IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 79208

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.

Appeal from Final Judgment and Dissolution of Injunction
District Court Case No. A761364
Eighth Judicial District Court of Nevada

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

NRAP 26.1 DISCLOSURE STATEMENT

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

National Education Association
Nevada State Education Association

Neither entity has a parent corporation or is a subsidiary or affiliate of a publicly owned corporation.

The following law firm have partners or associates who appeared on behalf of the Appellants or are expected to appear on their behalf in this Court:

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Dated this 18th day of May, 2020.

By: /s/ Debbie Leonard

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INTRODUCTION

CCEA's central argument on appeal starts from the proposition that teachers seeking union membership joined CCEA alone, and that CCEA was then free separately to contract (or not) with NSEA and NEA for services. From that premise, CCEA posits that it was free to stop transmitting members' dues when it terminated the Service Agreement with NSEA. But that central argument is wrong and, without it, CCEA's other arguments fall away.

The record evidence establishes that teachers becoming CCEA members joined not only CCEA, but also NSEA and NEA. As union members, employees received the rights and benefits of membership in all three organizations, including advocacy before the state legislature, discount programs, professional liability and life insurance, access to NEA's professional development, and financial services programs. Members also owed dues to all three organizations. This unified membership structure continued until CCEA disaffiliated from NSEA and NEA on April 25, 2018.

As the local affiliate in the unified membership structure, CCEA was responsible for collecting not only its own dues, but also the dues that its members owed as members of NSEA and NEA. It was then required to transmit the NSEA and NEA dues to NSEA, which kept its own dues and sent NEA's dues to NEA. At issue in this appeal is the $4.1 million in NSEA and NEA member dues that CCEA

collected and withheld before disaffiliation, representing payment from members to NSEA and NEA *for their membership* in those organizations. Contrary to CCEA's characterizations, the record evidence shows that members' dues obligations to NSEA and NEA had nothing to do with any exchange of services between NSEA and CCEA.

In the end, CCEA's misconduct is straightforward: CCEA collected money that members paid to satisfy their dues obligations to NSEA and NEA and then kept it. In doing so, CCEA violated not only its members' trust by misleading them regarding its intent to transmit their dues and jeopardizing their membership in good standing in NSEA and NEA, but also violated contract and tort law with respect to its pre-disaffiliation duties to its parent unions.

ARGUMENT

I. CCEA Mischaracterizes the Record to Suit Its Arguments

A. CCEA Ignores Its Status as NSEA and NEA Affiliate Through April 25, 2018, and the Legal Effect of That Relationship

CCEA's entire argument on appeal is that it had no duties to NSEA and NEA after it terminated the Service Agreement on August 31, 2017 and that its members owed no dues to those organizations. This is wrong as it ignores that CCEA's affiliation with NSEA and NEA continued through April 25, 2018, that the unified membership structure continued with that affiliation, and that the members' dues

obligations continued to all three organizations for as long as those organizations were affiliated.

1. The Primary Source of CCEA's Obligations to NSEA and NEA Was Affiliation, Not the Service Agreement

CCEA's contention that its obligations to NSEA and NEA grew out of the Service Agreement with NSEA, which was first executed in 1999, ignores the record. CCEA (known previously as the Clark County Classroom Teachers Association), NSEA, and NEA became affiliated labor unions in the 1950s and remained affiliated until CCEA disaffiliated, by vote of its membership, on April 25, 2018. III(0523); VI(1006-07 ¶¶ 5, 7); VII(1125 ¶¶ 3-4, 1126 ¶ 5, 1130, 1186 ¶ 8). CCEA's affiliation with NSEA and NEA did not grow out of the Service Agreement, which in any event was an agreement between *only* NSEA and CCEA; instead, it was mandated by CCEA's own Bylaws, which, through April 25, 2018, provided that CCEA "shall maintain affiliate status with the National Education Association and the Nevada State Education Association under the required procedures of each organization." VII(1084).

As a local affiliate of both NSEA and NEA, CCEA's primary and enduring contractual tie to its parent unions were the NSEA and NEA Bylaws, under the well-established principle—that CCEA nowhere disputes—that a parent union's governing document constitutes "an agreement between the international union and its local affiliates." *Serv. Emps. Int'l Union v. Nat'l Union of Healthcare Workers*,

598 F.3d 1061, 1070 (9th Cir. 2010). Because it is undisputed that CCEA did not disaffiliate from NSEA and NEA until April 25, 2018, it did not, as it asserts, "successfully divorce[] itself from the NSEA and NEA . . . by August 31, 2017." Answ.Br. 18.

2. By Virtue of the CCEA-NSEA-NEA Affiliation and the Unified Membership Structure That Affiliation Created, Members Owed Dues to All Three Organizations

For this same reason, CCEA has no basis to assert that the $4.1 million in unified membership dues that it collected was "never meaningfully dues," Answ.Br. 1, and that CCEA was therefore not obligated to give the money to NSEA. Tellingly, CCEA does not dispute that it maintained this unified membership structure through April 25, 2018. What follows is that, by virtue of the three unions' affiliation, and as required by each organization's bylaws, *see, e.g.* VII(1065) (showing that CCEA's own Bylaws required "evidence of membership in NSEA and NEA" before employees could join CCEA"), CCEA members remained NSEA and NEA members with dues obligations to NSEA and NEA through April 25, 2018—obligations that the members intended to satisfy by paying collectively the $4.1 million of dues beyond those owed for their CCEA membership. *E.g.*, VI(1037 ¶ 10); VII(1146-47); VII(1225 ¶ 10).

In order to facilitate the members' dues payment obligation, the NSEA and NEA bylaws required CCEA, as the local affiliate, to serve as the dues collection

agent for the local, state, and national unions, and to remit the state and national dues to NSEA, which in turn sent the national dues to NEA. VII(1187, 1199-1200).

In the Clark County School District, members typically paid their unified dues in bi-weekly installments through payroll deduction. VII(1126 ¶¶ 10-11). Members opted for payroll deduction by signing a Membership Enrollment Form that listed NSEA and NEA (and sometimes CCEA) at the top. *Compare* VI(1003), *with* III(0552). By signing the form, members authorized the School District to withhold the dues they owed to CCEA, NSEA, and NEA from their paychecks and to transfer that money to CCEA. *Id*.

CCEA attempts to circumvent the teachers' dues obligation to all three affiliated unions created through affiliation by contending that the Membership Enrollment Form only enrolled teachers in CCEA. This argument must be rejected, as it ignores the header, the text, and the clear purpose of the form, which among other things assured members that failure to provide demographic information in connection with executing the form "will in no way affect your membership status, rights or benefits in NEA, NSEA, or your local association." VI(1003). It also ignores the numerous places in the record where CCEA admits that its members were also members of NSEA and NEA until April 25, 2018. *See* VII(1141) (Executive Director of CCEA asserting on January 8, 2018, that CCEA members are "active members of CCEA, NSEA, and NEA"); III(0375) (Executive Director of

CCEA testifying on April 23, 2018, that disaffiliation vote's consequence would be that "members of CC[E]A would no longer be members of NSEA and [NEA]"). For CCEA now to contend that its members were not enrolled in NSEA and NEA is nonsense.

B. CCEA Assumed Contractual Responsibilities to NSEA in Addition, and Subsidiary, to Its Responsibilities as Local Affiliate

Contrary to CCEA's contentions, the 1979 Dues Transmittal Agreement ("Transmittal Agreement") and the 1999 Service Agreement, both between *only* NSEA and CCEA, did not establish or control CCEA's affiliation with NSEA and NEA. Instead, these agreements merely governed *additional* responsibilities to which CCEA and NSEA mutually agreed.

CCEA's affiliation with NSEA and NEA created its obligation to collect and transmit member dues. VII(1187, 1199-1200). The Transmittal Agreement, a stand-alone contract supported by "full and adequate consideration," provided a detailed monthly dues transmission schedule, building on the default dues transmission schedule set forth in the NEA Bylaws. *Compare* I(0068-70), *with* VII(1200). The Transmittal Agreement governed only *how* CCEA was required to transmit dues to NSEA. *See generally* I(0068-71). And the Transmittal Agreement neither established the individual members' status as members of NEA, NSEA, and CCEA, nor the members' obligations to pay membership dues to NSEA and NEA. *See id*.

Similarly, the Service Agreement, which was negotiated in 1999, to outline certain services that NSEA would provide to CCEA as a local affiliate, IV(0628-31), also had nothing to do with members' obligation to pay dues or with CCEA's status as local affiliate. Nor did the Service Agreement change or supplant the terms of the 1979 Transmittal Agreement. Instead, it provided expressly that the Transmittal Agreement would be "continued without change." IV(0628).

CCEA does not dispute that both the Transmittal Agreement and the Service Agreement were formed years after CCEA affiliated with NSEA and NEA. CCEA therefore was already independently bound by the NSEA and NEA Bylaws when it entered into the Transmittal Agreement and, later, the Service Agreement, and would remain so upon terminating either or both agreements.

II. By Refusing to Transmit the Disputed Funds to NEA and NSEA, CCEA Violated Nevada Contract and Tort Law

The parties' continuing affiliation through April of 2018 is the foundation for NSEA's and NEA's three separate and independent claims that: (1) CCEA breached its contractual obligation under the NSEA and NEA Bylaws to transmit their dues; (2) the Transmittal Agreement created a *separate* contractual transmission obligation, which CCEA also breached; and (3) CCEA had a duty in tort law not to interfere with NSEA and NEA's rights to their dues.

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A. CCEA's Argument That It Owed No Duty to Transmit Dues Under the NSEA and NEA Bylaws Is Baseless

CCEA does not dispute that it remained an NSEA and NEA affiliate until April 25, 2018. It nonetheless argues that it was either absolved of all obligations under the NSEA and NEA Bylaws after it terminated the Service and Transmittal Agreements, or that the NSEA and NEA Bylaws did not require it to transmit dues in the absence of a dues transmittal agreement. Answ.Br. 50. Neither argument is supported by the record or the law.

1. CCEA Was Bound by the NSEA and NEA Bylaws Until It Disaffiliated on April 25, 2018

Subsidiary affiliates like CCEA are contractually bound by their parent unions' bylaws. *See United Ass'n of Journeymen & Apprentices of the Plumbing and Pipefitting Indus. v. Local 334*, 452 U.S. 615, 619-21 (1981); *Nat'l Union of Healthcare Workers*, 598 F.3d at 1070. CCEA therefore could not unilaterally relieve itself of its obligations under the NSEA and NEA Bylaws by terminating the Service and Dues Transmittal Agreements—seven months before it actually disaffiliated from NSEA and NEA.

CCEA acknowledges that it remained an NSEA and NEA affiliate until April 25, 2018, *see* Answ.Br. 13-14, at which time CCEA informed NSEA and NEA that it "will *no longer* have any contractual relationship with NSEA and NEA," VII(1061) (emphasis added). Indeed, until April 25, 2018, CCEA's own Bylaws

required that it remain affiliated with NSEA and NEA. VII(1084). CCEA was therefore required to submit the question of disaffiliation to the Bylaws amendment process, which it did only at the end of April 2018. VII(1269-70, 1275, 1287-88); VI(1009-10 ¶¶ 36-39). And CCEA insisted it was affiliated with NSEA and NEA until the eve of the disaffiliation vote. III(0383) (Executive Director of CCEA testifying on April 23, 2018, that CCEA remained an affiliate of NSEA); VII(1141-42) (January 2018 letter from CCEA stating "the record clearly shows CCEA has not disaffiliated from NSEA and NEA"). CCEA therefore remained bound by the NSEA and NEA Bylaws until April 25, 2018.

CCEA's attempt to now disavow its continued affiliation and the contractual nature of the NSEA and NEA Bylaws is contradicted by its own arguments and behavior in these proceedings. In CCEA's Second Amended Complaint, filed October 26, 2017—almost two months after it claims to have unilaterally terminated the Transmittal Agreement, CCEA brought three claims against NSEA, each of which expressly relied on the affiliation relationship between CCEA and NSEA. The first cause of action alleged: "The bylaws of the NSEA constitute a contractual relationship between the NSEA and its local affiliate, the CCEA." I(0087). The second cause of action incorporated that same statement and then alleged, "The bylaws of NSEA 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." I(0089). And the third cause of action incorporated the first two, and stated, CCEA and NSEA "have a special contractual relationship in that the CCEA is a local affiliated labor organization of the statewide labor organization NSEA. This special contractual relationship is based upon the NSEA bylaws[.]" I(0090). CCEA cannot now retreat from these admissions by arguing the claims were brought in the alternative, Answ.Br. 49-50, because *every* claim brought by CCEA relied on allegations of the NSEA-CCEA affiliation and the ensuing contractual nature of the NSEA Bylaws.

CCEA made these same admissions in its answers and other filings in the district court, as noted in Appellants' opening brief. Op.Br. 35. CCEA's argument that its admissions can be disregarded because they were made before the district court ruled on whether the Transmittal Agreement had terminated, Answ.Br. 50, is unpersuasive. The district court entered that order *on December 20, 2018*, after CCEA had been disaffiliated from NSEA and NEA for eight months. VI(1018-29). Since CCEA would not be expected to assert its affiliate status after it disaffiliated, CCEA's argument simply seeks to distract the Court from what is obvious from the record.[1]

[1] CCEA's additional, unexplained argument that the admissions are worthless because they predate the Court's final decision in the case, Answ.Br. 50, is even more nonsensical.

Nothing in the Service Agreement or Transmittal Agreement purported to, or could, either create or alter the affiliation relationship between CCEA, NSEA, and NEA. *See supra* at Part I.B. Indeed, NEA was not even a party to those agreements—a crucial fact that CCEA ignores. Because the affiliation relationship was created and controlled by the unions' respective bylaws, there was no plausible basis for the district court to conclude that the affiliation relationship was modified by the Service Agreement or Transmittal Agreement.

2. CCEA Ignores the Plain Language and History of the NEA and NSEA Bylaws Provisions That It Breached

CCEA breached its duty under the NEA Bylaws to transmit the NSEA and NEA dues to NSEA. In addition, should the district court's finding that CCEA terminated the Transmittal Agreement in 2017 be upheld, CCEA also breached the NSEA Bylaws by remaining an affiliate without a dues transmittal agreement.

i. CCEA Breached the NEA Bylaws

CCEA's argument that the "NEA Bylaws simply create obligations on NEA to seek contracts with local affiliates" and impose no independent duty on local affiliates to transmit dues to the state affiliate and to NEA, Answ.Br. 45-46, ignores the plain language of NEA Bylaw Section 2-9. That Bylaw obligates local affiliates like CCEA: (1) to transmit NEA and state membership dues, (2) to do so through a dues transmission contract with the state organization, and (3) to transmit dues pursuant to a schedule set forth in Section 2-9(b), the timing of which can be altered

to a degree (but only a degree) by the dues transmission contract. VII(1199-1200); Op.Br. 37.

NEA has interpreted its Bylaws to place an obligation on the local affiliate to transmit dues on the Section 2-9(b) schedule regardless of whether a dues transmittal agreement is in place. VII(1187 ¶¶ 10-13). This construction is due great deference under well-established law that CCEA nowhere contests. *See Bldg. Material & Dump Truck Drivers, Local 420 v. Traweek*, 867 F.2d 500, 511 (9th Cir. 1989) (noting "standard of review of a union's interpretation of its own governing documents and regulations is highly deferential, absent bad faith or special circumstances").

If CCEA is right that it terminated the Transmittal Agreement as of September 1, 2017, then it violated its Section 2-9 obligations by (1) failing to remit the NSEA and NEA dues it collected; (2) continuing to collect NEA and NSEA dues without a transmittal agreement in place; and (3) not remitting dues it collected on the Section 2-9(b) transmission schedule. CCEA fails to explain how its violation of the second obligation can absolve it of its additional contractual obligations. Indeed, CCEA does not address the common-sense rule that a party cannot rely on the non-occurrence of a condition to excuse its own performance obligations if it had responsibility for that non-occurrence. *See* Restatement (Second) of Contracts § 245 (1979).

ii. CCEA Also Breached NSEA's Bylaws

Article VIII, section 3 of the NSEA Bylaws sets forth minimum standards that local unions must meet before being granted affiliate status, including that the local "[h]ave a dues transmittal contract" with NSEA. VII(1104-05). CCEA reads the affiliation provision of the NSEA Bylaws to place only a duty on NSEA to affiliate local associations that meet certain minimum standards, with no corresponding duty on the local to maintain those minimum standards for the remainder of its NSEA affiliation. Answ.Br. 45. That argument must be rejected under basic contract principles. *See Reno Club v. Young Inv. Co.*, 64 Nev. 312, 325, 182 P.2d 1011, 1017 (1947) (requiring court to give a contract a reasonable interpretation that avoids absurd results).

Moreover, NSEA has interpreted this Bylaws provision as making the maintenance of a dues transmittal contract a continuing affiliation obligation. IV(0616-17 ¶¶ 14-15). That interpretation is entitled to deference that the district court failed to afford NSEA. *See Traweek*, 867 F.2d at 511. It is also consistent with the history of subsection 3(F) of the NSEA Bylaws, which was added by the NSEA Delegate Assembly (which included CCEA representatives) after CCEA threatened in 2014 to withhold dues from NSEA as leverage to extract extra funding from NSEA. IV(0645-46 ¶ 5-7); VII(1056 ¶ 14).

In response, CCEA argues that any ambiguity in the Bylaws must be interpreted against NSEA as the drafter. Answ.Br. 43-44. Putting aside CCEA's representatives' participation in the amendment's adoption, *see* VII(1104-05, 1113), that interpretive canon is inapplicable in the context of a labor organization interpreting its own governing document, where the opposite presumption applies, *see Traweek*, 867 F.2d at 511.

3. Section 3(F) Does Not Create a Perpetual Contract Because CCEA Could Terminate It by Disaffiliating, Which It Did in April 2018

CCEA's argument that NSEA's reading of section 3(F) would create a "perpetual contract," Answ.Br. 39-41, 43, 47-48, is not supported by Nevada law. A perpetual contract arises only where the document expressly provides that it will endure perpetually unless terminated by mutual consent. *See, e.g., Bell v. Leven*, 120 Nev. 388, 391, 90 P.3d 1286, 1288 (2004). Here, CCEA had the unilateral option to terminate its obligations under the NSEA and NEA Bylaws—including its obligation to maintain a dues transmittal agreement—by disaffiliating from the state and national organizations. CCEA did so on April 25, 2018, VII(1061), thereby proving that the Bylaws were not a "perpetual contract."

4. CCEA's Termination of the Service Agreement Did Not Excuse Its Non-Compliance with the NSEA and NEA Bylaws While It Remained Affiliated

CCEA's argument that it had no obligations under the NSEA and NEA Bylaws because NSEA and NEA provided no services to CCEA under the expired Service Agreement during the 2017-2018 school year, Answ.Br. 46-47, fails on multiple fronts. First, NEA was not a party to the Service Agreement, so NEA's "failure" to perform services it did not have under a contract to which it was not a party cannot have terminated CCEA's duties to NEA. *Cf. W. States Const., Inc. v. Michoff,* 108 Nev. 931, 939, 840 P.2d 1220, 1225 (1992) (entity could not be liable for breach of a contract to which it was not a party). Second, CCEA offers no explanation for how the Service Agreement, which grew out of the CCEA-NSEA affiliation relationship, could be a condition *precedent* to CCEA's performance of its obligations as an affiliate under the independently enforceable NSEA Bylaws.

Because it remained an NSEA and NEA affiliate until April 25, 2018, CCEA remained contractually bound by each organization's bylaws. When CCEA collected and kept unified membership dues, and when it purported to terminate the Transmittal Agreement without a successor agreement, it breached those contracts.

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B. CCEA's Arguments That It Terminated the Transmittal Agreement Are Contrary to Law and Belied by the Record

When CCEA collected and kept NSEA and NEA's dues, it also separately violated CCEA's contractual obligations to collect and transmit dues under the Transmittal Agreement.

CCEA advances two arguments in support of the district court's summary judgment ruling that it did not breach the Transmittal Agreement as a matter of law. First, CCEA seeks to defend the district court's conclusion that the Service Agreement and Transmittal Agreement were integrated and that termination of the Service Agreement terminated the Transmittal Agreement.[2] Second, CCEA argues that even if the two Agreements remained separately enforceable, as a matter of law it independently terminated the Transmittal Agreement. Both arguments are wrong.

1. The Evidence Does Not Support the District Court's Finding That the Transmittal Agreement and Service Agreement Were Integrated as a Matter of Law

CCEA asserts that "[w]here a contract attaches and refers to another, courts often treat the latter as incorporated by reference in the former," but that assertion is not supported by CCEA's cited authority. Answ.Br. 24. The only case CCEA cites

[2] CCEA asserts that NSEA Parties misrepresented the district court's order because "the district court expressly lined through and struck the 'integrated agreement' language in its conclusions of law." Answ.Br. 35. CCEA, however, overlooks the district court's separate factual finding that the "Service Agreement and Dues Transmittal Agreement are a single integrated agreement." VI(1024).

on this point is *Haspray v. Pasarelli*, 79 Nev. 203, 380 P.2d 919 (1963), which stands only for the general proposition that "[t]wo separate writings may be sufficiently connected by internal evidence without any express words of reference of one to the other." *Id*. at 208, 380 P.2d at 921. NSEA Parties do not dispute that two separate writings *may* be deemed integrated *if* they meet certain standards—indeed, NSEA Parties cited more current and more direct authority on this point. *See* Op.Br. 22; *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 292, 662 P.2d 610, 615 (1983); *see also Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008) (confirming *Collins* as binding Nevada law on when two writings form one agreement).

Under Nevada law, the "general presumption is that where two or more written instruments are executed contemporaneously the documents evidence but a single contract if they relate to the same subject matter and one of the two refers to the other." *Collins*, 99 Nev. at 292, 662 P.2d at 615. The problem for CCEA is that the two agreements were executed 20 years apart (a fact that CCEA glosses over), and CCEA has not shown that the documents contain the necessary indicia of integration.

To the contrary, the documents indicate they were not integrated because the Service Agreement explicitly provided that the 20-year-old Transmittal Agreement "continued without change." IV(0628). The two agreements also deal with very

different subject matter. IV(0623, 0628). The four-page Service Agreement details services that NSEA agreed to provide to CCEA, CCEA's agreement to comply with certain NSEA-required minimum standards, and terms of NSEA's lease of Las Vegas office space from CCEA. IV(0628-31). CCEA focuses on two sentences from these four pages to argue that the two contracts purportedly had overlapping subject matter, yet fails to address the preceding sentence that "the [Transmittal Agreement] is continued without change." *Compare* Answ.Br. 25-26, *with* IV(0628). This plain language explicitly undermines CCEA's contention that the Service Agreement controlled the existing twenty-year-old Transmittal Agreement.

The out-of-state authority CCEA cites provides no additional support. *Nau v. Vulcan Rail & Constr. Co.*, 286 N.Y. 188, 197, 36 N.E.2d 106 (1941) (reading together instruments that "were executed at substantially the same time, related to the same subject-matter, [and] were contemporaneous writings"); *Town of Cheswold v. Cent. Delaware Bus. Park*, 188 A.3d 810, 819 (Del. 2018) (mere reference to another contract is insufficient to incorporate its substance); *Neville v. Scott*, 127 A.2d 755, 757 (Pa. Super. Ct. 1956) (contracts integrated because second agreement was incomplete without details of first); *Paine-Gallucci, Inc. v. Anderson*, 246 P.2d 1095, 1097 (Wash. 1952) (construing three construction contracts together where each related to construction of water main and were parts of the same transaction).

CCEA also erroneously argues that the two Agreements must be treated as integrated—and could not exist individually—because, together, they provide a purported "quid pro quo" exchange. Answ.Br. 26-28. This ignores that the Transmittal Agreement existed as an independent contract for twenty years before the Service Agreement was executed. *See supra* at 6-7. If the Transmittal Agreement could and did exist independently for two decades before the Service Agreement, and "continued without change" during the Service Agreement's existence, certainly it was "capable of surviving" termination of the latter. Answ.Br. 27.

CCEA's related argument that NSEA and NEA lost all rights to their membership dues when NSEA stopped providing *services to CCEA* under the expired Service Agreement does not justify CCEA's non-performance. Answ.Br. 30-31, 47. That is because members paid *for their membership in NSEA and NEA*, not for services that NSEA provided to CCEA.

The Service Agreement set terms of services that NSEA would provide to *CCEA*, not to NSEA's members, and was a contract between only CCEA and NSEA. IV(0628-31). When CCEA gave notice of termination of the Service Agreement effective September 1, 2017, NSEA naturally ceased performing under the expired agreement, but did not stop providing membership services to NSEA's and NEA's individual members. VI(1045-46) (outlining NSEA and NEA members' benefits, including advocacy before the state legislature, discount programs, professional

liability and life insurance, access to NEA's professional development services, and financial services programs). The Service Agreement had no bearing on NEA's rights—as a non-party to that contract—or on whether the members of the three affiliated unions continued to owe dues to NSEA and NEA.[3] Indeed, there is simply nothing from which the district court could conclude that termination of the Service Agreement affected CCEA's obligation to transmit members' dues to NSEA and NEA.

2. The Evidence Does Not Show CCEA Terminated the Transmittal Agreement

CCEA's brief also does not rehabilitate the district court's erroneous conclusion on summary judgment that letters notifying NSEA of CCEA's intent to terminate the Service Agreement also terminated the Transmittal Agreement as a matter of law.

Contract termination is a question of fact, *Morrow v. Barger*, 103 Nev. 247, 251, 737 P.2d 1153, 1155 (1987); *Trinity Health v. N. Cent. Emergency Servs*., 662

[3] NEA and NSEA members continued to receive specific membership benefits even after CCEA ceased transmitting their membership dues in August 2017. Although, in December 2017, the NEA Members Insurance Trust notified CCEA members whose national dues CCEA had collected and kept that, because NEA had not received their dues, their Life Insurance and Accidental Death and Dismemberment Insurance would terminate within 60 days, those benefits represent a fraction of the benefits members received as NSEA and NEA members. VI(1045-46); VII(1140). That communication itself shows that members continued to receive even those benefits *at least* through February 2018. VII(1140).

N.W.2d 280, 286 (N.D. 2003), and unilateral contract termination requires clear communication to be effective. *See Stovall v. Publishers Paper Co*., 584 P.2d 1375, 1377 (Or. 1978); Op.Br. 26-28 (discussing additional authority requiring unambiguous termination on summary judgment). Here, the letters on which CCEA relies did not mention, let alone articulate a clear intention to terminate, the Transmittal Agreement. IV(0637-42). On this record, the district court erred in concluding as a matter of law that CCEA gave adequate notice of its intent to terminate the Transmittal Agreement. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005) ("The substantive law controls which factual disputes are material and will preclude summary judgment[.]").

CCEA rests its argument primarily on its August letter, which it contends unequivocally terminated the Transmittal Agreement by asserting that "on August 31, 2017 there will not be a contract in place between the two organizations to collect and remit dues to NSEA." Answ.Br. 37. Given that CCEA was obligated by the NEA and NSEA Bylaws to continue to transmit the NEA and NSEA dues, that the NSEA Bylaws required that local affiliates to maintain a dues transmittal agreement, and that the August 3rd letter referred back to CCEA's two prior letters that purported to terminate only the Service Agreement, IV(0641), that one phrase in the August 3rd letter cannot do the work that CCEA wants of providing an unambiguous notice that the Transmittal Agreement was terminated. Rather, CCEA's assertion that upon

expiration of the Service Agreement there would "not be a contract in place between the two organizations to collect and remit dues to NSEA," *id*., is best read as CCEA's legal interpretation of the effect of terminating the Service Agreement, not as providing the required notice to terminate the Transmittal Agreement. That certainly is how NSEA interpreted CCEA's communication, as it made clear in its response, stating that it "strongly rejects your characterization that CCEA need not be forwarded [*sic*] to NSEA those portions of NSEA/NEA [dues] they are holding as a passthrough agent as required by NSEA/NEA policies, agreements, practice, and any applicable law." RSA I(088).[4]

Given CCEA's obligation to maintain a dues transmittal agreement, NSEA reasonably understood CCEA's letters—which referenced only the Service Agreement by name—to terminate only the Service Agreement. On this record, CCEA did not meet the standard for unilateral termination of the Transmittal Agreement and satisfy its summary judgment burden to show an absence of any dispute of material fact on this issue.

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[4] As detailed supra at 13, by 2017 the Transmittal Agreement had been amended by the 2015 NSEA Bylaws amendment, and as amended, the Transmittal Agreement itself required CCEA to maintain a dues transmittal contract for the entire time it was affiliated with NSEA. *See* VII(1056-57 ¶¶ 14-16, 1104-5, 1113); *see also* Op.Br. 29-31.

C. CCEA Cannot Escape Tort Liability by Mischaracterizing the Dues at Issue

Separate from CCEA's breaches of its contractual duties, CCEA also committed conversion and was unjustly enriched when it collected and kept dues the members paid to maintain their membership in NEA and NSEA.

CCEA has consistently admitted—as it must, given the unified membership structure—that the disputed funds are NSEA and NEA dues, Op.Br. 47-48 (detailing admissions) and, in fact, represented that it would send the money to NSEA and NEA "when a solution is reached with the contract," VII(1229); *see also id*. (President of CCEA explaining on December 16, 2017 that member received benefits of all three organizations); VII(1137-38) (Executive Director of CCEA telling members on January 22, 2018, "[y]ou pay $567 annually in dues to NSEA and NEA"); I(0083) (CCEA's Second Amended Complaint asserting CCEA "represents local educators who are required to pay dues to Defendant [NSEA]"); I(0085) (CCEA's Second Amended Complaint alleging "[m]embers of CCEA pay dues to CCEA, NSEA, and a parent organization, the National Education Association ("NEA"), through dues payments deducted from their pay checks by the employer").

CCEA cannot explain away these statements, which recognize the disputed dues as belonging to NSEA and NEA, simply because they were made during periods in which CCEA and NSEA were negotiating a potential amendment to the

Service Agreement. Answ.Br. 56-57. CCEA's position is incongruous; rather than negate the admissions, the context in which CCEA made the statements reinforces them. The fact that the parties did not resolve their dispute did not change the nature of the money. Tellingly, CCEA offers *no* alternative explanation of why it was collecting this money from members for the period that it remained affiliated with NSEA and NEA during the 2017-2018 school year, and why it adjusted the amount it collected only after disaffiliation. *See* IV(0620 ¶ 30); VI(1009 ¶ 35).

Ignoring the unified membership structure, CCEA argues that NSEA and NEA have no ownership interest in the disputed funds in order to give rise to a conversion claim. Answ.Br. 56. But the undisputed facts show that CCEA received payments from members that those members paid in order to satisfy their union dues obligations to NSEA and NEA, then held that money hostage. *Supra* at 2-7. CCEA thereby interfered with NSEA and NEA's possession of money that was owed to them, and that the members paid with the expectation that it would be given to NSEA and NEA. VII(1146-47) (email from CCEA member expressing displeasure that "my dues are currently being held in escrow and not going to NSEA").[5] That is conversion, plain and simple. *Larson v. B.R. Enters., Inc*., 104 Nev. 252, 254, 757 P.2d 354, 355-56 (1988).

[5] CCEA even argued in January 2018 that its collection of that dues money protected the members from falling out of good standing with NSEA and NEA. VII(1141).

The facts here are materially similar to *Hester v. Vision Airlines, Inc.*, No. 2:09-cv-0117-RLH-RJJ, 2011 WL 856871, at *3 (D. Nev. Mar. 9, 2011), in which funds paid to an intermediary with the expectation that the intermediary would pay those funds over to a third party were converted when the intermediary instead pocketed the funds. Op.Br. 43. CCEA attempts to distinguish *Hester* by arguing that it has contractual relations with both its members and with NSEA and NEA. Answ.Br. 52. That position is inconsistent with its claim that it had no contractual duties to NSEA and NEA during the time it committed conversion, and in any event, that does not distinguish the fact that CCEA engaged in the exact conduct of the converting party in *Hester*. Likewise, CCEA's attempt to distinguish *Giles v. General Motors Acceptance Corp*., 494 F.3d 865 (9th Cir. 2007), rests entirely on its counterfactual premise that NSEA and NEA have no ownership interest in the disputed funds.

Because the disputed funds are membership dues belonging to NSEA and NEA, CCEA's conduct also constitutes unjust enrichment. CCEA contends that NSEA Parties cannot establish unjust enrichment because NSEA Parties provided no services *to CCEA* and therefore provided nothing of value to CCEA. That argument conflates NSEA's duties to *CCEA* under the expired Service Agreement with the membership obligation to NSEA and NEA that members fulfilled by paying their NSEA and NEA dues. *See supra* Part I. As just explained, CCEA cannot dispute

that it collected and kept the NSEA and NEA dues. And any benefit CCEA obtained from NSEA and NEA dues is an unjust enrichment. Restatement (Third) of Restitution § 1 cmt. d (2011) ("Restitution is concerned with the receipt of benefits that yield a measurable increase in the recipient's wealth. Subject to that limitation, the benefit that is the basis of a restitution claim may take any form, direct or indirect.").

III. CCEA Cannot Avoid Fraud Liability by Offering, After Being Sued, to Return the Fraudulently Obtained Funds

With respect to the fraud claim brought by individual CCEA members, CCEA argues that because it promised, after being sued, to return funds that it obtained from teachers through alleged misrepresentation, and because the district court safeguarded a *portion* of the funds CCEA promised to return to the teachers for the pendency of the litigation, it can avoid liability for fraud altogether.

But the argument and case law set forth in our opening brief establishes that even if a perpetrator of fraud *actually returns*, during the course of litigation, the money fraudulently obtained, it cannot use that fact to defeat a fraud claim. *See* Op.Br. 52-53 (citing *Fullington v. Equilon Enters., LLC*, 210 Cal. App. 4th 667, 684 (2012)). In *Fullington*, the defendant argued that the plaintiff could not establish the damages element of fraud because the damages had been returned to the plaintiff during litigation, pursuant to a settlement in another case. *Id*. at 684. The court rejected that argument, relying on the principle that a perpetrator of fraud should not

be allowed to avoid the consequences of his fraud "simply by paying the actual damages claimed" pre-verdict. *Id*. at 685-86.

Here, CCEA has not returned any of the money fraudulently obtained, but nonetheless argues that the teacher parties have no damages because CCEA has promised to return to the teachers the NSEA and NEA dues that it collected. Not only does this argument disregard *Fullington*, but it also ignores that prevailing on their fraud claim would entitle the teacher parties not only to compensatory damages in the amount of NSEA and NEA dues they paid to CCEA, but also $243.84 that they each paid to CCEA in *CCEA dues*—money that is not in the restricted account and that CCEA has been free to return at any time. III(0518) (ordering CCEA to deposit funds "in respect to NSEA dues . . . and in respect to NEA dues" in Restricted Account). The fact that CCEA indicated recently it would also refund the $243.84 in CCEA dues it was alleged to have fraudulently obtained from the teacher parties cannot moot the claim that CCEA obtained the monies through fraud in the first place.

The teacher parties would also be entitled to recover punitive damages as an incident of proving fraud, which, consistent with the principles articulated in *Fullington*, this Court has held can be recovered even where fraud-related compensatory damages are completely offset. *See S.J. Amoroso Const. Co. v. Lazovich & Lazovich*, 107 Nev. 294, 298, 810 P.2d 775, 778 (1991) (plaintiff could

recover punitive damages on fraud claim even where compensatory damages for fraud were offset by recovery on contract claim). And, contrary to CCEA's argument, Answ.Br. 63-68, the teacher parties' recovery of punitive damages does not depend on establishing a separate punitive damages "claim," but instead would flow directly from liability on the fraud claim itself. *See* Op.Br. 53-54 (detailing case law). The cases CCEA cites for proof of additional factors necessary to establish a right to punitive damages involve common torts, not a claim for fraud. *See* Answ.Br. 66-67.

Finally, there is nothing improper about NSEA Parties asking the court to keep in place the injunction protecting the millions of dollars' worth of dues money at stake during the litigation. Notwithstanding CCEA's contrary representation (Answ.Br. 4, 15), the record shows that CCEA had not promptly segregated the money in a restricted account before the NSEA Parties sought injunctive relief, but instead, for extended periods, was retaining large amounts of the NSEA/NEA dues in its general checking account. V(0764-802). Only in April 2018, after the writ of attachment was litigated, did CCEA deposit more than $1.5 million into the account to make up for its failure to promptly deposit large amounts of the disputed funds in months prior. V(0796). CCEA did not offer to return the disputed funds to the teachers until well after the court's injunctive order safeguarding the funds. *Compare* I(0016) (seeking writ of attachment on March 30, 2018), *with* III(514-20 (entering

restricted account order), *and* RSA I(098) (requesting on December 12, 2018, to return funds to teachers). And, of course, it has never actually tendered any funds to the teacher parties.

CCEA improperly invokes the doctrine of judicial estoppel to avoid these facts. Judicial estoppel is limited to circumstances in which one party asserts and prevails on an inconsistent position and as a result would obtain an unfair advantage. *Marcuse v. Del Webb Communities, Inc*., 123 Nev. 278, 288, 163 P.3d 462, 469 (2007). NSEA Parties' request to protect the dues at issue is entirely consistent with their desire to preserve CCEA's ability to satisfy a damages award, is completely independent of the teachers' fraud claim (and the damages flowing from the claim), and provided no unfair advantage. Judicial estoppel simply does not apply here.

CONCLUSION

The district court erred in granting summary judgment to CCEA on all claims brought by the NSEA Parties. NSEA Parties therefore respectfully request that the Court grant NSEA Parties the relief set forth in their opening brief. *See* Op.Br. 55.

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AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document filed in case no. 79208 does not contain the social security number of any person.

Dated this 18th day of May, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 6,676 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 18th day of May, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Leonard Law, PC, and that on this 18th day of May, 2020, a copy of the foregoing APPELLANTS' REPLY BRIEF was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (E-Flex). Participants in the case who are registered with E-Flex as users will be served by the EFlex system and others not registered will be served via U.S. mail as follows:

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