IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA STATE EDUCATION ASSOCIATION; NATIONAL EDUCATION ASSOCIATION; RUBEN MURILLO, JR.; ROBERT BENSON; DIANE DI ARCHANGEL; AND JASON WYCKOFF,

Appellants,

v.

CLARK COUNTY EDUCATION ASSOCIATION; JOHN VELLARDITA; AND VICTORIA COURTNEY,

Respondents.

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Supreme Court No. 79208

District Court Case
No. A-17-761364-C
(Consolidated with Case
No. A-17-761884-C)

APPEAL
From the Eighth Judicial District Court
The Honorable Kerry Earley

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so the Justices of this Court may evaluate possible disqualification or recusal.

The following have an interest in the outcome of this case or are related to entities interested in the case:

- Clark County Education Association
- John Vellardita
- Victoria Courtney
- James Frazee
- Robert Hollowood
- Marie Neisess

There are no other known interested parties.

The following law firms' attorneys have appeared on behalf of the Respondents or are expected to appear on their behalf in this Court:

- Snell & Wilmer L.L.P.
- Asher, Gittler & D'Alba, Ltd.
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ROUTING STATEMENT

While this appeal does not fall squarely into the categories enumerated in NRAP 17, the Supreme Court should retain jurisdiction of this appeal because the issue is important and the amount in controversy is significant. Specifically, this appeal will determine whether over $4,000,000 is awarded to Appellants or returned to thousands of Clark County teachers.

Under NRAP 17(b)(5) appeals from tort cases with judgments of less than $250,000 are presumptively assigned to the Court of Appeals, as are contract disputes involving less than $75,000 (NRAP 17(b)(6)). Though no rule specifies that appeals exceeding these amounts in controversy be retained by the Supreme Court, NRAP 17 indicates that the amount at stake is relevant to the appellate court assignment.

Here, the amount in controversy substantially exceeds the amounts identified in NRAP 17, with over $4,000,000 held in escrow in addition to damages sought by Appellants. Because the amount at stake is significant, and because this dispute will determine whether the money will be returned to thousands of teachers in Clark County, Nevada, the Supreme Court should hear and decide this matter.

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The National Education Association ("NEA") and Nevada State Education Association ("NSEA") refuse to let go of $4.1 million of funds ("the Disputed Funds") from Clark County teachers to which they were never entitled, for services they never performed, and after the Clark County Education Association ("CCEA") indisputably terminated its primary agreement affiliating it with the NEA and NSEA ("the Service Agreement"). The district court properly reasoned that where CCEA terminated the Service Agreement by August 31, 2017 – before the next dues year – it necessarily terminated the inextricably linked contract to pay the NEA and NSEA dues ("the Dues Transmittal Agreement") that was attached as Addendum A to the Service Agreement.

The teachers' $4.1 million – collected from September 1, 2017 through April 2018 – was held in escrow by CCEA pending resolution of this suit, an action for declaratory judgment CCEA filed in September 2017 and won in July 2019. During the September 2017-August 2018 dues year, NSEA/NEA admit not performing under the concededly terminated Service Agreement. The funds CCEA escrowed were thus never meaningfully dues. This Court should affirm the district court's sound rulings and allow the return of the teachers' $4.1 million to them.

Statement of the Issues

1. Did the district court correctly determine that CCEA terminated the Dues Transmittal Agreement, where it is undisputed that CCEA properly terminated the Service Agreement to which it was attached and with which it was integrated, and where CCEA gave proper written notice upon the NSEA Parties' breaches of contract that it was terminating the Dues Transmittal Agreement?

2. Did the district court correctly determine that CCEA did not breach any contract in omitting to remit $4.1 million of money as dues, where it had terminated the contracts to pay dues, and no services were provided?

3. Did the district court properly dismiss the NSEA Parties' conversion claim, where the NSEA Parties have no ownership or property interest in the Disputed Funds?

4. Did the district court properly dismiss the NSEA Parties' unjust enrichment claim, where there was nothing taken from or given by the NSEA Parties, who undisputedly performed no services for CCEA members in return for their claim upon the Disputed Funds, and where the NSEA Parties have no ownership of the Disputed Funds?

5. Did the district court properly dismiss the NSEA Parties' claim for fraud, where there was no damage from the supposed fraud, the NSEA Parties who are teachers caused their own damage by joining a motion to keep CCEA from repaying them their share of the Disputed Funds, and should the request for punitive damages founded on these infirm premises likewise have been dismissed?

6. Did the four teachers among the NSEA Parties waive their claim for unauthorized due increase?

Statement of the Case

This is a suit brought by the CCEA and certain of its leaders (herein, collectively, "CCEA") against its former affiliates to determine that CCEA properly terminated its contracts with those former affiliates effective August 31, 2017. After the CCEA terminated those contracts – the Service Agreement and the Dues Transmittal Agreement – the NSEA Parties, consisting of the NSEA, the NEA, and four teacher members of the CCEA, sued CCEA. They contended that CCEA breached contracts with the NSEA Parties, or committed fraud by failing to renew the terms of those agreements beyond August 31, 2017. They further contended

that CCEA was unjustly enriched or effected a conversion by not paying dues to the NSEA Parties after September 1, 2017.

Other than termination of the Service Agreement and the Dues Transmittal Agreement, this appeal comes down to custody of $4.1 million of funds. These were funds remitted to CCEA as dues by the Clark County School District from unionized teachers' paychecks in the ordinary course during the period September 1, 2017 to April 20, 2018. CCEA escrowed these funds ("the Disputed Funds") in case it lost this suit, and would have to pay them as dues to the NSEA Parties.

Happily for it, CCEA won below. CCEA's termination of the agreements was held proper, and thus not fraud, or conversion, or unjust enrichment. The district court likewise held that CCEA could return the Disputed Funds to Clark County teachers. While the district court stayed the operation of that portion of its judgment at the NSEA Parties' request, CCEA stands ready to immediately return those funds to its teacher-members should this Court affirm the district court's sound judgment on the merits.

Factual Background

A. CCEA Had a Service Agreement With NSEA that Required Payment of Dues.

1. *CCEA, the Voice of Clark County's Teachers, Collects Dues from its Members Through a Membership Authorization Form.*

CCEA is the union for and voice of Clark County's teachers. It is a democratic organization and is the recognized and exclusive collective bargaining representative of the licensed professional employees of the Clark County School District ("the CCSD"). (VI AA 1013 ¶¶4-6). It advances the cause of education, promotes professional excellence among educators, protects the rights, welfare, and interests of educators, and secures professional autonomy for them. *Id.*

Members of CCEA pay dues to CCEA pursuant to a Membership Authorization Form. *Id.* at ¶10. The Membership Authorization Form authorizes payment from an individual member only to CCEA, with the individual members agreeing that "[d]ues are paid on an annual basis and, although dues may be deducted from my payroll check(s) in order to provide an easier method of payment, a member is obligated to pay the entire amount of dues for a membership year." (VI AA 1003). After members sign the Membership Authorization Form, their membership

dues for the year are deducted from their paychecks by their employer, the CCSD, pursuant to a collective bargaining agreement between CCEA and CCSD. (VI AA 1013 ¶10). CCSD directs those dues payments to CCEA. *Id.* at ¶11.

2. *CCEA Originally Sought Benefits for its Members Through a Service Agreement With NSEA That Incorporated a Dues Transmittal Agreement.*

Until August 31, 2017, CCEA was party to a Service Agreement with the NSEA. The Service Agreement required NSEA and NEA to provide a range of benefits to CCEA and its members, and stated as its purpose an intent to "provide a quality level of service to the members of the Clark County Educational Association." (IV AA 628).

To fund the services in the Service Agreement, a Dues Transmittal Agreement between the CCEA and the NSEA was attached as an Addendum A and incorporated into the Service Agreement. (IV AA 623-31). The Service Agreement – originally executed in June 1999 – provided that the payment arrangements reflected in the Dues Transmittal Agreement, first executed in October 1979, were "continued without change." (IV AA 628).

3. *The Dues Transmittal Agreement Was Part of a Triple Structure in Which CCEA Paid NSEA, Which in Turn Had an Obligation to Pay NEA.*

The Service Agreement, and its incorporated Dues Transmittal Agreement, comprised a structure through which CCEA – which had its own direct relationship with its members – would gather and remit dues to NSEA for eventual provision to both NSEA and NEA. The Service Agreement refers to this structure:

> CCEA agrees to transmit NSEA and NEA dues, and NSEA-TIP and NEA-PAC contributions to NSEA for each by the tenth business day following the payroll deduction. The agreement is attached as Addendum A.

(IV AA 628).

The structure existed because NSEA's Bylaws required it to have a Dues Transmittal Agreement in place with an affiliate labor organization as a precondition of affiliation. (VII AA 1104-05, Art. VIII, Sec. 3(F); VII AA 1199-1200, Sec. 2-9). Those Bylaws require that:

> **The NSEA shall affiliate** a local association when it meets the following minimum standards: (f): Have a dues transmittal with NSEA.

(VII AA 1104-05, Art. VIII, Sec. 3(F)) (emphasis added).

The structure through which CCEA collects dues from its members and remits them upstream to NSEA and NEA is likewise consistent with the NEA's own bylaws:

> The Association [NEA] shall enter into contracts with state affiliates [here, NSEA] governing the transmittal of Association dues. Local affiliates [here, CCEA] shall have full responsibility for transmitting state and Association dues to state affiliates on a contractual basis…..

(VII AA 1199-1200, Sec. 2-9).

Pursuant to these arrangements, the teachers' dues flowed this way, to CCEA and then to the NSEA, and finally the NEA, in a contractual arrangement between CCEA and NSEA, which the district court ruled was properly terminated:

- **From Individual Teachers → CCEA** (via Membership Authorization Form);
- **From CCEA → NSEA** (via Dues Transmittal Agreement)
- **From NSEA → NEA** (via NEA Bylaws)

The way the money played out for each individual teacher went like this after CCEA collected dues. CCEA contributed for each of its members $377.66 per year to NSEA, pursuant to the NSEA Policies, and $189 per year to the NEA. (VI AA 1013 ¶14). NSEA then transmitted NEA's portion of those dues to NEA. (VII AA 1199-1200, Sec. 2-9). Per

NEA's Bylaws, only NSEA was contractually obligated to pay NEA. *See id.*

B. After CCEA Could Not Get Information About What NSEA/NEA Did With its Dues, It Properly Terminated the Parties' Agreements, Leading to a Fight Over Whether CCEA Had to Pay More After Termination.

1. *CCEA Sought to Protect its Members By Finding Out How Its Dues Were Spent, But Got No Answer.*

CCEA became worried about how its teacher-members' dues were being used. So it started writing letters and asking questions. In January 11, 2017, CCEA wrote to the NEA requesting an "analytic assessment to determine what CCEA members receive from NSEA in exchange for the dues paid into NSEA." (I AA 0025 ¶20). CCEA also requested "a review of the past three years of NSEA's budget" including consideration of "CCEA['s] funding contribution to NSEA and NSEA's return of that funding to CCEA." *Id.* On January 15, 2017, CCEA further requested some explanation of "what return in form of program, service benefits, legal services, etc., that a CCEA member receives from NSEA for its monthly $31.66 dues contribution," including an explanation of "actual expenses associated with those payments." (*Id.* at ¶21.) On February 3, 2017, CCEA wrote again to repeat its information requests, but also to ask, pursuant to NSEA bylaws, for a neutral third-party audit

of NSEA's books to determine the answers to the CCEA's questions about the uses of its dues money and the expenditures to benefit CCEA members. (*Id*. at 26 ¶22.) On June 28, 2017, CCEA requested financial and operational information from NSEA and requested "a breakdown of those 'dues collected, i.e., member dues, special assessments, political action, advocacy funds, etc.'" (*Id*. at ¶23.)

Unfortunately, NSEA never produced the information requested in the January 11, January 15, February 3, and June 28, 2017 letters. CCEA then set about terminating the Service Agreement.

2. After NSEA Refused to Provide the Information CCEA Requested, CCEA Terminated the Service Agreement and the Dues Transmittal Agreement.

The Service Agreement and the Dues Transmittal Agreement expressly allowed either party to terminate and seek to renegotiate the terms of the agreement. (IV AA 625, 631). Specifically, the Service Agreement states that:

> The term of this agreement shall be from September 1 to August 31. This Agreement shall be automatically renewed on an annual basis, unless either party shall give written notice of termination to the other party, with evidence of receipt by the other party no later than thirty (30) days prior to the anniversary date of the Agreement. Should either party give notice of termination as provided alone, then this Agreement shall terminate on the anniversary date unless a

> successor agreement has been mutually agreed to by the parties.

(IV AA 631). The relevant anniversary date is September 1, 2017. *Id.* at 628.

The Dues Transmittal Agreement had an equivalent termination provision. It states that "[t]his agreement shall remain in force for each subsequent membership year unless terminated in writing by either party prior to September 1 of any NSEA membership year, or amended by mutual consent of both parties." *Id.* at 625. The NSEA membership year ran from September 1 to August 31. (VII AA 1092).

CCEA invoked these provisions. It notified NSEA of its intent to terminate the Dues Transmittal Agreement and negotiate a new agreement on May 3, 2017. (IV AA 637). The notice from CCEA to NSEA on May 3, 2017, was to terminate the Service Agreement inclusive of Addendum A, which constitutes the Dues Transmittal Agreement, under which CCEA members' dues payments were being transmitted by CCEA to NSEA. (VI AA 1014-15 ¶16). The Service Agreement was set to expire on August 31, 2017. (IV AA 628, 631). Specifically, the May 3rd letter stated that:

> Pursuant to the terms of the Service Agreement between the Nevada State Education Association and the Clark County Education Association, I write to give you notice to terminate this agreement, unless a successor agreement can be mutually agreed to by the parties.…Please accept this letter as our formal notice of termination of the Service Agreement.

(IV AA 637).

On July 17 and August 3, 2017, CCEA sent NSEA additional notices of termination, affirming that CCEA terminated the Service Agreement (including the Dues Transmittal Agreement) on May 3, 2017, and indicating CCEA's desire to renegotiate the Dues Transmittal Agreement. (IV AA 639, 641-42).

In its July 17, 2017 letter, CCEA wrote to NSEA:

> On May 3, 2017 CCEA served notice that it was terminating the Service Agreement between CCEA and NSEA…..This letter serves notice to NSEA that unless there is a successor agreement in place before the August 31, 2017 all terms and conditions of the agreement shall become null and void.

(IV AA 639).

And in the August 3, 2017 letter, CCEA repeatedly made clear that it was terminating not only the Service Agreement but the correlative and inseparable agreement to transmit dues:

> Your letter expressing a claim based on NSEA policies is incorrect as this is a contract matter, there has not been a mutual agreement to modify the Agreement, and without

> mutual agreement, the terms and conditions of the Agreement will be null and void upon its expiration on August 31, 2017.…***The Agreement serves as the dues transmittal contract, and it is otherwise set to expire unless a successor is negotiated*** per the terms and conditions of that Agreement. Upon expiration, ***CCEA is not only legally not obligated to transmit dues, but cannot transmit member dues*** to NSEA per NSEA's own Bylaws. To be clear, when the current Agreement between CCEA and NSEA expires on August 31, 2017 ***there will not be a contract in place between the two organizations to collect and remit dues*** to NSEA.

(IV AA 641-42) (emphasis added).

After the termination and expiration of the Dues Transmittal Agreement on August 31, 2017, CCSD continued to send employee dues to CCEA. (VI AA 1014-15 ¶19). CCEA voluntarily placed the difference between CCEA's dues and the amount remitted by CCSD into a restricted bank account where they remain today. *Id.*

C. After Terminating the Service Agreement and the Dues Transmittal Agreement, CCEA Formally Disaffiliated from NEA and NSEA.

On April 25, 2018, CCEA voted to formally disaffiliate from NEA and NSEA. (VI AA 1014-15 ¶20). The disaffiliation was approved by 88% of the member votes cast and became effective immediately. *Id.* On April 26, 2018, CCEA served notice to NEA and NSEA that CCEA had disaffiliated from both organizations effective immediately. (I RA 46-49).

Effective as of the date of disaffiliation with NSEA/NEA, CCEA ceased collecting any funds above what was owed to CCEA. (I RA 114 at ¶21).

D. This Litigation Followed.

1. Promptly After the End of the Prior Service and Dues Year, CCEA Sues for an Order That It Is No Longer Required to Send Funds to NSEA and NEA.

On September 12, 2017 – shortly after the termination and expiration of the Dues Transmittal Agreement on August 31, 2017 – CCEA filed suit in Eighth Judicial District Court Case No. A-17-761364-C to determine the legal effect of the termination. (I AA 0021-0031). Among other causes of action, CCEA's complaint contained a claim for declaratory relief, expressly requesting "[a]n order of [the district court] declaring the non-existence of a contract obliging Plaintiff CCEA, its members, or any Plaintiff to transmit dues to Defendant NSEA or any Defendant." (I AA 27-30).

The NSEA Parties filed a separate suit on September 21, 2017, alleging breach of contract, unjust enrichment, conversion, and fraud. (I AA 0053-71). The district court eventually consolidated those two suits into this one. (I RA 56-57).

2. The District Court Ratifies CCEA's Decision to Sequester the Disputed Funds Until the Court Could Decide Who Owned Them.

After suing to clarify ownership of the Disputed Funds, CCEA had already been voluntarily placing those funds into a restricted account after CCEA terminated the Dues Transmittal Agreement. CCEA did so while awaiting a decision as to whether it could return the funds to its members. (I RA 114 at ¶21). Despite CCEA sequestering the Disputed Funds, the NSEA Parties sought a writ attaching them anyway. (I RA 1-13). Judge Kishner declined to issue a writ of attachment. (III AA 472-75, 490-495). Instead, she required the CCEA Parties to continue placing the dues into the Restricted Account. (*Id.*; III AA 518-519). The district court further required that: (1) no funds be removed from the Restricted Account without a further order; and (2) CCEA provide a monthly account statement to the NSEA Parties. (III AA 518-519).

3. *The District Court Held That CCEA Owed No Duties to Collect or Transmit Dues to NSEA or NEA After September 1, 2017, Because CCEA Had Terminated the Service and Dues Transmittal Agreements.*

On June 18, 2018, the CCEA Parties filed a Motion for Partial Summary Judgment on its declaratory relief claim. (I RA 24-45). On November 15, 2018 – and after nearly two-and-a-half hours of oral

argument – the district court granted CCEA's Motion and requested relief, finding that:

> (1) The termination provisions of the Service Agreement and Dues Transmittal Agreement are clear and unambiguous, (2) CCEA's May 3, 2017, July 17, 2017, and August 3, 2017 letters notifying NSEA of the termination of the Service Agreement and Dues Transmittal Agreement are equally clear and unambiguous, (3) the Service Agreement and Dues Transmittal Agreement were terminated by CCEA within the required contractual timeframe, (4) this termination caused both agreements to expire on August 31, 2017, and (5) in light of the foregoing termination and expiration, CCEA owed no duties to NSEA or NEA under the Service Agreement and Dues Transmittal Agreement to collect and/or transmit membership dues on NSEA or NEA's behalf on or after September 1, 2017, nor did NSEA or NEA have any obligation to CCEA on or after September 1, 2017, to perform pursuant to the Service Agreement and Dues Transmittal Agreement, and, in fact, there is no dispute that NSEA and NEA ceased to perform under the Service Agreement and Dues Transmittal Agreement on or after September 1, 2017.

(VI AA 839, 953, 1027-28).

Consistent with both parties' understanding of the September 1, 2017 termination, the court further found that the NSEA Parties did not provide any services to CCEA or its members after September 1, 2017 – findings the NSEA Parties did not dispute in the district court, and do

not dispute now on appeal. (VI AA 1027-28; *see generally* Op.Br.; I RA 120-139).

4. The District Court Granted CCEA Summary Judgment on NSEA's Claims, Which Would Have Allowed The Teachers to Get the Disputed Funds Back, But Stayed Their Return Pending Appeal.

On December 12, 2018, the CCEA Parties moved for summary judgment on all of the NSEA Parties' causes of action. (VI AA 968-1000). The NSEA Parties also moved for summary judgment on their conversion claim and on their claims for breach of the NSEA and NEA Bylaws. (I RA 58-92, 184-202). After five hours of argument, the district court denied both of the NSEA Parties' motions for summary judgment in their entirety and granted CCEA summary judgment on all of NSEA's affirmative causes of action – resulting in final judgment in CCEA's favor. (VIII AA 1291, 1529; IX AA 1554-68).

Also on December 12, 2018, the CCEA Parties filed a motion to alter or amend the Court's order regarding the restricted account, seeking to disgorge the Disputed Funds from the Restricted Account and to return them to individual teachers. (I RA 93-109). The district court granted that motion, finding that the NSEA Parties had no legal, contractual, or

equitable right to the Disputed Funds, and permitting CCEA to return the Restricted Account funds to the teachers. (IX AA 1543-49).

At the NSEA Parties' request, and over the CCEA Parties' objection, the district court stayed enforcement of that order pending this appeal. (IX 1574-83). But for the district court's stay of enforcement of that order, CCEA would have returned the Disputed Funds to the teachers and stands ready to do so upon relief from this Court.

Summary of the Argument

This case is far simpler than the number of alternative arguments the NSEA Parties unsuccessfully advanced below would indicate. At bottom, the CCEA successfully divorced itself from the NSEA and the NEA by terminating its contractual arrangements with them by August 31, 2017. That foundation drives the outcome of all six arguments below.

First, the district court correctly determined that CCEA properly terminated the Service Agreement. The NSEA Parties do not dispute that. But terminating the Service Agreement cannot leave in place the Dues Transmittal Agreement integrated with it. The Dues Transmittal Agreement is likewise an attachment to and a part of the terminated Service Agreement, comprising an obligation to pay that only made sense

as a performance conditioned and dependent upon NSEA/NEA providing services. Given that the NSEA Parties agree that they provided no services after the August 31, 2017 termination, the Dues Transmittal Agreement likewise terminated for that reason. Finally, CCEA gave proper notice to terminate the Dues Transmittal Agreement, if notice specific to it was even required.

Second, given that CCEA properly terminated the Service Agreement and the Dues Transmittal Agreement, it had no obligation to pay dues after September 1, 2017. Any argument that the termination was ineffective is a failed argument that the Agreements were perpetual contracts, albeit without the specificity required to support such a disfavored construction. Nothing CCEA said about sequestering the Disputed Funds recognized any contractual obligation to pay NSEA/NEA dues, and no other contract arguably requires such payment.

Third, the district court properly dismissed the NSEA Parties' conversion claim, where the NSEA Parties have no ownership or property interest in the Disputed Funds. CCEA's Membership Authorization Form does nothing to establish ownership of the Disputed Funds in the NSEA Parties. Any supposed unity among the contracts relating to the

flow of dues to CCEA and then from CCEA to the NSEA Parties ended with the termination of the Service Agreement and the Dues Transmittal Agreement effective August 31, 2017. And nothing CCEA said established or conceded the existence of the NSEA Parties' nonexistent property right in the Disputed Funds.

Fourth, the district court correctly determined that the NSEA Parties' unjust enrichment claim likewise failed. The NSEA Parties provided no services after August 31, 2017, so there was nothing given by them or taken from them that was retained unjustly by CCEA. And the NSEA Parties lacked any property interest in the funds.

Fifth, the district court correctly rejected the NSEA Parties' claim for punitive damages. They were undamaged by CCEA, which omitted to pay dues where it had no contract to pay and the NSEA Parties provided no services. The teacher-plaintiffs aligned with NSEA/NEA were likewise undamaged. They get their money back if CCEA prevails, and they moved to stop CCEA from repaying them the very dues they now claim are their "damage," and which they claim were withheld from them oppressively and fraudulently. Estoppel bars that particularly unreasonable argument.

Sixth, the teacher-plaintiffs waived claims of unauthorized dues increases.

Standard of Review

This Court reviews factual findings for clear error and legal determinations *de novo*. *Edelstein v. Bank of New York Mellon*, 128 Nev. 505, 522, 286 P.3d 249, 260 (2012).

Argument

I. CCEA Terminated the Dues Transmittal Agreement, and the District Court Was Correct To Rule That It Did.

The NSEA Parties admit CCEA terminated the Service Agreement, which concerns the same subject matter as the Dues Transmittal Agreement, attaches and refers to the Dues Transmittal Agreement, and is inextricably entwined with the Dues Transmittal Agreement. Their primary argument for keeping the teachers' $4.1 million they did not earn is that CCEA had to separately terminate the Dues Transmittal Agreement but failed to do so. The NSEA Parties are wrong on both halves of that proposition. Terminating the Service Agreement necessarily terminates the Dues Transmittal Agreement. *See* Section I.A. And the CCEA took steps sufficient to constitute an independent termination of the Dues Transmittal Agreement. *See* Section I.B.

A. Terminating the Service Agreement, CCEA Necessarily Terminated the Dues Transmittal Agreement.

1. *The District Court Was Right – the Service Agreement Is Integrated With the Dues Transmittal Agreement.*

Contracts may be connected and incorporated if they relate, or refer, to the same transaction, even where they do not expressly reference each other. This Court set forth that controlling rule in a case that the NSEA Parties do not cite or address. *See Haspray v. Pasarelli*, 79 Nev. 203, 208, 380 P.2d 919, 921 (1963) ("Two separate writings may be sufficiently connected by internal evidence without any express words of reference of one to the other. That they refer to the same transaction and state the terms thereof may appear from the character of the subject matter and from the nature of the terms.") (citing 2 Corbin, Contracts § 514).

Many other jurisdictions agree with this general principle of contract law. *See, e.g., Nau v. Vulcan Rail & Construction Co.*, 286 N.Y. 188, 197, 36 N.E.2d 106, 110 (1941) (construing three separate writings as one contract and stating that "[e]ven though [the contracts] had been made at different dates, that fact would not affect the rule [to construe the documents as one] since they were to effectuate the same purpose and

formed a part of the same transaction.*"); Town of Cheswold v. Central Delaware Business Park*, 2018 WL 2748372 *6 (Del. June 8, 2018) ("Other documents or agreements can be incorporated by reference 'where a contract is executed which refers to another instrument and makes the conditions of such other instrument a part of it.' When that occurs, 'the two will be interpreted together as the agreement of the parties.'") (quoting *State v. Black*, 83 A.2d 678, 681 (Del. Super. 1951)); *Neville v. Scott*, 127 A.2d 755, 757 (Pa. Super. Ct. 1957) ("Where several instruments are made as part of one transaction they will be read together, and each will be construed with reference to the other; and this is so although the instruments may have been executed at different times and do not in terms refer to each other."); *Paine-Gallucci, Inc. v. Anderson*, 41 Wash.2d 46, 50 (1952) ("[I]f it appears to the court that the entire agreement of the parties was made up of more than one written document, that such documents were made as parts of the same transaction, related to the same subject matter and were not inconsistent with each other, all of them may be considered together.").

The Service Agreement and Dues Transmittal Agreement are integrated on many levels, making it necessary to construe them

together. First and most obviously, the Service Agreement that the NEA agrees terminated by August 31, 2017 expressly references ***and attaches as an addendum*** the Dues Transmittal Agreement. (IV AA 628, ¶1). Where a contract attaches and refers to another, courts often treat the latter as incorporated by reference in the former. Indeed, the attachment of the Dues Transmittal Agreement here exceeds Nevada standard's for treating a document as incorporated by reference. *See Haspray*, 79 Nev. at 208, 380 P.2d at 921 ("Two separate writings may be sufficiently connected by internal evidence without any express words of reference of one to the other. That they refer to the same transaction and state the terms thereof may appear from the character of the subject matter and from the nature of the terms.").

The Service Agreement contains within it the Dues Transmittal Agreement and thus the dues transmittal function, showing that both agreements are part of the self-same transaction and must be construed together. The NSEA Parties concede that the primary purpose of the Dues Transmittal Agreement – Addendum A to the Service Agreement – is to govern the collection and transmission of dues from CCEA to NSEA. (Opening Brief [herein by page, "Op.Br."] 25. As the portion of the Dues

Transmittal Agreement the NSEA Parties cite states, "[***t]his agreement is entered into for the purpose of collecting and transmitting[] dues and membership data***." (IV AA 623) (emphasis added). The Service Agreement and Dues Transmittal Agreement require the collection of dues in almost exactly the same language, each time describing CCEA's duty to collect, and stating that CCEA would be the agent for NSEA. The striking parallels are set forth here for reference:

SERVICE AGREEMENT	**DUES TRANSMITTAL AGREEMENT (ATTACHED AS ADDENDUM A TO THE SERVICES AGREEMENT)**
Duty to Transmit Dues: "CCEA agrees to transmit NSEA and NEA dues, and NSEA-TIP and NEA-PAC contributions to NSEA for each by the tenth business day following payroll deductions." (IV AA 628, ¶1).	**Duty to Transmit Dues:** "The [CCEA] agrees to transmit or have transmitted to the NSEA on a monthly basis within ten (10) working days after the school district transmits payroll deductions check and membership list to the [CCEA], membership dues…." (IV AA 623, Sec. II.B.1).
CCEA, Authorized Collector: "CCEA shall be authorized by NSEA to collect dues from NEA/NSEA administrator	**CCEA, Authorized Collector:** "The NSEA designates, and [CCEA] agrees to be its authorized agent for the purposes of collecting

members for transmittal to NSEA." *Id.*	and transmitting to NSEA and NEA dues and membership data from NSEA/NEA members who are also members of [CCEA]. The [CCEA] will collect or cause to be collected NSEA/NEA dues from NSEA/NEA members and will transmit or have transmitted all NSEA/NEA dues." *Id*. at Sec. 1.

The NSEA Defendants' idea that the two agreements can be pulled apart – with one viable and the other not – thus makes no sense.

2. ***The Service Agreement and Dues Transmittal Agreement Must Be Read As Operating Together To Avoid Absurd Results Under Their Plain Language.***

The Service Agreement and its Addendum A must also be read together because they comprise a *quid pro quo* exchange between CCEA and NSEA. The Service Agreement sets forth the services that NSEA will provide to CCEA in exchange for the dues transmittal services provided by CCEA to NSEA, as set forth in in both the Service Agreement and the Dues Transmittal Agreement. The *quid pro quo* comes right at the outset of the Service Agreement. Its paragraph 1 states that CCEA will transmit dues to NSEA, and the immediately following paragraph 2 provides that in exchange, NSEA will transmit grants to CCEA. (IV AA

628, ¶¶1-2). This is the core and essence of the Service Agreement – services for dues.

Thus, there is no severing one from the other, and to argue otherwise would result in an absurdity, given the *quid pro quo* the agreements embody. *See Eversole v. Sunrise Villas VIII Homeowners Ass'n*, 112 Nev. 1255, 1260, 925 P.2d 505, 509 (1996) ("Contractual provisions should be harmonized whenever possible and construed to reach a reasonable solution."); *Reno Club v. Young Inv. Co.*, 64 Nev. 312, 182 P.2d 1011 (1947) (holding that a contract should not be construed so as to lead to an absurd result).

Reading the Dues Transmittal Agreement as capable of surviving the termination of the Service Agreement flouts Nevada's canons of contract interpretation because it fails to give effect to both provisions – not only the covenant to pay dues, but the correlative covenant to provide services. *See, e.g., Quirrion v. Sherman*, 109 Nev. 62, 65, 846 P.2d 1051, 1053 (1993) ("[W]here two interpretations of a contract provision are possible, a court will prefer the interpretation which gives meaning to both provisions rather than an interpretation which renders one of the provisions meaningless."); *Royal Indem. Co. v. Special Serv. Supply Co.*,

82 Nev. 148, 150, 413 P.2d 500, 502 (1966) ("We first resort to general rules of contractual construction. Every word must be given effect if at all possible.").

The district court was thus correct to see the Service Agreement, which recites the necessity of paying dues and attaches and incorporates the Dues Transmittal Agreement, as a bilateral exchange of dues and services that cannot be severed and piecemealed as NSEA would wish it. *See, e.g., Washoe Cty. Sch. Dist. v. White*, 133 Nev. 301, 305, 396 P.3d 834, 839 (2017) (rejecting proposed contract interpretation that would have rendered term inapplicable and thus meaningless); *Musser v. Bank of Am.*, 114 Nev. 945, 949, 964 P.2d 51, 54 (1998) ("A court should not interpret a contract so as to make meaningless its provisions.").

Because the parties' contract can only reasonably be understood as a mutual and bilateral exchange, this Court should affirm, as affirmance respects the existence of both NSEA's covenant to provide services and CCEA's covenant to pay for them. But that conclusion is even more inescapable in light of NSEA's acquiescence in the termination by its complete failure to provide any services after September 1, 2017, as explained next.

3. *NEA and NSEA Cannot Deny the Termination of the Dues Transmission Agreement, Given Its Undisputed Failure to Provide Any Services After September 1, 2017.*

The district court's unappealed factual finding that NSEA/NEA ceased to perform under the Service Agreement and Dues Transmittal Agreement on or after September 1, 2017 likewise dooms NSEA's and NEA's appeal. (VI AA 1027-28). The NSEA and NEA nowhere complain of or contest this finding. (*See generally* Op.Br.). And they are not allowed to contest it for the first time in reply. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 (2011) ("Issues not raised in an appellant's opening brief are deemed waived."); *Bisch v. Las Vegas Metro Police Dep't*, 129 Nev. 328, 333 n.2, 302 P.3d 1108, 1112 (2013) (same).

The undisputed fact that NSEA and NEA stopped performing altogether after September 1, 2017 dooms their appeal because it is elementary that you cannot sue to enforce a contract you have abandoned performing. It is Nevada law that a plaintiff's substantial performance of a contract is a condition precedent to bring a claim for breach. *Thompson v. Herrmann*, 91 Nev. 63, 68, 530 P.2d 1183, 1186 (1975) ("[I]f the performance falls short of being substantial, then the

promisor is entitled to no recovery." (citation omitted)). This rule is well-settled in American law, and other states agree. *See, e.g., D.R. Horton, Inc.-Denver v. Bischof & Coffman*, 217 P3d 1262, 1271 (Colo. Ct. App. 2009) ("[G]enerally, performance or substantial performance by the plaintiff is a condition precedent to the right to recover on the contract."); *VRT, Inc. v. Dutton-Lainson Co.*, 530 N.W.2d 619 (1995) ("To successfully bring an action on a contract, a plaintiff must first establish that the plaintiff substantially performed the plaintiff's obligations under the contract.").

Another helpful way of understanding why the law will not let the NSEA Parties seek dues for a period when they did not perform is that it is a failure of mutuality. Under Nevada law, "'[M]utuality of obligation' is synonymous with 'consideration,' so a contract that lacks 'mutuality of obligation' fails for 'want of consideration.'" *Fidelity & Deposit Co. of Md. v. Big Town Mechanical, LLC*, No. 2: 13-cv-00380-JAD-GWF, 2017WL 5165044, at *2 (D. Nev. Nov. 7, 2017). So to the extent the NSEA Parties claim they are entitled to dues without services, they claim the existence of a contract that fundamentally and obviously lacks mutuality. But Nevada law is clear that "[m]utuality of obligation requires that unless

both parties to a contract are bound, neither is bound." *Sala & Ruthe Realty, Inc. v. Campbell*, 89 Nev. 483, 486-87, 515 P.2d 394, 396 (1973). So the NSEA Parties cannot refuse to perform services for the teachers and force the teachers to pay them $4.1 million anyway. Such a claimed arrangement cannot be a binding contract. "[I]f it appears that one party was never bound on his part to do the acts which form the consideration for the promise of the other, there is a lack of mutuality of obligation, and the other is not bound." *United Services Auto Ass'n v. Schlang*, 111 Nev. 486, 491, 894 P.2d 967, 970 (1995) (citation omitted.) For all of these reasons, this Court should affirm.

4. ***The Cases The NSEA Defendants Cite To Argue That the Contracts Were Not Integrated Are Unavailing.***

Finally, the cases the NSEA Parties cite do nothing to bolster their argument. The NSEA Parties primarily cite to three cases for the proposition that an agreement must use talismanic "incorporated herein" language to be effective, while ignoring and failing to cite binding Nevada law that expressly states the contrary. *See Haspray*, 79 Nev. at 208 ("Two separate writings may be sufficiently connected by internal evidence without any express words of reference of one to the other.").

The NSEA Parties cite *Royer v. Baytech Corp.*, No. 3:11-CV-00833, 2012 WL 3231027, at *4 (D. Nev. Aug. 3, 2012) for the proposition that the incorporating contract must "use language that is express and clear." However, the contract at issue in *Royer* actually had a "separation clause" that stated that "the parties' duties, obligations and responsibilities under the [additional writing] are separate from those under the Purchase Agreement." *Id.* Despite that separation clause, the court still found that the incorporation was "express and clear." In other words, despite the incorporating document's attempt to expressly disavow that the two writings were the same contract, the court still held that they were one contract.

The NSEA Parties also quote *R.W.L. Enters v. Oldcastle, Inc.*, for the proposition that separate writings will only be construed together if they are "so interrelated as to be considered one contract." (Op.Br. 23, citing 226 Cal. Rptr. 3d 677, 683 (Cal. Ct. App. 2017)). However, this case likewise states that the "contract need not recite that it 'incorporates' another document, so long as it 'guides the reader to the incorporated document.'" *Id.* (quoting *Shaw v. Regents of University of California*, 58 Cal. App. 4th 44, 54 (1997)). Such is the precise scenario here, as the

Service Agreement guides the reader to the attached the Dues Transmittal Agreement by expressly referencing it and attaching it as Addendum A.

Finally, the NSEA Parties cite *MMAWC, LLC v. Zion Wood Obi Wan Tr.*, 135 Nev. Adv. Op. 38, 448 P.3d 568, 572 (2019) for the proposition that, unless the agreement expressly uses the "incorporated herein" magic language, a document cannot be incorporated by reference. This Court said no such thing in *MMWAC*. While the facts in *MMAWC* concerned a settlement agreement that referred to a separate agreement that was "attached hereto and incorporated herein," this Court did not fashion a rule that the "incorporated here" language was a necessary prerequisite in every case to finding incorporation.[1]

B. CCEA Properly Terminated the Dues Transmittal Agreement on August 3, 2017, Assuming It Even Required Separate Termination.

Notably, contract integration is not a prerequisite to finding contract termination here. The NSEA Parties argue at length that: (1)

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[1] *Bank of Columbia v. Patterson's Adm'r,* 11 U.S. 299 (1813) and *Acequia, Inc. v. Prudential Ins. Co. of Am.,* 226 F.3d 798 (7th Cir. 2000) are inapposite. The CCEA Parties have not argued that the creation of the Service Agreement "superseded or extinguished" the Dues Transmittal Agreement.

the district court concluded that the Service and Dues Transmittal Agreements were an integrated agreement; and (2) this specific "conclusion of law" formed the sole basis of the district court finding that CCEA properly terminated the Dues Transmittal Agreement when it terminated the Services Agreement. (*See* Op.Br. 22-26.)

The NSEA Parties' argument is odd, incorrect, and contradicted by the district court's written order. The NSEA Parties ignore that when issuing its written decision, the district court expressly lined through and struck the "integrated agreement" language in its conclusions of law (taken from CCEA's proposed order) – with the final entered order reading as follows:

> The Service Agreement and Dues Transmittal Agreement ~~as an integrated agreement~~ expressly allow unilateral termination by either party, and those termination provisions are clear and unambiguous.

(VI AA 1027, ¶31).

Indeed, the district court went on to hold that:

> The May 3, 2017, July 17, 2017, and August 3, 2017 letters served to terminate **both** the Service Agreement and Dues Transmittal Agreement, which termination occurred within the required contractual timeframe.

> The foregoing termination notices caused both the Service Agreement and Dues Transmittal Agreement to expire on August 31, 2017.

(VI AA 1027, ¶¶32-33).

Based on the foregoing, the district court found that the CCEA notices sufficiently and ***independently*** terminated both agreements, irrespective of whether or not they were integrated. *Id.* Thus, integration of the agreements was not a conclusion of law that formed the basis of the district court's decision. Any argument by the NSEA Parties that the only reason the district court found that CCEA properly terminated the Dues Transmittal Agreement was because it was integrated with the terminated Service Agreement is contradicted by the district court's order. *See id.*

Moreover, even construing the Service Agreement and its Addendum A as separate contracts, as the NSEA Parties propose, their argument that CCEA was not clear in terminating the Dues Transmittal Agreement fails. As established above, the Dues Transmittal Agreement's termination provision states that "[t]his agreement shall remain in force for each subsequent membership year unless terminated in writing by either party prior to September 1 of any NSEA membership

year, or amended by mutual consent of both parties." (IV AA 625). As further established above, the primary – and arguably sole – obligation addressed in the Dues Transmittal Agreement is the transmittal of membership dues from CCEA to NSEA. (IV AA 623). On August 3, 2017 – well before the September 1st deadline to terminate – CCEA informed NSEA:

> The Agreement **serves as the dues transmittal contract**, and it is otherwise set to expire unless a successor is negotiated per the terms and conditions of that Agreement. Upon expiration, CCEA is not only legally not obligated to transmit dues, but cannot transmit member dues to NSEA per NSEA's own Bylaws. **To be clear, when the current Agreement between CCEA and NSEA expires on August 31, 2017 there will not be a contract in place between the two organizations to collect and remit dues to NSEA.**"

(IV AA 641-42) (emphasis added).

Notably, the NSEA Parties argue that "the letters do not mention the Transmittal Agreement at all," while simultaneously failing to cite this language to this Court. (*See* Op.Br. 28.) The NSEA Parties also misleadingly state that the "district court did not identify the language on which it relied to find that CCEA provided notice of the Transmittal Agreement's termination…." *Id.* Not so – ***the district court quoted the above language verbatim in its order***. (VI AA 1025). The NSEA

Parties cannot dispute that the foregoing letter was sent to and received by NSEA on August 3, 2017. They cannot dispute the letter's contents, nor that NSEA received it long before the termination date. The letter's termination language is clear, unambiguous, and sufficient to terminate the Dues Transmittal Agreement. It conveys not only CCEA's intent to terminate, but it goes above and beyond what is legally required by expressly providing the legal ramifications for such termination:

> Upon expiration, CCEA is not only legally not obligated to transmit dues, but cannot transmit member dues to NSEA per NSEA's own Bylaws. To be clear, when the current Agreement between CCEA and NSEA expires on August 31, 2017 there will not be ***a contract in place between the two organizations to collect and remit dues*** to NSEA.

(IV AA 641-42) (emphasis added).

NSEA's ostrich-like pretense that it was somehow confused as to what CCEA was terminating makes no sense. The letter's plan text says what it terminated: "***a contract … to collect and remit dues***." (*Id.*) (emphasis added). NSEA's wishful suggestion that the language might refer to something else is insupportable conjecture that gave the district court no reason to forbear from entering summary judgment against NSEA. *See Wood v. Safeway*, 121 Nev. 724, 731, 121 P.3d 1026, 1030 (2005) ("[T]he nonmoving party may not defeat a motion for summary

judgment by relying on the gossamer threads of whimsy, speculation, and conjecture."). The weakness of the NSEA Parties' argument is underscored by their citation of non-binding (and sometimes unpublished) cases from Arkansas, Michigan, Oregon, Ohio, and North Dakota. (Op.Br. 26-27.) The NSEA Parties offer no binding Nevada authority to bolster their argument on this point.

Further, the primary case cited by the NSEA Parties supports termination here. The Eighth Circuit Court of Appeals set forth the following standard in *Cedar Rapids Television Co. v. MCC Iowa LLC*, 560 F.3d 734, 740 (8th Cir. 2009):

> A notice of termination need not include the words "breach" or "termination" to effectuate termination…. In determining whether a clear and unequivocal termination has occurred, a court may consider the related conduct of the parties, including conduct between the giving of the notice and the actual date of termination…. Notice of termination is to be liberally construed, the true intent and purpose of the parties in the ordinary rules of trade being kept in mind.

(internal citations omitted).

Thus, the very standard set forth by the NSEA Parties supports termination here, as the content of the notice, timing of the notice (sent almost exactly 30 days before the termination deadline), and conduct of both parties (with NSEA/NEA themselves undisputedly ceasing to

provide services after receipt of the termination notice) supports a finding of termination here. Accordingly, even if this Court is inclined to treat the Service Agreement and Dues Transmittal Agreement as separate contracts for purposes of termination, the district court correctly found that CCEA timely terminated the Dues Transmittal Agreement.

This Court should affirm.

C. NSEA's Interpretation of the NSEA Bylaws Leads to an Improper Perpetual Contract and Renders the Express Termination Language in the Dues Transmittal Agreement Meaningless.

NSEA next argues that, because the NSEA Bylaws require that all affiliates have a dues transmittal contract with NSEA, CCEA could never terminate the Dues Transmittal Agreement unless there was a successor dues contract in place with NSEA. (Op.Br. 29.) This bootstrap fails because the NSEA Parties' interpretation would lead to a perpetual contract, which Nevada law only permits where the parties have expressly agreed to the perpetual duration. Here, by contrast, both agreements had express termination provisions. (IV AA 625, 631.)

The rule this Court set out in *Bell v. Leven*, 120 Nev. 388, 391, 90 P.3d 1286, 1288 (2004), should control here. While upholding a perpetual contract there, because the agreement at issue "contained an

unambiguous perpetual duration clause" that "expressly provided that it was to endure perpetually or until terminated by mutual consent of all parties," this Court generally warned against such provisions. The Court in *Bell* taught that "as a matter of public policy, courts should avoid construing contracts to impose a perpetual obligation" and that a perpetual contract should only be enforced "when the language of a contract clearly provides that the contract is to have a perpetual duration." *Bell*, 120 Nev. at 391, 90 P.3d at 1288 (emphasis added).

In explaining the narrow construction to be afforded perpetual contracts, this Court set forth two important governing principles. First, "where the intention to [impose a perpetual obligation] is unequivocally expressed, the contract will be upheld, [but] courts will only construe a contract to impose an obligation in perpetuity when the language of the agreement compels that construction…" *Bell*, 120 Nev. at 391, citing *Preferred Physicians Mut. Mgmt. Grp., Inc. v. Preferred Physicians Mut. Risk Retention Grp., Inc.*, 961 S.W.2d 100, 103 (Mo. Ct. App. 1998) (emphasis added)). Second, "the construction of a contract conferring indefinite duration is to be avoided unless compelled by the unequivocal

language of the contract." *Bell*, 120 Nev. at 391, citing *Delta Servs. & Equip., Inc. v. Ryko Mfg. Co.*, 908 F.2d 7, 9 (5th Cir. 1990).

Those clear principles make quick work of the NSEA Parties' claims of a perpetual contract. The Service Agreement and its incorporated Addendum A contains no provision seeking perpetual duration, let alone in unequivocal language Nevada law requires. Indeed, the opposite is true. The Dues Transmittal Agreement expressly and specifically allows unilateral contract termination at any time in writing prior to September 1 of any NSEA membership year. (IV AA 625) ("This agreement shall remain in force for each subsequent membership year unless terminated in writing by either party prior to September 1 of any NSEA membership year, or amended by mutual consent of both parties.").

Seeking to avoid the clear termination language in the Dues Transmittal Agreement, the NSEA Parties rely on language in the NSEA Bylaws. That fails for many reasons. First, the NSEA Parties own the decision to amend their own Bylaws to add the purported perpetuity provision to conflict with the previously-agreed upon termination provision in the Dues Transmittal Agreement. (Op.Br. 29 ("NSEA amended its Bylaws to require all local affiliates to maintain a dues

transmittal agreement….").) Second, the NSEA Parties cannot claim that CCEA consented to this amendment, and cite no record evidence on this point. Third, if the NSEA Bylaws somehow control at the expense of the Dues Transmittal Agreement, it would make meaningless the express termination provision there. Aside from the irony that this whole suit is about ***enforcing the Dues Transmittal Agreement*** despite the lack of providing any services back to CCEA, NSEA's self-serving argument that its Bylaws really control likewise flouts canons that require giving effect to all provisions in the Dues Transmittal Agreement itself. *E.g., Phillips v. Mercer*, 94 Nev. 279, 579 P.2d 174 (1978); *Caldwell v. Consol. Realty & Mgmt. Co.*, 99 Nev. 635, 639, 668 P.2d 284, 287 (1983). The district court was correct to reject these illogical and self-serving positions.

D. NSEA's Interpretation, and Self-Serving Paraphrasing, of the NSEA Bylaws is Misleading and Incorrect.

Even if the Court were inclined to enforce the Agreement as perpetual (which it should not), the NSEA Parties' representation of the purported conflict between the NSEA Bylaws and Dues Transmittal Agreement is misleading, as it selectively cites a limited portion of the applicable Bylaws. Specifically, the NSEA Parties represent to this

Court that NSEA "adopted a bylaw amendment to require that all affiliates have 'a dues transmittal contract with NSEA.'" (Op.Br. 29.) But the amended portion of the Bylaws states:

> ***[t]he NSEA shall affiliate*** a local association when it meets the following minimum standards: …
>
> (F) Have a dues transmittal contract with NSEA."

(VII AA 1104-05, Art. VIII, Sec. 3(F)). (emphasis added). Thus, NSEA's own Bylaws ***oblige NSEA to affiliate with a local association*** which has entered into a dues transmittal agreement – that language does not purport to oblige CCEA to maintain a dues transmittal agreement in place perpetually. *See id*. In other words, if the relevant dues transmittal agreement was terminated in advance of the membership year by the local association (as the plain terms of the Dues Transmittal Agreement provide), NSEA can then disaffiliate from the local association. There is no "conflict" between the Dues Transmittal Agreement and the NSEA Bylaws, and as admitted by NSEA (and from the clear and simple text of the actual Bylaws), the Bylaws only prevail if there is a conflict. (Op.Br. 30.)

Further, because it was NSEA's right and choice to amend its Bylaws to state the foregoing, any ambiguity is to be construed against

the drafter – NSEA. *See, e.g., Caldwell,* 99 Nev. at 638, 668 P.2d at 286*;* *Dickenson v. State, Dep't of Wildlife*, 110 Nev. 934, 937, 877 P.2d 1059, 1061 (1994). Accordingly, the NSEA Parties have failed to identify a conflict between the Dues Transmittal Agreement and the NSEA Bylaws. Their argument that the Dues Transmittal Agreement exists in perpetuity must fail.

II. The District Court Correctly Held that the NSEA Parties' Claim for Breach of Contract Fails.

A. CCEA's Termination of the Service Agreement and Dues Transmittal Agreement Ended Any Alleged Obligation Under the NSEA/NEA Bylaws to Send Dues.

The law makes clear CCEA's termination of the Service Agreement and Dues Transmittal Agreement effective August 31, 2017 ended any obligation CCEA had to NSEA/NEA to transmit dues. *Clark Cty. v. Bonanza No. 1*, 96 Nev. 643, 648–49, 615 P.2d 939, 943 (1980) ("As a general rule, none is liable upon a contract except those who are parties to it."). Where a contract has expired, the parties generally are "released . . . from their respective contractual obligations." *See Litton Fin. Printing Div. v. Nat'l Labor Relations Bd.*, 501 U.S. 190, 206 (1991); *Granite Constr. Co. v. Remote Energy Sols., LLC*, 403 P.3d 683 (Nev. 2017) (same). Termination of a contract discharges the remaining

obligations of all parties thereto. *See, e.g., CCT Communications, Inc. v. Zone Telecom, Inc.*, 327 Conn. 114, 135 n.14 (2017); *see also Conference Am., Inc. v. Conexant Sys., Inc.*, 508 F. Supp. 2d 1005, 1011–12 (M.D. Ala. 2007); 17B C.J.S. Contracts § 610.

Outside of the Service and Dues Transmittal Agreements, there is no contract under which CCEA is obliged to transmit dues. Certainly not the NSEA Bylaws. The NSEA bylaws state that:

> The NSEA shall affiliate a local association when it meets the following minimum standards: (f): **Have a dues transmittal with NSEA**.

(VII AA 1104-05, Art. VIII, Sec. 3(F)) (emphasis added). Because this passage creates obligations in NSEA, the only breach in view is NSEA's violation of its own Bylaws by asserting that CCEA remained an affiliate in the absence of a dues transmittal agreement. This is even more true given NSEA's undisputed failure to provide any services to CCEA, as required under the NSEA Bylaws, after CCEA terminated the Service Agreement and Dues Transmittal Agreement. (VI AA 1027-28).

Likewise, the NEA Bylaws simply create obligations on NEA to seek contracts with local affiliates, which are to transmit dues during

membership years beginning September 1 – and CCEA terminated before the September 1 at issue here:

> The Association [NEA] shall enter into contracts with state affiliates [NSEA] governing the transmittal of Association dues. **Local affiliates [CCEA] shall have full responsibility for transmitting state and Association dues to state affiliates <u>on a contractual basis</u>**.... A local shall transmit to a state affiliate and a state affiliate shall transmit to the Association at least forty (40) percent of the Association dues receivable for the year by March 15… and at least seventy (70) percent of the Association dues receivable for the year by June 1; the percentage shall be based upon the last membership count prior to January 15, and upon a membership year beginning September 1, **<u>unless the contracted transmittal schedule</u>** stipulates otherwise.

(VII AA 1199-1200, Sec. 2-9) (emphasis added).

There are no additional terms in either the NSEA or NEA Bylaws that even reference transmittal of dues, let alone impose an obligation on CCEA to transmit them. Thus, with the termination of the only contract to require dues transmittal – the Service and Dues Transmittal Agreements – there is simply no obligation for CCEA to transmit dues on or after September 1, 2017, and any allegation that CCEA failed to transmit dues to NSEA/NEA after September 1, 2017 fails.

A different path to the same outcome is to consider NSEA's and NEA's rendition of services in the Service Agreement as a condition

precedent to performance of obligations under the Dues Transmittal Agreement. "A condition precedent to an obligation to perform calls for the performance of some act after a contract is entered into, upon which the corresponding obligation to perform immediately is made to depend." *NGA #2 Ltd. Liab. Co. v. Rains*, 113 Nev. 1151, 1158–59, 946 P.2d 163, 168 (1997); *see also* 17A Am.Jur.2d Contracts § 469 (1997). No contract exists if a condition precedent to the contract fails to take place. *See Sala & Ruthe Realty, Inc. v. Campbell*, 89 Nev. 483, 487, 515 P.2d 394, 396 (1973). Given that it is undisputed that the NSEA Parties rendered no services after September 1, 2017 (VI AA 1027-28), the condition precedent to the performance of any payment of dues was unfulfilled, rendering any such surviving obligation unenforceable.

For all of these reasons, the district court properly held that CCEA did not breach NSEA/NEA's Bylaws and the NSEA Parties' breach of contract claims failed. (IX AA 1564-65).

B. The NSEA Parties' Proposed Analysis Renders the NSEA Bylaws a Perpetual Contract, Which Is Prohibited.

Recognizing that the NSEA Bylaws do not require CCEA to transmit dues absent a Dues Transmittal Agreement, the NSEA Parties'

argument for breach of the NSEA Bylaws is essentially that any lawful termination of the Dues Transmittal Agreement breached the NSEA Bylaws. Stated differently, the NSEA Parties argue that the contractual relationship between them and CCEA was interminable. This argument fails for two independent reasons.

First, the NSEA Parties' position is predicated on the existence of an improper perpetual contract. As explained in Section I.C. (*supra*, at 40-43), Nevada law prohibits perpetual contracts in this context; thus, CCEA did not breach the NSEA Bylaws when it terminated the Dues Transmittal Agreement.

Second, as explained in Section I.D. (*supra*, at 44-45), the obligation to maintain a Dues Transmittal Agreement is an obligation of NSEA – and not CCEA – under the clear terms of the NSEA Bylaws. Again, the NSEA Bylaws unambiguously state that "**[t]he NSEA shall affiliate** a local association when it meets the following minimum standards: … (F) Have a dues transmittal contract with NSEA" and the NEA Bylaws unambiguously state that "Local affiliates [CCEA] shall have full responsibility for transmitting state and Association dues to state

affiliates **on a contractual basis**." (VII AA 1104-05, Art. VIII, Sec. 3(F); 1199-1200, Sec. 2-9).

The NSEA Parties cite no contractual obligation for CCEA to maintain a Dues Transmittal Agreement with NSEA or NEA, to enter into a successor agreement with NSEA/NEA, or to transmit dues absent a Dues Transmittal Agreement, for there is none.

C. CCEA's Purported Statements about the Binding Nature of the Bylaws Were Pled in the Alternative, Are Not Legal Admissions, and Undisputedly Predate the Declaratory Relief Ruling by the District Court.

Perhaps recognizing the contractual interpretation flaws of their Bylaws argument, the NSEA Parties point to purported "admissions" by CCEA as to the continuing binding nature of the Bylaws. Such attempts are unavailing for several reasons.

First, it is undisputed that CCEA initiated a declaratory relief complaint less than two weeks after terminating the Dues Transmittal Agreement. CCEA expressly requested that the district court declare that CCEA properly terminated the Dues Transmittal Agreement and was legally permitted to remit the excess dues to the teachers. (I AA 27-30). Given the declaratory style of the complaint and the pending judicial determination, CCEA pled various claims in the alternative. *See* NRCP

8(d)(2) ("A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones.").

Second, it is undisputed that all of the statements and "admissions" cited by the NSEA Parties predate the district court's initial finding (entered on December 20, 2018) – that CCEA properly terminated the Dues Transmittal Agreement. (VI AA 1018-29). They also predate the district court's subsequent findings regarding the legal effect that the Dues Transmittal termination had on the Bylaws (entered July 3, 2019). (IX AA 1551-69). Accordingly, such statements do not bolster the NSEA Parties' argument that the Bylaws are binding here.

Third, even if this Court concluded that the Bylaws bound CCEA after termination, nothing in the NSEA nor NEA Bylaws require dues transmittal, as discussed above. Instead, both Bylaws expressly recognize that dues transmittal will be governed by a separate contract – which contract was properly and timely terminated by CCEA. (VII AA 1104-05, Art. VIII, Sec. 3(F); 1199-1200, Sec. 2-9). Again, this Court should affirm.

III. The District Court Correctly Held that the NSEA Parties' Claim for Conversion Fails Because NSEA and NEA Have No Ownership Interest in the Membership Dues.

A. The NSEA Parties Must Be the Rightful Owner of the Disputed Funds to Sustain a Conversion Claim, But Do Not Attempt Any Argument That They Are.

A party must be the rightful owner of property to sustain a claim for conversion. *See Bader v. Cerri*, 96 Nev. 352, 356, 609 P.2d 314, 317 (1980), *overruled on other grounds by Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 5 P.3d 1043 (2000); *M.C. Multi-Family Dev., L.L.C. v. Crestdale Associates, Ltd.*, 124 Nev. 901, 910–11, 193 P.3d 536, 542–43 (2008); *see also* Op.Br. 41 (quoting *Larsen v. B.R. Enters., Inc.,* 104 Nev. 252, 254, 757 P.2d 354, 356 (1988).) Fatally for their conversion claim, the NSEA Parties do not attempt to explain how NSEA or NEA are the rightful owner of the funds collected on or after September 1, 2017, which is one reason this Court should affirm the dismissal of the conversion claim.

The NSEA Parties' observations around this issue do not assist them. First, they note that NSEA gets a copy of a teacher's executed membership form with CCEA. (Op.Br. 46). That in no way makes CCEA's contract with a teacher a contract with NSEA/NEA. It creates

no privity and no direct payment to NSEA/NEA, especially after the termination of the Dues Transmittal Agreement. Second, repetitious description of how CCEA collects dues from members – and then separately remits dues to NSEA/NEA pursuant to separate contracts with NSEA/NEA – in no way transforms money into NSEA/NEA's property at the moment a teacher pays it to CCEA. (*See* Op.Br. 47-48). Third, while the NSEA Parties cite *Hester v. Vision Airlines, Inc.*, that case is about whether money can serve as the basis for a conversion claim, not about ownership's role in conversion. No. 2:09-CV-0117-RLH-RJJ, 2011 WL 856871, at *3 (D. Nev. Mar. 9, 2011). And *Hester* is distinguishable – there, the federal government was providing hazard pay to airline employees and gave it to Vision, which kept it. Here, CCEA has separate contractual relations with its members on one hand, and NSEA/NEA on the other, a very different scenario. Fourth, *Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865 (9th Cir. 2007) does not aid the NSEA Parties. That case concerned a claim for conversion, where it was clear that the converted funds were "Appellant's property," which is the what the NSEA Parties failed to establish here. *Id.* at 880.

B. The CCEA Membership Authorization Form Is Only Between CCEA and the Individual Members, Does Not Enroll Members in NSEA and NEA, and Does Not Make NSEA/NEA Owners of CCEA's Dues in CCEA's Hands.

Notably, the NSEA Parties fail to argue that the Dues Transmittal Agreement, Service Agreement, NSEA Bylaws, or NEA Bylaws provide NSEA/NEA with an ownership interest in the membership dues. *See Powell,* 127 Nev. at 161 n.3, 252 P.3d at 672 ("Issues not raised in an appellant's opening brief are deemed waived."). Without any a contract entitling NSEA/NEA to directly claim the membership dues at issue – as there is none in the Service Agreement, the Dues Transmittal Agreement, or the NSEA or NEA Bylaws – the NSEA Parties try to create such entitlement by glancing references to the Membership Authorization Form itself.

But the CCEA Membership Authorization Form cannot be taken the way the NSEA Parties suggest. By its clear terms, the CCEA Membership Authorization Form is a contract only between CCEA and CCEA's individual members. Signing the CCEA Membership Authorization Form, CCEA members authorize two things only. First, they authorize CCEA to negotiate and act on their behalf. The Membership Authorization Form states:

- My signature authorizes **my local association [CCEA]** to negotiate for me before the school district, as provided in Nevada Statutes, those items affecting my salary, hours and conditions of employment and to represent me in other matters affecting the professional services of educators and the quality of education.

(VI AA 1003) (emphasis added). Second, CCEA members authorize payroll deductions to be paid to CCEA. The Membership Authorization Form states:

- **Payroll Deduction Authorization.** With full knowledge of the above, I hereby agree to pay cash for, or herein, authorize my employer to deduct from my salary, **and pay to the local association [CCEA]**, in accordance with the agreed-upon payroll deduction procedure, the professional dues as established annually and the political action contributions in the amounts indicated above for this membership year and each year thereafter, provided that **I may revoke this authorization by giving written notice to that effect to my local association** between July 1 and July 15 of any calendar year, or as otherwise designated by the negotiated agreement. Dues are paid on an annual basis and, although dues may be deducted from my payroll check(s) in order to provide an easier method of payment, a member is obligated to pay the entire amount of dues for a membership year. I understand that **if I resign my membership in my local Association**, or in the event of termination, resignation or retirement from employment, I am still obligated to pay the balance of my annual dues and political or positive image contributions for that membership year and such payments will continue to be deducted from my payroll check(s).

Id. (emphasis added). These two provisions are followed by two signature blocks – one for the CCEA signing member, and another for CCEA. *Id.*

Tellingly, the Membership Authorization Form does not provide signature lines for NSEA or NEA because they are not parties to the Form. *See id.* The presence of the NSEA and NEA logos on the form does not constitute a contractual commitment as argued by appellants.

By these clear terms, one sees everything necessary to show that the NSEA Parties have no property rights in dues in CCEA's hands. The CCEA Membership Authorization Form:

- Does not enroll a member in NSEA or NEA;
- Does not authorize NSEA or NEA to act on the members' behalf;
- Does not authorize payroll deduction to be paid to NSEA or NEA; and
- Does not entitle NSEA or NEA to membership dues, let alone, delineate any specific amount of member dues for NSEA or NEA.

See id.

The NSEA Parties do not (and cannot) point to any contractual provisions in the Membership Authorization Form that would contradict any of the foregoing. In short, NSEA and NEA are indisputably not parties to the Membership Authorization Form and are not entitled to membership dues under the contract solely between CCEA and its members. Accordingly, CCEA's Membership Authorization Form does

not provide NSEA with an ownership interest in the membership dues. The NSEA Parties' claim for conversion must fail.

C. Any Supposed Unity of Membership and Application of NSEA/NEA Bylaws Ended When CCEA Terminated the Parties' Contractual Relationship.

There is finally a fatal contradiction within any argument that the NSEA Parties could have property rights in CCEA dues. It is this: claiming an entitlement to a share of CCEA's dues, the NSEA Parties claim unity among CCEA's contract with its members, and CCEA's separate contract with NSEA. (Op.Br. 45-47). Yet any such unity was shattered when CCEA terminated the Service Agreement and the Dues Transmittal Agreement and they consequently expired on August 31, 2017. (VI AA 1027-28). Any duties CCEA owed to NSEA/NEA under the Service Agreement or Dues Transmittal Agreement to collect and/or transmit membership dues ended that day. *Id.* As such, the Disputed Funds were collected at a time when there was indisputably no unified structure among agreements, even if one formerly had existed.

D. CCEA's Statements After September 1, 2017 Recognizing Continued Negotiations Between CCEA and NSEA, and Litigation Between Them, Were Not Recognitions of Ownership Rights in the NSEA Parties.

Seeking to confuse the issue, the NSEA Parties wave at a variety of

statements CCEA made after September 1, 2017, when it was explaining to its teacher-members that it was responsibly escrowing their Disputed Funds pending resolution of the dispute between the CCEA and the NSEA Parties. (Op.Br. 47-48). These statements in no way change the analysis. As both parties repeatedly admit, negotiations for a new dues transmittal agreement and service agreement continued past September 1, 2017. (I AA 59 ¶26; III AA 527, ¶26). During those negotiations, CCEA continued to collect member dues remitted by CCSD with the prospect that the parties would reach a resolution, placing those dues into a restricted account during the interim. (VI AA 1015). Any statement of CCEA ripped from its context in the Opening Brief about "NSEA and NEA dues" creates no entitlement to the funds, as that simply reflected the parties' continued negotiations – which ultimately failed during the fall of 2017 – and the pendency of CCEA's declaratory relief claim.

IV. The District Court Correctly Held that the NSEA Parties' Claim for Unjust Enrichment Similarly Fails.

A. There Is No Unjust Enrichment Because There Is No Impoverishment – It Is Undisputed That NSEA and NEA Provided No Services After September 1, 2017.

This Court should affirm the dismissal of the NSEA Parties' unjust enrichment claim because the claim requires that the NSEA Parties

provide a benefit to the CCEA which it retains – a factor not present here. *See Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 381, 283 P.3d 250, 257 (2012) (unjust enrichment requires plaintiff conferring a benefit on defendant). Here, it is undisputed that NSEA/NEA ceased to perform under the Service Agreement and Dues Transmittal Agreement after September 1, 2017. (VI AA 1027-28). As noted above, the NSEA Parties did not contest this finding below when moving for reconsideration, nor do they on appeal. (*See generally,* I RA 120-139; Op.Br.). They thus waived any challenge to it. *See Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672; *Bisch*, 129 Nev. at 333 n.2, 302 P.3d at 1112. Given that the NSEA Defendants provided nothing of value to CCEA after September 1, 2017, there can be no impoverishment – literally nothing was taken from them. *Leasepartners Corp. v. Robert L. Brooks Tr. Dated Nov. 12, 1975*, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997) (one essential element for unjust enrichment is "a benefit conferred on the defendant by the plaintiff"). Accordingly, their claim lacks any merit.

Considered another way, by failing to act for the benefit of the CCEA Parties after September 1, 2017, the NSEA Parties do not have clean hands in seeking the $4.1 million of Disputed Funds. *See Truck*

Ins. Exch. v. Palmer J. Swanson, Inc., 124 Nev. 629, 637–38, 189 P.3d 656, 662 (2008) ("[H]e who comes into equity must come with clean hands. The doctrine bars relief to a party who has engaged in improper conduct in the matter in which that party is seeking relief."). Either way, there is no impoverishment of the NSEA Parties, nor should equity reward a party that wants $4.1 million for concededly doing nothing whatsoever in exchange for it.

B. The NSEA and NEA Have No Ownership Interest in the Membership Dues.

Unjust enrichment requires "a benefit conferred on the defendant by the plaintiff, appreciation by the defendant of such benefit, and acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof." *Leasepartners Corp. v. Robert L. Brooks Tr. Dated Nov. 12, 1975*, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997). Thus, like a claim for conversion, the claimant must have some underlying right to the property/funds at issue. *See id.* (one of the essential elements for unjust enrichment is "a benefit conferred on the defendant ***by the plaintiff***") (emphasis added). But as explained in Section IV, *supra*, at 52-58, the NSEA Parties had no entitlement to the

funds. This claim too fails.

V. The District Court Correctly Held that Appellants' Claim for Fraud Fails.

A. The Claim That CCEA – Which Is Fighting to Return the Disputed Funds to All its Members – Defrauded Teachers of Those Funds Fails for Lack of Damages.

The district court was right to dismiss the fraud claim of four teachers who joined in the NSEA Parties' suit. Their claim for fraud is that CCEA failed to disclose to them an intention to disaffiliate from NSEA/NEA until it was too late to drop out of CCEA for the 2017-18 year, and thus made fraudulent representations about the services CCEA would provide. They further claim that but for those supposed misrepresentations, they would not have renewed their membership with CCEA in 2017-18. But even if all that is true, they still have no claim for fraud, one of the elements of which is "damage to the plaintiff resulting from" their justifiable reliance on a false statement. *Bulbman, Inc. v. Nevada Bell,* 108 Nev. 105, 110–11, 825 P.2d 588, 592 (1992).

The supposed damage to these four CCEA members was that they were damaged "in the amount of the NSEA and NEA dues that CCEA obtained from them by their fraudulent conduct." (III AA 540, ¶90). This specifically included their portion of the Disputed Funds – contained

within the CCEA dues they paid for the 2017-2018 membership year. (I RA 177-78). Accepting for the sake of argument the NSEA Parties' characterization of the dues these members paid as accurate, their full year of dues – per the (expired) Dues Transmittal Agreement, and inclusive of CCEA, NSEA, and NEA dues – was $810.50 for the membership year. (I RA 159). Of that total, $189 was to be sent to the NEA, $377.66 was to be sent to the NSEA, and $243.84 was for CCEA. (*Id.*)

As is patent in this record, CCEA is fighting to give back to all CCEA members, including these four plaintiffs, these Disputed Funds. The CCEA Parties expressly offered in briefing before the district court (not "open court," *compare* Op.Br. 51), to return to each of the four Teacher Parties the full $810.50. (AA VII 1253). This is, per the NSEA Parties, all of the membership dues collected by CCEA for the 2017-2018 membership year from each of the Teacher Parties. (I RA 159). This refund wholly nullified any damages sought under this claim for fraud, The district court properly granted summary judgment for CCEA.

B. The Four Teachers Among the NSEA Parties Are Authors of the Damage of Which They Complain in This Court.

There is no damage to be contrived from CCEA's supposed improper retention of the $810.50, because the NSEA Parties – remarkably, including the four teachers who have joined the NSEA Parties as Plaintiffs – are the authors of the damage of which they complain. The NSEA Parties – including the four plaintiff teachers – contend that "[i]t is also undisputed that CCEA has not repaid the teachers the damages arising from CCEA's fraud. Instead, CCEA has only given them a *promise* of repayment." (Op.Br. 52 (NSEA's emphasis).) This is a bit like Godzilla complaining that it is undisputed that Tokyo lies in ruins.

The NSEA and the NEA asked the district court to order that all disputed dues were to remain in a restricted account absent a subsequent order from the district court. (III AA 518-19). CCEA moved the district court for permission to disgorge those funds to CCEA's teacher-members. (I RA 93-109). Then the NSEA Parties – ***remarkably, including these four teachers*** – ***opposed returning the funds to the teachers***, and fought CCEA's motion. (I RA 140-155). The district court initially entered an order permitting the disgorgement. (IX AA 1548-49). But

then, the NSEA Parties, ***again including the same four teachers***, moved to stay enforcement of the district court's order to ensure that CCEA could not disperse those funds to teachers. (I RA 203-222). Over CCEA's objection, the district court granted that motion. (IX AA 1582).

Judicial estoppel should bar any claim of purported "damage" here. The stay won by the NSEA Parties and these four teachers today prevents the disbursal of funds to all teachers, including the four individual plaintiffs. Because the NSEA Parties – including these four teachers – won a stay, thus keeping the funds from being returned to the teachers, they should not be heard in this Court to cite that very problem as evidence of supposed "damage." *See Marcuse v. Del Webb Communities, Inc.*, 123 Nev. 278, 287-88, 163 P.3d 462, 468-69 (2007) (explaining how judicial estoppel bars party from taking two totally inconsistent positions where court accepted position in prior proceeding).

C. This Court Should Affirm the District Court's Dismissal of NSEA's Infirm and Unsupported Claim for Punitive Damages, Because There Is No Evidence of "Oppression, Fraud, or Malice" on CCEA's part.

This Court should affirm because there is simply no evidence – much less the statutorily required high bar of "clear and convincing evidence" – of "oppression, fraud, or malice" that would be needed to

support a claim for punitive damages. *See* NRS 42.005 (setting forth standard for proof of punitive damages).

1. *The theory that teachers whose refund of their share of the Disputed Funds has been blocked by NSEA are victims of CCEA "oppression, fraud, or malice" is insupportable in Nevada law.*

Demonstrating hubris and a deep lack of consistency, the same NSEA Parties who moved the district court to stop CCEA from distributing the Disputed Funds to teachers even rely on the nondistribution of the funds as a supposed demonstration of the oppressive conduct required for punitive damages. Seeking to revive their dismissed claim for punitive damages, NSEA unironically asserts that "[i]t is also undisputed that CCEA has not repaid the teachers the damages arising from" what NSEA calls "CCEA's fraud," which are their share of the Disputed Funds. (Op.Br. 52). But it is NSEA's fault that is so – it persuaded the district court to stay the judgment pending appeal to stop CCEA from returning the Disputed Funds to teachers, over CCEA's opposition. (IX AA 1582).

Appellants' citation to *S.J. Amoroso Const. Co. v. Lazovich & Lazovich*, 107 Nev. 294, 810 P.2d 775 (1991) is puzzling and self-defeating. In that case, this Court reiterated a rule fatal to the claim for

punitive damages here: "[p]unitive damages are not available on the count for breach of contract and are precluded in the absence of compensatory damages for the claim sustaining the punitive award." *Id.* at 298, 810 P.2d at 777. That rule is fatal to a claim for punitive damages because there are no compensatory damages here. The claimed damages are the Disputed Funds, which CCEA is litigating to give back to the teachers over the NSEA Parties' continuing objection. (III AA 518-519; IX AA 1582 at ¶¶ 16-18). Appellants cannot with one hand prevent CCEA from paying the teachers the Disputed Funds, and then claim outrage, malice, and oppression from their sequestration owing to the actions of appellants – yet that is precisely what the Opening Brief does.

Fullington v. Equilon Enterprises, LLC is no more helpful to Appellants. (*See* Op.Br. 52, citing 210 Cal. App. 4th 667, 690, 148 Cal. Rptr. 3d 434, 451 (2012).) By rejecting the rule that "compensable actual damages are an absolute prerequisite to an award of punitive damages," *Fullington* very directly contradicts this Court's teaching in *S.J. Amoroso*, quoted in the preceding paragraph. *See id.* at 689, 148 Cal. Rptr. 3d at 450.

2. ***Appellants do not point to facts upon which a verdict for punitive damages could properly rest.***

The law sets a high bar for punitive damages. Proof of simple negligence will not support an award of punitive damages, which instead requires "clear and convincing" evidence that a defendant acted with "oppression, fraud or malice, express or implied." Nev. Rev. Stat. § 42.005(1). The "clear and convincing evidence" standard "requires a finding of high probability." *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.*, 93 Cal. Rptr. 2d 364, 394 (2000). Evidence must be "'so clear as to leave no substantial doubt'" and "'sufficiently strong to command the unhesitating assent of every reasonable mind.'" *Id.* at 394 (quoting *In re Angelia P.*, 171 Cal. Rptr. 637 (1981)). And the trial court, as below, is the gatekeeper on this issue, determining whether the plaintiff has identified substantial evidence of oppression, fraud, or malice supporting a punitive damages instruction. *Dillard Dept Stores, Inc. v. Beckwith,* 115 Nev. 372, 380, 989 P.2d 882, 887 (1999).

Applying Nevada's demanding standard, this Court has often found claims for punitive damages wanting. *First Interstate Bank of Nev. v. Jafbros Auto Body*, 106 Nev. 54, 57, 787 P.2d 765, 767 (1990) (reversing punitive damages award where evidence "support[ed] an inference that

[the defendant] was negligent to the point of being unconscionably irresponsible," but there was no evidence of "oppression, fraud or malice."); *Maduike v. Agency Rent-A-Car*, 114 Nev. 1, 5-6, 953 P.2d 24, 26-27 (1998) (affirming the dismissal of plaintiffs' punitive damages claim: "the district court could not have reasonably inferred from the evidence that [the defendant] subjected the [plaintiffs] to 'cruel and unjust hardship with conscious disregard of the rights of the person'"); *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 484, 851 P.2d 459, 463 (1993) (affirming dismissal of punitive damages claim where there was no evidence of malice); *Jeep Corp.,* 101 Nev. at 650-51, 708 P.2d at 304 (affirming refusal to instruct on punitive damages because no evidence showed 'conscious disregard' of the rights of consumers); *Warmbrodt*, 100 Nev. at 709; 692 P.2d at 1286 (affirming refusal to instruct on punitive damages because of lack of evidence of "ill-will, or a desire to do harm for the mere satisfaction of doing it"); *Village Development Co. v. Filice*, 90 Nev. 305, 315, 526 P.2d 83, 89 (1974) (reversing punitive damages award because although "[t]he record contains evidence to show negligence and unconscionable irresponsibility . . . we find insufficient evidence to support a finding of 'oppression, fraud or malice'").

Here, Appellants offer a terse kernel of six lines of text on the final page of their brief as their proffer to this Court of the merit of the punitive damages claim. (Op.Br. 54). This is so short as to arguably constitute waiver. *See Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672. And the kernel lacks merit. Appellants simply assert with self-serving affidavits that CCEA intended to pull out of NSEA and NEA. (Op.Br. 54). Self-serving affidavits aren't enough to create issues of fact. *See Serrett v. Kimber*, 110 Nev. 486, 493, 874 P.2d 747, 751 (1994) (citing *Clauson v. Lloyd*, 103 Nev. 432, 743 P.2d 631 (1987)); *F.T.C. v. Publishing Clearing House, Inc.*, 104 F.3d 1168. 1171 (9th Cir. 1997). Worse yet, the record is replete with contradictory admissions by the NSEA Parties that CCEA tried to negotiate a new contract with NSEA/NEA well into September 2017 – months after CCEA purportedly knew that it was going to "jeopardize its members' good standing in NSEA and NEA." (*See* Op.Br. 50; (I AA 59; III AA 527).) If they needed more facts, the NSEA Parties did not request 56(d) relief to conduct additional discovery. There was simply nothing here that could have been clear and convincing evidence that punitive damages were justified.

VI. The NSEA Parties Abandoned their Claim of an Unauthorized Dues Increase (Count IX).

The district court also granted the CCEA Parties summary judgment on the NSEA Parties' claim for an unauthorized mid-year increase in CCEA dues. (IX AA 1567-68). The NSEA Parties, including specifically the four teachers among them, waived this claim by not raising it in their Opening Brief. *Powell*, 127 Nev. at 161 n.3, 252 P.3d at 672 ("Issues not raised in an appellant's opening brief are deemed waived."); *Bisch*, 129 Nev. at 333 n.2, 302 P.3d at 1112 (same). This Court should affirm the district court's dismissal of it.

Conclusion

For all of these reasons, this Court should affirm.

DATED: April 3, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that the **ANSWERING BRIEF** complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2010 processing program in 14-point Century Schoolbook type style. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it contains approximately 13,979 words.

DATED: April 3, 2020

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Finally, I hereby certify that I have read the **ANSWERING BRIEF** and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On April 3, 2020, I caused to be served a true and correct copy of the foregoing **ANSWERING BRIEF** upon the following by the method indicated:

☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below:

/s/ Maricris Williams
An Employee of SNELL & WILMER L.L.P.

4828-8919-2889