial court ruled—and NSF does not challenge on appeal—under Section 7.04 of the LLC Agreement, "Members are not transformed into fiduciaries of one another by way of the LLC Agreement." (Trial Opinion 63.)[14] Indeed, Robert Nederlander conceded at trial that Section 7.04 provides that "there's no fiduciary relationship one member to the other." (BR5 (Tr. 934:17-19 (Nederlander)).)

Additionally, in a manager-managed LLC like SHN, 50-50 members such as CSH Theatres owe no default fiduciary duties to the LLC or the other members. *Imbert* v. *LCM Interest Hldg.*, 2013 WL 1934563, at *7 (Del. Ch. May 7, 2013) ("Delaware law imposes no default fiduciary duties on non-managing, non-controlling members of limited liability companies."); *Kuroda* v. *SPJS Hldgs.*, 2010 WL 925853, at *7-8 (Del. Ch. Mar. 16, 2010) (dismissing breach of fiduciary

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[14] Section 7.04 provides that, "[e]xcept as otherwise expressly provided herein, nothing contained in this Agreement shall cause any Member to be deemed or otherwise treated as an agent or legal representative of the other Members or to create any fiduciary relationship for any purpose whatsoever." (A305.)

duty claim against LLC member because "[h]e was neither a manager . . . nor a controlling member, and he thus has no fiduciary duties").

Finally, even if CSH Theatres had the sort of control over SHN that might give rise to fiduciary duties (and it does not), NSF's fiduciary duty claim still fails.[15] A person in control of an entity "cannot be liable for breaching fiduciary duties . . . unless it uses its control to direct the actions of the entity it controls against the interests of" that entity. *Hite Hedge LP* v. *El Paso Corp.*, 2012 WL 4788658, at *3 (Del. Ch. Oct. 9, 2012); *see also Ford* v. *VMware, Inc.*, 2017 WL 1684089, at *21 (Del. Ch. May 2, 2017) ("[W]hen a controlling stockholder acts purely in a stockholder capacity, the controlling stockholder generally does not owe fiduciary duties and can act in its self-interest.").

CSH Theatres had no common-law fiduciary duty to NSF, as the Court of Chancery ruled. (Trial Opinion 63.) There is no basis for reversing that ruling, which NSF never appealed.

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[15] NSF's reliance on *In re USACafes, L.P. Litigation*, 600 A.2d 43 (Del. Ch. 1991) to argue that Appellees owe fiduciary duties to SHN is misplaced. As a subsequent decision recognizes, "to have any fiduciary duties to an entity, the affiliate must exert control over the assets of that entity." *Bay Ctr. Apts. Owner* v. *Emery Bay PKI*, 2009 WL 1124451, at *9 (Del. Ch. Apr. 20, 2009); *see also Paige Capital Mgmt.* v. *Lerner Master Fund*, 2011 WL 3505355, at *30 (Del. Ch. Aug. 8, 2011) (*USACafes* limited to "general partner of a limited partnership [] who exercises control over the partnership's property"). Here, CSH Theatres lacks such control of SHN, which is a 50-50, manager-managed LLC.

CONCLUSION

This Court should reverse the trial court's declaratory judgment interpreting the LLC Agreement to bind Affiliates of CSH Theatres and otherwise affirm the Court of Chancery's rulings.

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