ORIGINAL

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
FILED

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NEW MEXICO MILITARY INSTITUTE,

Plaintiff-Appellee,

v.

Ct. App. No. 35,621
Dist. Ct. No. D-504-CV-2013-339

NMMI ALUMNI ASSOCIATION, d.b.a. INSTITUTE ALUMNI ASSOCIATION, a New Mexico not for profit corporation.

Defendant-Appellant.

RULE 12-201 NMRA APPEAL
FROM THE DISTRICT COURT OF CHAVES COUNTY, NEW MEXICO

THE HONORABLE JANE SHULER GRAY

APPELLEE'S ANSWER BRIEF

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ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF COMPLIANCE

I hereby certify that the body of this Answer Brief complies with the limitations set forth in Rule 12-318(G) NMRA and consists of 10,973 words as determined by the "Word Count" feature of Microsoft Word 2010, and that the body of the brief is in proportionally-spaced typeface of Times New Roman, 14 point.

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Plaintiff-Appellee New Mexico Military Institute does not request oral argument.

I. INTRODUCTION

In the spring of 2013, the New Mexico Military Institute ("NMMI" or "Institute") terminated its relationship with its official affiliated alumni association, the NMMI Alumni Association, Inc. ("Association"). This case is about the Association's failure, as a terminated agent, to account and return property to NMMI, as the principal, following the parties' separation. The district court found that the Association was, in fact, the agent of NMMI and served its role as NMMI's alumni services office. The Association admits that it served in this role and even admits that it solicited and obtained funds in the name and on behalf of NMMI. However, the Association maintains that it should be permitted to retain, administer, and expend those funds following NMMI's termination of the agency relationship and over NMMI's objections. In order to prevent the unjust enrichment that would occur if the Association were permitted to do as it pleased, the district court exercised its broad equitable powers and achieved a just result by imposing a constructive trust over the funds in the Association's custody and ordered them to convey those funds to NMMI or another agent of its choice. Now, the Association asks this Court to undo that equitable result so that its surviving board members can fulfill their personal desires. Equity dictates that the district court's judgment be affirmed.

II. STATEMENT OF RELEVANT FACTS

A. History of NMMI alumni affairs.

NMMI, located in Roswell, New Mexico, is the nation's oldest state-supported, nationally accredited, college preparatory military boarding high school and junior college. Enrolled student cadets live each day within a military framework. They wear the cadet uniform, live in modern college-style dormitories, and eat their meals in a communal dining facility along with faculty and staff members. Originally founded as Goss Military Academy in 1891, the Academy was renamed the New Mexico Military Institute in 1893. In 1910, the New Mexico Enabling Act made NMMI a land-grant beneficiary and was later confirmed by the State's Constitution as a "state educational institution." *See* N.M. Const. Art. XII, Section 11. In 1908, NMMI hosted its first official alumni gathering. Major General Jerry W. Grizzle, Vol. I, 38:14-18. In 1938, NMMI officially created an internal on-campus alumni affairs department, managed by an NMMI employee, and developed its first alumni association. MG Grizzle, Vol. I, 38:19-22.

In 1964, then-current NMMI President and Superintendent, Major General Sam W. Agee, formed and incorporated a State of New Mexico not for profit corporation, the Appellant NMMI Alumni Association, Inc. MG Grizzle, Vol. I, 38:23-39:4; Def. Ex. A. The principal purposes of the corporation, as stated in its original Articles of Incorporation, were "to promote the interest and welfare of the

New Mexico Military Institute located in Roswell, New Mexico; to afford a permanent means of contact between the New Mexico Military Institute and its alumni; to create, establish, and maintain scholarships and student loan funds and to collect and administer trust funds and endowments for the use and benefit of New Mexico Military Institute; and to do generally any and all things which may be deemed advisable, necessary, or desirable in the interests of the New Mexico Military Institute, its students, and faculty." Def. Ex. A; *see also* Def. Ex. BT ("to promote the interest and welfare of the NMMI."). However, after the Association's official incorporation in 1964, in terms of how NMMI managed its alumni affairs, functionally nothing changed. The managing Executive Director remained an NMMI employee, continued to use office space on NMMI's campus, continued to wear an NMMI uniform, and communicated with NMMI's alumni on NMMI's letterhead. MG Grizzle, Vol. I, 39:5-12; 40:10-16. This arrangement and the function of NMMI's alumni office did not change in any respect until 1993. MG Grizzle, Vol. I, 39:5-12. From 1908 to 1993—despite operating as "the NMMI Alumni Association, Inc." in 1964—NMMI and its employees were solely responsible for providing all alumni affairs functions, including charitable fundraising, on behalf of NMMI. MG Grizzle, Vol. I, 39:1-4.

Following a State Auditor's opinion in 1989, the Association's staff were removed from NMMI's payroll and ceased wearing NMMI uniforms. *See* MG

Grizzle, Vol. I, 39:22-40:5; Carl Reynolds, Vol. IV, 211:24-212:25. And, after receiving guidance from the Attorney General's office in 1992 regarding a newly enacted New Mexico statute, NMMI and the Association entered into a written agreement to more clearly define the relationship between the two entities. Reynolds, Vol. IV, 212:21-25;[1] NMSA 1978, § 6-5A-1. Nonetheless, aside from being responsible for staffing and paying its own non-uniformed employees, the arrangement and function of NMMI's alumni office remained the same. The Association offices remained on NMMI's campus, they continued to use letterhead bearing NMMI's marks, used NMMI telephones, and even used NMMI email addresses ("@nmmi.edu"). MG Grizzle, Vol. I, 40:6-41:10; Reynolds, Vol. IV, 220:3-6. The parties' relationship and the function of NMMI's alumni office remained unchanged until the parties' separation in the spring of 2013. MG Grizzle, Vol. I, 41:11-13.

B. The parties' written agreements.

In 1993, the New Mexico legislature enacted NMSA 1978, § 6-5A-1 that requires government "agencies" to enter into written agreements "[p]rior to an

[1] The parties' stipulated transcript erroneously reflects that "a contract, is *not* required." Reynolds, Vol. IV, 211:16 (emphasis added). The controlling audio log reflects that the quoted language referenced is actually "a contract, is *now* required." *See* For the Record, December 11, 2014, at 4:45:29-43 p.m. The following discussion on cross examination also makes this point clear. *See* Reynolds, Vol. IV, 212:21-25.

agency accepting property or funds that have been transferred to an agency by an organization." The statute requires written agreements to provide a basic level of protection to state agencies because it contemplates that they will have a certain level of control over those organizations that seek to provide support and services that exclusively benefit their agency as demonstrated by its requirement that the state agency "reviewed the bylaws of the organization and found them acceptable." § 6-5A-1(B)(6); *see e.g.* NMAC 19.5.1.7.EE ("whose principal purpose *as authorized by the division* is to complement, contribute to and support, aid the function of or forward the division's or park's purposes.") (emphasis added). In 1993, NMMI and the Association entered into the first of a series of three statutorily required Memorandums of Agreements. *See* Def. Ex. D (1993 MOA); Def. Ex. G (2001 MOA); Def. Ex. CE (2012 MOA). Although there were three iterations of the MOAs, there was little to no difference between them. Blair Bouchier, Vol. III, 222:21-223:2.

These MOAs cloaked the Association with the express authority to represent NMMI in its alumni affairs. Although the appellant corporation has a dues paying "membership," the Association was obligated to perform its services as the alumni affairs office for *all* NMMI alumni.[2] *See* Def. Ex. D, Article 1.2(C); Def. Ex. G,

[2] The Association had approximately 2,300 dues paying members out of NMMI's 20,000 alumni. MG Grizzle, 45:10-13; Reynolds, 216:25.

Article 1.2(C); *see also* Brownfield, Vol. II, 85:18-21. The primary function of the Association, as recited in the MOAs, was "to support the mission of the Institute, assist the educational goals of the Institute, and enhance the life-time experience of having attended the Institute." *See* Def. Ex. D, Article 1.2(C); Def. Ex. G, Article 1.2(C); Def. Ex. D, Article 2.1(D). From the very first MOA, absent express written consent from the Institute, the Association was required to conduct its business in accordance with its Articles and Bylaws,[3] Def. Ex. D, Article 2.1(B), to employ an Executive Secretary for operational management, Def. Ex. D, Article 2.1(D), to organize its staff necessary to fulfill its corporate purpose, Def. Ex. D, Article 2.1(E), to serve as the primary records repository of Institute alumni records, Def. Ex. D, Article 2.1(F), and, to conduct, "in association with the Institute," the annual Homecoming event, Def. Ex. D, Article 2.1(H). In other words, the Association was now delegated the responsibility, subject to NMMI's direction and approval, of performing alumni oriented services on behalf of NMMI that NMMI and its employees had provided to its alumni since 1938—and for the first time as Association employees since its incorporation in 1964. In exchange for the services

[3] Approved as acceptable by the Institute pursuant to § 6-5A-1(B)(6). *See* Def. Ex. D, Article 4.1. Furthermore, the Association was expressly prohibited from altering or amending its Articles or Bylaws to the extent that such revisions would alter the parties' written agreement. Def. Ex. D, Article 2.2(C).

and the benefit provided to NMMI, NMMI permitted the Association to use office space on NMMI's campus, Def. Ex. D, Article 3.1(A), permitted the Association to use NMMI's name and marks, Def. Ex. D, Article 3.1(C), agreed to include the Association's Executive Director in NMMI staff meetings, Def. Ex. D, Article 3.1(D), agreed to coordinate all requests for disbursements of funds from the Association through the Superintendent's office, Def. Ex. D, Article 3.1(G), and officially recognized the Association as "the alumni association for the Institute." Def. Ex. D, Article 3.1(B).

In the performance of its role as NMMI's official alumni organization, the parties expressly agreed that the Association would be permitted to "solicit, invest, hold and expend funds." Id. The Association was also required to comply with "Institute rules and regulations" in regard to gifts received "for scholarship or financial assistance to cadets." Def. Ex. D. The Association was expressly prohibited from accepting any gifts that were "inconsistent with the Association's understanding of the Institute's goals and objectives," Def. Ex. D, Article 2.2(A), and NMMI's Superintendent was solely responsible for coordinating communications "with regard to the development and implementation of fund-raising activities and other projects through which the Association and the Foundation can assist the Institute in achieving its goals and objectives." Def. Ex. D, Article 4.3. Consequently, because the Association solicited and managed the

private donations it received on NMMI's behalf, the Association was required to "[m]aintain a financial accounting system considered adequate under customarily and currently accepted *governmental* accounting standards," Def. Ex. D, Article 2.2(L) (emphasis added), and additionally required to "[c]ause its financial operations to be audited annually in accordance with generally accepted governmental auditing standards by an independent professional auditor approved by the [NMMI] Board of Regents." Def. Ex. D, Article 2.2(M).

NMMI and the Association also entered into a series of agreements more specifically delineating fundraising efforts, along with the New Mexico Military Institute Foundation, Inc. ("Foundation"), called the Alliance Agreements.[4] "NMMI, the Foundation and the Association originally entered into an alliance, effective July 1, 1994, for fund raising purposes, so that future fund raising efforts by any of them would be centrally coordinated with *a goal of maximizing support for NMMI programs and projects* while providing adequate funds for operation of the Association and the Foundation and minimizing fundraising expenditures." Def. Tr. Ex. H, (emphasis added); RP 1779, ¶ 122; Pl. Ex. 39, p. 2 ("fund raising efforts by any of them would be centrally coordinated with a goal of maximizing support for

[4] Incorporated under the laws of the New Mexico in 1945, the Foundation is another NMMI affiliated non-profit entity that provides financial support to NMMI by way of managing approximately $50 million in investments and real estate assets on NMMI's behalf, Barnes, Vol. III, 59:4-23, and provides over $500,000.00 in scholarship funds to NMMI annually, Barnes, Vol. III, 88:9-13.

NMMI programs and projects."). The Alliance Committee controlled all matters related to fundraising and expenditures for the affiliated entities. John A. Phinizy, II, Vol. V, 32:17-19 ("We were in the Alliance Agreement with the Institute and the Foundation, and our finances were dictated through that."). As a result, the Association was required to submit its annual budget to the Alliance Committee, comprised of the President of the NMMI Board of Regents, the President of Alumni Association, the Chairman of the Foundation, and the Superintendent of NMMI, for approval. Def. Tr. Ex. H, Article 3.1; Pl. Ex. 39, Article 3.1 & Article 6.3. In summary, charitable solicitations and fundraising efforts of the Association from 1993 until the parties' separation in 2013 were expressly subject to NMMI rules and regulations, required to benefit NMMI and its goals and objectives, and subject to the direction of and in coordination with NMMI's President and Superintendent.

C. Association assets.

At the time of the parties' final separation in April of 2013, the Association was in control of approximately $6,047,523.70 in funds.[5] Pl. Ex. 140, p. 6. The Association had three primary categories of funds: restricted, temporarily restricted, and unrestricted. Pl. Ex. 140, p. 7-8 & 25; Jennifer Rawdon, Vol. IV, 157:25-158:5. The restricted assets are primarily those intended for scholarship, conservatively

[5] The Association's current Articles of Incorporation provide that all Association assets are to be distributed to the Institute upon its dissolution. Def. Ex. E, Article X.

invested, that could only be used to award NMMI scholarships for deserving cadets contingent on donor placed restrictions as approved by NMMI and its Scholarship Committee. Def. Ex. HH, p. 13 of 22; Def. Ex. HN. Temporarily restricted assets are those funds that were restricted by donors for a specific purpose for which the restriction had not yet been met. Def. Ex. HH, p. 13 of 22. The unrestricted assets were without any specific donor restrictions and used to fund Association operations, events, and activities in coordination with NMMI. Def. Ex. HH, p. 13 of 22. As of June 2013, the Association held approximately $1,507,013 in unrestricted assets and approximately $4,217,558 in fully and temporarily restricted assets.[6]

In February of each school year, the NMMI Scholarship Committee would meet to review the incoming cadets for the following school year to determine cadet eligibility for various forms of financial aid from multiple sources, including the Association, the Foundation, State legislative scholarships, and federal grants. Sonya Rodriguez, Vol. IV, 96-100. The NMMI Scholarship Committee was comprised of various NMMI employees from different departments (athletics, admissions, and commandant's office) and representatives from the Association and the Foundation.

[6] Since the termination of the parties' relationship in 2013, evidence obtained post-trial revealed that the Association expended approximately $1,872,370.74 of the funds the district court ultimately determined were raised by the Association on NMMI's behalf during the parties' agency relationship. [RP 2936, ¶ 6] As a matter of perspective, for fiscal year ending June 30, 2014, the Association raised approximately $18,912.00 of which only $13,052.00 was deemed unrestricted. *See* Def. Ex. HK, p. 5.

Rodriguez, Vol. IV, 100. Scholarship funds raised and managed by the Association on behalf of NMMI were directed by donors to be awarded by the NMMI Scholarship Committee. Def. Ex. HN. The NMMI Scholarship Committee, and more specifically the NMMI administration, is the only entity that has access to specific cadet protected information, and more importantly, the complete picture of an individual cadet's eligibility. Rodriguez, Vol. IV, 107:12-18. Historically, the Association contributed about $75,000 to $85,000 to NMMI annually from approximately sixty five scholarships that were being managed by the Association on behalf of NMMI. Whitfield, Vol. V, 131:5-8; 118:6.

D. NMMI's termination of its relationship with the Association.

In July of 2012, then Executive Director of the Alumni Association, David Romero, resigned. David Romero, Vol. III, 123:1-5. As a result, the Association began looking for a replacement and hired Jim Lowe in August of 2012 to manage the corporation. James Lowe, Vol. II, 175:3-6. Mr. Lowe's priority was to familiarize himself with the Association's finances. Lowe, Vol. II, 176:13-15. However, he was unable to find any Association financial records after March of 2012. Lowe, Vol. II, 177:2-4. Mr. Lowe learned that the Association's bookkeeping and accounting work was not being performed by anyone in-house and that they had engaged a Roswell accounting firm, May Taylor & Co., to provide the Association with accounting and bookkeeping services. Lowe, Vol. II, 177:12-19. Previously,

the NMMI Foundation, Inc. was providing accounting services to the Association, but in December of 2011, former Executive Secretary David Romero moved all Association bookkeeping and accounting responsibilities to the local accounting firm to commence work in January of 2012. Lowe, Vol. II, 177:22-178:2.

Mr. Lowe then spent the next several months trying to obtain up-to-date Association financial information from May Taylor. "I was on the phone or emailing pretty constantly...trying to figure out what was going on...the more I learned in 60 days was we had at that point seven months with no financial accounting statements, we had an expired contract with May Taylor, which expired on June 30th, and here it was September or October, we had no basis in which to submit a budget to the Alliance Committee under the MOA. I found three endowment scholarships that had been deposited but never executed, so they weren't in the system... and then, of course we didn't have a June 30 close and I was worried about the [IRS Form] 990."[7] Lowe, Vol. II, 178:19-179:10; *see also* Lowe, Vol. II, 202:16-203:2; Def. Ex. DM ("We have no idea of the financial health of the Alumni Association."); Plf. Ex. 43.[8] Mr. Lowe notified the members of the Association Board of the problems he discovered. Pl. Ex. 46. The Association and its accounting firm went back and forth

[7] The IRS Form 990 is to be completed annually for exempt organizations. The Association operated on the State's fiscal year, June 30 through July 1, as opposed to a calendar year. Lowe, Vol. II, 179:13-15.

over the next several months trying to resolve the Association's accounting situation. Lowe, Vol. II, 179-196. By January of 2013, the Association was still in need of 2012 financial information so that they could meet with the NMMI Scholarship Committee and determine what funds were available to award as scholarships. Plf. Ex. 67. The Association was six months into the new fiscal year and still had no available financial information for review by management. Lowe, Vol. II, 199:5-8. On February 11, 2013, Mr. Lowe e-mailed a memorandum and timeline to the Association Board and, at the direction of then Association Board President Jock Brownfield, provided a copy of his report to NMMI's President and Superintendent, Major General Jerry W. Grizzle. Plf. Ex. 79; Lowe, Vol. II, 206:14-23. As of the date of Mr. Lowe's February 2013 timeline, the Association still had no financial information available for review by management for the current fiscal year. Lowe, Vol. II, 204:5-10. In response to Mr. Lowe's update to the Association board, then Association Vice President, Blair Bouchier stated, "As each month continues to pass without catching up with the 2012 financials, we are getting further and further behind. In addition, neither our Executive Director, nor the Board, have an accurate report of the Association's financial health." Pl. Ex. 75. On February 14, 2013, Mr. Lowe, on behalf of the Association, requested that all Association work papers possessed by the May Taylor accounting firm be returned to the Association. Pl. Ex. 84. The Association decided to engage the Foundation employees to assist them in

creating Association financial statements starting with recreating the financial statements as of January 1, 2012. Lowe, 211:18-212:5; Def. Ex. HG.

In February of 2013, the NMMI Board of Regents held a meeting and received a report regarding the Association's lack of available financial information from Major General Grizzle. Lowe, 214-215. After MG Grizzle's report, concerned with the negative implications potentially imputable to NMMI, the NMMI Board of Regents elected to end its relationship with the Association. Bruce Fillpot, Vol. V, 83:3-5. At that time, the Association did not even have an accounting system, let alone one considered adequate under governmental accounting standards. Lowe, Vol. III, 216:5-8 ("Q. And at the time that you received this notification, did the Alumni Association have an accounting system? A. Not to the best of my knowledge.").[9] On February 21, 2013, NMMI delivered a written sixty day notice of its intent to terminate the parties' Memorandum of Agreement and end its

[9] Ultimately, the district court found the Association's expert testimony persuasive that although the Association did not use their accounting system, the Association had one in place. Baca, Vol. V, 178:4-6 ("But in no way, to me, does it mean that the system was not there. It just was not utilized."); RP 1864 ("Mr. Baca testified that although both sides assumed that Defendant had breached the last MOA by falling to maintain a proper accounting; contrary to popular opinion, Defendant had maintained proper accounting and was not in breach."). In an abundance of caution, and to thwart the Association's continued insistence that it could continue to hold itself out as the NMMI alumni association, NMMI subsequently terminated the MOA without cause. [RP 1813]

relationship with the Association. Pl. Ex. 88 ("The Institute seeks to terminate the MOA in accordance with Section 4.5."). NMMI noted the Association's requirement to maintain an adequate governmental accounting system and provided the Association thirty days to cure. Pl. Ex. 88. Notably, the Association did not dispute that it was in default of the parties' written agreements. *See* B. Bouchier, Vol. III, 222:1-4 ("Q. [Y]ou weren't able to cure in that 30 days? A. We were not.) & 212:17-19; Lew Bouchier, Vol. III, 143:18-19; RP 1112 ("The thirty day deadline could never have been met").[10] Association Board Member Bruce Fillpot was present at the February 2013 Regents' meeting and requested that the Regents provide the Association an additional sixty days to cure its defaults but that request was denied. Fillpot, Vol. V, 82:18-22 & 92:18-22. The Association provided no response to NMMI within the thirty day cure period. MG Grizzle, Vol. I, 92:13-14.

The NMMI Foundation employees were attempting to create the Association's missing financial records beginning with the prior fiscal year to get them current through June 30, 2012, and ready for audit. Fillpot, Vol. V, 84:6-13; Barnes, Vol. III, 83:25-84:6; Lowe, Vol. III, 25:6-8. As of February 27, 2013, days after NMMI's notice of termination, the Association was still attempting to create

[10] Indeed, the Association conceded at trial that it was not caught up with creating its financial records only through June of 2012 until sometime around May 15, 2013; 83 days after NMMI's notice was delivered. B. Bouchier, Vol. III, 213:13-17.

financial records for January of 2012. Pl. Ex. 90. By March 7, 2013, with great help from the Foundation employees, the Association's financial records were only current as of March 2012. Pl. Ex. 95. Having received no response from the Association regarding the notice of default, on March 22, 2013, NMMI notified the Association that there was a failure to cure to NMMI's satisfaction and that termination of the parties' relationship would be final as of April 20, 2013. Plf. Ex. 101; RP 1124 ("this is the result of what the 'let's wait and see what happens' and 'drag our feet' strategy. We made it easy for the Regents to pull the trigger. Nothing from us at all to counter with our efforts to cure. Of course they could have cancelled without cause but now the reason will forever be because we as a Board and staff failed."). After receiving NMMI's notice of the Association's failure to cure, the Association was still trying to create its accounting records for the prior fiscal year. Fillpot, Vol. V, 87:5-7; Barnes, Vol. III, 84:19-21. On April 22, 2013, NMMI notified the Association that termination of the memorandum of agreement was final.[11] Def. Ex. FR.

[11] Counsel for the Association represented at trial that they did not dispute that the parties' separation was final. Vol. V, 126:19- 127: 4-7.

E. Events leading to litigation

With termination of the agreement deemed final by both parties, NMMI implemented a plan to create an internal "Office of Alumni Relations" and desired to move the funds then in the possession of the Association to the Foundation for continued management and administration. MG Grizzle, Vol. II, 54:3-8. In the transition process, NMMI would have permitted the Association to stay on campus to coordinate the transition of alumni affairs from the Association to the newly created internal alumni office. MG Grizzle, Vol II, 54:9-21. Initially, the Association Board agreed to develop a plan to transition alumni affairs to the school and the two entities discussed ways to forbear NMMI's enforcement of the termination. Fillpot, Vol. V, 89:11-15. However, the Association board ultimately voted against remaining on campus and no longer desired to work with the administration. Fillpot, Vol V, 89:14-15. As a result, on May 6, 2013, NMMI inventoried the Association's office items and locked them out of the on-campus office. Fillpot, Vol. V, 90:14. Later that the same day, NMMI officially announced the opening of its internal Office of Alumni Relations. Def. Ex. FV.

The Association board became increasingly divisive. For the preceding several years, a small number of the members of the Association's board personally believed the role of the Association was to function as a check on the school's handling of various administrative matters and did not personally believe that the

Association was to serve as a supporting entity. Phinizy, Vol. V, 19:15-19 ("we ought to be able to voice our concerns without being subordinate to the school or being subordinate to the Superintendent or the Commandant or anybody there."); Fillpot, Vol. III, 97: 8-12; B. Bouchier, Vol. III, 196:7 ("I don't believe we were subordinate."). This minority sentiment caused great internal discord on the board, Lowe, Vol. III, 52:21-53:1 ("[M]ost of the votes would go 8-4 or 7-4 or whatever, so it was always -- there was always a position on the board that wasn't completely supportive of the objective, which I thought was kind of -- kind of weird. Q. Was that regardless of the issue? A. Pretty much."), which came to a contentious head upon NMMI's termination of the relationship. On May 17, 2013, Association President Board President Jock Brownfield called for a board meeting to determine the Association's future. Fillpot, Vol. IV, 96:1-4. However, six other members held a meeting on May 16, 2013 and removed Mr. Brownfield as President. Fillpot, Vol. V, 97:5-7. Thereafter, all but four of the eleven Association board members resigned and the surviving four members, the divisive minority, were now unconstrained and decided to personally operate the fractured corporation. B. Boucher, Vol. III., at 216.

On May 7, 2013, NMMI, through counsel, delivered a letter to the Association's board to cease using NMMI's name and marks and made a demand for the immediate transfer of the funds in the Association's custody to the

Foundation. Pl. Ex. 142. The Association did not respond to NMMI's demand, did not transfer any funds in its custody, and continued its operations using NMMI's intellectual property over NMMI's objections. MG Grizzle, Vol. II, 75:7-76:1; RP 332, ¶ 22. The Association's failure to return the funds in its custody to NMMI following the termination of the parties' relationship after appropriate demand—combined with the Association's blatant trademark infringements—is the core of this dispute. On June 10, 2013, NMMI filed suit to enjoin the Association from continuing to hold itself out as NMMI's alumni association and to reclaim the funds in the Association's custody raised on NMMI's behalf that the Association, as NMMI's terminated agent, should not rightfully continue to possess after the parties' separation.

III. LEGAL ARGUMENT

A. *The district court's finding that the Association was the agent of NMMI is correct and supported by substantial evidence.*

After the trial on the merits, the district court concluded that "at all time material" the Association was the agent of NMMI. [RP 2906, ¶ 1; *see also* RP 1780, ¶ 8] The Association's status as NMMI's agent is a question of fact that should not be disturbed on appeal. Segal v. Goodman, 1993-NMSC-018, ¶ 15, 115 N.M. 349; Fryar v. Employers Ins. of Wausau, 1980-NMSC-026, ¶ 6, 94 N.M. 77; *see also* Baca v. Employment Servs. Div. of Human Servs. Dep't of New Mexico, 1982-NMSC-096, ¶ 4, 98 N.M. 617.The district court's finding that the Association was

NMMI's agent should be resolved in favor of NMMI. *See* Tapia v. Panhandle Steel Erectors Co., 1967-NMSC-108, ¶ 5, 78 N.M. 86; Lujan v. Merhege, 1974-NMSC-014, ¶ 4, 86 N.M. 26. The evidence presented at trial—by both the Association and NMMI—substantially supports the district court's finding of the existence of an agency relationship.

An agency relationship is commonly understood as "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (hereinafter "RESTATEMENT"). Adopting this common understanding, New Mexico's courts specifically define an agent as "a person who, by agreement with another called the principal, represents the principal in dealings with third persons or transacts some other business, manages some affair, or does some service for the principal, with or without compensation." Barron v. Evangelical Lutheran Good Samaritan Soc., 2011-NMCA-094, ¶ 16, 150 N.M. 669. Simply put, an agent is "a person authorized by another to act on his behalf and under his control." W. Elec. Co. v. New Mexico Bureau of Revenue, 1976-NMCA-047, ¶ 12, 90 N.M. 164. Whether or not a relationship is one of agency is determined by the parties' conduct and not the labels they give themselves. Fryar v. Employers Ins. of Wausau, 1980-NMSC-026, ¶ 6, 94

N.M. 77; Chevron Oil Co. v. Sutton, 1973-NMSC-111, ¶ 4, 85 N.M. 679 ("the manner in which the parties designate a relationship is not controlling"); RESTATEMENT § 1.02.

New Mexico courts recognize that "if an act done by one person on behalf of another is in its essential nature one of agency, the one is the agent of the other, notwithstanding he is not so called." Sutton, 1973-NMSC-111, ¶ 4. This is true even if the parties expressly disclaim the existence of any agency relationship. *See* Fryar, 1980-NMSC-026, at ¶ 6, 94 N.M. at 80; RESTATEMENT § 1.03, cmt. e ("For example, if a lawyer accepts a retainer and files a complaint on behalf of a person, a client-lawyer relationship results although the lawyer has disclaimed in writing any intention to have such a relationship. Actions may speak louder than words."). Furthermore, the "chief consideration" as to whether an agency relationship exists is whether the principal has the right to control the manner in which the agent accomplishes the task. Hansler v. Bass, 1987-NMCA-106, ¶ 17, 106 N.M. 382. However, the principal need not have total control. "[A] person may be an agent although the principal lacks the right to control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgment." RESTATEMENT § 1.01, cmt. c; Id. at § 8.09, cmt. c ("A principal and an agent may agree that the principal will not give interim instructions or otherwise interfere with the agent's exercise of discretion."). In fact, the principal need not ever actually

exercise this control. It is sufficient for a finding of agency that the principal has the *right* to control the manner in which the details of the work are performed. Gallegos v. Citizens Ins. Agency, 1989-NMSC-055, ¶ 18, 108 N.M. 247.

The Association admits and concedes that it performed its various function and roles on behalf of NMMI. *See* B. Bouchier, Vol. III, 196:7-12; Fillpot, Vol. V, 102:4-18 ("Q. Well, I'm just trying to understand if you believe that the purpose of the Alumni Association is to assist and/or compliment NMMI in carrying out its statutory purpose and goals? A. From the standpoint that we are supposed to work hand-in-hand with New Mexico Military Institute and the administration, and have in the past, I would agree with that statement. Yes, we are here to work with them and to provide valid information for our members who are alums of that organization and to further their contributions in which -- whatever way they want *to make those contributions to New Mexico Military Institute*, whether it be through the Foundation, whether it be *through the Alumni Association*, or any other entity that's able to accept funds for the benefit of the cadets.") (emphasis added); *see also* Ronald A. Coco, Inc. v. St. Paul's Methodist Church, Inc., 1967-NMSC-138, 78 N.M. 97 (fact of agency may be established at trial by agent himself). The Association began the defense of this suit in 2013 by acknowledging that "the [Association] maintained the proud and honorable tradition of promoting and assisting [NMMI] through a variety of fund raising endeavors and scholarship

opportunities to cadets, as well as reaching out and serving the needs of NMMI alumni throughout the country and liaising affairs between NMMI alumni and the Institute." [RP 85, ¶ 1] Indeed, the Association admits in its Answer that "it solicited funds for the benefit of the Institute and on behalf of the Institute." RP 87, ¶ 11; *see e.g.* W. Elec. Co. v. New Mexico Bureau of Revenue, 1976-NMCA-047, ¶ 12, 90 N.M. 164 ("An agent is defined as a person authorized by another to act *on his behalf* and under his control.") (emphasis added); RESTATEMENT § 1.01, cmt. c (2006) (an agent "acts as a representative of or otherwise acts *on behalf of* another person...") (emphasis added); *see also* Def. Tr. Ex. HP, p. 9 ("the Association exists to promote and administer assets for the benefit of the New Mexico Military Institute located in Roswell, New Mexico."); Def. Ex. CZ; Def. Ex. HM, p.3; Def. Ex. L, p. 9 ("the Association exists to promote and administer assets for the benefit of the New Mexico Military Institute.");[12] RP 1779, ¶ 122; Pl. Ex. 39, p. 2 ("fund raising efforts by any of them would be centrally coordinated with a goal of maximizing support for NMMI programs and projects."). True to form, the Association admits in its Brief in Chief before this Court that "[s]ince its original Articles of Incorporation in 1964,

[12] Association board member Carl Reynolds admitted at trial that this statement was, in fact, *the* purpose of the Alumni Association. Vol. IV, 227:22-25 (A: "Those are two of our purposes, yes. Q: Well, those were the purposes, were they not? A. Well, but -- yes.") (referencing Def. Ex. L).

the Association *has functioned as the alumni arm of the New Mexico Military Institute*." BIC, p.1 (emphasis added); *see also* BIC, p. 36 ("The Association has had a close relationship with the Institute in the years since its incorporation."). The Association's own admissions and self-characterization of the parties' relationship as one of principal-agent is, by itself, determinative. *See e.g.* Panzer v. Panzer, 1974-NMSC-092, ¶ 22, 87 N.M. 29 ("No proof is required as to that which is admitted in the pleadings"). Unsurprisingly, the district court held the Association's corporate activities were performed at the direction of and on behalf of the New Mexico Military Institute. [RP 1764 at FOF, ¶ 7, ¶ 123, ¶ 124, ¶ 125, ¶ 126, & ¶ 127; COL ¶ 8] [13]

Additional support of a finding of agency exists in the appellant's corporate name. Until the parties' separation in 2013, the Association operated, solicited funds, and held itself out as the "NMMI" alumni association. NMMI permitted the

[13] The Association does not attack the district courts findings regarding the activities and functions that the Association performed on behalf of NMMI. "In the absence of such an attack, the findings of the trial court are the facts upon which the appeal must be determined." State ex rel. State Highway Commission v. Pelletier, 1966-NMSC-141, ¶ 5, 76 N.M. 555; Ojinaga v. Dressman, 1972-NMCA-017, ¶ 5, 83 N.M. 508 ("These were the facts found by the trial court and not challenged by the plaintiff. They thus become the facts in this court.").

Association to use the New Mexico Military Institute's name and marks to solidify public confidence that support to the Association was ultimately in support of NMMI and its goals—rather than in furtherance of some unaffiliated entity that, despite judicially admitting it solicited its funds on behalf of NMMI, maintains that it owes no duties to the school. Fillpot, Vol. V, 98:13-14 ("It's my position that the Association does not owe any financial duties to NMMI."); Vol. V, 98:6-10. But for the Association's official and recognized affiliation with NMMI—and NMMI's express permission to solicit donations on its behalf— the Association would never have received the funds in its custody. *See* Def. Ex. CE, Article 3.1(b) (the Institute agreed to "[r]ecognize the Association as the Alumni Association for the Institute."); Def. Ex. D, Article 1.2(c). Donors provided funds to the Association in order to support NMMI and its projects, programs, and cadets. *See* Plf. Ex. 143 ("To learn more about the Loyalty Fund and how you can *give back to NMMI*, call the Alumni Office.") (emphasis added); Plf. Ex. 144 ("I send my sincere appreciation to all who have chosen to *support NMMI* and give back to our alma mater.") (emphasis added); Def. Ex. HN (NMMI 024846) ("It was nice talking to you about your intent to establish a scholarship *at New Mexico Military Institute*.... These types of gifts *are crucial to the Institute* as they allow future generations of cadets to attend NMMI.") (emphasis added); Def. Ex. HN (NMMI 024860) ("For the benefit of the New Mexico Military Institute."). Absent NMMI's authorization and express consent for

the Association to act as the official alumni arm of the New Mexico Military Institute, the Association is statutorily prohibited from holding itself out as the "NMMI Alumni Association," unable to use NMMI's marks, and strictly prohibited from soliciting donations in support of the state entity. *See* RP 327; *see also* NMSA 1978, § 57-3B-4; NMSA 1978, § 57-22-6.3 (A)(2). The fact that NMMI permitted the Association to use NMMI's name and marks as an affiliated entity in Association communications and solicitations to the public—distributed from its on-campus office—demonstrates that the Association performed its role as an agent. *See e.g.* Tabet v. Campbell, 1984-NMSC-059, ¶ 9, 101 N.M. 334.

The parties' agreements provide that the Association's undertakings are "affirmative covenants" to be performed "unless the Institute shall have otherwise consented in writing."[14] Def. Ex. CE, Article 2.1. These agreements evidence that the Institute had the express right to control the Association's performance of its

[14] As reflected in the final operative MOA, the Superintendent of NMMI was solely responsible for the coordination and implementation of all Association activities. Def. Ex. CE, Article 4.3. In other words, the parties expressly agreed that Association activities would be subject to NMMI's direction and control. This level of control was expressly agreed to in all versions of the MOAs. *See* 2001 MOA, Article 4.3 & 1993 MOA, Article 4.3.

obligations subject to change only upon prior express written consent.[15] To be sure, the Association was only permitted to fundraise on behalf of NMMI "at such times, and in such manner, as are approved by the Alliance Committee." *See* Pl. Ex. 39, Article 5.2; *see also* MG Grizzle, Vol I, 62:2-6. The Association maintains that one sentence in the prior superseded MOAs negates the decades long conduct of both parties. BIC, p. 40. However, it is the conduct of the parties and the totality of the facts and circumstances of the relationship that defines it as one of agency and not the labels the parties give themselves. Furthermore, the MOAs that contain the noted disclaimer were superseded and no longer in effect at the time of the parties' separation, and therefore are not determinative. After examining the relationship of the parties based upon their conduct as established by the testimony and exhibits, the district court found that the Association was, in fact, the agent of NMMI. The

[15] The Association maintains that there is contradictory evidence in the record, by way of its board member's testimony, regarding NMMI's level of control. However, the district court found such evidence unpersuasive. The appellate court does not "weigh the evidence, nor overturn findings, merely because there is a conflict between the evidence accepted by the court and that upon which one of the parties relied." Lance v. New Mexico Military Inst., 1962-NMSC-066, ¶ 10, 70 N.M. 158; Beltran v. Van Ark Care Ctr., 1988-NMCA-043, ¶ 12, 107 N.M. 273 ("an appellate court will not reweigh the evidence."). Additionally, a principal is free to defer to the agent's exercise of professional judgment in fulfilling its role while still maintaining the right to control the agent's conduct. *See supra* p. 21.

Association used NMMI's name and marks, held its offices on NMMI's campus, sought NMMI approval of its Articles and Bylaws, solicited funds in the name and on behalf of NMMI, was required to provide alumni oriented services to all NMMI alumni, and was tasked "to do generally any and all things which may be deemed advisable, necessary or desirable in the interest of the New Mexico Military Institute, its cadets, faculty, and alumni." Def. Ex. E. The finding that the Association was an agent of the New Mexico Military Institute is supported by substantial evidence and should not be disturbed.

B. ***The parties' MOA is terminable at will as a matter of law.***

The parties' MOA is terminable at will. The Association challenges the district court's conclusion of law that the MOA is terminable at will. Such a challenge is reviewed on appeal by determining whether the law was correctly applied to the facts. Benavidez v. Benavidez, 2006-NMCA-138, ¶ 21, 140 N.M. 637. The parties entered into the MOA in March of 2012; however, it is a contract of indefinite duration and is perpetual in nature. *See generally* Def. Ex. CE. The district court found that the MOA has no definite term, and therefore concluded that it was terminable at will by either party. [RP 2905, ¶ 8]

It is widely supported that contracts contemplating continued performance for an indefinite duration may be terminated at the will of either party. *See e.g.* Melnick v. State Farm Mut. Auto. Ins. Co., 1988-NMSC-012, ¶ 18, 106 N.M. 726 ("the

agreement was for an indefinite period, and it was terminable-at-will."); *see also* Clear Lake City Water Auth. v. Clear Lake Util. Co., 549 S.W.2d 385, 390 (Tex. 1977); Jespersen v. Minnesota Min. and Mfg. Co., 700 N.E.2d 1014, 1016 (Ill. 1998) ("the rule that contracts of indefinite duration are terminable at will has long been followed in Illinois."). New Mexico has addressed contracts of indefinite duration in two primary instances: employment contracts and franchise contracts allowing the use and occupation of public roadways. In each instance, the reviewing courts have concluded that the contract's perpetual nature means that either party may terminate the contract at will. *See e.g.* Trujillo v. Northern Rio Arriba Elec. Co-op, Inc., 2002-NMSC-004, 131 N.M. 607; Melnick v. State Farm Mut. Auto. Ins. Co., 1988-NMSC-012, ¶ 14, 106 N.M. 726 (holding that either party may terminate an employment contract of indefinite duration at any time and without cause); City of Roswell, NM v. Mountain States Telephone & Telegraph Co., 78 F.2d 379, 386 (10th Cir. 1935) (applying New Mexico law to hold that either party may, at will, terminate a license allowing use of the streets for indefinite duration). Such termination is subject only to a requirement that the terminating party provide the non-terminating party with reasonable notice, which was provided here by NMMI's 60-day written notice. Rutter v. Rutter, 1964-NMSC-242, ¶ 13, 74 N.M. 737. The parties' MOA is therefore terminable at will subject only to reasonable notice.

The Association argues that NMMI "submitted no evidence that would support that conclusion." BIC, p. 22. However, the MOA itself, attached to NMMI's Complaint [RP 40] and introduced by the Association at trial [Def. Ex. CE] *is* the evidence in support. Additionally, Association board member, Mr. Bouchier, admitted at trial that either party could terminate the agreement "if it deemed it appropriate." Bouchier, Vol. III, 159:24-160:3 ("Q: And there's is no question is your mind that the Institute could terminate the Memorandum of Agreement if it deemed it appropriate, isn't that correct? A: I believe either party could."). Because the MOA lacks a definite term, as matter of law, it is subject to termination at will by either party upon reasonable notice. Such notice was provided to the Association and the agreement was deemed terminated by the district court. Surely a public educational institution cannot be judicially compelled into a contractual relationship of indefinite duration without its consent. The law—that indefinite duration contracts may be terminated at will—was correctly applied to the facts of this case.

The Association argues that it lacked sufficient notice of the MOA's at-will terminability because it was not specifically pled in NMMI's Complaint. However, the conclusion that the MOA is terminable at will is purely a legal conclusion for the court to decide. *See* 71 C.J.S. Pleading § 15 ("A complaint must contain only allegations of ultimate facts as opposed to allegations of legal conclusions."); Id. at § 17 ("A complaint need only allege facts that establish the right to recovery; not

only are allegations of law or conclusions not required, they are improper. In other words, it is sufficient if the pleader states the facts and leaves the court to find the law."). Furthermore, even if the Complaint contained an allegation that the MOA was not terminable at will the MOA itself controls. *See e.g.* Farmington v. Mumma, 1930-NMSC-076, ¶ 4, 35 N.M. 114 (where allegations of complaint are at variance with exhibits, the exhibits controls). Because this pure legal conclusion is correct as a matter of law and is supported by the district court's finding that the MOA is of an indefinite duration, the district court's conclusion is not erroneous.

C. *Regardless of any written agreement, the parties' relationship is terminable at will as a matter of law.*

As a result of being in a principal-agent relationship, either party could terminate the relationship for any reason at any time.[16] As a matter of law, agency relationships are terminable at will because they are formed and based upon consent. *See* Barron v. Evangelical Lutheran Good Samaritan Soc., 2011-NMCA-094, ¶ 16, 150 N.M. 669; RP 1780, ¶ 6. Absent consent the agency relationship can no longer exists. The agent cannot compel the principal to continue the relationship against the principal's wishes. *See* Hydro Res. Corp. v. Gray, 2007-NMSC-061, ¶ 40, 143 N.M. 142 ("an agency is a fiduciary relationship, whereby the agent is required to act only in the interest of the principal."). The principal always has the inherent power to

[16] The Association does not attack on appeal that the parties' relationship is terminable at will, but rather only that the parties' written agreement is not.

terminate the agent's authority, even if the principal previously agreed not to terminate the agent or to terminate the agent only for cause. RESTATEMENT § 3. 06, cmt. a ("Notwithstanding any agreement between principal and agent, either may terminate the agent's actual authority by a manifestation to the other."); 3 AM. JUR. 2D AGENCY § 37 (an agency relationship "may be revoked at the will of the principal . . . regardless of whether the principal has good reasons for revoking the agency and even though the instrument creating the agency contains an express declaration of irrevocability."). The principal may revoke the agent's authority by a manifestation to the agent and such revocation is effective when the agent has notice of it. RESTATEMENT § 3.09. "The rationale for the power to revoke or renounce is that agency is a consensual relationship. Whether the principal or the agent consents to the relationship is a relevant question on an ongoing basis throughout the duration of the relationship. A manifestation of nonconsent, or dissent, to the other party is *determinative*." RESTATEMENT § 3.10, cmt. b (emphasis added). Permitting the principal to terminate the agent at will makes sense. "The principal's power to revoke the agent's authority reduces the principal's risk in retaining the agent because exercising the power does not require a showing that the agent has breached a duty owed to the principal. Exercising the power to revoke enables the principal to reclaim property that the agent will not rightfully possess following the revocation." Id.

As a matter of law, when NMMI notified the Association that it was terminating the MOA, demanded that the Association transfer the funds in its custody and cease using NMMI's intellectual property, and then filed suit against the Association in state district court, the Association had notice of conduct inconsistent with consent to the continuance of any agency relationship. *See e.g.* Sec. Servs., Inc. v. K Mart Com., 996 F.2d 1516, 1523 (3d Cir. 1993) *aff'd*, 511 U.S. 431 (1994) (a principal "may manifest a termination of consent by conduct which is inconsistent with its continuance."); In re Cont'l Airlines Com., 64 B.R. 874, 879 (Bankr. S.D.Tex. 1986) ("*As a matter of law*, an inconsistent act terminates the authority of an agent.") (emphasis added). Once the Association received NMMI's notice that it considered the parties' relationship terminated, the Association lost all authority to act on NMMI's behalf and the agency relationship between the parties concluded.

NMMI clearly alleged in its Complaint that the parties' relationship was one of agency [RP 2; RP 5; RP 19] and that it deemed the relationship terminated. [RP 13, ¶ 60 ("the Institute elected to terminate the relationship between the two entities."); RP 20, ¶ 101; RP 22, ¶ 121] As a result, the parties' termination was raised in the Complaint and the parties expressly litigated whether their relationship was one of agency and whether that relationship was terminated. Given the district court's finding of agency, the ability of a principal to terminate the agency

relationship is inherent and is conclusive as a matter of law. The Association was on notice of the legal ramifications of the relationship since the filing of the Complaint and cannot defeat this outcome simply by maintaining that the words "at will" did not appear in the Complaint. *See e.g.*, Petty v. Bank of New Mexico Holding Co., 1990-NMSC-021, ¶ 7, 109 N.M. 524. This theory was tried by the parties as the issue of whether or not an agency relationship existed was the crux of the lawsuit.

After a trial on the merits and the evidence presented by both parties, the district court ultimately concluded that "NMMI's action in the spring and summer months of 2013 (terminating the MOA, demanding the transfer of funds in the Alumni Association's custody, and the filing of suit in district court) constitute expressive conduct inconsistent with consent to continuing the parties' agency relationship." RP 2866, COL ¶ 4. Although entered after a motion to supplement, no new evidence was required to be presented to the district court on this legal issue and there is nothing improper about using a procedure outlined in the Rules to supplement or amend conclusions of law following the trial on the merits. Pursuant to Rule1-052 NMRA, either party may move the district court to amend or make additional findings and conclusions and the court may even amend the judgment accordingly.[17] Indeed, a trial judge may even vacate and enter a new judgment. *See*

[17] Even the Association requested that the district court supplement and amend its findings and conclusions post trial. [RP 2179]

Rule 1-059 NMRA; *see also* Rule 1-060 NMRA; Nichols v. Nichols, 1982-NMSC-071, ¶ 19, 98 N.M. 322. The supplemental conclusion of law that the parties' relationship is terminable at will is merely one conclusion of law based upon and supported by the findings and facts as revealed by the evidence at trial. The judgment is still based upon the legal theory (the imposition of a constructive trust) as was specifically plead and requested in NMMI's complaint. This is factually distinguishable from the authority cited by appellant. *See* Credit Institute v. Veterinary Nutrition Corp., 2003-NMCA-010, 133 N.M. 248 (cited for the proposition that the trial court "may not grant judgment for relief which is neither requested by the pleadings nor within the theory on which the case was tried."). Here, the district court's judgment imposed a constructive trust: a legal theory expressly plead in NMMI's Complaint. [RP 20-21]. Because the parties' relationship was one of agency, the relationship was terminable at will as a matter of law regardless of any agreement between the two.

D. ***NMMI suffered a clear injury caused by the Association and remedied by the district court's judgment.***

NMMI has standing to sue the Association to reclaim the property the Association should not be permitted to retain following termination of the parties' relationship or even upon NMMI's demand. The Association admits that it raised funds on NMMI's behalf but denies that it owes any fiduciary duty and disputes that it has any obligation to remit those funds upon NMMI's demand. New Mexico's

standing doctrine requires litigants to allege an injury in fact, causation, and redressability. ACLU of New Mexico v. City of Albuquerque, 2008-NMSC-045, ¶ 1, 144 N.M. 471. Litigants must allege "that they are directly injured as a result of the action they seek to challenge in court." American Federation of State v. Board of County Com'rs of Bernalillo County, 2016-NMSC-017, ¶ 32, 373 P.3d 989. The Association argues that NMMI suffered no injury in fact and failed to allege or demonstrate standing.[18] However, NMMI clearly alleged in its Complaint that it suffered an injury in fact that was directly caused by the Association's conduct, and proved at trial that such injury did occur.

NMMI alleged that the funds in the Association's custody were obtained by it in its role as the agent of NMMI. [RP 5, ¶ 11; RP 19, ¶ 95; RP 19, ¶ 100] The Association admitted that it did, in fact, solicit funds on behalf of and for the benefit of the Institute. [RP 85, ¶ 11] As a result, when the parties' agency relationship was terminated in 2013 and when NMMI demanded that the Association remit its funds,

[18] Both NMMI and the Association were expressly exempt from the registration and reporting requirements of the Charitable Solicitations Act, *see* NMSA 1978, § 57-22-4(B)(1), and nothing in the act "shall be construed to preclude a person or group of persons from asserting a private cause of action against a charitable organization." § 57-22-9(D).

the Association had a fiduciary duty to comply with NMMI's lawful demand.[19] Barber's Super Markets, Inc. v. Stryker, 1972-NMCA-089, 84 N.M. 181; Swallows v. Laney, 1984-NMSC-112, 102 N.M. 81; RESTATEMENT § 8.01. Despite its fiduciary obligation to do so, the Association refused and ignored NMMI's demand. *See* RP 1778, ¶ 118; *see also* Duncan v. Holder, 107 P. 685, 687 (N.M. Terr. 1910) ("the law places upon the agent his duty to account to his principal for any advantage which he may secure in the line of his employment."); RESTATEMENT § 8.09(2).

The Association's failure to comply with its fiduciary obligation to abide by NMMI's demands gives NMMI standing to enforce its rights as a principal and recover the funds raised on NMMI's behalf. The Association is not permitted to retain the funds in its custody following termination of the agency relationship or when NMMI made its lawful demand—both of which occurred here—regardless of the absence of any finding of some other wrongful conduct. *See e.g.* England v. Doyle, 281 F.2d 304, 307 (9th Cir. 1960) ("Property received by one in his capacity as agent is not his, and the general rule is that the agent must deliver such property

[19] This duty exists even absent termination of the relationship. RESTATEMENT § 8.09, cmt. c ("Within a relationship of agency, a principal always has power to provide an agent with interim instructions concerning action to be taken on the principal's behalf."). This is also true had the parties agreed otherwise. Id. ("Even though principal and agent have previously agreed otherwise, an agent has a duty to comply with lawful instructions received from the principal.").

to his principal upon termination of the agency or the principal's demand."); Savage v. Mayer, 203 P.2d 9, 10–11 (Cal. 1949) ("It follows that the principal's right to recover does not depend upon any deceit of the agent, but is based upon the duties incident to the agency relationship and upon the fact that all profits resulting from that relationship belong to the principal.") (internal citations omitted); 3 AM. JUR. 2D AGENCY § 205. Rather, than simply remit, or segregate and keep safe, the disputed funds in the Association's custody and render an account to NMMI, the remaining four board members moved the Association to a new location and began to compete against NMMI using NMMI's intellectual property and, over the course of the litigation, expended approximately $1.8 million of the funds that the district court determined belonged to NMMI. [RP 2936, ¶ 6]

The Association breached its duties as agent by not abiding by NMMI's demand to remit the disputed funds following the parties' recognized separation, by failing to account to NMMI for the funds in its custody, by continuing to use NMMI's intellectual property over NMMI's objections, and by failing to segregate and keep safe the funds that were the subject of the parties' dispute. These actions, which are not in dispute nor attacked on appeal, constitute the injury suffered by NMMI and are sufficient to confer standing. A finding of breach of the parties' written agreement is not necessary and certainly does not permit the Association to continue to retain and expend the funds in its custody over NMMI's objections. *See*

3 AM. JUR. 2D AGENCY § 205 ("an agent must apply agency funds or property for the purposes of the agency, and the agent is under a duty not to apply them to any purpose not authorized by the terms of the agency."); RESTATEMENT § 8.01, cmt. b (an agent must "refrain from using the agent's position or the principal's property to benefit the agent or a third party."); *contra* RP 2870, ¶ 8; RP 2936, ¶¶ 5-6. Failure to deliver the funds to NMMI upon its demand in 2013 and the unlawful retention and expenditure of the funds after demand amounts to unjust enrichment. RESTATEMENT § 8.01, cmt. b ("An agent's liability stems from principles of restitution and unjust enrichment, from the agent's duty to account to the principal, and from tort law. The agent's breach subjects the agent to liability to account to the principal."); *accord* Union Bank v. Mandeville, 1919-NMSC-039.

Here, the district court exercised its broad equitable powers to achieve justice by imposing a constructive trust over the funds in the Association's custody in order to prevent the unjust enrichment that would occur if the Association were permitted to continue its unlawful retention and expenditure of the funds that the Association admits it solicited on behalf and for the benefit of NMMI. [RP 2907 ¶ 4; RP 2870, ¶ 11] "A constructive trust is a relationship with respect to property usually subjecting the person by whom its title is held to an equitable duty to convey the property to another on the ground that the title holder's acquisition *or retention* of the property is wrongful and that unjust enrichment would occur if the title holder were permitted

to retain the property" RESTATEMENT (THIRD) OF TRUSTS § 1, cmt. e (2003) (emphasis added); Bassett v. Bassett, 1990-NMSC-070, 110 N.M. 559; Matter of Estate of McKim, 1991-NMSC-019, ¶ 22, 111 N.M. 517. At a minimum, all that was necessary to impose this judicial remedy was a fiduciary relationship—which exists given the parties' agency relationship. *See e.g.* McKim, 1991-NMSC-019, at ¶ 20; RP 2907, ¶ 3.[20] Because circumstances have so drastically changed and because the organization no longer serves its role as incorporated—no matter how well intentioned its acts may be characterized on appeal—the Association's continued retention and expenditure of funds raised during a legal relationship with NMMI separate and apart from that legal relationship is unjust. Accordingly, NMMI has standing to enforce its rights as principal and the imposition of a constructive trust directing the Association to transfer the funds in its custody to NMMI, or another agent as may be designated by NMMI, adequately remedied the harm caused by the Association's conduct.

E. *To permit the Association to retain the disputed funds would violate donors' intent.*

The Association only had possession of the funds subject to this dispute as NMMI's agent. As the district court found, the Association was specifically tasked by NMMI to go out on behalf of NMMI and solicit donations from the public in

[20] The Association does not attack that there was a fiduciary relationship between the parties.

order to establish scholarships and endowments intended to benefit NMMI and its projects, programs, professors, and cadets. [RP 1779, ¶ 122-127] Indeed, the Association does not dispute nor attack these findings on appeal. *See* Ojinaga v. Dressman, 1972-NMCA-017, ¶ 5, 83 N.M. 508. The disputed funds cannot be decoupled from NMMI as they were obtained by the "NMMI" alumni association. Consequently, given the drastically changed circumstances as a result of the termination of the parties' relationship, the Institute Alumni Association—no longer the "NMMI" association—should not be permitted to retain and administer these funds separate and apart from NMMI over NMMI's objections.

The corporation is no longer affiliated with NMMI and is required to provide a notice of non-affiliation in all of its communications, [RP 629] it is legally incapable of transferring any of its funds to NMMI without a written agreement, which does not exist, and the remaining board members do not believe that the current corporate purpose is to continue to provide support to NMMI, the purposes for which the corporation was established and the premise on which its funds were solicited. Instead, the Association expended over $1.8 million raised on behalf of NMMI "on matters unrelated to providing support to NMMI, the purpose for which the Association solicited and obtained those funds in its role as agent." [RP 2870, ¶ 8] Such drastic change in circumstances surely warrants that the funds that were donated to the Association during its legal relationship with NMMI should not

remain with the Association, in whatever form or shape that corporation may now be, upon termination of that relationship. *See e.g.* In Re Harrington's Estate, 151 Neb. 81, 91-92 (1949) ("the bequest at bar was in effect a gift to the objects and purposes of plaintiff's corporation, and not to the corporation itself...."); In Re Swope's Estate, 121 N.Y.S.2d 181, 182 (1953) ("there can be no assurance that such funds would be used for the purposes contemplated by the testatrix."). The Association is unable to fulfill its corporate purpose "to do generally any and all things which may be deemed advisable, necessary, or desirable in the interests of the New Mexico Military Institute, its cadets, faculty, and alumni," Def. Ex. E, when its leadership has no interest in continuing to support NMMI, *see* Fillpot, Vol V, 100:15-20 ("Q. Would you agree with me that the principal and authorized purpose of the NMMI Alumni Association, now Institute Alumni Association, is to support the function and purposes of NMMI? A. No, I would not."); Fillpot, Vol. V, 125:1-3, and, as a result, NMMI no longer desires for the Association to fulfill its prior role. The district court ruled that the Association controlled funds should be administered either by NMMI or the NMMI Foundation Inc., which has an affiliated relationship and a written agreement with NMMI. The Association is free to continue to exist in whatever form it may choose to assume as an unaffiliated entity of NMMI, but it should not be permitted to retain or expend the funds raised during its agency relationship with NMMI over NMMI's objections.

The district court's judgment does not modify the terms of any wills nor the terms of any trusts. NMMI, or the Foundation if directed by NMMI, will continue to manage the restricted funds in accordance with the criteria established by the donors. There is no change in any of the distributive provisions of the restricted funds.[21] This is appropriate given the district court's broad equitable powers. *See* George T. Bogerts, THE LAW OF TRUSTS AND TRUSTEES § 396 ("Through exercise of its deviation power the court alters or amends administrative provisions in the trust instrument but does not alter the purpose of the charitable trust or change its dispositive provision."); RESTATEMENT (THIRD) OF TRUSTS § 66 (2003). ("The court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.") "The objective is to give effect to what the settlor's intent probably would have been had the circumstances in question been anticipated." RESTATEMENT (THIRD) OF TRUSTS § 66, cmt. a (2003).

Given that NMMI terminated the Association as its agent, the complete absence of any affiliation with NMMI, the legal inability to transfer funds to NMMI, the inability of the Association to have access to protected student information and

[21] As an example, the Godfrey scholarship cited by the Association was established in 1989 through the exclusive work of NMMI employees.

to practically determine what cadets are qualified for certain scholarships, *i.e.* those cadets that exhibit "leadership skills," it is impractical, inefficient, and unjust to permit the Association to continue to administer these funds without any connection or accountability to NMMI. Transferring the disputed funds to NMMI, or to the NMMI Foundation, for continued administration and management in accordance with the donors' placed restrictions on distribution only serves to carry out, not defeat, original intent. The judgment should be affirmed.

IV. CONCLUSION

WHERFORE the New Mexico Military Institute respectfully requests that the relief sought by the Association be denied, that the judgment of the district court be affirmed, and for any other and further relief as the Court deems proper and just.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 12-307 NMRA, I certify that on this 31st day of March, 2017, I caused *Appellee's Answer Brief,* along with this Certificate of Service, to be filed and served on the following by the method reflected:

Person Served	Method
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