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.

Electronically Filed
Apr 03 2020 01:41 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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

RESPONDENTS' SUPPLEMENTAL APPENDIX VOL. I

Andrew M. Jacobs
Nevada Bar No. 12787
Kelly H. Dove
Nevada Bar No. 10569
John S. Delikanakis
Nevada Bar No. 5928
Bradley T. Austin
Nevada Bar No. 13064
Michael Paretti
Nevada Bar No. 13926
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway,
Suite 1100
Las Vegas, NV 89169
Telephone: (702) 784-5200
Facsimile: (702) 784-5252

Joel D'Alba
Admitted *Pro Hac Vice*
ASHER, GITTLER & D'ALBA, LTD.
200 W. Jackson Blvd., Ste. 720
Chicago, IL 60606
Telephone: (312) 263-1500
Facsimile: (312) 263-1520

Attorneys for Respondents

INDEX

INDEX

INDEX

Document Name	Date Filed	Vol.	RA NO.
Exhibit 9 – Letter from Vikki Courtney and Theo Small to Lily Eskelsen Garcia dated April 26, 2018		I	RA048-RA049
Exhibit 11 – Affidavit of John Vellardita in Support of Plaintiffs' Motion for Partial Summary Judgment, dated June 518, 2018		I	RA050-RA055
Plaintiffs NSEA's and NEA's Motion for Partial Summary Judgment[1]	11/09/2018	I	RA058-RA092

DATED: April 3, 2020

SNELL & WILMER L.L.P.

/s/ Andrew M. Jacobs

Andrew M. Jacobs (Nevada Bar No. 12787)
Kelly H. Dove (Nevada Bar No. 10569)
John S. Delikanakis (Nevada Bar No. 5928)
Bradley T. Austin (Nevada Bar No. 13064)
Michael Paretti (Nevada Bar No. 13926)
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
ajacobs@swlaw.com
kdove@swlaw.com
jdelikanakis@swlaw.com
baustin@swlaw.com
mparetti@swlaw.com

[1] This document was submitted under seal in its entirety for CCEA's benefit due to the inclusion of confidential CCEA bank records. Because CCEA does not include those confidential exhibits in the instant appendix, and because the included document does not contain account or social security numbers, CCEA is not submitting this document under seal.

ASHER, GITTLER & D'ALBA, LTD.

Joel D'Alba (Admitted *Pro Hac Vice)*
200 W. Jackson Blvd., Ste. 720
Chicago, IL 60606
Telephone: (312) 263-1500
Facsimile: (312) 263-1520
jad@ulaw.com
Attorneys for Respondents

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 **RESPONDENTS' SUPPLEMENTAL APPENDIX VOL. I** 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.

PWAT
Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
BOIES SCHILLER FLEXNER LLP
300 South Fourth Street, Suite 800
Las Vegas, NV 89101
Tel.: (702) 382-7300
Fax: (702) 382-2755
rpocker@bsfllp.com
plal@bsfllp.com

John M. West*
Matthew Clash-Drexler*
James Graham Lake*
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
Tel.: (202) 842-2600
Fax: (202) 842-1888
jwest@bredhoff.com
mcdrexler@bredhoff.com
glake@bredhoff.com
* Admitted pro hac vice

Attorneys for Plaintiffs

DISTRICT COURT
EIGHTH JUDICIAL DISTRICT
CLARK COUNTY, NEVADA

NEVADA STATE EDUCATION ASSOCIATION; NATIONAL EDUCATION ASSOCIATION; RUBEN MURILLO; ROBERT BENSON; DIANE DI ARCHANGEL; AND JASON WYCOFF, Plaintiffs, vs. CLARK COUNTY EDUCATION ASSOCIATION; JOHN VELLARDITA; AND VICTORIA COURTNEY, Defendants.	Case No.: A-17-761884-C DEPT. NO.: 31 **APPLICATION FOR ORDER DIRECTING THE ISSUANCE OF A PREJUDGMENT WRIT OF ATTACHMENT WITH NOTICE**

COME NOW Plaintiffs National Education Association ("NEA") and Nevada State Education Association ("NSEA") (collectively "Union Plaintiffs"), by and through their attorneys of record, and move this Court, pursuant to Nev. Rev. Stat. §§ 31.010 *et seq.*, for an order directing the clerk to issue a writ of attachment as security for the satisfaction of a judgment that may be recovered by Union Plaintiffs. This Application is brought under Nev. Rev. Stat. § 31.013, for an order to issue after notice and hearing. Plaintiffs respectfully request that the Court issue an order directed to defendant Clark County Education Association ("CCEA") to show cause why the order for attachment should not be issued. *See* Nev. Rev. Stat. § 31.024.

This Application is made and based upon the following Points and Authorities, the Affidavit of Brian Lee, attached hereto as Exhibit 1, the exhibits included in the foregoing, and pleadings of the parties previously filed in this Court.

Dated this 30th day of March, 2018.

BOIES SCHILLER FLEXNER LLP

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
300 South Fourth Street, Suite 800
Las Vegas, NV 89101

John M. West*
Matthew Clash-Drexler*
James Graham Lake*
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
* Admitted pro hac vice

Attorneys for Plaintiffs

POINTS AND AUTHORITIES

I. Background of the Case, Plaintiffs' Claims and Prior Proceedings

A. This suit concerns the membership dues that union-represented teachers in Clark County pay to the three organizations to which they belong – Plaintiffs National Education Association ("NEA") and Nevada State Education Association ("NSEA"), and Defendant Clark County Education Association ("CCEA"). Union members, as part of their membership in NSEA and NEA, enjoy a variety of benefits and services offered by the state and national unions, and the NEA and NSEA membership dues fund the organizations' ability to provide them. For decades, members have paid their NSEA and NEA dues to CCEA (generally by payroll deduction), which then remitted these dues to NSEA. Despite CCEA's contractual obligations to continue remitting these dues, CCEA has since September 2017 refused to surrender to Union Plaintiffs what are millions of dollars of NEA and NSEA membership dues deducted by the Clark County School District ("School District") pursuant to Clark County teachers' authorizations; rather, CCEA has been diverting the NEA/NSEA dues monies into bank accounts under CCEA's control. To address this wrongful misappropriation of NEA and NSEA dues, dues that the unions' members intend to be paid to NEA and NSEA in order, *inter alia*, to fund the services and benefits they receive from their state and national unions, Plaintiffs on September 21, 2017 filed a Complaint, alleging that CCEA's actions (and those of its executive officers) violate multiple contractual obligations to NSEA and NEA; the complaint also alleged that this wrongful conduct constitutes unjust enrichment, conversion, and fraud.

On October 10, 2017, Defendants filed a partial motion to dismiss as to certain individual defendants and as to certain of the non-contractual claims. The Court, by order dated February 7, 2018, denied the motion to dismiss, except to the extent that the Court agreed that the original complaint failed to plead fraud with the particularity required by Rule 9(b) of the Nevada Rules of Civil Procedure; as to that count the Court permitted Plaintiffs to replead in an amended complaint, which Plaintiffs filed on February 27, 2018. Defendants have answered the Amended Complaint, filed certain counterclaims, and again have challenged the fraud claim, but only the

fraud claim, in a second motion to dismiss. During this entire period, CCEA has continued to receive and divert into its bank account the NEA and NSEA dues deducted on behalf of NEA and NSEA members by the School District. And, as explained below, not only is CCEA contractually obligated to have remitted the dues that it has instead diverted to accounts under its own control, it has been—and continues to be—unforthcoming, inconsistent, and opaque as to the location of the dues, the amounts of NEA and NSEA dues it has maintained in ostensibly secure CCEA "escrow" accounts, or any other information regarding the security of these monies that indisputably belong to NSEA and NEA, respectively.

B. The facts relevant to the instant motion are as follows: CCEA, which represents teachers and other school personnel employed by the School District, is a local affiliate of NSEA and NEA. Lee Affidavit ¶ 3. NEA, NSEA and CCEA have unified membership, which means that by joining CCEA a member joins NSEA and NEA as well, becoming a member of all three organizations, entitled to all the benefits of membership upon paying membership dues to all three associations. *Id.* ¶ 4. NSEA and NEA set their own membership dues rates on a uniform statewide or national basis, while CCEA establishes separately its own membership dues. *Id.* ¶ 4. For the current 2017-2018 school year, beginning September 1, 2017, each full-time active member pays NEA $189.00 and NSEA $377.66 annually. For nearly all members, dues are, pursuant to dues deduction authorization to the School District, paid in twice monthly increments throughout the year. *Id.* ¶ 5; Defs' Answer to Am. Complaint ¶13.

For decades, CCEA has served as the collection agent for NSEA, collecting and transmitting NSEA and NEA dues to NSEA (which in turn transmits NEA dues to NEA). Lee Aff. ¶ 7. The School District deducts the cumulative membership dues owed to CCEA, NSEA, and NEA from members' paychecks and transmits the deducted funds to CCEA. *Id.* ¶ 7. CCEA has no independent right to the NSEA and NEA dues transmitted to it by the School District. *Id.* ¶ 8. Since at least 1979, the mechanism by which CCEA is obligated to pay over to NSEA the NSEA and NEA membership dues money transmitted to it by the School District has been a Dues Transmittal Agreement, an agreement which has not been terminated by its terms and

remains in effect between CCEA and NSEA. *Id.* ¶ 10. Indeed, CCEA is contractually obligated to maintain such a dues transmittal agreement as an NSEA affiliate under the NSEA Bylaws, which provide that a local affiliate such as CCEA is to maintain a dues transmittal contract with NSEA for the purpose of transmitting dues payments to NSEA. *Id.* ¶ 11. Similarly, as a local affiliate of NEA, CCEA is bound by a contractual "responsibility for transmitting state and [NEA] dues to state affiliates on a contractual basis." *Id.* ¶ 12.

Notwithstanding these contractual obligations, CCEA in September 2017 ceased transmitting to NSEA the NEA and NSEA dues it received each month from the School District. *Id.* ¶ 13. Instead, CCEA has kept all of its members' dues payments – including the portions deducted by the School District for NEA and NSEA. *Id.* ¶ 13. Given that for the 2017-2018 school year, Plaintiffs believe there are 10,768 dues paying members as to which CCEA is refusing to remit the NSEA and NEA dues, the total amount Plaintiffs are due for the 2017-2018 school year, and as to which CCEA is contractually liable based on its failure to transmit, is approximately $6,101,795 ($189 NEA dues and $377.66 NSEA dues, times 10,768 members). *Id.* ¶ 14. To date, Plaintiffs believe that the School District has already transferred 15 of the 24 annual bi-monthly dues deductions to CCEA, of which CCEA has failed to remit to NSEA the dues deducted for NSEA and NEA. *Id.* ¶ 15. Based on these arithmetic calculations, the amount of NSEA and NEA dues CCEA has diverted to itself, and refused to remit to NSEA, is currently at least $3,813,621 – and increasing by more than one half million dollars every month. *Id.* ¶ 15.

Two additional points bear mentioning. Since the beginning of the lawsuit, Plaintiffs have sought to insure that the monies CCEA has collected but is maintaining wrongfully in its own coffers be secure to satisfy a judgment. *Id.* ¶ 14. Until very recently, CCEA has represented to Plaintiffs and to the Court that the dues were being deposited into what it called an "escrow" account, but CCEA refused to provide Plaintiffs with evidence that the monies were indeed in a true escrow account under independent control of an escrow agent, and to provide any details of the amounts deposited into this account, or the controls on the account. *Id.* ¶ 17. The limited information CCEA has provided indicate that NEA and NSEA dues moneys are *not* in an escrow

account, but rather (at best) in an account with unknown account holders in a "Credits Only status" that may be removed "at the request of an authorized signer on the account." *Id.* ¶ 17b; *see generally In re ABW, Inc.*, 29 B.R. 88 (D. Nev. 1983) ("an escrow requires not only that the depositor relinquish control over the subject of the escrow (there, the funds), but also that the third party be given instructions and agree to act as an escrow agent"). And, more recently, Defendants have effectively conceded that the monies CCEA has received that were "deducted from employee paychecks for NSEA and NEA" have *not*, in fact, been placed in a true escrow account as had been previously represented. Instead, in its most recent pleading filed in this Court CCEA now states that "those funds have been placed into a restricted account for the duration of this litigation." Answer and Counterclaims to Am. Comp. (filed March 16, 2018), at 25); *compare* Answer to Complaint (filed October 30, 2017), at 14 ("those funds have been placed into an *escrow account* for the duration of this litigation") (emphasis added); *see also* Joint Early Case Conference Report (filed February 22, 2018), at 4 (repeating, as a defense against Plaintiffs' claims, that Defendants have placed the NEA and NSEA dues "into an escrow account"). On information and belief, the NSEA and NEA dues monies are in fact maintained in accounts in CCEA's name and under CCEA's control. *Id.* ¶ 17a, Ex. E.

At the same time as CCEA holds millions of dollars belonging to NEA and NSEA in its own accounts, CCEA's financial situation appears perilous. Based on CCEA's own recent budget report, its expenses for the 2017-2018 year reflect a net shortfall of over $2,000,000 on a budget of less than $6,000,000. *Id.* ¶ 18. Moreover, the same report reflects anticipated "reimbursements" of more than $750,000 from NSEA, revenue that CCEA acknowledges it has not received. *Id.* ¶ 18. Based on the foregoing information, to the extent CCEA has not itself spent or wasted any of the NSEA and NEA dues it was obligated to remit, it appears to be maintaining in accounts in its own name nearly four million dollars of NEA and NSEA dues – monies that are at risk of being spent by CCEA to meet its other financial obligations, and that are subject to attachment or lien by any CCEA creditor.

II. Legal Analysis Applicable to Granting a Writ of Attachment With Notice

A. Statutory Requirements for Issuing a Writ of Attachment

At any time after issuing a summons, plaintiffs "may apply to the court for an order directing the clerk to issue a writ of attachment and thereby cause the property of the defendant to be attached as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment as provided in this chapter." Nev. Rev. Stat. § 31.010. Courts may issue a writ of attachment, *inter alia*, in (1) "an action . . . upon a contract, express or implied, for the direct payment of money" if the "contract is not secured by mortgage, lien or pledge upon real or personal property situated in this state"; (2) "[i]n any case where the attachment of the property of the defendant is allowed pursuant to this chapter or [any] other provision of law"; or (3) "[i]n any other case where the court finds that extraordinary circumstances exist which will make it improbable for the plaintiff to reach the property of the defendant by execution after the judgment has been entered." Nev. Rev. Stat. § 31.013. Moreover, a court may issue a writ of attachment *even without notice and hearing* in "an action for the recovery of the value of personal property, where such personal property is owned by the plaintiff and has been taken or converted by the defendant without the consent of the plaintiff." Nev. Rev. Stat. § 31.017(3).

Entitlement to a writ of attachment requires compliance with the provisions of Nevada Revised Statutes section 31.020(1) and (2), which set forth the requirements for the Plaintiffs' supporting affidavit, providing as follows:

> (a) Set forth clearly the nature of the plaintiff's claim for relief and that the same is valid.
> (b) Set forth the amount which the affiant believes the plaintiff is entitled to recover from the defendant, and if there is more than one plaintiff or more than one defendant, the amount the affiant believes each plaintiff

is entitled to recover or the amount that the plaintiff is entitled to recover from each defendant.

(c) Describe in reasonable and clear detail all the facts which show the existence of any one of the grounds for an attachment without notice to the defendant.

(d) Describe in reasonable detail the money or property sought to be attached and the location thereof if known.

(e) If the property sought to be attached is other than money, set forth to the best knowledge and information of the affiant, the value of such property less any prior liens or encumbrances.

(f) Name all third persons upon whom a writ of garnishment in aid of the writ of attachment will be served.

(g) In an action upon a foreign judgment attach a copy of the judgment to the affidavit for attachment as an exhibit.

(h) State whether, to the best information and belief of the affiant, the money or property sought to be attached is exempt from execution.

2. All applications to the court for an order directing the clerk to issue a writ of attachment with notice to the defendant shall be accompanied by an affidavit setting forth the item required by subsection 1, except that such affidavit may show the existence of any one of the grounds for attachment with notice.

Nev. Rev. Stat. § 31.020.

As demonstrated by the affidavit of Brian Lee, attached hereto as Exhibit 1, Plaintiffs NSEA and NEA satisfy the statutory requirements to support issuance of a writ of attachment with notice and hearing, and (although Plaintiffs do not seek to proceed without a hearing) would even satisfy the requirements of issuing a writ of attachment without notice and hearing.

B. Plaintiffs Have Satisfied the Statutory Requirements for Issuing the Writ

The facts set out in the affidavits are recited above and support the statutory requirements for issuing the writ of attachment as follows:

a. The nature of the plaintiffs' claim and that the same is valid

Since 1979, CCEA has been a party to a Dues Transmittal Agreement that requires it to remit to NSEA the NSEA and NEA portions of dues collected from members through the dues deduction process. As an affiliate of NSEA and NEA, CCEA has contractual responsibility to

pay over the NEA and NSEA dues on a contractual basis via monthly transmittal of the collected dues to NSEA. Since August 2017, CCEA has collected more than half of the members' NEA and NSEA dues transmitted to CCEA by the School District, but has not paid over any of these monies, as it is legally required to do, to NSEA or to NEA. Rather, it has converted the NEA and NSEA dues by depositing these monies in accounts under its control. On information and belief it will continue to do so with future collections from the School District until ordered by this Court to stop and pay over the NEA and NSEA dues as to which CCEA has no legal right.

b. The amount that the affiant believes the plaintiff is entitled to recover from the defendant, and if there is more than one plaintiff or more than one defendant, the amount the affiant believes each plaintiff is entitled to recover or the amount the affiant believes each plaintiff is entitled to recover from each defendant.

Calculations of the NSEA and NEA dues to be collected by CCEA for the 2017-2018 school year, which CCEA is refusing to remit to NSEA and has converted (or will convert upon transmittal to CCEA by the School District) into accounts in its own name totals $6,101,794.88. Upon information and belief the amount of money currently in CCEA's possession that NSEA is entitled to recover on its own behalf due to CCEA's ongoing breaches and conversions equals $2,541,651.80, and the amount NEA is entitled to recover on its own behalf is $1,271,970. Upon information and belief, the total NEA dues for CCEA members in the 2017-2018 school year is $2,035,152 and the NSEA dues $4,066,642.

c. The facts which show the existence of any one of the grounds for an attachment with notice to the defendant

Although Union Plaintiffs need meet only one of the grounds set out in Nev. Rev. Stat. § 31.013, the facts set out in Mr. Lee's Affidavit, as supplemented by exhibits thereto and pleadings filed with the Court, shows the existence of multiple grounds for issuing a writ in these

circumstances. *First*, Union Plaintiffs' claims rest, *inter alia*, "upon a contract, express or implied, for the direct payment of money." Specifically, the Dues Transmittal Agreement, attached to Mr. Lee's Affidavit, requires CCEA to transmit "to the NSEA on a monthly basis" the "NSEA and NEA Membership Dues." First entered into in 1979, the Agreement provides that it "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." No written termination of the Dues Transmittal Agreement has been made by either party and the Agreement remains in effect. Moreover, reinforcing the continuing contractual obligation to pay over the NEA and NSEA dues moneys collected from members, the NSEA Bylaws and the NEA Constitution, both of which constitute contracts between the parties, *see generally United Association of Journeymen v. Local 334, United Association of Journeymen*, 452 U.S. 615, 620-21 (1981), also require CCEA to maintain a contractual obligation to remit the union dues collected for NEA and NSEA.

Second, section 31.013(2) provides that a writ of attachment is appropriate if "allowed pursuant to this chapter or other provision of law." Nev. Rev. Stat. § 31.013(2). One of the provisions of Chapter 31, section 31.017(3), permits issuing a writ of attachment in "an action for the recovery of the value of personal property, where such personal property is owned by the plaintiff and has been *taken or converted* by the defendant without the consent of the plaintiff." Nev. Rev. Stat. § 31.017(3) (emphasis added). Here, Plaintiffs have, in Count Six of the Amended Complaint, stated a claim for conversion. On the facts averred in Mr. Lee's Affidavit, the dues that CCEA has kept in its own account and refused to transmit to NSEA are the personal property respectively of NSEA and NEA. Indeed, Defendants do not seriously contest these facts: in their Second Affirmative Defense to Plaintiffs' Amended Complaint, Defendants state

only that CCEA has not "exercised dominion or control over the dues payments deducted from employee paychecks *for NSEA and NEA* because those funds *have been placed* into a restricted account for the duration of this litigation." Answer and Counterclaims to Am. Comp. (filed March 16, 2018) (emphasis added). While CCEA may quibble (spuriously, we believe) about whether its actions technically constitute the tort of "conversion," it admits that a portion of the monies it has received and continues to receive from the School District – and which it refuses to transmit to NSEA but instead retains in an account under its control – are membership dues intended for NSEA and NEA. *See* Counterclaim (filed March 16, 2018), ¶ 13. Instead of transmitting the dues to the proper owners of the funds, CCEA has *taken* the dues and deposited them into its own accounts without permission. Nev. Rev. Stat. § 31.017(3) provides an additional and separate basis to issue the prejudgment writ of attachment as to the moneys already taken into CCEA's possession.

Third and finally, "extraordinary circumstances exist which will make it improbable for the plaintiff to reach the property of the defendant by execution after the judgment has been entered." Nev. Rev. Stat. § 31.013. This is so because, as set out in the attached affidavits, and described in greater detail above, CCEA has not been forthright with the Plaintiffs or with the Court regarding what it has done with the NEA and NSEA dues it has collected. CCEA first told Plaintiffs and represented to the Court that the funds were being placed in an "escrow" account, but when challenged to provide adequate proof of the account, CCEA has refused either to give evidence that the account is in fact an "escrow" account, or to provide information about the amounts of or control over the NEA and NSEA dues moneys placed and maintained in any CCEA account. Indeed, in its most recent pleading CCEA has deleted the assertion that these funds are in an "escrow" account, and now characterizes that account as a "restricted account"—

albeit one maintained in its own name and subject to its control. These facts raise a palpable suspicion that the property at issue may be diverted before judgment, and especially so when combined with the facts set out in attached affidavits of CCEA's financial difficulties, including its own representations that it is currently operating at a projected budget shortfall of more than $2,000,000 for the 2017-2018 budget year, up sharply from $405,124 for the prior budget year and $118,686 for the 2015-2016 budget year. *See* Lee Aff. ¶ 18, Ex. H. As such, the facts set out in the attached affidavits demonstrate the sort of extraordinary circumstances that the Court may find that Plaintiffs will be unable to satisfy their claims after judgment, either because CCEA will have spent these monies itself to continue its operations, or because other CCEA creditors will attach the NSEA and NEA dues moneys in CCEA's account before judgment.

d. The money or property sought to be attached and the location thereof if known

As set out above, the dues moneys sought be attached are either in one or more CCEA accounts which, on information and belief, are maintained at a Las Vegas branch of Bank of America Merrill Lynch (including in Account Number #501014714739), or will come into the Clark County School District's possession on a biweekly basis, based on payroll deduction authorizations through which the School District deducts NEA, NSEA, and CCEA dues from members' paychecks and transmits the moneys electronically to CCEA.

* * * * *

As further set out in the attached affidavit, Plaintiffs satisfy all the other relevant provisions of Nev. Rev. Stat. § 31.020, necessary to establish the right to a writ of attachment and appropriate writs of garnishment.

CONCLUSION

Section 31.024 of the Nevada Revised Statutes provides that the method for issuing a writ of attachment with notice and hearing, when the plaintiff's affidavit and other evidence received by the Court satisfy subsection 2 of Nev. Rev. Stat. § 31.024, is through an Order to Show Cause. Union Plaintiffs respectfully submit that they meet the requirements of the statute. Accordingly, Union Plaintiffs request the Court to issue an order pursuant to the terms of section 31.024, directed to Defendant CCEA, to show cause why the order for writ of attachment should not be issued. It is further requested that the Court set the hearing for the Court's earliest available date that is at least 3 days after service of the Order. A proposed Order to Show Cause is attached to this Application as Exhibit 2.

Respectfully submitted,

Dated this 30th day of March, 2018.

BOIES SCHILLER FLEXNER LLP

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
300 South Fourth Street, Suite 800
Las Vegas, NV 89101

John M. West*
Matthew Clash-Drexler*
James Graham Lake*
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
* Admitted pro hac vice

Attorneys for Plaintiffs

OPPS

Richard G. McCracken, Nevada Bar No. 2748
Kimberley C. Weber, Nevada Bar No. 14434
McCRACKEN, STEMERMAN & HOLSBERRY, LLP
1630 South Commerce Street, Suite 1-A
Las Vegas, NV 89102
Tel: (702) 386-5107
rmccracken@msh.law
kweber@msh.law

John S. Delikanakis, Nevada Bar No. 5928
Michael Paretti, Nevada Bar No. 13926
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Tel: (702) 784-5200
jdelikanakis@swlaw.com
mparetti@swlaw.com

Of Counsel:
Joel A. D'Alba
ASHER, GITTLER & D'ALBA, LTD.
200 West Jackson Blvd., Suite 720
Chicago, IL 60606
Tel: (312) 263-1500
jad@ulaw.com

Attorneys for Defendants/Counter-Plaintiffs Clark County Education Association, John Vellardita and Victoria Courtney

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs-Counter Defendants,

And

BRIAN LEE,

Counter-Defendant,

vs.

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

Defendants-Counter Plaintiffs.

Case No.: A-17-761884-C
DEPT. NO.: 31

DEFENDANTS – COUNTER PLAINTIFFS CLARK COUNTY EDUCATION ASSOCIATION'S, JOHN VELLARDITA'S AND VICTORIA COURTNEY'S OPPOSITION TO APPLICATION FOR PREJUDGMENT WRIT OF ATTACHMENT

Defendants/Counterclaimants Clark County Education Association ("CCEA"), John Vellardita ("Vellardita"), and Victoria Courtney ("Courtney", and collectively with CCEA and Vellardita, the "CCEA Parties") by and through their counsel, Snell & Wilmer L.L.P., McCracken Stemerman & Holsberry, LLP, and Asher, Gittler & D'Alba, Ltd., submit their Opposition to Plaintiffs/Counterdefendants Nevada State Edication Association ("NSEA") and Nevada Education Association's ("NEA", and collectively with NSEA, the "Union Parties") Application for a Prejudgment Writ of Attachment and Garnishment (the "Application"). This Opposition is based on the Memorandum of Points and Authorities below, the papers and pleadings on file with the Court, and any oral argument that this Court may entertain on behalf of the CCEA Parties.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Court should decline to issue a prejudgment writ of attachment. The Application is so factually and legally thin (other than a self-serving affidavit of thoughts and suppositions) relative to the extraordinary prejudgment relief sought, that it should be halted now. This is a breach of contract action for money damages between two commercially sophisticated parties that have been established and operating in Nevada for decades. There are claims and counterclaims before the Court. In a brazen attempt to circumvent the litigation process which the Union Parties initiated, they now seek a prejudgment seizure of over six million dollars (their alleged "damages") in CCEA dues that are stored in a restricted account with specific instructions that there can be no withdrawals from the account before completion of this litigation – all for the sole purpose of possibly enforcing an illusory final money judgment in an amount that is unknown and that does not yet exist (and should not exist, given the legally unsupported nature of the Union Parties' claims). This outrageous request is unsupported by any legal analysis whatsoever justifying such drastic action before final judgment. This is an abuse of the prejudgment writ process and a prejudgment writ of attachment should not issue.

II. THE CLAIMS AND COUNTERCLAIMS

This case is a breach of contract dispute between solvent entities—NSEA, NEA, and CCEA. Indeed, the fact that the parties have been litigating their differences in two separate actions within this judicial district demonstrates the parties are both solvent and committed to a final judgment *on the merits*. The core of this dispute is whether CCEA has an ongoing contractual obligation with the Union Parties after the contract was terminated. While the Union Parties claim they are owed more than $6 million in member dues, the Union Parties omit to advise the Court that CCEA exercised its right to terminate the agreement with the Union Parties in September 2017, and that the $6 million constitutes *an entire year's worth* of member dues while the fee dispute has only been pending for months. Nevertheless, in an abundance of caution, CCEA allocated the member dues it collected since September 2017 in a restricted account with specific instructions that there could be no withdrawals from the account until the instant litigation between NSEA and CCEA is resolved. In short, there is no basis for the Union Parties' Application.

On the other hand, the CCEA Parties filed an Amended Counterclaim against the Union Parties, among other, for declaratory relief in the absence of a dues transmittal agreement, a breach of the NSEA bylaws governing due process, a breach of the NSEA bylaws due to Plaintiffs' refusal to seat CCEA members on the NSEA board, retaliation due to the proposed by-law amendment, retaliation due to an ex-post facto change of NSEA's by-laws that would retroactively change the relationship with the CCEA parties, intentional interference with contract, and failure to comply with Nevada law governing the termination of group insurance policies. The CCEA Parties also filed a Motion for Preliminary Injunction pursuant to NRS 33.010 to protect their members from being irreparably harmed and to protect their interests in a judgment that may be entered by this Court that members' dues payments for the Union Parties do not have to be transferred in the absence of a successor dues transmittal agreement negotiated between the parties.

Accordingly, there is no justification for a writ of attachment and garnishment in this case, and the Court should deny the Union Parties' Application.

III. STATEMENT OF FACTS

A. Relationship between the Parties

CCEA is a democratic organization that is the exclusive collective bargaining representative of the licensed professional employees of the Clark County School District ("CCSD") and is the employee organization that serves as the local voice for educators to advance the cause of education, promote professional excellence among educators to protect the rights of educators, advance their interests and welfare, and secure professional autonomy. NSEA is the state wide affiliate of the CCEA. NSEA is not the recognized and exclusive bargaining agent for the School District's licensed professional employees. NEA is the national affiliate of both NSEA and CCEA.

B. The Underlying Dispute between CCEA and NSEA

CCEA has thousands of members, whose dues payments are at the center of this litigation due to a good faith dispute between CCEA and NSEA over the terms of a dues transmittal agreement that expired on September 1, 2017. Members of CCEA pay dues to CCEA that are deducted from their pay checks by their employer, the CCSD, pursuant to a collective bargaining agreement between CCEA and CCSD. Dues payments are directed to CCEA by CCSD. Dues are then transmitted to NSEA and NEA only through a dues transmittal agreement. The terms of the dues transmittal agreement allow either party to terminate and seek to renegotiate the terms of the agreement.

Pursuant to a dues transmittal contract, all dues of CCEA members were deducted from their pay checks and were sent to and collected by CCEA to be transmitted in proportioned amounts to NSEA. CCEA members contributed $377.66 per year per teacher to NSEA, pursuant to the NSEA Policies and $189 per year per teacher to the NEA.

CCEA notified NSEA of its intent to terminate the dues transmittal agreement and negotiate a new agreement on May 3, 2017, in a letter from the CCEA Executive Director to the NSEA Executive Director. *See* May 3, 2017, letter from J. Vellardita to B. Lee, attached hereto as **Exhibit A**. 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 contract, under

which CCEA members' dues payments were being transmitted by CCEA to NSEA. It was set to expire on August 31, 2017. *See* Service Agreement between Nevada State Education Association and the Clark County Education Association, attached hereto as **Exhibit B**.

CCEA again sent NSEA additional notices of its intent to terminate and a desire to renegotiate the contract for dues transmittal on July 17 and August 3, 2017. *See* August 3, 2017, letter from J. Vellardita to B. Lee, attached hereto as **Exhibit C**. These letters, along with the one dated May 3, 2017, effectively terminated the dues transmittal contract. Despite these attempts by CCEA to renegotiate prior to the termination dates of the Service Agreement and Contract for Dues Remittance, NSEA refused to negotiate. Nevertheless, on September 4 and 6, the CCEA Executive Director again requested that the NSEA renegotiate the Service Agreement and a Contract for Dues Remittance. NSEA finally accepted a date to meet on September 18, 2017, more than two weeks after the termination of the Agreements. Representatives of CCEA met for the purpose of negotiating a new dues transmittal agreement, but were told at the table by NSEA representatives that NSEA had no intention of renegotiating an agreement, and one was not reached.

On July 26, 2017, and September 4, 2017, Counter-Defendant Lee asserted that the policies of NSEA provide for affiliate agreements under which dues payments are to be submitted by CCEA to NSEA and that the Service Agreements are no longer available to local affiliates such as CCEA. The definition of affiliate agreements in the NSEA policies does not refer to the payment of dues from a local affiliate. Rather, the affiliate agreement definition refers to "mutual agreements that establish or confirm programs, training and other activities that are not addressed by NSEA policy or governing documents." The affiliate agreement referred to by Counter-Defendant Lee is not a dues transmittal contract that allows for the transmittal of members' dues from CCEA to NSEA. The dues transmittal contract is an agreement that is required by the NSEA Bylaws (Article VIII Section 3 (F)) and governing documents and the NEA Bylaws (Section 2-9).

C. CCEA's Maintenance of Member Dues after Termination of the Dues Transmittal Agreement.

CCEA and NSEA have not yet agreed upon a new dues transmittal agreement. The importance of the dues transmittal agreement is demonstrated in CCEA's Bylaws, which provide that it "shall maintain affiliate status with the NEA and the NSEA under the required procedures of each organization." CCEA Constitution and Bylaws, attached hereto as **Exhibit D** at Article X, Sec. 1; Bylaws of the Nevada State Education Association, attached hereto as **Exhibit E**. However, the dues transmittal agreement expired on September 1, 2017. After the termination of that agreement, CCSD continued to send the employees' dues to CCEA, whereupon the dues were placed into a restricted bank account. The funds in this restricted account are subject to the resolution of this litigation and will be disbursed to NSEA upon completion of this litigation and upon issuance of a letter from counsel for CCEA authorizing the release of the funds, which will be subject to Court approval. *See* Affidavit of John Vellardita, attached hereto as **Exhibit F**; *see also* December 12, 2017, letter from C. Keller to S. Cabayan, attached hereto as **Exhibit G**. Bank of America confirmed and acknowledged receipt of CCEA's letter, again confirming the "credits only" status of the Bank Account. *See* December 12, 2017, e-mail from D. Ferraro to C. Keller, attached hereto as **Exhibit H**. Despite CCEA's affirmative steps of placing its member dues in a restricted account, the Union Parties now seek a prejudgment writ of attachment to those funds.

IV. LEGAL ARGUMENT

A. Legal Standard

NRS 31.010 provides that a party "may apply to the court for an order directing the clerk to issue a writ of attachment and thereby cause the property of the defendant to be attached as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment as provided in this chapter." A writ of attachment is typically limited to instances upon contract for the unsecured payment of money, or where "the court finds that ***extraordinary circumstances exist*** which will make it improbable for the plaintiff to reach the property of the defendant by execution after the judgment has been entered." NRS 31.013 (emphasis added). For example, the district court appropriately issued a prejudgment writ of

attachment where the defendant was a resident of a foreign country, was in default, and due to a recent arrest for tax evasion, was likely to attempt to remove assets from Nevada. *See Juan Gabriel Shows, LLC v. CME Enterprises, Inc.*, 124 Nev. 1483, 238 P.3d 828 (2008).

In order to justify the extraordinary measure of a writ of attachment, the moving party must establish, among other things, that it has a valid claim for relief. NRS 31.020 (1)(a). The Union Parties do not have a valid claim, contractual or otherwise, for relief in the member dues retained by CCEA *after* termination of the dues transmittal contract with NSEA. Furthermore, there are no "extraordinary circumstances" warranting a prejudgment writ of attachment, as CCEA has already self-imposed restrictions above and beyond its duties as a commercial litigant at law by placing its post-September 2017 member dues into a restricted bank account subject to resolution of this litigation. As such, the Court should not grant the Union Parties the extraordinary remedy of a writ of attachment.

B. The Union Parties Do Not Have a Valid Claim to CCEA's Member Dues

The Union Parties' Application rests upon a supposed continuing contractual obligation after CCEA's September 2017 unilateral termination of the agreement to act as the collection agent for NSEA. The Union Parties assume, without any legal support, that a continuing contractual obligation exists between the parties and supports a damages claim in excess of $6 million and justifying it to a writ of attachment and garnishment in that amount.

CCEA unequivocally terminated the dues transmittal agreement. On May 3, 2017, the CCEA Executive Director sent the NSEA Executive Director a letter notifying NSEA of CCEA's desire to terminate the dues transmittal agreement and negotiate a new one. Ex. A. 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 contract, under which CCEA members' dues payments were being transmitted by the CCEA to the NSEA. Again, on July 17 and August 3, 2017, CCEA sent NSEA additional notices of termination, stating its desire to renegotiate the contract for dues transmittal. The dues transmittal agreement expired on August 31, 2017, and to date, the parties have not reached a new dues transmittal agreement.

The Union Parties have not presented any authority to support their position that an

ongoing relationship exists between the parties after the express termination and expiration of the dues transmittal agreement. Where a contract has expired, the parties generally are "released ... from their respective contractual obligations." *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). However, an exception exists where the parties' dispute regards a "right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement." *Granite Constr. Co. v. Remote Energy Sols., LLC*, 403 P.3d 683 (Nev. 2017).

Here, the Service Agreement and the Dues Transmittal Agreement expired on August 31 and September 1, 2017, respectively. NSEA has provided no authority that the dues transmittal agreement survives expiration and termination. As such, no valid enforceable contract exists between the parties, and the Union Parties are not entitled to the extraordinary remedy of a writ of attachment.

C. If the Court Improvidently and Ultimately Grants the Union Parties' Application, it Must Order the Union Parties to Post a Bond No Less Than $6,101,795.

NRS 31.030 provides that if the Court issues a prejudgment writ of attachment, the Court must:

> require a written undertaking on the part of the plaintiff payable in lawful money of the United States in a sum not less than the amount claimed by the plaintiff . . . with two or more sureties to the effect that if the plaintiff dismiss such action or if the defendant recover judgment the plaintiff will pay in lawful money of the United States all costs that may be awarded to the defendant, and all damages which the defendant may sustain by reason of the attachment including attorney's fees, not exceeding the sum specified in the undertaking.

Because the Union Parties seek to attach $6,101,795.00 of CCEA's funds, the Court must require the Union Parties to post a bond in the same amount as security for CCEA if the Court issues a prejudgment writ of attachment and garnishment.

/ / /

/ / /

IV. CONCLUSION

For the foregoing reasons, the CCEA Parties respectfully request that the Court deny the Union Parties' Application for a Prejudgment Writ of Attachment. There are no legal or equitable grounds to support such an extraordinary request in this fairly simple breach of contract case.

DATED this 11th day of April, 2018.

SNELL & WILMER L.L.P.

By: */s/ Michael Paretti*
John S. Delikanakis
Nevada Bar No. 5928
Michael Paretti
Nevada Bar No. 13926
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169

Joel A. D'Alba (*pro hac vice*)
200 West Jackson Blvd., Suite 720
Chicago, IL 60606

Richard G. McCracken
Nevada Bar No. 2748
Kimberley C. Weber
Nevada Bar No. 14434
McCRACKEN, STEMERMAN
& HOLSBERRY, LLP
1630 South Commerce Street, Suite 1-A
Las Vegas, NV 89102

Attorneys for Defendants/Counter-Plaintiffs Clark County Education Association, John Vellardita and Victoria Courtney

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 this date, I caused to be served a true and correct copy of the foregoing **DEFENDANTS – COUNTER PLAINTIFFS CLARK COUNTY EDUCATION ASSOCIATION'S, JOHN VELLARDITA'S AND VICTORIA COURTNEY'S OPPOSITION TO APPLICATION FOR ORDER DIRECTING THE ISSUANCE OF A PREJUDGMENT WRIT OF ATTACHMENT WITH NOTICE** by the method indicated below:

___X___	Odyssey E-File & Serve	_____	Federal Express
_____	U.S. Mail	_____	U.S. Certified Mail
_____	Facsimile Transmission	____X__	Hand Delivery
____X__	Email Transmission	_____	Overnight Mail

and addressed to the following:

Richard J. Pocker
Nevada Bar No. 3568
Paul J. Lal
Nevada Bar No. 3755
BOIES SCHILLER FLEXNER LLP
300 South Fourth Street, Suite 800
Las Vegas, NV 89101
Telephone: (702) 382-7300
Facsimile: (702) 382-2755
Email: rpocker@bsfllp.com
Email: plal@bsflli.com
Attorneys for Plaintiffs
(via Odyssey E-File & Serve, Email Transmission and Hand Delivery)

John M. West (*pro hac vice*)
Matthew Clash-Drexler (*pro hac vice*)
James Graham Lake (*pro hac vice*)
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
Telephone: (202) 842-2600
Facsimile: (202) 842-1888
Email: jwest@bredhoff.com
Email: mcdrexler@bredhoff.com
Email: glake@bredhoff.com
Attorneys for Plaintiffs
(via Odyssey E-File & Serve and Email Transmission)

DATED this 11th day of April, 2018.

/s/ Maricris Williams
An Employee of Snell & Wilmer L.L.P.

4848-4554-0961.1

Richard G. McCracken, Nevada Bar No. 2748
Kimberley C. Weber, Nevada Bar No. 14434
McCRACKEN, STEMERMAN & HOLSBERRY, LLP
1630 South Commerce Street, Suite 1-A
Las Vegas, NV 89102
Tel: (702) 386-5107
rmccracken@msh.law
kweber@msh.law

John S. Delikanakis, Nevada Bar No. 5928
Bradley T. Austin, Nevada Bar No. 13064
Michael Paretti, Nevada Bar No. 13926
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Tel: (702) 784-5200
jdelikanakis@swlaw.com
baustin@swlaw.com
mparetti@swlaw.com

Joel A. D'Alba (*pro hac vice*)
ASHER, GITTLER & D'ALBA, LTD.
200 West Jackson Blvd., Suite 720
Chicago, IL 60606
Tel: (312) 263-1500
jad@ulaw.com

Attorneys for Plaintiffs

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CLARK COUNTY EDUCATION ASSOCIATION, VICTORIA COURTNEY, JAMES FRAZEE, ROBERT B. HOLLOWOOD, and MARIE NEISESS, Plaintiffs v. NEVADA STATE EDUCATION ASSOCIATION, DANA GALVIN, RUBEN MURILLO JR., BRIAN WALLACE, and BRIAN LEE, Defendants	Case No.: A-17-761364-C DEPT. NO.: 28 **PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

///

///

///

Plaintiffs Clark County Education Association ("CCEA"), Victoria Courtney, James Frazee, Robert B. Hollowood, and Marie Neisess (collectively, "CCEA Plaintiffs") file this Motion for Partial Summary Judgment ("Motion"). This Motion is based upon the papers and pleadings on file herein, the following memorandum of points and authorities, Nevada Rule of Civil Procedure 56, and any oral argument that the Court may entertain on behalf of the CCEA Plaintiffs.

DATED this 18th day of June, 2018.

SNELL & WILMER L.L.P.

By: /s/ *John Delikanakis*
John S. Delikanakis
Nevada Bar No. 5928
Bradley T. Austin
Nevada Bar No. 13064
Michael Paretti
Nevada Bar No. 13926
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169

Richard G. McCracken
Nevada Bar No. 2748
Kimberley C. Weber
Nevada Bar No. 14434
McCRACKEN, STEMERMAN
& HOLSBERRY, LLP
1630 South Commerce Street, Suite 1-A
Las Vegas, NV 89102

Joel A. D'Alba (*pro hac vice*)
ASHER, GITTLER & D'ALBA, LTD.
200 West Jackson Blvd., Suite 720
Chicago, IL 60606

Attorneys for Plaintiffs

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

NOTICE OF MOTION

TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL.

PLEASE TAKE NOTICE that on the 19th day of JULY, 2018, at 9AM a.m/p.m., or as soon thereafter as counsel can be heard in Department 28 of the above-mentioned Court, the Court will hear Plaintiffs' Motion for Partial Summary Judgment.

DATED this 18th day of June, 2018.

SNELL & WILMER L.L.P.

By: /s/ *John Delikanakis*
John S. Delikanakis
Nevada Bar No. 5928
Bradley T. Austin
Nevada Bar No. 13064
Michael Paretti
Nevada Bar No. 13926
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169

Richard G. McCracken
Nevada Bar No. 2748
Kimberley C. Weber
Nevada Bar No. 14434
McCRACKEN, STEMERMAN
& HOLSBERRY, LLP
1630 South Commerce Street, Suite 1-A
Las Vegas, NV 89102

Joel A. D'Alba (*pro hac vice*)
ASHER, GITTLER & D'ALBA, LTD.
200 West Jackson Blvd., Suite 720
Chicago, IL 60606

Attorneys for Plaintiffs

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs move pursuant to NRCP 56 for summary judgment as to their second cause of action and seek declaratory judgment in their favor with respect to their right to terminate a service agreement and dues transmittal agreement between Nevada State Education Association ("NSEA") and CCEA.

Pursuant to a membership authorization form between CCEA and individual Clark County School District ("CCSD") members, all dues of CCEA members are deducted from their pay checks and sent to and collected by CCEA. Once collected by CCEA – and *only* pursuant to a dues transmittal agreement – proportioned amounts of the foregoing dues are transmitted from CCEA to NSEA. The dues transmittal agreement, which is attached and incorporated by reference to the service agreement[1] between CCEA and NSEA as Addendum A, is the only contract between CCEA and NSEA, obligating CCEA to transmit dues to NSEA. Finally, pursuant to the National Education Association's ("NEA") bylaws – a contract only between NSEA and the NEA –NSEA then transmits a portion of the foregoing dues to NEA.

Both the service agreement and dues transmittal agreement between CCEA and NSEA provide that either party may unilaterally terminate the agreements, as long as written notice of termination is sent (1) prior to September 1 of any given membership year for termination of the dues transmittal agreement and (2) at least thirty days prior to September 1 for termination of the service agreement.

Nearly 120 days before September 1, 2017 – and well within the contractually-provided termination timeframe for both agreements – CCEA terminated the dues transmittal agreement and service agreement by sending written notice of termination to NSEA on May 3, 2017. On July 17, 2017 and August 3, 2017, CCEA sent NSEA additional letters, affirming that CCEA terminated the service agreement (inclusive of the dues transmittal agreement) on May 3, 2017. The May 3, 2017 letter to NSEA stated that CCEA was terminating the service agreement and

[1] The service agreement states that: "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" and incorporates by specific reference and attaches the dues transmittal agreement as Addendum A.

dues transmittal agreement, causing both agreements to expire pursuant to their express terms on August 31, 2017.

On April 25, 2018, CCEA voted to disaffiliate from NEA and NSEA. That vote was approved by 88% of the CCEA members who voted and the disaffiliation became effective immediately. On April 26, 2018, CCEA served notice to NEA and NSEA that CCEA had disaffiliated from both organizations and no longer had any relationship with either organization.

In light of the above, CCEA moves for summary judgment and an order declaring that: (1) the termination provisions of the service agreement and dues transmittal agreement are clear and unambiguous, (2) CCEA's 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/NEA under the service agreement and dues transmittal agreement to collect and/or transmit membership dues on NSEA/NEA's behalf on or after September 1, 2017.

In the alternative, and in the event the Court finds that the service and dues transmittal agreements were not terminated and did not expire on August 31, 2017, CCEA moves this Court for an order declaring that any duty owed by CCEA to NSEA/NEA ended on April 25, 2018, when CCEA disaffiliated from both NSEA and NEA.

II. STATEMENT OF FACTS

A. Relationship between the Parties.

CCEA is a democratic organization that is the exclusive collective bargaining representative of the licensed professional employees of CCSD and is the employee organization that serves as the local voice for educators to advance the cause of education, promote professional excellence among educators to protect the rights of educators, advance their interests and welfare, and secure professional autonomy. Affidavit of John Vellardita ("Vellardita Aff.") at ¶4, attached hereto as **Exhibit 11**. CCEA is the recognized and exclusive bargaining agent for CCSD's licensed professional employees. Vellardita Aff. at ¶6 NSEA is not the recognized and

Snell & Wilmer
LLP
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

exclusive bargaining agent for CCSD's licensed professional employees. Vellardita Aff. at ¶6. NSEA was the state-wide affiliate of the CCEA until April 25, 2018. Vellardita Aff. at ¶5. NEA was the national affiliate of the CCEA until April 25, 2018. Vellardita Aff. at ¶7. NEA remains the national affiliate of NSEA. Vellardita Aff. at ¶8.

B. The Underlying Dispute between CCEA and NSEA.

1. Dues are transmitted from CCEA to NSEA only pursuant to a dues transmittal agreement.

CCEA has thousands of CCSD educators who are members and whose dues payments are at the center of this litigation due to a good faith dispute between CCEA and NSEA over the rights and obligations under a dues transmittal agreement that expired on August 31, 2017. Vellardita Aff. at ¶9. Members of CCEA pay dues to CCEA pursuant to a membership authorization form ("Membership Authorization Form"). Vellardita Aff. at ¶10. The Membership Authorization Form is only between CCEA and the individual members, with the individual members agreeing that:

> **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).

Membership Authorization Form, attached hereto as **Exhibit 10** (emphasis supplied).

Once the individual member enters into the Membership Authorization Form with CCEA, membership dues are then deducted from members' pay checks by their employer, the CCSD,

///

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

pursuant to a collective bargaining agreement between CCEA and CCSD. Vellardita Aff. at ¶10. Dues payments are directed to CCEA by CCSD. Vellardita Aff. at ¶11.

Dues are then transmitted to NSEA only through a dues transmittal agreement ("Dues Transmittal Agreement"), which is an addendum to a services agreement ("Service Agreement") as Addendum A. Vellardita Aff. at ¶12; Service Agreement between Nevada State Education Association and the Clark County Education Association, attached as **Exhibit 1**. The Service Agreement references the Dues Transmittal Agreement as follows:

> 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.

Exhibit 1, at ¶1.

The Dues Transmittal Agreement is required to be in place with any affiliate labor organization as a condition of affiliation pursuant to the NSEA Bylaws (Article VIII Section 3 (F)) and the NEA Bylaws (Section 2-9). Bylaws of the Nevada State Education Association, attached as **Exhibit 5**; Bylaws of the National Education Association, attached as **Exhibit 6.** Specifically, the NSEA bylaws require that:

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

Exhibit 6 at Article VIII Section 3 (F). The NEA bylaws require that:

> 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.

Exhibit 5 at Section 2-9.

///

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

As it pertains to the transmittal of dues, the contractual relationships flow as follows:

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

Thus, pursuant to the Membership Authorization Form, all dues of CCEA members are deducted from their pay checks and are sent to and collected by CCEA. Exhibit 10. Then, pursuant to the Dues Transmittal Agreement, proportioned amounts of the foregoing[2] are transmitted from CCEA to NSEA. Exhibit 1 at Addendum A. Finally, pursuant to the NEA Bylaws, NSEA then transmits NEA's portion of those dues to NEA. Exhibit 5 at Section 2-9. In the absence of a Dues Transmittal Agreement, there is no obligation for CCEA to transmit dues to NSEA and per NEA's bylaws, only NSEA has a contractual obligation to pay NEA. *See id*.

2. CCEA properly terminated the dues transmittal agreement.

The Service Agreement and the Dues Transmittal Agreement expressly allow either party to terminate and seek to renegotiate the terms of the agreement. *See* Exhibit 1 at ¶20 and Addendum A at VI.

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.

Exhibit 1 at ¶20 (emphasis supplied). The relevant anniversary date is September 1, 2017. Exhibit 1 at 1.

Similarly, the Dues Transmittal Agreement states that "[t]his agreement shall remain in force for each subsequent membership year **unless terminated in writing by either party prior**

[2] CCEA members each contributed $377.66 per year to NSEA, pursuant to the NSEA Policies and $189 per year to the NEA. Vellardita Aff. at ¶14.

to September 1 of any NSEA membership year, or amended by mutual consent of both parties." Exhibit 1, Addendum A at VI (emphasis added). The NSEA membership year runs from September 1 to August 31. Exhibit 5 at Article I, Section 3 ("Membership Year: The membership year shall be September 1 to August 31.").

CCEA notified NSEA of its intent to terminate the Dues Transmittal Agreement and negotiate a new agreement on May 3, 2017, in a letter from the CCEA Executive Director to the NSEA Executive Director. *See* May 3, 2017, letter from J. Vellardita to B. Lee, attached as **Exhibit 2**. 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. Vellardita Aff. at ¶16. It was set to expire on August 31, 2017. *See* Exhibit 1. 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.

May 3, 2017 Letter, Exhibit 2.

On July 17, 2017 and August 3, 2017, CCEA sent NSEA additional notices of termination, affirming that CCEA terminated the Service Agreement (inclusive of the Dues Transmittal Agreement) on May 3, 2017, and indicating its desire to renegotiate the Dues Transmittal Agreement. *See* July 17, 2017 and August 3, 2017, letters from J. Vellardita to B. Lee, attached as **Exhibits 3** and **4**.

Specifically, the letters stated that:

> 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.

July 17, 2017 Letter, Exhibit 3.

> 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,

Snell & Wilmer
LLP
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

> 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.

August 3, 2017 Letter, Exhibit 4 (emphasis supplied).

After the termination and expiration of the Dues Transmittal Agreement on August 31, 2017, CCSD continued to send the employees' dues to CCEA, whereupon the dues were placed into a restricted bank account where they remain to this date. Vellardita Aff. at ¶19.

D. CCEA Disaffiliates from NEA and NSEA.

On April 25, 2018, CCEA voted to disaffiliate from NEA and NSEA. *See* Vellardita Aff. at ¶20. The disaffiliation was approved by 88% of the votes 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 and no longer had any relationship with either organization. April 26, 2018 Letters, attached hereto as **Exhibits 8** and **9**. Effective as of the date of disaffiliation with NSEA and NEA, CCEA ceased collecting any membership dues in excess of what was owed to CCEA. *See* Vellardita Aff. at ¶21.

On April 25, 2018, NSEA and NEA created a new local affiliate named the NEA-SN. Vellardita Aff. at ¶22. NEA-SN is not the recognized bargaining representatives of the CCSD licensed employees. Vellardita Aff. at ¶23. Since NEA-SN's creation, NSEA and NEA have been promoting NEA-SN and asking members of CCEA to join their new local union. Vellardita Aff. at ¶24.

III. CONCISE STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to NRCP 56(c), the following facts are material to the disposition of Plaintiffs' motion for partial summary judgment and are not genuinely disputed:

- Members of CCEA pay dues to CCEA pursuant to Membership Authorization Form. The Membership Authorization Form is only between CCEA and the individual members, with the individual members agreeing that:

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

- **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). Exhibit 10 (emphasis supplied).

- Once the member enters into the Membership Authorization Form with CCEA, membership dues are then, deducted from their pay checks by their employer, the CCSD, pursuant to a collective bargaining agreement between CCEA and CCSD. Vellardita Aff. at ¶10.

- Dues payments are directed to CCEA by CCSD. Vellardita Aff. at ¶11.

- Dues are then transmitted from CCEA to NSEA only through a Dues Transmittal Agreement, which is an addendum to the Service Agreement. Exhibit 1; Vellardita Aff. at ¶12.

- The Service Agreement references the Dues Transmittal Agreement as follows: "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" and incorporates by specific reference and attaches the Dues Transmittal Agreement as Addendum A. Exhibit 1, at ¶1.

- The Dues Transmittal Agreement is required to be in place with any affiliate labor organization as a condition of affiliation pursuant to the NSEA Bylaws (Article VIII Section 3 (F)) and the NEA Bylaws (Section 2-9). Bylaws of the Nevada State Education Association, attached as **Exhibit 5**; Bylaws of the National Education Association, attached as **Exhibit 6.**

- Specifically, the NSEA bylaws require that:

  - The NSEA shall affiliate a local association when it meets the following minimum standards: (f): Have a dues transmittal with NSEA. Exhibit 6 at Article VIII Section 3 (F).

Snell & Wilmer
LLP
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

Snell & Wilmer
LLP
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

- The NEA bylaws require that:
    - 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. Exhibit 5 at Section 2-9.
    - Thus, pursuant to the Membership Authorization Form, all dues of CCEA members are deducted from their pay checks and are sent to and collected by CCEA.
    - Pursuant to the Dues Transmittal Agreement, proportioned amounts of the foregoing[3] are transmitted from CCEA to NSEA.
    - Pursuant to the NEA Bylaws, NSEA then transmits NEA's portion of those dues to NEA.
- The terms of the Service Agreement and Dues Transmittal Agreement allow either party to terminate and seek to renegotiate the terms of the agreement. Exhibit 1.
- The Service Agreement expressly 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, **<u>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</u>** unless a successor agreement has been mutually agreed to by the parties. Exhibit 1 at ¶20 (emphasis supplied). The relevant anniversary date is September 1, 2017. Exhibit 1 at 1.
- Similarly, the Dues Transmittal Agreement states that:
    - This agreement shall remain in force for each subsequent membership year **<u>unless terminated in writing by either party prior to September 1 of any NSEA membership year</u>**, or amended by mutual consent of both parties." Exhibit 1, Addendum A at VI (emphasis supplied). The NSEA membership year runs from

[3] CCEA members each contributed $377.66 per year to NSEA, pursuant to the NSEA Policies and $189 per year to the NEA. Vellardita Aff. at ¶14.

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

September 1 to August 31. Exhibit 5 at Article I, Section 3 ("Membership Year: The membership year shall be September 1 to August 31.").

- CCEA notified NSEA of its intent to terminate the Dues Transmittal Agreement and negotiate a new agreement on May 3, 2017, in a letter from the CCEA Executive Director to the NSEA Executive Director. Exhibit 2; Vellardita Aff. at ¶15.

- 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. It was set to expire on August 31, 2017. *See* Exhibit 1; Vellardita Aff. at ¶16.

- Specifically, the May 3, 2017 letter states that:

    - 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. Exhibit 1.

- On July 17, 2017 and August 3, 2017, CCEA sent NSEA additional notices of termination, affirming that CCEA terminated the Service Agreement (inclusive of the Dues Transmittal Agreement) on May 3, 2017, and indicating its desire to renegotiate the Dues Transmittal Agreement. Exhibits 3 and 4; Vellardita Aff. at ¶17.

- Specifically, the July 17, 2017 and August 3, 2017 letters stated that:

    - 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. July 17, 2017 Letter, Exhibit 3.

    - 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**. August 3, 2017 Letter, Exhibit 4 (emphasis supplied).

- After the termination of the Dues Transmittal Agreement, CCSD continued to send the employees' dues to CCEA, whereupon the dues were placed into a restricted bank account. Vellardita Aff. at ¶19.

- On April 25, 2018, CCEA voted to disaffiliate from NEA and NSEA, which disaffiliation was approved by 88% of the votes and effective immediately. *See* Vellardita Aff. at ¶20.
- Effective as of the date of disaffiliation with NSEA and NEA, CCEA ceased collecting any membership dues in excess of what was owed to CCEA. *See* Vellardita Aff. at ¶21.
- On April 26, 2018, CCEA served notice to NEA and NSEA that CCEA had disaffiliated from both organizations effective immediately and no longer had any relationship with both organizations. *See* Exhibits 8 and 9; Vellardita Aff. at ¶21.

III. LEGAL ARGUMENT

A. Legal Standard.

Summary judgment is appropriate when the moving party demonstrates that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. NRCP 56(c). The Nevada Supreme Court has abandoned the "slightest doubt" standard and adopted the federal standard derived from the famous trilogy of federal summary judgment cases. *Wood v. Safeway*, 121 Nev. 724, 730, 121 P.3d 1026, 1031 (2005) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). In doing so, the Nevada Supreme Court recognized that summary judgment should not be treated as a "disfavored procedural short-cut", but instead as an "integral part" of the rules, "which are designed to secure the just, speedy, and inexpensive determination of every action." *Id.* (quoting *Celotex,* 477 U.S. at 327).

The nonmoving party "bears the burden to do more than simply show that there is some metaphysical doubt as to the operative facts in order to avoid summary judgment being entered in the moving party's favor." *Id*. at 732. The nonmoving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him [and] is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." *Id*.

///

Snell & Wilmer
LLP
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

B. CCEA Properly Terminated the Service Agreement and Dues Transmittal Agreement within the Contractually-Permitted Timeframe Prior to September 1, 2017.

CCEA properly terminated the Services Agreement and Dues Transmittal Agreement prior to September 1, 2017, which caused both Agreements to expire pursuant to their plain terms on August 31, 2017. Upon the expiration and termination of the foregoing agreements, CCEA no longer had any obligation to collect on behalf of or transmit dues to NSEA.

CCEA now seeks a declaratory order from this Court, pursuant to its second cause of action and the Uniform Declaratory Judgment Act, codified as NRS 30.040, declaring that: (1) the termination provisions of the Service Agreement and Dues Transmittal Agreement are clear and unambiguous, (2) CCEA's 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/NEA under the service agreement and dues transmittal agreement to collect and/or transmit membership dues on NSEA/NEA's behalf on or after September 1, 2017.

1. Both the Service Agreement and Dues Transmittal Agreement allow for unilateral termination.

The operative contracts at issue here are the Service Agreement and the Dues Transmittal Agreement (which Dues Transmittal Agreement is attached to and incorporated by specific reference and made a part of the Service Agreement as Addendum A), which are between CCEA and NSEA. As set forth above, it is only pursuant to the Dues Transmittal Agreement that CCEA members' dues payments to NSEA were transmitted by CCEA to NSEA. See supra at 6:11 – 8:7 and 10:23 – 12:9. NSEA then had a separate contractual obligation only with NEA to forward the applicable dues to NEA. *Id.*

The Service Agreement expressly allows unilateral termination by either party, stating that:

Snell & Wilmer
LLP
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

> 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.

Exhibit 1 at ¶20 (emphasis added). The relevant anniversary date is September 1, 2017. Exhibit 1 at 1.

Similarly, the Dues Transmittal Agreement unambiguously allows for unilateral termination, stating 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**,[4] or amended by mutual consent of both parties." Exhibit 1, Addendum A at VI (emphasis added). *See Nelson v. California State Auto. Ass'n Inter-Ins. Bureau*, 114 Nev. 345, 347, 956 P.2d 803, 805 (1998) ("Questions of contract construction, in the absence of ambiguity or other factual issues, are suitable for determination by summary judgment."); *S. Tr. Mortg. Co. v. K & B Door Co*., 104 Nev. 564, 568, 763 P.2d 353, 355 (1988) ("[W]here a document is clear and unambiguous, the court must construe it from the language therein."); *Chwialkowski v. Sachs*, 108 Nev. 404, 406, 834 P.2d 405, 406 (1992) (same); *Renshaw v. Renshaw*, 96 Nev. 541, 543, 611, P.2d 1070, 1071 (1980) (same); *Ellison v. California State Auto Ass'n*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990) (same); *Watson v. Watson*, 95 Nev. 495, 496, 596 P.2d 507, 508 (1979) ("Courts are bound by language which is clear and free from ambiguity and cannot, using guise of interpretation, distort plain meaning of agreement."). The termination provisions of the Dues Transmittal Agreement are plain and unambiguous. The Court should enforce the foregoing provisions and CCEA's right to terminate.

///

[4] The NSEA membership year runs from September 1 to August 31. Exhibit 5 at Article I, Section 3 ("Membership Year: The membership year shall be September 1 to August 31.").

Snell & Wilmer
LLP
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

2. CCEA properly terminated both the Service Agreement and Dues Transmittal Agreement within the contractually-permitted timeframe.

On May 3, 2017 – nearly 120 days before September 1, 2017, and pursuant to the termination provisions included in the Service Agreement and Dues Transmittal Agreement – the CCEA Executive Director sent the NSEA Executive Director a letter notifying NSEA of CCEA's termination of the Service Agreement and desire to negotiate a new agreement. Exhibit 2. The notice from CCEA to NSEA on May 3, 2017, was to terminate the Service Agreement, inclusive of the Dues Transmittal Agreement, attached thereto as Addendum A. Exhibit 2; Vellardita Aff. at ¶16. 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.

Exhibit 2.

On July 17, 2017 and August 3, 2017, CCEA sent NSEA additional notices of termination, affirming that CCEA terminated the Service Agreement on May 3, 2017 (inclusive of the Dues Transmittal Agreement), and stating its desire to renegotiate the contract for dues transmittal. Exhibits 3 and 4; Vellardita Aff. at ¶¶16-17. Specifically, the letters stated that:

> 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.

July 17, 2017 Letter, Exhibit 3.

> 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.

Snell & Wilmer
LLP
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

August 3, 2017 Letter, Exhibit 4. To date, CCEA and NSEA have not agreed upon a new Dues Transmittal Agreement, and CCEA is now completely disaffiliated with both NSEA and NEA. Vellardita Aff. at ¶¶18, 20-21.

The May 3, 2017, termination letter served to unilaterally terminate the Service Agreement and Dues Transmittal Agreement prior to September 1, 2017, well within the contractually-provided termination timeframe for both agreements. Thus no valid enforceable contract exists between CCEA and NSEA as of September 1, 2017 with respect to collecting and transmitting membership dues. In light of CCEA's notice of termination – which complied with the termination provisions of both the Service Agreement and Dues Transmittal Agreement – any rebuttal argument by NSEA that either Agreement was not terminated would nullify the unambiguous termination provisions contained therein. *See Mendenhall v. Tassinari*, 403 P.3d 364, 373 (Nev. 2017) ("Furthermore, a court should not interpret a contract so as to make meaningless its provisions, and every word must be given effect if at all possible.") (internal quotation omitted); *Bielar v. Washoe Health Sys., Inc*., 129 Nev. 459, 465, 306 P.3d 360, 364 (2013) (same).

Accordingly, Plaintiffs respectfully request that, pursuant to Plaintiff's second cause of action for declaratory relief, this Court issue an order declaring that: (1) the termination provisions of the Service Agreement and Dues Transmittal Agreement are clear and unambiguous, (2) CCEA's 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/NEA under the service agreement and dues transmittal agreement to collect and/or transmit membership dues on

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

NSEA/NEA's behalf on or after September 1, 2017.[5]

C. Alternatively, CCEA's Relationship with NSEA and NEA Terminated on April 25, 2018, when CCEA Voted to Disaffiliate from NSEA and NEA.

In the unlikely event the Court finds that the Service and Dues Transmittal Agreements were *not* terminated as of September 1, 2017, the Court should alternatively find and declare as a matter of law that any duty owed by CCEA to NSEA/NEA was terminated via CCEA's April 25, 2018 disaffiliation.

On April 25, 2018, CCEA's membership voted to disaffiliate from NEA and NSEA. *See* Vellardita Aff. at ¶20. The disaffiliation was approved by 88% of the votes and was effective immediately. *Id.* Any purported duty owed by CCEA to NSEA/NEA was undisputedly terminated via the April 25, 2017 disaffiliation – as CCEA no longer has any association, affiliation, or contractual relationship with NSEA and NEA. On April 26, 2018, CCEA served notice to NEA and NSEA that CCEA had disaffiliated from both organizations effective immediately and no longer had any contractual relationship with either organization. Exhibits 8 and 9; Vellardita Aff. at ¶21.

Accordingly, if the Court finds that the Service and Dues Transmittal Agreements were not terminated by their own plain terms and CCEA various written notices to NSEA and NEA as of September 1, 2017, the Court should alternatively issue an order declaring that any duties owed by CCEA to NSEA/NEA were terminated on April 25, 2018, by virtue of CCEA's disaffiliation from NSEA and NEA. *CCT Communications, Inc.,* 327 Conn. at 135 fn.14 (The "general rule" is "that termination of a contract discharges the remaining obligations of all parties thereto."); *Conference Am., Inc.,* 508 F. Supp. 2d at 1011–12 ("When a contract is terminated, even wrongfully, there is no longer a contract, hence no duty to perform and no right to demand

[5] *See Litton Fin. Printing Div. v. Nat'l Labor Relations Bd.*, 501 U.S. 190, 206 (1991) (Where a contract has expired, the parties generally are "released ... from their respective contractual obligations."); *Granite Constr. Co. v. Remote Energy Sols., LLC*, 403 P.3d 683 (Nev. 2017) (same); *CCT Communications, Inc. v. Zone Telecom, Inc.*, 327 Conn. 114, 135 fn.14 (2017) (The "general rule" is "that termination of a contract discharges the remaining obligations of all parties thereto."); *Conference Am., Inc. v. Conexant Sys., Inc.*, 508 F. Supp. 2d 1005, 1011–12 (M.D. Ala. 2007) ("When a contract is terminated, even wrongfully, there is no longer a contract, hence no duty to perform and no right to demand performance."); 17B C.J.S. Contracts § 610 ("The parties to an agreement are relieved of their mutual obligations upon termination of the agreement, and neither party is liable after termination for further transactions thereunder.").

Snell & Wilmer
LLP
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

performance."); 17B C.J.S. Contracts § 610 ("The parties to an agreement are relieved of their mutual obligations upon termination of the agreement, and neither party is liable after termination for further transactions thereunder.").

IV. CONCLUSION

The Court should grant Plaintiffs' motion for partial summary judgment in its entirety, and issue an order declaring that: (1) the termination provisions of the Service Agreement and Dues Transmittal Agreement are clear and unambiguous, (2) CCEA's 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/NEA under the service agreement and dues transmittal agreement to collect and/or transmit membership dues on NSEA/NEA's behalf on or after September 1, 2017.

///

Snell & Wilmer
LLP
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

In the alternative, and in the event the Court finds that the service and dues transmittal agreements were not terminated and did not expire on August 31, 2017, this Court should issue an order declaring that any duties owed by CCEA to NSEA ended on April 25, 2018, when CCEA disaffiliated from both NSEA and NEA.

DATED this 18th day of June, 2018.

SNELL & WILMER L.L.P.

By: /s/ *John Delikanakis*
John S. Delikanakis
Nevada Bar No. 5928
Michael Paretti
Nevada Bar No. 13926
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169

Joel A. D'Alba (*pro hac vice*)
200 West Jackson Blvd., Suite 720
Chicago, IL 60606

Richard G. McCracken
Nevada Bar No. 2748
Kimberley C. Weber
Nevada Bar No. 14434
McCRACKEN, STEMERMAN
& HOLSBERRY, LLP
1630 South Commerce Street, Suite 1-A
Las Vegas, NV 89102

Attorneys for Plaintiffs

Snell & Wilmer
LLP
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

Snell & Wilmer
LLP
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

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 this date, I caused to be served a true and correct copy of the foregoing **PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT** by the method indicated below:

X	Odyssey E-File & Serve	_____	Federal Express
_____	U.S. Mail	_____	U.S. Certified Mail
_____	Facsimile Transmission	_____	Hand Delivery
_____	Email Transmission	_____	Overnight Mail

and addressed to the following:

Richard J. Pocker
Nevada Bar No. 3568
Paul J. Lal
Nevada Bar No. 3755
BOIES SCHILLER FLEXNER LLP
300 South Fourth Street, Suite 800
Las Vegas, NV 89101
Telephone: (702) 382-7300
Facsimile: (702) 382-2755
Email: rpocker@bsfllp.com
Email: plal@bsfllp.com

Attorneys for Plaintiffs

John M. West (*pro hac vice*)
Robert Alexander (*pro hac vice*)
Matthew Clash-Drexler (*pro hac vice*)
James Graham Lake (*pro hac vice*)
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
Telephone: (202) 842-2600
Facsimile: (202) 842-1888
Email: jwest@bredhoff.com
Email: mcdrexler@bredhoff.com
Email: glake@bredhoff.com

Attorneys for Plaintiffs

DATED this 18th day of June, 2018.

/s/ Lyndsey Luxford
An Employee of Snell & Wilmer L.L.P.

4828-8979-3639

EXHIBIT 8

CCEA
Clark County Education Association
the union of teaching professionals

4230 McLeod Drive
Las Vegas, NV 89121
Tel. 702/733-3063
800/772-2282
Fax 702/733-0240
www.ccea-nv.org

April 26, 2018

Lily Eskelsen Garcia, NEA President
1201 16th Street, NW
Washington, DC 20036-3290
Sent electronically

Re: Disaffiliated

Dear President Eskelsen-Garcia:

Please be advised that effective immediately CCEA is no longer affiliated with the National Education Association (NEA) and the Nevada State Education Association (NSEA) and accordingly, we will no longer have any contractual relationships with NEA and NSEA.

Respectfully,

Vikki Courtney, President

Theo Small, Vice-President

EXHIBIT 9

CCEA
Clark County Education Association
the union of teaching professionals

4230 McLeod Drive
Las Vegas, NV 89121
Tel. 702/733-3063
800/772-2282
Fax 702/733-0240
www.ccea-nv.org

April 26, 2018

Ruben Murillo, NSEA President
3511 E. Harmon Ave.
Las Vegas, NV 89121
Sent electronically

Re: Disaffiliated

Dear President Murillo:

Please be advised that effective immediately CCEA is no longer affiliated with the Nevada State Education Association (NSEA) and the National Education Association (NEA) and accordingly, we will no longer have any contractual relationships with NSEA and NEA.

Respectfully,

Vikki Courtney, President

Theo Small, Vice-President

EXHIBIT 11

Richard G. McCracken, Nevada Bar No. 2748
Kimberley C. Weber, Nevada Bar No. 14434
McCRACKEN, STEMERMAN & HOLSBERRY, LLP
1630 South Commerce Street, Suite 1-A
Las Vegas, NV 89102
Tel: (702) 386-5107
rmccracken@msh.law
kweber@msh.law

John S. Delikanakis, Nevada Bar No. 5928
Bradley T. Austin, Nevada Bar No. 13064
Michael Paretti, Nevada Bar No. 13926
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Tel: (702) 784-5200
jdelikanakis@swlaw.com
baustin@swlaw.com
mparetti@swlaw.com

Joel A. D'Alba (*pro hac vice*)
ASHER, GITTLER & D'ALBA, LTD.
200 West Jackson Blvd., Suite 720
Chicago, IL 60606
Tel: (312) 263-1500
jad@ulaw.com

Attorneys for Plaintiffs

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CLARK COUNTY EDUCATION ASSOCIATION, VICTORIA COURTNEY, JAMES FRAZEE, ROBERT B. HOLLOWOOD, and MARIE NEISESS, Plaintiffs v. NEVADA STATE EDUCATION ASSOCIATION, DANA GALVIN, RUBEN MURILLO JR., BRIAN WALLACE, and BRIAN LEE, Defendants	Case No.: A-17-761364-C DEPT. NO.: 28 **AFFIDAVIT OF JOHN VELLARDITA IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

///

///

STATE OF NEVADA)
)
COUNTY OF CLARK___)

AFFIDAVIT OF JOHN VELLARDITA

John Vellardita, being first duly sworn, deposes and says as follows:

1. I make this Affidavit in support of the PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT.

2. I have personal knowledge of the facts set forth herein and am competent to testify thereto.

3. I have been the appointed Executive Director of the Clark County Education Association ("CCEA") since 2011. My duties include representing the collective bargaining interests, negotiating collective bargaining agreements and related matters for teachers and licensed professionals employed by the Clark County School District. I have provided expert labor relations advice and guidance in negotiating multiple collective bargaining agreements, representing hundreds of teachers in individual grievance matters, and lobbying the State legislature for funding of teachers' salaries and changes in the education system for Clark County.

4. As stated in its Constitution and Bylaws, CCEA is an independent and self-governed organization that is the exclusive collective bargaining representative of the licensed professional employees of the Clark County School District ("CCSD") and is the employee organization that serves as the local voice for educators to advance the educational profession, promote professional excellence among educators, protect the rights of educators, advance their interests and welfare, ensure through collective action the advancement of quality public education, and secure professional autonomy.

5. Nevada State Education Association ("NSEA") was the state wide affiliate of the CCEA until April 25, 2018.

6. CCEA is the recognized and exclusive bargaining agent for CCSD's licensed professional employees. NSEA is not the recognized and exclusive bargaining agent for CCSD's licensed professional employees.

Snell & Wilmer
LLP.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

7. NEA was the national affiliate of both NSEA and CCEA until April 25, 2018.

8. National Education Association ("NEA") is still the national affiliate of NSEA.

9. CCEA has thousands of members, whose dues payments are at the center of this litigation due to a good faith dispute between CCEA and NSEA over the terms of a dues transmittal agreement that expired on September 1, 2017.

10. Members of CCEA pay dues to CCEA pursuant to a membership authorization form ("Membership Authorization Form"), which dues are deducted from their pay checks by their employer, the CCSD, pursuant to a collective bargaining agreement between CCEA and CCSD.

11. Dues payments are directed to CCEA by CCSD.

12. Dues are then transmitted to NSEA only through a dues transmittal agreement, which agreement is attached to the services agreement as Addendum A. A true and correct copy of the service agreement is attached to Plaintiffs' Motion for Partial Summary Judgment as **Exhibit 1**.

13. Once CCEA transmits dues to NSEA, NSEA then transmits NEA's portion of those dues to NEA. Only NSEA has a contractual obligation to pay NEA, per NEA's bylaws. True and correct copies of the Bylaws of the Nevada State Education Association, and the Bylaws of the National Education Association are attached to Plaintiffs' Motion for Partial Summary Judgment as **Exhibits 5** and **6**.

14. CCEA members contributed $377.66 per year per teacher to NSEA, pursuant to the NSEA Policies and $189 per year per teacher to the NEA.

15. CCEA notified NSEA of its termination of the dues transmittal agreement and its intent to negotiate a new agreement on May 3, 2017, in a letter from the CCEA Executive Director to the NSEA Executive Director. A true and correct copy of the May 3, 2017 letter is attached to Plaintiffs' Motion for Partial Summary Judgment as **Exhibit 2**.

16. 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 contract, under which CCEA members' dues payments were being transmitted by CCEA to NSEA. It was set to

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

expire on August 31, 2017.

17. On July 17, 2017 and August 3, 2017, CCEA sent NSEA additional notices of termination, affirming that CCEA terminated the service agreement (inclusive of the dues transmittal agreement) on May 3, 2017, and indicating its desire to renegotiate the Dues Transmittal Agreement. True and correct copies of the July 17 and August 3, 2017 letters are attached to Plaintiffs' Motion for Partial Summary Judgment as **Exhibits 3** and **4**.

18. CCEA and NSEA have not yet agreed upon a new dues transmittal agreement.

19. After the termination of that agreement, CCSD continued to send the employees' dues to CCEA, whereupon the dues were placed into a restricted bank account.

20. On April 25, 2018, CCEA voted to disaffiliate from NEA and NSEA, which disaffiliation was approved by 88% of the votes and effective immediately.

21. On April 26, 2018, CCEA served notice to NEA and NSEA that CCEA had disaffiliated from both organizations effective immediately and no longer had any contractual relationship with both organizations. True and correct copies of April 26, 2018 letters are attached to Plaintiffs' Motion for Partial Summary Judgment as **Exhibits 8** and **9**. Effective as of the date of disaffiliation with NSEA and NEA, CCEA ceased collecting any membership dues in excess of what was owed to CCEA.

22. On April 25, 2018, NSEA and NEA created a new local affiliate named the NEA-SN.

23. NEA-SN is not the recognized bargaining representatives of the CCSD licensed employees.

24. Since NEA-SN's creation, NSEA and NEA have been promoting NEA-SN and asking members of CCEA to join their new local union.

25. A true and correct copy of CCEA's Constitution and Bylaws is attached to Plaintiffs' Motion for Partial Summary Judgment as **Exhibit 7**.

///

Snell & Wilmer
LLP.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

26. A true and correct copy of the Membership Authorization Form Bylaws is attached to Plaintiffs' Motion for Partial Summary Judgment as **Exhibit 10**.

I declare under penalty of perjury and under the laws of the State of Nevada that the forgoing is true and correct.

John Vellardita

SUBSCRIBED and SWORN to before me this 18 day of June 2018.

NOTARY PUBLIC

Sharon Whalum
Notary Public
State of Nevada
My Commission Expires: 03-31-19
Certificate No.: 11-4293-1

Snell & Wilmer L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

Richard G. McCracken, Nevada Bar No. 2748
Kimberley C. Weber, Nevada Bar No. 14434
McCRACKEN, STEMERMAN & HOLSBERRY, LLP
1630 South Commerce Street, Suite 1-A
Las Vegas, NV 89102
Tel: (702) 386-5107
rmccracken@msh.law
kweber@msh.law

John S. Delikanakis, Nevada Bar No. 5928
Michael Paretti, Nevada Bar No. 13926
Bradley T. Austin, Nevada Bar No. 13064
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Tel: (702) 784-5200
jdelikanakis@swlaw.com
mparetti@swlaw.com
baustin@swlaw.com

Joel A. D'Alba (*Pro Hac Vice*)
ASHER, GITTLER & D'ALBA, LTD.
200 West Jackson Blvd., Suite 720
Chicago, IL 60606
Tel: (312) 263-1500
jad@ulaw.com

Attorneys for Plaintiffs Clark County Education Association, Victoria Courtney, James Frazee, Robert G. Hollowood and Maria Neisess

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CLARK COUNTY EDUCATION ASSOCIATION, VICTORIA COURTNEY, JAMES FRAZEE, ROBERT G. HOLLOWOOD, and MARIA NEISESS,

Plaintiffs,

vs.

NEVADA STATE EDUCATION ASSOCIATION, DANA GALVIN, RUBEN MURILLO, JR., BRIAN WALLACE, and BRIAN LEE,

Defendants.

Case No.: A-17-761364-C

DEPT. NO.: XXVIII

ORDER GRANTING PLAINTIFFS' MOTION TO CONSOLIDATE CASES A-17-761364-C AND A-17-761884-C

///

///

6/29/18

Plaintiffs Clark County Education Association ("CCEA"), Victoria Courtney, James Frazee, Robert B. Hollowood, Marie Neisess, and John Vellardita (collectively, "CCEA Parties") having come before the Court on their Motion to Consolidate the cases identified as A-17-761364-C and A-17-761884-C, and the Court, having considered the moving papers, the pleadings and papers on file with the Court, and the oral arguments submitted by the parties, it is **ORDERED** that the CCEA Parties' Motion to Consolidate Cases A-17-761364-C and A-17-761884-C is GRANTED, and the cases A-17-761364-C and A-17-761884-C are now consolidated in to case A-17-761364-C. The caption shall be amended accordingly.

DATED this 27 day of June, 2018.

DISTRICT COURT JUDGE
RONALD J. ISRAEL
A-17-761364-C

RESPECTFULLY SUBMITTED BY:

By: _____
John S. Delikanakis, Nevada Bar No. 5928
Michael Paretti, Nevada Bar No. 13926
Bradley T. Austin, Nevada Bar No. 13064
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Tel: (702) 784-5200

Attorneys for Plaintiffs Clark County Education Association, Victoria Courtney, James Frazee, Robert G. Hollowood and Maria Neisess

4846-7903-6779.1

MPSJ

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
BOIES SCHILLER FLEXNER LLP
300 South Fourth Street, Suite 800
Las Vegas, NV 89101
Tel.: (702) 382-7300
Fax: (702) 382-2755
rpocker@bsfllp.com
plal@bsfllp.com

Robert Alexander (admitted pro hac vice)
Matthew Clash-Drexler (admitted pro hac vice)
James Graham Lake (admitted pro hac vice)
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
Tel.: (202) 842-2600
Fax: (202) 842-1888
jwest@bredhoff.com
ralexander@bredhoff.com
mcdrexler@bredhoff.com
glake@bredhoff.com

Attorneys for NSEA Defendants

DISTRICT COURT
EIGHTH JUDICIAL DISTRICT
CLARK COUNTY, NEVADA

CLARK COUNTY EDUCATION ASSOCIATION, VICTORIA COURTNEY, JAMES FRAZEE, ROBERT G. HOLLOWOOD, AND MARIA NEISESS, Plaintiffs, v. NEVADA STATE EDUCATION ASSOCIATION, DANA GALVIN, RUBEN MURILLO JR., BRIAN WALLACE, AND BRIAN LEE, Defendants.	Case No.: A-17-761364-C (Consolidated with Case No. A-17-761884-C) DEPT. NO.: 4 **PLAINTIFFS NSEA'S AND NEA'S MOTION FOR PARTIAL SUMMARY JUDGMENT** **FILED UNDER SEAL**

Plaintiffs Nevada State Education Association ("NSEA") and National Education Association ("NEA"), by and through their counsel, respectfully move the Court pursuant to Nevada Rule of Civil Procedures 56 for an order granting summary judgment on Count Six of their Second Amended Complaint. The grounds for this motion are set forth in the accompanying Memorandum of Points and Authorities, the papers and pleadings on file in the present case, and any argument the Court may entertain with respect to this Motion at the time of hearing.

Dated this 9th day of November, 2018.

BOIES SCHILLER FLEXNER LLP

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
300 South Fourth Street, Suite 800
Las Vegas, NV 89101

Robert Alexander*
Matthew Clash-Drexler*
James Graham Lake*
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
* Admitted pro hac vice

Attorneys for NSEA/NEA Plaintiffs

NOTICE OF MOTION

PLEASE TAKE NOTICE that a hearing on NSEA and NEA Plaintiffs' **Motion for Partial Summary Judgment** will be held in Department 4 of the above-entitled court on the 8 day of January 2019, at the hour of 9:00 a.m./p.m., or as soon thereafter as counsel may be heard.

Dated this 9th day of November, 2018.

BOIES SCHILLER FLEXNER LLP

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
300 South Fourth Street, Suite 800
Las Vegas, NV 89101

Robert Alexander*
Matthew Clash-Drexler*
James Graham Lake*
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
* Admitted pro hac vice

Attorneys for NSEA/NEA Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

Among the claims Plaintiffs Nevada State Education Association ("NSEA") and National Education Association ("NEA") brought in their Second Amended Complaint was Count Six, which alleged that Defendant Clark County Education Association ("CCEA") converted money paid as dues by CCEA members for their union membership in NSEA and NEA, but which CCEA failed to remit to NSEA. On the record evidence developed, it is undisputed that between August 2017 and April 25, 2018, CCEA collected and received from teachers through payroll deduction by their employer, Clark County School District ("CCSD" or "School District"), more than four million dollars of NSEA and NEA dues money during the 2017-2018 school year, beginning with new hire orientation in August 2017, and continuing until after CCEA disaffiliated from its parent union on April 25, 2018. It is further undisputed that CCEA and its agents refused to remit NSEA's and NEA's dues money, but rather—without any right or permission to do so—kept it in bank accounts under CCEA's control, accounts to which NSEA and NEA had no access. Accordingly, there being no dispute of material fact that CCEA has converted NSEA and NEA's dues money paid by their members, it is appropriate for the Court, pursuant to Nevada Rule of Civil Procedure 56(c), to grant summary judgment in favor of Plaintiffs NSEA and NEA on Count Six of the Second Amended Complaint.[1]

[1] Currently pending before the Court is CCEA's motion for partial summary judgment on its declaratory judgment claim, in which CCEA asks the Court to declare that a contract between NSEA and CCEA authorizing CCEA to collect and transmit NSEA and NEA dues terminated prior to the 2017-2018 school year or, at the latest, upon disaffiliation on April 25, 2018. Resolving the contract claim in CCEA's partial summary judgment motion, argument on which will be heard on November 15, 2018, has no bearing on NSEA's and NEA's conversion claim, because, as we explain, it is undisputed that CCEA in fact did collect and keep the NSEA and NEA dues from new hires in August 2017 and from all members from September 2017 through April 2018, irrespective as to whether it did so pursuant to any existing contract between the then-affiliated unions.

BACKGROUND[2]

As a point of reference and introduction, the following Exhibits attached hereto are made a part of and incorporated by reference into this Motion: Exhibit 1, NSEA and NEA Plaintiffs' Concise Statement of Undisputed Facts in Support of NSEA and NEA Plaintiffs' Motion for Partial Summary Judgment ("Statement of Facts"); Exhibit 2, Affidavit of Brian Lee in Support of NSEA and NEA Plaintiffs' Motion for Partial Summary Judgment ("Lee Aff."); and Exhibit 3, Affidavit of Henry Pines in Support of NSEA and NEA Plaintiffs' Motion for Partial Summary Judgment ("Pines Aff.").

CCEA is a local union that represents teachers and other School District professionals. Until April 25, 2018, CCEA was affiliated with NSEA at the state level and with NEA at the national level.[3] *See* Statement of Facts ¶¶ 1–3. During the course of this affiliation, union members belonged, and paid dues, to all three organizations. *Id.* ¶ 4.

During the 2017-2018 school year, which runs from September 1 through August 31, more than 10,500 CCSD teachers chose to be union members, which required them to pay union dues for the school year. *See id.* ¶¶ 5–9. By virtue of NEA's unified membership system, teachers who chose to continue their union membership for the 2017-2018 school year paid a single amount of dues, which was composed of the aggregate dues for the three union affiliates—CCEA, NSEA, and NEA—each of which established its own annual dues pursuant to

---

[2] Consistent with NRCP 56(c), the factual background references are to the Plaintiffs' Concise Statement of Undisputed Facts attached hereto as Exhibit 1, submitted in conjunction with this Motion.

[3] On April 25, 2018, CCEA disaffiliated from NSEA and NEA. NSEA and NEA Plaintiffs' Concise Statement of Facts in Support of NSEA and NEA Plaintiffs' Motion for Partial Summary Judgment ("Statement of Facts") ¶ 2. The instant motion does not seek summary judgment with respect to collected dues attributable to post-disaffiliation periods.

its own bylaws. *See id.* ¶ 7. This aggregated annual dues amount at the outset of the 2017-2018 school year was $810.50, which consisted of $377.66 in NSEA dues, $189 in NEA dues, and $243.84 in CCEA dues. *See id.*

Almost all union members chose to pay their annual dues via School District payroll deduction. The School District collected the bi-monthly member dues from union members' paychecks and transmitted them to CCEA. *See id.* at ¶¶ 8, 11. CCEA, as the local affiliate, was the collection agent for NEA and NSEA, which permitted CCEA to collect the unified dues amounts for all three affiliates through the payroll deduction process. *See id.* ¶ 10. Upon collection, CCEA promptly remitted the NSEA and NEA portions of member dues to NSEA, which in turn remitted the NEA member dues to the national affiliate. *See id.* ¶ 4. This collection and remittance protocol had been in place for decades. *See id.* ¶ 10.

From September 1, 2017, through April 25, 2018, CCEA received $4,089,364.16 in NSEA and NEA dues from union members which was transferred electronically by the School District to CCEA's "Clark County Education Association Expense Account" at Bank of America. *Id.* ¶ 13. In addition, during August 2017, immediately prior to the 2017-2018 school year, an additional amount of $42,374.31 in NSEA and NEA dues from new hires was transferred to CCEA. *See id.* ¶ 12 (detailing new hires dues collections); *see also id.* ¶ 17 (detailing NSEA and NEA dues monies received by CCEA from CCSD for each pay period from September 2017 through April 25, 2018). Instead of remitting the NSEA and NEA dues money to NSEA, CCEA retained all of the dues money in its own accounts. *See id.* ¶ 15. CCEA refused to remit the NSEA and NEA dues it collected, and this lawsuit followed in September 2017. *See id.*

From time to time, CCEA transferred money held in its general Bank of America expense account into a separate account at Bank of America, opened on September 12, 2017, simply entitled "Clark County Education Association" ("Restricted Account"). *See id.* ¶ 18; *see also id.* ¶ 22 (detailing dates and amounts CCEA transferred into its Restricted Account). As of November 20, 2017, and continuing until April 23, 2018, funds could have been removed from that account merely "at the request of an authorized signer on the account." *Id.* ¶ 21. The "restricted" status of the funds between September 12, 2017, and November 20, 2017, is unknown, but ultimately irrelevant. *See id.* ¶ 21. At a hearing on April 23, 2018, Judge Kishner, acting on Plaintiffs' motion for a writ of attachment, issued an order restricting CCEA from removing funds from the Restricted Account absent judicial approval. *See id.* ¶¶ 26–27.

ARGUMENT

I. Summary Judgment Standard

Nevada Rule of Civil Procedure 56 provides that a party is entitled to summary judgment on a given claim when there is "no genuine issue as to any material fact" and the claimant is "entitled to a judgment as a matter of law." Nev. R. Civ. P. 56(c). "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1030-31 (2005). "The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." *Id.*

In opposing a motion for summary judgment, it is the non-moving party's "burden to 'do more than simply show that there is some metaphysical doubt' as to the operative facts" in order to avoid summary judgment. *Id.* at 732 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). "The nonmoving party 'must, by affidavit or otherwise, set

forth specific facts demonstrating the existence of a genuine issue for trial.'" *Id.* (quoting *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992)).

II. The Applicable Legal Framework of Conversion

Conversion is defined as exerting wrongful "dominion over another's personal property or wrongful interference with the owner's dominion." *Larson v. B.R. Enters., Inc.*, 104 Nev. 252, 254, 757 P.2d 354, 356 (1988) (quoting *Bader v. Cerri*, 96 Nev. 352, 357 n.1, 609 P.2d 314, 317 n.1 (1980)). As such, conversion occurs when one party obtained another's property without permission and exercised dominion over it in a manner that wrongfully interfered with the other's right over the property. *See WMCV Phase 3, LLC v. Shushok & McCoy, Inc.*, 750 F. Supp. 2d 1180, 1195-96 (D. Nev. 2010) (wrongful collection of, and failure to remit, funds meant for another party constituted "a distinct act of dominion wrongfully exerted over another's personal property")(quoting *Wantz v. Redfield*, 74 Nev. 196, 326 P.2d 413, 414 (1958). But conversion also occurs when one originally obtained possession of property lawfully, but fails to remit that property to its rightful owner. *See* Restatement (Second) of Torts § 237 (bailee who refuses to surrender chattel on demand is liable for conversion). For instance, a parking attendant who refused to return a car at the end of a bailment would be liable for conversion, *see Mills v. Continental Parking Corp.*, 86 Nev. 724, 725-26, 475 P.2d 673, 674 (1970), as would an employer who kept for its own benefit money intended for its employees, *see Hester v. Vision Airlines, Inc.*, 2011 WL 856871, at *3 (D. Nev. Mar. 9, 2011).

The wrongful exercise of dominion need not be permanent to constitute conversion. In fact, "the return of the property converted does not nullify the conversion, but can serve to mitigate damages." *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 607, 5 P.3d 1043, 1049 (2000) (quoting *Bader,* 96 Nev. at 356) (brackets in *Evans*); *see also* Restatement (Second) of

Torts § 222A (noting that "extent and duration of the actor's exercise of dominion or control" can serve to help determine "the seriousness of the interference"). Moreover, conversion liability can arise even where the alleged converter no longer has dominion or control over the converted property. As such, intentionally barring a rightful possessor's access to chattel constitutes conversion. *See* Restatement (Second) of Torts § 223(a) (dispossession constitutes conversion); *id.* § 221(c) (defining dispossession as intentionally "barring possessor's access to chattel").

"Personal property" encompasses not just chattel as the term was understood long ago; indeed, "money can be the subject of a conversion claim," if the specific amount is "'identifiable, such as where it is earmarked, or set aside in a separate account.'" *Aliya Medcare Finance, LLC v. Nickell*, 156 F. Supp. 3d 1105, 1132-33 (D.C. Cal. 2015) (quoting *Hester*, 2011 WL 856871, at *3 (applying Nevada law)). Money in a bank account may form the basis of a conversion claim, as may accounts receivable. *See Joseph v. Chanin*, 940 So. 2d 483, 486 (Fla. Dist. Ct. App. 2006) (bank account); *Aliya*, 156 F. Supp. 3d at 1133 (accounts receivable). Indeed, *union dues money deducted from employee paychecks*, kept in a company's general account, and not specifically segregated or earmarked, has been deemed sufficiently specific and identifiable to form the basis of a conversion claim. *See LoPresti v. Terwilliger,* 126 F. 3d 34, 42 (2d Cir. 1997).

A party's control over the personal property at issue need not be absolute to constitute conversion. Hence money held in a trust ostensibly to protect it pending the outcome of a dispute can be the subject of a conversion claim. On this point, *Lopez v. Javier Corral, D.C.*, 126 Nev. 690, 2010 WL 5541115 (Nev. Dec. 20, 2010) (unpublished), is instructive. There, the Nevada Supreme Court held that a lawyer who placed disputed settlement funds in his trust

account, which only he could access, committed conversion of those funds. The defendant, a personal-injury lawyer, had long referred clients to the plaintiff, a chiropractor, who would take as payment a certain percentage of any settlement money the client received. A dispute arose over whether clients' liability to the chiropractor was limited to the agreed-upon settlement percentage. Id. at *1. During the pendency of the dispute, the lawyer placed settlement funds owed to the chiropractor into a trust account, which only the lawyer could access. The court held that, although placement of disputed funds into a trust account is not per se conversion, the lawyer intended to at least temporarily deprive the chiropractor of funds due to him, funds to which the lawyer had no right. Id. at *6. *See also Larson,* 104 Nev. 252 (defendant who received money owed to plaintiff applied portions of that money to satisfy plaintiff's debt and kept the rest, but because defendant had no right to use any portion of money received for any purpose, including satisfying plaintiff's debt, controlling the *entire amount* received amounted to interfering with plaintiff's right to property, and constituted conversion).[4]

Given the foregoing discussion, it is unsurprising that courts have found defendants liable for conversion in similar circumstances to this case. For instance, in *Laborers' Combined Funds of W. Pa. v. Molinaro Corp.*, 234 F. Supp. 3d 660, 667–68 (W.D. Pa. 2017), the court held that an officer of an employer who withheld money from employees' wages for union dues and political action contributions, but failed to give that money to a benefit fund, as required by the applicable labor agreement, was personally liable for conversion. *Id.* at 667–68. The court held

[4] A party may be liable for conversion even if its actions also constitute breach of contract. *See Giles v. General Motors Acceptance Corp.*, 494 F.3d 865, 880 (9th Cir. 2007) (applying Nevada law). The economic loss doctrine, which some courts apply to limit the universe of purely economic damages recoverable in unintentional tort cases, *see Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66, 73, 206 P.3d 81, 86 (2009), does not bar recovery when a defendant has "an independent duty imposed under tort law not to take [the plaintiff's] property without legal authority to do so," *Giles*, 494 F.3d at 880.

that, "[i]n failing to remit the withheld wages to the Funds, [the defendant] clearly deprived the Funds of their right of property and, therefore, is personally liable for conversion." *Id.* at 668.

Similarly, in *Laborers Combined Funds of W. Pa. v. Cioppa*, 346 F. Supp. 2d 765 (W.D. Pa. 2004), the court held a corporate officer of an employer liable in conversion to an employee benefit fund. The employer had deducted union dues and PAC contributions from employee paychecks, but failed to remit that money to the benefit fund, which in turn would have remitted the money to the union and political action committee. *Id.* at 773–74. The court noted that "regardless of what [the defendant] did with the withheld wages, [he] clearly deprived others of their right of property." *Id.* at 773.

And in *Goldstein v. Mangano*, 417 N.Y.S. 2d 368 (N.Y. Civ. Ct. 1978), the court held an officer of an employer company liable to the union in conversion based on the employer's failure to remit dues deducted from employee paychecks to the union. *See id.* at 371–72.[5] The court rejected the defendants' argument that the money collected from employee paychecks was not sufficiently identifiable for conversion purposes because a "definite monthly sum" was deducted from each worker's wages and the employer was responsible for segregating the funds and paying them to the union. *Id.* at 371.

III. NSEA and NEA are Entitled to Summary Judgment as to CCEA's Conversion of More than Four Million Dollars in NSEA and NEA Member Dues.

As set out in Plaintiffs' Statement of Facts, CCEA collected and received dues money belonging to NSEA and NEA and failed to remit that money in contravention of NSEA's and NEA's rights. CCEA maintained that money in two bank accounts in its name, to which it had

[5] The Fourth Department Appellate Division later abrogated the portion of *Goldstein* holding that corporate officers could be personally liable for unpaid wages. *See Stoganovic v. Dinolfo*, 461 N.Y.S.2d 121, 122 (N.Y. App. Div. 1983).

access, but which was inaccessible to NSEA and NEA. While the record is disputed with respect to dues collected for periods after CCEA disaffiliated, these undisputed facts establish that CCEA converted NSEA and NEA's dues money collected for the period August 2017 through April 25, 2018.

a. CCEA Wrongfully Exercised Dominion and Control Over NSEA and NEA Dues Money

The NSEA and NEA dues money remitted by CCSD and collected and received by CCEA are the personal property of the NSEA and NEA, respectively. Indeed, CCEA has admitted as much, stating on several occasions that until disaffiliation it collected and was in possession of NSEA and NEA dues money. *See* Statement of Facts ¶ 24; *see also* Vellardita Aff. ¶ 15 (Mar. 29, 2018) ("[E]mployees' due [*sic*] payments for NSEA and NEA have been deducted from their paychecks and have been placed in a Bank of America restricted account . . . ."); Defendants-Counter Plaintiffs' Answer to Amended Complaint and Counterclaim, ¶ 13 of Counterclaim (Mar. 16, 2018) ("Members of CCEA pay dues to CCEA, NSEA, and . . . [NEA] through dues payments deducted from their pay checks . . . [and] directed to CCEA by the School District."); August 2017 Check Detail, CCEA 013351 (describing money as "NEA & NSEA Dues Collected from Members"); CCEA 013417 (same); September 2017 Check Detail, CCEA 013525 (same); October 2017 Check Detail, CCEA 013613–14 (same); November 2017 Check Detail, CCEA 013717 (same).

That being so and given that money held in a bank account can be the subject of a conversion claim, the NSEA and NEA dues money remitted from employee paychecks here is sufficiently specific and identifiable to be the subject of a conversion claim, even when deposited into a general bank account. *See Aliya*, 156 F. Supp. 3d at 1132-33 (money can be the subject of a conversion claim); *Hester*, 2011 WL 856871, at *3 (money meant for employees, but not

remitted was proper subject of conversion claim); *see also LoPresti*, 126 F.3d at 42 (union dues money collected by employer and held in general account was proper subject of conversion claim).

More specifically, the collected dues money at issue was transferred from CCSD to CCEA and into CCEA's expense account. Statement of Facts ¶ 13. Upon transfer of the funds from CCSD to CCEA, CCEA had possession and control over the funds; it thereby exercised dominion over them. *See* Dominion, Black's Law Dictionary (10th ed. 2014) (defining "dominion" as "[c]ontrol; possession"). By barring NSEA's access to its dues money, CCEA intentionally dispossessed NSEA and NEA of their property. *See* Restatement (Second) of Torts §§ 221, 223 (intentional dispossession of property constitutes conversion). And once CCEA failed to turn over NSEA and NEA's dues money to NSEA, its possession of the funds became wrongful. *See generally Larson*, 104 Nev. at 254 (exercising dominion over another's personal property is conversion); Am. Jur. 2d Conversion § 41 ("Conversion may be predicated upon the wrongful detention of, or failure to deliver, personal property."). To be sure, to the extent CCEA was collecting the NSEA and NEA dues pursuant to the collection and transmittal agreement, it was permitted to maintain the funds for a couple of weeks before remitting them to NSEA. It is undisputed, however, that CCEA has long exceeded that limited contractual right, and once that right terminated, continuing control or dominion constituted conversion. *See, e.g., Mills*, 86 Nev. at 725-26; *Molinaro Corp.*, 234 F. Supp. 3d at 667–68; *Cioppa*, 346 F. Supp. 2d at 773; *Goldstein*, 417 N.Y.S. 2d at 371, discussed *supra* Part II.

First, CCEA engaged in conversion by controlling the NSEA/NEA money in its own general operating account for extended periods without permission. For example, in September 2017, CCEA transferred only $43,271.31 into the "restricted" account, despite receiving

$498,970.86 from CCSD earmarked for transmission to NSEA in the month of September. *See* Statement of Facts ¶ 22(a)–(b). And in October 2017, CCEA transferred no money into the "restricted" account, despite receiving $500,243.42 earmarked for NSEA that month. *See id.* ¶¶ 17(e)–(f), 22. During those months, CCEA therefore maintained the majority of the dues money wrongfully withheld from NSEA/NEA in its business checking account, where it was subject to no restriction on CCEA's use. In fact, CCEA was so cavalier in its handling of NSEA/NEA monies that in April 2018—with the writ of attachment looming—it made five deposits from its general account amounting to $1,535,288.15, to make up for its shortfall leading up to April 2018. *See* Statement of Facts ¶¶ 22(l)-(m).

Second, while CCEA often kept NSEA/NEA dues money in its own business checking account for weeks or months before transferring the funds into the "restricted" account, eventually placing the NSEA/NEA dues money into a restricted account does not limit CCEA's conversion. CCEA's dominion and control over the NSEA and NEA dues money continued even after CCEA transferred the money into the restricted account, which was established by CCEA and bears its name. *See id.* ¶ 20. Until April 23, the account's "restricted status" meant only that funds could be removed by CCEA "at the request of an authorized signer on the account." *Id.* ¶ 21. It was not until the April 23, 2018 hearing that an order from the Court precluded CCEA from removing the funds unilaterally from the "restricted" account. *See id.* ¶ 26–27. And as discussed above, because the essence of conversion is depriving the rightful party of its property, the act of placing "disputed" money into a trust-type account does not excuse a party's conversion where it has no claim of right to the property it placed in the trust account. See *Lopez*, 2010 WL 5541115 at *6. It is therefore of no moment that after the court's order CCEA no longer had absolute control over the dues money; its continued interference with

NSEA and NEA's possession of its dues money continued its conversion. *See generally* Restatement (Second) of Torts § 223(a); § 221(c) (dispossession by intentionally barring possessor's access constitutes conversion).

b. The Parties' Contractual Relationship, or Lack Thereof, Provides No Defense to the Count Six Conversion Claim

To be sure, NSEA has asserted a separate claim as to whether CCEA had contractual authority to collect the NSEA/NEA dues in the first place, or whether, as CCEA contends in its motion for partial summary judgment currently pending before the court, its contractual authority to collect the dues had expired.[6] But whether CCEA had the *contractual* obligation to transmit dues in the manner set out by the Dues Transmittal Agreement (and whether it ever had a contractual right to collect such dues) is immaterial to the conversion claim. CCEA received money that was intended for NSEA and NEA and placed it in accounts inaccessible to those organizations. One who originally has lawful possession of property, but who does not remit that property to its rightful owner, commits conversion. *See, e.g.*, *Mills*, 86 Nev. at 725-26 (parking attendant who refused to return car at end of bailment would be liable for conversion); *Hester*, 2011 WL 856871, at *3 (conversion claim arises where airline "received money specifically earmarked to be given to its flight crews, but kept it for its own benefit"); *State v. Rothrock*, 45 Nev. 214, 200 P. 525, 530 (1921) (party who collects money for another but keeps it for itself is treated as having converted those funds, irrespective of its right as agent to have collected the funds in the first place). And, as discussed *supra* note 4, the existence of a breach-of-contract cause of action against CCEA does not preclude its conversion liability. *See Giles*, 494 F.3d at 879 (applying Nevada law to hold that existence of contract did not preclude

[6] Plaintiffs' Motion for Partial Summary Judgment in Case No. A-17-761364, at 4–5.

conversion claim because of defendant's "independent duty imposed under tort law not to take [plaintiff's] property without legal authority to do so").

Conversely, if, as Defendants contend, the Dues Transmittal Agreement was terminated before the 2017-2018 school year, CCEA would have had no authority to collect dues on NSEA's behalf, as its collection-agent status would have expired with the Agreement and NSEA and NEA dues money transferred to CCEA were immediately converted. *See WMCV*, 750 F. Supp. 2d at 1180 (2010) (collection of funds on behalf of principal by former agent constituted conversion). Accordingly, the existence of a contract governing CCEA's rights would be irrelevant.

It is thus immaterial whether CCEA had the authority to collect the NSEA/NEA dues and therefore to exercise dominion over the disputed money at the moment of collection. CCEA's failure to remit the dues to NSEA/NEA renders it liable for conversion.

///

///

///

///

///

///

///

///

///

///

///

CONCLUSION

Given that there is no dispute of material fact regarding CCEA's liability for conversion of NSEA and NEA dues money prior to its disaffiliation from NSEA and NEA, Plaintiffs NSEA and NEA request that the Court enter judgment for Plaintiffs on Count Six of the Second Amended Complaint and order the requested disgorgement of the NSEA/NEA dues money collected by CCEA from new hires in August 2017 and from regular members for dues deduction periods from September 1, 2017, through April 25, 2018. *See* Second Amended Complaint Prayer for Relief ¶ C.

Dated this 9th day of November, 2018.

Respectfully submitted,

BOIES SCHILLER FLEXNER LLP

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
300 South Fourth Street, Suite 800
Las Vegas, NV 89101

Robert Alexander*
Matthew Clash-Drexler*
James Graham Lake*
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
* Admitted pro hac vice

Attorneys for NSEA/NEA Plaintiffs

STAT

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
BOIES SCHILLER FLEXNER LLP
300 South Fourth Street, Suite 800
Las Vegas, NV 89101
Tel.: (702) 382-7300
Fax: (702) 382-2755
rpocker@bsfllp.com
plal@bsfllp.com

Robert Alexander (admitted pro hac vice)
Matthew Clash-Drexler (admitted pro hac vice)
James Graham Lake (admitted pro hac vice)
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
Tel.: (202) 842-2600
Fax: (202) 842-1888
jwest@bredhoff.com
ralexander@bredhoff.com
mcdrexler@bredhoff.com
glake@bredhoff.com

Attorneys for NSEA Defendants

DISTRICT COURT
EIGHTH JUDICIAL DISTRICT
CLARK COUNTY, NEVADA

CLARK COUNTY EDUCATION ASSOCIATION, VICTORIA COURTNEY, JAMES FRAZEE, ROBERT G. HOLLOWOOD, and MARIA NEISESS, Plaintiffs, v. NEVADA STATE EDUCATION ASSOCIATION, DANA GALVIN, RUBEN MURILLO JR., BRIAN WALLACE, and BRIAN LEE, Defendants.	Case No.: A-17-761364-C (Consolidated with Case No. A-17-761884-C) DEPT. NO.: 4 **NSEA AND NEA PLAINTIFFS' CONCISE STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF NSEA AND NEA PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

NSEA PLAINTIFFS' CONCISE STATEMENT OF FACTS IN SUPPORT OF NSEA AND NEA PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

A. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Since before the 1970s and continuing until April 25, 2018, the Clark County Education Association ("CCEA")—which was formerly known as the Clark County Classroom Teachers Association or CCCTA—was an affiliate of NSEA. Affidavit of Brian Lee ("Lee Aff.") ¶ 3; CCEA Parties' Reply in Support of Motion for Partial Summary Judgment at 4, *Clark County Education Association, et al. v. Nevada State Education Association, et al.,* A-17-761364-C (filed Aug. 14, 2018).

2. Until April 25, 2018, when it disaffiliated from NSEA, CCEA was also an affiliate of the National Education Association. Lee Aff. ¶¶ 3, 13.

3. CCEA represents teachers and other school personnel employed by the Clark County School District ("School District"), and CCEA has done so while an affiliate of NSEA and NEA since the 1970s. Lee Aff. ¶ 3.

4. When NEA, NSEA and CCEA were affiliated, the organizations operated through a unified membership structure, which means that by joining CCEA a member joined NSEA and NEA as well, becoming a member of all three organizations who was both entitled to all the benefits of membership and obligated to pay annual membership dues of all three associations. The NEA and NSEA dues payments have always belonged to NEA and NSEA, respectively, and CCEA has only had rights to the CCEA membership dues. Lee Aff. ¶ 4.

5. The NSEA membership year is geared to the school year, and ran from September 1 through August 31. The 2017-2018 NSEA membership year ran from September 1, 2017 through August 31, 2018. Lee Aff. ¶ 5.

6. For the 2017-2018 school year, there were 10,768 unified CCEA-NSEA-NEA members. Defendants' Amended Answer and Counterclaim ¶ 13; Defendants' Answer to Second Amended Complaint ¶ 13. That number fluctuated between 10,755 and 10,861 during the school year. *See* Affidavit of Henry Pines ("Pines Aff.") Exhibit H (Dues Transmittal Reports for Sept. 8, 2017, and Mar. 23, 2018).

7. Aggregated dues for the 2017-2018 school year were $810.50 per member, constituting $189 per member for NEA, $377.66 per member for NSEA, and $243.84 per member for CCEA. Dues amounts were set by each organization pursuant to its own bylaws. Defendants' Answer ¶ 13; Pines Aff. Exhibit A ¶ 14 (Vellardita Affidavit in Support of Plfs' Motion for Partial Summary Judgment (June 18, 2018)).

8. For the overwhelming majority of the members, dues were, pursuant to dues deduction authorization to the School District, paid in twice monthly increments throughout the year. Lee Aff. ¶ 5.

9. Teachers who chose to become or remain unified CCEA/NSEA/NEA members for a membership year were responsible for paying the full annual amounts of dues for the entire membership year to all three associations, irrespective of whether they terminated membership in the middle of the school year. Although members were obligated to pay the full amounts of annual dues, if they authorized payroll dues deduction they were not required to pay the full amount up front, but rather they could have paid the annual membership dues in increments throughout the year. Lee Aff. ¶ 6.

10. For decades, CCEA served as the collection agent for NSEA, collecting and transmitting NSEA and NEA dues to NSEA (which in turn transmits NEA dues to NEA). The School District deducted the aggregated membership dues owed to CCEA, NSEA, and NEA from members' paychecks and transmitted the deducted funds to CCEA. Lee Aff. ¶ 7.

11. In September 2017, CCEA continued collecting on a bi-monthly basis unified-member dues from members through payroll deduction with the School District, and continued to do so up to at least April 25, 2018, the date of disaffiliation. Lee Aff. ¶ 10.

12. During August 2017, CCEA also collected dues from certain members, including new hires. In August 2018, CCEA received $42,374.31 in NSEA and NEA dues collected by CCSD from new union members and remitted to CCEA. Lee Aff. ¶ 10; Pines Aff. Exhibit H (Dues Transmittal Reports for Aug. 10, 2017 and Aug. 25, 2017).

13. From August 2017 through April 25, 2018, CCEA received $4,131,738.47 in NSEA and NEA dues collected by CCSD from union members and remitted electronically to

CCEA's "Clark County Education Association Expense Account." Pines Aff. Exhibit F (John S. Delikanakis e-mail to Graham Lake (May 22, 2018)); Pines Aff. Exhibit H (Dues Transmittal Reports from August 10, 2017, to April 10, 2018).

14. Prior to the 2017-2018 school year, CCEA remitted the NSEA and NEA dues collected by CCSD from union members within two weeks of receipt. Lee Aff. ¶ 8.

15. Although CCEA collected NSEA and NEA member dues through payroll deduction in and after August 2017 up until at least April 25, 2018, it has refused to pay over the NSEA and NEA dues moneys, notwithstanding NSEA's demand that CCEA remit the NSEA/NEA dues money. Instead, CCEA has kept all of members' dues payments – including the portions deducted by the School District for NEA and NSEA—in its own accounts under its own name, which necessitated this lawsuit. Lee Aff. ¶¶ 10, 14 & Exhibit B (Letter from Brian Lee to John Vellardita (Sept. 4, 2017).

16. The NSEA and NEA dues remitted to CCEA by CCSD on a bi-monthly basis amounted to $15.74 per pay period per member for NSEA dues, and $7.88 for NEA dues. Pines Aff. Exhibit H.

17. The amounts that CCEA received in NEA and NSEA dues per pay period are as follows[1]:

a. August 10, 2017 (new hires only): $6,682.24 in NEA dues; $12,923.53 in NSEA dues; and $424.00 in PAC contributions.

b. August 25, 2017 (new hires only): $7,454.48 in NEA dues; $14,417.06 in NSEA dues; and $473.00 in PAC contributions.

c. September 8, 2017: $84,854.72 in NEA dues; $164,104.49 in NSEA dues; and $5,384.00 in PAC contributions.

d. September 25, 2017: $85,213.74 in NEA dues; $164,797.91 in NSEA dues; and $5,406.75 in PAC contributions.

e. October 10, 2017: $85,284.66 in NEA dues; $164,935.07 in NSEA dues; and $5,411.25 in PAC contributions.

[1] *See* Pines Aff. Exhibit G.

f. October 25, 2017: $85,218.16 in NEA dues; $164,805.53 in NSEA dues; and $5,407.00 in PAC contributions.

g. November 9, 2017: $85,226.04 in NEA dues; $164,820.77 in NSEA dues; and $5,407.50 in PAC contributions.

h. November 22, 2017: $85,293.50 in NEA dues; $164,950.31 in NSEA dues; and $5,411.75 in PAC contributions.

i. December 8, 2017: $85,226.04 in NEA dues; $164,820.77 in NSEA dues; and $5,407.50 in PAC contributions.

j. December 22, 2017: $85,268.90 in NEA dues; $164,904.59 in NSEA dues; and $5,410.25 in PAC contributions.

k. January 10, 2018: $85,068.44 in NEA dues; $164,515.97 in NSEA dues; and $5,397.50 in PAC contributions.

l. January 25, 2018: $85,029.04 in NEA dues; $164,439.77 in NSEA dues; and $5,395.00 in PAC contributions.

m. February 9, 2018: $85,273.32 in NEA dues; $164,912.21 in NSEA dues; and $5,410.50 in PAC contributions.

n. February 23, 2018: $85,438.80 in NEA dues; $165,232.25 in NSEA dues; and $5,421.00 in PAC contributions.

o. March 9, 2018: $85,415.16 in NEA dues; $165,186.53 in NSEA dues; and $5,419.50 in PAC contributions.

p. March 23, 2018: $85,557.00 in NEA dues; $165,460.60 in NSEA dues; and $5,428.75 in PAC contributions.

q. April 10, 2018: $85,497.42 in NEA dues; $165,346.55 in NSEA dues; and $5,424.75 in PAC contributions.

r. CCEA did not provide an accounting of dues collected for the pay period of April 25, 2018. Pines Aff. Exhibit F.

18. CCEA periodically transferred the NSEA and NEA dues money held in the Bank of America Merrill Lynch Business Account to a separate account at Bank of America Merrill

Lynch entitled "Clark County Education Association" ("Restricted Account"). Pines Aff. Exhibits I & J.

19. The Restricted Account was established by CCEA on September 12, 2017. Pines Aff. Exhibit C (Email from Joel D'Alba to John West and attachments (Dec. 15, 2017)) ¶ 15. It is titled "Clark County Education Association." Pines Aff. Exhibit J.

20. CCEA represented that as of April 30, 2018, the amount in the Restricted Account, including NEA and NSEA dues money collected on April 25, 2018, was $4,131,738.47. Pines Aff. Exhibit F.

21. As of November 20, 2017, funds could only be removed from the Restricted Account "at the request of an authorized signer on the account." Pines Aff. Exhibit C. The "restricted" status of the funds in the Restricted Account from September 12, 2017, to November 20, 2017, is unknown.

22. NEA and NSEA dues were transferred from CCEA's general account into the Restricted Account starting on September 22, 2017, up until April 30,2018, as follows[2]:

a. September 22, 2017: $100.00
b. September 25, 2017: $43,271.31
c. November 7, 2017: $253,446.21
d. November 9, 2017: $255,418.40
e. November 29, 2017: $255,630.98
f. December 11, 2017: $255,430.69
g. December 22, 2017: $255,454.31
h. January 31, 2018: $255,655.56
i. February 20, 2018: $255,454.31
j. February 23, 2018: $255,583.74
k. March 23, 2018: $254,981.91
l. April 6, 2018: $254,863.81
m. April 10, 2018: $255,596.03

[2] See Pines Aff. Exhibit J.

n. April 25, 2018: 256,092.05

o. April 30, 2018: $512,715.07

p. April 30, 2018: $256,021.19

23. As of May 1, 2018, CCEA had deposited $4,131,738.47 into the Restricted Account. Pines Aff. Exhibit J. CCEA has represented that that figure accounts for all NEA and NSEA dues money collected from August 2017 through April 25, 2018. Pines Aff. Exhibit F.

24. The member dues transmitted by payroll deduction and eventually placed into the restricted account are NSEA and NEA dues money. Pines Aff. Exhibit B ¶ 15 (Affidavit by John Vellardita in Support of CCEA Parties' Opposition to Application for Prejudgment Writ of Attachment (dated March 29, 208) ; CCEA Parties' Counterclaim ¶ 13 (March 16, 2018); Pines Aff. Exhibit D (CCEA Financial Reports); Pines Aff. Exhibit F.

25. During all periods up until April 23, 2018, all NEA and NSEA dues CCEA maintained were in bank accounts under CCEA's control, and neither NEA nor NSEA were permitted access to their dues. Lee Aff. ¶ 10-11; Pines Aff. Exhibits F, I & J.

26. At a hearing on April 23, 2018, Judge Kishner, acting on NSEA's application for a prejudgment writ of attachment, ordered that "all funds in the possession of or received by [CCEA] for the 2017-2018 school year in respect to NSEA dues (numerically calculated traditionally at the annual rate of $376.66) and in respect to NEA dues (numerically calculated traditionally at the annual rate of $189.00) shall continue to be deposited by CCEA into [the Restricted Account]." *See* Order at 2, *Nevada State Education Assoc., et al., v. Clark Cty. Educ. Assoc., et al.*, A-17-761884-C (May 10, 2018) (entered May 11, 2018).

27. Judge Kishner's order precluded CCEA from removing funds from the "restricted" account absent judicial approval. *See* Order at 3, *Nevada State Education Assoc., et al., v. Clark Cty. Educ. Assoc., et al.*, A-17-761884-C (May 10, 2018) (entered May 11, 2018).

28. The NEA dues received by CCEA through payroll deduction by CCSD for the August 2017 through April 10, 2018, period amounts to $1,293,001.66. The amount of NEA dues received by CCEA on April 25, 2018, is unknown. While in accounts under CCEA's

control, NEA cannot use its dues money paid by members, and has had no access to the money. Pines Aff. Exhibit H; Lee Aff. ¶ 11.

29. The NSEA dues received by CCEA through payroll deduction by CCSD for the August 2017, through April 10, 2018, period amounts to $2,582,613.91. The amount of NSEA dues received by CCEA on April 25, 2018, is unknown. While in accounts under CCEA's control, NSEA cannot use its dues money paid by members, and has had no access to the money. Pines Aff. Exhibit H; Lee Aff. ¶ 11.

30. CCEA ceased depositing NSEA/NEA member dues collected from CCSD payroll deduction into the restricted account after disaffiliation. Pines Aff. Exhibit E.

31. CCEA has refused to release the NSEA and NEA dues money to NSEA. Lee Aff. ¶ 12.

Dated this 9th day of November, 2018.

Respectfully submitted,

BOIES SCHILLER FLEXNER LLP

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
300 South Fourth Street, Suite 800
Las Vegas, NV 89101

Robert Alexander*
Matthew Clash-Drexler*
James Graham Lake*
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
* Admitted pro hac vice

Attorneys for NSEA/NEA Plaintiffs

AFFT
Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
BOIES SCHILLER FLEXNER LLP
300 South Fourth Street, Suite 800
Las Vegas, NV 89101
Tel.: (702) 382-7300
Fax: (702) 382-2755
rpocker@bsfllp.com
plal@bsfllp.com

Robert Alexander (admitted pro hac vice)
Matthew Clash-Drexler (admitted pro hac vice)
James Graham Lake (admitted pro hac vice)
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
Tel.: (202) 842-2600
Fax: (202) 842-1888
jwest@bredhoff.com
ralexander@bredhoff.com
mcdrexler@bredhoff.com
glake@bredhoff.com

Attorneys for NSEA Defendants

DISTRICT COURT
EIGHTH JUDICIAL DISTRICT
CLARK COUNTY, NEVADA

CLARK COUNTY EDUCATION ASSOCIATION, VICTORIA COURTNEY, JAMES FRAZEE, ROBERT G. HOLLOWOOD, and MARIA NEISESS, Plaintiffs, v. NEVADA STATE EDUCATION ASSOCIATION, DANA GALVIN, RUBEN MURILLO JR., BRIAN WALLACE, and BRIAN LEE, Defendants.	Case No.: A-17-761364-C (Consolidated with Case No. A-17-761884-C) DEPT. NO.: 4 **AFFIDAVIT OF BRIAN LEE IN SUPPORT OF NSEA AND NEA PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Brian Lee, first being duly sworn, deposes and affirms:

1. I am over the age of eighteen and am competent to testify on the matters set forth herein. I make the statements in this Affidavit in support of NSEA and NEA Plaintiffs' Motion for Partial Summary Judgment. The statements in this Affidavit are made on the basis of facts of which I have personal knowledge and on the basis of my review of records kept in the ordinary course of business by Plaintiff Nevada State Education Association ("NSEA"), except to the extent that statements made on information and belief are statements that I believe to be true.

2. I am the Executive Director of NSEA and have held that position since September 8, 2015. As Executive Director I have responsibility for directing and supervising the day-to-day activities of the organization, and am familiar with the NSEA financial, membership, and other business records, as well as the NSEA relationships with its current and former affiliates, including Defendant Clark County Education Association ("CCEA") and co-Plaintiff National Education Association ("NEA"). I am also familiar with the proceedings in this litigation and have received documents and correspondence provided in this litigation by counsel for CCEA to Plaintiffs' counsel.

3. CCEA represents teachers and other school personnel employed by the Clark County School District ("School District") and has done so while an affiliate of NSEA and NEA since the 1970s.

4. Until April 25, 2018, NEA, NSEA and CCEA had unified membership, which meant that by joining CCEA a member joined NSEA and NEA as well, becoming a member of all three organizations entitled to all the benefits of membership and obligated to pay membership dues to all three associations. For the 2017-2018 membership year, as in prior years, union members were required to pay the unified dues obligation as a condition of continuing membership. The NEA and NSEA portions of the dues paid by members for their continuing union membership belonged and continue to belong to NEA and NSEA, respectively, and CCEA had rights only to the CCEA portion of the membership dues paid by union members.

5. For the 2017-2018 school year, which ran from September 1, 2017 to August 31, 2018, each full-time active member paid the following in annual dues: $189.00 to NEA, $377.66 to NSEA, and $243.84 to CCEA. For nearly all members, the unified annual dues of $810.50 were paid in twice-monthly increments throughout the year, pursuant to dues deduction authorization provided to the School District.

6. During the years CCEA was affiliated with NSEA and NEA, teachers who chose to become members were responsible to pay the full annual amount of dues, irrespective of whether they terminated membership during the school year. Although members were obligated to pay the full amount of annual dues, if they authorized payroll dues deduction they were not required to pay the full amount up front, but rather paid the annual membership dues in bi-monthly increments throughout the year.

7. For decades, CCEA served as the collection agent for NSEA, collecting and transmitting NSEA and NEA dues to NSEA (which in turn transmitted NEA dues to NEA). The School District deducted the cumulative membership dues owed to CCEA, NSEA, and NEA from members' paychecks and transmitted the deducted funds to CCEA for further distribution.

8. Prior to the 2017-2018 school year, CCEA historically was required to remit to NSEA the NSEA and NEA dues collected by CCSD from union members within two weeks of receipt by CCEA, which is consistent with the terms of the dues collection and transmittal agreement between CCEA and NSEA, and in operation for decades.

9. On information and belief, CCEA instructed the School District to change the amount of members' dues deductions after April 25, 2018, but that the amount of dues deduction did not in fact change until June 2018.

10. CCEA did not transmit to NSEA the NEA and NSEA dues it received each month from the School District that the School District deducted from members' paychecks beginning in August 2017, and continuing until April 25, 2018. CCEA has refused to pay over the NSEA and NEA dues moneys, notwithstanding NSEA's demands that the NSEA and NEA dues

collected by CCEA be unconditionally remitted. Instead, CCEA has kept the NSEA and NEA member dues deducted by the School District.

11. NSEA and NEA have had no access to and no control over their dues money, and have been unable to use the NSEA and NEA dues money collected by CCEA and not remitted to NSEA.

12. CCEA has refused to release the NSEA and NEA dues money to NSEA.

13. CCEA notified NSEA by letter of the CCEA Board of Directors' vote to disaffiliate from NSEA and NEA on April 26, 2018. A true and correct copy of that letter is attached to this Affidavit as Exhibit A.

14. Attached to this Affidavit as Exhibit B is a true and correct copy of a letter that I sent to John Vellardita, dated September 4, 2017.

Further Affiant Sayeth Naught.

Brian Lee

STATE OF Nevada)

) ss

COUNTY OF Clark)

Subscribed and sworn to before me

this 2 day of November, 2018.

Notary Public

LISA A. TOTH
Notary Public-State of Nevada
APPT. NO. 08-6336-1
My Appt. Expires 06-11-2020

CCEA
Clark County Education Association
the union of teaching professionals

4230 McLeod Drive
Las Vegas, NV 89121
Tel. 702/733-3063
800/772-2282
Fax 702/733-0240
www.ccea-nv.org

April 26, 2018

Ruben Murillo, NSEA President
3511 E. Harmon Ave.
Las Vegas, NV 89121
Sent electronically

Re: Disaffiliated

Dear President Murillo:

Please be advised that effective immediately CCEA is no longer affiliated with the Nevada State Education Association (NSEA) and the National Education Association (NEA) and accordingly, we will no longer have any contractual relationships with NSEA and NEA.

Respectfully,

Victoria A. Courtney
Vikki Courtney, President

T Small
Theo Small, Vice-President

Nevada State Education Association
NSEA
www.nsea-nv.org

September 4, 2017

John Vellardita, Executive Director
Clark County Education Association
4230 McLeod Drive
Las Vegas, NV 89121

Re: Your Letter of September 4, 2017

Dear John:

I am in receipt of your letter of September 4, 2017. In response to your letter, NSEA is willing to meet on September 18, 2017 to discuss the negotiation of a new affiliate agreement. As I have previously stated in correspondence with you, Service Agreements are no longer available to any entity under the umbrella of NSEA which represents "active members." This fact was previously mentioned to you and was also stated in previous copies of NSEA policies provided to you. Please review the policies regarding affiliation agreements and contact me should you have any questions. Simply put, NSEA is barred by policy from negotiating new "service agreements" with entities which represent "active members" and will not do so in this instance or any other instance.

Additionally, at this time, due to time conflicts among members of the NSEA negotiating team, we are only available to meet on September 18, 2017, but should we need more than one day, we can arrange for addition days at that meeting.

I appreciate you taking the initiative in attempting to secure a neutral site for the negotiations on the new affiliation agreement, please forward suggestions as to sites as soon as possible, additionally we may have suggestions as to meeting sites.

Regarding your inquiry about four "invoices" in the amount of $467,130.69, I previously wrote to you that NSEA would not be paying these "invoices" and laying out my reasoning. This position has not changed.

Lastly, NSEA strongly rejects your characterization that CCEA need not be forwarded to NSEA those portions of NSEA/NEA they are holding as a passthrough agent as required by NSEA/NEA policies, agreements, practice, and any applicable law.

I look forward to hearing from you and look forward to mutually beneficial negotiations.

Sincerely,

Brian Lee
Executive Director

3511 E. Harmon Avenue, Las Vegas, NV 89121 * (800)248-6732 * (702)733-7330 * Fax: (702)733-6004
1890 Donald Street, Reno, NV 89502 * (800)232-6732 * (775)828-6732 * Fax: (775)828-6745

AFFT
Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
BOIES SCHILLER FLEXNER LLP
300 South Fourth Street, Suite 800
Las Vegas, NV 89101
Tel.: (702) 382-7300
Fax: (702) 382-2755
rpocker@bsfllp.com
plal@bsfllp.com

Robert Alexander (admitted pro hac vice)
Matthew Clash-Drexler (admitted pro hac vice)
James Graham Lake (admitted pro hac vice)
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
Tel.: (202) 842-2600
Fax: (202) 842-1888
jwest@bredhoff.com
ralexander@bredhoff.com
mcdrexler@bredhoff.com
glake@bredhoff.com

Attorneys for NSEA Defendants

DISTRICT COURT
EIGHTH JUDICIAL DISTRICT
CLARK COUNTY, NEVADA

CLARK COUNTY EDUCATION ASSOCIATION, VICTORIA COURTNEY, JAMES FRAZEE, ROBERT G. HOLLOWOOD, and MARIA NEISESS, Plaintiffs, v. NEVADA STATE EDUCATION ASSOCIATION, DANA GALVIN, RUBEN MURILLO JR., BRIAN WALLACE, and BRIAN LEE, Defendants.	Case No.: A-17-761364-C (Consolidated with Case No. A-17-761884-C) DEPT. NO.: 4 **AFFIDAVIT OF HENRY PINES IN SUPPORT OF NSEA AND NEA PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Henry Pines, first being duly sworn, deposes and affirms:

1. I am over the age of eighteen and am competent to testify on the matters set forth herein. I make the statements in this Affidavit in support of NSEA and NEA Plaintiffs' Motion for Partial Summary Judgment.

2. I am a paralegal at the law firm of Bredhoff & Kaiser, counsel for the NSEA Parties. The statements in this Declaration are made on the basis of my review of records kept in the ordinary course of business by Bredhoff & Kaiser.

3. Attached as Exhibit A is a true and authentic copy of an affidavit by John Vellardita, submitted by Defendants in this case as Exhibit 11 in support of their Motion for Partial Summary Judgment, filed on June 18, 2018.

4. Attached as Exhibit B is a true and authentic copy of an affidavit by John Vellardita, submitted by Defendants in this case as Exhibit F in support of their Opposition to NSEA Parties' Application for Prejudgment Writ of Attachment, filed on April 11, 2018.

5. Attached as Exhibit C is a true and authentic copy of an email and its attachment sent from Joel, D'Alba, counsel for CCEA parties, to John West, former counsel for NEA/NSEA parties, regarding a Bank of America account opened by CCEA. The attachment includes correspondence between CCEA and Bank of America regarding a bank account ending in 4739.

6. Attached as Exhibit D is a true and authentic copy of portions of CCEA Financial Reports produced by Defendants in this case during the course of discovery, bates stamped CCEA 013351, CCEA 013417, CCEA 013525, CCEA 013613-14, CCEA 013717.

7. Attached as Exhibit E is a true and authentic copy of a transcript of a hearing held before the Discovery Commissioner in this case on September 26, 2018.

8. In this litigation, CCEA, through its counsel, has provided Bredhoff & Kaiser documentation related to the NEA and NSEA dues not paid over to NEA and NSEA. True and correct copies of the correspondence and documentation received by Bredhoff & Kaiser from CCEA's counsel are attached as follows:

a. An email sent from John S. Delikanakis to Graham Lake on May 22, 2018 and attached hereto as Exhibit F;

b. A letter from John Delikanakis to Robert Alexander, dated April 6, 2018, providing documentation in response to the Court's Order, *Nevada State Education Assoc., et al., v. Clark Cty. Educ. Assoc., et al.*, A-17-761884-C (May 10, 2018) (entered May 11, 2018), attached hereto as Exhibit G.

   i. Attached to that letter were Dues Transmittal Reports from August 10, 2017, to April 10, 2018, attached hereto as Exhibit H;

   ii. Also attached to that letter were redacted Bank of America statements for a Clark County Education Association Expense Account for September 1, 2017, through March 31, 2018, attached hereto as Exhibit I;

c. Records, with a notarized business records certification signed by Bank of America employee Brittany D'amore, for a Bank of America Account entitled "Clark County Education Association" ending in 4739 from September 13, 2017, to July 31, 2018, and attached hereto as Exhibit J;

Further Affiant Sayeth Naught.

Henry Pines

STATE OF District of Columbia)

) ss

COUNTY OF Washington)

Subscribed and sworn to before me

LINDA J. MASON NOTARY PUBLIC DISTRICT OF COLUMBIA 20[illegible] EXP. 01-31-21

this 7th day of November, 2018.

Linda J. Mason
Notary Public

Richard G. McCracken, Nevada Bar No. 2748
Kimberley C. Weber, Nevada Bar No. 14434
McCRACKEN, STEMERMAN & HOLSBERRY, LLP
1630 South Commerce Street, Suite 1-A
Las Vegas, NV 89102
Tel: (702) 386-5107
rmccracken@msh.law
kweber@msh.law

John S. Delikanakis, Nevada Bar No. 5928
Michael Paretti, Nevada Bar No. 13926
Bradley T. Austin, Nevada Bar No. 13064
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Tel: (702) 784-5200
jdelikanakis@swlaw.com
mparetti@swlaw.com

Of Counsel:
Joel A. D'Alba
ASHER, GITTLER & D'ALBA, LTD.
200 West Jackson Blvd., Suite 720
Chicago, IL 60606
Tel: (312) 263-1500
jad@ulaw.com
Attorneys for the CCEA Parties

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CLARK COUNTY EDUCATION ASSOCIATION, VICTORIA COURTNEY, JAMES FRAZEE, ROBERT G. HOLLOWOOD, and MARIA NEISESS, Plaintiffs, vs. NEVADA STATE EDUCATION ASSOCIATION, DANA GALVIN, RUBEN MURILLO, JR., BRIAN WALLACE, and BRIAN LEE, Defendants. NEVADA STATE EDUCATION ASSOCIATION; NATIONAL EDUCATION ASSOCIATION; RUBEN MURILLO; ROBERT BENSON; DIANE DI ARCHANGEL; AND JASON WYCKOFF, Plaintiffs-Counter Defendants,	Case No.: A-17-761364-C DEPT. NO.: 4 (consolidated with A-17-761884-C) **CCEA PARTIES' MOTION TO ALTER OR AMEND COURT'S MAY 11, 2018 ORDER PURSUANT TO NRCP 59(E) and 60(B)**

And

BRIAN LEE,

Counter-Defendant,

vs.

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

Defendants-Counter Plaintiffs.

Pursuant to NRCP 59(e)[1] and 60(b), Clark County Education Association ("CCEA"), Victoria Courtney, James Frazee, Robert B. Hollowood, Marie Neisess, and John Vellardita (collectively, "CCEA Parties"), by and through their counsel, Snell & Wilmer L.L.P., McCracken Stemerman & Holsberry, LLP, and Asher, Gittler & D'Alba, Ltd., move to alter or amend the Court's May 11, 2018 Order ("Motion"). This Motion is based on the Memorandum of Points and Authorities below, the papers and pleadings on file with the Court, and any oral argument that this Court may entertain on behalf of the CCEA Parties.

DATED this 12th day of December, 2018.

SNELL & WILMER L.L.P.

By: /s/ *John Delikanakis*
John S. Delikanakis
Nevada Bar No. 5928
Michael Paretti
Nevada Bar No. 13926
Bradley T. Austin
Nevada Bar No. 13064
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169

Joel A. D'Alba (*pro hac vice*)
200 West Jackson Blvd., Suite 720
Chicago, IL 60606

[1] *See Lytle v. Rosemere Estates Prop. Owners*, 314 P.3d 946, 948 (Nev. 2013) (holding that Rule 59(e) applies to any appealable order). Because the May 11, 2018 Order is injunctive in nature, it is appealable. *See* NRAP 3A(b)(3). The CCEA Parties alternatively move under Nevada Rule of Civil Procedure 60(b), EDCR 2.24, and pursuant to the Court's May 11, 2018 Order, which Order states that "all funds on deposit in the Restricted Account … shall not be changed or modified, without a further Order from this Department 31 of this Court."

Richard G. McCracken
Nevada Bar No. 2748
Kimberley C. Weber
Nevada Bar No. 14434
McCRACKEN, STEMERMAN
& HOLSBERRY, LLP
1630 South Commerce Street, Suite 1-A
Las Vegas, NV 89102

Attorneys for the CCEA Parties

NOTICE OF MOTION

IT IS HEREBY ORDERED that Defendants/Counterclaimants' **CCEA PARTIES' MOTION TO ALTER OR AMEND COURT'S MAY 11, 2018 ORDER UNDER NRCP 59(E) and 60(B)** will be heard on the 05 day of Feb., 2019, at the hour of 9:00 a.m. / ~~p.m.~~ in Department 4.

DATED this _____ day of December, 2018.

Submitted by:

SNELL & WILMER L.L.P.

/s/ *John Delikanakis*
John S. Delikanakis
Nevada Bar No. 5928
Michael Paretti
Nevada Bar No. 13926
Bradley T. Austin
Nevada Bar No. 13064
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169

Attorneys for the CCEA Parties

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On November 15, 2018, the Court ruled that 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 ("MSJ Order"). Thus, the Court should alter or amend the May 11, 2018 Order ("Restricted Account Order"), vacating the Restricted Account Order in its entirety and permitting CCEA to disgorge the funds held in the restricted account that were collected between August 31, 2017 and April 24, 2017, and return them to the individual CCEA members, the teachers from whom the funds were collected.[2]

By way of background, on March 30, 2018, the NSEA Parties filed an Application for Order Directing the Issuance of a Prejudgment Writ of Attachment with Notice ("Application"), which the CCEA Parties opposed. The Application was premised on the specific argument that CCEA had a contractual obligation after September 1, 2017 to collect and remit dues to NSEA/NEA, which argument, as explained below, was expressly rejected by this Court in November. Indeed, the NSEA Parties repeatedly allege as a basis for their Application as follows:

- Despite **CCEA's contractual obligations to continue remitting these dues** . . . . Application at 3:11-12 (emphasis supplied);
- And, as explained below, not only is **CCEA contractually obligated to have remitted the dues** that it has instead diverted to accounts under its own control…. Application at 4:3-9 (emphasis supplied);
- Since at least 1979, the mechanism by which CCEA is obligated to pay over to NSEA the NSEA and NEA membership dues money transmitted to it by the School District **has been a Dues Transmittal Agreement**, an agreement which has not been terminated by its terms and remains in effect between CCEA and NSEA. Application at 4:26 – 5:1 (emphasis supplied);
- Specifically, **the Dues Transmittal Agreement, attached to Mr. Lee's Affidavit, requires CCEA to transmit "to the NSEA on a monthly basis" the "NSEA and NEA**

[2] Notably, the individual NSEA Parties, Ruben Murillo, Robert Benson, Diane Di Archanhel, and Jason Wycoff are included in this group of CCEA members who will benefit from a grant of this motion.

> **Membership Dues**." First entered into in 1979, the Agreement provides that it "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." No written termination of the Dues Transmittal Agreement has been made by either party and the Agreement remains in effect. Application at 9:2-10 (emphasis supplied).

In opposition, the CCEA Parties showed that CCEA had been voluntarily placing the monies at issue into a restricted bank account since the inception of litigation. The Honorable Judge Joanna Kishner entertained oral argument on the Application on April 23, 2018 and ultimately declined to issue a writ of attachment. Instead, Judge Kishner issued an equitable order, requiring that the CCEA Parties continue placing the dues into a restricted account (as they had been doing since the inception of the case).

Specifically, the Court ordered that: (1) all funds in the possession of or received by CCEA for the 2017-2018 school year in respect to NSEA dues and in respect to NEA dues be deposited into a restricted account, "as [CCEA] has represented to the Court it has done during the course of this litigation"; (2) that no funds shall be withdrawn, transferred, or disbursed out of the Restricted Account, and the Restricted Account shall not be changed or modified, without a further Order from Department 31 of this Court;[3] and (3) that CCEA provide a monthly account statement to the NSEA Parties. Restricted Account Order dated May 11, 2018, attached hereto as **Exhibit 10**.

On June 18, 2018, the CCEA Parties filed a Motion for Partial Summary Judgment ("Motion") on its declaratory relief claim. On November 15, 2018, this Court granted CCEA's Motion and requested relief in its entirety, specifically finding that prior to September 1, 2017, CCEA properly terminated the contracts between CCEA and NSEA requiring dues transmittal (both the Service Agreement and Dues Transmittal Agreement), and expressly held that CCEA owed no duties to NSEA/NEA under the Service Agreement and Dues Transmittal Agreement to

[3] The Restricted Account Order makes specific reference to Department 31 because at the time the Restricted Account Order was issued, two separate actions between the NSEA Parties and CCEA Parties were proceeding in Departments 28 and 31. On June 29, 2018 – after the Restricted Account Order was issued, the Department 31 action was consolidated into the Department 28 action upon motion by CCEA. On July 2, 2018, the consolidated action was reassigned to Department 1. Upon peremptory challenge, and on July 9, 2018, the consolidated action was ultimately assigned to this Department. Thus, this Department is the proper Department to hear the instant Motion.

collect and/or transmit membership dues on NSEA or NEA's behalf on or after September 1, 2017 – thus, completely nullifying the underlying basis for the Restricted Account Order.

Pursuant to Nevada Rule of Civil Procedure 59(e) and 60(b),[4] and in light of this Court's finding that CCEA owed no duties to NSEA/NEA under the service agreement and dues transmittal agreement to collect and/or transmit membership dues on NSEA/NEA's behalf on or after September 1, 2017, the CCEA Parties respectfully request that this Court vacate the Restricted Account Order in its entirety and permit CCEA to disgorge the funds held in the restricted account and return the money to the CCEA members from whom the funds were collected.

II. STATEMENT OF FACTS[5]

A. Relationship between the Parties.

CCEA is a democratic organization that is the exclusive collective bargaining representative of the licensed professional employees of CCSD and is the employee organization that serves as the local voice for educators to advance the cause of education, promote professional excellence among educators to protect the rights of educators, advance their interests and welfare, and secure professional autonomy. Affidavit of John Vellardita ("Vellardita Aff.") at ¶4, attached hereto as **Exhibit 9**. CCEA is the recognized and exclusive bargaining agent for CCSD's licensed professional employees. Vellardita Aff. at ¶6. NSEA is not the recognized and exclusive bargaining agent for CCSD's licensed professional employees. Vellardita Aff. at ¶6. NSEA was the state-wide affiliate of the CCEA until April 25, 2018. Vellardita Aff. at ¶5. NEA was the national affiliate of the CCEA until April 25, 2018. Vellardita Aff. at ¶7. NEA remains the national affiliate of NSEA. Vellardita Aff. at ¶8.

///

[4] *See* FN 1.

[5] This fact section essentially re-states the facts presented to the Court in the CCEA Parties' successful Motion for Partial Summary Judgment. They are re-stated here for the Court's convenience.

B. The Underlying Dispute between CCEA and NSEA.

1. Dues are transmitted from CCEA to NSEA only pursuant to a dues transmittal agreement.

CCEA has thousands of CCSD educators who are members and whose dues payments are at the center of this litigation due to a good faith dispute between CCEA and NSEA over the rights and obligations under a dues transmittal agreement that expired on August 31, 2017. Vellardita Aff. at ¶9. Members of CCEA pay dues to CCEA pursuant to a CCEA membership authorization form ("CCEA Membership Authorization Form"). Vellardita Aff. at ¶10. The CCEA Membership Authorization Form is only between CCEA and the individual members, with the individual members agreeing that:

> **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).

CCEA Membership Authorization Form, attached hereto as **Exhibit 8** (emphasis supplied).

Once the individual member enters into the CCEA Membership Authorization Form with CCEA, membership dues are then deducted from members' pay checks by their employer, the CCSD, pursuant to a collective bargaining agreement between CCEA and CCSD. Vellardita Aff. at ¶10. Dues payments are directed to CCEA by CCSD. Vellardita Aff. at ¶11.

Dues are then transmitted to NSEA only through a dues transmittal agreement ("Dues Transmittal Agreement"), which is an addendum and incorporated into a services agreement ("Service Agreement") as Addendum A. Vellardita Aff. at ¶12; Service Agreement between

Nevada State Education Association and the Clark County Education Association, attached as **Exhibit 1**. The Service Agreement references the Dues Transmittal Agreement as follows:

> 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.

Exhibit 1, at ¶1.

Pursuant to the NSEA Bylaws, NSEA is required to have a Dues Transmittal Agreement in place with any affiliate labor organization as a condition of affiliation (Article VIII Section 3 (F)) and the NEA Bylaws (Section 2-9). Bylaws of the Nevada State Education Association, attached as **Exhibit 5**; Bylaws of the National Education Association, attached as **Exhibit 6.** Specifically, the NSEA bylaws require that:

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

Exhibit 6 at Article VIII Section 3 (F). The NEA bylaws require that:

> 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.

Exhibit 5 at Section 2-9 (emphasis supplied).

Thus, pursuant to the CCEA Membership Authorization Form, all dues of CCEA members are deducted from their pay checks and are sent to and collected by CCEA. Exhibit 8. Then, pursuant to the Dues Transmittal Agreement, proportioned amounts of the foregoing[6] are transmitted from CCEA to NSEA. Exhibit 1 at Addendum A. Finally, pursuant to the NEA Bylaws, NSEA then transmits NEA's portion of those dues to NEA. Exhibit 5 at Section 2-9. In

[6] CCEA members each contributed $377.66 per year to NSEA, pursuant to the NSEA Policies, and $189 per year to the NEA. Vellardita Aff. at ¶14.

the absence of a Dues Transmittal Agreement, there is no obligation for CCEA to transmit dues to NSEA and per NEA's bylaws, only NSEA has a contractual obligation to pay NEA. *See id*.

2. CCEA properly terminated the dues transmittal agreement.

The Service Agreement and the Dues Transmittal Agreement expressly allow either party to terminate and seek to renegotiate the terms of the agreement. *See* Exhibit 1 at ¶20 and Addendum A at VI.

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.

Exhibit 1 at ¶20 (emphasis supplied). The relevant anniversary date is September 1, 2017. Exhibit 1 at 1.

Similarly, the Dues Transmittal Agreement 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." Exhibit 1, Addendum A at VI (emphasis added). The NSEA membership year runs from September 1 to August 31. Exhibit 5 at Article I, Section 3 ("Membership Year: The membership year shall be September 1 to August 31.").

CCEA notified NSEA of its intent to terminate the Dues Transmittal Agreement and negotiate a new agreement on May 3, 2017, in a letter from the CCEA Executive Director to the NSEA Executive Director. *See* May 3, 2017, letter from J. Vellardita to B. Lee, attached as **Exhibit 2**. 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. Vellardita Aff. at ¶16. It was set to expire on August 31, 2017. *See* Exhibit 1. 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.

May 3, 2017 Letter, Exhibit 2.

On July 17, 2017 and August 3, 2017, CCEA sent NSEA additional notices of termination, affirming that CCEA terminated the Service Agreement (inclusive of the Dues Transmittal Agreement) on May 3, 2017, and indicating its desire to renegotiate the Dues Transmittal Agreement. *See* July 17, 2017 and August 3, 2017, letters from J. Vellardita to B. Lee, attached as **Exhibits 3** and **4**.

Specifically, the letters stated that:

> 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.

July 17, 2017 Letter, Exhibit 3.

> 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.

August 3, 2017 Letter, Exhibit 4 (emphasis supplied).

After the termination and expiration of the Dues Transmittal Agreement on August 31, 2017, CCSD continued to send the employees' dues to CCEA, whereupon the dues were voluntarily placed into a restricted bank account where they remain to this date. Vellardita Aff. at ¶19.

///

C. Judge Kishner's Restricted Account Order.

On March 30, 2018, Plaintiffs filed their Application for Order Directing the Issuance of a Prejudgment Writ of Attachment with Notice, which the CCEA Parties opposed. In opposition, the CCEA Parties represented that CCEA had been placing the dues at issue into a restricted account since the inception of litigation. The Honorable Judge Joanna Kishner entertained oral argument on the Application on April 23, 2018, and issued an equitable order, ordering the CCEA Parties to continue doing what they showed they had been doing since the inception of the case. Restricted Account Order, attached hereto as **Exhibit 11**. Specifically, the Court ordered, in relevant part, as follows:

- That all funds in the possession of or received by CCEA for the 2017-2018 school year in respect to NSEA dues (numerically calculated traditionally at the annual rate of $376.66) and in respect to NEA dues (numerically calculated traditionally at the annual rate of $189.00) shall continue to be deposited by CCEA into account number #501014714739 (the "Restricted Account"), maintained at the Bank of America Las Vegas, Nevada Branch (the "Bank") as it has represented to the Court it has done during the course of this litigation; and
- That all funds on deposit in the Restricted Account with respect to the 2017-2018 NSEA and NEA dues shall remain in the Restricted Account, and that no funds shall be withdrawn, transferred, or disbursed out of the Restricted Account, and the Restricted Account shall not be changed or modified, without a further Order from this Department 31 of this Court.

The Restricted Account Order further required CCEA to provide NSEA and NEA with a monthly statement from the Restricted Account.

D. This Court Subsequently Held that CCEA Owed No Duties to NSEA or NEA to collect and/or transmit membership dues on NSEA/NEA's behalf on or after September 1, 2017.

On June 18, 2018, the CCEA Parties filed a Motion for Partial Summary Judgment on its declaratory relief claim. On November 15, 2018, this Court granted CCEA's Motion and

requested relief in its entirety, finding that: (1) the termination provisions of the Service Agreement and Dues Transmittal Agreement are clear and unambiguous, (2) CCEA's 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/NEA under the Service Agreement or Dues Transmittal Agreement to collect and/or transmit membership dues on NSEA/NEA's behalf on or after September 1, 2017.**

III. LEGAL ARGUMENT

A. Legal Standard.

"A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry and Tile Contractors Ass'n v. Jolley, Urga & Wirth, Ltd*., 113 Nev. 737, 741, 941 P.2d 486 (1997). Rule 59(e) motions have been interpreted as "cover[ing] a broad range of motions, [with] the only real limitation on the type of motion permitted [being] that it must request a substantive alteration of the judgment, not merely correction of a clerical error, or relief of a type wholly collateral to the judgment." *AA Primo Builders, LLC v. Washington*, 245 P.3d 1190, 1193 (Nev. 2010).

"Among the 'basic grounds' for a Rule 59(e) motion are 'correct[ing] manifest errors of law or fact,' 'newly discovered or previously unavailable evidence,' the need 'to prevent manifest injustice,' or a 'change in controlling law'." *Id.* (*citing Coury v. Robison*, 115 Nev. 84, 124–27, 976 P.2d 518 (1999)). *See also*, *Lytle v. Rosemere Estates Prop. Owners*, 314 P.3d 946, 948 (Nev. 2013) (holding that Rule 59(e) applies to any appealable order).[7] The requirements for filing a Rule 59(e) motion are minimal; in addition to being timely filed (no later than 10 days after service of written notice of entry of the judgment), the motion must "be in writing, . . . state with particularity [its] grounds [and] set forth the relief or order sought." *Id.* at 1192.

///

[7] Because this Court's Order is injunctive in nature, it is appealable. *See* NRAP 3A(b)(3).

NRCP 60(b) states that:

> (b) On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; or, (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that an injunction should have prospective application. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than 6 months after the proceeding was taken or the date that written notice of entry of the judgment or order was served. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

NRCP 60(b).

B. The Court Should Vacate the Restricted Account Order and Permit CCEA to Return the Funds held in the Restricted Account to the Individual CCEA Members from Whom They Were Collected.

On March 30, 2018, the NSEA Parties filed an Application for Order Directing the Issuance of a Prejudgment Writ of Attachment. The Application requested that the Court issue an order directing the issuance of a prejudgment writ of attachment and garnishment in favor of NSEA in the sum of $4,066,692 and in favor of NEA in the sum of $2,035,152.

The NSEA Parties' request was entirely premised on the argument that CCEA had a contractual obligation, after September 1, 2017, to collect and remit to NSEA/NEA the foregoing dues – which argument was expressly rejected by this Court. Indeed, the NSEA Parties repeatedly allege as a basis for their Application as follows:

- Despite CCEA's contractual obligations to continue remitting these dues . . . . Application at 3:11-12;
- And, as explained below, not only is CCEA contractually obligated to have remitted the dues that it has instead diverted to accounts under its own control…. Application at 4:3-9;

- Since at least 1979, the mechanism by which CCEA is obligated to pay over to NSEA the NSEA and NEA membership dues money transmitted to it by the School District has been a Dues Transmittal Agreement, an agreement which has not been terminated by its terms and remains in effect between CCEA and NSEA. Application at 4:26 – 5:1;

- Specifically, the Dues Transmittal Agreement, attached to Mr. Lee's Affidavit, requires CCEA to transmit "to the NSEA on a monthly basis" the "NSEA and NEA Membership Dues." First entered into in 1979, the Agreement provides that it "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." No written termination of the Dues Transmittal Agreement has been made by either party and the Agreement remains in effect. Application at 9:2-10.

In opposition, the CCEA Parties, in part, showed that CCEA had voluntarily been placing the dues at issue into a restricted account since the inception of litigation.

The Honorable Judge Joanna Kishner declined to issue a writ of attachment, and instead, issued an equitable order, requiring that (1) all funds in the possession of or received by CCEA for the 2017-2018 school year in respect to NSEA dues and in respect to NEA dues be deposited into a restricted account; (2) that no funds shall be withdrawn, transferred, or disbursed out of the Restricted Account, and the Restricted Account shall not be changed or modified, without a further Order from this Department 31 of this Court, "as [CCEA] has represented to the Court it has done during the course of this litigation"; and (3) that CCEA provide a monthly account statement to the NSEA Parties.

On June 18, 2018, the CCEA Parties filed a Motion for Partial Summary Judgment on its declaratory relief claim and on November 15, 2018, this Court granted CCEA's Motion and requested relief in its entirety, finding, for the first time in this litigation,[8] that: (1) the termination provisions of the Service Agreement and Dues Transmittal Agreement are clear and unambiguous, (2) CCEA's 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)

[8] "Among the 'basic grounds' for a Rule 59(e) motion are 'correct[ing] manifest errors of law or fact,' 'newly discovered or previously unavailable evidence,' the need 'to prevent manifest injustice,' or a 'change in controlling law'." *AA Primo Builders, LLC v. Washington, 245 P.3d 1190, 1193 (Nev. 2010) (citing Coury v. Robison, 115 Nev. 84, 124–*27, 976 P.2d 518 (1999)) (emphasis supplied).

CCEA owed no duties to NSEA/NEA under the Service Agreement or Dues Transmittal Agreement to collect and/or transmit membership dues on NSEA/NEA's behalf on or after September 1, 2017.

In light of this Court's subsequent finding that CCEA owed no duties to NSEA/NEA under the Service Agreement or Dues Transmittal Agreement to collect and/or transmit membership dues on NSEA/NEA's behalf on or after September 1, 2017, the repeatedly stated underlying basis for the Restricted Account Order (the contractual relationship between CCEA and NSEA) has been resolved and no longer exists.[9] As such, the CCEA Parties respectfully request that this Court vacate the Restricted Account Order in its entirety and permit CCEA to disgorge and return the funds held in the restricted account to the individual CCEA members (including the individual NSEA Parties) from whom they were collected.

IV. CONCLUSION

For the foregoing reasons, the CCEA Parties respectfully request that the Court vacate the Restricted Account Order in its entirety and permit CCEA to disgorge and return the funds held in the restricted account to the individual CCEA members from whom they were collected.

DATED this 12th day of December, 2018.

SNELL & WILMER L.L.P.

By: /s/ *John Delikanakis*
John S. Delikanakis
Nevada Bar No. 5928
Michael Paretti
Nevada Bar No. 13926
Bradley T. Austin
Nevada Bar No. 13064
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169

Joel A. D'Alba (*pro hac vice*)
200 West Jackson Blvd., Suite 720
Chicago, IL 60606

Richard G. McCracken
Nevada Bar No. 2748

[9] See FN 8.

Kimberley C. Weber
Nevada Bar No. 14434
McCRACKEN, STEMERMAN
& HOLSBERRY, LLP
1630 South Commerce Street, Suite 1-A
Las Vegas, NV 89102

Attorneys for the CCEA Parties

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 this date, I caused to be served a true and correct copy of the foregoing **CCEA PARTIES' MOTION TO ALTER OR AMEND COURT'S MAY 11, 2018 ORDER UNDER NRCP 59(E) and 60(B)** by the method indicated below:

X	Odyssey E-File & Serve	_____	Federal Express
_____	U.S. Mail	_____	U.S. Certified Mail
_____	Facsimile Transmission	_____	Hand Delivery
_____	Email Transmission	_____	Overnight Mail

and addressed to the following:

Richard J. Pocker
Nevada Bar No. 3568
Paul J. Lal
Nevada Bar No. 3755
BOIES SCHILLER FLEXNER LLP
300 South Fourth Street, Suite 800
Las Vegas, NV 89101
Telephone: (702) 382-7300
Facsimile: (702) 382-2755
Email: rpocker@bsfllp.com
Email: plal@bsfllp.com
Attorneys for Plaintiffs
(via Odyssey E-File & Serve, Email Transmission and Hand Delivery)

John M. West (*pro hac vice*)
Matthew Clash-Drexler (*pro hac vice*)
James Graham Lake (*pro hac vice*)
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
Telephone: (202) 842-2600
Facsimile: (202) 842-1888
Email: jwest@bredhoff.com
Email: mcdrexler@bredhoff.com
Email: glake@bredhoff.com
Attorneys for Plaintiffs
(via Odyssey E-File & Serve and Email Transmission)

DATED this 12th day of December, 2018.

/s/ Lyndsey Luxford
An Employee of Snell & Wilmer, L.L.P.

4840-6719-7825.1

EXHIBIT 9

Richard G. McCracken, Nevada Bar No. 2748
Kimberley C. Weber, Nevada Bar No. 14434
McCRACKEN, STEMERMAN & HOLSBERRY, LLP
1630 South Commerce Street, Suite 1-A
Las Vegas, NV 89102
Tel: (702) 386-5107
rmccracken@msh.law
kweber@msh.law

John S. Delikanakis, Nevada Bar No. 5928
Bradley T. Austin, Nevada Bar No. 13064
Michael Paretti, Nevada Bar No. 13926
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Tel: (702) 784-5200
jdelikanakis@swlaw.com
baustin@swlaw.com
mparetti@swlaw.com

Joel A. D'Alba (*pro hac vice*)
ASHER, GITTLER & D'ALBA, LTD.
200 West Jackson Blvd., Suite 720
Chicago, IL 60606
Tel: (312) 263-1500
jad@ulaw.com

Attorneys for CCEA Parties

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CLARK COUNTY EDUCATION ASSOCIATION, VICTORIA COURTNEY, JAMES FRAZEE, ROBERT B. HOLLOWOOD, and MARIE NEISESS, Plaintiffs v. NEVADA STATE EDUCATION ASSOCIATION, DANA GALVIN, RUBEN MURILLO JR., BRIAN WALLACE, and BRIAN LEE, Defendants	Case No.: A-17-761364-C DEPT. NO.: 4 **AFFIDAVIT OF JOHN VELLARDITA IN SUPPORT OF CCEA PARTIES' OPPOSITION TO NSEA PARTIES' MOTION FOR PARTIAL SUMMARY JUDGMENT AND COUNTERMOTION FOR PARTIAL SUMMARY JUDGMENT**

///

///

STATE OF NEVADA)
)
COUNTY OF CLARK___)

AFFIDAVIT OF JOHN VELLARDITA

John Vellardita, being first duly sworn, deposes and says as follows:

1. I make this Affidavit in support of the CCEA PARTIES' OPPOSITION TO NSEA PARTIES' MOTION FOR PARTIAL SUMMARY JUDGMENT AND COUNTERMOTION FOR PARTIAL SUMMARY JUDGMENT ("Opposition/Countermotion").

2. I have personal knowledge of the facts set forth herein and am competent to testify thereto.

3. I have been the appointed Executive Director of the Clark County Education Association ("CCEA") since 2011. My duties include representing the collective bargaining interests, negotiating collective bargaining agreements and related matters for teachers and licensed professionals employed by the Clark County School District. I have provided expert labor relations advice and guidance in negotiating multiple collective bargaining agreements, representing hundreds of teachers in individual grievance matters, and lobbying the State legislature for funding of teachers' salaries and changes in the education system for Clark County. As the Executive Director, I attend the meetings of the CCEA Executive Board and the Association Representative Council. Victoria Courtney is the elected president of the CCEA.

4. As stated in its Constitution and Bylaws, CCEA is an independent and self-governed organization that is the exclusive collective bargaining representative of the licensed professional employees of the Clark County School District ("CCSD") and is the employee organization that serves as the local voice for educators to advance the educational profession, promote professional excellence among educators, protect the rights of educators, advance their interests and welfare, ensure through collective action the advancement of quality public education, and secure professional autonomy.

5. Nevada State Education Association ("NSEA") was the state wide affiliate of the CCEA until April 25, 2018.

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

6. CCEA is the recognized and exclusive bargaining agent for CCSD's licensed professional employees. NSEA is not the recognized and exclusive bargaining agent for CCSD's licensed professional employees.

7. NEA was the national affiliate of both NSEA and CCEA until April 25, 2018.

8. National Education Association ("NEA") is still the national affiliate of NSEA.

9. CCEA has thousands of members, whose dues payments are at the center of this litigation due to a good faith dispute between CCEA and NSEA over the terms of a dues transmittal agreement that expired on September 1, 2017.

10. Members of CCEA pay dues to CCEA pursuant to a membership authorization form ("CCEA Membership Authorization Form"), which dues are deducted from their pay checks by their employer, the CCSD, pursuant to a collective bargaining agreement between CCEA and CCSD.

11. Dues payments are directed to CCEA by CCSD.

12. Dues are then transmitted to NSEA only through a dues transmittal agreement, which is an addendum and incorporated into a services agreement as Addendum A. A true and correct copy of the service agreement is attached to the Opposition/Countermotion as **Exhibit 1**.

13. Once CCEA transmitted dues to NSEA, NSEA then transmits NEA's portion of those dues to NEA. Only NSEA has a contractual obligation to pay NEA, per NEA's bylaws. True and correct copies of the Bylaws of the Nevada State Education Association, and the Bylaws of the National Education Association are attached the Opposition/Countermotion as **Exhibits 5** and **6**.

14. CCEA members contributed $377.66 per year per teacher to NSEA, pursuant to the NSEA Policies and $189 per year per teacher to the NEA.

15. CCEA notified NSEA of its termination of the dues transmittal agreement and its intent to negotiate a new agreement on May 3, 2017, in a letter from the CCEA Executive Director to the NSEA Executive Director. A true and correct copy of the May 3, 2017 letter is attached to the Opposition/Countermotion as **Exhibit 2**.

16. The notice from CCEA to NSEA on May 3, 2017, was to terminate the Service

Snell & Wilmer L.L.P. LAW OFFICES 3883 Howard Hughes Parkway, Suite 1100 Las Vegas, Nevada 89169 702.784.5200

Agreement inclusive of Addendum A, which constitutes the dues transmittal contract, under which CCEA members' dues payments were being transmitted by CCEA to NSEA. It was set to expire on August 31, 2017.

17. On July 17, 2017 and August 3, 2017, CCEA sent NSEA additional notices of termination, affirming that CCEA terminated the service agreement (inclusive of the dues transmittal agreement) on May 3, 2017, and indicating its desire to renegotiate the Dues Transmittal Agreement. True and correct copies of the July 17 and August 3, 2017 letters are attached to the Opposition/Countermotion as **Exhibits 3** and **4**.

18. CCEA and NSEA have not yet agreed upon a new dues transmittal agreement.

19. After the termination of that agreement, CCSD continued to send the employees' dues to CCEA, whereupon the dues were placed into a restricted bank account.

20. On April 25, 2018, CCEA voted to disaffiliate from NEA and NSEA, which disaffiliation was approved by 88% of the votes and effective immediately.

25. A true and correct copy of CCEA's Constitution and Bylaws is attached the Opposition/Countermotion as **Exhibit 7**.

26. A true and correct copy of the CCEA Membership Authorization Form is attached to the Opposition/Countermotion as **Exhibit 8**.

27. A true and correct copy of the July 26, 2017 letter from NSEA to CCEA is attached to the Opposition/Countermotion as **Exhibit 11**.

28. The Association Representative Council, "ARC" is the legislative and policy – forming body of the Association and consists of elected officers, an Executive Board, and one or more representatives elected from each school faculty. The ARC representatives are selected by open nomination and secret ballot election. The ARC meets one time per year and among its responsibilities are establishing and amending the Associations Bylaws, policies and election procedures, establishing the level of dues to be paid by members, adopting the annual budget and exercising final authority in all matters of the CCEA.

29. The elected officers of the CCEA are president, vice president, secretary and treasurer.

Snell & Wilmer L.L.P. LAW OFFICES 3883 Howard Hughes Parkway, Suite 1100 Las Vegas, Nevada 89169 702.784.5200

30. The Executive Board consists of the four elected officers and over sixteen members elected in zones or districts throughout the county.

31. The CCEA has been affiliated with a state wide organization, Nevada State Education Association and a national organization, the National Education Association.

32. I am aware of and attended the meetings of the Executive Board held in March and April 2018 in which the issues of disaffiliation from the Nevada State Education Association and the National Education Association were discussed and voted upon.

33. Pursuant to the CCEA Bylaws, members of CCEA were notified by an email sent to all members on March 24, 2018, of the general membership meeting scheduled for April 25, 2018. A true and correct copy is attached hereto as **Exhibit 12**.

34. April 14, 2018, the Executive Board of CCEA met to consider a proposed bylaw amendment to set CCEA dues at $510 per year upon disaffiliation from the NSEA and the NEA and upon CCEA becoming an independent labor organization.

35. As of April 14, 2018, the annual dues payments for CCEA members included payments to CCEA, NSEA and NEA and were $810.50. The $510 dues payments considered by the dues motion on April 14, 2018, constituted a dues decrease for all CCEA members.

36. The Association Representative Council met on April 24, 2018, to consider a by-law change in Article X, Section 1 by removing the word "shall" from the affiliate's status and bylaw provision and inserting the word "may," which meant that the Association may, rather than shall maintain affiliate status with the NSEA and NEA. That change to Article X of the Bylaws was approved. A true and correct copy of the ARC Agenda, April 24, 2018, Bates 14482, is attached hereto as **Exhibit 13**.

37. On April 24, 2018, the Association Representative Council adopted a tentative budget for fiscal year 2018-19, setting the CCEA annual dues rate at $510 for each member.

38. On April 25, 2018, members of the Association at a general membership meeting were advised that the Association Representative Council amended the Bylaws to effectively authorize the disaffiliation from the NSEA and NEA and those union dues would be reduced by an amount of 40 percent a year from $33.78 per paycheck to $21.25 per paycheck. On April 25,

Snell & Wilmer L.L.P. LAW OFFICES 3883 Howard Hughes Parkway, Suite 1100 Las Vegas, Nevada 89169 702.784.5200

2018, the CCEA members were notified by a mass email of this vote and received a second notice of the general membership meeting to take place on that day. A true and correct copy of the April 25, 2018 notice is attached hereto as **Exhibit 14**.

39. At the April 25, 2018, general membership meeting, the members approved a motion to disaffiliate from the NSEA and NEA. As a result of the disaffiliation vote, the dues payments were no longer going to be made to the NSEA or NEA, and there was a consequent reduction of union dues by 40 percent. The reduction of dues was ratified by the CCEA members at that meeting. A true and correct copy of the notice is attached hereto as **Exhibit 15**.

I declare under penalty of perjury and under the laws of the State of Nevada that the forgoing is true and correct.

John Vellardita

SUBSCRIBED and SWORN to before me
this 12th day of December 2018.

NOTARY PUBLIC

JENNIFER FOWLER
Notary Public, State of Nevada
Appointment No. 18-2464-1
My Appt. Expires May 20, 2022

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

EXHIBIT 11

Nevada State Education Association
NSEA
www.nsea-nv.org

July 26, 2017

John Vellardita, Executive Director
Clark County Education Association
4230 McLeod Drive
Las Vegas, NV 89121

Re: Your Letter of July 17, 2017

Dear John:

On May 3, 2017, you wrote to me offering to "renegotiate the current Service Agreement and anticipate meeting with [me] to discuss these issues." I responded on May 4, 2017, stating that,

> "I believe that the policies of the NSEA allow for the renegotiations of affiliation/service agreements starting on September 15th. I am constrained by our NSEA policies. I will consider this letter a request to start those negotiations starting as soon as possible after that date."

The specific policy section I was referencing in my May 4, 2017 response to you was NSEA Policy III. Operations, E. Operation, Affiliate and Service Agreements, 2, which states that,

> "A written request to create an Affiliate Agreement shall be submitted by the affiliate's President, between September 15 and December 15 of each fiscal year, to the NSEA president and the NSEA Executive Director."

CCEA did not send any response or otherwise communicate with NSEA on this matter until I received your July 17, 2017. In that letter, you state that "[t]his letter serves notice to NSEA that unless there is a successor agreement in place before the August 31, 2017 [sic] all terms and conditions of the [Service/Affiliate[1]] agreement shall become null and void." NSEA disagrees with your assertion. As I wrote to you on May 4, in accordance with NSEA's policies, we are willing to meet with representatives of CCEA to negotiate a successor Affiliation Agreement as outlined in NSEA Policy III. Operations, E. Operation, Affiliate and Service Agreements beginning on September 15, 2017.

I understand from your letter that CCEA faces a number of challenges at the present moment. In the interests of unity and partnership with our local, NSEA is willing to prioritize Affiliate Agreement negotiations and will try to meet as soon as possible after September 15, 2017. Please provide several dates after that time so that I can coordinate with legal counsel and the rest of the NSEA negotiations team.

[1] It should be noted that while your letter seeks to negotiate a "Service Agreement" with NSEA. As you are aware, NSEA policy provides that Service Agreements are between NSEA and a program group that does not represent active members. NSEA policies provide that entities like CCEA, which do represent active members, may enter into an Affiliate Agreement with NSEA.

3511 E. Harmon Avenue, Las Vegas, NV 89121 * (800)248-6732 * (702)733-7330 * Fax: (702)733-6004
1890 Donald Street, Reno, NV 89502 * (800)232-6732 * (775)828-6732 * Fax: (775)828-6745
557 W. Silver, Suite 203, Elko, NV 89801 * (888)673-2004 * (775)777-8361 * Fax: (775)777-8362

In Unity,

Brian Lee
Executive Director

MRCN
Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
BOIES SCHILLER FLEXNER LLP
300 South Fourth Street, Suite 800
Las Vegas, NV 89101
Tel.: (702) 382-7300
Fax: (702) 382-2755
rpocker@bsfllp.com
plal@bsfllp.com

Robert Alexander (admitted pro hac vice)
Matthew Clash-Drexler (admitted pro hac vice)
James Graham Lake (admitted pro hac vice)
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
Tel.: (202) 842-2600
Fax: (202) 842-1888
ralexander@bredhoff.com
mcdrexler@bredhoff.com
glake@bredhoff.com

Attorneys for NSEA Parties

DISTRICT COURT
EIGHTH JUDICIAL DISTRICT
CLARK COUNTY, NEVADA

CLARK COUNTY EDUCATION ASSOCIATION, VICTORIA COURTNEY, JAMES FRAZEE, ROBERT G. HOLLOWOOD, AND MARIA NEISESS, Plaintiffs, v. NEVADA STATE EDUCATION ASSOCIATION, DANA GALVIN, RUBEN MURILLO JR., BRIAN WALLACE, AND BRIAN LEE, Defendants.	Case No.: A-17-761364-C (Consolidated with Case No. A-17-761884-C) DEPT. NO.: 4 **NSEA PARTIES' MOTION FOR PARTIAL RECONSIDERATION OF THE DECEMBER 20 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Date of hearing:** **Time of hearing:**

The Nevada State Education Association ("NSEA"), National Education Association ("NEA"), Ruben Murillo, Robert Benson, Diane Di Archangel, Jason Wyckoff, Dana Galvin, Brian Wallace, and Brian Lee (collectively, "NSEA Parties")[1] move this Court to partially reconsider its December 20, 2018 Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Motion for Partial Summary Judgment. The grounds for this motion are set forth in the accompanying Memorandum of Points and Authorities, the papers and pleadings on file in the present case by the time of the hearing, and any argument the Court may entertain with respect to this Motion at the time of hearing.

DATED this 10th day of January, 2019.[2]

BOIES SCHILLER FLEXNER LLP

/s/ Paul J. Lal
Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
300 South Fourth Street, Suite 800
Las Vegas, NV 89101

Robert Alexander*
Matthew Clash-Drexler*
James Graham Lake*
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
* Admitted pro hac vice

Attorneys for NSEA Parties

[1] NSEA, Dana Galvin, Ruben Murillo, Brian Wallace, and Brian Lee are Defendants in Case No. A-17-761364-C, in which the CCEA Parties moved for, and the Court granted, partial summary judgment. Meanwhile, NSEA, NEA, Ruben Murillo, Robert Benson, Diane Di Archangel, and Jason Wyckoff are Plaintiffs in Case No. A-17-761884-C who have pleaded claims that are implicated by the Court's ruling of December 20, 2018.

[2] With the Notice of Entry of the ruling filed on December 20, 2018, under the Eighth Judicial District Court Rules and in light of the intervening holidays on Christmas Day and New Year's Day, a motion for reconsideration is timely if filed on or before January 10, 2019. *See* E.D.C.R. 2.24; E.D.C.R. 1.14(a), (c).

NOTICE OF MOTION

TO: ALL PARTIES; and

TO: THEIR RESPECTIVE COUNSEL.

PLEASE TAKE NOTICE that the NSEA Parties will bring the foregoing Motion on hearing in Department 4 of the above-entitled court on the ___ day of February 28, 2019, at the hour of 9:00 a.m./~~p.m.~~, or as soon thereafter as counsel may be heard.

DATED this 10th day of January, 2019.

BOIES SCHILLER FLEXNER LLP

/s/ Paul J. Lal

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
300 South Fourth Street, Suite 800
Las Vegas, NV 89101

Robert Alexander*
Matthew Clash-Drexler*
James Graham Lake*
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
* Admitted pro hac vice

Attorneys for NSEA Parties

MEMORANDUM OF POINTS AND AUTHORITIES

On December 20, 2018, the Court entered an order that granted the CCEA Parties' motion for partial summary judgment seeking a declaration that two contracts (the Service Agreement and Dues Transmittal Agreement) had terminated and that CCEA therefore "owed no duties to NSEA or NEA under the Service Agreement and Dues Transmittal Agreement." *See* December 20, 2018 Findings of Fact, Conclusion of Law, and Order Granting Plaintiffs' Motion for Partial Summary Judgment ("December 20 Ruling") at p.8 (attached as Exh. A[3]). For the reasons explained below, the NSEA Parties respectfully request in this motion that the Court reconsider two aspects of the findings of fact underlying its order—neither of which go to the Ruling's holding that the Dues Transmittal Agreement and Service Agreement terminated, as a matter of law, effective August 31, 2017. More specifically, aspects of the findings of fact contained in Paragraphs 6, 8-10, and 12 are clearly erroneous, contrary to repeated CCEA admissions in this suit, and could be read to implicate claims and motions which are now before the Court in pending motions but which were neither the basis of the CCEA Parties' June 18, 2018 motion for partial summary judgment nor the basis of the Court's order granting it.[4]

BACKGROUND

A. Factual Background

In view of the extensive briefing in this case, we highlight only the clear facts pertinent to the motion, and otherwise incorporate, to the extent useful, the factual summary set forth in the NSEA Parties' July 20, 2018 opposition brief and its accompanying concise statement of facts. *See* NSEA Defs.' Opp'n to Pls.' Mot. for Partial Summ. J. at 5-9 (attached as Exh. B); NSEA Defs.' Concise Stmt. of Facts in Supp. of NSEA Defs.' Opp'n ("Fact Stmt.") ¶¶ 1-38 (attached as Exh. C).

[3] Excerpts of documents that the NSEA Parties cite in this motion are attached as exhibits for the Court's convenience, with the first citation to the document identifying the exhibit parenthetically.

[4] The NSEA Parties addressed these matters in their December 7, 2018 letter to the Court, prior to the Court's December 20 Ruling.

Unified Membership Structure. Prior to April 25, 2018, when NEA, NSEA and CCEA were affiliated, the organizations operated through a unified membership structure. Fact Stmt. ¶ 4. As the CCEA Parties have expressly conceded, unification meant that by joining CCEA a member also was joining NSEA and NEA as well, becoming a member of all three organizations who was entitled both to all the benefits of membership, and obligated to pay annual membership dues of all three associations. *See id.*; CCEA Parties' Answer (Oct. 30, 2017) ¶ 12 (attached as Exh. D). CCEA Bylaws expressly required unified membership with NSEA and NEA. *See* CCEA Parties' Partial Mot. for Summ. J. ("CCEA MSJ"), Ex. 7 at 023 (CCEA Bylaws Article II, Section 1) (attached as Exh. E); *see also id.*, Ex. 5 at 014 (NSEA Bylaws Article II, Section 5) (attached as Exh. F).

Unified Membership Form. Consistent with this unified membership structure, the three affiliated unions used versions of a NEA/NSEA/CCEA membership enrollment form pursuant to which individuals filling out the form enrolled as members of all three organizations. *See, e.g.*, CCEA MSJ, Ex. 10 (attached as Exh. G). These forms bore NSEA's and NEA's logos, were printed in triplicate or quadruplicate with a designated copy reserved for NSEA, and referred to an individual's "membership status… in NEA, NSEA, or [the] local association." *Id.* Other versions of the same form stated on the cover page to the enrollment form: "Join with your colleagues … become a member of CCEA, NSEA, and NEA." Ex. B to the NSEA Parties' Second Am. Compl. (attached as Exh. H).

Separate Dues Set By Each of the Unified Unions. Each of the three unions set the amount of its own dues required for members. *See* Fact Stmt. ¶ 4; *see also, e.g.*, CCEA MSJ, Ex. 7 at 024 (CCEA Bylaws Article II, Section 4); *id.*, Ex. 5 at 014 (NSEA Bylaws Article II, Section 2). Thus, prior to CCEA's disaffiliation, NEA/NSEA/CCEA members owed NEA dues to NEA, NSEA dues to NSEA, and CCEA dues to CCEA in the amounts that each organization determined through its internal governance procedures, as the CCEA Parties have conceded. *See* CCEA Parties' Am. Answer (Mar. 21, 2018) ¶ 13 (attached as Exh. I). A member's obligation to pay dues to each union was based upon each union's bylaws and/or policies. *See id.*

CCEA's Collection of NEA and NSEA Dues. Until August 31, 2017, CCEA served as the contractually designated "collection agent" for NSEA, collecting and transmitting NSEA and NEA dues to NSEA (which in turn transmits NEA dues to NEA). Fact Stmt. ¶ 8; *see also* CCEA MSJ, Ex. 1 at 005 (attached as Exh. J) ("The NSEA designates, and [CCEA] agrees to be its authorized agent for the purpose of collecting and transmitting NSEA and NEA dues and membership data from NSEA/NEA members who are also members of the [CCEA]." (emphasis added)). As the term "collection agent" acknowledges, a portion of the dues being collected by CCEA as NSEA's "agent" were not CCEA's dues, but rather *NSEA and NEA dues*. The contract which designated CCEA as the "authorized agent for the purpose of collecting and transmitting NSEA and NEA dues" terminated on August 31, 2017 (as this Court has now ruled). After that date, the NSEA and NEA dues that CCEA continued to collect were not collected pursuant to that contract.

B. Procedural Background

CCEA's Motion and the Court's Ruling. On June 18, 2018, the CCEA Parties filed a partial motion for summary judgment on their second claim in the lead case, Case No. A-17-761364-C. The motion sought narrow declaratory relief concerning the parties' respective responsibilities under two specific contracts (the Service Agreement and Dues Transmittal Agreement), and *not* under any other form of contract nor as a matter of tort. *See* CCEA MSJ at 15, 18, 20 (seeking declaration that "CCEA owed no duties to NSEA/NEA *under the service agreement and dues transmittal agreement*" (emphasis added)). The CCEA Parties did *not* move for summary judgment on any other claim, although, as we note below, most of the claims on which the CCEA Parties did not initially move are now subject to pending motions for partial summary judgment. Following a hearing, the Court granted CCEA's motion and entered the December 20 Ruling. The NSEA Parties now seek partial reconsideration of the Court's findings of fact, namely Paragraph 12, in which the Court characterizes CCEA's obligation to transmit NEA and NSEA dues, and Paragraphs 6, 8, 9, and 10, in which the Court characterizes

the "Membership Enrollment Form" and the nature of dues deducted pursuant to the form's authorization.

Pending Motions. There currently are two dispositive motions pending before the Court. On November 9, 2018, the NSEA Parties filed a motion for partial summary judgment on their conversion claim. On December 13, 2018, the CCEA Parties countermoved for partial summary judgment on the NSEA Parties' claims for conversion, unjust enrichment, breach of contract (NSEA, NEA, and CCEA Bylaws), fraud, and for an unauthorized mid-year dues increase. And the NSEA Parties intend to file cross motions for partial summary judgment with respect to additional claims that are the subject of the CCEA Parties' December 13 countermotion. The Court has scheduled a hearing on the pending motions for March 7, 2019. The claims in these summary judgment motions involve in some regard NEA's and NSEA's rights to require CCEA to remit the dues money currently in the Restricted Account.

ARGUMENT

A. Standard of Review

It is appropriate for a Court to reconsider a prior ruling when new evidence is presented, or when the prior decision is "clearly erroneous." *Masonry and Tile Contractors Ass'n of Southern Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). Reconsideration may also be warranted where a court "has made a decision outside the adversarial issues presented to the Court by the parties." *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990); *see also Auto-Owners Ins. Co. v. Se. Floating Docks, Inc.*, 605-CV-334-ORL-31GJK, 2008 WL 2074397, at *1 (M.D. Fla. May 15, 2008) ("Appropriate circumstances for reconsideration include situations in which the Court has obviously misapprehended a party's position, the facts, or mistakenly has decided an issue not presented for determination.").

B. Reconsideration of Paragraph 12 of the Findings of Fact Is Necessary Because the CCEA Parties' Motion for Partial Summary Judgment Concerned Only the Parties' Rights under the Dues Transmittal Agreement and Service Agreement.

Paragraph 12 of the December 20 Ruling's findings of fact states that, "[i]n the absence of a Dues Transmittal Agreement, there is no obligation for CCEA to transmit dues to NSEA and per NEA's bylaws, only NSEA has a contractual obligation to pay NEA." The primary error of this finding is its overbreadth. We respectfully ask the Court that it be reconsidered because (1) it was a decision outside the adversarial issues presented by the CCEA Parties' motion; (2) it is clearly erroneous on the summary judgment record; and (3) additional evidence to be offered by the NSEA Parties in connection with the pending motions for partial summary judgment reinforces that CCEA is in fact obliged to remit the NSEA and NEA dues it collected to NEA and NSEA, and that under the Rule 56 summary judgment standard, it is clearly erroneous to find this fact as undisputed in favor of CCEA.

1. Paragraph 12 Decides Issues Not Before the Court on the CCEA Parties' Motion for Partial Summary Judgment

Reconsideration is warranted where a court "has made a decision outside the adversarial issues presented to the Court by the parties." *Bank of Waunakee*, 906 F.2d at 1191. Paragraph 12, if construed literally, does just that, for it could be read to address issues beyond the scope of CCEA's partial motion for summary judgment that was before the Court.

The CCEA Parties' motion for partial summary judgment sought a limited declaration concerning two specific contracts—i.e., the Dues Transmittal Agreement and the Services Agreement. The motion specifically set forth the relief it sought as follows:

> The Court should grant Plaintiffs' motion for partial summary judgment in its entirety, and issue an order declaring that: (1) the termination provisions of the *Service Agreement and Dues Transmittal Agreement* are clear and unambiguous, (2) CCEA's 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/NEA *under the*

> *service agreement and dues transmittal agreement* to collect and/or transmit membership dues on NSEA/NEA's behalf on or after September 1, 2017.

CCEA MSJ at 15, 18, 20 (emphasis added).[5] The CCEA Parties' motion did not seek to resolve the parties' rights outside of those two contracts—whether as obligations under other contracts or as duties under tort or equity law. *See id.*

Notwithstanding the narrow scope of CCEA's motion, Paragraph 12 of the December 20 Ruling's findings of fact on its face would go beyond CCEA's requested relief, stating without limitation that "there is no obligation for CCEA to transmit dues." Of course, finding that CCEA owed no duties to NSEA/NEA under the *Service Agreement and Dues Transmittal Agreement* does not determine the duties CCEA owed under *other* contracts or sources of authority, duties addressed in other claims that have not been adjudicated. Because, however, Paragraph 12 could be construed to include *any* CCEA obligation, including those under tort law or another contract (such as the NEA or NSEA bylaws), it risks impacting those unadjudicated claims.

The finding of Paragraph 12 was thus "outside the adversarial issues presented to the Court by the parties." *Bank of Waunakee*, 906 F.2d at 1191. The existence of legal duties other than those arising under the two specific contracts at issue—the Dues Transmittal Agreement and the Service Agreement—were not pertinent to the motion.[6]

On that basis alone, the Court should grant reconsideration. *See Am. Hardware Mfrs. Assn. v. Reed Elsevier, Inc.*, 03 C 9421, 2010 WL 3034419, at *4 (N.D. Ill. July 27, 2010). In *Reed Elsevier*, for example, the court had issued a ruling that "effectively granted summary judgment *sua sponte*" on grounds not argued by the parties, and it later recognized that the ruling "implicate[d] significant fairness concerns" given the importance of providing a party opposing summary judgment "an adequate opportunity to respond." *Id.* at *3; *see also id.* ("[D]ue process requires that a party have the opportunity to make arguments in support of its claim before a

[5] The CCEA Parties' reply brief reiterated the specific and narrow relief sought in the motion. *See* CCEA Parties' Reply in Supp. of Summ. J. at 16.

[6] Indeed, the CCEA Parties omitted the assertion from their Rule 56(c) statement of material facts, *see* CCEA MSJ at 10-14, and did not otherwise pursue the point beyond a passing and unsupported assertion in the background section of their brief, *id.* at 8.

court grants summary judgment against it."). Here, the broad finding in Paragraph 12 was not material to any argument raised in the proceedings on the partial summary judgment motion, and the NSEA Parties had no inkling that argument needed to be made against it.

2. Paragraph 12 Is Clearly Erroneous on the Summary Judgment Record

In any event, Paragraph 12 is a clearly erroneous finding of fact under the summary judgment standard the Court must apply.

The CCEA Parties as movant bore the burden of establishing under NRCP 56(e) that there was no genuine dispute over Paragraph 12, and the "summary judgment burden shifts to the non-movant only when the motion is 'made *and supported* as provided in this rule.'" *Fergason v. LVMPD*, 131 Nev. Adv. Op. 94, 364 P.3d 592, 595 (2015) (emphasis added) (quoting NRCP 56(e)). The CCEA Parties never met this burden with respect to Paragraph 12. The CCEA Parties' sole citation in support of the proposition was Section 2-9 of the NEA Bylaws. *See* CCEA MSJ at 8. Nothing in the citation addresses CCEA's obligations under the law of conversion or unjust enrichment, nor under the NSEA Bylaws—as it would have had to do in order to support the notion that, absent a dues transmittal agreement, there was "*no* obligation for CCEA to transmit dues to NSEA" (emphasis added).[7]

Moreover, the only evidence the CCEA Parties provided in support of the assertion—the NEA Bylaws—demonstrates the opposite of what Paragraph 12 states. *See* CCEA MSJ, Ex. 6 (attached as Exh. K). While we will address the scope of the NEA Bylaws more fully in our opposition to the CCEA Parties' countermotion for summary judgment on the breach of the NEA Bylaws claim, we note here that the NEA Bylaws unambiguously demonstrate that CCEA had dues-transmission obligations in the absence of a dues transmittal agreement, for they not only placed "full responsibility" on CCEA for transmitting dues on a contractual basis (such that CCEA was obligated to have a successor agreement in place before termination of the prior

[7] Nor does the citation to Section 2-9 of the NEA Bylaws support the proposition that CCEA had "no obligation" under the NEA Bylaws to transmit dues. *See* CCEA MSJ, Ex. 6; *infra* at 7-8.

agreement) but also set default transmission requirements that apply in the absence of a contract. *See id.* (Section 2-9(a), (b)). But even if the Court were to believe the NEA Bylaws to be ambiguous on the point, the Court was obliged not only to provide the parties a full opportunity to address this issue, *see supra* at 5-7, but also to draw all reasonable inferences in favor of the NSEA Parties as nonmovants in the summary judgment proceeding. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) ("[T]he evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.").

Simply put, the CCEA Parties failed to carry their initial summary judgment burden with respect to the assertion that became Paragraph 12 of the Ruling, and when that happens, "the opposing party has no duty to respond on the merits and summary judgment may not be entered." *Fergason*, 131 Nev. Adv. Op. 94, 364 P.3d at 595.

3. Additional Evidence to Be Offered to the Court by the NSEA Parties in Connection with the Pending Motions for Partial Summary Judgment Demonstrates that, in the Absence of a Dues Transmittal Agreement, CCEA Was Obligated to Transmit the NEA and NSEA Dues That It Wrongfully Collected

Finally, reconsideration of Paragraph 12 would also be appropriate in light of additional evidence the Court will be offered in connection with the pending cross motions for partial summary judgment on other claims against CCEA for failing to transmit the NEA and NSEA dues.[8] *See Jolley, Urga & Wirth*, 113 Nev. at 741, 941 P.2d at 489 ("A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced.…"); *see also, e.g.*, *Salser v. Dyncorp Int'l, Inc.*, No. 12-10960, 2016 WL 1594373, at *1 (E.D. Mich. Apr. 21, 2016) (reconsidering and vacating prior grant of summary judgment based upon evidence "not presented in the Motion for Summary Judgment" that demonstrated the error of granting summary judgment). Evidence that has or will be submitted in connection with the pending motions does not go to the question whether the Dues Transmittal Agreement terminated as a matter of law on August 31, 2017 and therefore was omitted from the NSEA

[8] *See supra* at 4 (describing pending motions).

Parties' briefing on CCEA's June motion for partial summary judgment. That evidence, however, which the NSEA Parties incorporate by reference and some of which we include here, contradicts the finding embodied in Paragraph 12.

For example, there is evidence that demonstrates CCEA's obligation to transmit NSEA and NEA dues to NSEA as a matter of tort law. The sole ground, in the CCEA Parties' submissions respecting the pending motions, upon which CCEA appears to dispute its obligation to transmit NSEA and NEA dues under the law of conversion and unjust enrichment is that NEA and NSEA lack an underlying right to the dues in question, *see* CCEA Parties' Opp'n & Countermotion (Dec. 13, 2018) at 13-18, 20-22, but a variety of additional evidence undermines CCEA's position in this regard:

- CCEA Executive Director John Vellardita repeatedly has acknowledged that the dues presently in dispute belong to NSEA and NEA. He has stated that "employees' due [sic] payments *for NSEA and NEA* have been deducted from their paychecks and have been placed in a Bank of America restricted account . . . ." Vellardita Aff. (Mar. 29, 2018) ¶ 15 (emphasis added) (an exhibit to CCEA Parties' Apr. 3, 2018 Motion for Injunctive Relief and attached hereto as Exh. L). He stated in a letter to CCEA/NSEA/NEA members dated January 22, 2018: "You pay $567 annually in dues to NSEA and NEA." Exh. M-1 at NSEA-00012101; *see also generally* Decl. of Henry Pines in Supp. of Motion for Reconsideration (attached as Exh. M). And he stated in another letter, dated January 8, 2018, that "CCEA is in litigation with NSEA and NEA, and merely escrowing *collected dues of both organizations*…." Exh. M-1 at NSEA-00012104 (emphasis added).[9]

- Counsel for CCEA acknowledged in a letter dated December 26, 2017 that the money CCEA was collecting and placing into the restricted bank account was NSEA's and NEA's, stating: "All of the *NSEA and NEA dues money* deducted from employee pay checks has been regularly placed into [a bank account]…." Exh. M-2 at CCEA 000052 (emphasis added).

- Similarly, the NSEA Parties' motion for partial summary judgment includes internal CCEA records showing that, after September 1, 2017, CCEA knew it was collecting "NEA & NSEA Dues" from members. *See* NSEA Parties' Mot. for Partial Summ. J.

[9] The January 8, 2018 letter from John Vellardita also states that "in the event of delinquent dues, NEA Bylaws Section 2.9 provides that 'where 40% of the yearly dues must be paid by March 15th and 70% by June 1, with penalties imposed for late payment,'" further reinforcing CCEA's own understanding of its duty to pay over dues under the terms of the NEA Bylaws. Exh. M-1 at NSEA-00012105.

(Nov. 9, 2018) at 12 (citing CCEA 013351, CCEA 013417, CCEA 013525, CCEA 013613-14, CCEA 013717).

The foregoing evidence, contrary to Paragraph 12, is probative of the conclusion that there *was* an obligation for CCEA to transmit the NEA and NSEA dues it collected from NEA/NSEA members, even after CCEA terminated the Dues Transmittal Agreement.

C. Reconsideration Is Also Appropriate with Respect to the Findings Regarding the NEA/NSEA/CCEA Membership Enrollment Form

The findings of fact in the December 20 Ruling refer to and interpret the membership enrollment form that was used by individuals to sign up for unified membership in NEA, NSEA, and CCEA, referring to it as "the *CCEA* Membership Authorization Form," and stating (a) that, following an individual's signing such a form, "*CCEA* membership dues" were then deducted from that individual's paychecks, and (b) that the dues transmitted to NSEA constitute "[a] portion of the *CCEA* membership dues." December 20 Ruling ¶¶ 6, 8-10 (emphasis added). These findings are contrary to the fact that the membership enrollment form was used by individuals to join not just CCEA but all three unions at once—NEA, NSEA, and CCEA—and that the professional dues that individuals authorized to be deducted from their paychecks and sent to CCEA were the *aggregated* amounts of NSEA, NEA, and CCEA dues, not only "CCEA membership dues." The Court's findings should be reconsidered (1) because they are clearly erroneous on the summary judgment record and are inconsistent with the CCEA Parties' own admissions, and (2) because they are contradicted by additional evidence relevant to the pending motions for partial summary judgment.

1. The findings of fact regarding the membership enrollment form contradict the CCEA Parties' repeated admissions and are "clearly erroneous." *See Jolley, Urga & Wirth*, 113 Nev. at 741, 941 P.2d at 489.

To begin with, the CCEA Parties admitted in their October 30, 2017 answer that:

> NEA, NSEA and CCEA have unified membership, meaning *that by joining CCEA a member also joins NSEA and NEA as well, becoming a member of all three organizations entitled to all the benefits of membership and obligated to pay membership dues to all three associations*.

CCEA Parties' Answer (Oct. 30, 2017) ¶ 12 (emphasis added). And they further admitted that:

> NSEA and NEA dues are set by the duly elected representatives of those organizations, pursuant to those organizations' governing bylaws. For the 2017-18 academic year, *full-time active members pay $377.66 in annual dues to NSEA and $189 to NEA*. *CCEA determines its own membership dues, which on information and belief are approximately $245 for the current academic year.*

CCEA Parties' Am. Answer (Mar. 21, 2018) ¶ 13 (emphasis added); CCEA Parties' Am. Answer (Mar. 16, 2018) ¶ 13 (attached as Exh. N); CCEA Parties' Answer (Oct. 30, 2017) ¶ 13.

Indeed, the CCEA Parties affirmatively alleged in their now-dismissed counterclaim that the dues money at issue, which was deducted from teachers' paychecks *after* the Dues Transmittal Agreement was terminated, was "for NSEA" and "for NEA":

> Since September 1, 2017, *Dues designated for NSEA* in the amount of 0.6 percent of the teachers' average salary and *dues money for NEA* have been deducted from paychecks of the licensed professionals of the Clark County School District and have been placed in a restricted account with specific instructions that there can be no withdraws from the account except upon a Court order from Department 31 of the Eighth Judicial District Court authorizing such withdrawal.

CCEA Parties' Second Am. Counterclaim (July 9, 2018) ¶ 57 (emphasis added) (attached as Exh. O); CCEA Parties' Am. Counterclaim (Mar. 21, 2018) ¶ 31 (Exh. I); CCEA Parties' Counterclaim (Mar. 16, 2018) ¶ 31; *see also* CCEA Parties' Am. Counterclaim ¶ 31 ("The funds in this restricted account are subject to the resolution of this litigation *and will be disbursed to the NSEA and the NEA upon completion of this litigation*…." (emphasis added)).

Moreover, at the hearing on their motion for partial summary judgment, the CCEA Parties conceded that, contrary to statements in the December 20 Ruling, "enrolling" individuals signed up for paying dues to "CCEA, NSEA, and NEA." Nov. 15, 2018 Hr'g Tr. at 46, lines 4-8 (attached as Exh. P). The colloquy went as follows:

> THE COURT: Well, I know that, but what they were enrolling in is this paying dues to CCEA, NSEA and NEA. That was --they joined that organization or association. I don't want to say it wrong. Correct?
> MR. DELIKANAKIS: Correct….

Id.

2. Even absent these concessions, the form submitted by the CCEA Parties with their motion as Exhibit 10 sufficiently contradicts—certainly on a summary judgment standard—the factual findings of Paragraphs 6, 8, 9, and 10. For starters, it is evident from face of the form that individuals filling it out were enrolling in membership in *all three* organizations, and that the form is a generic one used not just by CCEA but by different local associations across Nevada as well. *See* Ex. 10 to CCEA MSJ (attached here as Exh. G). The individual who filled out the form attached to CCEA's motion, for example, had to affirmatively write "CCEA" under the box labeled "Local Association." *Id.* While the specific *local association* which an enrollee was joining could vary depending on who filled out the form, the fact that the enrollee was joining NSEA and NEA was a constant. *See id.* Several features of the form are worth highlighting in this regard:

- The form features NSEA and NEA logos, but not a CCEA logo, and is set in quadruplicate with a copy slated to go to NSEA. *See id.*

- The form states "[t]he following information is optional and failure to answer it will in no way affect your membership status, rights or benefits *in NEA, NSEA, or your local association*," *id.* (emphasis added), clearly indicating that the solicited information *before* the proviso *did* affect "membership status… in NEA [and] NSEA." This language thus demonstrates that the point of the form was for individuals to enroll in all three organizations.

- The form states "[t]he *NSEA* Delegate Assembly voted…to establish a $2.00 per month assessment of all *members*…." *Id.* (emphasis added). Such a reference plainly makes clear that people filling out the form were signing up, *inter alia*, to be *NSEA members*.

- Similarly, the form states: "Although The NEA Fund for Children and Public Education requests an annual contribution of $15, this is only a suggestion. A member may contribute more or less than the suggested amount, or may contribute nothing at all, *without it affecting his or her membership status, rights, or benefits in NEA* or any of its affiliates." *Id.* (emphasis added).[10]

[10] The version of the form Diane Di Archangel filled out, attached as Exhibit C to the Second Amended Complaint, uses language that is even more explicit about the tripartite membership, stating, with respect to voluntary political donations, that a "member … may contribute nothing at all, without it affecting *his or her membership status, rights, or benefits in the NEA, the NSEA or the CCEA*." Ex. C to NSEA Parties' Second Am. Compl. (emphasis

Moreover, the nature of the Dues Transmittal Agreement that CCEA terminated demonstrates that the dues deducted from teachers' paychecks included NEA and NSEA dues, rather than constituting just CCEA dues. The terminated agreement provided that "NSEA designates, and [CCEA] agrees to be its authorized agent for the purpose of collecting and transmitting NSEA and NEA dues," CCEA MSJ, Ex. 1 at 005 (attached here as Exh. J), and the very act of CCEA's agreeing to become a "collection agent" acknowledges that NSEA, as principal, has an underlying claim of right to the property to be collected. The dissolution of an agreement designating a collection agent has no effect on the underlying property rights, as between the principal and the people from whom the property is being collected.[11]

Finally, the CCEA and NSEA Bylaws—both of which CCEA included in its motion—further confirm that the findings in the December 20 Ruling misdescribe the membership enrollment form and the nature of the dues deducted pursuant to the authorization on the form. First, Article II, Section 1 of CCEA's own Bylaws required as a precondition of CCEA membership that an individual present "evidence of membership in NSEA and NEA." CCEA MSJ, Ex. 7 at 023 (attached here as Exh. E). This provision was satisfied by the membership enrollment form because the NEA/NSEA/CCEA form constituted evidence of an individual's

---

added) (attached here as Exh. Q). Similarly, the version of the form attached as Exhibit B to the Second Amended Complaint also reinforces the conclusion that the forms were for joint enrollment in NEA, NSEA, and CCEA, because that version includes a cover sheet that, *inter alia*, states in bold: "Join with your colleagues … become a member of *CCEA, NSEA, and NEA*." (emphasis added).

[11] An example helps to illustrate. Imagine that a phone company contracts with an agency to collect on overdue phone bills in exchange for payment or services to the agency. The dissolution of that contract would not affect the rights of the phone company vis-à-vis its customers with overdue bills. To square the hypothetical with CCEA's actions, of course, one would have to further assume that, for months after the termination of its collection contract, the agency unlawfully collected payments from customers with the phone company. *See also, e.g.*, *WMCV Phase 3, LLC v. Shushok & McCoy, Inc.*, 750 F. Supp. 2d 1180, 1184-85, 1195 (D. Nev. 2010) (the cancelation of a contract between a lessor and a commercial collection agent to recover lessees' debts to the lessor did not affect the lessor's property interest in the debt, and the lessor could bring conversion claim against the former collection agent for collecting and not transmitting the debt after the cancelation of the collection contract).

enrollment in NSEA and NEA. But if CCEA's litigation position and the Court's findings regarding the membership enrollment form were correct, then individuals filling out the membership enrollment form would not have become CCEA members until they separately provided "evidence of membership in NSEA and NEA."

Second, Article II, Section 5 of the NSEA Bylaws states "[m]embership begins when an applicant signs a payroll deduction form for membership in the United Education Profession and gives that application to an agent of the NSEA." CCEA MSJ, Ex. 5 at 014 (attached here as Exh. F). In other words, the membership enrollment form was understood to be exactly what it appears to be on its face: a joint NEA/NSEA/CCEA membership enrollment form.

The foregoing would be sufficient to conclude, as a matter of law, that the membership enrollment forms were for *joint* enrollment in NEA, NSEA, and CCEA, with dues collected for all three organizations. But in any event, we believe it was clearly erroneous for the Court to have made contrary findings of fact on *summary judgment* in favor of CCEA. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029.

2. As with the finding of fact in Paragraph 12, *see supra* at 8-10, reconsideration of the Court's findings on the membership enrollment form is independently appropriate in view of the additional evidence that will be offered to the Court in connection with the pending motions for partial summary judgment; some of that evidence is also included here. *See Jolley, Urga & Wirth*, 113 Nev. at 741, 941 P.2d at 489; *Salser*, 2016 WL 1594373, at *1. This additional evidence—which the NSEA Parties incorporate by reference herein—confirms, among other things, that (prior to CCEA's disaffiliation) NEA, NSEA, and CCEA followed a unified membership model and used a unified NEA/NSEA/CCEA membership enrollment form, and that the dues deducted from NEA/NSEA/CCEA members' paychecks were the aggregated amounts of NEA, NSEA, and CCEA membership dues, rather than solely "CCEA membership dues."

For example, additional evidence further confirms that the membership enrollment form was used for enrollment in NEA, NSEA, and CCEA. Thus, CCEA advertised unified membership on its website in September 2017 as follows:

> When you join the Association you become part of a 3 million member family. The Clark County Education Association (CCEA), Nevada State Education Association (NSEA), and the National Education Association (NEA) are the family that stands with you. *Unified membership will immediately provide you access to local, state and national advocates and programs to help you reach your professional and financial goals*.

Exh. M-3 at 00000286 (emphasis added). CCEA's acknowledgement of unified membership enrollment has been consistent over the years—consistent, that is, until its recent filings in this case—with earlier CCEA publications touting "Unified Membership and Its Benefits to You," and entreating teachers to "[j]oin CCEA/NSEA/NEA today." Exh. M-4 at 00000046-47.

CONCLUSION

For the reasons stated above, the Court should partially reconsider the foregoing findings of fact in its December 20 Ruling to remove or amend Paragraph 12, and to amend Paragraphs 6, 8, 9, and 10 to make clear that the membership enrollment form was designed for individuals to become members of NEA, NSEA, and CCEA and to authorize the aggregated dues of all three organizations, rather than those of just CCEA.

Dated this 10th day of January, 2019.

Respectfully submitted,

BOIES SCHILLER FLEXNER LLP

/s/ Paul J. Lal

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
300 South Fourth Street, Suite 800
Las Vegas, NV 89101

Robert Alexander*
Matthew Clash-Drexler*
James Graham Lake*

BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
* Admitted pro hac vice

Attorneys for the NSEA Parties

CERTIFICATE OF SERVICE

This document applies to Case No. A-17-761364-C, in which the parties are, on the one hand, the Clark County Education Association ("CCEA"), Victoria Courtney, James Frazee, Robert Hollowood, and Maria Neisess, and, on the other hand, the Nevada State Education Association ("NSEA"), Dana Galvin, Ruben Murillo, Brian Wallace, and Brian Lee; as well as to Case No. A-17-761884-C, in which the parties are, on the one hand, NSEA, National Education Association, Ruben Murillo, Robert Benson, Diane Di Archangel, and Jason Wyckoff, and, on the other hand, CCEA, John Vellardita, and Victoria Courtney.

Pursuant to NRCP 5(b)(2)(D), I, an employee of BOIES SCHILLER FLEXNER LLP, hereby certify that service of the foregoing ***NSEA PARTIES' MOTION FOR PARTIAL RECONSIDERATION OF THE DECEMBER 20 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER*** was made this date by electronic filing and/or service via the Eighth Judicial District Court's E-Filing System to the following:

Richard G. McCracken
Kimberly C. Weber
McCracken, Stemerman & Holsberry, LLP
1630 S. Commerce Street, Suite 1-A
Las Vegas, NV 89102

John S. Delikanakis
Michael Paretti
Bradley T. Austin
Snell & Wilmer, L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169

Joel A. D'Alba
Asher, Gittler & D'Alba, LTD.
200 West Jackson Blvd, Suite 720
Chicago, Illinois 60606

Dated this 10th day of January, 2019.

/s/ Paul J. Lal
An employee of Boies Schiller Flexner

OPPM
Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
BOIES SCHILLER FLEXNER LLP
300 South Fourth Street, Suite 800
Las Vegas, NV 89101
Tel.: (702) 382-7300
Fax: (702) 382-2755
rpocker@bsfllp.com
plal@bsfllp.com

Robert Alexander (admitted pro hac vice)
Matthew Clash-Drexler (admitted pro hac vice)
James Graham Lake (admitted pro hac vice)
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
Tel.: (202) 842-2600
Fax: (202) 842-1888
ralexander@bredhoff.com
mcdrexler@bredhoff.com
glake@bredhoff.com

Attorneys for NSEA Parties

DISTRICT COURT
EIGHTH JUDICIAL DISTRICT
CLARK COUNTY, NEVADA

CLARK COUNTY EDUCATION ASSOCIATION, VICTORIA COURTNEY, JAMES FRAZEE, ROBERT G. HOLLOWOOD, AND MARIA NEISESS, Plaintiffs, v. NEVADA STATE EDUCATION ASSOCIATION, DANA GALVIN, RUBEN MURILLO JR., BRIAN WALLACE, AND BRIAN LEE, Defendants.	Case No.: A-17-761364-C (Consolidated with Case No. A-17-761884-C) DEPT. NO.: 4 **NSEA PARTIES' OPPOSITION TO CCEA PARTIES' MOTION TO ALTER OR AMEND THE COURT'S MAY 11, 2018 ORDER** **Date of hearing: March 7, 2019** **Time of hearing: 9:00 a.m.**

Plaintiffs in Case No. A-17-761884-C—the Nevada State Education Association ("NSEA"), National Education Association ("NEA"), Ruben Murillo, Robert Benson, Diane Di Archangel, and Jason Wyckoff (hereinafter collectively, "NSEA Parties")—oppose the Motion to Alter or Amend the Court's May 11, 2018 Order Pursuant to NRCP 59(e) and 60(b) of Defendants Clark County Education Association ("CCEA"), John Vellardita, and Victoria Courtney (hereinafter collectively, "CCEA Parties"). The grounds therefor are stated in the accompanying Memorandum of Points and Authorities.

DATED this 23rd day of January, 2019.

BOIES SCHILLER FLEXNER LLP

/s/ Paul J. Lal

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
300 South Fourth Street, Suite 800
Las Vegas, NV 89101

Robert Alexander*
Matthew Clash-Drexler*
James Graham Lake*
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
* Admitted pro hac vice

Attorneys for NSEA Parties

MEMORANDUM OF POINTS AND AUTHORITIES

The Court should deny the CCEA Parties' motion requesting that the Court vacate the May 11, 2018 Order ("Restricted Account Order"). The Restricted Account Order granted as modified the NSEA Parties' application for a writ of attachment ("Writ Application") on the bank account into which CCEA was depositing, at the time, the NEA and NSEA dues it collected from individuals who were members of NEA and NSEA. *See* CCEA Parties' Motion to Alter or Amend the Court's May 11, 2018 Order Pursuant to NRCP 59(e) and 60(b) ("Motion"). The CCEA Motion is based on a mischaracterization of the Writ Application and the order granting it, as having been "entirely premised" on the then-pending claim for breach of the Dues Transmittal Agreement (*see* Motion at 13). But in fact the Writ Application *and* the Court's order were also independently based upon the NSEA Parties' conversion claim, Bylaws contract claims, and CCEA's dire financial condition. As none of those grounds for the order are even challenged by CCEA in its Motion, the Motion is due to be denied.

BACKGROUND

A. Factual Background[1]

1. The Unified Membership Structure of NEA, NSEA, and CCEA, and the Membership Dues of Each Union for the 2017-2018 Membership Year.

For decades, NEA, NSEA and CCEA were affiliated and maintained a unified membership structure. *See* NSEA and NEA Plaintiffs' Concise Statement of Undisputed Facts (Nov. 9, 2018) ("SOF") ¶ 4. That meant that by joining the local CCEA union a member also joined the state NSEA and the national NEA, becoming a member of all three organizations who was entitled to all the benefits of membership, and obligated to pay the annual membership dues of all three associations, *id.*, as CCEA has conceded, CCEA Parties' Answer (Oct. 30, 2017) ¶ 12

[1] The facts are set forth in additional detail in the NSEA Parties' briefing in connection with the pending motions for partial summary judgment.

(attached as Exh. A).[2] Reflecting this unified membership structure, the three affiliated unions used versions of a template NSEA membership enrollment form to sign up individuals as CCEA/NSEA/NEA members. *See* CCEA Parties' Partial Mot. for Summ. J. (June 18, 2018) ("CCEA's June MSJ"), Ex. 10 (attached as Exh. B).

Each of the three affiliates set their own membership dues amount in accordance with their governing documents and democratic procedures. *See* SOF ¶ 7. Thus, prior to CCEA's disaffiliation, NEA/NSEA/CCEA members paid NEA dues to NEA, NSEA dues to NSEA, and CCEA dues to CCEA, as CCEA has conceded. *See* CCEA Parties' Am. Answer (Mar. 21, 2018) ¶ 13 (attached as Exh. C).

All three unions set their respective membership dues for the 2017-2018 membership year (running from September 1, 2017 through August 31, 2018) prior to the start of the membership year. *See* SOF ¶¶ 5, 7. For the 2017-2018 membership year, NEA/NSEA/CCEA member dues comprised $189 in annual membership dues to NEA, $377.66 in annual membership dues to NSEA, and $243.84 in annual membership dues to CCEA. *Id.* ¶ 7.

2. CCEA's Collection of NEA and NSEA Dues

For decades prior to August 31, 2017, CCEA served as the contractually designated "collection agent" for NSEA, collecting and transmitting NSEA and NEA dues to NSEA (which in turn transmitted NEA dues to NEA). SOF ¶ 10; *see also* CCEA's June MSJ, Ex. 1 at 005 (attached as Exh. E) ("The NSEA designates, and [CCEA] agrees to be its authorized agent for the purpose of collecting and transmitting NSEA and NEA dues and membership data from NSEA/NEA members who are also members of the [CCEA]."). As the term "collection agent" in the Dues Transmittal Agreement denotes, the dues being collected by CCEA as NSEA's "agent" pursuant to the agreement were not CCEA's dues, but rather *NSEA and NEA dues*. *See id.* Although this Court's December 20, 2018 ruling held that the contract which designated CCEA as the "authorized agent for the purpose of collecting and transmitting NSEA and NEA

[2] Excerpts of this and various other documents in the record that are cited in this Opposition are attached as exhibits for the Court's convenience, with the first citation to the document identifying the exhibit parenthetically.

dues" terminated as of August 31, 2017, that ruling does not answer what authority CCEA had to continue to collect the NSEA and NEA dues after that date without NSEA's or NEA's permission, whether by contract or otherwise. *See* SOF ¶ 11.

a. NEA and NSEA Dues Collected from September 2017-April 2018

From September 2017 through April 2018 (and after, *see* Part 2(b) *infra*), CCEA continued to collect and withhold NSEA and NEA dues that the School District deducted from members' paychecks on a bimonthly basis. *See id.* Those membership dues deductions were made by the School District in line with its commitment in the collective bargaining agreement to deduct dues for both CCEA and "its affiliates." Ex. D-1 to Decl. of Henry Pines ("Pines Decl.").[3]

The CCEA Parties initially asserted that CCEA timely placed all such NSEA and NEA dues it collected into a bank account—which they initially described as an "escrow account" but then settled on the designation of it as a "restricted account."[4] In fact, however, CCEA did not timely deposit NSEA and NEA dues into the restricted account, and, as a consequence, by March 31, 2018 there was an accumulated shortfall in the "restricted account" of over a million dollars. *Compare* SOF ¶ 17 (NEA and NSEA dues CCEA received), *with id.* ¶ 22 (NEA and NSEA dues CCEA deposited into restricted account); *see also* Pls. NSEA's and NEA's Mot. for Partial Summ. J. (Nov. 9, 2018), Ex. J at 0028.

b. NEA and NSEA Dues Collected in May 2018

CCEA disaffiliated from NEA and NSEA on April 25, 2018. SOF ¶ 2. But CCEA continued collecting NSEA and NEA dues in May 2018, as CCEA's counsel acknowledged it would do in open court. *See* May 1, 2018 Hr'g Tr. at 10:5-9 (attached as Exh. F). Thus, in May

---

[3] The Declaration of Henry Pines is attached as Exhibit D, and the exhibits thereto are numbered sequentially beginning with D-1.

[4] CCEA began by representing to NSEA and to this Court that it had placed the NSEA and NEA dues in an "escrow account." Answer (Oct. 30, 2017) at 14. Once the NSEA Parties started investigating the terms of this so-called "escrow account," CCEA's operative description shifted from an "escrow account" to a "restricted account," *see, e.g.*, Am. Answer & Counterclaim (Mar. 21, 2018) at 25.

2018, the School District deducted the same per-teacher amount of dues as in the previous months – namely, an amount equal to the sum of the NEA, NSEA, and CCEA dues. Decl. of Jason Wyckoff ¶ 10 & Ex. D (attached Exh. G); Decl. of Diane Di Archangel ¶ 9-10 & Ex. C (attached Exh. H). Those funds, however, were never placed into the restricted account. *See* Pines Decl. ¶ 5.[5]

B. Procedural Background

1. The Application for a Writ of Attachment and the Order Granting the Application as Modified

On March 30, 2018, the NSEA Parties filed their Writ Application based on the following three grounds:

- Under Nev. Rev. Stat.§ 31.013(2) and Nev. Rev. Stat. § 31.017(3), based on the NSEA Parties' "claim for conversion." *See* Writ Application at 10-11; *see also* Pls.' Reply in Supp. of Application for Prejudgment Writ of Attachment (Apr. 13, 2018) ("Attachment Reply") at 3-4.

- Under Nev. Rev. Stat.§ 31.013(3), based in part on CCEA records showing its "financial difficulties." Writ Application at 11-12; *see also* Attachment Reply at 6.

- And under Nev. Rev. Stat.§ 31.013(1), based on CCEA's contractual duties under the Dues Transmittal Agreement (which the Court has now held to have terminated as a

[5] CCEA's failure to deposit these dues is all the more striking because Court explicitly *rejected* the proposition that CCEA could unilaterally decline to do so without first moving for the Court's permission. At the May 1, 2018 hearing, counsel for CCEA requested the Court's permission not to place the May 2018 dues into the Restricted Account. *See* May 1, 2018 Hr'g Tr. at 10:8-19 ("dues in the amounts that have normally been collected for NSEA will be received and they will be placed in the ordinary course of business per Your Honor's order into the restricted account, but we'd like permission to return that money to the members in due course after the complete collection of the funds. And so we're asking whether you can -- if you're willing to do this by an oral statement today or whether you would prefer a motion."). The Court rejected the request, requiring a motion "so that all parties have a full opportunity to address the issue, be fully heard on the issue." *Id.*; *see also id.* at 11:6-12 (COURT: "since there's not a stipulation, sounds to me like I'll be seeing some type of motion and we'll address it when it shows up on my proverbial doorstep." MR. DELIKANAKIS: "Thank you, Your Honor. We'll approach (indiscernible) motion." MR. D'ALBA: "Thank you, Your Honor. I understand and appreciate your decision."). CCEA, however, neither placed the May 2018 dues "per Your Honor's order[ ] into the restricted account" nor filed any motion relieving it of the obligation of doing so.

matter of law on August 31, 2017), and based on the NSEA and NEA Bylaws (which is the subject of pending cross motions for partial summary judgment). Writ Application at 10; *see also* Attachment Reply at 5.

The CCEA Parties' opposition brief, filed April 11, 2018, ignored that the NSEA Parties sought attachment based on their conversion claim and failed to offer any rebuttal evidence that would suggest that CCEA was not having the financial difficulties identified in the Attachment Application. *See* CCEA Parties' Opp'n to Application for Prejudgment Writ of Attachment at 1-9; *see also* Attachment Reply at 3 (noting that "CCEA ignored entirely this [conversion] basis for attachment because it has nothing to say"); *id.* at 6 (noting that "CCEA, in its opposition, has provided no evidence that refutes" the proposition "that based on CCEA's own records, it is in dire financial condition").

On April 23, 2018, the Court held a hearing on the NSEA Parties' Writ Application and granted the application as modified by the Court. *See* Apr. 23 Hr'g Tr. at 162-63 (attached as Exh. I). The Court granted the motion "as modified" to minimize the burden of a full writ on both CCEA (which would then have to transfer the funds) and the NSEA Parties (which would then have to post a bond). *See id.* at 154-55 ("The only reason why I was saying leaving it in the same account was really to eliminate extra costs, defense and everyone having any issues. If you already have it in the Bank of America account, Bank of America already has it..."); *id.* at 144-145 ("that leads this Court that the...proper interim remedy -- moving the funds from one spot and having to do a bond for the amount of the funds really doesn't seem like the best effective course here.").

The Court entered its written order on May 11, 2018. *See generally* Restricted Account Order (attached as Exh. J). Among other things, the Court ordered that "all funds in the possession of or received by [CCEA] for the 2017-2018 school year in respect to NSEA dues (numerically calculated traditionally at the annual rate of $376.66) and in respect to NEA dues (numerically calculated traditionally at the annual rate of $189.00) shall continue to be deposited

by CCEA into [the] account." *Id.* at 2. And it decreed that "no funds shall be withdrawn, transferred, or disbursed" from the account without Court order. *Id.* at 3.

2. Subsequent Motion Practice

On June 18, 2018, the CCEA Parties filed a partial motion for summary judgment seeking declaratory relief regarding the parties' respective responsibilities under two specific contracts (the Service Agreement and Dues Transmittal Agreement). CCEA's motion did not seek relief as to any other pending claims. *See* CCEA's June MSJ at 15, 18, 20 (seeking declaration that "CCEA owed no duties to NSEA/NEA *under the service agreement and dues transmittal agreement*" (emphasis added)). Nor did the CCEA Parties move for summary judgment on any other claim at that time, although, as we note below, most of the claims on which the CCEA Parties did not initially move are now subject to pending competing motions for partial summary judgment. Following a hearing, the Court granted CCEA's motion and entered its ruling on December 20, 2018.[6]

There are currently four pending motions before the Court.

1. The NSEA Parties' motion for partial reconsideration of the Court's December 20, 2018 ruling.
2. The NSEA Parties' November 9, 2018 motion for partial summary judgment on their conversion claim.
3. The CCEA Parties' December 12, 2018 countermotion for partial summary judgment on the NSEA Parties' claims for conversion, unjust enrichment, breach of contract (NSEA, NEA, and CCEA Bylaws), fraud, and for an unauthorized mid-year dues increase.
4. The NSEA Parties' January 23, 2019 motion for partial summary judgment on the NEA and NSEA breach of bylaws claims.

[6] On January 10, 2018, the NSEA Parties filed a motion for partial reconsideration of two aspects of the Court's findings of fact in the December 20, 2018 ruling. *See* NSEA Parties' Mot. for Partial Reconsideration of the Dec. 20 Findings of Fact, Conclusions of Law, and Order.

ARGUMENT

The CCEA Parties' Motion is premised entirely on the proposition that, because the Court has ruled that the Dues Transmittal Agreement terminated August 31, 2017, the Court's Order has outlived its purpose. *See* Motion at 13-15. Because that premise is wrong, in that it is based on mistaken characterizations of the attachment proceedings and the Court's December 20 summary judgment ruling, the Motion is due to be denied, particularly given the rigorous showing that must be made to modify such an order. *See id.* at 12-13 (listing the Rule 59 bases for relief as "correct[ing] manifest errors of law or fact, newly discovered or previously unavailable evidence, the need to prevent manifest injustice, or a change in controlling law" (internal quotation marks omitted)).

A. The Restricted Account Order Was Independently Based upon, and Justified By, the NSEA Parties' Conversion Claim (Nev. Rev. Stat.§ 31.013(2) and Nev. Rev. Stat. § 31.017(3))

CCEA's Motion mischaracterizes the Writ Application and the Restricted Account Order that granted it as modified, stating, in bold and underline, that the NSEA Parties' request for an attachment "was *entirely premised* on the argument that CCEA had a contractual obligation, after September 1, 2017, to collect and remit to NSEA/NEA the foregoing dues." Motion at 13 (emphasis altered). That assertion is wrong.

The NSEA Parties' Writ Application was *not* "entirely premised" on the Dues Transmittal Agreement, and instead advanced "multiple grounds for issuing a writ." Writ Application at 9. While *one* of these grounds relied upon the Dues Transmittal Agreement, *see id.* at 9-10, two other independent grounds did not, *see id.* at 10-11.

In particular, the NSEA Parties noted—in a section of the Writ Application which we quote below at length—that a writ of attachment was appropriate under the "additional and separate basis" afforded by their conversion claim:

> [S]ection 31.013(2) provides that a writ of attachment is appropriate if "allowed pursuant to this chapter or other provision of law." Nev. Rev. Stat. § 31.013(2). One of the provisions of Chapter 31, section 31.017(3), permits issuing a writ of

> attachment in "an action for the recovery of the value of personal property, where such personal property is owned by the plaintiff and has been *taken or converted* by the defendant without the consent of the plaintiff." Nev. Rev. Stat. § 31.017(3) (emphasis added). Here, Plaintiffs have, in Count Six of the Amended Complaint, stated a claim for conversion. On the facts averred in Mr. Lee's Affidavit, the dues that CCEA has kept in its own account and refused to transmit to NSEA are the personal property respectively of NSEA and NEA. Indeed, Defendants do not seriously contest these facts: in their Second Affirmative Defense to Plaintiffs' Amended Complaint, Defendants state only that CCEA has not "exercised dominion or control over the dues payments deducted from employee paychecks *for NSEA and NEA* because those funds *have been placed* into a restricted account for the duration of this litigation." Answer and Counterclaims to Am. Comp. (filed March 16, 2018) (emphasis added). While CCEA may quibble (spuriously, we believe) about whether its actions technically constitute the tort of "conversion," it admits that a portion of the monies it has received and continues to receive from the School District - and which it refuses to transmit to NSEA but instead retains in an account under its control - are membership dues intended for NSEA and NEA. *See* Counterclaim (filed March 16, 2018), ¶ 13. Instead of transmitting the dues to the proper owners of the funds, CCEA has *taken* the dues and deposited them into its own accounts without permission. Nev. Rev. Stat. § 31.017(3) provides an additional and separate basis to issue the prejudgment writ of attachment as to the moneys already taken into CCEA's possession.

Id. at 10-11 (underlined emphasis added).

Indeed, in their reply brief, the NSEA Parties' primary argument was that their conversion claim (which CCEA ignored at the time and ignores now) justified the attachment, and that the Court should enter "the writ of attachment on this [conversion] basis alone." *See* Attachment Reply at 2-5.[7]

---

[7] Counsel for the NSEA Parties underscored at the April 23, 2018 hearing that they sought a writ of attachment based upon the independent ground of conversion:

> ...[E]ither the CCEA has collected these NSEA and NEA dues and in violation of contract, refused to transmit them over or alternatively they have collected these NEA and NSEA dues without any authority whatsoever. And if that's the case, then they've engaged in taking and converting the monies that -- funds that belong to NSEA and NEA.
>
> Under either of those accounts -- either of those theories, a writ of attachment is appropriate.

Apr. 23, 2018 Hr'g Tr. at 126:12-18.

The Court, in issuing the Restricted Account Order, observed that it was "fully advised in the premises" and that there was "good cause" for granting the Writ Application as modified. Restricted Account Order at 2; *see also* Apr. 23, 2018 Hr'g Tr. at 144:21-22 (the Court indicated it was "incorporating all the pleadings" in its ruling).[8] Because in the Restricted Account Order Judge Kishner necessarily protected the NSEA and NEA dues from being dissipated, or otherwise used, while the NSEA Parties continued litigating their conversion claim, the fact that this Court has ruled on the continued operation of the *Dues Transmittal Agreement* provides no basis to alter or amend Judge Kishner's Order. The Restricted Account Order's purpose—to protect, *inter alia*, the allegedly converted funds at issue—continues to be served while the conversion claim proceeds. There therefore exists no "manifest error of law or fact" or "newly discovered or previously unavailable evidence" that would justify CCEA's demand of this Court to dissolve Judge Kishner's Order and permit CCEA to disburse over $ 4 million in funds—destroying the purpose and effect of the Order.

B. The Restricted Account Order Was Also Independently Based upon, and Justified By, the NSEA Parties' Contract Claims under the NSEA and NEA Bylaws, as Well as By CCEA's Financial Troubles (Nev. Rev. Stat.§ 31.013(1) and (3))

CCEA's Motion founders on two additional faulty premises about the underlying attachment proceedings.

1. The CCEA Parties in their Motion assert that the "argument that CCEA had a contractual obligation, after September 1, 2017, to collect and remit" NSEA/NEA dues "was expressly rejected by this Court," Motion at 13, and that "[i]n light of this Court's subsequent finding that CCEA owed no duties to NSEA/NEA under the Service Agreement or Dues Transmittal Agreement to collect and/or transmit membership dues on NSEA/NEA's behalf on or after September 1, 2017, the repeatedly stated underlying basis for the Restricted Account

[8] As we described above, the Court granted the writ request "as modified" to minimize the logistical complications to both sides that the arcane procedure of a full writ of attachment would entail. *See supra* at 5-6.

Order (the contractual relationship between CCEA and NSEA) has been resolved and no longer exists." *Id.* at 15.

As we explained above, this assertion misconstrues the attachment proceedings. The NSEA Parties argued, *inter alia*, that attachment was appropriate under the contractual theory of attachment under Nev. Rev. Stat. § 31.013(1). *See* Writ Application at 7. While this theory was based *in part* upon the Dues Transmittal Agreement, it was not limited to that particular contract. *See id.* Rather, the NSEA Parties' § 31.013(1) argument was also based on "the NSEA Bylaws and the NEA Constitution." Writ Application at 10; *see also* Attachment Reply at 2 (noting that CCEA has "obligations under *a separate contact*—the NSEA Bylaws" and arguing that "CCEA has either breached the Dues Transmittal Agreement by failing to transmit timely the NEA and NSEA dues, or if—as CCEA contends—that Agreement has been terminated, it has collected NSEA and NEA dues from the School District without any authority to do so and in violation of its *contractual obligations under the NSEA Bylaws*" (emphasis added)). It is thus simply erroneous to say that, in light of the Court's "finding that CCEA owed no duties to NSEA/NEA under the Service Agreement or Dues Transmittal Agreement," the "underlying basis for the Restricted Account Order (the contractual relationship between CCEA and NSEA) has been resolved and no longer exists." Motion at 15.[9] That error is an additional basis to reject the extraordinary and irreversible relief CCEA seeks.

2. Next, the CCEA Parties' Motion also overlooks that the NSEA Parties, in the Writ Application, provided proof that "extraordinary circumstances exist which will make it improbable for the plaintiff to reach the property of the defendant by execution after the judgment has been entered," Writ Application at 11 (quoting Nev. Rev. Stat.§ 31.013), proof based both upon the CCEA Parties' evasive characterization of its control over the bank account holding NEA/NSEA dues, *see supra* note 4, and upon the fact that CCEA was "operating at a

[9] Of course, finding that CCEA owed no duties to NSEA/NEA *under the Service Agreement and Dues Transmittal Agreement* does not determine the duties CCEA owed under *other* contracts (like the NSEA and NEA Bylaws).

projected budget shortfall of more than $2,000,000 for the 2017-2018 budget year, up sharply from $405,124 for the prior budget year and $118,686 for the 2015-2016 budget year," Writ Application at 12.

The "extraordinary circumstances" basis for Judge Kishner's Order has, if anything, become clearer since the entry of the Restricted Account Order. To begin with, CCEA in its Motion states that it intends to disgorge all of the funds in the Restricted Account to the individual members from whom the NSEA and NEA dues were collected. That significantly heightens concerns about CCEA's ability to satisfy a money judgment against it, and thus makes "it improbable for the plaintiff to reach the property of the defendant by execution after the judgment has been entered." Nev. Rev. Stat.§ 31.013(3). It goes without saying that, if the funds were wrongly disgorged from the Restricted Account, it would be logistically nearly impossible to attempt to undo that disbursement to thousands of individuals—some of whom are no longer members of CCEA, some of whom are no longer members of NEA and NSEA, and some of whom are presumably no longer members of any union.

Concerns about CCEA's financial ability to satisfy judgment are further heightened by the fact that, only last month, CCEA imposed an additional mid-membership year increase of $120 per year per CCEA member. *See* Pines Decl., Ex. D-2. That the CCEA would impose a 23.5% increase in its annual dues in the middle of a membership year—and do so despite significant questions regarding its validity, *see* NSEA Parties' Second Am. Compl. ¶¶ 103-08 (Count Nine)—further suggests that CCEA is suffering increased financial difficulties, and would be unable to pay a full monetary judgment to the NSEA Parties under the many remaining claims not yet resolved by the Court.

Indeed, the Restricted Account Order would separately be justified under the standards for a preliminary injunction. *See Clark Cty. Sch. Dist. v. Buchanan*, 112 Nev. 1146, 1150, 924 P.2d 716, 719 (1996) (an injunction is appropriate where a party establishes "a likelihood of success on the merits and a reasonable probability [that the conduct of the party opposing the injunction], if allowed to continue, will cause irreparable harm"). First, the NSEA Parties in

their summary judgment briefing have established "a likelihood of success on the merits" on their claims to the NEA and NSEA dues that make up the funds in the Restricted Account, *see id.*, and indeed have gone well beyond what is required by demonstrating their entitlement to the funds *as a matter of law*, whether as a matter of conversion, or under the NSEA and NEA Bylaws. Second, there is "a reasonable probability" that the disgorgement of the funds in the Restricted Account, were the Court to permit it, would "cause irreparable harm" to NEA and NSEA, as discussed above in the context of Nev. Rev. Stat.§ 31.013(3). Finally, the balance of hardships weighs decisively in favor of keeping the Restricted Account Order in place. *See id.* In contrast to the significant risk of irreparable harm that the NSEA Parties would face if the order were vacated and the NEA/NSEA dues in the account were disbursed, the CCEA Parties face no irreparable harm from the continued application of the Restricted Account Order until the parties' rights are fully determined. CCEA has conceded it has no claim of right to the NEA/NSEA dues in the Restricted Account, *see* CCEA Parties' Opposition & Countermotion for Partial Summ. J. at 1-2, and the individual members from whom NEA/NSEA dues were collected and placed into the account do not face irreparable harm because the Restricted Account Order protects against the dissipation of the funds prior to the Court's final adjudication of the parties' rights.

* * *

In the end, the CCEA Parties' Motion is quite limited. The Motion does *not* argue that granting the Writ Application (as modified) based upon the NSEA Parties' conversion claim was erroneous under Nev. Rev. Stat. § 31.013(2) and Nev. Rev. Stat.§ 31.017, much less that CCEA could prove it was "manifestly erroneous." Nor does CCEA's Motion argue that granting the Writ Application (as modified) based upon the NSEA and NEA Bylaws or CCEA's perilous financial condition was erroneous under Nev. Rev. Stat. § 31.013(1), (3). CCEA has not raised these arguments either here or in the proceedings before Judge Kishner on the original writ application. *See, e.g.*, Attachment Reply at 3, 6-8. Not only does CCEA's failure to do so effectively concede the points, *see Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. Adv. Op. 9, 412

P.3d 56, 60 (2018) (parties who "failed to respond to … arguments … have waived the issue" (citing *Bates v. Chronister,* 100 Nev. 675, 682, 691 P.2d 865, 870 (1984)), it requires denial of its motion as those unchallenged grounds are sufficient, in themselves, to justify the Order.

CONCLUSION

For the reasons stated above, the Court should deny the CCEA Parties' Motion to Alter or Amend the Court's May 11, 2018 Order Pursuant to NRCP 59(e) and 60(b).

Dated this 23rd day of January, 2019.

Respectfully submitted,

BOIES SCHILLER FLEXNER LLP

/s/ Paul J. Lal

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
300 South Fourth Street, Suite 800
Las Vegas, NV 89101

Robert Alexander*
Matthew Clash-Drexler*
James Graham Lake*
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
* Admitted pro hac vice

Attorneys for the NSEA Parties

CERTIFICATE OF SERVICE

This document applies to Case No. A-17-761884-C, and the parties in the case are, on the one hand, the Nevada State Education Association, National Education Association, Ruben Murillo, Robert Benson, Diane Di Archangel, and Jason Wyckoff, and, on the other hand, the Clark County Education Association, John Vellardita, and Victoria Courtney.

Pursuant to NRCP 5(b), I, an employee of BOIES SCHILLER FLEXNER LLP, hereby certify service of the foregoing ***NSEA PARTIES' OPPOSITION TO CCEA PARTIES' MOTION TO ALTER OR AMEND THE COURT'S MAY 11, 2018 ORDER*** was made this date by electronic filing and/or service via the Eighth Judicial District Court's E-Filing System to the following:

Richard G. McCracken
Kimberly C. Weber
McCracken, Stemerman & Holsberry, LLP
1630 S. Commerce Street, Suite A-1
Las Vegas, NV 89102

Joel A. D'Alba
Asher, Gittler & D'Alba, LTD.
200 West Jackson Blvd, Suite 720
Chicago, Illinois 60606

John S. Delikanakis
Michael Paretti
Snell & Wilmer, L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169

Dated this 23rd day of January, 2019.

/s/ Carolyn E. Wright
An employee of Boies Schiller Flexner LLP

OPPM
Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
BOIES SCHILLER FLEXNER LLP
300 South Fourth Street, Suite 800
Las Vegas, NV 89101
Tel.: (702) 382-7300
Fax: (702) 382-2755
rpocker@bsfllp.com
plal@bsfllp.com

Robert Alexander (admitted pro hac vice)
Matthew Clash-Drexler (admitted pro hac vice)
James Graham Lake (admitted pro hac vice)
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
Tel.: (202) 842-2600
Fax: (202) 842-1888
ralexander@bredhoff.com
mcdrexler@bredhoff.com
glake@bredhoff.com

Attorneys for NSEA Parties

DISTRICT COURT
EIGHTH JUDICIAL DISTRICT
CLARK COUNTY, NEVADA

CLARK COUNTY EDUCATION ASSOCIATION, VICTORIA COURTNEY, JAMES FRAZEE, ROBERT G. HOLLOWOOD, AND MARIA NEISESS,

Plaintiffs,

v.

NEVADA STATE EDUCATION ASSOCIATION, DANA GALVIN, RUBEN MURILLO JR., BRIAN WALLACE, AND BRIAN LEE,

Defendants.

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

DEPT. NO.: 4

NSEA PARTIES' OPPOSITION TO CCEA PARTIES' COUNTERMOTION FOR PARTIAL SUMMARY JUDGMENT

FILED UNDER SEAL

Date of hearing: March 7, 2019

Time of hearing: 9:00 a.m.

Plaintiffs in Case No. A-17-761884-C—the Nevada State Education Association ("NSEA"), National Education Association ("NEA"), Ruben Murillo, Robert Benson, Diane Di Archangel, and Jason Wyckoff (hereinafter collectively, "NSEA Parties")—oppose the CCEA Parties' Countermotion for Partial Summary Judgment filed December 12, 2018. The grounds therefor are stated in the accompanying Memorandum of Points and Authorities.

DATED this 23rd day of January, 2019.

BOIES SCHILLER FLEXNER LLP

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
300 South Fourth Street, Suite 800
Las Vegas, NV 89101

Robert Alexander*
Matthew Clash-Drexler*
James Graham Lake*
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
* Admitted pro hac vice

Attorneys for NSEA Parties

MEMORANDUM OF POINTS AND AUTHORITIES

In response to the NSEA Parties' motion for partial summary judgment on Count Six of their complaint (conversion), the CCEA Parties countermoved for partial summary judgment not just on Count Six but also on Counts Two, Three, and Four (breach of the NEA, NSEA, and CCEA bylaws), Count Five (unjust enrichment), Count Seven (fraud), and Count Nine (unlawful mid-year dues increase). *See* CCEA Parties' Opp'n to NSEA Parties' Mot. for Partial Summ. J. & Countermotion for Partial Summ. J. ("Countermotion").

That individuals who choose to join a union agree to the terms of union membership as set forth in the union's constitution and bylaws, and that the union has the right to collect dues according to those terms, are straightforward and common-sense legal propositions. The facts here – as established by CCEA's own admissions, *see infra* at 7-10 – are that individuals joined CCEA/NSEA/NEA as members, authorized the payment of their dues to all three unions by payroll deduction, and in fact paid the three unions' dues amounts from September 1, 2017 through May of 2018.[1] But CCEA never remitted the NSEA/NEA portions of the dues to NSEA or NEA. Because those facts contradict the fundamental premise of CCEA's Countermotion, which contends that NEA and NSEA had no right—indeed, no right *as a matter of law*—to the NEA and NSEA dues CCEA collected from NEA and NSEA members during the 2017-2018 membership year, CCEA's Countermotion is due to be denied in full.

BACKGROUND

A. Factual Background[2]

1. The Unified Membership Structure of NEA, NSEA, and CCEA, and the Membership Dues of Each Union for the 2017-2018 Membership Year.

For decades, NEA, NSEA and CCEA were affiliated and maintained a unified membership structure. *See* NSEA Parties' Concise Statement of Material Facts ("SOF") ¶¶ 2-4.

---

[1] Effective June 2018, CCEA altered the per-teacher amount of dues it collected from the Clark County School District, no longer purporting to collect the full prorated amount of NEA, NSEA, and CCEA dues. *See infra* at 4.

[2] On summary judgment, the Court reviews the facts and reasonable inferences drawn therefrom in the light most favorable to the nonmovant. *Wood v. Safeway, Inc.*, 121 Nev. 724,

That meant that by joining the local CCEA union a member also joined the state NSEA and the national NEA, becoming a member of all three organizations who was entitled to all the benefits of membership, and obligated to pay the annual membership dues of all three associations, *id.* ¶ 4, as CCEA itself admitted, CCEA Parties' Answer (Oct. 30, 2017) ¶ 12. Reflecting this unified membership structure, the three affiliated unions used versions of a template NSEA membership enrollment form to sign up individuals as CCEA/NSEA/NEA members. *See* Countermotion, Ex. 8.

Each of the three affiliates set their own membership dues amount in accordance with their governing documents and democratic procedures. *See* SOF ¶ 9. Thus, prior to CCEA's disaffiliation, NEA/NSEA/CCEA members owed NEA dues to NEA, NSEA dues to NSEA, and CCEA dues to CCEA as CCEA itself admitted. *See* CCEA Parties' Am. Answer (Mar. 21, 2018) ¶ 13.

All three unions set their respective membership dues for the 2017-2018 membership year (running from September 1, 2017 through August 31, 2018) prior to the start of the membership year. *See* SOF ¶¶ 5-8. For the 2017-2018 membership year, NEA/NSEA/CCEA members owed $189 in annual membership dues to NEA, $377.66 in annual membership dues to NSEA, and $243.84 in annual membership dues to CCEA. *Id.* ¶ 9.

2. CCEA's Collection of NEA and NSEA Dues

For decades prior to August 31, 2017, CCEA served as the contractually designated "collection agent" for NSEA, collecting and transmitting NSEA and NEA dues to NSEA (which in turn transmitted NEA dues to NEA). SOF ¶ 11; *see also* Countermotion , Ex. 1 at 005 ("The NSEA designates, and [CCEA] agrees to be its authorized agent for the purpose of collecting and transmitting NSEA and NEA dues and membership data from NSEA/NEA members who are also members of the [CCEA]."). As the term "collection agent" in the Dues Transmittal Agreement denotes, the dues being collected by CCEA as NSEA's "agent" pursuant to the

---

729, 121 P.3d 1026, 1029 (2005). Consistent with NRCP 56(c), the factual background references the NSEA Parties' Concise Statement of Material Facts, which is attached as Exhibit 7 hereto.

agreement were not CCEA's dues, but rather *NSEA and NEA dues*. *See id.* Although this Court's December 20, 2018 ruling held that the contract which designated CCEA as the "authorized agent for the purpose of collecting and transmitting NSEA and NEA dues" terminated as of August 31, 2017, that ruling does not answer what authority CCEA had to continue to collect the NSEA and NEA dues after that date without NSEA's or NEA's permission, whether by contract or otherwise. *See* SOF ¶¶ 15, 17.

a. NEA and NSEA Dues Collected from September 2017-April 2018

From September 2017 through April 2018 (and after, *see* Part 2(b) *infra*), CCEA continued to collect and withhold NSEA and NEA dues that the School District deducted from members' paychecks on a bimonthly basis. *See id.*[3] Those membership dues deductions were made by the School District in line with its commitment in the collective bargaining agreement to deduct dues for both CCEA and "its affiliates." *Id.* ¶ 10.

The CCEA Parties initially asserted that CCEA timely placed all such NSEA and NEA dues it collected into a bank account—which they initially described as an "escrow account" but then settled on the designation of it as a "restricted account."[4] *Id.* ¶ 18. In fact, however, CCEA did not timely deposit NSEA and NEA dues into the restricted account. *Id.* ¶ 25. As a consequence, by March 31, 2018 there was an accumulated shortfall in the "restricted account" of over a million dollars. *See id.* Instead of being deposited in the "restricted account" those missing NSEA and NEA dues monies were deposited into and maintained by CCEA in its general account, often for months. *See id.* ¶ 26.

---

[3] CCEA has repeatedly admitted in these proceedings that the dues it collected from members during this period included NSEA and NEA dues. *See infra* at 7-10.

[4] CCEA began by representing to NSEA and to this Court that it had placed the NSEA and NEA dues in an "escrow account." Answer (Oct. 30, 2017) at 14. Once the NSEA Parties started investigating this so-called "escrow account," the operative description shifted from an "escrow account" to a "restricted account," *see, e.g.*, Am. Answer & Counterclaim (Mar. 21, 2018) at 25.

b. NEA and NSEA Dues Collected in May 2018

CCEA disaffiliated from NEA and NSEA on April 25, 2018. SOF ¶ 3. But CCEA continued collecting NSEA and NEA dues in May 2018, as CCEA's counsel acknowledged in open court. *See* May 1, 2018 Hr'g Tr. at 10. Thus, in May 2018, the School District deducted the same per-teacher amount of dues as in the previous months – namely, an amount equal to the sum of the NEA, NSEA, and CCEA dues. SOF ¶ 28. The May 2018 NSEA and NEA dues, however, were never placed into any restricted account but were deposited into CCEA's general account. *See id.* ¶¶ 23, 28-29.

B. Procedural Background

1. The Restricted Account Order

On March 30, 2018, the NSEA Parties filed an Application for Order Directing the Issuance of a Prejudgment Writ of Attachment (Mar. 30, 2018). The application sought the writ on a variety of grounds, including upon the NSEA Parties' "claim for conversion" and their claims for the breach of the NEA and NSEA bylaws. *Id.* at 10-11; *see also* Reply in Supp. of Application for Prejudgment Writ of Attachment (Apr. 13, 2018) at 3-5.

On April 23, 2018, the Court held a hearing at which it granted the NSEA Parties' application for a prejudgment writ of attachment, as modified by the Court. Apr. 23, 2018 Hr'g Tr. at 163. In so doing, the Court stated it was "incorporating all the pleadings" in its ruling. *Id.* at 144. On May 11, 2018, the Court entered its written order (the "Restricted Account Order"), which stated that it was "fully advised in the premises" and that there was "good cause" for granting the Attachment Application as modified. *See* Restricted Account Order at 2.[5] Among other things, the Court ordered that "all funds in the possession of or received by [CCEA] for the 2017-2018 school year in respect to NSEA dues (numerically calculated traditionally at the

[5] The Court granted the motion "as modified" to minimize the logistical burden of a full writ on both CCEA (which would then have to transfer the funds) and the NSEA Parties (which would then have to post a bond). *See* Apr. 23, 2018 Hr'g Tr. at 144-45, 154-55 (explaining the reason for the modified order).

annual rate of $376.66) and in respect to NEA dues (numerically calculated traditionally at the annual rate of $189.00) shall continue to be deposited by CCEA into [the] account." *Id.* at 2.

Notwithstanding that ruling in May of 2018, and despite being directed to the contrary by the Court, CCEA collected the NSEA and NEA dues amounts and commingled those amounts in CCEA's general account rather than depositing them into the restricted account.[6]

2. CCEA's Rule 59 Motion Seeking to Vacate the Restricted Account Order

Concurrent with the filing of its Countermotion, CCEA filed a Motion to Alter or Amend the Court's May 11, 2018 Order ("Rule 59 Motion") that seeks to vacate the Restricted Account Order. At various points, the Countermotion relies on the prospect of the Rule 59 Motion's being granted as the basis for summary judgment. *E.g.*, Countermotion at 27. Concurrently with this brief, the NSEA Parties are filing an opposition to the Rule 59 Motion that explains why CCEA is not entitled to that relief. *See generally* NSEA Parties' Opp'n to CCEA Parties' Motion to Alter or Amend the Court's May 11, 2018 Order.

3. The Parties' Motions for Partial Summary Judgment

The parties have filed four motions for partial summary judgment in the consolidated cases.

First, on June 18, 2018, the CCEA Parties filed a partial motion for summary judgment on their second claim in the lead case, Case No. A-17-761364-C. The motion sought declaratory

---

[6] At the May 1, 2018 hearing, counsel for CCEA requested the Court's permission not to place the May 2018 dues into the Restricted Account. *See* May 1, 2018 Hr'g Tr. at 10 ("dues in the amounts that have normally been collected for NSEA will be received and they will be placed in the ordinary course of business per Your Honor's order into the restricted account, but we'd like permission to return that money to the members in due course after the complete collection of the funds. And so we're asking whether you can -- if you're willing to do this by an oral statement today or whether you would prefer a motion."). The Court rejected the request, requiring a motion "so that all parties have a full opportunity to address the issue, be fully heard on the issue." *Id.*; *see also id.*at 11 (COURT: "since there's not a stipulation, sounds to me like I'll be seeing some type of motion and we'll address it when it shows up on my proverbial doorstep." MR. DELIKANAKIS: "Thank you, Your Honor. We'll approach (indiscernible) motion." MR. D'ALBA: "Thank you, Your Honor. I understand and appreciate your decision."). CCEA, however, neither placed the May 2018 dues "per Your Honor's order[ ] into the restricted account" nor filed any motion relieving it of the obligation to do so.

relief concerning the parties' respective responsibilities under two specific contracts (the Service Agreement and Dues Transmittal Agreement); it did *not* extend to any other of the pending contracts nor tort claims the NSEA Parties had pled. *See* CCEA's June MSJ at 15, 18, 20 (seeking declaration that "CCEA owed no duties to NSEA/NEA *under the service agreement and dues transmittal agreement*" (emphasis added)). The CCEA Parties did *not* move for summary judgment on any other claim at the time. Following a hearing, the Court granted CCEA's motion and entered its ruling on December 20, 2018.[7]

Second, on November 9, 2018, the NSEA Parties filed a motion for partial summary judgment on their conversion claim.

Third, on December 13, 2018, the CCEA Parties filed the Countermotion addressed in this opposition brief.

Fourth, on January 23, 2019, the NSEA Parties filed cross-motions for partial summary judgment with respect to the NEA Bylaws and NSEA Bylaws, two of the claims that are the subject of the Countermotion.

ARGUMENT

Under the familiar summary judgment standard, courts will grant summary judgment only in cases where the movant shows that the evidentiary record contains "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56(c). In determining whether a "genuine issue" of fact exists to preclude summary judgment, the court looks to whether "the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Wood*, 121 Nev. at 731, 121 P.3d at 1031. "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Id.* at 729, 1029. Summary judgment is appropriate only if no reasonable jury might return a verdict in favor of

[7] On January 10, 2018, the NSEA Parties filed a motion for partial reconsideration of two aspects of the Court's findings of fact in the December 20, 2018 ruling. *See* NSEA Parties' Mot. for Partial Reconsideration of the Dec. 20 Findings of Fact, Conclusions of Law, and Order.

the nonmoving party based on that evidence. *Cline v. Indus. Maint. Eng'g & Contracting Co.*, 200 F.3d 1223, 1229 (9th Cir. 2000).

This case is somewhat unusual in that both parties, in addition to contesting the other's right to summary judgment, have also submitted their own motions for summary judgment on the same claims. While the NSEA Parties have, for reasons explained in those motions, sought summary judgment on their claims for conversion and breach of the NSEA and NEA bylaws (Counts Two, Three, and Six), this submission is limited to explaining why *CCEA* is not entitled to summary judgment on any claim.

A. CCEA Is Not Entitled to Summary Judgment on the Conversion Claim (Count Six)

CCEA is not entitled to summary judgment on NSEA Parties' claim for conversion. The only basis for CCEA's motion on this count is that "NSEA/NEA cannot satisfy the ownership interest element" of their conversion claim. Countermotion at 19.[8] CCEA's proffered basis is wrong as a matter of law, and is contradicted by multiple admissions CCEA has made in these proceedings.

1. A Rule 56 movant's own admissions, without more, may suffice to preclude summary judgment, *see* NRCP 56(c) (nonmovant's response may rely on any "admission"),[9] and here the CCEA Parties "sabotage their [sole] theory by their own admissions," *Freeman v. San Diego Ass'n of Realtors*, 322 F. 3d 1133, 1150 (9th Cir. 2003).

---

[8] This is a new argument. Previously, CCEA defended against the conversion claim by arguing that, by placing "the dues payments deducted from employee paychecks for NSEA and NEA" in the restricted (or "escrow") account, CCEA had not "exercised dominion or control" over the funds. *See, e.g.*, CCEA Parties' Answer to Second Am. Compl. (July 9, 2018) at 24. CCEA has, however, abandoned that argument—and for good reason, since by withholding the monies from NEA and NSEA, it clearly has exercised dominion and control over them.

[9] *See also, e.g.*, *Leary v. Delarosa*, No. 5:16-CV-43, 2017 WL 2692652, at *5 (W.D. Va. June 21, 2017) (movant's "judicial admission…forecloses summary judgment"); *Safeco Ins. Co. of Illinois v. Tremblay*, No. 2:16-CV-837-FTM-38CM, 2018 WL 3648265, at *3 (M.D. Fla. Aug. 1, 2018) ("This admission is also important because it precludes summary judgment"); *Ford Motor Co. v. Heralpin USA, Inc.*, No. CV 15-23638-CIV, 2017 WL 4777545, at *3 (S.D. Fla. Oct. 23, 2017) ("admissions create issues of fact precluding entry of summary judgment").

Time and again, CCEA has admitted—both in pleadings and in its other filings—that the converted funds were NSEA and NEA dues, money owed to NSEA and NEA. *See, e.g.*, Opp'n Exhibit 6M[10] at CCEA 013351, 013417, 013613–14, CCEA 013717 (internal CCEA financial records from August 2017-November 2017 describing line items as "NEA & NSEA Dues Collected from Members"); Vellardita Aff. (dated Mar. 29, 2018 and attached to CCEA Parties' Apr. 3, 2018 Motion for Injunction) ¶ 15 ("[E]mployees' due [*sic*] payments *for NSEA and NEA* have been deducted from their paychecks and have been placed in a Bank of America restricted account . . . ." (emphasis added)); CCEA Parties' Answer to Am. Compl. & Counterclaim, ¶ 13 of Counterclaim (Mar. 16, 2018) ("Members of CCEA pay dues to CCEA, NSEA, and . . . [NEA] through dues payments deducted from their pay checks . . . [and] directed to CCEA by the School District.").

Indeed, the foregoing is just the tip of the iceberg of CCEA admissions that directly contradict its argument here that NEA and NSEA had no ownership interest in the funds subject to the conversion claim. The record also contains all of the following admissions:

- "Dues *designated for NSEA* in the amount of 0.6 percent of the teachers' average salary and *dues money for NEA* have been deducted from paychecks of the licensed professionals of the Clark County School District and have been placed in a restricted account with specific instructions from the CCEA that there could be no withdraws from the account except only upon completion of the litigation between NSEA and CCEA. The funds in this restricted account are subject to the resolution of this litigation *and will be disbursed to the NSEA and the NEA upon completion of this litigation* and upon issuance of a letter from counsel for the CCEA authorizing the release of the funds, which will be subject to the permission from the Court." Defendants-Counter Plaintiffs Answer to Amended Complaint and Counterclaim ¶ 31 (Mar. 16, 2018) (emphasis added).

---

[10] Citations to "Opp'n Exhibit _" refer to exhibits that are attached to this Opposition as declaration exhibits. Thus, "Opp'n Exhibit 6M" refers to exhibit M to the Declaration of Henry Pines which is attached hereto as Exhibit 6. Where we cite a declaration itself as opposed to one of its exhibits, the citation does not include a letter. That is, whereas "Opposition Exhibit 3A" refers to the first Exhibit A to the Declaration of Jason Wyckoff, a reference to "Exhibit 3" is to the declaration itself. (Where we cite evidence already in the record that is not attached to this brief, we include the name of the pleading to which the evidence is attached.)

- "Since September 1, 2017, *Dues designated for NSEA* in the amount of 0.6 percent of the teachers' average salary and *dues money for NEA* have been deducted from paychecks of the licensed professionals of the Clark County School District and have been placed in a restricted account...." Defendants-Counter Plaintiffs' Answer to Second Amended Complaint and Counterclaim ¶ 57 (July 9, 2018) (emphasis added).
- "THE COURT: Well, I know that, but what they were enrolling in is this paying dues to CCEA, NSEA and NEA. That was – they joined that organization or association. I don't want to say it wrong. Correct? MR. DELIKANAKIS: Correct." Nov. 15, 2018 Hr'g Tr. at 46:4–8.
- "As of April 14, 2018, the annual dues payments for CCEA members included payments to CCEA, NSEA and NEA and were $810.50." Countermotion, Ex. 9 (Aff. of John Vellardita dated Dec. 12, 2018) ¶ 35.
- "As a result of the [April 25, 2018] disaffiliation vote, the dues payments were no longer going to be made to the NSEA or NEA, and there was a consequent reduction of union dues by 40 percent." *Id.* ¶ 39.

Moreover, representatives of CCEA have admitted that the dues money belongs to NSEA and NEA in communications to both NEA and the membership, and in CCEA's own internal governance documents. On January 8, 2018, for example, CCEA Executive Director John Vellardita sent a letter to the NEA Members Insurance Trust in which he stated:

> Currently, CCEA is in litigation with NSEA and NEA, and merely escrowing collected *dues of both organizations* while negotiating a successor dues transmittal agreement pursuant to the terms of the agreement and in accordance with NSEA/NEA Bylaws and Policies. . . . Dues are not a requirement for 'active' NSEA or NEA membership, where the *dues have been paid*, but held in escrow pending a negotiation of a successor Dues Transmittal Agreement.

Opp'n Exhibit 6A (emphasis added). On December 26, 2017, counsel for CCEA stated in a letter that a bank account had been established "to hold *NSEA and NEA dues money*," that "the dues money *for NSEA and the NEA* was placed into" the account, and that "[a]ll of the *NSEA and NEA dues money* deducted from employee pay checks" was being placed into the account. Opp'n Exhibit 6B (emphasis added). On September 11, 2017, Victoria Courtney, President of CCEA, sent an email to a member describing the breakdown of members' annual dues obligations to CCEA, NSEA and NEA, including amounts due to each organization for the 2017-2018 school year. Opp'n Exhibit 6C. Finally, at their August 19, 2017, Executive Board meeting, CCEA

board members voted to "place the dues collected *on behalf of NSEA* in an escrow account." Opp'n Exhibit 6D (emphasis added).

In light of these admissions, it not plausible for CCEA to argue that, as a matter of law, the dues money does not belong to NSEA and NEA. Indeed, as we argue in our own summary judgment motion, CCEA's multiple admissions establish *NEA's and NSEA's* entitlement to summary judgment on conversion. But for purposes of the present motion it is enough for the Court to conclude, as it must on the record here, that the admissions alone would permit a reasonable factfinder to conclude that the dues at issue are NEA's and NSEA's, precluding summary judgment in CCEA's favor on the issue. *See Cline*, 200 F.3d at 1229; *see also supra* note 9 (listing cases denying summary judgment based upon admissions).

2. Even apart from the list of admissions catalogued above, the record is replete with evidence from which a rational juror could find that NEA and NSEA have an ownership interest in the disputed 2017-2018 dues money that CCEA has refused to remit.

a. First, members of CCEA were indisputably required to be members of NSEA and NEA. *See* SOF ¶ 4. Each organization's bylaws required that members of one organization be members of all three: the local, state, and national associations. Under the CCEA bylaws in effect until its April 25, 2018 disaffiliation, a precondition to individual membership in CCEA was "evidence of membership in NSEA and NEA." Countermotion, Ex. 7 at 023 (CCEA Bylaws Art. II, sec. 1).[11] The NSEA bylaws provided that "[a]ctive members of the NSEA shall also be members of the NEA and of a local association where available." Opp'n Exhibit 1C at Pis.' Init. Disc. (NSEA v. CCEA)_00000667 (NSEA Bylaws Art. II, Sec. 1(A)(6)). And the NEA Bylaws mandated that local affiliates "shall require membership in the NEA and in its state affiliate where eligible." Opp'n Exhibit 2A (NEA Bylaws at Sec. 8-7(c)).

[11] After disaffiliation from NSEA and NEA, CCEA amended Article II, section 1 to remove the unified membership requirement and to allow "[a]ny member of the bargaining unit [to] become a member of [CCEA]." *Compare* Opp'n Exhibit 6L (Art. II, sec. 1), Opp'n Exhibit 1B (Art. II, sec. 1).

By virtue of their membership, members owed the dues money CCEA collected to all three organizations on an annual basis. *See* Countermotion, Ex. 8 ("Dues are paid on an annual basis . . . . [A] member is obligated to pay the entire amount of dues for a membership year."); Countermotion, Ex. 7 at 024 (CCEA Bylaws Art. II, sec. 3) ("The Association fiscal/membership year shall be from September 1 through August 31."); Opp'n Exhibit 1C at 1 (NSEA Bylaws Art. II, sec. 3) ("The membership year shall be September 1 to August 31."); Opp'n Exhibit 2A (NEA Bylaws Sec. 2-5) ("The membership year shall be from September 1 through August 31."); *see also* Opp'n Exhibit 6C (Email from Victoria Courtney dated Sept. 11, 2017, describing dues breakdown on an annual basis). Members had the option to pay their annual dues in bi-monthly installments, deducted directly from their paycheck by the School District. *See* SOF ¶ 12. The School District then transmitted the unified dues to CCEA, as the collective bargaining agreement expressly permitted the deduction of dues "for…affiliates" of CCEA. *Id.* ¶ 10. Members could opt-in to unified membership and this payroll deduction option by signing a payroll-deduction authorization form, a sample of which is included as Exhibit 8 to the Countermotion.

By signing that form, members enrolled in all three organizations and agreed to pay annual dues thereto. SOF ¶ 13. CCEA argues that the payroll-deduction authorization form was "an agreement only between CCEA and the individual members." Countermotion at 9. That is incorrect,[12] but it is also immaterial to the instant motion because, regardless of whether the form

[12] Prior to CCEA's disaffiliation, the person who collected NEA/NSEA/CCEA membership enrollment forms from enrollees and countersigned the form, did so on behalf of the unified Association (NEA, NSEA, and CCEA). *See* Opp'n Exhibit 5 (Decl. of Robert Benson) ¶¶ 3-5. In other words, the person signing and collecting the form from enrollees was, among other things, acting as the agent of the NSEA Parties. *See id.* ¶ 4; Opposition Exhibit 1C (NSEA Bylaws Article II, Section 5) ("Membership begins when an applicant signs a payroll deduction form for membership in the United Education Profession and gives that application to *an agent of the NSEA*" (emphasis added)). On black letter principles of agency, NSEA and NEA were therefore parties to the contract executed by their agent. *See generally Great Am. Ins. Co. v. Gen. Builders, Inc.*, 113 Nev. 346, 352, 934 P.2d 257, 261 (1997) (discussing authority of agent to bind a principal to a contract). (In the alternative, NSEA and NEA would plainly be third-party beneficiaries, given the content of the form and the fact that it is printed in triplicate to ensure

was a contract only between CCEA and the members and whether it included NSEA and NEA as beneficiaries of the dues obligation, the form clearly conveyed to members that by signing, they enrolled as members in all three affiliated organizations and agreed to pay—and did pay—dues for all three affiliated organizations. *See* Countermotion, Ex. 8 (the form contains the names and logos of NSEA and NEA at the top and refers to the "membership status, rights or benefits in NEA [and] NSEA"; mentions only NEA and NSEA, not other organizations, by name; and also provides that "[d]ues are paid on an annual basis and . . . a member is obligated to pay the entire amount of dues for a membership year").

b. Additional record evidence supports the conclusion that the dues at issue are NSEA and NEA's property. For example, the language in the now-terminated Dues Transmittal Agreement provided that "NSEA designates, and [CCEA] agrees to be its authorized agent for the purpose of collecting and transmitting NSEA and NEA dues." Countermotion, Ex. 1 at 005. The very act of CCEA's agreeing to become a "collection agent" acknowledges that NSEA, as principal, has an underlying claim of right to the property to be collected. Just as the termination of an agreement designating a collection agent has no effect on the underlying rights to the property subject to collection, so too here the termination of the Dues Transmittal Agreement has no effect on the underlying rights of each of the three unions to their dues. *See, e.g., WMCV Phase 3, LLC v. Shushok & McCoy, Inc.*, 750 F. Supp. 2d 1180, 1184-85, 1195 (D. Nev. 2010) (the cancelation of a contract between a lessor and a commercial collection agent to recover lessees' debts to the lessor did not affect the lessor's property interest in the debt, the lessor could bring a conversion claim against the former collection agent for collecting and not transmitting the debt after the cancelation of the collection contract).

Or, to take two final examples, on January 22, 2018, CCEA Executive Director John Vellardita wrote a letter to CCEA/NSEA/NEA members stating—in the present tense—that members "pay $567 annually in dues to NSEA and NEA." Opp'n Exhibit 6A at NSEA-

---

that NSEA was provided a carbon copy. *See, e.g.*, Countermotion, Ex. 8.) This evidence further undermines the factual basis for CCEA's summary judgment argument.

00012101. And CCEA Policies make clear the tripartite dues obligation, stating, e.g., that "[p]art time teachers shall pay proportional dues *to local, state, and national associations* based on the proportion of the day covered by the contract." Opp'n Exhibit 6E at NSEA-00009696 (emphasis added).

* * *

Given all this evidence, a reasonable juror could find that (1) members of CCEA were also members of NSEA and NEA, (2) they owed and paid dues to the state and national associations on an annual basis through payroll deduction, and (3) CCEA collected those dues from the School District for NSEA and NEA. Based upon that, a reasonable juror could further conclude that NSEA and NEA have an ownership interest in the membership dues at issue. Accordingly, the CCEA Parties' summary judgment motion as to the conversion claim fails.

B. CCEA Is Not Entitled to Summary Judgment on the Unjust Enrichment Claim (Count Five)

CCEA's arguments for summary judgment on unjust enrichment fare no better. As to NEA and NSEA, CCEA incorporates the arguments it made regarding conversion, asserting that NEA's and NSEA's unjust enrichment claims are foreclosed because they "do not have an ownership interest or underlying right to the funds at issue." Countermotion at 20; *see also id.* at 22. That is wrong for the reasons we explained with respect to conversion, which we hereby incorporate by reference. *See supra* at 7-13.

As to the individual plaintiffs, whom CCEA designates as the "Teacher Parties," CCEA raises two principal arguments—neither of which has merit.

1. CCEA first contends that, in the event the Court grants its pending Rule 59 Motion, "any damages asserted by the Teacher Parties would be nullified." Countermotion at 20. With respect to the unjust enrichment claim, that is mistaken for three independent reasons.

First, CCEA's Rule 59 Motion lacks merit, as we have detailed separately, and therefore can provide no basis for granting judgment on the unjust enrichment claim.

Second, even if the Rule 59 Motion were granted, disbursing the funds in the Restricted Account to the Teacher Parties would not "nullif[y]" their damages claims because the funds in the restricted account do not include the full amount of NSEA and NEA dues collected from them by CCEA during the 2017-18 membership year. SOF ¶ 29. As noted above, in May 2018, CCEA collected dues in the same prorated amounts as in previous months when the deductions indisputably included NEA and NSEA dues. SOF ¶ 28; *see also* Opp'n Exhibit 3 ¶ 10; Opp'n Exhibit 3D; Opp'n Exhibit 4 ¶ 10; Opp'n Exhibit 4C. And teachers from whom these May 2018 dues were deducted considered the amounts of deducted dues to include their NEA and NSEA membership dues. *See* Opp'n Exhibit 4 (Di Archangel Decl.) ¶ 10; Opp'n Exhibit 3 (Wyckoff Decl.) ¶ 10. Despite the fact that the May 2018 dues included NEA and NSEA dues, and notwithstanding CCEA's obligation to deposit such dues into the Restricted Account pursuant to the Restricted Account Order, CCEA failed to do so. *See* SOF ¶ 28-29. Because a reasonable factfinder could conclude from the foregoing that CCEA collected NSEA and NEA dues that were never deposited in the Restricted Account, disbursing only the funds in the account to the Teacher Parties could not moot or "nullif[y]" the individual plaintiffs' claim to the NEA and NSEA dues collected from them.

Third, CCEA's position is wrong as a matter of law. One of the measures of damages available to an unjust enrichment plaintiff is the disgorgement of the wrongdoer's profits. Restatement (Third) of Restitution and Unjust Enrichment§ 3 (2011). The damages for "unjust enrichment of a conscious wrongdoer...is the net profit attributable to the underlying wrong," and a "conscious wrongdoer who makes an unauthorized investment of the claimant's property is both accountable for profits and liable for losses, and the claimant is free to pursue the most advantageous remedy in light of the outcome." *Id.* § 51 (4) & cmt. j. The record includes evidence demonstrating that, contrary to CCEA's assertions, for months at a time it failed to deposit the NSEA and NEA dues it received from the School District into the Restricted Account—causing a shortfall of at least $500,000 by October 2017 that increased to a shortfall of more than $1 million by January 2018. *See* Exhibit 6H at 0006, 0020; *see also* SOF ¶ 25. How

CCEA used this money that it delayed depositing in the Restricted Account, and whether that money generated profits subject to disgorgement, is the subject of ongoing discovery—but no Rule 56(f) affidavit is needed to meet CCEA's summary judgment argument because CCEA presents no evidence to show that the money it kept (whether in its general or operating account or elsewhere) before depositing it into the Restricted Account generated no profit, whether by interest or otherwise. *See Fergason v. LVMPD*, 131 Nev. Adv. Op. 94, 364 P.3d 592, 595 (2015) (where movant fails to carry its initial summary judgment burden, "the opposing party has no duty to respond on the merits and summary judgment may not be entered").[13]

2(a). Next, CCEA argues that the Membership Form constitutes an express agreement between the Teacher Parties and CCEA that precludes the Teacher Parties from pursuing an unjust enrichment theory. Countermotion at 21 (quoting *Leasepartners Corp. v. Robert L. Brooks Tr.*, 113 Nev. 747, 942 P.2d 182 (1997); *Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 566 P.2d 819 (1977)).

But the mere fact that *a* contract exists between two parties is insufficient to foreclose an unjust enrichment claim. To the contrary, "where the subject matter giving rise to the claim for unjust enrichment is beyond the scope of the express contract, the claim is not barred." *U-Haul Co. of Nev. Inc., v. Gregory J. Kamer, Ltd.*, No. 2:12-CV-231-KJD-CWH, 2013 WL 4505986, at *2 (D. Nev. Aug. 21, 2013) (citing *Leasepartners*, 113 Nev. At 755, 942 P.2d at 187); *see also Brown v. Brown*, No. CV 13-03318 SI, 2013 WL 5947032, at *8 (N.D. Cal. Nov. 5, 2013) (under Nevada law, "unjust enrichment is not available when there is an express, written contract *regarding the particular subject matter*" (emphasis added) (citing *Leasepartners*, 113 Nev. At 755-56, 942 P.2d at 187)). In other words, "when an express contract does not fully address a subject, a court of equity may impose a remedy to further the ends of justice." *Coppolillo v. Cort*, 947 N.E.2d 994, 998 (Ind. Ct. App. 2011). That is, "the existence of a contract, in and of itself,

[13] For this reason, CCEA's unsupported request for a "declaratory order" that would limit "the Teacher Parties' unjust enrichment damages to the portion of dues the Teacher Parties actually paid to CCEA in excess of CCEA dues," Countermotion at 22, must fail as well. Unjust enrichment damages includes, at the plaintiff' election, disgorgement of wrongful profits.

does not preclude equitable relief which is not inconsistent with the contract." *Id.*; *see also generally* Restatement (Third) of Restitution and Unjust Enrichment (2011) § 2 cmt. c (noting that unjust enrichment claims may lie notwithstanding contract).

CCEA's argument fails as to the individual Teacher Parties under these governing principles. Contrary to its suggestion (at 21), the mere fact of a contractual relationship pursuant to the Membership Form does not preclude all forms of unjust enrichment. And it certainly does not preclude the Teacher Parties' claims in Count Five, because the Membership Form does not set forth *CCEA's duties* upon receiving the aggregated NEA, NSEA, and CCEA dues. Because that subject matter "is beyond the scope of the express contract, the claim is not barred." *U-Haul Co.*, 2013 WL 4505986, at *2; *accord Coppolillo*, 947 N.E.2d at 998.

(b) CCEA also makes the extraordinary assertion that the contracts this Court held to have *expired* on August 31, 2017—the Service Agreement and the Dues Transmittal Agreement—serve to bar NEA's and NSEA's unjust enrichment claims regarding conduct *following* their termination. Countermotion at 21. The contention fails not only for the reasons just explained with respect to the Teacher Parties, *see supra* at 15-16, but also because "the *LeasePartners* rule assumes the 'express, written contract' is enforceable. If the written instrument is not an enforceable contract…[,] a claim for unjust enrichment is still available." *Hydrotech, Inc. v. Ames Const., Inc.*, No. 3:12-CV-00262-LRH, 2013 WL 551510, at *2 (D. Nev. Feb. 12, 2013) (citing *Leasepartners*, 113 Nev. at 755-56, 942 P.2d at 187; Restatement (Third) of Restitution & Unjust Enrichment § 32 (2011)); *MPower Sys. India (Pvt) Ltd. v. Articmaster Inc.*, No. 3:16-cv-00558, 2018 WL 4210779, at *7 (D. Nev. Sept. 4, 2018) (similar); *Kattawar v. Logistics & Distribution Servs., Inc.*, No. 14-2701-STA-CGC, 2015 WL 508011, at *8 (W.D. Tenn. Feb. 6, 2015) (similar).[14]

[14] CCEA's suggestion (at 21-22) that the specific manner in which a contract terminated is at all relevant (whether through abandonment, pursuant to a termination clause, or otherwise), and that *only* contracts terminated under the doctrine of abandonment permit unjust enrichment claims after termination, is frivolous. Just because abandonment of a contract is a circumstance in which unjust enrichment or quantum meruit is viable does not mean it is the *only* such

C. CCEA Is Not Entitled to Summary Judgment on the Claims for Breach of Contract under the NSEA Bylaws (Count Two), the NEA Bylaws (Count Three), and the CCEA Bylaws (Count Four)

Likewise, CCEA cannot show that it is entitled to summary judgment on Counts Two and Three of the NSEA Parties' Second Amended Complaint, which allege that CCEA breached the NSEA and NEA bylaws by failing to maintain a dues transmittal contract with NSEA and by withholding dues money from NSEA and NEA.

CCEA's position relies entirely upon its assertion that it is not contractually bound by the NSEA and NEA bylaws because it terminated a separate contract—the Dues Transmittal Agreement with NSEA—as of August 31, 2017. *See* Countermotion at 22-23. This argument is nonsensical, but in any event, as the NSEA Parties describe more fully in their Motion for Partial Summary Judgment on Counts Two and Three, filed concurrently with this opposition, CCEA has admitted repeatedly that the NSEA and NEA bylaws constituted separate contracts that *were* binding on CCEA, at least until its disaffiliation from NEA and NSEA on April 25, 2018. *See generally* NSEA Parties' Motion for Partial Summary Judgment at 4 (filed Jan. 23, 2019). Under these admitted facts, CCEA's Countermotion under Counts Two and Three fails.[15]

As to the NEA bylaws, CCEA admitted in its Answer to the Second Amended Complaint that "NEA's Bylaws constitute a contract between NEA and its affiliated state and local associations, including CCEA." *See* Answer to Second Amended Complaint ¶ 64; *see also* Opp'n Exhibit 1A (Letter from CCEA President Victoria Courtney and Vice President Theo Small (Apr. 26, 2018)) ("Please be advised that effective immediately CCEA is no longer

---

circumstance. *See, e.g.*, *Hydrotech*, 2013 WL 551510; *MPower*, 2018 WL 4210779; *Kattawar*, No. 14-2701-STA-CGC, 2015 WL 508011.

[15] Count Four rises or falls with Counts Two and Three. Because Article X, § 1 of CCEA's Bylaws provided that CCEA "shall maintain affiliate status with the [NEA] and the [NSEA] under the required procedures of each organization," Countermotion, Ex. 7 at 042, CCEA's failure to meet its summary judgment burden as to the NEA and NSEA bylaws *also* means that CCEA failed to meet its Rule 56 burden to show that it did not violate the requirement in its bylaws to comply with the "required procedures" of NEA and NSEA.

affiliated with [NSEA] and [NEA] and accordingly, we will *no longer* have any contractual relationship with NSEA and NEA." (emphasis added)).

Similarly, as to the NSEA bylaws, CCEA admitted that "NSEA's Bylaws constitute a contract between NSEA and its affiliated local associations, including CCEA." Answer to Second Amended Complaint ¶ 60. Moreover, in its *own* Second Amended Complaint, CCEA averred that the "bylaws of the NSEA constitute a contractual relationship between the NSEA and its local affiliate, the CCEA." CCEA Parties' Second Am. Compl. ¶ 26 (Oct. 26, 2017); *see also id.* ¶ 52 (arguing that a "special contractual relationship" between the parties "is based on the NSEA bylaws"). Indeed, the entire basis of CCEA's own claim in the lawsuit it brought is that NSEA bylaws were a contract between CCEA and NSEA. CCEA cannot now argue otherwise.

CCEA's only remaining argument is that requiring CCEA to enter into a successor dues transmittal agreement under the NEA and NSEA bylaws would constitute a perpetual contract. *See* Countermotion at 24. Whatever force that argument could have in interpreting the dues transmittal agreement itself, it is irrelevant in construing the NEA or NSEA bylaws. A perpetual contract arises only where the document expressly provides that it will endure perpetually *and* that termination requires mutual consent of both parties. *See, e.g.*, *Bell v. Leven*, 120 Nev. 388, 391, 90 P.3d 1286, 1288 (Nev. 2004). Here, CCEA had the unilateral option to terminate prospectively its obligations under the NEA and NSEA bylaws—and therefore to terminate its obligation to maintain a dues transmittal agreement—by disaffiliating from the state and national organizations, an option it unilaterally exercised on April 25, 2018. SOF ¶ 3. CCEA has demonstrated by its own actions that the NEA and NSEA bylaws' requirement that local affiliates maintain a dues transmittal agreement with a state affiliate does not in any way render either a "perpetual contract."

CCEA offers no substantive argument that, if bound by the NSEA and NEA bylaws, it nonetheless did not violate its obligations under them.[16] Given that CCEA cannot maintain as a matter of law that while an affiliate of NEA and NSEA it was not party to the NSEA and NEA bylaws, there is no basis for CCEA's motion for summary judgment on Counts Two and Three.

D. CCEA Is Not Entitled to Summary Judgment on the Teacher Members' Fraud Claim (Count Seven)

With respect to the individual plaintiffs' fraud claims, CCEA asserts that "summary judgment is appropriate…as to damages" because, in its view, if the Court grants its pending Rule 59 Motion, "any damages asserted by the [individual teachers who bring Count Seven] would be nullified." Countermotion at 26-27. CCEA's motion does not dispute that material facts exist as to whether it did defraud its members, the Teacher Parties, but rather is limited to contesting whether damages flow from the fraud. *Id.* But even this argument is deficient for multiple independent reasons.

First, it is entirely premised on the Court's granting its Rule 59 Motion, which, for the reasons we explain in our opposition to that Motion, should be denied.

Second, even if the NEA and NSEA dues in the Restricted Account were returned to the individual plaintiffs, that would *not* "nullif[y]" their damages claims. CCEA incompletely quotes Paragraph 90 of the Second Amended Complaint by omitting the phrase "at a minimum," *compare* Counterclaim at 27, *with* NSEA Parties' Second Am. Compl. ¶ 90, to suggest that the only fraud damages at issue are the NSEA and NEA dues that CCEA improperly collected. That is simply not the case. The individual plaintiffs' compensatory damages are not limited to NSEA and NEA dues in the Restricted Account, and CCEA has not made any showing that they should be so limited. *See Fergason*, 131 Nev. Adv. Op. 94, 364 P.3d at 595 (where movant fails to carry

---

[16] As NSEA Parties show in their Motion for Partial Summary Judgment on Counts Two and Three, the CCEA Parties are in clear breach of the substantive requirements of NEA bylaws Section 2-9 and NSEA bylaws Art. VIII, sec. 3(F). For the reasons laid out in that brief, not only should CCEA's summary judgment motion be denied, but the Court should enter summary judgment in favor of NSEA Parties on Counts Two and Three.

its initial summary judgment burden, "the opposing party has no duty to respond on the merits and summary judgment may not be entered").

The most glaring deficiency in CCEA's theory is that it fails to acknowledge that the individual plaintiff Teacher Parties seek punitive damages on their fraud claim. *See* NSEA Parties' Second Am. Compl. at 23. Thus, even if disbursing the Restricted Account monies were to moot all compensatory damages under the claim (though it would not, *see infra*), the fraud claim would still permit an award of punitive damages. *See, e.g.*, *Frazier v. Castle Ford, Ltd.*, 430 Md. 144, 161, 59 A.3d 1016, 1026 (2013) (even though the defendant's tender mooted actual damages under the fraud claim, such a tender did not moot a punitive damages recovery); *Spivak v. Willis of Illinois, Inc.*, No. 12 C 1116, 2012 WL 1719841, at *2–3 (N.D. Ill. May 15, 2012) (settlement offer that included no provision for punitive damages where punitive damages were authorized under ICFA did not moot case); *Cochetti v. Desmond*, 572 F.2d 102, 105 (3d Cir. 1978) (award providing compensatory relief did not moot the claim for punitive damages).[17]

In any case, even apart from potential punitive damages, clear record evidence supports damages beyond just the NEA and NSEA dues in the Restricted Account (foreclosing summary judgment on this ground). For example, there is evidence that Jason Wyckoff would not have joined CCEA, and Diane Di Archangel would not have remained a member of CCEA, but for CCEA's fraudulent representations and omissions set forth in Count Seven. *See* Opp'n Exhibit 3 (Wyckoff Decl.) ¶ 7; Opp'n Ex. 4 (Di Archangel Decl.) ¶ 8. Proper compensatory damages for Mr. Wyckoff and Ms. Di Archangel thus include the amount of *CCEA dues* that would not have been authorized by them but for the fraudulent conduct alleged in the complaint.[18] Moreover, as discussed above, the Restricted Account does not include all of the NSEA and NEA dues

[17] The Countermotion attempts no showing that punitive damages are foreclosed as a matter of law. Nor could it make such a showing, since that is a fact-dependent issue that is the subject of ongoing discovery.

[18] For this reason, CCEA's request in the alternative that the Court enter a declaratory order limiting damages to "the portion of dues the Teacher Parties actually paid to CCEA in excess of CCEA dues" also fails—although the request could also be denied simply on the basis that CCEA offers no reasoning or basis for such relief. *See* Countermotion at 27.

deducted from the individual plaintiffs' paychecks. *See supra* at 4. Returning the NEA/NSEA dues monies in the Restricted Account would therefore not fully moot the individual plaintiffs' claim to the NEA and NSEA dues collected from them.

E. CCEA Is Not Entitled to Summary Judgment on the Teacher Members' Claim of an Unauthorized Mid-Year Increase in CCEA Dues (Count Nine)

Finally, CCEA argues (at pp. 27-29) for summary judgment on Count Nine, a claim on which individual CCEA members allege that CCEA breached the express terms of the Membership Form that limit the amount of dues that may be deducted from their paychecks to those dues "established annually" for the "membership year." Restating arguments the Court rejected at the November 15 hearing on CCEA's motion to dismiss Count Nine, the CCEA Parties argue that the "controlling nature of the CCEA Constitution and Bylaws" can override any express limits in the Membership Form, and that increasing CCEA dues mid–membership year was permissible since "there was an overall reduction in union dues." *Id.* These arguments lack merit as to this straightforward contract claim, because they ignore the relevant contract at issue.

1. The Mid-Year Increase in CCEA Dues Violated the Limitations of the Membership Form, Regardless of Whether the Dues Increase Was Permissible under the CCEA Bylaws

The limitations to payroll deduction set forth in the Membership Form are unambiguous. Members, in signing the form, authorized only the deduction of dues "as established annually" for the "membership year," *see* Countermotion, Ex. 8—and *not* the deduction of any additional dues exceeding those amounts that were established *annually* for the membership year. Prior to September 2017, CCEA set annual CCEA membership dues at $243.84 for CCEA's 2017-2018 membership year, SOF ¶ 9, which pursuant to the CCEA Bylaws then in effect ran from September 1, 2017 through August 31, 2018, *see* Countermotion, Ex. 7 at 024; SOF 6-7. That is, the maximum amount of CCEA dues that could be deducted, consistent with the Membership Form, between September 1, 2017 and August 31, 2018 was $243.84, i.e., the amount of CCEA dues "established annually" for the "membership year." Countermotion, Ex. 8. And yet, CCEA

purported to increase the annualized CCEA dues to $510 in April 2018, effective *immediately*. *See* Countermotion at 28-29. CCEA's action therefore violated the unambiguous limitation of the Membership Form's deduction authorization.[19]

The CCEA does *not* argue that the limitation in Membership Form—authorizing only the deduction of dues "as established annually" for the "membership year"—means anything other than what it says. *See* Countermotion at 27-29. Instead, CCEA argues that, regardless of the language in the Membership Form, the CCEA Bylaws, as a matter of law, have a "controlling nature" and permitted such a dues increase. *Id.* at 28. CCEA does not provide any legal (or factual) authority for this proposition, and saying it is so does not make it so. To the contrary, whether or not CCEA's mid-year dues increase was permissible under the *CCEA Bylaws* is irrelevant to whether CCEA breached *the Membership Form* by imposing increased CCEA dues above the amounts the members authorized on the form. An example illustrates the point. Suppose the Membership Form authorized the deduction of "CCEA dues not to exceed $300," and suppose further that CCEA nonetheless raised its annual dues to $500 pursuant to authority asserted from its bylaws. Regardless of whether the annual dues increase was permissible under the bylaws, the deduction of such dues was *not* permitted by the clear and express language in the Membership Form. The same result obtains here.

---

[19] Because the form *unambiguously* limits the deduction authorization to those dues "as established annually" for the "membership year," *see* Countermotion, Ex. 8, it would be appropriate for the Court to grant summary judgment on Count Nine *against* CCEA and in favor of the individual plaintiffs who bring the claim. The appropriateness of judgment against CCEA is underscored by the fact that the CCEA Parties have failed to file an answer to Count Nine despite their motion to dismiss the claim having been denied on December 5, 2018. *See generally* NRCP 55; *see also Tahoe Village Realty v. DeSmet*, 95 Nev. 131, 134, 590 P.2d 1158, 1160 (1979) ("failure to file an answer" "may suggest neglect" and, in some circumstances, is not "excusable"), *abrogated on other grounds by Ace Truck & Equip. Rentals v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987).

2. A Genuine Dispute of Fact Exists Whether CCEA's Mid-Year Dues Increase Was Even Permissible under the CCEA Bylaws

Though the foregoing is enough to deny the Countermotion on Count Nine, CCEA's arguments regarding the propriety of its actions under its bylaws are also contradicted by the evidence, bringing it far short of its burden as the Rule 56 movant.

a. The principal theory CCEA asserts is that its Association Representative Council ("ARC") altered the CCEA dues obligation on April 24, 2018. *See* Countermotion at 28 ("a dues reduction was enacted by the [ARC] in April 24, 2018"). This purported "fact," which is not even part of CCEA's putative Concise Statement of Undisputed Material Facts, is a half-truth at best, for although there exists evidence that the ARC did approve a CCEA dues alteration at its April 24 meeting, it was a dues alteration effective *September 1, 2018*, not April 2018.[20] The September 2018 effective date is clear from the fact that, at the time of the ARC's action, CCEA's "fiscal/membership year" ran from "September 1 through August 31," Countermotion, Ex. 7 at 024, *see also* Exhibit 6I at CCEA014480-89 (none of the bylaw amendments altered the fiscal/membership year). Any "fiscal year 2018-19" dues increase the ARC adopted on April 24 was for the "fiscal year" constitutionally defined by the bylaws as beginning September 1, 2018 and ending August 31, 2019. With the benefit of this essential context omitted by Countermotion, CCEA's evidence proves the precise opposite of what it hoped; thus, for example, Mr. Vellardita's averment that on "April 24, 2018, the [ARC] adopted a tentative budget for *fiscal year 2018-19*, setting the CCEA annual dues rate at $510 for each member" demonstrates that the ARC raised annual CCEA dues to $510 *effective September 1, 2018.*

---

[20] Moreover, CCEA's extraordinary assertion that a more-than-twofold increase in CCEA dues was a dues "reduction," Countermotion at 28, can be rejected summarily. Not only have the CCEA Parties repeatedly admitted that its annual dues went from $243.84 to $510, *see* SOF ¶ 9 ($243.84); Countermotion at 29 ($510), the very document in which the dues change was implemented acknowledges repeatedly that the change was a dues "*increase*." Opp'n Exhibit 6I at CCEA014526 (emphasis added); *see also, e.g.*, *id.*, Ex. 6J at CCEA014582 (acknowledging that altering CCEA dues to $372 per year would constitute "rais[ing] the dues"). Indeed, the CCEA Executive Board, on March 27, 2018, approved a motion "that the Executive Board recommend to the ARC that *CCEA raises dues* to a level that meets the fiscal needs of the Association." *Id.*

Countermotion, Ex. 9 ¶ 37. The deduction, prior to September 2018, of prorated amounts of CCEA dues at the higher annualized rate of $510 was therefore *ultra vires*.

The September 2018 effective date of the dues increase is further proven by CCEA's official ARC records—the relevant portions of which are tellingly omitted from the Countermotion. CCEA offers only the cover sheet and agenda of the April 24, 2018 ARC packet, which states that the "Proposed 2018-19 Budget" was to be considered on Page 59, but omits in its summary judgment submission the portion of the ARC packet that actually states the substance of that budget (i.e., Page 59). *See* Countermotion, Ex. 12. The substantive portion of the packet omitted by CCEA, which we introduce here, fully contradicts its position, as is evident from the following excerpt:

CLARK COUNTY EDUCATION ASSOCIATION (CCEA)
BUDGET DRAFT 2018 - 2019
March Draft With Dues Increase
03/06/18

		Budget 2018-2019	Budget 2017-2018	Comments
REVENUE				
4020	CCEA MEMBERSHIP DUES	5,508,000	2,497,000	10,800 @ $510/yr- $42.5/mo ($22.18/mo increase)
4115	NEA & NSEA-UNISERV GRANTS		705,572	9 UniServ Grants ($78,508)
4120	OTHER REVENUE	18,251	18,251	Cell Tower
4122	NHO PARTNER REVENUE	200,000	50,000	

Opp'n Exhibit 6I at CCEA014526 (Page 59 of the ARC Packet).

This proposed budget makes clear that the raised dues rates were effective *September 2018*, not immediately upon adoption of the budget. The chart demarcates in red the "Dues Increase." *Id.* The CCEA dues figure in the "Budget 2018-2019" column is red (indicating it is subject to the increase), while the figure in the "Budget 2017-2018" column is black (indicating it is not). *See id.* By crosschecking CCEA's then-current budget, the CCEA dues amount in the Budget 2017-2018 column—$2,497,000—confirms that the "2017-2018 Budget" ends August 2018 and thus that the 2018-2019 Budget (in which the dues increase occurs) starts September 2018. Thus, a few pages earlier, the packet includes the following excerpt of the then-current budget:

		Budget 2017 - 2018	Actual February	Actual Sep '16 - Aug 17	Actual Sep '15 - Aug 16
REVENUE					
4020	CCEA MEMBERSHIP DUES	2,497,000	1,244,115	2,429,283	2,274,410

Id. at CCEA014519. Note that the same figure ($2,497,000) is used for the 2017-18 budget, and that the dates in the rightmost columns demonstrate that the annual budgets, consistent with the CCEA Bylaws, *see supra* at 23, run from September through August.

The evidence, in sum, contradicts even the proposition that the ARC—as an undisputed fact—enacted an immediately effective dues increase on April 24, 2018. As such, summary judgment is inappropriate on CCEA's own argument.[21]

b. And yet there is more. Even if the ARC (or the general membership) had approved a dues increase effective in April 2018, summary judgment would still be inappropriate because such an act would conflict with the CCEA Bylaws, which do not provide CCEA an unfettered right to raise CCEA dues whenever it wants. CCEA quotes Article II, Sections 4(A) and (B), Countermotion at 28, and argues that these provisions give the ARC "permission…to alter dues" mid-membership year. Countermotion at 28. But nothing in the quoted provisions,[22] or elsewhere in the CCEA Bylaws, suggests, much less unambiguously compels, the reading that the ARC may alter mid-year the annual dues rate. The better and fairer reading of these provisions—and certainly the one required when viewing the evidence in the light most favorable to the nonmovants under Rule 56—is that any alteration under Section 4(B) becomes effective at the outset of the next fiscal/membership year. Not only would this reading eliminate

---

[21] While CCEA also states the dues change was "approved by CCEA members," Countermotion at 28, and "was ratified by the CCEA members" at the April 25, 2018 general membership meeting, *id.* at 29, the only source cited by the Countermotion is Exhibit 15, which appears to be an email to members. Not only is the email hearsay, which does not establish the truth of what occurred at the meeting, it also does not say *when* the dues change was effective. Countermotion, Ex. 15. And, of course, no part of this averment appears in CCEA's Concise Statement of Undisputed Material Facts. *See* Countermotion at 8-12.

[22] Article II, Section 4(A) and (B) state:

> A. Dues of members shall be increased/decreased annually based upon the percentage of salary increase to Class A, Step 1 of the teacher salary schedule for the previous fiscal year.
>
> B. The dues for members of the Association may be altered by the Association Representative Council.

Countermotion, Ex. 7 at 024.

any discrepancy between payroll-deduction members and cash-basis members—the latter of whom satisfy their dues obligation upfront at the outset of the membership year, and thus before any mid-year dues increase, with a "check of the entire year," Exhibit 6E at NSEA-00009696—it would also avoid the unreasonableness of CCEA's position in light of the restriction in the dues authorization that members can only drop their membership between July 1 and 15 of a calendar year. On its theory, CCEA could raise dues to extortionate levels in the middle of the year, immediately deducting prorated amounts of the higher annual dues, and members would have no recourse but to pay the increased dues and to wait until the next drop period to withdraw their authorization or drop their membership.[23]

CONCLUSION

For the reasons stated above, the Court should deny the CCEA Parties' Countermotion for Partial Summary Judgment.

Dated this 23rd day of January, 2019.

Respectfully submitted,

BOIES SCHILLER FLEXNER LLP

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
300 South Fourth Street, Suite 800
Las Vegas, NV 89101

Robert Alexander*
Matthew Clash-Drexler*
James Graham Lake*
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
* Admitted pro hac vice

Attorneys for the NSEA Parties

[23] This unreasonable reading of the CCEA bylaws also reinforces our primary argument, that the Membership Form provided members express protection from unilateral mid-year dues increases.

MPSJ

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
BOIES SCHILLER FLEXNER LLP
300 South Fourth Street, Suite 800
Las Vegas, NV 89101
Tel.: (702) 382-7300
Fax: (702) 382-2755
rpocker@bsfllp.com
plal@bsfllp.com

Robert Alexander (admitted pro hac vice)
Matthew Clash-Drexler (admitted pro hac vice)
James Graham Lake (admitted pro hac vice)
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
Tel.: (202) 842-2600
Fax: (202) 842-1888
ralexander@bredhoff.com
mcdrexler@bredhoff.com
glake@bredhoff.com

Attorneys for NSEA Parties

DISTRICT COURT
EIGHTH JUDICIAL DISTRICT
CLARK COUNTY, NEVADA

CLARK COUNTY EDUCATION ASSOCIATION, VICTORIA COURTNEY, JAMES FRAZEE, ROBERT G. HOLLOWOOD, AND MARIA NEISESS, Plaintiffs, v. NEVADA STATE EDUCATION ASSOCIATION, DANA GALVIN, RUBEN MURILLO JR., BRIAN WALLACE, AND BRIAN LEE, Defendants.	Case No.: A-17-761364-C (Consolidated with Case No. A-17-761884-C) DEPT. NO.: 4 **NSEA AND NEA PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiffs Nevada State Education Association ("NSEA") and National Education Association ("NEA"), by and through their counsel, respectfully move the Court pursuant to Nevada Rule of Civil Procedures 56 for an order granting summary judgment on Counts Two and Three of their Second Amended Complaint. The grounds for this motion are set forth in the accompanying Memorandum of Points and Authorities, the Concise Statement of Undisputed Facts, the papers and pleadings on file in the present case, and any argument the Court may entertain with respect to this Motion at the time of hearing.

DATED this 23rd day of January, 2019.

BOIES SCHILLER FLEXNER LLP

/s/ Paul J. Lal

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
300 South Fourth Street, Suite 800
Las Vegas, NV 89101

Robert Alexander*
Matthew Clash-Drexler*
James Graham Lake*
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
* Admitted pro hac vice

Attorneys for NSEA/NEA Plaintiffs

NOTICE OF MOTION

PLEASE TAKE NOTICE that a hearing on NSEA and NEA Plaintiffs' **Motion for Partial Summary Judgment** will be held in Department 4 of the above-entitled court on the 19 day of MARCH, 2019, at the hour of 9:00 a.m./~~p.m.~~, or as soon thereafter as counsel may be heard.

Dated this 23rd day of January, 2019.

BOIES SCHILLER FLEXNER LLP

/s/ Paul J. Lal

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
300 South Fourth Street, Suite 800
Las Vegas, NV 89101

Robert Alexander*
Matthew Clash-Drexler*
James Graham Lake*
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
* Admitted pro hac vice

Attorneys for NSEA/NEA Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

Counts Two and Three of the Second Amended Complaint brought by Plaintiffs Nevada State Education Association ("NSEA") and National Education Association ("NEA") allege that Defendant Clark County Education Association ("CCEA") violated the NSEA and NEA Bylaws, respectively. As CCEA admitted in every answer filed in this case, during the period CCEA was affiliated with NEA and NSEA, "NEA's Bylaws constitute[d] a contract between NEA and its affiliated state and local associations, including CCEA." CCEA Parties' Answer to Second Am. Compl. ¶ 64 (July 9, 2018); CCEA Parties' Answer to Am. Compl. ¶ 64 (Mar. 16, 2018); CCEA Parties' Answer to Compl. ¶ 39 (Oct. 30, 2017). CCEA also admitted that "NSEA's Bylaws constitute[d] a contract between NSEA and its affiliated local associations, including CCEA." CCEA Parties' Answer to Second Am. Compl. ¶ 60; CCEA Parties' Answer to Am. Compl. ¶ 60; CCEA Parties' Answer to Compl. ¶ 35.

It is entirely undisputed—and indisputable—that CCEA collected over four million dollars of NEA and NSEA dues money. *See* NSEA and NEA Plaintiffs' Concise Statement of Undisputed Facts in Support of NSEA and NEA Plaintiffs' Motion for Partial Summary Judgment ("SOF") ¶ 11. As a party to the NEA Bylaws, CCEA had the "full responsibility" to transmit these NSEA and NEA dues to NSEA, and also to maintain a contract to specify the details of such transmittal. In the absence of a contract specifying otherwise, the NEA Bylaws provided a default dues transmission schedule. For its part, the NSEA Bylaws obligated CCEA to maintain an agreement to transmit NSEA and NEA dues to NSEA. When CCEA failed to transmit to NSEA the dues that it had collected, the undisputed material facts allow only one conclusion: CCEA was in breach of its contractual obligation under both the NEA and NSEA

Bylaws. Summary judgment is therefore warranted in favor of Plaintiffs NSEA and NEA on Counts Two and Three of the Second Amended Complaint.

BACKGROUND

The undisputed facts support summary judgment in favor of the Plaintiffs on Counts Two and Three.

I. The Parties' Relationship Pre-Disaffiliation: Unified Membership

CCEA is a local union that represents teachers and other professionals in the Clark County School District. *See* SOF ¶ 4. Until its decision to terminate the relationship on April 25, 2018, CCEA was an affiliate of NSEA at the state level and an affiliate of NEA at the national level. *Id.* ¶ 1-3. While affiliated, the three unions operated through a unified membership structure, which means that when an employee joined CCEA she correspondingly became a member of all three organizations, entitled to the benefits of membership and obligated to pay the annual membership dues to all three organizations. *Id.* ¶ 5. Under this unified membership structure, CCEA collected all three organizations' dues, and then transmitted the NSEA and NEA dues to NSEA, which passed along the NEA dues to the national organization. *Id.* ¶ 6.

This unified membership structure is established by the Bylaws of each organization. The CCEA Bylaws make "evidence of membership in NSEA and NEA" a precondition of CCEA membership. Declaration of Brian Lee ("Lee Decl.") Ex. B (CCEA Bylaws) Art. II, sec. 1.[1] The NSEA Bylaws similarly provide that "[a]ctive members of the NSEA shall also be members of the NEA and of a local association where available." Lee Decl. Ex. E (NSEA Bylaws) Art. II,

[1] After it disaffiliated from NSEA and NEA, CCEA amended Article II, section 1 to remove the unified membership requirement and to allow "[a]ny member of the bargaining unit [to] become a member of the Association [CCEA]." *Compare* Lee Decl. Ex. B (CCEA Bylaws effective Apr. 25, 2017), Art. II, sec. 1, *with* Pines Decl. Ex. B (CCEA Bylaws effective Sept. 8, 2018), Art. II, sec. 1.

sec. 1(A)(6). And the NEA Bylaws mandate that local affiliates "shall require membership in the NEA and in its state or local affiliate where eligible." Declaration of James P. Testerman ("Testerman Decl.") Ex. A (NEA Bylaws) Sec. 8-7c.

This unified membership structure is not unique to Nevada. Nationwide, NEA has fifty-two state affiliates and 15,370 local affiliates, each of which operates according to the unified membership structure established by the organizations' governing documents. SOF ¶¶ 15–16. Members of each of these local affiliates are also members of the state affiliate and of NEA. *Id.* And each of these local affiliates follows the same dues transmittal process: per the NEA Bylaws, the local association collects dues on behalf of itself, the state affiliate, and NEA, and then transmits the state and NEA dues to the state affiliate. *Id.* ¶¶ 16 &18.

II. Pre-Disaffiliation Contractual Responsibilities of CCEA to NSEA and NEA: Transmitting Collected NEA and NSEA Dues

The contractual breach claims at issue in this motion involve two contracts: the NEA Bylaws and the NSEA Bylaws. The respective Bylaws of the NEA and NSEA, as CCEA has admitted, are both contracts and were both binding on CCEA until its disaffiliation on April 25, 2018. *Id.* ¶¶ 13 & 19. We highlight the relevant provisions of each below.

With respect to the NEA Bylaws, Section 2-9 placed "full responsibility" on CCEA to transmit both NSEA and NEA dues to NSEA. SOF ¶ 16. In addition, the NEA Bylaws establish a default transmittal schedule obligation that was binding on CCEA absent a more specific dues transmittal contract between CCEA and NSEA agreeing otherwise. *Id.* ¶¶ 16–17. Under the NEA Bylaws, CCEA was required to transmit to NSEA forty percent of NEA's dues for the school year by March 15 and 70 percent of NEA's dues for the school year by June 1. *Id.* ¶ 16. NSEA

was then responsible for transmitting NEA dues that it received from CCEA to NEA. *Id.* ¶¶ 6 & 16.

The NSEA Bylaws, for their part, were drafted to reflect and conform with the requirements of the NEA Bylaws, *see id.* ¶ 23 and provide that maintaining a dues transmittal agreement with NSEA is a condition of affiliation. *Id.* ¶¶ 20 & 23.

Between September 1, 2017 and April 25, 2018, CCEA remained an affiliate of NEA and NSEA. SOF ¶ 2–3. During that period, CCEA collected approximately four million dollars in NSEA and NEA dues from individual members. *Id.* ¶ 11.[2] CCEA, however, never transmitted any of those dues to NSEA. *Id.* In addition, CCEA never entered into a new dues transmittal contract with NSEA that would substitute for the default transmittal schedule set out in the NEA Bylaws. *Id.* ¶ 7.

ARGUMENT

I. Summary Judgment Standard

Nevada Rule of Civil Procedure 56 provides that a party is entitled to summary judgment on a given claim when there is "no genuine issue as to any material fact" and the claimant is "entitled to a judgment as a matter of law." Nev. R. Civ. P. 56(c). The nonmoving party can establish that a "factual dispute is genuine" only when such evidence could lead a "rational trier of fact [to] return a verdict for the nonmoving party." *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1030-31 (2005). "The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." *Id.*

---

[2] In addition, during August 2017, immediately prior to the 2017-2018 school year, CCEA collected NSEA and NEA dues money from new hires that it did not transmit to NSEA. SOF ¶ 10.

In opposing a motion for summary judgment, it is the non-moving party's "burden to 'do more than simply show that there is some metaphysical doubt' as to the operative facts." *Id.* at 732 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). "The nonmoving party 'must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial.'" *Id.* (quoting *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992)).

II. The Undisputed Facts Demonstrate That CCEA Breached the NEA Bylaws

In every answer filed in this case, CCEA "admit[ted]" that "NEA's Bylaws constitute a contract between NEA and its affiliated state and local associations, including CCEA." *See* Answer to Second Amended Complaint ¶ 64; Answer to Amended Compl. ¶ 64; Answer to Compl. ¶ 39; *see also* SOF ¶ 13 (citing Lee Decl. Ex. A (Letter from John Vellardita, Executive Director of CCEA, to Ruben Murillo, NSEA President (Apr. 26, 2018)) ("Please be advised that effective immediately CCEA is no longer affiliated with [NSEA] and [NEA] and accordingly, we will *no longer* have any contractual relationship with NSEA and NEA." (emphasis added))).[3] Until CCEA disaffiliated on April 25, 2018, the NEA Bylaws formed a binding contract between NEA, NSEA, and CCEA. And as parties to this contract, both NSEA and NEA, have the right to enforce the promises made by CCEA for NSEA's benefit. *See* Restatement (Second) of Contracts § 9 ("[T]here may be multiple promisors and multiple promisees in one set."); Corbin

[3] Those admissions in themselves foreclose CCEA's position, argued in support of its motion for summary judgment, that CCEA was not contractually bound by the NEA or NSEA Bylaws. *See* CCEA Parties' Opposition to NSEA Parties' Motion for Partial Summary Judgment at 22–23.

on Contracts § 940 (contemplating that a single contract may contain separate promises "being made to two or more others").[4]

Given that CCEA was a party to and, correspondingly, bound by the NEA Bylaws, the undisputed material facts establish that CCEA breached its contractual obligations under the NEA Bylaws by failing to remit the NEA and NSEA dues that it had collected to NSEA.

A. Under Nevada law, when a contract is clear on its face, the contract will be "construed from the written language and enforced as written." *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005); *see also Ellison v. Cal. State Auto Ass'n*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990). Moreover, interpretation of a contractual provision must take into account the contract as a whole in order to give the contract "reasonable and harmonious meaning." *Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42, 44, 846 P.2d 303, 304 (1993); *see also Ringle v. Bruton*, 120 Nev. 82, 93, 86 P.3d 1032, 1039 (2004) (contracts should be read as a whole).

Here, the plain language of the NEA Bylaws compels the conclusion that CCEA breached section 2-9 of the contract in two ways: First, its failure to maintain a dues transmittal

---

[4] Even had NSEA not been a party to the Bylaws, it could still sue for breach as a third-party beneficiary. Under Nevada law, a contract containing a clear intent to benefit a third party, coupled with that third-party's reasonably foreseeable reliance on the promise, creates in the third party an enforceable right to performance of the promise. *See Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 379, 566 P.2d 819, 825 (1977); *see also* Restatement (Second) of Contracts §§ 302(1)(b), 304 (contract through which promisee intends to give beneficiary the benefit of promised performance is enforceable not only by the parties to the contract, but also by the third-party beneficiary). There can be no dispute that the NEA Bylaws provide a benefit to NSEA by virtue of the "full responsibility" on CCEA to transmit dues *to NSEA*, and that NSEA could reasonably rely upon CCEA's promise in the NEA Bylaws to serve as collection agent. *See Lipshie*, 93 Nev. at 379, 566 P.2d at 825; *see also* Lee Decl. Exh. K & L (describing NSEA's prior notice to CCEA that CCEA had an ongoing obligation to collect and transmit unified membership dues under the NEA, NSEA, and CCEA Bylaws). Because NSEA *is* a party to the NEA Bylaws, the Court need not reach the third-party beneficiary analysis.

contract with NSEA placed it in breach of NEA Bylaws section 2-9(a), which placed "full responsibility" on CCEA for transmitting dues, and to do so on a "contractual basis." SOF ¶ 16. Second, its failure to remit NSEA and NEA dues to NSEA was a breach of its "full responsibility" to transmit the dues, and, more specifically, a breach of NEA Bylaws section 2-9(b), which sets out a local affiliate's dues-transmission obligations that apply in the absence of a valid transmission contract. *Id.* ¶¶ 16–17.

Section 2-9 of the NEA Bylaws sets forth the "Dues Transmittal and Enforcement Procedures." In pertinent part, Section 2-9 provides as follows:

> a. The Association shall enter into contracts with state affiliates governing the transmittal of Association dues. State affiliates shall have the full responsibility for transmitting Association dues from local affiliates on a contractual basis. Local affiliates shall have the full responsibility for transmitting state and Association dues to state affiliates on a contractual basis. Standards and contracts for transmitting dues shall be developed between the state affiliate and each local affiliate.
>
> b. 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, unless the contracted transmittal schedule stipulates otherwise

As the language of Section 2-9 makes clear, the overarching purpose of this section is to regulate the relationship of the parent organization (NEA), with its state and local affiliates with respect to the affiliates' financial duties to the parent organization under the unified membership structure.[5]

---

[5] This analysis accords with NEA's internal interpretation of its Bylaws, as delineated in the accompanying Declaration of James P. Testerman, Senior Director for the NEA Center for Organizing. NEA's interpretation of its own Bylaws is due special weight. *See Bldg. Material & Dump Truck Drivers, Local 420 v. Traweek*, 867 F.2d 500, 511 (9th Cir. 1989) (courts' review of "a union's interpretation of its own governing documents and regulations is highly deferential,

As to the obligations placed upon affiliated local associations (like CCEA), the NEA Bylaws mandate that it is the "[l]ocal affiliate [that has] the *full responsibility* for transmitting state and Association dues to state affiliates on a contractual basis." SOF ¶ 16 (emphasis added). The plain language therefore places the "full responsibility" on CCEA to transmit to NSEA the NEA and NSEA dues it collected, *and* to maintain a contract under which this "full responsibility" is implemented. It is undisputed that the dues transmitted by CCSD to CCEA contained members dues for NEA, NSEA, and CCEA. *Id.* ¶ 12. By terminating its dues transmittal agreement with NSEA and failing to enter into a successor agreement, CCEA thereby breached NEA Bylaws Section 2-9(a).

CCEA's failure to transmit to NSEA the NEA and NSEA dues it collected also breached Section 2-9 of the NEA Bylaws. Consistent with, and following on, Section 2-9(a)'s mandate that CCEA, as the local association, has the "full responsibility" for transmitting the NEA and NSEA dues, Section 2-9(b) sets forth a default transmission schedule applicable to all local associations, a schedule that is mandatory, absent a transmission contract adopting a modified transmission schedule. Section 2-9(b) begins by stating that CCEA, as the local association, "*shall*" transmit dues to NSEA on a specified schedule, regardless of whether there is a dues transmittal agreement in place. The word "shall" constitutes an unambiguous command. *See, e.g., Adkins v. Oppio*, 105 Nev. 34, 37, 769 P.2d 62, 64 (1989) ("The word 'shall' is a term of command; it is imperative or mandatory, not permissive or directory."); *see also Pasillas v. HSBC Bank USA*, 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011) (interpreting "shall" as imperative or mandatory). The second clause of section 2-9(b), separated by a semi-colon,

---

absent bad faith or special circumstances"); *see also Sim v. N.Y. Mailers' Union No. 6*, 166 F.3d 465, 470 (2d Cir. 1999) (noting union's interpretation of its own constitution and Bylaws entitled to "special weight" and will be upheld unless "patently unreasonable").

provides that "the percentage [of dues transmitted] shall be based upon the last membership count prior to January 15, and upon a membership year beginning September 1, unless the contracted transmittal schedule stipulates otherwise." SOF ¶ 16.

Section 2-9 read as a whole, can only be reasonably construed to mean that unless a local and state affiliate establish a separate dues transmission schedule, the local association is obligated to transmit to NSEA the dues receivable on the schedule specified by section 2-9(b). Thus, the absence of a dues transmittal agreement did not relieve CCEA of the obligation to transmit the dues it had collected; instead, per the NEA Bylaws, the absence of such an agreement meant that CCEA had the default duty to transmit these dues receivable on the schedule mandated by Section 2-9(b). Because it is undisputed that CCEA transmitted no NEA or NSEA dues to NSEA (despite its continued collection of those dues until at least April 25, 2018) CCEA breached both Section 2-9 (a) and (b) of the NEA Bylaws.

B. CCEA argues in its own summary judgment motion that it did not breach these Bylaws because there was no "contractual basis" for it to transmit the dues it had collected once CCEA terminated the Dues Transmittal Agreement, effective August 31, 2017. *See* CCEA Parties' Opposition to NSEA Parties' Motion for Partial Summary Judgment at 22–23. But this contention—which relies on the absence of a dues transmittal agreement with NSEA for that period—ignores that the NEA Bylaws themselves provide a "contractual basis" for the obligation. CCEA has apparently forgotten that it has admitted that it was a party to and bound by the NEA Bylaws, *see supra* at 8, which in turn, bind CCEA to transmit to NSEA the NEA and NSEA dues it collected.

Moreover, CCEA's argument fails because it would leads to the illogical and absurd result of allowing CCEA, solely by virtue of its then-affiliation with NSEA and NEA—an

affiliation controlled by the NEA Bylaws—to collect from NEA and NSEA members over $4 million in *NSEA* and *NEA* dues receivable from those members, and yet to withhold those dues from the organizations for whom they were collected. The unified membership structure tying together NEA, its state and local affiliates, and their members belies CCEA's position. First, it is undisputed that an employee joining CCEA became a member of all three organizations.[6] SOF ¶ 5. Section, it is undisputed that CCEA, like all of the 15,370 other NEA local affiliates, served as the collection agent for all three organizations' dues, and then transmitted the NSEA and NEA dues to NSEA, which passed along the NEA dues to the national organization. *Id.* ¶¶ 6, 18. The argument CCEA advances could allow local associations unilaterally to decide not only whether the state and national organizations receive dues money owed to them from thousands of their members, but would also allow local associations unilaterally to decide for individuals, who joined the union as members of *all three affiliated organizations*, to no longer pay dues to the state and national affiliates.[7] In other words, CCEA's position would have the effect of undermining the NEA unified membership structure mandated in its own Bylaws. Such a reading of the NEA Bylaws would lead to an absurd result, *see Reno Club v. Young Inv. Co.*, 64 Nev. 312, 325, 182 P.2d 1011, 1017 (1947) ("A contract should not be construed so as to lead to an absurd result."); *see also id.* at 326 ("[A] construction which makes the contract fair and

---

[6] Section 8-7(c) of the NEA Bylaws mandates that local association must require that its members maintain "membership in the Association and in its state affiliate where eligible." SOF ¶ 14. This affiliation requirement further cements the conclusion that locals must remit members' state and NEA dues.

[7] CCEA's argument that it was entitled to collect unified membership dues, but not to remit the state and association dues to NSEA threatened members' status under CCEA's own Bylaws. CCEA's then-operative Bylaws provided that membership in NSEA and NEA is a prerequisite to membership in CCEA. *See* Lee Decl. Ex. B, Art. II, sec. 1. That CCEA's actions undermined its members' status in CCEA itself further demonstrates the fallacy of CCEA's argument that it had no obligation to pay over unified membership dues to NSEA.

reasonable will be preferred to one which leads to harsh or unreasonable results." (quoting Williston on Contracts, Vol. II, sec. 620 at 1202–03)); *Shelton v. Shelton*, 119 Nev. 492, 498, 78 P.3d 507, 510 (2003) (preferring an interpretation that "yields a fair and reasonable result, as opposed to a harsh and unfair result"), and would violate the principle that contractual provisions should be read in harmony, *see Eversole v. Sunrise Villas VIII Homeowners Assoc.*, 112 Nev. 1255, 1260, 925 P.2d 505, 509 (1996) (articulating principle that contractual provisions "should be harmonized whenever possible and construed to reach a reasonable solution").

III. CCEA Breached the Plain Language of the NSEA Bylaws

The NSEA Bylaws also required CCEA to maintain a dues transmittal agreement with NSEA during the course of its affiliation with NSEA. CCEA argues in its counter-motion for summary judgment that it is not bound by the NSEA Bylaws, asserting that in the absence of the Service Agreement and Dues Transmittal Agreement, there is "no other contract that would subject CCEA to those Bylaws." CCEA Parties' Opposition to NSEA Parties' Motion for Partial Summary Judgment at 22. But this is a puzzling position for CCEA to now take, because CCEA's own pleadings in this litigation are flatly inconsistent with this new argument. In every answer filed in this case, CCEA *admitted* that "NSEA's Bylaws constitute a contract between NSEA and its affiliated local associations, including CCEA." CCEA Parties' Answer to Second Am. Compl. ¶ 60; CCEA Parties' Answer to Am. Compl. ¶ 60; CCEA Parties' Answer to Compl. ¶ 35. Moreover, in its *own* Second Amended Complaint, CCEA *itself alleged* that the "Bylaws of the NSEA constitute a contractual relationship between the NSEA and its local affiliate, the CCEA." CCEA Parties' Second Amended Complaint for Breach of Fiduciary Duty, Breach of Contract, and Declaratory Relief ¶ 26 (Oct. 26, 2017); *see also id.* ¶ 52 (arguing that a "special contractual relationship" between the parties "is based on the NSEA Bylaws"). Indeed,

the fundamental basis of CCEA's own claim in the lawsuit it brought is that NSEA Bylaws constituted a contract between CCEA and NSEA. CCEA cannot now argue that while the NSEA Bylaws constitute a binding contract when trying to enforce an obligation thereunder, it is not a binding contract when being held to its terms.

A. As there is no genuine dispute that CCEA was bound by the NSEA Bylaws until its disaffiliation on April 25, 2018, we turn to the Bylaws language itself, applying the same principles of construction discussed in Section II, *supra.* Article VIII, section 3 of the NSEA Bylaws provides that "NSEA shall affiliate a local association when it meets the following minimum standards . . . Have a dues transmittal contract with NSEA." SOF ¶ 20. As John Vellardita admitted in letters dated September 4 and 6, 2017, a "dues remittance contract is required by NSEA's by-laws." *See* Lee Decl. Ex. G & H. Once CCEA terminated without replacement the Dues Transmittal Agreement, effective August 31, 2017, it became in breach of the NSEA Bylaws.[8] Its failure to enter into a successor dues transmittal agreement rendered CCEA in breach of Article VIII, Section 3(F)'s plain-language terms until it disaffiliated from NSEA on April 25, 2018. *See* SOF ¶¶ 20 & 23.

B. The circumstances surrounding the adoption of the Bylaw provision confirm the provision's purpose and meaning. *See Washoe Cty. Sch. Dist. v. White*, 396 P.3d 834, 838 (2017) (in discerning the meaning of a contract, Nevada courts may look to the circumstances surrounding the adoption of the contract). In 2015, NSEA—with participation of the CCEA

[8] In previously arguing that CCEA did not terminate the dues transmittal agreement in summer 2017, the NSEA Parties were attempting to harmonize CCEA's actions with its obligations under the NSEA Bylaws. *See* NSEA Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment at 13-15 (July 20, 2018). In the wake of the Court's ruling that CCEA did, as a matter of law, terminate the dues transmittal agreement, *see* Court's Order on CCEA's Partial Motion for Summary Judgment (Dec. 20, 2018), it is now clear that CCEA breached the NSEA Bylaws by failing to enter into a successor transmittal contract.

representatives to the NSEA Delegate Assembly—amended its Bylaws to add the requirement that affiliates "[H]ave a dues transmittal contract with NSEA." SOF ¶ 22. The minutes from the Delegate Assembly meeting in which this amendment was proposed and adopted show that the rationale for this amendment was as follows: "The NEA Bylaws state there is to be an agreement between the state and local affiliates. This Bylaw would place NSEA in compliance with the NEA Bylaws." *Id.* ¶ 23. As suggested, the amendment was intended to ensure that affiliates at all times had a contractually-defined mechanism to transmit NSEA dues collected from NSEA members by the local affiliate through payroll deduction, and to conform with section 2-9(a) of the NEA Bylaws, requiring that local affiliates like CCEA maintain "full responsibility for transmitting [NSEA] and [NEA] dues to [NSEA] on a contractual basis."

The history of the foregoing amendment adding in 2015 the language expressly requiring a dues transmittal agreement with affiliates also supports NSEA's position. This NSEA Bylaws amendment was proposed and adopted in 2015 after CCEA threatened, in 2014, to withhold from NSEA dues money collected on NSEA's behalf. SOF ¶¶ 21–22. The amendment sought to prevent the very actions presented in this lawsuit—CCEA's withholding NSEA (and NEA) dues money and claiming that, in the absence of a dues transmittal agreement, it is free not to transmit that money to NSEA. *Id.* ¶ 23.

* * * *

The plain language of Article VIII, section 3 of the NSEA Bylaws clearly required CCEA, during the time it was an affiliate of NSEA, to maintain a dues transmittal agreement with NSEA. The history of that language, as well as the impetus for its adoption, further confirms the plain-language reading. CCEA's failure to maintain a dues transmittal agreement

with NSEA from August 31, 2017, until it disaffiliated on April 25, 2018, therefore placed CCEA in breach of the NSEA Bylaws.

IV. Neither the NEA Nor NSEA Bylaws Constitutes a Perpetual Contract

We note that CCEA suggests in its counter-motion for summary judgment that requiring CCEA to enter into a successor dues transmittal agreement under the NEA and NSEA Bylaws would constitute a perpetual contract. *See* CCEA Parties' Opposition to NSEA Parties' Motion for Partial Summary Judgment at 24. Whatever force that argument could have in interpreting the dues transmittal agreement itself, it is irrelevant in construing that validity of either the NEA or NSEA Bylaws. A perpetual contract arises only where the document expressly provides that it will endure perpetually *and* that termination requires mutual consent of both parties. *See, e.g., Bell v. Leven*, 120 Nev. 388, 391, 90 P.3d 1286, 1288 (2004). Here, CCEA had the unilateral option to terminate prospectively its obligations under the NEA and NSEA Bylaws—and therefore to terminate its obligation to maintain a dues transmittal agreement—by disaffiliating from the state and national organizations, which it did on April 25, 2018. SOF ¶ 3. CCEA has demonstrated by its own actions that the NEA and NSEA Bylaws' requirement that local affiliates maintain a dues transmittal agreement with a state affiliate does not in any way render either a "perpetual contract."

///

///

///

///

///

///

CONCLUSION

There is no dispute of material fact that CCEA did not comply with its obligations under the NEA and NSEA Bylaws. There is further no dispute that those Bylaws constituted binding contracts to which CCEA was a party until it disaffiliated from the state and national affiliates on April 25, 2018. Accordingly, Plaintiffs NSEA and NEA request that the Court enter judgment for Plaintiffs on Counts Two and Three of the Second Amended Complaint.

Dated: January 23, 2019.

Respectfully submitted,

BOIES SCHILLER FLEXNER LLP

/s/ Paul J. Lal

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
300 South Fourth Street, Suite 800
Las Vegas, NV 89101

Robert Alexander*
Matthew Clash-Drexler*
James Graham Lake*
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
* Admitted pro hac vice

Attorneys for NSEA/NEA Plaintiffs

CERTIFICATE OF SERVICE

This document applies to Case No. A-17-761884-C, and the parties in the case are, on the one hand, the Nevada State Education Association, National Education Association, Ruben Murillo, Robert Benson, Diane Di Archangel, and Jason Wyckoff, and, on the other hand, the Clark County Education Association, John Vellardita, and Victoria Courtney.

Pursuant to NRCP 5(b), I, an employee of BOIES SCHILLER FLEXNER LLP, hereby certify service of the foregoing ***NSEA AND NEA PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT*** was made this date by electronic filing and/or service via the Eighth Judicial District Court's E-Filing System to the following:

Richard G. McCracken
Kimberly C. Weber
McCracken, Stemerman & Holsberry, LLP
1630 S. Commerce Street, Suite A-1
Las Vegas, NV 89102

Joel A. D'Alba
Asher, Gittler & D'Alba, LTD.
200 West Jackson Blvd, Suite 720
Chicago, Illinois 60606

John S. Delikanakis
Michael Paretti
Snell & Wilmer, L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169

Dated this 23rd day of January, 2019.

/s/ Carolyn E. Wright
An employee of Boies Schiller Flexner LLP

MSTY
Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
BOIES SCHILLER FLEXNER LLP
300 South Fourth Street, Suite 800
Las Vegas, NV 89101
Tel.: (702) 382-7300
Fax: (702) 382-2755
rpocker@bsfllp.com
plal@bsfllp.com

Robert Alexander (admitted pro hac vice)
Matthew Clash-Drexler (admitted pro hac vice)
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
Tel.: (202) 842-2600
Fax: (202) 842-1888
ralexander@bredhoff.com
mcdrexler@bredhoff.com

Attorneys for NSEA Parties

DISTRICT COURT
EIGHTH JUDICIAL DISTRICT
CLARK COUNTY, NEVADA

CLARK COUNTY EDUCATION ASSOCIATION, VICTORIA COURTNEY, JAMES FRAZEE, ROBERT G. HOLLOWOOD, AND MARIA NEISESS,

Plaintiffs,

v.

NEVADA STATE EDUCATION ASSOCIATION, DANA GALVIN, RUBEN MURILLO JR., BRIAN WALLACE, AND BRIAN LEE,

Defendants.

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

DEPT. NO.: 4

HEARING REQUESTED

NSEA AND NEA PLAINTIFFS' MOTION FOR STAY PENDING APPEAL

FILED UNDER SEAL

NEVADA STATE EDUCATION ASSOCIATION; NATIONAL EDUCATION ASSOCIATION; RUBEN MURILLO; ROBERT BENSON; DIANE DI ARCHANGEL; AND JASON WYCKOFF, Plaintiffs-Counter Defendants, And BRIAN LEE, Counter-Defendant, vs. CLARK COUNTY EDUCATION ASSOCIATION; JOHN VELLARDITA; AND VICTORIA COURTNEY, Defendants-Counter Plaintiffs.	Case No.: A-17-761884-C (consolidated with A-17-761364-C)

Plaintiffs Nevada State Education Association ("NSEA") and National Education Association ("NEA") (collectively "Union Parties"), by and through their counsel, file this Motion for Stay Pending Appeal of the Court's Order granting CCEA's Motion to Alter or Amend the Court's May 11, 2018 Order Pursuant to NRCP 59(e) and 60(b), notice of entry of which was filed electronically on July 3, 2019. The grounds for this Motion are set forth in the accompanying Memorandum of Points and Authorities, the papers and pleadings on file in the

///

///

///

///

///

///

present case, and any argument the Court may entertain with respect to this Motion at the time of hearing.

DATED this 16th day of July, 2019.

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
300 South Fourth Street, Suite 800
Las Vegas, NV 89101

Robert Alexander*
Matthew Clash-Drexler*
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
* Admitted pro hac vice

Attorneys for NSEA/NEA Parties

MEMORANDUM OF POINTS AND AUTHORITIES

This consolidated action arises from political disputes between two long-affiliated unions. The instant motion seeks a stay of the Court's Order, notice of entry of which was filed on July 3, 2019, that granted the CCEA Parties' Motion to Alter or Amend in Case No. A-17-761884-C ("July 2019 Order"). The July 2019 Order dissolved an injunction that had been ordered by the Court (per Judge Joanna Kishner) on May 11, 2018, in response to the Union Parties' application for a pre-judgment writ of attachment. The May 2018 injunction required Clark County Education Association ("CCEA"), John Vellardita, and Victoria Courtney (collectively "CCEA Parties") to hold disputed funds in a restricted account pending further order from the Court. The July 2019 Order that we seek to stay was informed by, and encompassed, the Court's decision granting summary judgment to CCEA Parties on the claims brought by NSEA, NEA, Ruben Murillo, Robert Benson, Diane Di Archangel, and Jason Wyckoff (collectively "NSEA Parties").

Because the object of the appeal of final judgment in Case No. A-17-761884-C would be defeated and the NSEA Parties would suffer irreparable or serious harm if the money currently held in the restricted account is permitted to be disbursed before a decision on appeal, a stay pending appeal is necessary in order to avoid undue prejudice to the NSEA Parties.

BACKGROUND

Because the Court is well-versed in the facts of this case, we provide a limited background to orient the Court to the instant motion.

At the heart of the dispute is the NSEA Parties' contention that CCEA has wrongfully withheld over $4 million in NEA and NSEA dues money that it collected from members of CCEA, NSEA, and NEA during the 2017-2018 school year, and that it was obligated to remit to NSEA. That $4,089,364.16 is currently held in a restricted account in CCEA's name; pursuant to the May 2018 injunction that was dissolved by the July 2019 Order, CCEA was prohibited from removing any of the disputed funds.

As shown by facts not disputed by CCEA, and set forth in the NSEA Parties' submissions on the motions for summary judgment on claims underlying the Court's July 2019 Order, CCEA is a local union that represents teachers and other Clark County School District professionals. *See* NSEA and NEA Plaintiffs' Concise Statement of Undisputed Facts in Support of NSEA and NEA Plaintiffs' Motion for Partial Summary Judgment on Bylaws dated January 23, 2019 ("Bylaws SOF") ¶ 4. For decades CCEA been affiliated with NSEA on the state level and NEA on the national level. *Id.* ¶ 1-3; *see also* Findings of Fact, Conclusions of Law, and Order Granting the Clark County Education Association Parties' Motion for Partial Summary Judgment and Denying the Nevada State Education Association Parties' Motions for Partial Summary Judgment ("2019 SJ Order") ¶¶ 3-4. On April 25, 2018, by vote of its membership, CCEA formally disaffiliated from NSEA and NEA. *See id.* ¶¶ 27-28. For periods prior to disaffiliation, the relationship between the parties was governed by various contracts, including the NSEA Bylaws, the NEA Bylaws, a 1979 Dues Transmittal Agreement, and a 1999 Service Agreement. *See* Bylaws SOF ¶¶ 13 & 19; *see also* NSEA Defendants' Concise Statement of Facts in Support of NSEA Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment dated July 20, 2018 ("NSEA Def. SOF") ¶¶ 9-12, 17-22. While affiliated, the three unions operated through a unified membership structure, which means that when an employee joined CCEA she correspondingly became a member of all three organizations, entitled to the benefits of membership and obligated to pay the annual membership dues to all three organizations. *Id.* ¶ 4.

Pursuant to their affiliation, from September 1, 2017, through April 25, 2018, CCEA received $4,089,364.16 in NSEA and NEA dues from union members which was transferred electronically by the School District to CCEA's "Clark County Education Association Expense Account" at Bank of America. NEA Plaintiffs' Concise Statement of Undisputed Facts in Support of NSEA and NEA Plaintiffs' Motion for Partial Summary Judgment on Conversion dated November 9, 2018 ("Conversion SOF") ¶ 13. In addition, during August 2017,

immediately prior to the 2017-2018 school year, an additional amount of $42,374.31 in NSEA and NEA dues from new hires was transferred to CCEA. *See id.* ¶ 12 (detailing new hires dues collections); *see also id.* ¶ 17 (detailing NSEA and NEA dues monies received by CCEA from CCSD for each pay period from September 2017 through April 25, 2018). Instead of remitting the NSEA and NEA dues money to NSEA, CCEA retained all of the dues money in its own accounts. *See id.* ¶ 15; *see also* July 2019 Order ¶ 3. CCEA refused to remit the NSEA and NEA dues it collected, and this lawsuit followed in September 2017. *See* Conversion SOF ¶ 15.

As relevant to this motion, the NSEA Parties' lawsuit, which is the subject of appeal and includes the instant order dissolving Judge Kishner's injunction, alleges that CCEA's withholding of NSEA and NEA dues violated CCEA's contractual obligations to NSEA and NEA (under the NSEA Bylaws, the NEA Bylaws, and the Dues Transmittal Agreement), and that it constituted conversion and unjust enrichment.

On March 30, 2018, the NSEA Parties filed an application with the District Court for a prejudgment writ of attachment, seeking judicial protection of the dues money that CCEA had collected that was intended for NSEA and NEA. *See* Application for Order Directing the Issuance of a Prejudgment Writ of Attachment with Notice. The impetus for that motion was a concern that the money at the heart of the parties' dispute could be dissipated before judgment. *See id.* at 11-12. At a hearing on April 23, 2018, Judge Kishner, recognizing that the money was the subject of the dispute and that neither side wanted the other to be able to "deplete" the disputed funds, ordered that the disputed funds remain in a restricted account until further instruction from the court in order to preserve the status quo. Apr. 23, 2018, Hrg. Tr. at 145, 159-60. The order was then memorialized in the May 11, 2018, order described above.

On December 12, 2018, CCEA Parties filed a Motion to Alter or Amend the restricted account order, seeking to pay out all the funds in the restricted account to the thousands of individual members from whom the NSEA and NEA dues were collected. *See* CCEA Parties' Motion to Alter or Amend Court's May 11, 2018 Order Pursuant to NRCP 59(e) and 60(b). At a

hearing on May 9, 2019, the Court ruled in favor of the CCEA Parties on all of the NSEA Parties' outstanding claims and separately granted the CCEA Parties' motion to alter or amend the May 11, 2018, order, dissolving Judge Kishner's injunction. *See* July 2019 Order at 7. A notice of appeal was filed on July 15 respecting the foregoing orders.

The Court's vacating of the May 2018 injunction is predicated entirely on the ruling granting summary judgment to CCEA Parties on all of NSEA Parties' affirmative claims, along with the Court's prior order entered December 20, 2018, granting summary judgment to CCEA on one of its affirmative claims for declaratory relief. Because those rulings are also subjects of appeal and underlie the instant order sought to be stayed, we briefly discuss the rulings.

First, following a November 15, 2018, hearing, the Court granted the CCEA Parties' motion for partial summary judgment seeking a declaration that the Service Agreement and Dues Transmittal Agreement had terminated effective September 1, 2017. *See* December 20, 2018 Findings of Fact, Conclusion of Law, and Order Granting Plaintiffs' Motion for Partial Summary Judgment ("December 20 Order") at 8. In granting CCEA Parties' request for declaratory relief, the District Court found that the Service Agreement incorporates the Dues Transmittal Agreement, *id.* ¶ 13, and that therefore CCEA's notice of intent to terminate the Service Agreement also applied to, and permitted it to terminate, the Dues Transmittal Agreement, *id.* ¶¶ 20-21. The Court's order thus effectively granted judgment to CCEA Parties on NSEA Parties' first claim for relief. Second, following a May 9, 2019, hearing, the Court entered summary judgment for CCEA Parties on all of NSEA Parties' pending claims, including their claims based on tort and contract, through which NSEA Parties asserted that the dues money in the restricted account rightly belongs to, and was required to be transferred to, NSEA and NEA, respectively. The Court concurrently issued a temporary stay precluding CCEA Parties from removing funds from the restricted account pending the Court's decision whether to issue a permanent stay pending appeal. *See* May 9, 2019 Hr'g Tr. at 234. Specifically, the Court wanted

briefing on how best "to make sure you can get your appeal and the funds stay where they are." May 9, 2019 Hr'g. Tr. at 235.

On July 1, the Court signed its order granting CCEA's Motion to Alter or Amend, denying NSEA Parties' motions for summary judgment and granting CCEA Parties' motions for summary judgment, notice of entry of which was filed on July 3. As noted, the NSEA Parties filed their notice of appeal on July 15.[1]

ARGUMENT

Under Nevada Rule of Civil Procedure 62(c), "[w]hile an appeal is pending from an interlocutory order or final judgment that . . . dissolves . . . an injunction, the court may stay . . . or grant an injunction on terms for bond or other terms that secure the opposing party's rights." The NSEA Parties respectfully ask that the Court stay the order granting the CCEA Parties' Motion to Alter or Amend—an order which has the effect of dissolving the injunction Judge Kishner entered for the purpose of prohibiting the transfer or dissipation of the disputed funds in the restricted account—pending final resolution of NSEA and NEA's claims to the funds.

Nevada Rule of Appellate Procedure 8(c) sets forth the substantive factors that guide a court's consideration of a motion for a stay pending appeal. The Court should consider:

> (1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.

Nev. R. App. P. 8.[2] Where the first factor weighs in the movant's favor, the Nevada Supreme Court has noted that the final factor—likelihood of success on the merits—will counterbalance the first only "when the appeal appears to be frivolous or the stay sought purely for dilatory

---

[1] On May 28, 2019, the Court granted the parties' request to stay proceedings on the CCEA Parties' two remaining claims pending appeal of the claims brought by the NSEA Parties.

[2] While an appellate court may also grant a stay, a party must ordinarily move first in the district court. *See* NRAP 8(a)(1)(A).

purposes." *State v. Robles-Nieves*, 129 Nev. 537, 546, 306 P.3d 399, 406 (2013); *accord Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 89 P.3d 36, 40 (2004) (according almost decisive weight to first factor in interlocutory appeal of action to compel arbitration). Here, the factors uniformly weigh in favor of granting a stay; crucially, the first and second factors counsel in favor of a stay, as disbursement of the funds in the restricted account before final resolution on appeal will effectively deprive the NSEA Parties of a meaningful appeal and likely subject them to irreparable or serious harm.

I. The Object of Appeal Will Undoubtedly Be Defeated Absent a Stay and NSEA Parties Will Be Irreparably or Seriously Harmed

Here, the first two factors of the stay analysis overlap and weigh substantially in favor of granting a stay; we therefore address them together. The object of the NSEA Parties' appeal is to reverse the Court's entry of summary judgment and to recover the $4,089,364.16 in NSEA and NEA dues money that is currently held in the restricted account. Should the Court deny a stay of this order pending appeal, the funds will be disbursed by CCEA to approximately 10,000 individuals, making their recovery practically impossible, effectively depriving the NSEA Parties of a meaningful appeal and irreparably or seriously harming them in the process.

(a) Where the preservation of a party's contested rights would be defeated absent a stay pending appeal, a stay should be entered. *See Mikohn Gaming Corp.*, 120 Nev. at 253, 89 P.3d 39. Here, absent a stay, the object of the NSEA Parties' appeal will undoubtedly be defeated. The object of the appeal is reversal of summary judgment and the recovery of the $4,089,364.16 held in the restricted account. Should dissolution of the restricted account injunction not be stayed pending appeal, CCEA will disburse the money, almost certainly rendering illusory the success NSEA Parties might have on appeal.

CCEA Parties' representations to the Court in both their Motion to Alter or Amend and at the May 9, 2019, hearing, make clear that they would disburse the funds in the restricted account to the individual members from whom the NSEA and NEA dues were collected. *See* Motion to

Alter at 13-15; May 9 Hr'g Tr. at 232-33. If CCEA were allowed to do so, and it was later determined on appeal that CCEA wrongfully disbursed the monies, it would not be possible to undo the disbursements to thousands of individuals—some of whom are no longer members of CCEA, may have moved, and may no longer be found within the state. In any event, the cost of recovering small sums from thousands of individuals would far exceed the amount collected. Moreover, it is unlikely that CCEA itself would be able to satisfy a $4 million judgment once it has distributed the restricted account funds. *See infra* at 10-11.

As the Court has noted, preserving the disputed funds is crucial to maintaining the integrity of this litigation. In entering the restrict account injunction, Judge Kishner recognized that the money in that account was the subject of the parties' dispute and that neither side wanted the other to be able to "deplete" the disputed funds prior to a final decision on the merits of the case. *See* Apr. 23, 2018 Hr'g Tr. at 145, 159-60. Similarly, after granting summary judgment to the CCEA Parties on the NSEA Parties' claims, this Court recognized that a stay pending appeal might be necessary "to make sure [NSEA Parties] can get [their] appeal and the funds stay where they are." May 9, 2019 Hr'g Tr. at 235. Denying a stay here would "effectively eliminate the [NSEA Parties'] right to appeal," *State v. Robles-Nieves*, 129 Nev. 537, 546, 306 P.3d 399, 406 (2013), because recovery of the funds would be rendered nearly impossible. The first stay factor therefore weighs heavily in favor of granting this motion.

(b) If the NSEA Parties are denied a stay of this Court's order dissolving the restricted account injunction, NSEA Parties will lose any prospect of collecting the $4 million in dues money should they prevail on appeal, which would cause exactly the irreparable or serious injury that Rule 62(c) is intended to prevent.

In the preliminary injunction context, which also requires that the movant show an irreparable harm in the absence of an injunction, courts have found this factor met where "there is a significant probability that if the monies held in escrow were released [to the defendant],

such monies would likely be unavailable in the future should [the plaintiff] prevail on its claims." *Basin Elec. Power Co-op v. MPS Generation, Inc.*, 395 F. Supp. 2d 859, 867 (D. N.D. 2005).

The concern that the disputed money might disappear absent injunctive relief is particularly acute where, as here, there is a serious risk that the defendant would otherwise be unable to satisfy a judgment against it for the disputed funds. A majority of the federal courts of appeals have held that a preliminary injunction may be appropriate to prevent the dissipation or loss of assets, even where only monetary relief is sought. For instance, in *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994), the plaintiffs brought suit against the former President of the Philippines under the Alien Tort Act. The plaintiffs moved for a preliminary injunction to prevent the defendant's estate from transferring any assets, "in order to preserve the possibility of collecting a judgment." *Id.* at 1469. The court held that it was appropriate to enjoin distribution of the estate's assets "where the plaintiffs can establish that money damages will be an inadequate remedy due to impending insolvency of the defendant or that defendant has engaged in a pattern of secreting or dissipating assets to avoid judgment." *Id.* at 1480. In doing so, the court discussed cases in the Second, Fourth, Eighth, Tenth, and D.C. Circuits as well as the Supreme Court that enjoined distribution of assets where it was alleged that the defendant's financial condition or actions would frustrate a potential money judgment. *Id.* (collecting cases); *see generally Deckert v. Independence Shares Corp.*, 311 U.S. 282, 290 (1940) (preliminary injunction to preserve status quo merited in face of allegations that party against whom judgment was sought was "insolvent and its assets in danger of dissipation or depletion"); *Johnson v. Couturier*, 572 F.3d 1067, 1081-82 (9th Cir. 2009) (upholding district court's decision enjoining corporation from advancing defense costs where it was unlikely that defendants would be able to reimburse those costs).

As we explained in our Writ Application, CCEA itself represented that it was operating at a projected budget shortfall of more than $2 million for the 2017-2018 budget year, up sharply from $405,124 for the prior budget year and $118,686 for the 2015-2016 budget year. *See*

Application for Order Directing the Issuance of a Prejudgment Writ of Attachment with Notice at 12; Lee Writ Aff. ¶ 18. Moreover, in the middle of the 2018-2019 membership year, CCEA imposed a 23.5% dues increase on its members, further suggesting that CCEA is suffering financial difficulties and would not be able to satisfy a $4 million judgment absent the money in the restricted account. *See* NSEA Parties' Opposition to CCEA Parties' Motion to Alter or Amend the Court's May 8, 2018, Order at 11. Finally, in a document dated March 6, 2018, that was produced by CCEA during discovery, CCEA appears to have projected a budget shortfall of over $2 million for the 2018-2019 budget year. *See* Declaration of Henry Pines in Support of NSEA Parties' Motion to Stay Pending Appeal, Ex. A. Accordingly, there is a substantial risk here that if CCEA were allowed to disburse the money in the restricted account before the parties' appeal is resolved, it would be unable after appeal to satisfy a judgment from its own funds, irreparably or seriously harming NSEA Parties.

Nor would it be an adequate solution for the NSEA Parties to seek to collect directly from the CCEA members. The more than 10,000 members to whom CCEA wishes to disburse the restricted account funds are not parties to this action. In the analogous preliminary injunction context, courts have held that a successful litigant suffers a likelihood of irreparable harm if it would have to pursue a multiplicity of suits to recover money that was the subject of the litigation. For instance, in *Lynch Corp. v. Omaha Nat. Bank*, 666 F.2d 1208, 1212 (8th Cir. 1981), the plaintiff entered into an asset purchase agreement with a liquidating third-party, placing a portion of the purchase price into escrow for at least 185 days, but once released from escrow, the funds would be distributed to the liquidating company's shareholders. *Id.* at 1209. During the escrow period, the plaintiff sued the liquidating company in state court to rescind the purchase agreement and restore its escrowed money. *Id.* at 1210. The escrow agent, Omaha National Bank, could not be joined in the state-court action, but was on notice of the pending action. When the bank started making payments from the escrow account, including payments for attorney's fees incurred by the liquidating company in defending the pending state-court

action, plaintiff sued the bank in federal court and, upon motion, the federal court enjoined the bank to prohibit it from disbursing from the escrow account. On the irreparable harm prong, the Court held that if the bank continued to make payments from the escrow account, and should the plaintiff succeed in the state-court case against the liquidating entity, the plaintiff would be "forced to pursue the numerous transferees who received escrow money from" the defendant bank in order to recover the formerly escrowed funds. *Id.* at 1212. Its prospective injury was therefore "irreparable and there [was] no adequate remedy at law because a multiplicity of suits would be required to gain relief." *Id*; *accord Tujague v. Adkins*, 2018 WL 4816094, at *3 (E.D. Tex. Oct. 4, 2018) ("[A] plaintiff seeking economic damages will suffer irreparable harm when the defendant's dissipation of assets would require the plaintiff to initiate a multiplicity of suits to gain relief." (alterations omitted) (quoting *Fed. Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 561 (5th Cir. 1987))).

The same analysis applies here. Should CCEA now be allowed to disburse the money in the restricted account to the members, and should the NSEA parties then prevail on appeal, the NSEA Parties would be required to pursue more than 10,000 small dollar collection actions in order to recover the $4 million currently held in the restricted account. This represents an irreparable or serious harm warranting a stay pending appeal. The first and second stay factors therefore weigh heavily in favor of granting this motion.

II. CCEA Parties Will Not Suffer Irreparable or Serious Harm if the Stay is Granted

The CCEA Parties, on the other hand, will not suffer any harm—much less irreparable or serious harm—if the stay is granted and the status quo maintained for the duration of the appeal. CCEA has conceded that it has no claim of right to the money in the restricted account, *see* CCEA Parties' Opposition & Countermotion for Partial Summary Judgment at 1-2, and the 10,000 individual members to whom CCEA proposes distributing the monies are neither parties to this action, nor face irreparable or serious harm from some further delay in receiving any distribution to which they are entitled, because Judge Kishner's order protects against the

dissipation of the funds in the restricted account. Should CCEA Parties prevail on appeal, they will be able to disburse the money to the members at the conclusion of that appeal. *See, e.g., Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1202 (9th Cir. 1988) (a temporary loss of funds that *ultimately can be recovered* does not usually constitute irreparable injury).

III. NSEA Parties are Likely to Prevail on the Merits

The final stay factor—whether the appellant is likely to prevail on the merits of the appeal—weighs in favor of granting a stay.

> Although, when moving for a stay pending an appeal or writ proceedings a movant does not always have to show a probability of success on the merits, the movant must *'present a substantial case on the merits when a serious legal question is involved* and show that the balance of equities weighs heavily in favor of granting the stay.'

Hansen v. Eighth Judicial Dist. Court ex rel. Cty of Clark, 116 Nev. 650, 659, 6 P.3d 982, 987 (2000) (emphasis added). As noted above, *see supra* at p. 7, in cases where the object of the appeal will be defeated absent a stay, the Court has noted that only frivolous appeals or stay motions filed for dilatory purposes will fail to satisfy this last factor. *See Mikohn Gaming Corp.*, 120 Nev. at 254, 89 P.3d 36, 40 (granting stay where merits were "unclear" but first factor was strong); *see also Robles-Nieves*, 129 Nev. at 546, 306 P.3d at 406 (granting stay where there was "at least a fair dispute").

While the District Court ruled in favor of the CCEA Parties in Case No. A-17-761884-C, this is far from a frivolous appeal; indeed, we respectfully submit that the NSEA Parties have a likelihood of success on appeal of one or more of the claims that would provide the NSEA Parties the right to the money in the restricted account. As the Court recognized at the May 9, 2019 hearing, the claims involve "complicated issues," and the case undoubtedly would be "going up" on appeal. Hr'g Tr. at 237-38.

The Court's decision to dissolve the restricted account injunction was premised on its decision that NSEA Parties' claims for conversion, a breach of the NSEA or NEA bylaws, or a

breach of the Dues Transmittal Agreement, all failed as a matter of law, and that no issue of fact precluded granting CCEA summary judgment on every claim. Should the NSEA Parties ultimately prevail on any one of these claims, they would be entitled to the money in the restricted account. We respectfully believe that there are at the very least "serious legal questions presented" to which we "present a substantial case on the merits," and that the probability of success on the merits on any of these claims warrants a stay pending appeal.

a. *Conversion*

First, the NSEA Parties' claim that CCEA Parties converted over $4 million in NSEA and NEA dues money is premised on a straightforward legal argument: When one party obtains another's property without permission and exercises dominion over it in a manner that wrongfully interferes with the other's right over the property, a claim for conversion arises. *See WMCV Phase 3, LLC v. Shushok & McCoy, Inc.*, 750 F. Supp. 2d 1180, 1194-95 (D. Nev. 2010). A party that initially obtains the disputed property lawfully but holds onto it beyond that party's lawful bailment is also liable for conversion. *See Hester v. Vision Airlines, Inc.*, 2011 WL 856871, at *3 (D. Nev. Mar. 9, 2011). Money is the proper subject of a conversion claim. *See Aliya Medcare Finance, LLC v. Nickell*, 156 F. Supp. 3d 1105, 1132-33 (D.C. Cal. 2015) (quoting *Hester*, 2011 WL 856871, at *3 (applying Nevada law)).

The record supports finding that CCEA collected NSEA and NEA dues payments for eight months while CCEA remained affiliated with NSEA and NEA, and its members were members of NEA and NSEA as well, but that CCEA refused to transfer the dues to NSEA or NEA, although CCEA claims no right to the money. *See* Plaintiffs NSEA's and NEA's Motion for Partial Summary Judgment Filed Under Seal dated November 9, 2018 ("NSEA Parties' PSJ Mot.") at 6; *see also* Conversion SOF ¶¶ 12, 13, 15, 17. There is a likelihood the NSEA Parties will prevail on the conversion claim; the appeal clearly is not frivolous.

b. *Breach of Contract – Bylaws*

The NSEA Parties' claim that CCEA breached the NSEA and NEA Bylaws is similarly straightforward. Throughout the case, CCEA has admitted, and indeed relied upon, the proposition that the NSEA and NEA Bylaws are binding contracts between it and the respective state and national affiliate. *See* Answer to Second Amended Complaint ¶ 64; Answer to Amended Compl. ¶ 64; Answer to Compl. ¶ 39; *see also* Bylaws SOF ¶ 13 (citing Lee Decl. Ex. A (Letter from John Vellardita, Executive Director of CCEA, to Ruben Murillo, NSEA President (Apr. 26, 2018)) ("Please be advised that effective immediately CCEA is no longer affiliated with [NSEA] and [NEA] and accordingly, we will *no longer* have any contractual relationship with NSEA and NEA." (emphasis added))).

By failing to transmit to NSEA the dues it collected on NSEA's and NEA's behalf before it disaffiliated, the NSEA Parties contend that CCEA violated Section 2-9 of the NEA Bylaws, which not only places "full responsibility" on the local affiliate, CCEA, to transmit dues to the state affiliate "on a contractual basis," but also dictates a default transmission schedule that applies in the absence of a valid transmission contract. Our consistent argument has been that CCEA breached the NEA Bylaws by failing to transmit the dues it collected on behalf of NSEA and NEA according to Section 2-9's default schedule. There is a likelihood the NSEA Parties will prevail on this bylaw contract claim; the appeal clearly is not frivolous.

The NSEA Bylaws also required CCEA to maintain a dues transmittal agreement with NSEA during the course of its affiliation with NSEA. Specifically, Article VIII, section 3 of the NSEA Bylaws provides that "NSEA shall affiliate a local association when it meets the following minimum standards . . . Have a dues transmittal contract with NSEA." Bylaws SOF ¶ 20. Once CCEA purported to terminate without replacement the Dues Transmittal Agreement, it became in breach of the NSEA Bylaws. Its failure to enter into a successor dues transmittal agreement rendered CCEA in breach of Article VIII, Section 3(F)'s plain-language terms until it

disaffiliated from NSEA on April 25, 2018. *See* Bylaws SOF ¶¶ 20 & 23. There is a likelihood the NSEA Parties will prevail on this bylaw contract claim; the appeal clearly is not frivolous.

c. *Dues Transmittal Agreement*

Finally, NSEA Parties have a likelihood of success on the claim that CCEA breached the 1979 Dues Transmittal Agreement between it and NSEA, because CCEA did not terminate it effective September 1, 2017, when it terminated a related Service Agreement with NSEA. If NSEA prevails on its contention that the Dues Transmittal Agreement was not terminated while CCEA remained an NSEA affiliate, judgment on this claim must be reversed.

As the NSEA Parties have maintained throughout this litigation, the 1979 Dues Transmittal Agreement and the 1999 Service Agreement are two separate agreements, with separate provisions governing their respective terminations; moreover, the Dues Transmittal Agreement, but not the Service Agreement, contains a provision incorporating NSEA Bylaw amendments. *See* NSEA Defs. Opp. to Pltfs. Mot. for Partial Summ. J. (July 20, 2018) at 6-7. The parties agree that CCEA terminated the Service Agreement prior to the start of the 2017-2018 school year. CCEA argued, and the Court agreed, that by terminating the Service Agreement, it also terminated the Dues Transmittal Agreement, relying on the premise that the Service Agreement subsumed the Dues Transmittal Agreement, and that the Dues Transmittal Agreement could be terminated even if in conflict with NSEA Bylaws incorporated into that agreement. *See* December 20 Order ¶¶ 11-13.

Courts will not grant summary judgment on a contract termination defense if the language that the movant used is less than clear and unequivocal as to the contract it was terminating. *See Benefit Servs. Of Ohio, Inc. v. Trumbull Cty. Comm'rs*, No. 2003-T-0045, 2004 WL 2376479, at *7–8 (Ohio Ct. App. Oct. 22, 2004) (concluding that 'a genuine issue of material fact [existed] as to the issue of termination" where the letters allegedly terminating the contract did not appear to have actually provided "written notice of termination"); *Trinity Health v. N. Cen. Emerg. Servs.*, 662 N.W.2d 280, 286 (N.D. 2003) (assessing whether a series of

ambiguous communications constituted a termination of the contract, and concluding that "[n]ot only can rational arguments be made for different interpretations of the contract, there are genuine issues of material fact about . . . whether or not Trinity Health terminated the contract. Those issues preclude summary judgment.").

Here, NSEA relies on two substantial arguments: first, the written communications CCEA relies on clearly intended to terminate the 1999 Service Agreement, but say nothing about the separate 1979 Dues Transmittal Agreement. Second, had CCEA sought to terminate the Dues Transmittal Agreement without replacing it with a successor dues transmittal contract with NSEA, CCEA would be in breach of the NSEA Bylaws, which are incorporated into and controlling of the Dues Transmittal Agreement itself. NSEA has a likelihood of success on either or both of these serious legal arguments; their appeal clearly is not frivolous.

* * * * *

In sum, the NSEA Parties have advanced multiple claims, and have advanced a "substantial case on the merits" as to each; indeed, we propose that the NSEA Parties have a likelihood of success on the merits of their appeal as to one or more of the claims, only one of which need be reversed to also reverse the July 2019 Order on dissolving the restricted account.

IV. The Restricted Account Acts as Security

As noted above, pending an appeal from an interlocutory order or final judgment dissolving an injunction, the court may "stay, suspend, modify, restore, or grant an injunction" either on terms of bond "or other terms that secure the opposing party's rights." Nev. R. Civ. P. 62(c). Because the disputed funds are currently held in the restricted account, and therefore CCEA's rights to disburse that money should they prevail on appeal are safeguarded, there is no basis to require the NSEA Parties to post any separate bond for monies that are already judicially protected by the restricted account.

The "purpose of security for a stay pending appeal is to protect the judgment creditor's ability to collect the judgment if it is affirmed by preserving the status quo and preventing

prejudice to the creditor arising from the stay." *Nelson v. Heer*, 121 Nev. 832, 835, 122 P.3d 1252, 1254 (2005); *see also McCullogh v. Jeakins*, 99 Nev. 122, 123, 659 P.2d, 302, 303 (1983) ("The purpose of a supersedeas bond is to protect the prevailing party from loss resulting from a stay of execution of the judgment."). It is therefore within the district court's discretion to determine the best means of preserving the appellees' ability to collect the judgment. *See McCullogh*, 99 Nev. at 123, 659 P.2d at 303 ("A district court, in its discretion, may provide for a bond in a lesser amount, or may permit security other than a bond . . ."). Indeed, a "supersedeas bond should not be the judgment debtor's sole remedy, particularly where other appropriate, reliable alternatives exist." *Nelson*, 121 Nev. at 835, 122 P.3d at 1254.

To determine whether to accept alternate security in lieu of a bond, the Nevada Supreme Court adopted a five-factor test articulated in *Dillon v. City of Chicago*, 866 F.2d 902, 904-05 (7th Cir. 1988). *See Nelson*, 121 Nev. at 836. The court should consider:

> (1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.

Id. Here, granting a stay pending appeal will automatically satisfy the first four *Nelson* factors and the fifth factor is irrelevant. Should the dissolution of the restricted account injunction be affirmed on appeal—

(1) CCEA's collection process will be simple—the stay will be lifted and the order dissolving the restricted account will take effect.

(2) The affirmation of the District Court's judgment and CCEA's obtaining its judgment will be simultaneous.

(3) The court can be assured of the availability of the disputed funds, as they will remain in the restricted account.

(4) Posting a bond would be needlessly duplicative, would be a waste of resources, and would serve no identifiable purpose because the money in question is safely held in the restricted account.

In these circumstances, the Court should enter a stay of the dissolution order pending appeal of the judgment in Case No. A-17-761884-C and should treat the restricted account as alternative security. *Cf. Foster v. Hallco Mfg. Co., Inc.*, 835 F. Supp. 1235, 1236 (D. Or. 1993) (treating escrow account created to hold disputed funds pending resolution of parties' dispute as alternative security).

CONCLUSION

NSEA Parties respectfully request that the Court enter a stay of its July 2019 Order dissolving the injunction preserving the restricted account pending appeal of the final judgment in Case No. A-17-761884-C.

Dated this 16th day of July, 2019.

Respectfully submitted,

Richard J. Pocker (Nevada Bar No. 3568)
Paul J. Lal (Nevada Bar No. 3755)
300 South Fourth Street, Suite 800
Las Vegas, NV 89101

Robert Alexander*
Matthew Clash-Drexler*
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
* Admitted pro hac vice

Attorneys for NSEA/NEA Parties

John S. Delikanakis, Nevada Bar No. 5928
Bradley T. Austin, Nevada Bar No. 13064
Michael Paretti, Nevada Bar No. 13926
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Tel: (702) 784-5200
jdelikanakis@swlaw.com
baustin@swlaw.com
mparetti@swlaw.com

Richard G. McCracken, Nevada Bar No. 2748
Kimberley C. Weber, Nevada Bar No. 14434
McCRACKEN, STEMERMAN & HOLSBERRY, LLP
1630 South Commerce Street, Suite 1-A
Las Vegas, NV 89102
Tel: (702) 386-5107
rmccracken@msh.law
kweber@msh.law

Joel A. D'Alba (*pro hac vice*)
ASHER, GITTLER & D'ALBA, LTD.
200 West Jackson Blvd., Suite 720
Chicago, IL 60606
Tel: (312) 263-1500
jad@ulaw.com
Attorneys for the CCEA Parties

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CLARK COUNTY EDUCATION ASSOCIATION, VICTORIA COURTNEY, JAMES FRAZEE, ROBERT G. HOLLOWOOD, and MARIA NEISESS, Plaintiffs, vs. NEVADA STATE EDUCATION ASSOCIATION, DANA GALVIN, RUBEN MURILLO, JR., BRIAN WALLACE, and BRIAN LEE, Defendants.	Case No.: A-17-761364-C DEPT. NO.: 4 (consolidated with A-17-761884-C) **CCEA PARTIES' OPPOSITION TO NSEA AND NEA MOTION FOR STAY PENDING APPEAL**
NEVADA STATE EDUCATION ASSOCIATION; NATIONAL EDUCATION ASSOCIATION; RUBEN MURILLO; ROBERT BENSON; DIANE DI ARCHANGEL; AND JASON WYCKOFF, Plaintiffs-Counter Defendants,	

And

BRIAN LEE,

Counter-Defendant,

vs.

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

Defendants-Counter Plaintiffs.

Clark County Education Association ("CCEA"), Victoria Courtney, James Frazee, Robert B. Hollowood, Marie Neisess, and John Vellardita (collectively, "CCEA Parties") file this Opposition to NSEA and NEA's (collectively, "NSEA Parties") Motion for Stay Pending Appeal ("Opposition").

///

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

The Opposition is based upon the papers and pleadings on file herein, the following memorandum of points and authorities, and any oral argument that the Court may entertain on behalf of the CCEA Parties.

DATED this 9th day of August, 2019.

SNELL & WILMER L.L.P.

By: /s/ *John S. Delikanakis*

John S. Delikanakis
Nevada Bar No. 5928
Bradley T. Austin
Nevada Bar No. 13064
Michael Paretti
Nevada Bar No. 13926
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169

Richard G. McCracken
Nevada Bar No. 2748
Kimberley C. Weber
Nevada Bar No. 14434
McCRACKEN, STEMERMAN
& HOLSBERRY, LLP
1630 South Commerce Street, Suite 1-A
Las Vegas, NV 89102

Joel A. D'Alba (*pro hac vice*)
ASHER, GITTLER & D'ALBA, LTD.
200 West Jackson Blvd., Suite 720
Chicago, IL 60606

Attorneys for the CCEA Parties

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Dissatisfied with this Court's ruling, the NSEA Parties once again seek the same injunctive relief that the Court denied when granting the CCEA Parties' Motion to Alter or Amend as recently as July 3, 2019. In a substantive 7-page decision, and after 5 hours of oral argument on CCEA's Motion to Alter to Amend and other directly-related briefing, the Court permitted CCEA to return the funds at issue to the CCEA members and granted summary judgment in CCEA's favor and against NSEA on every single one of NSEA's claims. Despite the recency of the Court's ruling, the NSEA Parties current motion ("Motion to Stay") seeks the same relief as outlined in its opposition to CCEA's Motion to Alter or Amend and is based on the same facts and arguments that the Court found unpersuasive when it granted CCEA's Motion to Alter or Amend a month ago. Nothing has changed in the last thirty days to alter that result, nor do the NSEA Parties claim otherwise.

Fatal to the NSEA Parties' request for a stay pending appeal is the undisputable fact that the only damages the NSEA Parties seek are purely monetary in nature, which – under long-standing Nevada, Ninth Circuit, and U.S. Supreme Court law – cannot form the basis of irreparable harm and do not support the type of extraordinary injunctive relief the NSEA Parties seek. For this reason alone, the Court should deny the NSEA Parties' Motion outright and in its entirety. As discussed *infra*, the remaining three elements are equally as unavailing for the NSEA Parties' Motion. The end result is a motion that falls utterly short of meeting the rigorous standard for an injunctive stay pending appeal.

For the reasons set forth herein, the Court should deny the NSEA' Parties' Motion for Stay Pending Appeal.

II. STATEMENT OF FACTS

The CCEA Parties incorporate by reference the factual summary set forth in their Motion to Alter or Amend Court's May 11, 2018 Order (filed on December 12, 2018), as well as the Findings of Fact set forth in this Court's: December 20, 2018 Findings of Fact, Conclusions of Law, and Order Granting CCEA's Motion for Partial Summary Judgment ("December 20th MPSJ

Order"); July 3, 2019 Findings of Fact, Conclusions of Law, and Order Granting CCEA's Countermotion for Partial Summary Judgment ("July 3rd MPSJ Order"); and July 3, 2019 Findings of Fact, Conclusions of Law, and Order Granting CCEA's Motion to Alter or Amend ("July 3rd MTAA Order"). The CCEA Parties also provide the following procedural background for additional context.

On March 30, 2018, the NSEA Parties filed an Application for Order Directing the Issuance of a Prejudgment Writ of Attachment with Notice (the "Application"), which the CCEA Parties opposed. In opposition, the CCEA Parties represented to the Court that CCEA had been placing the dues at issue into a restricted account since the inception of this lawsuit. The Honorable Judge Joanna Kishner entertained oral argument on the Application on April 23, 2018, and issued an equitable order on May 11, 2018 ("Restricted Account Order"), ordering as follows:

1. That all funds in the possession of or received by CCEA for the 2017-2018 school year in respect to NSEA dues (numerically calculated traditionally at the annual rate of $376.66) and in respect to NEA dues (numerically calculated traditionally at the annual rate of $189.00) shall continue to be deposited by CCEA into account number ending in -4739 (the "Restricted Account"), maintained at the Bank of America Las Vegas, Nevada Branch (the "Bank") as CCEA has represented to the Court it had done during the course of this litigation; and
2. That all funds on deposit in the Restricted Account with respect to the 2017-2018 NSEA and NEA dues shall remain in the Restricted Account, and that no funds shall be withdrawn, transferred, or disbursed out of the Restricted Account, and the Restricted Account shall not be changed or modified, without a further Order from this Department 31 of this Court.
3. The Restricted Account Order further required CCEA to provide NSEA and NEA with a monthly statement from the Restricted Account.

On June 18, 2018, the CCEA Parties filed a Motion for Partial Summary Judgment on their declaratory relief claim. On December 20, 2018, the Court granted the CCEA Parties' Motion for Partial Summary Judgment **in its entirety**, finding that: (1) the termination provisions of the

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

underlying Service Agreement and Dues Transmittal Agreement are clear and unambiguous, (2) CCEA's 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/NEA under the Service Agreement or Dues Transmittal Agreement to collect and/or transmit membership dues on NSEA/NEA's behalf on or after September 1, 2017.

This Court subsequently considered the NSEA Parties' Motion for Partial Summary Judgment on Conversion (filed November 9, 2018), the CCEA Parties' Countermotion for Partial Summary Judgment (filed December 12, 2018) ("CCEA Countermotion for Summary Judgment"), and the NSEA Parties' Motion for Partial Summary Judgment on Bylaws (filed January 23, 2019). The Court heard oral argument from the parties on these motions on May 9, 2019, and issued its ruling from the bench at the hearing, granting all of the foregoing motions in the CCEA Parties' favor (and against the NSEA Parties) **in their entirety**.

In conjunction with the foregoing CCEA Countermotion for Summary Judgment, the CCEA Parties filed a Motion to Alter or Amend on December 12, 2018, requesting that the Court alter or amend the Restricted Account Order, vacating the Restricted Account Order in its entirety and permitting CCEA to disgorge the funds held in the restricted account that were collected between August 31, 2017 and April 24, 2017, and return them to the individual CCEA members, the teachers from whom the funds were collected. CCEA's Motion to Alter or Amend was based on the arguments that:

- The Service Agreement and Dues Transmittal Agreement were terminated by CCEA within the required contractual timeframe, which termination caused both agreements to expire on August 31, 2017, and in light of the foregoing termination and expiration, CCEA owed no duties to NSEA/NEA under the Service Agreement or Dues Transmittal Agreement to collect and/or transmit membership dues on NSEA/NEA's behalf on or

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

after September 1, 2017 – as ultimately held by this Court in its December 20th MPSJ Order;

- NSEA and NEA have no legal or contractual right to the funds held in the Restricted Account under the NSEA or NEA Bylaws, which Bylaws expressly rely upon the (terminated) Dues Transmittal Agreement for any obligation to transmit dues – as ultimately held by this Court in its July 3rd MPSJ Order;
- NSEA and NEA have no legal or contractual right to the funds held in the Restricted Account under the Membership Authorization Form, which Form is only between CCEA and the individual members – as ultimately held by this Court in its July 3rd MPSJ Order; and
- NSEA/NEA have no equitable right to the funds held in the Restricted Account – as ultimately held by this Court in its July 3rd MPSJ Order.

In opposition, the NSEA Parties argued that they would suffer irreparable harm should the court grant CCEA's Motion to Alter or Amend and that the NSEA Parties established a likelihood of success on the merits of their claims (all of which were subsequently granted against NSEA and in CCEA's favor). *See* NSEA Parties' Opposition to Motion to Alter or Amend at 11:24-12:18.

Unpersuaded, the Court ruled that the underlying basis for the Court's May 11, 2018 Order no longer existed. As such, the Court vacated the Restricted Account Order in its entirety and permitted CCEA to disgorge and return the funds held in the Restricted Account to the individual CCEA members (including the individual NSEA Parties) from whom they were collected. NSEA now improperly seeks a second bite at the apple to stay enforcement of that Order. Such request is unnecessary and should be summarily denied.

III. LEGAL ARGUMENT

A. A Stays is Not Warranted under NRCP 62(c) nor Would it be Consistent with the Court's Prior Ruling.

The NSEA Parties move for a stay pending appeal under NRCP 62(c). As a preliminary matter, while NRCP 62(c) vests this Court with discretion to grant an injunction pending an appeal, it does not lessen or ease the high threshold a party must still satisfy to warrant injunctive relief. In

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

fact, the party seeking a stay or injunction pending appeal must still satisfy the primary elements for the extraordinary injunctive relief being requested, *i.e.* irreparable harm and likelihood of success on the merits.[1] *Compare, Hansen v. Eighth Jud. Dist. Court ex rel. Cty. of Clark,* 116 Nev. 650, 657, 6 P.3d 982, 986 (2000) *with Boulder Oaks Cmty. Ass'n v. B&J Andrews Enters*., LLC, 215 P.3d 27, 31 (Nev. 2009).

Tellingly, this Court previously evaluated the NSEA Parties' request for continued injunctive relief as recent as May 2019 (via CCEA Parties' Motion to Alter or Amend and the NSEA Parties' opposition thereto) and found the NSEA Parties' request for continued injunctive relief wanting. Indeed, ***the NSEA Parties specifically briefed these identical factors*** (namely, likelihood of success on the merits and irreparable harm) in opposition to the CCEA Parties' Motion to Alter or Amend:

> Indeed the Restricted Account Order would separately be justified under the standards for a preliminary injunction…. First, the NSEA Parties in their summary judgment briefing have established 'a likelihood of success on the merits' on their claims to the NEA and NSEA dues that make up the funds in the Restricted Account…. Second, there is 'a reasonable probability' that the disgorgement of the funds in the Restricted Account, were the Court to permit it, would 'cause irreparable harm' to NEA and NSEA.

NSEA Parties' Opposition to Motion to Alter or Amend at 11:24-12:18.

Despite these identical arguments, the Court subsequently and appropriately granted CCEA's Motion to Alter or Amend in its entirety, entering CCEA's proposed order a mere four weeks ago. Nothing has changed to alter that result in the short interim, nor do the NSEA Parties point to any intervening facts or change in law that would warrant the extraordinary relief sought here. The Court should not issue a stay now – permitting the injunctive relief the Court denied when it issued its order on July 3, 2019. It would be inconsistent with the Court's recent (and final) order on the CCEA Parties' Motion to Alter or Amend. For these reasons alone, the NSEA Parties' request for a stay/injunctive relief should be denied.

[1] Indeed, the NSEA Parties' moving papers expressly recognize the overlap between the preliminary injunction and motion to stay pending appeal standard, and utilize the same analysis. *See* Motion at 10:24-11:2 ("In the preliminary injunction context, which also requires the movant to show and irreparable harm in the absence of an injunction….")

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

To the extent the Court is inclined to evaluate the individual factors for issuing a stay pending appeal, the application of those factors here fares no better for the NSEA Parties. The standard for issuing a stay pending appeal is set forth in *Hansen v. Eighth Jud. Dist. Court ex rel. Cty. of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000), which requires the court to consider similar factors as those already addressed in the Motion to Alter or Amend briefing in this case. Specifically, the factors that the Court considers are as follows:

1. Whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied;

2. Whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is dissolved;

3. Whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and

4. Whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.

Hansen v. Eighth Judicial District Court ex rel. County of Clark, 6 P.3d 982, 986, 116 Nev. 650, 657 (2000); NRAP 8(c). Careful analysis of these factors and the facts and circumstances of the underlying dispute demonstrates that the requested stay is unwarranted and should be denied.

B. NSEA will not suffer Irreparable Harm and the Object of the Appeal will not be Defeated if the Stay is Denied.

1. Monetary damages do not constitute irreparable harm.

In support of their irreparable harm analysis, the NSEA Parties' conveniently gloss over one undisputable fact that wholly resolves the pending Motion in CCEA's favor – the NSEA Parties seek a stay to protect fungible money— nothing more; nothing less.

It is well established in Nevada that "irreparable injury" requires more than mere monetary damages. *See*, e.g., *Hamm v. Arrowcreek Homeowners' Ass'n,* 124 Nev. 290, 297, 183 P.3d 895, 901 (2008) (noting that "[g]enerally, harm is 'irreparable' if it cannot adequately be remedied by compensatory damages (internal quotations omitted)); *Excellence Cmty. Mgmt., LLC v. Gilmore*, 351 P.3d 720, 131 Nev. Adv. Op. 38 (2015) ("Irreparable harm is an injury "for which compensatory damage is an inadequate remedy"); *Boulder Oaks Cmty. Ass'n v. B & J Andrews*,

215 P.3d 27, 125 Nev. 397 (2009); *Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1030 (1987). Nevada is not unique in this respect. Indeed, the standard followed in Nevada is consistent with United States Supreme Court precedent that unambiguously states that, "The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (quoting *Virginia Petroleum Jobbers Assn. v. FPC*, 104 U. S. App. D. C. 106, 259 F. 2d 921 (1958)).

The Ninth Circuit has articulated a similar standard, concluding that, "monetary injury is not normally considered irreparable." *Los Angeles Memorial Coliseum Com'n v. Nat'l Football League*, 634 F. 2d 1197, 1203 (9th Cir 1980); *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985) (holding that lost revenue involved purely monetary harm measurable in damages and thus did not rise to level of irreparable injury which would justify granting preliminary injunction.). Showing monetary injuries, without more, will not justify granting a preliminary injunction. *See Lydo Enter, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) (explaining that if money damages or other relief granted in the ordinary course of litigation can adequately compensate the plaintiff, irreparable injury probably will not follow the denial of a preliminary injunction).

Here, the NSEA Parties repeatedly admit that their only possible damages are purely monetary in nature. In just the pending Motion, the NSEA Parties concede:

- "At the heart of this dispute is the NSEA Parties' contention that CCEA has wrongfully withheld over $4 million in NEA and NSEA dues money …." (Motion at 4:22-23);
- "That $4,089,364.16 is currently held in a restricted account in CCEA's name…." (Motion at 4:25);
- "The object of the NSEA Parties' appeal is to reverse the Court's entry of summary judgment and to recover the $4,089.364.16 in NSEA and NEA dues money…." (Motion at 9:12-13);
- "The object of the appeal is reversal of summary judgment and the recovery of the $4,089.364.16 held in the restricted account." (Motion at 9:20-22).

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

The NSEA Parties point to no other damages besides monetary damages, nor can they. As such, based on well-established and binding Nevada precedent, the NSEA Parties cannot satisfy the irreparable harm element and their request for a stay must be denied.

Because the damages sought by the NSEA Parties are entirely monetary and fungible, the object of the appeal will not be defeated by denying the Motion to Stay. As repeatedly and expressly admitted by the NSEA Parties, the object of their appeal is to recover roughly $4 million. *See supra*. Whether that money is paid from the Restricted Account or from CCEA's own assets is of no moment. Money is fungible, and the NSEA Parties cannot in good faith claim otherwise.

2. The NSEA Parties' "concerns" over CCEA's financial ability to pay a judgment are unfounded, unsupported, and legally irrelevant.

Any purported concerns of CCEA's inability to satisfy a $4 million judgment are wholly unsupported and speculative at best. Indeed, other than a self-serving affidavit – wherein NSEA simply speculates on CCEA's financial condition – the only document offered as "evidence" of any purported financial difficulties is a March 6, 2018 document purportedly projecting a CCEA revenue shortfall for the 2018-2019 membership year. *See Lane v. Buckley*, 643 F. App'x 686, 688 (10th Cir. 2016) (stating that "simple economic loss usually does not, in and of itself, constitute irreparable harm; such losses are compensable by monetary damages" and that speculative opinions by the movant as to a perceived inability to pay was insufficient to demonstrate a right to injunctive relief). Reliance on the March 2018 document is further misplaced, as it has now been a year and a half since the date of that document and CCEA continues to operate uninterrupted and without financial difficulty. Declaration of John Vellardita, attached hereto as **Exhibit 1**.

As set forth in the accompanying declaration from CCEA's President, John Vellardita, CCEA is solvent. *Id*. Its assets are not in danger of dissipation or depletion, and it would be able to satisfy a judgment in the highly unlikely event a judgment was rendered against CCEA. *Id.* No further analysis should be required.

NSEA goes on to make the bald assertion that because CCEA imposed a dues increase in 2018, the increase itself is somehow evidence of financial difficulties, borderline insolvency, or an inability to satisfy a judgment. The NSEA Parties assertion is unsupported and absurd. By that

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

same logic, one could conclude that any Fortune 500 company that increased consumer pricing from 2018-2019 is in financial disarray and on the brink of insolvency. Such is simply not the case. All of the foregoing is a misguided attempt by NSEA to circumvent the undisputable fact that the only damages at issue here are fungible monetary damages – monetary damages that this Court has now twice held that the NSEA Parties have no entitlement whatsoever. As such, the NSEA Parties cannot – under Nevada, U.S. Supreme Court, or Ninth Circuit law – support their request to stay. This Court should deny the same.

a. The cases cited in support of the NSEA Parties' "insolvency" argument is patently inapplicable and misleading.

In support of the NSEA Parties' concerns of CCEA's purported inability to satisfy a judgment, the NSEA Parties cite to a non-binding Ninth Circuit case where the facts therein are plainly distinguishable from the instant case. *See* Motion at 11. Indeed, the NSEA Parties conveniently omit crucial details and necessary findings in the Ninth Circuit's *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1480 (9th Cir. 1994), such that the NSEA Parties' citation thereto is patently misleading.

By way of brief factual background, plaintiffs in *In re Estate of Ferdinand Marcos* brought suit against the former president of the Philippines under the Alien Tort Act **for his role in the torture, disappearance, and summary execution of more than 10,000 people in the Philippines**. *Id*. at 1469. Plaintiffs subsequently moved to continue a previously-issued preliminary injunction to prevent the president's estate ("Estate") from transferring or secreting any assets in order to preserve the possibility of collecting a judgment. *Id*. The motion was granted by the district court and appealed to the Ninth Circuit.

While the Ninth Circuit ultimately affirmed the district court, enjoining the Estate from transferring assets and cash, the supporting reasons have absolutely no overlap with the instant case – nor do the NSEA Parties even attempt to allege otherwise – making the holding inapposite. Specifically, the Ninth Circuit affirmed the district court based on the following:

- The Ninth Circuit found a substantial likelihood that plaintiffs would succeed on the merits because the plaintiffs had since prevailed at trial on liability and had been awarded

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

substantial exemplary damages. *Id.* at 1480.

- Compare with this case, where this Court recently granted all pending dispositive motions against the NSEA Parties and in CCEA's favor.

- The Ninth Circuit found that expected damages would likely exceed $320 million, and that the estate held $320 million in foreign accounts, that plaintiffs had previously been unable to execute judgments against the estate, and that federal courts twice previously enjoined the estate from transferring or secreting assets, based on a pattern and practice of secreting assets through foreign bank accounts by the use of aliases and shell corporations.
    - Compare with this case where there are: (1) no allegations of foreign bank accounts; (2) no allegations that NSEA (or any party) has previously been unable to collect a judgment against CCEA; and (3) no allegations that CCEA has ever been accused of secreting or improperly transferring assets to avoid a judgment.

The NSEA Parties conveniently omit these dispositive facts and holdings a from their nearly full-page recitation of *In re Estate of Ferdinand Marcos*. Perhaps the most glaring omission is the Ninth Circuit's express conclusion that "a district court has authority to issue a preliminary injunction where the plaintiffs can establish that ***money damages will be an inadequate remedy*** due to impending insolvency of the defendant or that defendant has engaged in a pattern of secreting or dissipating assets to avoid judgment. ***This holding is thus restricted to only extraordinary cases in which equitable relief is not sought***." *Id*. at 1480 (emphasis supplied).

In contrast, and as set forth above, a host of binding Nevada Supreme Court cases, along with the Ninth Circuit and U.S. Supreme Court, routinely hold that monetary damages, in and of themselves, cannot support irreparable harm. Such is the case here. *In re Estate of Ferdinand Marcos* is thus wholly inapplicable to the case at hand.

b. CCEA has never suggested that NSEA initiate individual lawsuits against the teachers.

Because CCEA is able to satisfy a judgment, the NSEA Parties' concerns about collecting a judgment directly from the individual teachers is simply irrelevant. As a preliminary matter, CCEA does not suggest that the NSEA Parties initiate individual lawsuits against the teachers.

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

Further, the NSEA Parties would have no basis to file individual suits against the teachers because, as this Court previously found, the NSEA Parties provided nothing by way of services to warrant some equitable payment from the individual teachers. *See* December 20th MPSJ Order at 8:7-15 ("[I]n 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"). Thus, such discussion is simply inapplicable here.

C. CCEA Members will be Harmed.

The NSEA Parties' analysis as to whether CCEA will be harmed if the Court grants their requested stay is misguided. The NSEA Parties focus their limited analysis on CCEA as an entity. However, CCEA's primary function is to represent the interests of its members, the Clark County School District teachers. And as repeatedly represented in this litigation, the funds at issue in this litigation – and the funds that the NSEA Parties seek to wrongfully obtain – belong to the teachers.

The teachers deserve a speedy resolution of this matter – which case has been pending in District Court for nearly two years and will likely be tied up on appeal for at least another year. The teachers are the ones who suffer harm by the stay, and because the NSEA Parties are unlikely to obtain any success on their appeal (as discussed further below), granting a stay will accomplish nothing but delay in returning the funds to the rightful owners – the teachers, who have a clear and palpable need for these funds.

D. The NSEA Parties are Not Likely to Prevail on the Merits.

The fourth and final *Hansen* factor, likelihood of success on the merits, again supports denial of the NSEA Parties' request for a stay pending resolution of the appeal, as this very Court has ruled against the NSEA Parties and in CCEA's favor on four separate motions for summary judgment, including summary judgment against the NSEA Parties on each of their claims.

While these claims have been briefed at length in front of this Court via various dispositive motions, the CCEA Parties provide a short overview of why the NSEA Parties to not enjoy a likelihood of success on appeal:

///

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

1. The NSEA Parties' claim for conversion fails.

As determined by this Court in its July 3rd MPSJ Order, the NSEA Parties' claim for conversion fails. "Conversion is defined as exerting wrongful 'dominion over another's personal property or wrongful interference with the owner's dominion.'" *Larsen v. B.R. Enters., Inc.,* 104 Nev. 252, 254, 757 P.2d 354, 356 (1988)*; see also*, *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) ("A conversion occurs whenever there is a serious interference to a party's rights in his property"); *M.C. Multi-Family Dev., L.L.C. v. Crestdale Associates, Ltd*., 124 Nev. 901, 910–11, 193 P.3d 536, 542–43 (2008) (defining conversion as "a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title or rights therein or in derogation, exclusion, or defiance of such title or rights."). A precondition to bringing a claim for conversion is that the claimant must be the rightful owner of the property.

As this Court properly found:

- NSEA and NEA have no legal or contractual right to the funds at issue in this litigation ("Sequestered Funds") under the Service Agreement or Dues Transmittal Agreement, which agreements were terminated prior to September 1, 2017;
- NSEA and NEA have no legal or contractual right to the Sequestered Funds under the NSEA or NEA Bylaws, which Bylaws expressly rely upon the (terminated) Dues Transmittal Agreement for any obligation to transmit dues;
- NSEA and NEA have no legal or contractual right to the Sequestered Funds under the Membership Authorization Form, which Form is only between CCEA and the individual members; and
- NSEA/NEA have no equitable right to the Sequestered Funds, or any other funds CCEA collected on behalf of its members after September 1, 2017.

In light of the foregoing, NSEA/NEA are not the rightful owners of, and have no legal or equitable right to, the Sequestered Funds and as a result, cannot meet the rightful owner element. The NSEA Parties do not enjoy a likelihood of success on the merits.

///

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

2. NSEA's claim for breach of contract fails.

As determined by this Court in its July 3rd MPSJ Order, the NSEA Parties' claims for breach of contract fail. "Questions of contract construction, in the absence of ambiguity or other factual issues, are suitable for determination by summary judgment." *See Nelson v. California State Auto. Ass'n Inter-Ins. Bureau*, 114 Nev. 345, 347, 956 P.2d 803, 805 (1998) *S. Tr. Mortg. Co. v. K & B Door Co*., 104 Nev. 564, 568, 763 P.2d 353, 355 (1988) ("[W]here a document is clear and unambiguous, the court must construe it from the language therein."); *Chwialkowski v. Sachs*, 108 Nev. 404, 406, 834 P.2d 405, 406 (1992) (same); *Renshaw v. Renshaw*, 96 Nev. 541, 543, 611, P.2d 1070, 1071 (1980) (same); *Ellison v. California State Auto Ass'n*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990) (same); *Watson v. Watson*, 95 Nev. 495, 496, 596 P.2d 507, 508 (1979) ("Courts are bound by language which is clear and free from ambiguity and cannot, using guise of interpretation, distort plain meaning of agreement.").

As previously determined by this Court in its December 20, 2018 Order (and as set forth below), the Service Agreement and Dues Transmittal Agreement were terminated by CCEA within the required contractual timeframe, which termination caused both agreements to expire on August 31, 2017. But-for the Service and Dues Transmittal Agreements (which this Court found expired on August 31, 2017, due to CCEA's termination), CCEA is not subject to the NSEA/NEA Bylaws, nor are NSEA/NEA parties to the CCEA Bylaws. Accordingly, no contractual relationship between CCEA and NSEA/NEA – inclusive of any contractual relationship created by the NSEA/NEA/CCEA Bylaws – existed on or after September 1, 2017. In the absence of a Dues Transmittal Agreement, there is no obligation for CCEA to transmit dues to NSEA and per NEA's bylaws, only NSEA has a contractual obligation to pay NEA. Accordingly, because CCEA was not bound by NSEA/NEA Bylaws after September 1, 2017, and because NSEA/NEA are not parties to the CCEA Bylaws, there can be no breach by CCEA and NSEA/NEA's breach of contract claims fail. *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."). The NSEA Parties do not enjoy a likelihood of success on the merits.

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

3. Dues Transmittal Agreement

As determined by this Court in its December 20th MPSJ Order, CCEA properly terminated both the Dues Transmittal Agreement and Service Agreement within the required contractual timeframe. The Service Agreement and Dues Transmittal Agreement expressly allow unilateral termination by either party, and those termination provisions are clear and unambiguous. The letters sent by CCEA on May 3, 2017, July 17, 2017, and August 3, 2017 served to terminate both the Service Agreement and Dues Transmittal Agreement, which termination occurred within the contractual termination timeframe. The foregoing termination notices caused both the Service Agreement and Dues Transmittal Agreement to expire on August 31, 2017.

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.

The NSEA Parties do not enjoy a likelihood of success on the merits and this Court should deny their request to stay.

IV. CONCLUSION

This Court should deny the NSEA Parties' request to stay this matter pending resolution of the appeal. The analysis of the four *Hansen* factors demonstrate that the requested stay is unwarranted. There is no irreparable harm, as the damages at issue are purely monetary in nature, and there is no indication that the object of the appeal will be defeated absent a stay. In sharp contrast, the CCSD teachers stand to incur continuing injury in the event that the requested stay is granted. And finally, the NSEA Parties have not demonstrated a likelihood of success on the merits – having previously lost on all NSEA pending claims and legal theories in front of this Court after an extraordinary amount of briefing and oral argument. Accordingly, the CCEA Parties

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

respectfully request that this Court deny the motion for a stay and permit CCEA to return the funds at issue to the rightful owners, the teachers.

DATED this 9th day of August, 2019.

SNELL & WILMER L.L.P.

By: /s/ *John S. Delikanakis*

John S. Delikanakis
Nevada Bar No. 5928
Michael Paretti
Nevada Bar No. 13926
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169

Richard G. McCracken
Nevada Bar No. 2748
Kimberley C. Weber
Nevada Bar No. 14434
McCRACKEN, STEMERMAN
& HOLSBERRY, LLP
1630 South Commerce Street, Suite 1-A
Las Vegas, NV 89102

Joel A. D'Alba (*pro hac vice*)
ASHER, GITTLER & D'ALBA, LTD.
200 West Jackson Blvd., Suite 720
Chicago, IL 60606

Attorneys for the CCEA Parties

Snell & Wilmer
L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

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 this date, I caused to be served a true and correct copy of the foregoing **CCEA PARTIES' OPPOSITION TO NSEA AND NEA MOTION FOR STAY PENDING APPEAL** by the method indicated below:

X	Odyssey E-File & Serve	_____	Federal Express
_____	U.S. Mail	_____	U.S. Certified Mail
_____	Facsimile Transmission	_____	Hand Delivery
_____	Email Transmission	_____	Overnight Mail

and addressed to the following:

Richard J. Pocker
Nevada Bar No. 3568
Paul J. Lal
Nevada Bar No. 3755
BOIES SCHILLER FLEXNER LLP
300 South Fourth Street, Suite 800
Las Vegas, NV 89101
Telephone: (702) 382-7300
Facsimile: (702) 382-2755
Email: rpocker@bsfllp.com
Email: plal@bsfllp.com

Attorneys for NSEA Parties

John M. West (*pro hac vice*)
Robert Alexander (*pro hac vice*)
Matthew Clash-Drexler (*pro hac vice*)
BREDHOFF & KAISER, PLLC
805 15th Street N.W., Suite 1000
Washington, DC 20005
Telephone: (202) 842-2600
Facsimile: (202) 842-1888
Email: jwest@bredhoff.com
Email: mcdrexler@bredhoff.com
Email: glake@bredhoff.com

Attorneys for NSEA Parties

DATED this 9th day of August, 2019.

/s/ Lyndsey Luxford
An Employee of Snell & Wilmer L.L.P.

4815-4389-0846

EXHIBIT 1

John S. Delikanakis, Nevada Bar No. 5928
Bradley T. Austin, Nevada Bar No. 13064
Michael Paretti, Nevada Bar No. 13926
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Tel: (702) 784-5200
jdelikanakis@swlaw.com
baustin@swlaw.com
mparetti@swlaw.com

Richard G. McCracken, Nevada Bar No. 2748
Kimberley C. Weber, Nevada Bar No. 14434
McCRACKEN, STEMERMAN & HOLSBERRY, LLP
1630 South Commerce Street, Suite 1-A
Las Vegas, NV 89102
Tel: (702) 386-5107
rmccracken@msh.law
kweber@msh.law

Joel A. D'Alba
Admitted pro hac vice
ASHER, GITTLER & D'ALBA, LTD.
200 West Jackson Blvd., Suite 720
Chicago, IL 60606
Tel: (312) 263-1500
jad@ulaw.com

Attorneys for the CCEA Parties

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CLARK COUNTY EDUCATION ASSOCIATION, VICTORIA COURTNEY, JAMES FRAZEE, ROBERT G. HOLLOWOOD, and MARIA NEISESS, Plaintiffs, vs. NEVADA STATE EDUCATION ASSOCIATION, DANA GALVIN, RUBEN MURILLO, JR., BRIAN WALLACE, and BRIAN LEE, Defendants.	Case No.: A-17-761364-C DEPT. NO.: 4 (consolidated with A-17-761884-C) **DECLARATION OF JOHN VELLARDITA IN SUPPORT OF OPPOSITION TO NSEA AND NEA PLAINTIFFS' MOTION FOR STAY PENDING APPEAL**

NEVADA STATE EDUCATION ASSOCIATION; NATIONAL EDUCATION ASSOCIATION; RUBEN MURILLO; ROBERT BENSON; DIANE DI ARCHANGEL; AND JASON WYCKOFF, Plaintiffs-Counter Defendants, And BRIAN LEE, Counter-Defendant, vs. CLARK COUNTY EDUCATION ASSOCIATION; JOHN VELLARDITA; AND VICTORIA COURTNEY, Defendants-Counter Plaintiffs.	Case No.: A-17-761884-C (consolidated with A-17-761364-C)

I, John Vellardita, declare as follows:

1. I am the Executive Director of Clark County Education Association ("CCEA"), Plaintiff and Counterdefendant in the above-captioned matter.

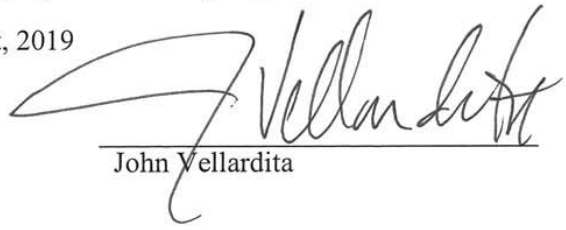
2. I make this declaration in support of CCEA's Opposition to Nevada State Education Association and National Education Association's Motion for Stay Pending Appeal.

3. I have personal knowledge of all matters set forth in this declaration, and if called upon to testify, could and would competently testify thereto.

4. CCEA is solvent, its assets are not in danger of dissipation or depletion, and it is not suffering from financial difficulties.

5. I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 7 day of August, 2019



John Vellardita

Snell & Wilmer L.L.P. LAW OFFICES 3883 Howard Hughes Parkway, Suite 1100 Las Vegas, Nevada 89169 702.784.5200