Case No. 78341

In the Supreme Court of Nevada

In the Matter of the Estate of MILTON I. SCHWARTZ, deceased.

A. JONATHAN SCHWARTZ, Executor of the Estate of MILTON I. SCHWARTZ,

Appellant,

vs.

THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE,

Respondent.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable GLORIA J. STURMAN, District Judge
District Court Case No. 07-P061300-E

APPELLANT'S APPENDIX VOLUME 22 PAGES 5251–5500

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CHRONOLOGICAL TABLE OF CONTENTS TO APPENDIX

15	Reply in Support of Motion to Dismiss Executor's Petition for Declaratory Relief	10/02/13	2	399–432
16	Recorder's Transcript of Motions Hearing	10/08/13	2	433–475
17	Notice of Entry of Order Denying Adelson Campus' Motion to Dismiss Executor's Petition for Declaratory Relief Without Prejudice & Allowing Limited Discovery	11/13/13	2	476–479
18	Demand for Jury Trial	11/27/13	2	480–481
19	Motion for Reconsideration	12/02/13	2 3	482–500 501–582
20	Opposition to the Executor's Motion for Reconsideration of the Court's November 12, 2013, Order Denying Adelson Campus' Motion to Dismiss Executor's Petition for Declaratory Relief without Prejudice & Allowing Limited Discovery	12/09/13	3	583–638
21	Transcript of Proceeding: Motion for Reconsideration	12/10/13	3	639–669
22	Transcription of Discovery Commissioner Hearing Held on January 29, 2014	01/29/14	3	670–680
23	Notice of Entry of Order Denying Motion for Reconsideration and Re-Setting Discovery Deadline	02/27/14	3	681–684
24	Notice of Entry of Order Regarding Deposit of Funds in Blocked Account at Morgan Stanley	03/07/14	3	685–690
25	Notice of Entry of Order Granting Motion to Modify November 12, 2013 Order and/or Limit Discovery; and Order Denying the Dr. Miriam and Sheldon G. Adelson Educational Institute's Ex Parte Application (with notice) Countermotion to Continue the	03/07/14	3	691–696

	February 11, 2014 Hearing to Allow Discovery Commissioner to Resolve Discovery Dispute			
26	Adelson Campus' Motion for Partial Summary Judgment	04/22/14	3 4	697–750 751–772
27	Opposition to Motion for Partial Summary Judgment	05/27/17	4 5	773–1000 1001–1158
28	Supplement to Petition for Declaratory Relief to Include Remedies of Specific Performance and Mandatory Injunction	05/28/17	5	1159–1165
29	Errata to Opposition to Motion for Partial Summary Judgment	06/03/14	5	1166–1181
30	Adelson Campus' Reply in Support of Motion for Partial Summary Judgment	06/24/14	5 6	1182–1250 1251–1273
31	Supplement to Opposition to Motion for Partial Summary Judgment	07/02/14	6	1274–1280
32	Transcript for Motion for Summary Judgment	07/09/14	6	1281–1322
33	Notice of Entry of Order Denying the Dr. Miriam and Sheldon C. Adelson Educational Institute's Motion for Partial Summary Judgment	09/05/14	6	1323–1326
34	Opposition to the Adelson Campus' Motion for Reconsideration of Denial of Motion for Partial Summary Judgment	10/06/14	6	1327–1333
35	Reporter's Transcript of Proceedings	10/08/14	6	1334–1376
36	Notice of Entry of Stipulation and Order for Protective Order	03/05/15	6	1377–1389
37	Petition for Partial Distribution	05/19/16	6	1390–1394
38	Errata to Petition for Partial Distribution	06/02/16	6	1395–1410
39	Recorder's Transcript of Proceeding: All Pending Motions	08/03/16	6	1411–1441

65	Recorder's Transcript of Proceedings, Pretrial Conference, All Pending Motions	08/15/18	11 12	2647–2750 2751–2764
66	The Adelson Campus' Opposition to the Estate's Motion for Reconsideration of the Court's Order Granting Summary Judgment on the Estate's Claim for Breach of Contract and Countermotion to Strike the 8/14/18 Declaration of Jonathan Schwartz and All Attached Exhibits in Support	08/16/18	12	2765–2792
67	Recorder's Transcript of Proceedings, Pretrial Conference – Day 2, All Pending Motions	08/16/18	12	2793–2868
68	Motion for Judgment as a Matter of Law Regarding Breach of Contract an Mistake Claims	08/31/18	12	2869–2902
69	Trial Transcripts (Rough Drafts)	09/03/18	12 13 14 15 16 17 18	2903–3000 3001–3250 3251–3500 3501–3750 3751–4000 4001–4250 4251–4304
70	Opposition to Motion for Judgment as a Matter of Law Regarding Breach of Contract and Mistake Claims	09/03/18	18	4305–4333
71	The Estate's Motion for Judgment as a Matter of Law Regarding Construction of Will	09/03/18	18	4334–4341
72	Recorder's Partial Transcript: Jury Instructions	09/04/18	18	4342–4367
73	Recorder's Partial Transcript of Jury Trial: Closing Arguments	09/04/18	18	4368–4467
74	Amended Jury List	09/05/18	18	4468
75	Jury Instructions	09/05/18	18 19	4469–4500 4501–4512

76	Verdict Form	09/05/18	19	4513–4516
77	Proposed Jury Instructions Not Used at Trial	09/05/18	19	4517–4520
78	Proposed Verdict Form Not Used at Trial	09/05/18	19	4521–4525
79	Judgment on Jury Verdict	10/04/18	19	4526–4532
80	Recorder's Transcript of Proceedings, Motion for Judgment as a Matter of Law Regarding Breach of Contract and Mistake Claims, The Estate's Motion for Judgment as a Matter of Law Regarding Construction of Will	10/04/18	19	4533–4554
81	Notice of Entry of Order Denying the Adelson Campus' Motion to Strike Jury Demand on Order Shortening Time	10/05/18	19	4555–4558
82	Notice of Entry of Order Denying the Adelson Campus' Motion for Summary Judgment Regarding Breach of Contract	10/05/18	19	4559–4562
83	Notice of Entry of Order Denying the Estate's Motion for Reconsideration of the Court's Order Granting Summary Judgment on the Estate's Claim for Breach of Oral Contract and the Adelson Campus' Countermotion to Strike the August 14, 2018 Declaration of Jonathan Schwartz an All Attached Exhibits in Support	10/05/18	19	4563–4566
84	Notice of Entry of Judgment on Jury Verdict	10/05/18	19	4567–4575
85	The Dr. Miriam and Sheldon G. Adelson Educational Institute's Verified Memorandum of Costs	10/11/18	19	4576–4579
86	Appendix of Exhibits to the Dr. Miriam and Sheldon G. Adelson Education Institute's Verified Memorandum of Costs (Volume 1 of 2)	10/11/18	19 20	4580–4750 4751–4842

87	Appendix of Exhibits to the Dr. Miriam and Sheldon G. Adelson Education Institute's Verified Memorandum of Costs (Volume 2 of 2)	10/11/18	20 21	4843–5000 5001–5123
88	Motion to Retax Costs Pursuant to NRS 18.110(4) and to Defer Award of Costs Until All Claims are Fully Adjudicated	10/16/18	21	5124–5167
89	The Estate's Motion for Post-Trial Relief from Judgment on Jury Verdict Entered October 4, 2018	10/22/18	21 22	5168–5250 5251–5455
90	Adelson Campus' Post-Trial Brief on Outstanding Claims	11/16/18	22 23	5456–5500 5501–5555
91	Post-Trial Brief Regarding the Parties' Equitable Claims and for Entry of Judgment	11/16/18	23	5556–5693
92	The Dr. Miriam and Sheldon G. Adelson Educational Institute's Opposition to the Estate's Motion for Post-Trial Relief from Judgment on Jury Verdict Entered October 4, 2018	11/21/18	23 24	5694–5750 5751–5788
93	The Adelson Campus' Opposition to the Estate's Motion to Retax Costs Pursuant to NRS 18.110(4) and to Defer Award of Costs Until All Claims are Fully Adjudicated	11/21/18	24	5789–5803
94	The Estate's Reply to Adelson Campus's Opposition to Motion for Post-Trial Relief from Judgment on Jury Verdict Entered on October 4, 2018	12/21/18	24	5804–5816
95	The Dr. Miriam and Sheldon G. Adelson Educational Institute's Opposition to the Estate's Post-Trial Brief Regarding the Parties' Equitable Claims and for Entry of Judgment	12/21/18	24	5817–5857

108	Notice of Appeal	03/22/19	27	6516–6517
109	Case Appeal Statement	03/22/19	27	6518–6521
110	The Estate's Opposition to the Adelson Campus' Motion to Re-Tax and Settle Costs	03/25/19	27	6522–6546
111	The Adelson Campus' Reply in Support of Motion to Re-Tax and Settle Costs	04/04/19	27	6547–6553
112	Recorder's Transcript of Pending Motions	04/11/19	27	6554–6584
113	Notice of Entry of Order	07/25/19	27	6585–6595
114	Stipulation and Order Regarding Trial Transcripts	08/05/19	27	6596–6597
115	Notice of Appeal	08/16/19	27	6598–6599
116	Case Appeal Statement	08/16/19	27	6600–6603
117	Notice of Posting Supersedeas Bond on Appeal	08/19/19	27	6604–6606
118	Trial Exhibit 3		27	6607–6609
119	Trial Exhibit 4		27	6610–6611
120	Trial Exhibit 5		27	6612–6620
121	Trial Exhibit 6		27	6621
122	Trial Exhibit 9		27	6622–6625
123	Trial Exhibit 14		27	6626–6628
124	Trial Exhibit 17		27	6629–6638
125	Trial Exhibit 22		27	6639–6645
126	Trial Exhibit 28		27	6646–6647
127	Trial Exhibit 38		27	6648–6649
128	Trial Exhibit 41		27	6650–6675
129	Trial Exhibit 43		27	6676–6679
130	Trial Exhibit 44		27	6680–6682
131	Trial Exhibit 51		27	6683–6684
132	Trial Exhibit 52		27	6685–6686
133	Trial Exhibit 55		27	6687–6713
134	Trial Exhibit 61		27 28	6714–6750 6751–6799
135	Trial Exhibit 62		28	6800–6867
136	Trial Exhibit 111		28	6868–6869

137	Trial Exhibit 112		28	6870
138	Trial Exhibit 113		28	6871
139	Trial Exhibit 114		28	6872
140	Trial Exhibit 115		28	6873
141	Trial Exhibit 118		28	6874–6876
142	Trial Exhibit 128		28	6877
143	Trial Exhibit 130		28	6878–6879
144	Trial Exhibit 134		28	6880–6882
145	Trial Exhibit 139		28	6683–6884
146	Trial Exhibit 149		28	6885–6998
147	Trial Exhibit 158		28	6999
148	Trial Exhibit 159		28	7000
149	Trial Exhibit 162		28	7001
150	Trial Exhibit 165		29	7002
151	Trial Exhibit 384		29	7003–7007
152	Trial Exhibit 1116A		29	7008

ALPHABETICAL TABLE OF CONTENTS TO APPENDIX

	Judgment on the Estate's Claim for Breach of Oral Contract and the Adelson Campus' Countermotion to Strike the August 14, 2018 Declaration of Jonathan Schwartz an All Attached Exhibits in Support			
25	Notice of Entry of Order Granting Motion to Modify November 12, 2013 Order and/or Limit Discovery; and Order Denying the Dr. Miriam and Sheldon G. Adelson Educational Institute's Ex Parte Application (with notice) Countermotion to Continue the February 11, 2014 Hearing to Allow Discovery Commissioner to Resolve Discovery Dispute	03/07/14	3	691–696
24	Notice of Entry of Order Regarding Deposit of Funds in Blocked Account at Morgan Stanley	03/07/14	3	685–690
43	Notice of Entry of Order Regarding the Adelson Campus' Motion for Protective Order	05/08/17	6	1483–1486
8	Notice of Entry of Order to Appear and Show Cause	05/14/13	1	160–163
36	Notice of Entry of Stipulation and Order for Protective Order	03/05/15	6	1377–1389
45	Notice of Entry of Stipulation to Stay Matter Pending Petition for Writ of Mandamus or Prohibition	05/24/17	6	1488–1492
44	Notice of Filing Petition for a Writ of Mandamus of Prohibition	05/17/17	6	1487
117	Notice of Posting Supersedeas Bond on Appeal	08/19/19	27	6604–6606
9	Objection to Petition to Compel Distribution, for Accounting, and for Attorneys' Fees and Ex Parte Petition for Order to Issue Citation to Appear and Show Cause	05/28/13	1	164–230

	Request for All Future Notices to be Properly Served			
91	Post-Trial Brief Regarding the Parties' Equitable Claims and for Entry of Judgment	11/16/18	23	5556–5693
77	Proposed Jury Instructions Not Used at Trial	09/05/18	19	4517–4520
78	Proposed Verdict Form Not Used at Trial	09/05/18	19	4521–4525
73	Recorder's Partial Transcript of Jury Trial: Closing Arguments	09/04/18	18	4368–4467
72	Recorder's Partial Transcript: Jury Instructions	09/04/18	18	4342–4367
13	Recorder's Transcript of All Pending Motions	06/25/13	2	357–385
62	Recorder's Transcript of Hearing on Motions in Limine and Motions for Summary Judgment	08/09/18	10 11	2417–2500 2501–2538
16	Recorder's Transcript of Motions Hearing	10/08/13	2	433–475
112	Recorder's Transcript of Pending Motions	04/11/19	27	6554–6584
39	Recorder's Transcript of Proceeding: All Pending Motions	08/03/16	6	1411–1441
41	Recorder's Transcript of Proceeding: Status Check	09/28/16	6	1455–1464
80	Recorder's Transcript of Proceedings, Motion for Judgment as a Matter of Law Regarding Breach of Contract and Mistake Claims, The Estate's Motion for Judgment as a Matter of Law Regarding Construction of Will	10/04/18	19	4533–4554
67	Recorder's Transcript of Proceedings, Pretrial Conference – Day 2, All Pending Motions	08/16/18	12	2793–2868
65	Recorder's Transcript of Proceedings, Pretrial Conference, All Pending Motions	08/15/18	11 12	2647–2750 2751–2764

	Brief Regarding the Parties' Equitable Claims and for Entry of Judgment			
85	The Dr. Miriam and Sheldon G. Adelson Educational Institute's Verified Memorandum of Costs	10/11/18	19	4576–4579
71	The Estate's Motion for Judgment as a Matter of Law Regarding Construction of Will	09/03/18	18	4334–4341
89	The Estate's Motion for Post-Trial Relief from Judgment on Jury Verdict Entered October 4, 2018	10/22/18	21 22	5168–5250 5251–5455
63	The Estate's Motion for Reconsideration of: The Court's Order Granting Summary Judgment on the Estate's Claim for Breach of Oral Contract and Ex Parte Application for an Order Shortening Time	08/14/18	11	2539–2623
110	The Estate's Opposition to the Adelson Campus' Motion to Re-Tax and Settle Costs	03/25/19	27	6522–6546
57	The Estate's Pretrial Memorandum	08/06/18	9 10	2246–2250 2251–2263
58	The Estate's Pretrial Memorandum	08/06/18	10	2264–2274
94	The Estate's Reply to Adelson Campus's Opposition to Motion for Post-Trial Relief from Judgment on Jury Verdict Entered on October 4, 2018	12/21/18	24	5804–5816
96	The Estate's Response to the Adelson Campus' Post-Trial Brief on Outstanding Claims	12/21/18	24	5858–5923
32	Transcript for Motion for Summary Judgment	07/09/14	6	1281–1322
21	Transcript of Proceeding: Motion for Reconsideration	12/10/13	3	639–669
42	Transcript of Proceedings: Motion for Protective Order on Order Shortening Time	04/19/17	6	1465–1482

22	Transcription of Discovery Commissioner Hearing Held on January 29, 2014	01/29/14	3	670–680
136	Trial Exhibit 111		28	6868–6869
152	Trial Exhibit 1116A		29	7008
137	Trial Exhibit 112		28	6870
138	Trial Exhibit 113		28	6871
139	Trial Exhibit 114		28	6872
140	Trial Exhibit 115		28	6873
141	Trial Exhibit 118		28	6874–6876
142	Trial Exhibit 128		28	6877
143	Trial Exhibit 130		28	6878–6879
144	Trial Exhibit 134		28	6880–6882
145	Trial Exhibit 139		28	6683–6884
123	Trial Exhibit 14		27	6626–6628
146	Trial Exhibit 149		28	6885–6998
147	Trial Exhibit 158		28	6999
148	Trial Exhibit 159		28	7000
149	Trial Exhibit 162		28	7001
150	Trial Exhibit 165		29	7002
124	Trial Exhibit 17		27	6629–6638
125	Trial Exhibit 22		27	6639–6645
126	Trial Exhibit 28		27	6646–6647
118	Trial Exhibit 3		27	6607–6609
127	Trial Exhibit 38		27	6648–6649
151	Trial Exhibit 384		29	7003–7007
119	Trial Exhibit 4		27	6610–6611
128	Trial Exhibit 41		27	6650–6675
129	Trial Exhibit 43		27	6676–6679
130	Trial Exhibit 44		27	6680–6682
120	Trial Exhibit 5		27	6612–6620
131	Trial Exhibit 51		27	6683–6684
132	Trial Exhibit 52		27	6685–6686
133	Trial Exhibit 55		27	6687–6713
121	Trial Exhibit 6		27	6621
134	Trial Exhibit 61		27 28	6714–6750 6751–6799

135	Trial Exhibit 62		28	6800–6867
122	Trial Exhibit 9		27	6622–6625
69	Trial Transcripts (Rough Drafts)	09/03/18	12 13 14 15 16 17 18	2903–3000 3001–3250 3251–3500 3501–3750 3751–4000 4001–4250 4251–4304
76	Verdict Form	09/05/18	19	4513–4516
103	Verified Memorandum of Costs of A. Jonathan Schwartz, Executor of the Estate of Milton I. Schwartz	02/27/19	25	6111–6015

you were doing your own inquiry.

You went out there in two-thousand-and-whenever, maybe that's why you went. I don't know, he doesn't say he went just for that purpose. I don't know why he went, but it just seems to me that he was on notice from the time people started telling him they're not honoring your father's legacy the way you believe they should be. That was inquiry notice, and the problem -- and that's, again, what I keep saying, in the context of what this case is, it is a -- we're talking about the administration of a will here.

Why was this taking so long? It just -- it's -- as you said, there are some cases out there that have lasted for 50 years, I understand that, and we all know that's an unfortunate fact about probate, but this was the will, and it wasn't about the trust, this was just a will, you need to get the will administered, and the big chunk of this, of the estate, was left to -- was possibly encumbered by this legacy to the Milton I. Schwartz Hebrew account.

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So, it seems to me that one would make inquiry when you get notice, somebody telling you, they're not honoring your father's legacy, and you've got inconsistent information, that you would try to resolve it. It just -- I just can't see how he had anything other than notice from whatever they -- the very first time somebody told him something inconsistent with the acknowledgments he was getting from them, why are they still using this letterhead if I'm being told by my friends that they're not honoring it?

You're on notice. So, I just can't see how he can get around the four-year statute of limitations on oral contract, to the extent it's oral. I just can't see it.

So, moving on. So, I'm going to grant that motion, and we've next

005251

got the second motion, statute of limitations. This is the breach of contract motion.

MR. FREER: So, just to be clear on the findings, and the finding is that he was placed on inquiry notice?

THE COURT: Yeah, the facts -- it's clear that he had inconsistent information prior to March of 2010, when he put it in writing. He clearly put it in writing in May. He clearly put it in writing in May that he had been talking to school management for at least a couple of months about solving this problem, but when did he become informed about the problem? I grant you it's not entirely clear, but I don't see how he could have -- it could have been any time other than the very first time somebody told him something inconsistent.

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MR. JONES: But, Your Honor, we would argue that based on his deposition testimony was as early -- this is what he said -- as early as 2007. So, we don't know exactly what he was told in 2007, but we know something about the issue related to breaches, because that's what he put in his May 2010 letter --

005252

THE COURT: Right.

MR. JONES: -- occurred, that led him to believe --

THE COURT: But we have a baseline because of the gala, all of this stuff that was put out because of the gala. I mean that's your baseline. That's what everybody thinks is what it is. What happened afterwards is the problem.

MR. JONES: Your Honor, we'll prepare the order and run it by counsel before we submit it to the Court.

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THE COURT: Okay. So, then we've got breach of contract.

MR. JONES: Yes, Your Honor. Again, I will start by asking the Court if there are any particular areas where you have any questions or things that you wanted me to focus on, I would be happy to do so.

THE COURT: Okay. I understand that your problem is with the oral contract, so I think that's barred by the statute of limitations.

MR. JONES: All right. So --

THE COURT: I mean I just can't get pass the no action on it, but I'm -- how are you trying to define the written contracts? Because there's all these letters, and then there's Board action taken and minutes that document, and there's things being filed with the Secretary of State.

MR. JONES: Well, you -- I think you asked a very interesting question, although I think the question is better put to the Estate. What's the contract? What is the contract?

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So, let's talk about some very basic concepts that we all learned in our first year of law school, is what does it take to form a contract? You have to have a valid contract form, which requires an offer and acceptance.

Okay. So, let's just say, for purposes of argument -- now I'm going to get to this in deeper later -- but let's just say for purposes of argument that there's an offer here that I'll give you $500,000 and you can put -- you give me naming rights. There's a question about what that means, what naming rights are, a big question, but put that aside for the moment. You give me some kind of naming rights in return for the $500,000, and I want those naming rights in perpetuity. Okay. So, that's an offer and let's just say there's an acceptance to that general proposition.

And then you have to have a meeting of the minds, what does that mean? So, what does the naming rights mean? You have to have an understanding on both sides as to what -- perpetuity, I don't think anybody can argue what that means. We all understand what perpetuity means, forever and ever, but you've got to have an understanding of what naming rights means. Then you have to have consideration. How much are you going to give for those naming rights, whatever they are? So -- and then you have to have performance, and then you have to have a beach, and you have to have damages.

Another issue, basic contract law, is you cannot have a valid contract when material terms are lacking or are insufficiently certain and definite, and that goes to the concept of a meeting of the minds. If you can't say what exactly the parties agreed to, and the Court cannot guess as to what that is -- what the parties intended, then you don't have a contract. The Court must be able to ascertain what is required out of the agreement or of the parties with respect to this agreement.

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So, what do we have, Judge? Let's just walk through the litany of things. We have a resolution in 20 -- or, excuse me, in 1989, actually 1990. They point to that resolution as the basis of the contract, right? Mr. Schwartz said, I'm going to give you $500,000, and there's a resolution that says we're going to name the corporation the Milton I. Schwartz Hebrew Academy. The corporation, Your Honor. It doesn't say the grounds, it doesn't say the campus, it doesn't say the buildings, it doesn't say anything about letterhead, it doesn't say anything about the website, assuming there was such a thing in 1990, it doesn't say anything about the signage, it does not say those things.

That is not a contested fact. That is a uncontested fact.

So, we have a resolution that they claim is the agreement. That's when it was made, 1989, everything goes back to '89 and '90 in this resolution. So, if you look at the resolution, it has to contain all of the aspects of the contract in order to be enforceable. But what is a resolution, Your Honor? What is a corporation resolution? Well, we know that a corporate resolution is simply an act of the corporation -- may I approach, Your Honor?

THE COURT: Yes.

MR. JONES: This is statutory, these are Nevada Revised Statutes. NRS 82.201. The Board of Directors can make the bylaws of the corporation. 82.315. Amendment of the Articles. A corporation, whose directors have held a first meeting, or which has members who are not incorporated, may amend its Articles in any of the following respects, by changing the name of the corporation.

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So, we know, as a matter of law, that the corporation can, by subsequent resolution, change its name. So, how does that relate to this case? Well, we know in 1994, when there was this dispute that you brought up earlier, the corporation -- Your Honor, may I approach?

THE COURT: Yes.

MR. JONES: This is another exhibit. The corporation passed another resolution that changed its name and took Milton I. Schwartz off of the corporation.

THE COURT: Uh-huh.

MR. JONES: Now, according to them, that's -- that would be a material breach of the agreement. Mr. Schwartz didn't say at that point, well,

005255

you know, there was a big fight over what was going on and who was going to control the school. He left and started another school.

So, we know, legally, when Mr. Schwartz did that resolution, and the reason I bring this up, Your Honor, think about it. When Mr. Adelson and Dr. Adelson did their donation to the school, what they did, and this is not disputed, there's documentation and counsel has seen these, there was a resolution that the Board passed, and the resolution said that Mr. Chaltiel, who was the chairman of the Board of the corporation, was authorized to sign the contract with the Adelsons, that stated in contractual form what the contract was between the school and the corporation, and it recited that the details of that contract and the consideration paid for that contract.

005256

So, the resolution that was passed there was a resolution for the company to -- or the corporation to enter into a contract. This, by contrast, was simply a resolution of the corporation, which as a matter of law, could be changed by a subsequent Board resolution. And it's not -- in other words, Judge, that is not a contract. It cannot be a contract because -- well, for a number of reasons, but one, it is subject to change by a subsequent Board. Moreover -- may I approach, Your Honor?

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THE COURT: Okay.

MR. JONES: Your Honor, those are bylaws that I'm providing you. Your Honor, those bylaws for the Milton I. Schwartz Hebrew Academy happened after the '96 reunification, if you will, when Mr. Schwartz came back, and Mr. Schwartz was, I believe, Chairman of the Board at the time. If you look at the last page, he was, I think he was Chairman of the Board, he wasn't President, but you will see this is April of 1999. And these bylaws were passed

005256

while Mr. Schwartz was there. And if you look at the -- page 8 of these bylaws that Mr. Schwartz approved as a member of the Board, if you look at Article VII, Section 7.01, it says contracts. The Board of Trustees may authorize an officer or agent of the corporation, in addition to the officer so authorized by these bylaws, to enter into any contract or execute and deliver any instrument in the name of or on behalf of the corporation, and such authority may be general or confined to specific instances.

So, it gives the corporation authority to enter contracts, which we certainly understand it should be able to do. But more intriguingly, if you look at the next page, page 9, these are bylaws, remember Mr. Schwartz approved in 1999, Section 7.04, gifts. The Board of Trustees may accept on behalf of the corporation any contribution, gift, bequest, or devise, for the general purposes, or for any specific purpose of the corporation.

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And here's where it becomes important to this case. The Board of Trustees may vary the use to which a specific contribution, gift, bequest, or devise can be put in the event to use for which the contribution, gift, bequest or devise is to be used, becomes impossible, unnecessary, impractical, or contrary to the best interests of the corporation.

Now, why do I bring that up, Your Honor? Mr. Milton Schwartz, in the videotape of the gala, commented about how without the Adelson's contribution, the school essentially would go away. Now, in other words, without Mr. Adelson and Dr. Adelson's contribution, it would be contrary to the best interests of the school.

So, Mr. Schwartz signed bylaws that said any gift that was given -- now if there's a contractual right, there's a difference there, but there's an

acknowledgment by Mr. Schwartz, as a part of that Board that if there's a gift that's been given, and the use of that gift becomes impractical or contrary to the best interest of the corporation, the corporation can do something else with that gift, can vary the use.

So, that goes to what this company could -- this corporation, under Nevada law, could do with respect to Mr. Schwartz's gift unless there was a binding enforceable contract.

THE COURT: Well, it seems to me that that would only affect this particular situation once Jonathan were to hand over the check for $500,000. They can do with it what they want to do with it.

MR. JONES: Actually, Your Honor, Well, I would --

THE COURT: I don't think it has anything to do with this.

005258

MR. JONES: I would disagree to this extent. There's no limitation as to when the gift was given. Now, if there's a binding contract, I would agree with you. You can't retroactively say well, now we've got a contract with somebody, a written enforceable contract, and we can do something else with the gift, or change the use of the gift because it's not in the school's best interest, but they've got to have a binding contract first.

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THE COURT: I did have a question for you, because it's attached, to the opposition. Dr. Lubin.

MR. JONES: I'm sorry?

THE COURT: About Dr. Lubin?

MR. JONES: Yes. Yes, Your Honor.

THE COURT: Because I realize that this affidavit she has produced in this other litigation, a very contentious litigation over her and her

employment, and resulted in a case, unemployment contract, and all this. I mean that was contentious litigation; but anyway, what she says in here -- and this is like totally unrelated to anything about Mr. Schwartz, this is all about whether or not they properly fired her-- Milton Schwartz became elected to the Board of Trustees -- and this is Dr. Lubin's affidavit, page 8, paragraph 19. Milton Schwartz became elected to the Board of Trustees of the Hebrew Academy after making a large gift to the school. Also, in consideration of that grant, the school has borne his name since 1989. And then paragraph 21, I personally solicited Mr. Schwartz' donation to the Academy. The very donation resulting in the school being named for him.

This all goes back 30 years. This all goes back 30 years.

MR. JONES: Well, I'm glad you brought that up, Your Honor.

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THE COURT: So, if she concedes that --

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MR. JONES: Let me --

THE COURT: -- on behalf of the -- she was the person who, on behalf of the corporation, solicited that donation. She was, I'm assuming, fully authorized, she was the head of school, so I'm assuming she was acting as an authorized agent at the time she did it.

MR. JONES: May I approach, Your Honor?

THE COURT: Sure.

MR. JONES: This is Dr. Lubin's testimony. This is another part of her testimony.

THE COURT: Okay. All right. So, this is her more recent deposition?

MR. JONES: That's right. This is her deposition. This is a

005259

deposition taken, by the way, by the Estate in this case. We ended up asking a few questions until we were cut off by her -- Dr. Lubin's son.

So, if you look at the second page:

Mr. Schwartz donated 500,000 to the Hebrew Academy, in return for which it would guarantee that his name would change in perpetuity with the Milton I. Schwartz Hebrew Academy.

Okay. That certainly supports their argument.

THE COURT: Uh-huh.

MR. JONES: Did you see where I read that?

Yes.

Any disagreement with Mr. Schwartz's testimony here?

No.

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Okay. Affiant was first elected --

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Answer: Only -- the only -- sorry, the only thing that I would add to this would be -- that would be later, that he never -- we never received the other 500,000.

Mr. Kemp: Right.

Mr. Leveque: Do you know what bequest Mr. Schwartz made in his Last Will and Testament?

Answer: The only thing I know is he made a promise to make the contribution of a million dollars, and we got 500,000. I know that we never received the other 500,000.

There you go, Judge. That's the problem, and that goes to the -- what is this contract? She says -- and by the way, not only that, he said -- Mr. Schwartz, himself, said it was $1 million.

THE COURT: Milton?

MR. JONES: I'm sorry, too many Schwartz's.

THE COURT: Yes.

MR. JONES: Yes. Milton Schwartz, himself, said at other times in the past, he gave $1 million, not 500 and pledged 500, he said I gave a million. Dr. Lubin, as you just point out she was the one that was in charge of this, and she said he only fulfilled half of his pledge.

THE COURT: And so then, here's the other half being left in the will, but you changed the name. Isn't that the whole argument?

MR. JONES: Well, no, that's the problem they've got. The will has nothing to do with naming rights. You know, on its face, it does not.

THE COURT: Okay.

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MR. JONES: You can't -- and, you know, that's what they want to do. They want to cobble together all kinds of things to try to create a hole. They're trying basically to make a human, and what's they've created is Frankenstein's monster. It doesn't -- you cannot pick parts out and say, well, wait a minute, this doesn't work, so we'll steal a part from over here and try to plug it in.

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THE COURT: Okay.

MR. JONES: That goes to the essence of the whole point of this motion. You have to have a definitive enforceable agreement. What the heck was it? Was it $1 million, which Dr. Lubin says -- and by the way, for the gift to be complete -- remember, he didn't say -- in that resolution that they're hanging their hat on, it didn't say 500,000 and 500,000 in my will. It didn't say that, it said 500,000, and they would name it in a resolution, not a contract.

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And there is a huge distinction in the law between the two. That's why they've got to go to all these other things to try to cobble them together.

THE COURT: Okay.

MR. JONES: In the petition, Mr. Schwartz says, on page 2: In August, '89, Milton Schwartz donated 500,000 to the Academy in return for which the Academy would guarantee that its name would change in perpetuity to the Milton I. Schwartz Academy. That's -- this is the verified petition, under oath. I apologize, Your Honor. So, may I approach?

THE COURT: Uh-huh.

MR. JONES: This was the deposition of Jonathan Schwartz. Now, remember, I just read a verified petition from Mr. Jonathan Schwartz, half-a-million-dollars, that's the full consideration. That's the agreement. Remember, they're trying to allege a contract here, a written contract, that's the agreement.

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Now, you look at Mr. Jonathan Schwartz's testimony three years later, in 2016. And by the way, we believe the reason he changed his testimony from what he said in his verified petition -- so, by the way, just think of what we got here, Judge. He's testified under oath in a deposition, I swear, under oath, that the deal was a half-a-million in cash up front, and I'll raise a half-a-million from other people. He testifies under oath in a sworn petition to this Court that it's a half-a-million-dollars, period, that's all it was.

So, he says, on page 14,

Question: Was it your understanding the agreement was that the 500,000 be given to the school or that there was a million, as Dr. Lubin said in her book?

Answer: No, here's what the agreement was. Stating it unequivocally. The agreement was that my father would give 500,000 and raise 500,000. That's how the million was arrived at, and that's what he did. He, personally, gave half-a-million dollars and then he rose -- he raised another half-a-million dollars to total million.

They have the burden of proof. They have to show what the contract terms were. They say, under oath, it's half-a-million and that's it. They say, under oath, it's a half-a-million, plus a half-a-million from other people, not from him giving more money, from other people.

THE COURT: But I don't know if anybody asked Dr. Lubin about this, but she goes on in her affidavit, and this is what caught my eye. I think she always disputed that Milton wanted to claim he raised the money from Dr. Sogg (Phonetic) --

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MR. JONES: Dr. Sogg.

THE COURT: -- and George Rudia (Phonetic) --

MR. JONES: Yes.

THE COURT: -- and somebody else. And she goes into this in the affidavit from '93 or '04 or '02, or whatever it was. She was always annoyed by the idea that he claimed to have raised that other half-a-million. She took credit for it.

MR. JONES: Well, I'm going to talk about that, too.

THE COURT: So, isn't that -- isn't that just a question of fact over who raised the money, and was he really -- if he was raising the other half, and he just claimed he had raised that other half? He didn't really raise the other half? I mean how is that inconsistent? I mean she obviously had -- took issue

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with him over -- even back in 1990, whatever, that she's the one who raised that, not Milton.

MR. JONES: I understand your question, and I hope to be able to answer it in my discussions with you today.

THE COURT: Okay. All right. Because just to me, it seems like that's just a question. That it just goes to the whole question of fact of, you know, what were the terms.

MR. JONES: If that -- and I'll go to that point right now if that's a concern of the Court. Just for the record, I want to point out that this was, again, another exhibit. This is a supplemental affidavit of Mr. Schwartz that actually was drafted in connection with that litigation you were referring to.

THE COURT: Yeah, Mr. Schwartz, because that's a subject of another motion. I know I read that somewhere.

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MR. JONES: Would you -- I've got a copy if you would like.

THE COURT: Okay, Yeah, if you've got it because I know it --

MR. JONES: Sure.

THE COURT: -- it's the other motion. I have read it.

MR. JONES: I think -- I assume this is what you're referring to, Your Honor. Milton Schwartz's deposition from 1993?

THE COURT: Right. I remember that now.

MR. JONES: Yeah. And so again, he goes back to the -- all he had to do was raise a half-a-million, not a half-a-million plus half-a-million. So, let me see. So, this is a transcript -- a certified transcript of the interview of Mr. Schwartz. May I approach?

THE COURT: Yeah.

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MR. JONES: I know I've got a lot of stuff here. All right. So ,if you look at this, Your Honor, this is from June of 2007, where again, he goes -- he changes the deal from half-a-million, period, to half-a-million plus he raised a half-a-million. This goes directly to your question. If you look at page 3 of the transcript that I've provided the Court, this is Mr. Schwartz speaking to Dr. Adelson, she said: Quote, I need a million dollars that I can get -- and I can get the land from John Goolsby (Phonetic). She didn't know that I was working on the land at the time, and that John Goolsby -- I don't know the answer. Whether he gave me the land, the land for me or for her. I don't know why he would give it to her, but he owed me.

So, here it goes: I decided to give her a half-a-million dollars. I didn't feel I could afford a million dollars at the time, and I raised a half-a-million dollars, 300,000 from one man, Paul Sogg, a hundred-thousand from Mr. Cohen, Joe Cohen, who's still alive, and I think he's 95 now, 25 from Jerry Renschler's father. I still remember George Rudia, who was my lawyer at the hospital. So that's 825, and other.

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So, here's the problem. Let's just say -- and by the way, it's not 825, he did bad math -- it's 925. But first of all, to even get to this point, you have to assume that there is some definitive term of this so-called contract. We now know, under oath, it's 500,00 only. We now know under oath, it's 500,000, plus raised 500,000. We now know, under oath, somebody else saying under oath, it was a million. So, from, just from Mr. Schwartz, we have three different statements of the consideration paid for these alleged naming rights. And by the way, we haven't gotten to what the naming rights entail, by the way.

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But if you do the math, Mr. Schwartz, himself, can't come up with the number. He doesn't get to a million bucks. And by the way, the uncontroverted evidence, I believe, is that Mr. Sogg only gave 200,000. He never gave the final 100,000. That's the evidence in this case that has not been controverted and there's no evidence to suggest he ever gave 300. He only gave two, which actually does put it back to 825.

Giving Mr. Schwartz every benefit of the doubt, he got a contract -- assuming you had a contract, you have a failure of consideration by the uncontroverted -- uncontrovertable facts. That's a problem. They can't get around that.

So, again, if you want to give them every inference, as a matter of law, because it's a summary judgment, we'll give it to him, that for, hypothetically, because there's a lot of other problems with this contract, but as it relates just strictly to consideration, Mr. Schwartz, assuming you believe the one story, that it was a half-a-million and raised a half-a-million, he, by his own sworn -- or his own testimony -- statement, doesn't get there. And again, the actual evidence shows that Mr. Sogg only put up 200,000.

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So, any questions about that, Your Honor.

THE COURT: No, fine. Okay. So, your issue is that the terms of the contact were not defined, and -- because I think -- okay, never mind.

MR. JONES: I'm sorry, say that again?

THE COURT: So, that is that the terms of the contract are not defined. So, as a matter of law, no contract -- no breach of contract?

MR. JONES: Well, so that's the issue of consideration, but -- of consideration, assuming that there was a contract based upon the one

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statement, but you don't have definitive terms. You have a -- you have a statement at one point that it was a half-a-million, a statement of another point it was a half-a-million, plus give a half-a-million, you have other statements that it was $1 million. And these are coming from the Petitioner, themselves, both Jonathan Schwartz and his own father. They directly contradict themselves as to what the consideration was that was paid. So --

THE COURT: And then we get into this whole issue of well, if he only gave his 500,000, and whether Tamar claimed she's the one who raised the money, or he's raised the money, the total never added up to a million.

MR. JONES: Correct.

THE COURT: Somehow, they got a million, because they were able to get the land from someone. So somewhere, somebody came up with the balance.

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MR. JONES: Maybe --

THE COURT: There had to have been $1 million or they weren't getting that land from someone.

MR. JONES: That could be, Your Honor, but we can't speculate --

THE COURT: Right. Okay.

MR. JONES: -- based on -- and they certainly don't have the right to come in and say well, they got the land, so somebody must have -- okay, we'll concede that, but the burden of proof -- at this stage of the proceedings, discovery's closed.

THE COURT: Okay.

MR. JONES: And one of the other things they're going to say is -- they may say, is Ms. Pacheco shows that Mr. Schwartz gave over $1 million

himself at some point in time. The problem with that argument is she also testified under oath that in 2014, I believe, that Mr. Jonathan Schwartz, after the complaint got filed, all that -- she was the bookkeeper for Mr. Milton Schwartz --

THE COURT: Uh-huh.

MR. JONES: -- after -- a year after the complaint got filed, he told her to destroy all the evidence of the alleged payments. I don't think they, as a matter of law, can rely upon evidence that they willfully destroyed.

MR. FREER: Your Honor, that's not what she said.

THE COURT: Okay. All right.

MR. JONES: Well, it said it doesn't exist.

THE COURT: Okay.

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MR. JONES: And Mr. Schwartz said he don't need it anymore, or words to that effect.

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So, let's go back now to the definitive agreement. They claim, according to Mr. -- remember what their petition is, Your Honor. Their petition is consistent essentially with what Mr. Jonathan Schwartz said in May of 2010. He gets Mr. -- in fact, Mr. Jonathan Schwartz went on to say that even if the school bought other property somewhere else, that Milton Schwartz's name would have to appear on that other property. That's how far it goes. It covers everything. I guess that's based upon something that was in a letter from -- I think it's actually Dr. Sabbath. May I approach, Your Honor?

THE COURT: Yes.

MR. JONES: So, here's the letter. Dr. Sabbath said -- and this was after the dispute, has been resolved with Mr. Schwartz, and they say we're

005268

going to do all these things and put this on a letterhead. We're going to put it on the buildings, we're going to do all these things.

Now, think about this, Judge. There's a contract that supposedly was entered in 1990. This is 1996, there's no additional consideration that's referenced here whatsoever, and, in fact, if you look at the second page, it says: The restoration of the name of the Milton I. Schwartz Hebrew Academy has been taken as a matter of Menschlichkeit, an acknowledgment of your contribution and assistance at the Academy, your continued commitment to Jewish education, reflected by the establishment of the Jewish Community Day School, and last, but not least, your recent action as a man of Shalom.

In other words, totally gratuitous. We are honoring you, but we are -- this is not a contract, there's no Board resolution, there's no Board resolution saying that the Board has agreed to contractually bind itself to these things. And, in fact, Dr. Sabbath's letter says just the opposite. We're doing it as a sign of our respect for you, and essentially, of your humanitarianism. That's what Menschlichkeit means essentially.

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So, is that the contract? If that's what they're alleging is the contract, on its face, it does not comply with contractual law of the State of Nevada. Failure of consideration, failure of authorization from the Board. There's no Board resolution that's tied to this. And so, what this comes down to, Judge, what this all boils down to, is we have a resolution in 1989 that says for $500,000, we're going to put your name on the corporation, that's all it says. It doesn't say we're going to put it on the school, it doesn't say that we're going to put it on the letterhead, it doesn't say we're going to put it on the sign, it doesn't say anything else.

And that resolution is not a binding contract as a matter of Nevada law. Mr. Schwartz, himself, was a member of the Board. In fact, he was the chairman of the Board, which we know for a fact, had the authority in 1994, to pass another resolution, took his name off. And we had another resolution that was passed in 1996 that put his name back on the corporation. And we had another resolution, a valid resolution, in 2007 and 2008, that took his name off the corporation. That is not evidence of a binding contract under Nevada law, and there is clearly no sufficiently definite terms for this Court to enforce such a contract. It doesn't talk about future schools, it doesn't talk about future buildings, it doesn't talk about the campus. And again, what is the consideration for this agreement? They can't even decide themselves.

So, if they can't decide, under oath, how is it they expect this Court to be able to tell the parties what this alleged contract was?

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THE COURT: Okay.

MR. JONES: Thank you, Your Honor.

MR. FREER: Well, Your Honor, in part, I feel like Mr. Jones has done half my job for me. We are not here today to prove the contract or its terms. This is a motion for summary judgment, and we're here to show that there's no issue of material fact relating to the contract or its terms. And his reading of Tamar Lubin highlights why there are issues of fact.

Let me just -- you know, we're talking about law school today, whenever a contract exists, that terms, the existence, the performance, those are issue of fact. We've got issues of fact here. If you want me to go through --

THE COURT: No.

MR. FREER: -- all of the --

THE COURT: I struggled with the statute of limitations on -- I don't struggle with this.

MR. FREER: Okay.

THE COURT: This thing has been disputed since 30 years ago. Nobody can agree on anything, but they had the name on the building. Dr. Lubin says that was the consideration. She disputes who raised the other half-a-million-dollars. I mean it's all -- they've been fighting about this for 30 years.

MR. FREER: Right. And, Your Honor --

THE COURT: And all we're doing is perpetuating a fight that, I think, people thought was over 20 years ago, and it's just never going to be over.

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MR. FREER: And I'll submit to Your Honor that I've got four pages --

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THE COURT: I don't need to hear it.

MR. FREER: -- of additional facts showing that there's a contractual --

THE COURT: Nobody's -- nobody's been able to agree on this thing for 30 years. They have fought for 30 years.

MR. FREER: So, anyway, if Your Honor has any questions for me, our position is there's a lot of evidence here that would go into --

THE COURT: There was some sort of performance, what's that based on? I mean that's been my whole problem all along.

MR. FREER: Right. Well, I mean all you have to do is look at Exhibit D. That is the Hebrew Academy building fund pledges, July 1 through

005271

February 21, 1990.

THE COURT: Uh-huh.

MR. FREER: The first line says: Milton I. Schwartz pledged 500,000. Amount paid, 500,000. Unpaid, zero. That's not anybody's testimony, that's the corporate record. And on top of that, you have performance by the corporation in consideration of pledged 500,000, paid 500,000, unpaid none. They changed the bylaws. They amend the articles of incorporation.

And Roberta Sabbath testifies that, basically -- hang on, let me find my notes here -- that when she -- she went with Tamar Lubin, and they solicited and received Milton's donation. And the agreement was made then and there, to name the school after him, in perpetuity, and that the agreement in perpetuity was memorialized in the bylaws.

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And then we've got testimony of Lenny Schwartzer, who was the legal counsel for the entity at the time. He says he put in perpetuity in there, and I'll quote right here. He said: Perpetuity was included -- this is me paraphrasing right now. Actually, I'll just read it. This is his deposition, and the whole string goes from page 9 at lines 7 through 10 - 21.

Question: Okay. You used the word "in perpetuity." What was your understanding as to why the term "in perpetuity" came about?

Answer: Well, it came about because the discussions I always had Milton when he was discussing with the board members, and I don't remember -- at a board meeting I just remember as part of the discussions. We had non-board meetings where we would have several board members. There were times when I discussed it with him. I did the legal work for him at

005272

the school on a pro bono basis. We used the term --

Sorry, there's a lot. I'm getting there.

We used the term 'in perpetuity' because since it was by far the largest amount of money anybody had ever donated to the school, and it was made possible to build a new school on High Point. Without the donation, there wouldn't be a school.

Okay. So, in consideration of that, it was our understanding and I believe it was our agreement that the school would be named the Milton I. Schwartz Hebrew Academy so long as it was a Hebrew day school.

I can go on. There are issues of fact with respect to whether the contract was -- the contract in existence, the terms. There isn't anything about this that's undisputed. This is an issue for trial. I'd be happy to answer any other questions, Your Honor.

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MR. JONES: Well, first of all, Your Honor, they're trying to enforce the contract. They have the burden of showing that there's a valid contract. And for Mr. Freer to say that the terms are clear. I don't -- as a matter of both fact and law, how can he say the terms are clear when his own client and the testator have said two different things under oath about what the terms were and what the consideration was.

I guess I would ask this Court if we try this case, is the Court going to decide which of the affidavits or which of the testimony -- conflicting testimony to believe? They have the burden to prove. So, are you going to pick or is the jury going to say, well, I've decided I'm going to just -- whatever Milton Schwartz said in 1993, I'm going to believe that's the consideration and I'm going to ignore what he said in --

THE COURT: That's the very thing when I said I was wondering why we have a jury.

MR. JONES: Well, I don't think we're supposed to have a jury, but.

THE COURT: To me this seems like -- this one is so clearly -- I mean what did they agree to? We just have to sort it all out after we hear everything from everybody. Who knows? Whatever they come in here -- and they may have some explanation. I don't know. But to me, there's just too many questions of fact on this one.

MR. JONES: And I appreciate that you're saying that there's too many questions of fact. There is no question of fact with respect to the contradicted testimony of both Jonathan Schwartz and Milton Schwartz. There is no question of fact about that. They have said -- both of them have said, under oath, contradictory things as to what the consideration was.

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THE COURT: Right.

MR. JONES: Nobody can argue about that. That is what it is. That's -- to me, that's the inquiry, because I don't have to put on any evidence of something else. Those are admissions against their interest. That's why I say at this stage of the litigation when they have taken positions on the record under oath, I don't know what else -- what other inquiry could be had. It doesn't matter -- actually, to tell you the truth, Your Honor, it doesn't matter what Lenny Schwartzer said. It doesn't matter what Dr. Sabbath said. It doesn't matter what Dr. Lubin said. It doesn't matter what -- well, who -- Ms. Rosen.

I mean it doesn't matter, because their statements are not relevant to the inquiry when you have the actual party trying to enforce the contract

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saying that I can't tell you or I directly contradict what I tell you to be the terms of the contract. That means that, to me, it is unclear, as a matter of law, what the consideration was.

But the other question is, is this Court I guess finding, as a matter of law, that a corporate resolution -- because that's the only thing they've ever pointed to is -- the bylaws -- the bylaws -- not only can it be changed by the bylaws that were signed by Mr. Schwartz, but the statutes say they can be changed, and they, in fact, did change them to remove Mr. Schwartz's name. The resolutions as a matter of Nevada law can be changed.

So, to me, that's -- unless the Court says a corporate resolution in and of itself, as opposed to a corporate resolution that says the Chairman of the Board can sign a contract is a contract, I think they can't win on that grounds. But --

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THE COURT: Okay.

MR. JONES: -- one other final point, we haven't talked about the statute of frauds, which is a part of our brief. And --

THE COURT: Oh, good point.

MR. JONES: -- there is no question that -- and we've cited case law that says when you have a contract that's in perpetuity, even if one side performs one side of it, if the ongoing obligations of the other side is for more than a year, it's subject to statute of frauds. So, you still haven't been told by Mr. Freer, and we didn't see it in their papers as to exactly what the written contract is.

And, Judge, think about what they're saying. It can't be a resolution in 1989 that is based upon $500,000, and then have some additional

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terms tacked onto it by another document down the road later without any additional consideration. And no resolutions, by the way, no future -- well, I guess there is another resolution in 1996, when they changed it back to the Hebrew Academy, but there's no consideration for that.

So, what is the written contract that gets around the statute of frauds in the State of Nevada? And unless they can point a written contract out to you that complies with all of the requirements of a contract, they lose as a matter of law based upon the statute of frauds. So, I guess I would ask the Court --

THE COURT: Okay. We can discuss that. So, I'll let Mr. Freer address that and --

MR. JONES: Okay.

THE COURT: -- and you can certainly have the last word.

MR. JONES: Thank you, Your Honor.

MR. FREER: All right, Your Honor. Just going back to the one issue of asking what the Court would end up finding. The Court doesn't have to find anything today other than that there's an issue of fact.

With respect to the statute of frauds, the statute of frauds doesn't require that the contract be entirely in writing, it just has to be evidenced in writing. That's the *Edwards* case, 112 Nev. 1025, where a material term might otherwise be omitted, the statute of frauds is still satisfied in part where you've got part performance.

And I disagree with Mr. Jones' case that's cited. That's the *Almaciga* (phonetic) case. It's a Southern District of New York case that doesn't allow the part performance. *Edwards* allows part performance. It says

-- we've presented evidence that at least part if not full performance by Milton and the school had occurred. Because the issue isn't necessarily what the amount of consideration Milton provided. The issue is whatever consideration he provided that is in disagreement was accepted by the school. That's what's in the records. That's what they testified to is he made a donation, the school accepted it, and they changed the name.

And so, for purposes of where we're at today in terms of summary judgment and just getting over that hurdle, that satisfies it.

THE COURT: Right. So, the other thing we forgot to talk about is the countermotion for advisory jury. And I think this gets back to this whole thing we've been talking about all day today is who's going to make these decisions. Do we need a jury, or do we not need a jury? So, what's that? I mean you did request a jury, but --

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MR. FREER: So, the countermotion for the advisory jury is with respect to the supplemental claim for specific performance. We had, as a remedy, a claim that if the Court found or if the trier-of-fact found a breach of contract, that specific performance claim could be heard by the jury in an advisory fashion since it was already listening to all the evidence.

Because obviously we all -- again, we're back to law school stuff here -- we all recognize specific performance. That is a call that the Court ultimately makes. Our countermotion was essentially along the lines of if the jury's going to be hearing everything else, because it should -- and obviously, I know they disagree with that and we'll argue that horse at a later date -- then this Court can also have an advisory jury as to that specific performance claim. That's all it was.

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THE COURT: Okay. And so, my concern with that is as Mr. Jones has raised, at some point we have to confirm -- I mean you've already had 200 people come in and fill out a jury questionnaire. So, we're preparing for this as if it's a jury case. Do we need a jury, and do we need a jury as to what issues, or is this all just going to boil down to these are all just legal concepts, you have to look at the evidence, and we can apply it to the law?

So, are you looking for a ruling on that today? Because I've got to tell you, today I'm just not sure, and I don't think we've ever --

MR. FREER: No, we're not looking for --

THE COURT: -- got it narrowed down --

MR. FREER: -- an issue. We're not looking for a ruling on the advisory jury, not today.

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THE COURT: -- that I really have -- okay, so -- because I'm not -- because that I think is all a part of this bigger issue of do we have a jury at all, right? I guess you still have to --

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MR. FREER: Yeah, I mean obviously we can't request an advisory jury --

THE COURT: Right.

MR. FREER: -- if we don't have a right to a jury.

THE COURT: Okay.

MR. FREER: I will --

THE COURT: Yeah, I just wanted to make sure.

MR. FREER: -- I will concede that point, Your Honor.

THE COURT: Okay. All right. Great.

MR. JONES: Your Honor, we actually agree on at least one thing

today. That's a --

THE COURT: There you go.

MR. JONES: -- that's a start.

THE COURT: Okay. So, I told Mr. Jones he could have the last words on -- in response. I mean again, it just seems from my understanding, your view is as a matter of law, part performance, this --

MR. FREER: Well, and on top of that is -- the other issue is statute of frauds doesn't require the contract to be in writing. It has to be evidenced in writing. And so, where you have this agreement, they go to Milton and he goes in, and he accepts it, gives them the money, that's the agreement. The agreement changes over time. We could go through 45 minutes if you want me to take time to show you all the issues of fact of what has occurred since then, but all that's necessary is that it be evidenced in writing. We have tons of writings here that evidence the term -- that the contract existed.

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THE COURT: Okay.

MR. FREER: And so, it satisfies the statute of frauds from our point.

THE COURT: Okay.

MR. JONES: Okay. Your Honor, and I see where you're leading, but let me just point out something. Unless I'm hearing something different, and maybe Mr. Freer can correct me if I'm wrong, but this contract arose in 1989 or 1990. That's the contract they're trying to enforce, I assume. I don't know if there's something before that time or something else, but unless the Court tells me differently or Mr. Freer does, that's what I assume to be the contract they're talking about.

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We have to start somewhere. I don't know where else to start. That seems to be the starting place where they say this resolution happened. It says his name is going to be -- the corporation is going to be named in perpetuity for him, corporation. So, just think of this simple concept, Judge. This is their contract they're trying to enforce. They have to tell you what the contract says. That's what their obligation is. It's a legal document. That's not a question of fact. It's a legal document.

So, just think of this most basic obvious premise, whatever the contract was in 1989, you can't add terms to it later without more consideration. I hope everybody would agree with that concept. You can't say, well, here's a contract, but we're going to expand it in some future years based upon something else. It's got to be -- all the parts and pieces have to be there in 1989 or 1990. That to me is just the most basic concept we're dealing with.

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So -- oh, and by the way, I have to bring this up. Mr. Carlson pointed out to me I misspoke about Ms. Pacheco, and I probably offended Mr. Schwartz unintentionally. He reminded that she didn't say -- I don't know where I got that in my head. I thought I heard her -- recall her saying that she said -- and I don't mean this he was doing it nefariously, but that said to get rid of that stuff. They didn't need it anymore.

MR. FREER: There's always advocacy.

MR. JONES: But she did testify, as Mr. Carlson pointed out, that she lost the checks and the check register while moving their office. So, I needed to correct the record with that. I --

THE COURT: I appreciate that.

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MR. JONES: -- apologize to Ms. Pacheco and to Mr. Schwartz.

THE COURT: That's fine.

MR. JONES: Okay. So, getting back to this whole premise. We have a contract supposedly in 1989 or 1990. Whatever that was, that's it. You can't try to change it from there. So, they rely heavily on the *Edwards* case. That was Mr. Freer's whole big argument. Well, yeah, but it has to be substantially in writing. Well, let's look exactly. We cited this on page 11 of our reply, quote: It is the consensus of judicial opinion that such a writing must contain all the essential elements of the contract. The substantial parts of the contract must be embodied in writing with such a degree of certainty as to make clear and definite the intention of the parties without resort to oral evidence.

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Judge, if their claim here is that the contract is the resolution, the resolution is otherwise the statute of frauds. There is no other contract they can point to. You can't talk about a contract down the road. They didn't make a new contract. Everything goes back -- Mr. Milton Schwartz's testimony, Jonathan Schwartz's testimony all goes back to 1990. Then as a matter of law, the only writing they have, assuming the resolution is a valid and binding contract, which I would dispute to my dying day until the Nevada Supreme Court tells me otherwise, but let's just assume for purposes that it is.

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It says his name of the -- the name of the corporation will be Milton I. Schwartz. So, at a bare minimum, this Court should rule as a matter of law that the most they could argue about or the most they can get in this dispute is that the corporation should be named the Milton I. Schwartz Corporation in perpetuity. Now, of course, we adamantly disagree with that, but the very

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case they're relying upon says: The substantial parts of the contract must be embodied in writing with such a degree of certainty as to make clear and definite the intention of the parties without the resort to oral evidence.

There's nothing else in that resolution, and there's no other document that talks about it.

And a memorandum in order to make enforceable a contract within the statute may be any document in writing, formal or informal, signed by the party to be charged or by his agent actually or apparently authorized thereunto, which states with reasonable certainty each party to the contract either by his own name or by such a description as will serve to identify him or the name or description of his agent; the land, goods, or other subject matter to which the contract relates; and the terms and conditions of all promises constituting the contract and by whom and to whom the promises are made."

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In the *Edwards* case, the Court reasoned that there was conflicting testimony regarding two of the documents. One of those documents merely indicated a factual circumstance, but did not establish any of the terms or promises in the alleged agreement. And a letter between the parties was insufficient because it did not establish the consequence of a default or establish liability.

Your Honor, it violates the statute of frauds or all they've got is a resolution. That's it, one or the other. Thank you.

THE COURT: Okay. Thanks. As I said, this -- there have been questions about this for 30 years, and I don't know that we are any closer. We're just going to have to hear the evidence. Whoever that finder-of-fact is, whether we decide we don't need a jury, which has been puzzling me.

Okay. So, I'm going to deny that motion. I think that there remain to be too many questions of fact that would have to be decided before we could answer the issues of law.

So, on this -- with respect to those motions, I think we are done, but we do have the stack of motions in limine, some of which are pretty easily resolved, and others are not. So, the only thing remaining there is I do have the motion to strike the jury demand on an order shortening time. So, what's -- we still need to get that question answered. What's the -- I mean it's next week. Are we having a pretrial conference sometime, we can put this on with a pretrial conference?

MR. LeVEQUE: Just a calendar call, I think.

MR. CARLSON: Yes.

[Court and Clerk confer]

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THE COURT: Okay. On Wednesday? Okay.

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MR. JONES: I think that's -- yeah, that's on Wednesday at 10:30, Your Honor.

THE COURT: Okay. So, we'll discuss it then.

MR. FREER: We will -- let's go with that and then if we need more time, we'll let the Court know. I understand, but if they've done a fantastic 50-page motion, I may --

MR. JONES: It's -- I think it's about two pages long.

THE COURT: Okay.

MR. FREER: Okay.

MR. JONES: It's not that long.

MR. FREER: So, we're either or we can do it.

THE COURT: Okay. All right.

MR. FREER: The only thing --

THE COURT: Yeah. Uh-huh.

MR. FREER: The short answer is, yeah, I would be fine on the 15th to go forward with that. The only possibility, and actually it's occurring right now as we speak, is Judge Gonzalez is moving my final closing arguments in a matter that is supposed to occur that morning at 8:00 to some other time, and I believe it's that day. It would be the afternoon, though.

THE COURT: Okay.

MR. FREER: So, if I've got a conflict, let's -- I'm fine however long you want to schedule this on the 15th.

THE COURT: All right. Well, I'll return this. Okay. He'll bring it over to you. I put it on, just for the record, on the 15th at 10:30, the 15th at 10:30. So, it's actually six pages, so -- but still that's not that bad.

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So, with respect to our motions in limine, some of these kind of flow from the others. They did serve omnibus opposition on these issues about out-of-court statements, and then we have these issues with respect to the two experts, which I thought kind of fit together. So, rather than go just directly in order, if we could discuss maybe first the experts and what they can say or shouldn't be allowed to say, and then we can do the hearsay issues.

MR. JONES: Sure. That's fine with me, Your Honor.

THE COURT: So, it's motion in limine 1 and 2.

MR. JONES: You know, Your Honor, they are -- I don't think they're complicated points. I think that -- I think our motion with respect to -- let me see if I can find my stuff here.

THE COURT: Well, one thing first because the way they're captioned is to strike the expert report and preclude him from testifying.

MR. JONES: Right.

THE COURT: And, typically, I don't admit reports.

MR. JONES: Sure. Okay.

THE COURT: So, the report itself is only used to allow them to like refresh their recollection or impeach them with something. So, technically, that part of it, I don't think there's any dispute on it. It's just this question that with respect to precluding them in their entirety, versus just not letting him testify about certain things that were in those reports.

MR. JONES: Yeah, and I appreciate it. I think that's my understanding of the rule, but some judges allow the reports in so out of an abundance of caution, I -- I think I've tried cases in front of you where I believe you, consistent with your ruling, you didn't let them in, but I wanted to make sure. So that's why we did that.

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THE COURT: I think I did issue that, yes.

MR. JONES: Well, with respect to --

THE COURT: The Rabbi Wynne first.

MR. JONES: Yes, Your Honor. Well, he has three opinions. His belief that it was Mr. Schwartz -- Milton Schwartz's practice and intent that the naming rights accompany his contribution. I don't know how in the world that's an expert opinion. It's a nice way to get around the hearsay rule, but the fact that he knew Mr. Schwartz and Mr. Schwartz confided in him, and assuming he did, and I don't doubt that he wouldn't -- if the Rabbi says he did, that they did have discussions and maybe about this very subject, but how in

005285

the world is that possible appropriate to have him testify as a so-called expert witness? I've never heard of such a thing.

The second opinion is hearsay conversation where he says Mr. Schwartz told him in 1994, that he'd give a million dollars to the school if the school would be named for him, which of course, interestingly enough, contradicts his other statement.

THE COURT: No. No, this is what -- the Rabbi is the one who started the other school. And for a period of time, Milton was involved with the other school.

MR. JONES: Right.

THE COURT: And he promised them $100,000 if they'd name that school after him.

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MR. JONES: Oh, I'm sorry.

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THE COURT: That's how I read that.

MR. JONES: Okay.

THE COURT: Which I think is just fact.

MR. JONES: Well, maybe I just misread it, but then --

THE COURT: I don't think that's -- that's an opinion.

MR. JONES: And then telling him that it was his understanding -- Milton Schwartz told him that what his understanding was of his intent in naming the school.

Your Honor, I guess I would have to ask this Court how in the world is that appropriate in a court of law to have a rabbi come in and say, well, you know, in the Jewish faith that this is something that's important to people and, therefore, that's why he did it. I think that's appalling.

THE COURT: That's the ultimate question. That's the ultimate question. So, I'm not sure he can say that, but I did think some of this was proper expert testimony because many of us may not know some of these -- and, you know, this is his opinion as to what the Jewish religion provides for, but there's -- on the first page of his report, it starts like the fourth paragraph, the long paragraph: In the Jewish religion, it is important for members to perform good deeds. I mean to the extent the jury needs to hear that, I think --

MR. JONES: And how does that relate to --

THE COURT: -- I think if that was just the jury.

MR. JONES: -- to necessarily relate to Mr. Schwartz? Because that's a general statement, so --

005287

THE COURT: Right.

MR. JONES: -- how is it relevant to our trial unless they can relate it back to Mr. Schwartz? And the only way they could do that is through hearsay. You can't bootstrap in a, at least from my perspective -- I mean I could think of all kinds of absurd results. I'll start getting experts for all kinds of interesting propositions that would then allow me to somehow or another bootstrap hearsay testimony in.

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Because even if he says that, what relevance does that have in this case unless it could be tied back to Mr. Schwartz and his intent that there is -- that some Jewish people that have this belief and that the Jewish faith, this is an important issue. How religious was Mr. Schwartz? And if he was real religious, is that like he did this? That to me is exactly what the hearsay rule has been created to prohibit.

So, I don't know -- you know, obviously the Court's going to do what it --

THE COURT: Uh-huh.

MR. JONES: -- it thinks is right, but I -- is there anything else that the Court thinks is appropriate for the rabbi to testify about?

THE COURT: Well, I was wondering because he seemed more of a fact witness to me than an expert. He --

MR. JONES: Well, he is.

THE COURT: -- he has these two incidents that he relates where he says: When Milton was on his break from the Hebrew Academy, he came to me in my little school that I had started and said I'll give you $100,000 if you name it after me, but then he, again, he mended fences and went back to the Hebrew Academy. So that's just a fact.

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And then he talks about how in 2004, he was associated with something different and Milton said, would you -- if I give you money, would you name the educational sanctuary after him. And the guy said, I did. He gave me the money, and I did it.

So, I have problems with going on and then tying that somehow to the Schwartz -- the Milton Schwartz Hebrew Academy concept. I mean I did see that he does have expert information about the theory of within the Jewish religion of why one --

MR. JONES: I --

THE COURT: -- makes charitable contributions kind of like Dr. Sabbath said in her letter we're recognizing this about you.

MR. JONES: I certainly understand that part of your point, Judge.

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I don't know how that has any place in a trial in this case. There's no evidence that Mr. Schwartz did -- not from Mr. Schwartz -- Milton Schwartz -- there's no evidence from Mr. Schwartz, other than hearsay, that the reason he did this is because of the reasons as dictated by the rabbi as something that could have been the reasons he did it.

And so, what -- the problem with that kind of testimony is if the Court allows it in, let's just say we had a jury, then the jury hears -- they -- I think that that provides a great basis for error. Well, if the Court allowed that in, that must have been the reason that he did it. If you don't allow the hearsay in -- which I think it would be clear error to allow that kind of a statement in from the rabbi of what Milton Schwartz told him -- if you don't allow it in, then you've got this testimony in a vacuum. And the only inference to be raised as to why it came in is because it must relate to this case and that must be the reason why Milton Schwartz did this.

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I just think it creates a terrible precedent and a terrible circumstance for testimony that is disconnected to the specific issues in this case. I'm not --

THE COURT: Okay.

MR. JONES: -- disputing that he's a rabbi and he has some rabbinical knowledge and that's all well and good, but how is that appropriate to come up in this case? There's nothing in the bequest. There's nothing in the resolution that says -- that talks about this issue and suggests in any way, shape, or form that this is why he was doing it.

THE COURT: So, even -- he does have religious knowledge, and it's here in this one little -- in two little paragraphs about this is the basic tenet

of the Jewish religion or whatever.

MR. JONES: Right.

THE COURT: I can see how he's an expert there, but I understand your concern that how he can link that to Milton is -- I mean that seemed like he's making -- I don't know how he gets there. He does have factual information, though. He has two specific incidents when he talked about money and naming things with Milton. He had two conversations. Those are just fact.

MR. JONES: I agree.

THE COURT: It's not an expert opinion. It's just a fact. He's just a fact witness.

MR. JONES: And those facts are blatant hearsay, and they're excluded by the hearsay rule.

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THE COURT: No, not really. I mean --

MR. JONES: Why would they not be, Your Honor?

THE COURT: Milton came to him and said --

MR. JONES: It's an out-of-court statement being offered for the truth of the matter.

THE COURT: Right, but what did the -- Rabbi Wynne do in response? When he -- Rabbi Wynne testified the reason why at whatever this is, I don't know -- the Schule --The reason why it ended up this being named the Milton Schwartz Education Center is because that was the condition of the gift, so I honored it. That's -- isn't that (indiscernible) testimony?

MR. JONES: Well, he can say that -- he can say what was in his mind --

THE COURT: Uh-huh. Right.

MR. JONES: -- his belief. He can't say what Milton Schwartz said to him.

THE COURT: Okay.

MR. JONES: There's a difference. I certainly can appreciate that point, but, again, how that's -- and that, by the way, is not being -- he's not being -- he's being offered here as an expert witness, not as a fact witness. And so, if that's the Court's position, I would vehemently object to them then trying to use him as a fact witness when they've offered him as an expert.

THE COURT: Okay. Thanks.

MR. FREER: Your Honor, you kind of hit the nail on the head with respect to he's both. He's a percipient expert, nothing different than a treating physician. We agree with you that the only expert testimony there is paragraphs 4, 5, and 6. The rest of it is fact witness. And the purpose for the expert testimony is to allow him to lay a foundation regarding the tenets of Jewish religion to put into context the statements or the conversations that he had with Milton.

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Now, back to the whole hearsay, it does relate back because hearsay in this case in terms of the portion of the trial dealing with the construction of the will, hearsay is completely admissible for any and all reason with respect to the decedent and his intent.

THE COURT: Right, but here was my concern about -- he seems to just be drawing the ultimate conclusion. From my conversations with Milton, I know that he was very aware of these concepts from the Jewish religion. Indeed, he was keenly aware of the dual need to provide charity to education

005291

and to preserve his namesake and legacy in order to continue his progression in the afterlife.

MR. FREER: And that was based on the 15 -- 13-year relationship they had with each other in the conversations.

THE COURT: Can an expert make that kind of conclusion?

MR. FREER: Well, I mean if you want to limit --

THE COURT: Because he's not talking about the will.

MR. FREER: -- if you want to limit that ultimate issue, but in terms of the hearsay discussions, I mean we briefed the hearsay with respect to intent --

THE COURT: Yeah.

MR. FREER: -- ad nauseum.

THE COURT: Yeah. Right.

MR. FREER: And --

THE COURT: But my problem here is that he wasn't dealing with Milton that last -- it's interesting. The last time he came back to him and said, do you need some money, $100,000, name it after me, that was right about the time he wrote the will. I mean I know it was amended a couple of times, but that's right about the time he wrote the will in 2004.

But it doesn't seem to indicate that that was in the context of writing his will. And so, that's kind of the distinction here. I mean he could draw his conclusions about why Milton wrote his will the way he did, but that's not based on anything Milton might have sat down and talked to him and say, look, I want to try to honor this principle that we've talked about and, you know, how would I do this? Would it work if I do this in my will?

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It's just a general -- I had general conversations with him about these issues. Okay. But I don't -- how can you draw that conclusion? I mean it doesn't seem to me --

MR. FREER: Well, maybe we limit that ultimate conclusion. But the issue here is whether or not he's allowed to testify at all.

THE COURT: Right.

MR. FREER: And, clearly, he meets the standards for an expert with respect to paragraphs 4, 5, and 6. He also has percipient testimony with respect to that. And, you know, with respect to discussions regarding the intent and stuff, you go back to the *Jones Estate* case where basically in matters of will construction, any evidence is admissible to explain what the testator meant. And so, all this does is help lead to what -- remember this Court said, the ultimate question of fact, and this is the order of 3/10/15: The ultimate question of fact will be decided by the jury on the Adelson Campus' claim to compel distribution is whether Decedent Milton I. Schwartz intended the 500,000 bequest, identified in Section 2.3 of his Last Will and Testament to be made only to an entity named after him bearing the name Milton I. Schwartz Hebrew Academy.

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And with respect to both the Jewish tenets and beliefs and his interactions with Milton, that is evidence that is relevant to what Milton understood and intended when he drafted his will. Did he draft --

THE COURT: So, again, because your couching this guy as an expert, which puts him kind of in a different category in the jury's mind. Based upon such conversations, it is my firm belief and understanding that this was Milton's lifelong practice and intent to make contributions that would

005293

bear his name and ensure a legacy for his name. Indeed, from our conversations, it was Milton's clear intent that the Milton I. Schwartz Hebrew Academy be named after him in perpetuity for reasons including, but not limited to, religious beliefs that he could only progress in the afterlife through good deeds bearing his name.

MR. FREER: That's a great conclusion, Your Honor. I would love to keep that conclusion, but if Your Honor's got problems with it --

THE COURT: I don't --

MR. FREER: -- we'll have a limiting instruction with respect to --

THE COURT: I'll --

MR. FREER: -- the ultimate -- with that ultimate conclusion.

THE COURT: Yeah, how can he come to this? He can't invade the province of the jury.

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MR. FREER: He's a very talented man, Your Honor.

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THE COURT: Okay. All right. He can't invade the province of the jury.

MR. FREER: So, I mean but bottom line, what we're looking for is just having the foundation laid as to what the Jewish customs and beliefs were --

THE COURT: Uh-huh.

MR. FREER: -- because we're talking about what did Milton understand and what were his beliefs when he was drafting that will.

THE COURT: Uh-huh.

MR. FREER: Having him talk about paragraphs 4 ,5 ,and 6 with respect to the donative intent, and the meetings, and the dual purposes, that's

005294

clearly within his realm as an expert. If Your Honor wants to limit the amount of testimony that it has in terms of coming to an ultimate conclusion based on that, that's fine, but he should be allowed to testify as to those Jewish tenets and beliefs, and he should be allowed to testify as to his personal knowledge of interactions with Milton in terms of drawing an ultimate conclusion. I will stipulate here and now that he can't draw an ultimate conclusion.

THE COURT: Okay. Thank you.

MR. JONES: Think about what they're saying, Judge. They're saying they want to be able to get the rabbi to say in the Jewish faith, this is why you do something like this. And that alone -- so what happens in closing argument? What does a lawyer say? The lawyers says that's why -- as the rabbi told you, that's why Milton Schwartz did this. That's why this was important.

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So, even though there will be no testimony to that effect, that's what the lawyer's going to say in argument.

THE COURT: Uh-huh.

MR. JONES: That is totally inappropriate because that wouldn't be what the evidence is. This is testimony that you're suggesting that it be allowed, it would be given in a vacuum. So, there's a general proposition. That's like stereotyping that every Jewish person in the world, this is the only reason they would have done it because that is the only reason they want it in is to create an inference that that's why Milton Schwartz did it.

And, by the way, you cannot be an expert witness and a percipient witness. You can't be both.

THE COURT: Right.

MR. JONES: So --

THE COURT: Well, a treating doctor technically is, but --

MR. JONES: Well, you're right.

THE COURT: But --

MR. JONES: A treating doctor is an exception.

THE COURT: Right. But --

MR. JONES: I'm sorry. Go ahead, Your Honor.

THE COURT: -- but I mean this is not in the same context. He doesn't talk about this being in the context if I was his religious advisor. He talks about this in the context of they were friends and they talked about religion, and they --

MR. JONES: And that's really interesting --

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THE COURT: Okay.

MR. JONES: -- but it has nothing to do with admissible evidence in a court of law by an expert witness.

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THE COURT: Uh-huh.

MR. JONES: And think of the prejudicial effect. You get to say the statement. It's like the smoking gun kind of thing. You get to throw out the smoking gun, and then in closing argument the lawyer gets to point and say they're the ones that were holding the gun.

THE COURT: Uh-huh.

MR. JONES: It's just completely -- I've never heard of any such a thing. And, by the way, this whole idea of the decedent's intent, that's okay to talk about, that is in connection with a will issue, an issue in the will.

THE COURT: Right.

MR. JONES: The will has nothing to do with naming rights. I defy Counsel to point to me where it says in the will that I've given this half a million dollars for the naming rights. It doesn't say that.

THE COURT: Right. Yeah. And so, I understand that, which is why it seems to me that I appreciate the fact that he's identified as an expert, but it really seems that he's more of a percipient witness because he had these two interactions with Milton that were consistent with how he acted in the naming of the Milton I. Schwartz Hebrew Academy. Those were -- just because -- it does go to -- in the context of a will, it does go to what did the person who wrote the will mean in those words. And that's where we get into this whole problem of what if there's no more Milton I. Schwartz Hebrew Academy.

So, that testimony, it seems to me, is relevant to the idea of would he have only wanted it to be -- if it was the Milton I. Schwartz Hebrew Academy or would it -- because with no -- this is about drafting wills. This is all this is relevant to. This is not relevant to did he have an agreement, did they breach the agreement. It's not. This is a very -- that's why it's such a mess.

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This is about the will. And that's what I keep saying, this is about the will. What did he mean when he said in his -- and I understand we've gotten into this whole -- of whether there was an agreement in perpetuity, but it's really about this will. What does that language mean when you don't have a successor clause that says, I leave this to the Regional Justice Center or whatever successor courthouse there may later be. That's the will. That's the will issue.

All he's talking about here is I dealt with him twice in which -- the

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way he dealt with me is consistent with how -- why he would have -- this is what he would have meant in -- the jury should think this is what he meant in the will.

MR. JONES: No, you see I --

THE COURT: So, that's the problem with this. It's trying to jumble up three different things.

MR. JONES: And I believe that --

THE COURT: I'm sure he meant well, and he was just telling the truth about his interactions.

MR. JONES: Sure.

THE COURT: But I have real problems with it, the way it's written.

MR. JONES: Well, obviously, as do we, Your Honor.

THE COURT: Yeah.

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MR. JONES: And we would ask that he be stricken. It's not appropriate for him to testify in this case. It's just not. Any testimony he gives that is not clearly hearsay is speculative in nature.

THE COURT: Right. Okay.

MR. JONES: So, as to what Mr. Schwartz's intent was in 1990.

THE COURT: Right. Yeah. Because, of course, it predates. But I'm only talking about -- this to me is relevant to the will --

MR. JONES: I understand what you're saying.

THE COURT: -- which he wrote in 2004.

MR. JONES: I understand.

THE COURT: And it's consistent with what he at the -- here at the same time was talking to his friend about, about giving money to his

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organization which, in fact, named a room after him. That's interesting. That's relevant to the will, but the rest of it I just have a real problem with.

MR. JONES: So, you're ruling is, Your Honor?

THE COURT: So, I mean I understand they named him as an expert. And I appreciate the fact that he is an expert. I don't know that there is any way you could couch his testimony other than invading the province of the jury with respect to what went on. And besides it's very speculative because this all went on before he ever knew him. So, that's my problem with most of this.

The two anecdotes about the two times he dealt with Milton on naming rights issues, those to me are relevant, but they're facts. He's not an expert. Those are just facts that I had two interactions with Milton, other than our long relationship. I get that, but I met him in 1994 in the middle of his fight with the Hebrew Academy and he was talking about -- and he made this offer. We didn't accept it, whatever. That goes to when he then wrote his will in 2004.

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I mean I can see how there's -- the 2004 one to me is much more relevant to the will. That's around the same time and it's totally consistent with what he was doing in this odd language that he used. I mean did Oshins really write this will? I think -- didn't Jonathan write it for him? I think Jonathan wrote it for him. He and Jonathan stepped down. Didn't they write this will together? Because this will is, I could tell you, not work product out of that office. It seems this was a self-drafted will, as I recall. Really odd language. It would not have looked like that had any of these people actually written it for him.

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So, if the argument is can he be introduced as an expert? Although he has information and expertise, which is undeniable, undeniable that he is an expert on the teachings of the Jewish religion, that to me -- I just don't see how you can get that in, because you have to make this ultimate conclusion that this is why he wrote the will the way he wrote it. And an expert can't do that. An expert can't do that.

So, I don't see how his testimony could be anything other than as a fact witness based on these interactions that he personally had with Milton. He just -- it's unrelated to why he did what he did. He can't say in 18 -- 19 -- not 18 -- 1988 that this was what motivated Milton. I just don't see how he can do it. I don't think there's any way you can use it as expert testimony from him.

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I do disagree with you, although I think it's incredibly specific as to does he have factual testimony he can give. That's a different question, and --

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MR. JONES: Well, they didn't offer him as a fact witness, Your Honor.

THE COURT: -- in a different way. So --

MR. JONES: And we would object if they try to offer him as a fact witness now.

THE COURT: Okay. All right. So, that's the question then. If you -- it's a Rule of Civil Procedure question, which does apply in probate. You know they don't want to. He's identified as an expert witness, and -- but really what he is to me is a fact witness, but he wasn't identified as a fact witness.

MR. JONES: He's not.

THE COURT: And so, if he can't testify as an expert, can he testify

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at all? That's the question.

MR. JONES: We would object to him -- we'd move to strike him as a witness and certainly we didn't move to strike him as a fact witness, because they never offered him as such. And so, had they done that, we would have moved to strike him as a fact witness as well.

THE COURT: Okay.

MR. FREER: In response to that, Your Honor, what he's going to testify as a fact witness is already laid out. They already deposed him with respect to the facts.

THE COURT: But it's the civil procedure concept that --

MR. FREER: And --

THE COURT: -- if you identify somebody as an expert witness and it turns out they're not allowed to testify as an expert witness, can they still testify as a fact witness?

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MR. JONES: I certainly don't believe they can. I've never seen that happen once.

THE COURT: That an expert's stricken as an expert, but --

MR. FREER: Well, when they're stricken as an expert, they're not offered -- allowed to give expert testimony. But with respect to that percipient testimony that's already there, they could still provide that. There's no harm or --

THE COURT: Usually an expert that's stricken, they don't have any personal knowledge.

MR. FREER: Correct.

THE COURT: They very seldom have personal knowledge. I mean

sometimes they -- I mean they just -- I don't ever know an expert who has personal knowledge. This is very unusual. Usually you don't see an expert with personal knowledge.

MR. JONES: Your Honor, let me put it this way, I've never seen an expert witness -- and as you said, a doctor's a good example. A doctor that has been identified as an expert witness, who has been stricken as an expert, but then was allowed to testify as a fact witness or a percipient witness. So, I would object to them trying to at this point offer the rabbi as a fact witness when he has been offered up to this point in time, a week and a half before trial, as an expert witness.

THE COURT: Okay.

MR. FREER: And I would go back to there being no prejudice. If Your Honor wants examples or us to look at it, we can turn around and come back on the -- what is it, the 15th, and address the issue whether he can testify as a percipient witness if he's stricken as an expert.

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THE COURT: Okay. That's the ruling is that -- because I'm with Mr. Jones. Like I said, the only thing I can think of is a doctor. And doctors do come in all the time, and they don't give any expert opinions. They just talk about their treatment. But they were identified that they're going to come in and talk about their treatment. We're going to have an expert who testifies about the whole global picture. This person was just a chiropractor, and he did three treatments. They come in all the time like that.

So, that -- it's really just the rule of civil procedure, which is if you identify an expert witness who also is within his expert opinions has personal knowledge like a doctor, some doctors come in and give expert opinions all

the time, and they have personal interactions with the person and they're based on facts they actually know. But this is one where he was identified as an expert. I don't know what your disclosure said. To me, it's just a civil procedure issue of can he now testify because he absolutely has personal facts known to him. Can he testify in that context?

So, that would be the only question to be answered because otherwise I don't see any way he can testify. It just -- everything he says sort of leads to the ultimate question for the jury is why was he doing this. The two factual interactions seem to me to go -- well, actually, really only the second one, now that I think about it. The second one goes very much to at the same time he was writing his will, he made this other offer to this -- what is this? It's a Schule. I don't know what that means.

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MR. FREER: A Schule is a school I believe.

UNIDENTIFIED SPEAKER: A study group.

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THE COURT: Okay. A study group? Okay. He made the offer to this Schule to give them $100,000 to name -- to naming the room after him. That's the same time he's writing his will. So, that to me is relevant. That is a fact that is relevant, but if he wasn't identified as offering facts, just as an expert, can he still testify?

So, if you want to research that, fine, and we can talk about it on Wednesday, but otherwise I don't see any way he can testify.

MR. FREER: Okay. We will supplement, Your Honor.

THE COURT: It's a real limited issue that he can testify at all and not as an expert, absolutely not as an expert.

MR. JONES: Your Honor, if they're going to do that, we're

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supposed to respond to that when?

THE COURT: I don't know. Just bring me -- I don't need to see it in writing. Just if you can bring me something, because I don't know of anything out there that says -- has ever really addressed this. I've never seen it. It's bizarre.

MR. JONES: I haven't either. That's why --

THE COURT: It just seems to me that if you're not -- if you're not -- if a witness isn't identified, they can't testify. Okay, fine. So, when an expert's identified, and he's stricken because it's not expert testimony, but he has some interesting facts to relay, relevant facts, can he still do that? That's the question. Good luck writing a Westlaw query on that. I don't know how you're going to find it.

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MR. JONES: Your Honor, while I'm thinking about it, could we get -- maybe by Tuesday, can we get -- we're going to have the hearing on the jury issue. Could we get by --

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THE COURT: On Wednesday?

MR. JONES: -- Noon by Tuesday, could you get us your opposition?

MR. FREER: The opposition? Yeah.

THE COURT: Something -- if there's something out there that says, here's a matter of law --

MR. LeVEQUE: By noon Tuesday?

MR. FREER: For the Wednesday hearing?

THE COURT: And we don't have time for them to respond in writing.

MR. JONES: Thank you.

THE COURT: Unless you want to do close of business Monday, and they have until close of business Tuesday. I just -- I mean I just don't know -- I'll be surprised if you can find anything. It's such a -- it just isn't something that happens. And it's -- I think if someone can --

MR. JONES: So, he's stricken as an expert but --

THE COURT: Yeah.

MR. JONES: -- there's a question in the Court's mind as to whether or not he would be appropriate as a fact?

THE COURT: He could still be allowed to testify as a fact witness.

MR. JONES: All right. I understand. And the parties will further brief the issue.

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THE COURT: Okay. Rushforth is entirely different.

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MR. JONES: I would --- well, I would think so, Your Honor, only because I've had -- I've actually tried this a time or two in my career, and I've never been successful with it. Every opinion he has with I guess the exception of Opinion Number 5 that based upon the extrinsic of parol evidence, he can tell the Court what Mr. Schwartz's intent was, which I think I guess if that's the case, why would we need a jury or the Court depending on who it is.

THE COURT: Right. So, again, the question of the report itself not coming in, you're moving to exclude in its entirety. My question is, is there something he has that meets hallmark -- that he meets hallmark. I don't know that we really need to discuss that issue.

MR. JONES: You know, well, first of all, that's an interesting question.

THE COURT: But we've got to --

MR. JONES: He's a lawyer, so presumably he could testify about legal issues --

THE COURT: Right.

MR. JONES: -- and interpretation of documents.

THE COURT: Right. Practicing --

MR. JONES: I'm not going to dispute that.

THE COURT: Right.

MR. JONES: I've just never seen a court allow a lawyer to come in and tell the Court what the law was as an expert witness.

THE COURT: Right. And then --

MR. JONES: That's what they're trying to do. I mean --

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THE COURT: Exactly. And that's I think a distinction. I agree and that's the way they said they were planning on presenting it was that Mr. Rushforth can testify about practices. And that's why I was asking, I don't think that an estate planner wrote this will. Am I remembering -- so I thought that Milton dictated it to Jonathan.

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MR. FREER: The testimony -- this is my best recollection, but my understanding is that they got an exemplar -- kind of a template copy from an attorney. Jonathan sat down and Milt -- with Milt, and they typed the --

THE COURT: Yeah.

MR. FREER: -- typed the will. Jonathan's an attorney.

THE COURT: Right. He is, but I mean I think Mr. Rushforth, in distinction from being an attorney -- I mean I could sit down and write my own will. But he's an estate planner. He's got -- and above all these things, he's

written these -- it's different. So, what he as an estate planner would do -- like that's what I was saying, I could not believe the Oshin -- the Oshin's Firm did not write that will. It just doesn't look like a will that came out of the attorney's office that does this for a living. It's very much a personal will. He wrote it. He wrote it.

MR. JONES: And I believe you have seen a few wills in your time, Your Honor.

THE COURT: Yeah. So, very clearly, he wrote this will.

MR. JONES: I don't know --

THE COURT: So, I guess that's the problem that I had with Rushforth is that you can testify, and he does this all the time, I see him all the time in malpractice, this is not -- you know, if you're holding yourself out to be this, then this is not good practice. That I have no problem with.

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MR. JONES: I agree. And certainly, in a malpractice case, there's a -- what the standard of care is, is a different issue. He's testifying as to what the legal interpretation of -- well, his opinion is about the successor clause, interpretation of the legal term and supporting authority. That's a legal conclusion to this Court. That is your providence that you get to decide.

The opinion of NRS 133.200, the anti-lapse statute. That's your decision. That's not an expert's opinion. That is inappropriate regarding the ambiguity that exists in Milton I. Schwartz's intent of his bequest. That's the ultimate issue of the case that is the matter of law by the Court, is the document ambiguous or not. You decide that, not -- I can argue about it. Mr. Freer can argue about it, but you decide that issue.

And a lawyer coming in and adding on top of what Mr. Freer

argues about whether the will is ambiguous or not is -- then they get to double team me. He gets another lawyer to get a shot at whether that lawyer thinks there's an ambiguity. That's your decision to make.

MR. FREER: It's already three against two.

THE COURT: So, I guess just in looking through these, if we start the questions presented portion of the report, letter E, Questions Presented, and the first one being: What is the purpose of a successor clause?

MR. JONES: Right.

THE COURT: What is the standard practice in the industry for including a successor clause? So, it's two different things. One is what is a successor clause. I mean that's a matter of law. That's not -- it's going to be -- if we need a jury instruction on that, it's written based on where the law is. But my question is where he's talking about the context of what is the standard of practice in the industry for -- again, this is the problem. It wasn't an estate planner that wrote the will. And so, I mean this is so personal to Milton, he wrote this himself, that I'm just not sure that the standard and practice in the industry is relevant to a question the jury would be considering. I mean because that's the hallmark issue.

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MR. JONES: Your Honor, I think you make the point. I don't know what else I could add to it. If this is essentially -- and, again, whether Jonathan Schwartz is an attorney, he does not hold himself out as an estate planning attorney with a degree of skill and expertise of an attorney that practices in that area of the law. I mean that's just -- there's no dispute about that.

THE COURT: Uh-huh.

MR. JONES: So, what the standard and practice is in that

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particular subspecialty of the law is irrelevant to the construction of this will, as you've already pointed out. I don't know what else I need to say about that.

THE COURT: Yeah. Okay. Thanks.

MR. FREER: Your Honor, as we pointed out in our opposition, E-1, 2, and 3 are the issues that we would concede are what his testimony is limited to. With respect to explaining -- I mean he is an attorney, but we've got highly technical terms. Having an attorney explain why these attorneys use the language, you know, and why they use successor clauses and what the standard practice is, I know Your Honor's already leaning the other way, but that's why we think that he would be able to assist the jury with respect to that issue.

THE COURT: All right. With all due respect, I think that Mr. Jones has a point that E-1 is instructing the Court: A successor clause is intended to provide one or more alternate beneficiaries when the bequest to a specific beneficiary fails. Okay. That I think -- that's just a question of law. If a finder-of-fact needs to be instructed on what is the law, that, you know, looking at this will, ladies and gentlemen of the jury, there's no successor clause. You are informed that a successor clause is the following. And the question of the fact the jury has to make, or the finder-of-fact, is that if we don't see that language in here, then that's question number 1.

Similarly, question number 3, E-3, that to me is -- that's the ultimate conclusion that whoever it is that is your trier-of-fact is going to make. My -- where I'm struggling with is E-2, this whole section about standard of practice, I mean why you would do it. But the reason I got -- I mean if you were suing, like I said, you can't -- you know, I was like who wrote this. This is

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terrible. But that's not what he's doing. He's not saying that the person who wrote this made a mistake, and it's malpractice the way they did it, which is what I see Mr. Rushforth all the time on and, yes, he is very expert at that, and I don't deny that.

But, again, here I'm just trying to see if there's -- I mean how is -- I understand that the kind -- he's just going to talk about standard and practice in the industry, but that's not how this will was drafted. This was drafted -- I mean this was just a gentleman who was so intimately involved in his father's estate planning. They worked on this together, and with Jonathan, he does not hold himself out. I don't know -- I mean does he do legal work for the cab company, I don't know. I just always thought he ran his dad's business, and he never held himself out to be a practicing lawyer, which is always the problem if you're giving legal advice, and you're not holding yourself out as -- I just struggle with this one.

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On the other hand, one can infer the testator really meant to say Milton I. Schwartz Hebrew Academy or its successor in interest. Well, how? How can you infer that?

Pecuniary bequest Milton I. Schwartz Hebrew Academy to an entity that did exist under that name creates an ambiguity. I just -- I mean it's helpful in drafting jury instructions assuming this is an issue that can go to a jury, and I'm not sure it can.

And this conclusion, D-1. The testator, during his lifetime, declined to make gifts to the school even though it was the legal successor of the Hebrew Academy, because it no longer bore testator's name. Do we have testimony about that?

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MR. FREER: Say that again, Your Honor.

THE COURT: Did anybody testify to that? D-1. Is that a known fact that Milton stopped making gifts to the school even though he -- it was a legal successor, because it no longer bore his name?

MR. FREER: Yeah, I believe Jonathan and Susan Pacheco testified as to that.

MR. JONES: So, that's testimony about fact that somebody told him. That's not an expert opinion.

THE COURT: Uh-huh.

MR. JONES: I mean, that's like an expert getting over there and saying it's a legal opinion -- an expert opinion about what somebody told him. I mean that --

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THE COURT: Yeah, I just -- I'm struggling with this as an expert. My conclusion. My conclusion that the decedent's will was intended to gift the Hebrew -- Milton I. Schwartz Hebrew Academy only if the schools bore his name. Unless the school bears the name indicated that, of course, fails because the pecuniary bequest -- I mean, this is the ultimate question that we started -- that we first were here talking about in 2013. This is the very first question we had. That's the whole issue in the case. I don't -- you can't -- I don't think that's appropriate for expert testimony. I just don't see how we can use this.

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MR. FREER: Understood, Your Honor.

THE COURT: Okay. I'm going to grant this motion to exclude him and unlike the previous one he -- that's his role. And so, if he's excluded testifying to all that, then we're done.

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Okay. So, what do you want to take first? Do you want to take this hearsay issues or do we want to go with these other two issues that I think are maybe -- well, I'm not going to jinx this. I'm not going to say they're easier. Seven and eight, pre-admission of documents and instructing the jury on certain issues.

MR. FREER: I think seven, we -- after we got together and did the exhibits --

THE COURT: Should we kind of agree on this?

MR. FREER: -- I think we're fine on seven.

THE COURT: Because I thought that that was the whole point of your 2.47?

MR. FREER: Yeah, we are now fine, so that's --

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THE COURT: Did you agree on all of them? The last will, the -- because clearly the will and the articles, those are public records. I just didn't know what -- with respect to the -- you know, they're all authenticated. What's your foundation to get them in? Are we all in agreement on that? We've got it worked out?

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MR. FREER: Yeah, my understanding is they do have an issue -- I'm sorry, I didn't mean to overstep is --

MR. JONES: No, go ahead. Go ahead.

MR. FREER: -- is that I think they have an issue with the videotape of Milton Schwartz, that they were going to withdraw that request to have it pre-admitted, but everything -- the wills, and the pledge agreement, resolution, and the other four items in their motion we --

THE COURT: Because we have --

MR. FREER: -- we have already agreed to.

THE COURT: -- certain things that are authenticated, no problem, the Court record and the public record. They still have to have grounds to be admitted and somebody to testify. I mean are we okay on those?

MR. FREER: I'll leave it to them. I just didn't want to represent that --

THE COURT: Okay.

MR. FREER: -- everything was agreed to.

MR. JONES: Your Honor, and Mr. LeVeque was there and Mr. Carlson.

MR. FREER: So, the two people that don't know anything about it --

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THE COURT: Yeah, they're talking.

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MR. JONES: No, I was there too, but I just want to make sure -- one of them correct me if I'm wrong. We had some issues about the video interview --

THE COURT: Uh-huh.

MR. JONES: -- and when we were at the meet and confer, I believe the ultimate agreement was that the entire video could come in, but the partial transcripts -- actually, I'm kind of --

MR. LeVEQUE: That's what I wanted, Randall, but you -- I think --

MR. JONES: What did we sign?

MR. LeVEQUE: -- we talked about that, but you said you didn't want the video to come in, because you said that there was parts of the video that you would consider statements against interest, or party admissions, but

that we would stipulate to authenticity. But if you want it the other way, I'm good with that.

MR. CARLSON: That sounds right to my recollection, was that we stip to authenticity.

MR. JONES: Oh, okay.

THE COURT: But not admissibility?

MR. CARLSON: Yes.

THE COURT: Somebody is still going to have to come in and --

MR. CARLSON: I think so.

MR. JONES: That is -- Mr. LeVeque does remind me of the discussion.

MR. LeVEQUE: It was back and forth.

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MR. JONES: There was too many things I've been trying to think about, Judge. Basically, we're not going to object to the foundational issues -- authenticity and foundation. There are parts of it we believe that are admissions against -- well, I'm sorry -- statements by a party-opponent that would be hearsay, and so we have hearsay objections to some of the statements of Mr. Schwartz. Other statements of Mr. Schwartz we think come in under the exception to the hearsay rule as admissions against interest.

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So, the -- I guess we would say to the Court the agreement is there's a stipulation as to authenticity and foundation. Is that right? Otherwise, I believe we have agreed to --

THE COURT: The will?

MR. JONES: -- we've reached a stipulation as to the other documents. In fact, I think we have even more. We have a joint exhibit list that

we've agreed to.

THE COURT: All right. So, this is mooted. It will be handled as part of the parties' stipulation based on the 2.47 meeting.

MR. JONES: Yes, Your Honor.

THE COURT: Okay. So, that will be addressed. It will instead be addressed by the parties' agreements on admissible evidence. Okay. Great.

Pre-instructing the jury. You know, we do have, under the general instruction portion of the new book, some these issues are addressed there. And we do read many of these things just -- you know, it's hard to believe, but, you know, when we pre-instruct the jury, we're reading. It's not something I've got memorized. There are some issues that the jury told.

Once the jury is selected and the -- before they're seated, this -- I'll read you -- this is what I read. We start with: This is a civil case, but it's -- okay, I guess we can call it civil. Trial is to proceed in the following order, and then after instructions it's just the procedure. If I determine the facts, there's no way to correct your decision on the facts. Sometimes, there's objections to the testimony -- and we do have in here, I think -- we can read -- I have the language. For credibility or believability of a witness, we have language to read. I typically don't, but depending on what the parties want, I typically don't read that one.

The other things asked for here, I don't even know that there is a jury instruction on the definition of hearsay. So, I didn't see how that could even be done. The direct and circumstantial, and believability and credibility conceivably you can. Burden of the proof is generally just dealt with, you know, usually during selection. You tell them that -- you know, this is the party

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that has the burden of proof.

MR. JONES: And it wouldn't be a limited -- one of the reasons we asked for that, Your Honor, it has come up at just about every trial I've had in the last ten or 15 years, because a lot of jurors -- and the Court sometimes even says it without us having to say anything. The Court says: A lot of you are familiar with -- you've heard about, you know, the criminal standard and this is not a criminal case and beyond a reasonable doubt. This is a civil case, so it just -- the only reason --

THE COURT: I usually go over that in jury selection.

MR. JONES: And if you do, that's the only point. The reason we do this -- we ask for this is we think it actually benefits both sides, assuming we have a jury. That there's a couple of basic things that kind of helps them up front understand when the lawyers get up to do opening statement, they have some context in which kind of to relate to this, like what is hearsay.

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And, again, this is just -- we're just offering this.

THE COURT: Yeah.

MR. JONES: One of the elements of a contract, something -- you know, if didn't want to do it, I understand. I'm just -- I think that sometimes it helps a jury have some context in which to understand the opening statement. It's not a huge issue. I think it's helpful, but I leave it to the Court's discretion. It's whatever you think is best.

THE COURT: Okay.

MR. FREER: And we, just briefly, identify in our objection that it doesn't -- you know, and 16.090, basically provides unless there's a good reason to vary from the standard procedure, just stick with the standard

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procedure. We outlined some issues, especially with any kind of pre-instruction relating to hearsay that it would be prejudicial because there's so many different avenues of where evidence is going to be admissible for --

THE COURT: Right.

MR. FREER: -- limited purposes, et cetera.

THE COURT: So, with respect to this request, to the extent that typically during jury selection where we have people who have been on juries before, it comes up in that context, and often times counsel will ask do you understand that in the criminal case you had to look at a different standard of care -- standard of proof and this is not a criminal case, we just have to tip the scales a little bit. I mean usually, that's how we see it. I don't -- it's not really read as an instruction to them. And I'm fine with that.

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The description of direct and circumstantial evidence, I can read it. I typically don't, but I could read it. The believability or credibility is, again, something that I can read. Usually -- I usually don't read it, but it certainly -- I don't think there's anything that says it's improper to. It's just that I typically don't.

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The deposition of substantive evidence, you know, usually in the final instructions we have the standard pattern instruction. I usually don't read that before, but as depositions are opened, and published, and as a -- and usually, we just tell them this is -- a lot of times you'll have people on the jury who have given depositions. So, it's not something I really instruction them on, but just as depositions come in we talk about publishing the deposition, it doesn't mean it's, you know, a book. It just means that it's going to be read to you here, you'll have a chance to hear what somebody said here, and this

testimony was taken under oath. It's not really an instruction.

Hearsay, we never define hearsay for them. That's strictly -- the judge rules on whether it is or isn't hearsay, and I've never seen an instruction -- a jury instruction on hearsay. I don't even know how you would instruct a jury on hearsay.

MR. JONES: It --

MR. FREER: Lawyers don't even understand it.

MR. JONES: -- yeah.

THE COURT: I was going to say -- I mean, that's like a whole thing on the bar exam, is this hearsay or is it not. I mean, I do not think that instructing the jury on hearsay is appropriate. My only question is, is there a strong objection -- as I said, I usually don't instruct the jury on who's got the burden of proof. In my experience, it comes up. And we deal with it in that fashion as opposed to an actual instruction.

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I do have language on these other couple of issues here, which is -- I do have credibility or believability. We start out with: You must not be influenced, by any degree, by any personal feeling of sympathy or prejudice for or against the Plaintiff, or for or against the Defendant. Both sides are entitled to the same fair and impartial consideration. The credibility and believability of a witness, essentially, is the instruction. And there are two kinds of evidence, direct and circumstantial. I typically don't read them.

MR. JONES: Your Honor, we don't need to belabor this. Whatever you think is appropriate. Again, I'll leave it to your sound discretion.

THE COURT: Okay.

MR. JONES: We -- I think to the extent you think it would be

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helpful to do any of that, then we just brought it up to the Court --

THE COURT: Okay.

MR. JONES: -- and I leave it to you.

THE COURT: All right. Yeah, I would not read the jury or pre-instruct the jury on burden of proof. I think that it's, in my experience, almost always thoroughly examined in the context of inquiring of jurors if they understand. If the Court instructs you -- you know, if you've been on a jury, and it was criminal, it's not the same burden of proof, those kinds of things. And, also, not technically on the depositions.

I can read the other two. I mean I don't have any problem with it, direct and circumstantial evidence, and believability and credibility. I don't have a problem with those. I didn't say I do. All right. I guess, the -- all right. The concern I have is just whether you are -- as the concern is raised. Placing greater emphasis on those preliminary instructions that happens actually in trial, and I am -- I am concerned about that as well. Some of these things, I believe, just come up naturally in the course of selecting the jury, and it's not necessary to instruct them in the kind of detail that a jury instruction would provide.

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So, to the extent that burden of proof comes up during jury selection, I think that's entirely appropriate. I have concerns about instructing people on the -- jurors on these other issues. I don't typically do it. So --

MR. JONES: Fair, enough, Your Honor.

THE COURT: All right. So, now we have this whole hearsay problem that is dealt with differently in probate to a certain extent and because we have this mish-mash of issues presented here, it's kind of a question of

context, it seems to me.

MR. JONES: Your Honor, I don't know how -- if you're -- we're going to get into that great detail. If we are -- could we take a short break?

THE COURT: Sure. Yeah, let's do that, because we're going to be here probably a little while after 5. So, yes, let's take a break until 5. Okay.

MR. JONES: Thank you, Your Honor.

[Recess at 4:50 p.m., recommencing at 5:01 p.m.]

THE BAILIFF: All rise. Department 26, back in session.

THE COURT: Okay. We're ready to go back on the record. Counsel, are we ready to proceed, or do we have some other agreement?

MR. JONES: Well, I wish I had an agreement we settled the case.

THE COURT: Yeah.

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MR. JONES: Not that -- unfortunately, not that good of news.

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THE COURT: Okay. Great.

MR. JONES: Your Honor, I told counsel during the break that, unfortunately, for me, anyway, my wife had planned a dinner with some out-of-town family members --

THE COURT: Sure. No problem.

MR. JONES: -- at 5:30.

THE COURT: Absolutely.

MR. JONES: But assuming that works for you, we could do this on Wednesday when we come over to argue --

THE COURT: Yes, and do we have anything on Wednesday afternoon?

MR. JONES: We have three left, I think, is all we have left. Four

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has been withdrawn.

THE COURT: Oh, that's right one of them is withdrawn. I totally forgot.

MR. FREER: Right.

UNIDENTIFIED FEMALE: Number four?

MR. FREER: So, it's just the hearsay stuff.

THE COURT: Yeah, number four is withdrawn. So, we just have three, five, and six.

MR. FREER: So, on Wednesday we would come back with whether or not we can have Rabbi Wynne testify to hearsay stuff, and then the jury trial.

THE COURT: Because -- I'll tell you my -- I think it all comes down to the issue of prejudice. I mean, this is just stuff that he's -- anecdotally he's reported that already, so I don't know how much of a surprise it could be. Anyway, I'm not going to say anything because there might be a case out there, I don't know. I just haven't -- I've never seen it.

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[Court and Clerk confer]

THE COURT: Would you -- because we're on for 10:30 after guardianship. So, would Wednesday -- would you prefer afternoon, because right now you're on at 10:30, and hopefully we can finish guardianship. Our problem with guardianships, if we have to file everything physically in court it adds, like, ten minutes to every single one of those cases, because we have to physically file -- we're supposed to file it in the courtroom. There's a reason nobody else has to do this. It's really time consuming. It's very time consuming.

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MR. JONES: I'm available in the afternoon --

THE COURT: Pardon?

MR. JONES: -- if he Court wants to put it at 1:30, I don't know, if counsel?

THE COURT: Well, that may not be such a bad day. I mean, we could probably -- we can -- it looks like we can probably do it 10:30, if you think that's enough time. I mean we can work through lunch.

MR. FREER: We could try.

MR. JONES: We could try.

THE COURT: If we go a little bit into lunch, the that's -- I just wanted to offer you the alternative if you wanted to come afterwards.

MR. JONES: You know, because they're all related -- we filed it as separate motions, but they're really all totally interrelated.

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THE COURT: They're really one, yeah.

MR. JONES: So, it's -- and then we'll have the issue of the jury.

THE COURT: Yeah, what we're going to do with the jury and --

MR. JONES: I don't think -- probably that won't take too long either.

THE COURT: What are we going to do about a jury? Do we really still need a jury. And, number two, are we -- what are we going to do about the one witness.

MR. JONES: Okay.

THE COURT: That's it. Okay. Thank you, guys.

MR. JONES: Thank you, Your Honor.

MR. FREER: Thank you, Your Honor.

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THE COURT: Thanks for staying and helping me work through all this. Good to have it all done in advance, right.

[Proceedings concluded at 5:04 p.m.]

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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of my ability.

_____

Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708

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EXHIBIT “4"

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Attorneys for The Dr. Miriam and Sheldon G. Adelson Educational Institute

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of

MILTON I. SCHWARTZ,

Deceased.

Case No.: 07-P-061300
Dept. No.: 26/Probate

ORDER DENYING THE ESTATE'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER GRANTING SUMMARY JUDGMENT ON THE ESTATE'S CLAIM FOR BREACH OF ORAL CONTRACT AND THE ADELSON CAMPUS' COUNTERMOTION TO STRIKE THE AUGUST 14, 2018 DECLARATION OF JONATHAN SCHWARTZ AND ALL ATTACHED EXHIBITS IN SUPPORT

Hearing Date: August 16, 2018
Hearing Time: 1:30 p.m.

THIS MATTER having come before the Court on August 16, 2018, the DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE ("Adelson Campus") having appeared by and through its counsel of record, KEMP, JONES & COULTHARD, LLP, and A. JONATHAN SCHWARTZ, EXECUTOR OF THE ESTATE OF MILTON I. SCHWARTZ (the "Estate"), having appeared by and through his counsel of record, SOLOMON DWIGGINS & FREER, LTD., on the Estate's Motion for Reconsideration of the Court's Order Granting Summary Judgment on the Estate's Claim for Breach of Oral Contract and the Adelson Campus' Countermotion to Strike the August 14, 2018 Declaration of Jonathan Schwartz and All Attached Exhibits in Support. The Court having reviewed and considered the papers and pleadings on file herein, and having heard the

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arguments of counsel, with good cause appearing and there being no just cause for delay,

Accordingly, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Estate's Motion for Reconsideration of the Court's Order Granting Summary Judgment on the Estate's Claim for Breach of Oral Contract is hereby DENIED.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that the Adelson Campus' Countermotion to Strike the August 14, 2018 Declaration of Jonathan Schwartz and All Attached Exhibits in Support is hereby DENIED.

IT IS SO ORDERED.

DATED this 4th day of October, 2018.

DISTRICT COURT JUDGE

Approved as to Form and Content By:

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EXHIBIT "5"

Electronically Filed
8/30/2018 8:16 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of:	CASE#: P-07-061300
MILTON SCHWARTZ	DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN,
DISTRICT COURT JUDGE

THURSDAY, AUGUST 16, 2018

RECORDER'S TRANSCRIPT OF PROCEEDINGS

PRETRIAL CONFERENCE - DAY 2

ALL PENDING MOTIONS

APPEARANCES:

For the Estate of Milton Schwartz:	ALAN D. FREER, ESQ. ALEX G. LEVEQUE, ESQ.
For the Dr. Miriam and Sheldon G. Adelson Educational Institute:	J. RANDALL JONES, ESQ. JOSHUA D. CARLSON, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

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Las Vegas, Nevada, Thursday, August 16, 2018

[Case called at 1:54 p.m.]

THE COURT: … have some remaining motions in limine which I thought we should just wrap those up, and then we can talk about those other two issues, because we have the motion for reconsideration and countermotion and then we also have the estate having supplemented Rabbi Wyne.

Did you see both of those?

MR. CARLSON: Yes.

THE COURT: Okay. All right, so let's wrap up those motions in limine we didn't already talk about and we'll figure out which ones those are. I think I kept --

MR. FREER: Three five six.

THE COURT: Three, five and six.

Mr. Jones.

MR. JONES: Good afternoon, Your Honor. Randall Jones and Josh Carlson on behalf of the Adelson Educational Campus.

THE COURT: And --

MR. JONES: I don't know --

MR. FREER: Oh I'm sorry. Alan Freer and Alex LeVeque on behalf of the estate.

THE COURT: Okay. So hopefully we did not interfere with your previous matter. We did have an opportunity to talk to the colleagues from Mr. Freer's office who had the matter at two. They

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agreed to wait and they're not going to come in till three. So --

MR. JONES: Okay. So --

THE COURT: -- cleared the way for --

MR. JONES: So we better go.

THE COURT: We better go. Yeah.

MR. JONES: Okay. I've just got a little outline, Your Honor --

THE COURT: Okay, thanks.

MR. JONES: -- of my argument that hopefully will --

THE COURT: Appreciate that.

MR. JONES: -- help everyone kind of follow along. The reason you'll note there that -- and the way I look at this you tell me if you disagree, Your Honor, but three, seven and 10 -- is that what it is?

MR. CARLSON: Three --

MR. LEVEQUE: Three, five and six.

MR. CARLSON: -- five and six.

MR. JONES: Three, five and 10 (sic).

THE COURT: Six.

MR. JONES: They're all having to do with out-of-court statements made by -- allegedly made by Mr. Milton Schwartz to his son, to other board members or other third parties.

THE COURT: And the family did agree on one. Is that included in numbers 3, 5 and 6 because the family did concede on one.

MR. FREER: Four.

THE COURT: Oh four. So four they conceded on.

MR. JONES: Right.

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THE COURT: So we only have to talk about the three that are in issue which are three --

MR. JONES: Right.

THE COURT: -- five and six. Got it.

MR. JONES: And then of course Mr. Schwartz -- Milton Schwartz' own statements in the form of affidavits and things to that effect so --

THE COURT: Okay. Great.

MR. JONES: -- they -- I think -- I would put it this way, Your Honor, to start the point here. This is -- and I've had conversation with counsel and they're probate lawyers so they deal with this world more than I ever do and they pointed out to me when I said well your whole case seems to rest on getting in hearsay evidence and they said well, hey, this is an estate case and we can do that in an estate case.

Actually I don't think they can. And the point here is, is that this is simply trying to use the interpretation of a will issue as an end run to the hearsay rule with respect to their breach of contract claim, which by the way is really a dec relief claim, but the point's still the same. They're trying to use the fact that there's a will involved in this process to get around the hearsay rule, but the problem is the rules don't allow that.

And so I think it's important to start with what -- how is it possible that they can get into the testator's intent here? And the only way they can do that, as I understand it, is if there's a question of ambiguity of the will. And I assume the Court agrees with that premise because if not, then I have to go somewhere else.

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THE COURT: Okay.

MR. JONES: So --

THE COURT: On same page.

MR. JONES: -- if that's our starting point, there has to be an ambiguity in the will so let's look at the will. The provision at issue is 2.3, Milton I. Schwartz Hebrew Academy, I hereby give, devise and bequest the sum of $500,000 to the Milton I. Schwartz Hebrew Academy, the Hebrew Academy.

And then it goes on to talk about the mortgage and the other things. And what happens if there's a mortgage it goes to pay the mortgage down, but there's no question -- there's no ambiguity about the 500,000. That's 500,000. There's no ambiguity about he says he wants to bequest it to Milton I. Schwartz Hebrew Academy, and then he puts in paren Hebrew Academy. The entire 500,000 amount shall go to the Hebrew Academy for the purpose of funding scholarships to Jewish -- educate Jewish children only.

So that's the plain language on the document and we know from lots of Nevada cases but one we cite in particular says an ambiguous provision means simply there are two constructions or interpretations that may be given to a provision of a will that it may be understood in more senses than one. Makes sense -- two interpretations.

But we know in *In re Walters Estate* the court said: In construction of a will, the court -- first of all not the jury, so that is clearly not a jury question -- seeks to ascertain intention of testatrix, but such

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intention must be found in the words used by the testatrix and if such words are unambiguous, there is no occasion for construction.

So what types of ambiguities can there be? There are two types of ambiguities, a patent ambiguity and a latent ambiguity. A patent ambiguity is when there is uncertainty on the face of the document. So there's no uncertainty in what is stated here, Milton I. Schwartz Hebrew Academy; that he is giving it to the Hebrew Academy $500,000 either to pay off a mortgage -- if there is no mortgage, then to go to scholarships. That's what it says.

So how do we define -- how does the Court define more appropriately what a latent ambiguity is? A latent ambiguity exists where the language of the will, though clear on its face, is susceptible to more than one meaning when applied to the extrinsic facts. And we cited a couple examples that would been -- been used by the courts before. First example is -- of a latent ambiguity is Wilma made a request -- bequest in a will to my cousin, John Reynolds. On its face there does not appear to be an ambiguity. However, Wilma has two cousins named John Reynolds. Two or more persons meet the description in the will. Now we have, okay, did she mean this John Reynolds or did she mean that John Reynolds? And the other one is essentially the same kind of an issue.

They've alleged a latent ambiguity exists, Your Honor. That's what they're saying. They're not saying it's a patent ambiguity, although -- I don't think they're saying that all. In fact, Jonathan Schwartz himself has said there is no ambiguity in this will.

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And I heard what you said yesterday about well maybe he meant that he wanted the money to go to kids for their education, and I think you even mentioned cy pres is a possibility here. The only way that I -- it seems to me that the Court could come to that conclusion -- because there's nothing on the face of the words used in paragraph 2.3 that suggest that. You'd have to go outside the will to come up with that conclusion.

They -- they're essentially seeking this construction -- by the way, their position is what that means is that the words of the estate means so long as the Hebrew Academy is named after me. That does not appear in 2.3. Just doesn't. And the words themselves don't suggest that. It just says the Hebrew Academy; I'm going to give the money to the Hebrew Academy. They don't say and I want -- only so long as it's named the Hebrew Academy.

In re Jones: At the outset the limits of the court's power to construe the language of the will should be noted. A court may not vary the terms of a will to conform to the court's view as the true testamentary intent. That is black letter law in the State of Nevada. The court -- and by the way, doesn't say the jury. The court may not vary the terms of the will to conform to the court's view as to the true testamentary intent. The question before us is not what the testatrix actually intended or what she meant to write. Evidence is admissible which, in its nature and effect, simply explains the testator -- what the testator has written, but no evidence can be admissible which, in its nature or effect, is appropriate (sic) to the purpose of showing merely what he intended to have written.

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The only way they can get this testimony in is if this Court says I want to know from other people what he intended. The law in Nevada -- I believe this is categorical error to allow an interpretation of these words.

THE COURT: Is this a motion for summary judgment or is this a motion in limine?

MR. JONES: It's a motion in limine --

THE COURT: Okay.

MR. JONES: -- but Your Honor, here's the point. It all goes back to the -- these motions in limine. I want -- they being the estate. The estate wants to put up all these witnesses to tell the jury what Mr. Schwartz -- Milton Schwartz intended in his will. That's the only way they can get it in related to the contract claim.

The black letter law says they can't do that. They can't do it. So it is a motion in limine. The -- so how do they get past the hearsay rule unless this Court determines that these witnesses can come in and testify about his -- what he intended to say or what he meant by the unambiguous words contained in his will?

I understand the Court feels compelled to let them do that, but that is just on its face contrary to what the Nevada Supreme Court has told us for decades. It just is. I mean there's no two ways around that.

To gives the words used any other than their recognized meaning or to hold that extrinsic evidence may be admitted for that purpose would be to sanction the changing of the will for the purpose not of enforcing an unambiguous bequest but rather rendering an

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unambiguous bequest -- an ambiguous bequest unambiguous. That cannot be done.

THE COURT: Well, so --

MR. JONES: Yes, Your Honor.

THE COURT: -- isn't the question -- if you look at it on its face unambiguous, I bequeath it to this institution, it doesn't exist and he knows it doesn't exist prior to his death, yet he does nothing to change this. So what did he mean? Did he just -- is that just his name for it or did he really think they needed to change the name? I mean that's our problem.

MR. JONES: Well here -- actually, Your Honor, I think you're working under a misapprehension. Mr. Schwartz died in August I believe 2000- --

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MR. CARLSON: Seven.

MR. JONES: Seven. Yes, 2007. The corporation -- the name of the corporation was changed I believe in March or May of 2008.

THE COURT: Right.

MR. JONES: So --

THE COURT: But the school name had been changed.

MR. JONES: No it was not, Your Honor, the first resolution that occurred happened December -- I think was December 13 of 2007. In fact that's a point they make that Jonathan Schwartz uses as a -- an attempt to castigate the school by saying you just waited -- you know, he just died and here you go and change the -- everything on him. So the fact is Milton Schwartz when he made that bequest, the school was

called, the corporation was called the Milton I. Schwartz Hebrew Academy.

THE COURT: Okay.

MR. JONES: So he -- and by the way, here's the other interesting thing about it. That -- the name didn't come off of that school until -- Mr. Schwartz refused up until 2013, 2013, six years after Milton Schwartz died. The testimony has been consistent that the board decided to take the name off when Jonathan Schwartz refused to honor his father's bequest. So even up till six years after he died, Milton I. Schwartz's name was on the elementary school. But as a matter of indisputable fact --

THE COURT: And by that, just to be clear, we mean it was -- I don't know if the proper term is etched? It was physically --

MR. JONES: It was actually --

THE COURT: -- in the wall of the building over the front door.

MR. JONES: Actually, Your Honor, I think it -- it actually was raised letters. They were attached --

THE COURT: Oh raised letter? Okay.

MR. JONES: -- to the building is my recollection is, and I don't think it's -- whatever it was --

THE COURT: I only saw it once.

MR. JONES: -- they were -- I'm almost positive that they were actual physical letters that were --

THE COURT: Okay.

MR. JONES: -- decent size letters that said Milton I. Schwartz

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Hebrew Academy on the school, the front of the school.

We're going to be introducing that. We're not trying to shy away from that point at all. But if the Court was of -- under the impression that at the time that Milton made that bequest that the school had changed the corporate name and the school had changed the name on the building, that is incorrect. And so --

THE COURT: Yeah.

MR. JONES: And by the way, this is where it becomes problematic and this is an issue we have to face in this case. At some point the board took the name off the lower school, but it wasn't for years later and it wasn't as a -- some kind of a bait and switch with Milton I. Schwartz, it was because of the conduct of his son, the executor of his estate, long after Milton died.

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So that's why I have a problem with them saying well what was his intent? At the time he made that bequest, the corporation was in his name, the school was in his name, his name was on the letterhead, all the things that they believe they have a contract right for which I'm absolutely convinced and I -- I'm not trying to convince them, I know I can't do that, but based on the evidence I've seen, he had no enforceable contract right for.

But that's beside the point. What they're trying to do, Judge, is they're trying to use a loophole in Chapter 51 of the hearsay rule to bootstrap in hearsay to try to prove a contract claim that is totally absolutely categorically inappropriate under the law of the state with respect to the interpretation of wills.

THE COURT: Is this improper in all context? Because always the question is for the truth of the matter. So what's the truth of the matter you're trying to establish? If you're trying to establish did your dad have a contract with whichever one of the iterations of the board there was --

MR. JONES: Sure.

THE COURT: -- or with Dr. Lubin and Ms. Sabbath when they -- Dr. Sabbath when they came over, that's one thing versus when you're -- when you were taking your dad's dictation of this will, what did you understand him to be saying when you wrote this? Why did he say Milton I. Schwartz Hebrew Academy? Well, because he always told me that's -- it was named after him in perpetuity so that's what I thought he was saying.

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MR. JONES: Well in any other case, that wouldn't even be a hesitation for the Court say that's hearsay, you cannot get that in. The only way that they can even talk about getting it in is try to hit this loophole under Rule 51 and it doesn't apply the black letter law the State of Nevada for at this point over 40 years. Actually about 60 years. I think that the *Jones* case is as old as I am. Actually it's a year younger. So it's only 62 years old. So that's the problem.

By the way, they have a right to bring in -- we have stipulated to the -- they've alleged there's four documents that establish this contractual right. This is in their papers so again they should be estopped from trying to argue something else. We've asked them forever tell us what the document is that creates this written contract.

Well it's the resolution from 1990 -- actually 1989. It's the amendment to the articles in 1990. It's a letter, an unsigned letter I believe is the other thing that they say they've got. Oh no, I'm sorry, the bylaws, the bylaws from 1990, from December of 1990. And then the checks that he wrote for $500,000, I think they're three checks.

So we're not trying to -- if there's a foundation for those -- most of those documents by the way I've stipulated to authenticity and foundation. If they want to talk to Lenny Schwartzer for example who's on the board and said well what was your understanding, that's a valid question that I might have some issues with it one way or another but I can't make a hearsay objection because that's his state of mind of what he was thinking at a particular point in time.

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The question that I object to is well what did Milton Schwartz tell you about what his intent was. That is categorically inadmissible as hearsay in a context of any other case. The only way to get around it is the exception to 51 point what is one five oh.

THE COURT: Right. And so that -- again that's my question about context. Isn't the issue here whether something that would otherwise be hearsay and otherwise would be inadmissible in the context it's being ask is admissible because there is this one little loophole and it's relevant to that?

MR. JONES: By the way, I'm not arguing about its relevance. I would argue -- I could see the reason the Court thinks --

THE COURT: Right.

MR. JONES: -- it's relevant, highly relevant, what his intent

was. The problem is Nevada law says even under that loophole you cannot do it unless this Court finds that there is a specific ambiguity of the will. Then issues of intent are allowed in -- to some extent.

But I mean the *In re Jones* case is I mean just absolutely right on point. Evidence is inadmissible -- or is admissible which, in its nature and effect, simply explains the testator -- what the testator had written, but no evidence can be admissible which, in its nature or effect, is applicable to the purpose of showing merely what was intended to have been written.

And that's the problem they've got, Judge. They want to add the language expressly or implicitly of well, the Hebrew Academy so long as it remained the Hebrew Academy in perpetuity. That last part does not exist in the will. It is not ambiguous. It doesn't say anywhere in the will -- we read it, it says sum of $500,000 to the Milton I. Schwartz Hebrew Academy, the Hebrew Academy. And at the time he died, the corporation was named the Hebrew Academy, his name was on that school, it was on the website, was on the letterhead, it was on everything.

So the only way they can meet that exception to the hearsay rule is in a -- in a will contest is if the will is ambiguous with respect to his intent or excuse me, is with respect to what the words themselves say. If the words don't say anywhere in there and nobody could construe them to say the Milton I. Schwartz Hebrew Academy so long as it remains so in perpetuity, that's what this case is about. That's their whole argument. You know, so I don't know -- and by the way, if that's

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true, all three of those motions in limine we should prevail on --

THE COURT: Okay.

MR. JONES: -- because every single one of them goes to the same issue; they're trying to get in Milton Schwartz's intent -- statements that Milton that either himself in an affidavit, which I mean my gosh, you're talking about affidavits that are 30 years old --

THE COURT: Right. So that's why we should look at the different -- just real quickly --

MR. JONES: Sure. Of course.

THE COURT: -- what each of these out-of-court statements by these respective people is. So Jonathan. Milton dictated the will to him or at least discussed with him what he wanted in the will I mean so worked on drafting with him.

MR. JONES: Sure.

THE COURT: So in that context, okay, but it seemed like there was more that you were looking at other times that Milton had talked to him about -- I don't know if it was in the context of the prior litigation or just mentioned it --

MR. JONES: Well, we tried to -- because it's a motion in limine --

THE COURT: -- you know, because a lot of talking about it.

MR. JONES: Because it's a motion in limine it's --

THE COURT: Right.

MR. JONES: -- it's always, you know, better if you can. Let me see.

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THE COURT: I mean my father told me. I specifically remember my father -- my father was enjoying this -- I can see that, was enjoying this process. Yeah.

MR. JONES: So yeah, if you look at -- it's on page 6 of our motion we have a whole laundry list here of specific because I think it's hard for the Court to make an --

THE COURT: Right.

MR. JONES: -- omnibus ruling --

THE COURT: Exactly.

MR. JONES: -- and so that's why we didn't want to do -- we wanted to give you specific examples.

THE COURT: Right. And so that's why I said talking about in context because there -- I think there are issues with respect to when it is and is not relevant to so you couldn't ask it if you're trying to prove something other than where it falls into this loophole. So --

MR. JONES: Well and I would say this, Your Honor.

THE COURT: -- that's the problem.

MR. JONES: I would have to say relevance to me is not the issue because certainly you could make a legitimate argument --

THE COURT: I get --

MR. JONES: -- this is all relevant.

THE COURT: No, but I'm just saying if what they're talking about is something other than it's -- because it's a pretty narrow exception. With all due respect, why wouldn't anything that was said during the process of drafting the will be relevant and admissible under

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the exception because that's exactly what it is.

MR. JONES: Well I'll tell you exactly why --

THE COURT: Okay.

MR. JONES: -- because -- we're only talking about one provision. We're not talking about other aspects of the will, we're talking about one provision --

THE COURT: Right.

MR. JONES: -- 2.3 of the will. That provision is not ambiguous and the testa- or the executor himself has said under oath it's not ambiguous. If he's saying it's not ambiguous, then you cannot have him testify -- the exception does not apply to him because he's already said to you it's not ambiguous, therefore the testator's intent of what he meant the words to mean are inadmissible.

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And for any other purpose, by the way, if it's to relate to -- if they want to use it for some other purpose like well did that inform your opinion as to whether or not your dad thought he had an enforceable naming rights contract, well that's just flat out inadmissible under --

THE COURT: Right.

MR. JONES: -- the hearsay rule. It doesn't come under the --

THE COURT: Okay. All right.

MR. JONES: -- exception at all. But the -- what -- related to specifically to the exception, Jonathan says it's not ambiguous, only one provision is at issue. If he wants to talk about his dad's intent of some other provision of the will other than 2.3 that the Court might find to be ambiguous, then I believe the exception would apply. But you have to

apply it in the context of this case and the only issue they want to use it in connection with is 2.3, paragraph 2.3 of the will. And so you have to -- as the Court as the gatekeeper here, you have to look at 2.3 --

THE COURT: Right.

MR. JONES: -- and you have to say does 2.3 say anything in it there that would lead me to believe it's ambiguous to such an extent on its face --

THE COURT: Haven't I already said that like five times?

MR. JONES: That --

THE COURT: I'm -- I mean --

MR. JONES: That you --

THE COURT: -- prior to you getting into the case, there were motions in -- I understand Jonathan believes this makes perfect sense. I don't.

MR. JONES: Oh, fair enough, Your Honor. I've heard you say that and I guess I would ask this Court so I'm clear, and I'd like a record of this, tell me exactly what it is you believe that is ambiguous about that statement on its -- on that will provision on its face.

THE COURT: Well, here's my problem -- I probably shouldn't read this excerpt, should probably look at the actual will.

MR. JONES: I may have a copy of it.

THE COURT: Is it attached to anything you guys --

MR. CARLSON: We have a full copy.

MR. FREER: And I would just point out, Your Honor, I think you already did describe what your problem was in the 3/10/15 order --

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THE COURT: Yeah.

MR. FREER: -- where it talks about the ultimate question of fact.

MR. JONES: Your Honor, I have a copy of the full will if you like.

THE COURT: Okay, thanks. Yeah. Okay, so --

MR. JONES: Yeah, I'd like to know exactly where the Court --

THE COURT: Okay.

MR. JONES: -- thinks there's an ambiguity on its face.

THE COURT: Okay. I'm fine with I hereby give, devise and bequeath the sum of $500,000 to the Milton I. Schwartz Hebrew Academy, parens, the Hebrew Academy. Okay. Technically, at the -- he -- at the time of his death, technically, the corporation was named after him. They already though, as I recall, had announced a name change and were using a name change on like advertising materials, the -- the big gala which Milton was honored specifically listed both, and so the question there is when he says that, does he mean only the elementary school? So they could only use it in the elementary school that was problem one.

So whatever, whatever. And then he starts talking about this -- all this stuff about the bank and the loan and the loan that I've guaranteed. I don't know where that came from. So if at the time of my death there is a bank or lender mortgage on the -- upon which I, my heirs or assigns or successors in interest are obligated as a guarantor on behalf of the Hebrew Academy, the $500,000 is to be first used

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towards the mortgage.

So that's just directing the executor as I -- I think that's what this means, the executor is to determine if there is a mortgage and -- on which Milton was a guarantor and if so he needs to direct the academy to say you may need this for operating funds, but you can't use it for that, you're going to have to apply this only to the mortgage that my dad's a guarantor on.

And then what? Does that pay off the mortgage that he's a guarantor on? Does he get -- does the estate get a release? I mean I --

MR. JONES: Well, all those questions --

THE COURT: What?

MR. JONES: -- Your Honor, though, that's the Court inferring what the --

THE COURT: Right.

MR. JONES: -- intent is after that.

THE COURT: Right, and so that's -- because then we have to get to this and the reason we need to know that is that in the event the lender will not release my estate, then no gift is given to them. So I mean this is more that Jonathan has to do to figure out if he's going to give any money.

If it's not going to secure a release, then you don't get it. But in the event that there isn't a mortgage at the time of my death, the entire amount goes to the Hebrew Academy for the purpose of funding scholarships to educate Jewish children only, so any gentiles attending the school, sorry, you're out of luck but this is going to pay the fees only

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for the Jewish children.

So the problem that I had here was when he then says the Hebrew Academy, I don't know what that is. And I understand Milton I. Schwartz Hebrew Academy that he's calling the Hebrew Academy, but there's more to -- by the time -- I think even by the time he wrote this but certainly by his death, they had the upper school. They only had, and I don't know what year it opened, for a long time went to the eighth grade. So -- and I don't know the timing on 2004 what there was -- if that was still just the eighth grade. And if that's what he intended, these were funding elementary school scholarships for the Jewish children, only in the event there's no mortgage. But if there's a mortgage, then you don't get any gift at all I guess is the way that it reads if you read the whole thing as one.

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I didn't find this that easy to interpret with all -- and I understand Jonathan thinks --

MR. JONES: And by the way --

THE COURT: -- he made perfect sense.

MR. JONES: I very much appreciate you giving me kind of the feedback as to what you found to be ambiguous so based on what you just said, it would seem to me that that would fall directly within the purview of the *Jones* case where it says evidence --

THE COURT: Right. But then when you talk to Jonathan, when Jonathan was drafting this, somehow he -- he believes that what his father meant was only if the school kept his name in perpetuity and, you know, where's that? And that's when you get into this other part of

the case where they believe they had an agreement that it would remain so in perpetuity so you have to interpret the will in light of his intention that it would be in perpetuity. That's not in the will, but that's what Jonathan tells us my dad intended I -- I wrote down what his intentions were and that's what he intended.

MR. JONES: Well, that's why hearsay is not admissible at trial. Self-serving hearsay especially.

THE COURT: Okay.

MR. JONES: And so let's just go back using what you've -- and I tried to follow along what you said is first thing was what Hebrew Milton I -- what did he mean by that?

MR. FREER: Your Honor, we're not on a summary judgment as to ambiguity.

THE COURT: Exactly. Yeah. No. And that's kind of why I ask is this a motion for summary judgment, are we really getting the motion for summary judgment or this just is about evidence. So Mr. Jones's argument is you -- it's totally inadmissible for this reason that there's no ambiguity. I believe there's a patent ambiguity and there's a latent ambiguity.

MR. JONES: And the patent ambiguity is?

THE COURT: What does that mean?

MR. JONES: Well there's only one Hebrew -- Milton I. Schwartz Hebrew Academy at the time. There were -- there was nothing else.

THE COURT: Right.

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MR. JONES: There was only one, so that's not a latent ambiguity I would certainly say. I don't know how that could be a latent ambiguity --

THE COURT: Okay.

MR. JONES: -- when there was only one. I mean that's what the definition of ambiguity is, is if there could be two meanings. There would have to be -- by definition there would have to be two Milton I. Schwartz Hebrew Academies which we know there were not.

THE COURT: No.

MR. JONES: The latent -- well I don't -- maybe I'm missing something about the analysis there.

THE COURT: Okay. All right. So yeah.

MR. JONES: Is could there be two Milton I. Schwartz --

THE COURT: That's not -- that was not my problem. That was not that there -- is there another one out there. Because, you know, he's been involved in the other school, he was involved in the shul, but --

MR. JONES: So what is the --

THE COURT: -- those were -- he didn't put his --

MR. JONES: -- patent ambiguity, Your Honor, that I'm missing?

THE COURT: -- he didn't name those. So my problem here is the Milton I. Schwartz Hebrew Academy, does he mean only up to the eighth grade? Did he envision the whole ultimate Adelson Educational Campus?

MR. JONES: And that's what -- I'm sorry.

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THE COURT: So that's my problem because how do we know what it goes to? Because he's clearly directing this to something, how do we read this whole thing to say okay, there's no mortgage, the Adelsons have paid everything off, he's no longer a guarantor on anything, this goes then to scholarships for Jewish children for what? Up to the eighth grade?

MR. JONES: For the record, Your Honor, I -- I just want to make it clear for the record. I believe that that is precisely specifically what the *In re Jones* case does not allow the Court to do.

THE COURT: Okay.

MR. JONES: It does not allow the Court --

THE COURT: Got it here.

MR. JONES: -- to admit evidence, by its nature or effect, which is applicable to the purpose of showing merely what was -- what he intended to have written, and everything you just said is what your -- your questioning is what he intended to have written. That is expressly prohibited by the *In re Jones* case, and I understand if -- and that's fine if I -- if the Court rules against me, but I want it to be absolutely utterly clear on the record that I believe that is specifically prohibited under *In re Jones*. It is contrary to 51.150, it is contrary to *In re Jones*, it's contrary to the *Zovorik versus Kordit* (phonetic) case.

So I understand, Your Honor, with that -- listen, if that's the Court's position then, my argument goes to every one of these --

THE COURT: Okay.

MR. JONES: -- out-of-court statements made, whether it be in

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the form of --

THE COURT: Right.

MR. JONES: -- Milton Schwartz's sworn affidavits --

THE COURT: Okay.

MR. JONES: -- whether it goes to Jonathan Schwartz' testimony, whether it goes to third parties who testified what they -- what Milton Schwartz told them during his life, I believe they are categorically inadmissible pursuant to --

THE COURT: Okay.

MR. JONES: -- *In re Jones* and Nevada Supreme Court precedent.

THE COURT: Okay. Now, again, and in the context we have Jonathan in the context of the scrivener --

MR. JONES: I think that's --

THE COURT: -- for lack of better term. Susan was his assistant?

MR. JONES: Yeah -- well yes. As I understand Susan and -- and bookkeeper kind of?

MR. LEVEQUE: Controller secretary.

MR. JONES: Yeah.

MR. LEVEQUE: Assistant.

THE COURT: And so her -- information she would have would be in the context of when he told her issue a check, write a letter, so when she was again acting on his instructions -- okay. Dr. Pokroy.

MR. JONES: Yes, Your Honor.

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THE COURT: Yeah, that's different.

MR. JONES: That's different why?

THE COURT: He was on the board --

MR. JONES: Okay.

THE COURT: -- and what I understand his out-of-court statement is that as a member of the board --

MR. JONES: If are you --

THE COURT: -- so a member -- at the time, at the time, a member of the board, so isn't that a party? Wasn't he acting for the board?

MR. JONES: Actually, Your Honor, I think we addressed that issue specifically is that it's if your -- it had to be an admission against your interest at the time the statement was made and --

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THE COURT: Okay.

MR. JONES: -- and they were all on the same side. That's again case law that I think is unambiguous, it's very clear --

THE COURT: And so that would be the same for Roberta Sabbath; again, she was --

MR. JONES: Correct.

THE COURT: -- at the time an -- I don't think she was the director, or she might have been for one of these. Because she -- at a point in time she was like the assistant, another point in time she was the director.

MR. JONES: That's right.

THE COURT: Okay, got -- so same issue there. And then

Lenard Schwartzer, again same issue, he was on the board when they allegedly --

MR. JONES: Right.

THE COURT: -- had this discussion.

MR. JONES: So --

THE COURT: Okay, so at the time and since these were -- there was no dispute at the time, then they're admissible. Okay, got it. All right. Thanks.

MR. JONES: Yeah, so we -- I understand the admission against interest and I think that's a -- that was a good point to raise. The problem is the case law says it had to be an admission against your interest at the time the statement was made. At that time they were all, if you will, on the same side, so to speak.

THE COURT: Okay.

MR. JONES: Thank you, Your Honor.

THE COURT: All right.

MR. FREER: Well Your Honor, fundamental disagreement on just about everything.

THE COURT: Uh-huh.

MR. FREER: With respect to the ambiguity, just to point out to what Your Honor ruled previously is the ambiguity is patent ambiguity because there's a lack of successor clause there. If you remember we went back in --

THE COURT: Yeah.

MR. FREER: -- 2015 because there wasn't a successor

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clause it's ambiguous, otherwise it would lapse.

THE COURT: Right. And it says there's no gift.

MR. FREER: Right. And that lack of successor clause is even more interesting because when you go through the documents the school's got on file, Milton Schwartz has a second codicil -- before he draft this one without a successor, there's one that gives it to the Milton I. Schwartz Hebrew Academy or its successors. And so he knew what a successor clause was --

THE COURT: And he talks about his -- in his own context if I guaranteed or my successors or my heirs --

MR. FREER: Right.

THE COURT: I mean he knew that language. It's --

MR. FREER: Right. So I just wanted to --

THE COURT: He was pretty sophisticated guy.

MR. FREER: -- clear that up. There's ambiguity there. And we get focused and myopically so focused on the issue with respect to the lapse, but we also have a mistaken bequest and when you have a claim for mistaken bequest, it's the belief; does the belief constitute a mistake? It doesn't matter whether or not there ultimately is a contract. If he believed there was an enforceable contract and that's what he made the bequest on the basis of, then that's admissible.

So but we only have to -- as Your Honor pointed out, we only have to have one ground for admissibility at this point. So we're kind of wading way into the weeds. That's why our position was now is not the time, let's -- as we get into it and we're in context and --

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THE COURT: That was my question, doesn't it depend on the context?

MR. FREER: It does -- absolutely, and if you look at most of the testimony that they're citing to, those -- a lot of those questions can be asked in such a way that it doesn't even evoke hearsay --

THE COURT: Right.

MR. FREER: -- and you got to look at a lot of those questions were questions that they were asking Jonathan, they were asking --

THE COURT: And particularly with Susan, who Milton -- what did Milton direct you to do? Directed me to write this check.

MR. FREER: Right.

THE COURT: She was --

MR. FREER: What did she observe?

THE COURT: I don't know if you'd call her an agent but he acted through her. She had to write the check --

MR. FREER: Right.

THE COURT: -- in order for him to sign it. I mean --

MR. FREER: And as we point out --

THE COURT: -- whatever that -- whatever you call that.

MR. FREER: As we point out in our brief, there's more than one loophole. You got the present sense impression, you've got a bunch of different ones, statements about a will, statements against interest, present sense impression, assurance of accuracy, state of mind, verbal acts.

So the only reason I'm bringing those up right now is because

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it sounds like Your Honor's already found one. I just don't want to be pigeonholed when we're going to trial that oh we only talked about one loophole. We're asserting that there are a number of loopholes, but the issue is we need to determine that at trial. Because doing this out of context without anything is --

THE COURT: Right.

MR. FREER: -- virtually impossible. So if Your Honor has any questions --

THE COURT: I do and that's then -- because I'm okay with Jonathan and Susan because they had very specific roles they were performing for Milton based on Milton's -- what Milton told them to do this is why I'm doing this.

The board members and Dr. Sabbath, I mean assuming those are the only ones who are coming in. They were acting for the school. I get that part.

MR. FREER: Yeah.

THE COURT: So --

MR. FREER: Our position is it is a statement against interest. They were acting -- they were on the board at the time those statements were made. On top --

THE COURT: And the problem with that is that while Mr. Jones says they were all on the same side, they weren't.

MR. FREER: They weren't, because there's litigation involved and you get --

THE COURT: Yeah.

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MR. FREER: -- Tamar Lubin that has an affidavit directly against Milton I. Schwartz, except what's the one thing -- she goes on and on for 20 pages about I disagree with Milton, I disagree with Milton. What's the one thing she agrees with? The school was named after him because he gave us money. And so --

THE COURT: Right.

MR. FREER: -- you've got, you know, issues with respect to that, but on top of that, it's if he understood -- if they made a representation to him and he understood that representation based on what they --

THE COURT: Right.

MR. FREER: -- were saying, that's a present sense impression.

THE COURT: So those are three and five. Milton's affidavit is a whole nother --

MR. FREER: Okay.

THE COURT: -- can of worms.

MR. FREER: All right, let's talk about Milton's affidavit.

THE COURT: Because he is dead, how can we use -- I mean I understand you can use something to impeach somebody -- you can impeach with anything so there may be uses for the affidavit that aren't just Milton testified to -- or Milton claimed X in an affidavit. There's no chance to cross-examine an affidavit. So --

MR. FREER: Well --

THE COURT: -- how do we use an affidavit?

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MR. FREER: The issue with the affidavit is it was his understanding --

THE COURT: Milton's affidavit --

MR. FREER: Yeah, it's his --

THE COURT: -- to be clear because the others can all testify.

MR. FREER: It's his then -- as he's answering this, it's his present sense impression as to what his understanding of the agreement was.

THE COURT: Okay.

MR. FREER: All that -- and if you look at the case that we cited with respect to the -- hang on one second. It's the Iowa case. It doesn't talk about -- it doesn't -- that case stands for the proposition when you're talking about understanding and intent with respect to what you're doing with the will, present sense impression all the way along the points -- data points of those plans are admissible.

Now we also asserted additional grounds with respect to the affidavit, unavailability of witness with respect -- NRS 51.315, because of accuracy -- he was under oath. This was him -- this wasn't in -- prior to litigation, this was in litigation, and here's the issue is in that litigation the naming rights of the school were not at issue. It was about conflicting boards. In fact, I think everybody in the litigation testified as the same thing; yeah, is the Milton I. Schwartz Hebrew Academy because he gave us money.

So -- the other thing we listed was, you know, was an ancient document. I guess I just raise for the record during the litigation there

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was a chance to depose him about that declaration. The school could have deposed him. They didn't.

THE COURT: In -- you mean in prior litigation?

MR. FREER: Yeah.

THE COURT: In prior litigation -- be really clear.

MR. FREER: Yeah.

THE COURT: He was dead by the time we got started talking about --

MR. FREER: Right.

THE COURT: -- the will and what he meant. So like I said --

MR. FREER: I understand you've got --

THE COURT: -- there are all kinds of ways you could use this. You -- because, I don't know, maybe Dr. Pokroy or Roberta Sabbath or even Dr. Lubin were involved in something he says happened, you could inquire of them doesn't -- impeach them with his affidavit; doesn't that say instead it was this? You can impeach them with anything.

MR. FREER: Right. So --

THE COURT: But that -- because I'm trying to figure out are we proposing to just introduce into evidence this affidavit?

MR. FREER: No.

THE COURT: Okay.

MR. FREER: I'm not going to have an --

THE COURT: Okay.

MR. FREER: -- opening argument saying Milton I. Schwartz

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said in his declaration --

THE COURT: Okay.

MR. FREER: -- blah, Exhibit 1 --

THE COURT: So again it's how --

MR. FREER: It's all contextual, Your Honor.

THE COURT: -- the affidavit is used --

MR. FREER: Exactly.

THE COURT: -- because to like read it in, you can't -- you can't do that because it's not a deposition under oath so you can't read it in. So if the context of how it's going to be used is something that you can do, like Dr. Lubin testifies I never had that conversation with him, well, you know, look at this affidavit of Milton Schwartz written in whatever year --

005361

MR. FREER: Right.

THE COURT: -- during the time of whatever litigation, does that refresh your recollection, does that -- isn't it true that he said it was this, does that change your testimony? Those kinds of things -- so again it's a question of -- I just want to make sure that nobody was proposing to show this to the jury, to give it to them in the evidence book or to just sit and read it like it was a deposition.

MR. FREER: No, this is all context.

THE COURT: Okay.

MR. FREER: If there's some kind of admissibility issue, then that -- you know, we'll deal with admissibility and if there's some kind of limitation, Your Court can -- Your Honor can give a limiting instruction or

limiting guide, but talking about a blanket prohibition on hearsay statements when we don't have any kind of context or even how they're raised or asserted I think oversteps the bounds of a motion in limine.

THE COURT: Okay. Well because my understanding was that -- the argument that it wasn't -- it's admissible because it's not hearsay. I don't agree with that. I wouldn't go that far. Because in order for it to be an out-of-court statement of Milton -- that's where I do agree with Mr. Jones that it's not in the context of this litigation so it's not a statement he made in this case. And even in any of the prior cases I think they would have had to have cross-examined them on it, and this is just an affidavit so appreciate the fact he's under oath, but --

MR. FREER: Understood, Your Honor.

THE COURT: I mean it conflicts with what Milton said in the interview on the tape -- on the videotape. It's not entirely consistent. I mean so that's my concern is that I think it can be used in the right context.

MR. FREER: It's all context, Your Honor.

THE COURT: I just want to make very clear nobody thinks we're showing it to the jury, we're putting it in their evidence book, just -- somebody will sit on the stand and read it, just so we're clear. Okay.

MR. FREER: We're clear.

THE COURT: I appreciate that, thank you. That's clarification so I feel better about it now. So okay.

So Mr. Jones.

MR. JONES: Yes, Your Honor. I think that's -- maybe there's

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been a misunderstanding. That's what our motion in limine is about, to exclude it from being admissible into evidence. I understand the Court's point that if Dr. Lubin got up and testified and said something, they could use it as a document to try to refresh her recollection, see if she agreed with it. They can't even -- as far as I understand the rules of evidence, but I learn something new every day, they can't get up there and say here's an affidavit from Milton Schwartz that contradicts you, I want you to read this. They can show her a document and say I want to show you this document --

THE COURT: Right.

MR. JONES: -- would you please take a look at it, see who signed it, oh looks like Milton Schwartz signed it, whatever.

THE COURT: Refresh her recollection with it.

MR. JONES: Does that refresh your recollection? Yes or no. But it doesn't come into evidence --

THE COURT: Right.

MR. JONES: -- and that's what our motion --

THE COURT: That's why I said I didn't want anybody thinking they could just read or anything else.

MR. JONES: That's what our motion is about, Judge.

THE COURT: So I think we're on the -- I actually think we may be on the same page. It's not admissible in and of itself as a document in evidence.

MR. JONES: I've never seen an affidavit ever come into evidence in that --

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THE COURT: Ever. No. There's no way it can't be read in, it can't be an exhibit that the jury sees. Can it be used for proper purposes? It can be and --

MR. JONES: And our motion does not address anything other than it's --

THE COURT: Right. Then I think we're on the same page.

MR. JONES: -- it's not admissible at trial.

THE COURT: So --

MR. JONES: They are not. There's not just one --

THE COURT: Okay, it would be --

MR. JONES: -- there's many many out-of-court statements by Mr. --

THE COURT: It would -- so with respect to just Milton's affidavit, let's take that one first.

MR. JONES: Okay.

THE COURT: With respect to Milton's affidavit, it's granted in part and denied in part.

MR. JONES: Well actually, Your Honor, I think --

THE COURT: To the extent --

MR. JONES: -- there's more than one -- there's multiple affidavits.

THE COURT: Yeah, oh I -- I think you're correct. Yeah. I'm thinking --

MR. JONES: So I assume it would apply to all -- whatever your ruling is it applies to all --

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THE COURT: His affidavits.

MR. JONES: Yes, thank you.

THE COURT: Okay.

MR. JONES: Thank you.

THE COURT: His affidavits would be granted in part and denied in part. Granted to the extent that the affidavit itself, any affidavit, cannot come into evidence. It cannot be introduced as an exhibit for the jury to view in other words. As a document that may be relevant, it may be used for proper purposes. For example, and this is where it could be used, impeachment or refresh somebody's recollection.

MR. JONES: And Your Honor, I understand you will make those rulings as you see fit during the course of the trial --

THE COURT: And that will be waiting for proper objections at the time of trial.

MR. JONES: And I -- and that will give me the opportunity to make any think -- any objections I think are appropriate to the proffer --

THE COURT: Right.

MR. JONES: -- or whatever use it's intended for --

THE COURT: But we've been talking about context.

MR. JONES: -- but my motion --

THE COURT: Okay.

MR. JONES: -- is strictly limited to prohibiting the introduction of those affidavits as exhibits at trial to referencing them to the jury by reading from it there's an affidavit where -- for example, there's an affidavit you'll hear about from Milton Schwartz where he says blah blah

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blah --

THE COURT: Right, I --

MR. JONES: -- and then try to move the admission of that affidavit.

THE COURT: Exactly. I think we all agree on that so proper uses of it for impeachment or refreshing recollection are allowed. The documents themselves are not introduced into evidence. They are not exhibits, in other words, for the trial.

MR. JONES: Well and perhaps --

THE COURT: And they're not going to be read in as if they were a transcript or a deposition.

MR. JONES: And perhaps this is where -- you keep referring to context and it's hard because by saying that you -- it obviously entails meaning that you have to look at the particular circumstances. I'm not trying to handcuff the Court from --

THE COURT: Right.

MR. JONES: -- from making rulings as things happen --

THE COURT: I guess maybe the better way to put that would be they -- just because they're an affidavit of a party, it doesn't mean they could be publishes to the jury as a deposition could be.

MR. FREER: That was my concern, Your Honor. I'm fine with that --

THE COURT: You can't read them in as if they were a deposition, publish them to the jury.

MR. JONES: Or ask them to be admitted into evidence --

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THE COURT: Right.

MR. JONES: -- as a separate -- as a document.

THE COURT: Okay. Yes. But in certain context there may be proper uses for the document. Okay.

MR. JONES: And I --

THE COURT: So that one we agree on.

MR. JONES: I understand. That was not my -- and so be clear my motion was not directed --

THE COURT: Right.

MR. JONES: -- towards anything other than --

THE COURT: And you're correct, you did -- it's a very different title. That was testified -- that was not allowed -- document into evidence. These others are testifying about statements. And the reason I guess why I was a little confused was I was thinking the concern was they were going to try to use this as if it were a deposition to publish it to the jury and read it in. We're all clear. Everybody understands that is improper. It will not happen.

So that was my -- why I wanted to clarify what you wanted to use it for there so we're clear on that one. The issue on the testimony because the -- when you talked about testimony, it was very specific the testimony of four -- four people, five people?

MR. JONES: I think four --

THE COURT: Four people --

MR. JONES: -- if you count Jonathan.

THE COURT: -- who may have had out-of-court statements

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made to them by Milton when they were acting in some capacity. Dr. Pokroy, Roberta Sabbath and Lenard Schwartzer were in the context of being representatives of the school at the time a statement was made to them, and depending on how it's asked and if a foundation is laid that at that point in time the parties were not necessarily -- had the same interest but this was done to -- because there was a conflict.

I mean my recollection was particularly with respect to Ms. -- Dr. Sabbath and Mr. Schwartzer, that was during I think following Dr. Lubin's litigation when they brought Milton back and they were needing to resolve the dispute with him, it was -- he was -- it wasn't his litigation. It was in order to bring him back because he had -- he was adverse to them. He left because he didn't agree with how they were running the school and they -- in order to resolve that and bring him back, they came to an agreement, allegedly. That's what I understood them to be doing.

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MR. JONES: Well and, Your Honor, so --

THE COURT: So I think it's a foundational question.

MR. JONES: And with that in mind, to the extent they can establish a particular statement was made while there was a -- because I agree with you, there was a point of contention there. I thought the statements we were referring to in our motion as I recall were after the reconciliation when they're all on the same page, so to speak, so they're not adverse to each other, but if not, then I believe that the rule is -- rule is clear it has to be the parties had to be adverse at the time the statement was made.

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THE COURT: Just looking at Roberta Sabbath there's like

two different ones you pointed out.

MR. JONES: Right.

THE COURT: One I think was when they were talking about will you come back, how do we resolve this, name it in perpetuity. The other one was the letter. And maybe that -- you know, maybe the objection there is wait a minute, that letter was after they resolved things.

So I mean there are objections that can be made at the proper time so with respect to this, I don't think I can make a blanket ruling in advance of hearing individual questions which can establish both the context that they're being asked the question and a proper foundation for why there would be an exception in place. So that would be reserved for appropriate objections to a specific question asked at the time of trial.

MR. JONES: Yeah, and I guess one of my concerns is, is that we now have litigation so for example, in Milton Schwartz's -- or excuse me, Jonathan Schwartz's deposition now we're in litigation. There's a fight between the parties.

THE COURT: Yeah.

MR. JONES: And Jonathan's testifying for example --

THE COURT: Okay, so now we're going to move on to number 3 that's Jonathan so --

MR. JONES: I'm sorry.

THE COURT: -- and again --

MR. JONES: I was jumping around. You're right.

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THE COURT: Yeah, so that's the ruling I -- because I'm assuming you're -- you've got Mr. Carlson here because he's going to write you some lovely orders. So moving then to three --

MR. JONES: Okay.

THE COURT: -- because each of these was different and you made them separate for a reason. I understand --

MR. JONES: We did. We did.

THE COURT: -- it's an omnibus opposition but separate for a reason. So number 3, this is statements made to Jonathan by his father.

MR. JONES: So here's one example on page 6, Milton discussed the fact that the school was supposed to be named the Milton I. Schwartz Hebrew Academy in perpetuity with Jonathan's siblings, Robin, Arlene (phonetic) and Samuel. So the problem I have about this, Your Honor, is this is incredibly self-serving testimony after the litigation's started. So is it true? I mean obviously I can challenge that and challenge the credibility say well sir -- if the Court let it in, say well yeah, ladies and gentlemen, that's -- that testimony is very suspect because Milton's saying that -- excuse me, Jonathan's saying that after this lawsuit started so he has a lot of motivation to lie.

But that's why hearsay is not allowed because those statements are inherently untrustworthy. It goes directly to the heart of the issue, so you read these statements that they -- that's why we were very specific and we tried to give this Court specific examples. And at a minimum, I guess I would ask the Court to go through and look at these

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and -- because I don't think it is appropriate to do just some a la carte carte blanche type of ruling that says nothing that Jonathan ever said about conversations with his father is admissible.

As Mr. Freer even said, well, it depends on the context. Like well what was your state of mind in -- after you had a conversation with your dad? Well my state of mind was this is what I thought my dad wanted to do. But it doesn't say my dad said to do this. That's where -- I think the other issue's probably improper, but that's your call, not mine. I think these are very specific about things -- essentially quotes that Jonathan is saying his father told him and I believe those -- those specific ones in some other context about his -- Jonathan's state of mind after having a conversation with his father might be different.

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I did this so you would have a specific example of a particular statement that that crosses a line, that's clearly hearsay, it doesn't go to Jonathan's state of mind about after had a conversation with his dad, it goes to what Milton Schwartz told him at a point in time. That's big difference.

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THE COURT: You have to also remember in addition to being the scrivener, Jonathan's the executor, so there's a couple things on here where Milton told Jonathan you might need this Roberta Sabbath letter if the naming rights to the school ever become an issue. Milton told Jonathan here's a copy of the bylaws. It says Milton I. Schwartz Hebrew Academy in perpetuity. You may need this one day if it -- and so, again, in the context of you -- Jonathan as the executor for Milton being given instructions by his father before his death, I'm giving you this

document because you will need this in your role as my executor. So why is Jonathan acting the way he is, why is he insisting on this? Well, my father gave me this with the understanding I would need it to prove in perpetuity. Probably okay.

MR. JONES: That -- but I believe that the only way that comes in, in the context even of a probate case -- and I don't want to belabor this, but it goes back to Rule 51.150 and it has to fit the exception.

THE COURT: Right, and that's -- so that's again why I said depending on context, there might -- because we have to remember not just the context includes not just who's involved, but what they're doing at that time. For example, Susan Pacheco, writing -- why did you write that check? Well because he told me to.

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Milton's -- you know, Jonathan played a couple of different roles here.

MR. JONES: No, I certainly get that.

THE COURT: He wasn't just a kid. I understand the -- your concerns about well he told the whole family, we were all sitting around at dinner one night. Okay. But there are some things they're very specifically tied to Milton giving direction to his executor. That's -- you know, that's different for me because we're -- then we're getting in context of what the decedent prior to his death told their executor to do for him and the executor acts in accordance with the instructions.

MR. JONES: And is that --

THE COURT: Is that really appropriate?

MR. JONES: -- is that automatically admissible?

THE COURT: No, depends on the context. It's not -- and it depends on how it's asked so this is my problem with, you know, Jonathan why are you pursuing this, well my dad told me I would need to have this in perpetuity stuff. Okay.

MR. JONES: Well let's assume that that is the question that he ask. Is that admissible as far as you're concerned?

THE COURT: I think it could be.

MR. JONES: It could be?

THE COURT: Right. Because, you know, why in looking at -- why did you write the will the way you wrote it? I understood when I wrote it that the agreement was it would be in perpetuity and that's what I assumed.

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MR. JONES: I understood.

THE COURT: I assumed I didn't need to put it in writing. I don't know that he's going to say that, but if the question's asked like that, you're an attorney, why did you write this will such odd language? Well, my understanding was it was in perpetuity and I didn't need to say anything because my dad had bylaws that proved it. Well?

MR. JONES: Well I guess my question is I guess -- and this is to just help me understand the ruling and what I can do or not do at trial and what --

THE COURT: Because we have this issue with scrivener's errors -- we didn't really talk about that, but that's kind of another issue here is did Jonathan somehow make an error in writing this?

MR. JONES: Well there's no evidence to that even from Jonathan --

THE COURT: No.

MR. JONES: -- that he ever made an error so --

THE COURT: I know there's not.

MR. JONES: -- I would object at this point that they now try to bring up another issue we never were allowed to investigate during the discovery phase.

THE COURT: Okay. All right.

MR. JONES: So they can come up with all kinds of things, but I guess I'm trying to say with what I understand that the --

THE COURT: But that -- but to me that's admissible is the point it's different. It's a weird place to be where you're being asked to interpret what a dead person meant when they did something and you have to do it in probate. You have to do it.

MR. JONES: And but it would -- so let me -- I guess help me out if you could, Judge --

THE COURT: I mean it's not different rules of evidence, it's just the context of the --

MR. JONES: So is that a hearsay statement? I guess my first question is it a hearsay statement?

THE COURT: What?

MR. JONES: Whatever Jonathan said his dad said. So I guess --

THE COURT: Is it an out -- not hearsay, is it an out-of-court

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statement?

MR. JONES: Offered for the truth of --

THE COURT: Truth of the matter asserted.

MR. JONES: Is that hearsay?

THE COURT: Yes, but -- but is it otherwise admissible because of one, two, three, four?

MR. JONES: Yeah, and --

THE COURT: Whatever the exceptions are.

MR. JONES: So first of all I guess that's what I wanted to finally get to is the fundamental question --

THE COURT: Oh I don't think there's a question --

MR. JONES: -- is a statement like we've ben talking about --

THE COURT: I don't think any of us -- I don't think anybody would dispute that these are out-of-court statements. Everything you've pointed out are out-of-court statements. Everything is an out-of-court statement. But is it otherwise admissible?

MR. JONES: And so I guess my question would be to the Court is can the Court tell me what the exception to the hearsay rule is for these -- let's just stick to Jonathan for example and the ones we've given here.

THE COURT: Well but the problem is I don't know that's how a question's going to be asked and I -- the difficulty for me --

MR. JONES: Well, but we know what the statement is. I'm not trying to get the question, I'm just saying he can't say this particular thing. I'm not talking about a question, I'm talking about a statement we

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know he's made before --

THE COURT: Right.

MR. JONES: -- that -- so if we all agree that statement that he's made before is a hearsay statement, then regardless of the question because I don't -- I'm not worried about a question -- if it's a new question, then that's fine. I do know that this statement has been made, this statement appears to me under everything I've ever learned about evidence to be an out-of-court statement being offered for the proof of the matter. If that's true, it falls under Rule -- Chapter 51. Then the only way it comes in, as we lawyers typically think of, is it has to be an exception.

So it doesn't -- I'm not asking the context of the opinions, I'm talking about the actual statement itself which we have stated under oath so we know that's a hearsay statement --

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MR. FREER: Your Honor, this isn't appropriate for --

MR. JONES: Well, if counsel -- you've interrupted me twice now. I've asked -- I did not interrupt you and I would appreciate it if you allow me to finish.

THE COURT: Okay. All right. Thank you.

MR. JONES: Thank you, Your Honor. So this statement -- it's not a question, it's a statement. So that statement I think everybody in this courtroom that's taken evidence could agree is a hearsay statement --

THE COURT: Okay.

MR. JONES: -- so then --

THE COURT: I will tell you my concern with doing that.

MR. JONES: Okay.

THE COURT: As I said, it depends on the context, it depends on how the question is phrased. I don't know I -- if I rule you cannot say the words that I had numerous conversations over the course of many years concerning the Milton I. Schwartz Hebrew Academy gift, if somehow in the context of a question that is asked in an appropriate fashion, you know, what was your understanding as the scrivener of this will when you wrote it that your father wanted -- what did he want you to write, what did he tell you to write, what did he want you to write? Well he wanted to do this for this reason; it was in perpetuity, whatever.

If I've ruled on one of these specific statements and there's a word in there, I don't want to have a big fight in front of a jury over whether the fact that I once said he couldn't use he -- it was inappropriate to use the word in perpetuity because that was something said to him out of court. I don't want to get into that problem.

We know that these are hearsay statements. I'm not going to dispute you that these are hearsay statements. There may be a context by which I mean was Jonathan acting as his executor, was he acting as his scrivener, was he giving his dad legal advice, what was the context?

MR. JONES: And I understand, Your Honor. I won't belabor this any more --

THE COURT: Yeah.

MR. JONES: -- other than just use one example. He used to love to say whenever he would say --

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THE COURT: Yeah.

MR. JONES: -- the Milton I. Schwartz Hebrew Academy --

THE COURT: I like that one.

MR. JONES: -- he would say the Milton I. Schwartz Hebrew Academy in perpetuity with emphasis added.

THE COURT: Yeah.

MR. JONES: That is an incredibly gratuitous statement to -- goes to the heart of the case, incredibly self-serving. That is a -- alleged to be a quote. It's in quotation marks. And so the whole point of a motion in limine is to avoid the very thing you just talked about. I ask you now so when they try to get that statement in and Jonathan Schwartz who's up there on the witness stand who's a lawyer and he blurts out oh my dad used to say that he wanted always -- whenever he mentioned the name he said Milton I. Schwartz in perpetuity added emphasis, I jump up objection. That's why I've got a motion in limine here --

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THE COURT: Okay.

MR. JONES: -- and I think that's inappropriate and I would ask that if that kind of thing happens, I'm going to tell the Court I'm going to ask for either instructions and depending on if it happens again I want everybody to be forewarned I'm going to ask for sanctions and I'm going to ask for a mistrial potentially if that is continued to be abused in this trial. I think that is wholly inappropriate, I think it's contrary to Rule 51 and *In re Jones*, and so, Your Honor, I appreciate letting me make my record.

THE COURT: Okay. Thank you very much.

So again for our rule, these specific issues I'm not ruling on. I'm reserving objections to statements that may or may not be elicited based on the context in which the question's ask and what the actual question is as to whether that would be admissible. Objections can be made at the time of trial. And yes, if you want to move to strike, we can take into consideration as -- if improper statements are made, we can consider moving to strike such statements.

MR. JONES: Thank you, Your Honor.

THE COURT: That's as far as I'm willing to go right now.

So those are all of our motions in limine.

MR. FREER: Yeah. Just one clarification on the order though, Your Honor.

THE COURT: Yeah.

MR. FREER: *Deveroux versus State* says that the motions in limine are without prejudice --

THE COURT: Correct.

MR. FREER: -- because obviously if we come in -- so I just want that finding in there because if we obviously -- as to Milton's declaration --

THE COURT: Right.

MR. FREER: -- if there's another ground of something that we come up on, I'm just not -- I'm trying to not foreclose that so --

THE COURT: Right, and that's what I want to make really clear it's -- it may be given the context or the wording of a question a

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proper question to ask. If the answer is inappropriate, the remedy there is to strike. If the question's inappropriate, the remedy is to object. So nobody is prejudiced from raising proper objections or moving to strike, just make that clear. Because yes, there are people who blurt things out.

We need to talk about Rabbi Wyne. I think it's pronounced Wyne.

THE CLERK: So you haven't done number 1, right?

THE COURT: We did number 1 previously.

THE CLERK: So was that --

MR. JONES: We did but it was in the context of him as an expert. You talked about him as a fact witness.

THE COURT: Is that Dr. Wyne?

MR. FREER: Rabbi Wyne.

MR. CARLSON: Rabbi.

THE COURT: Rabbi Wyne.

MR. JONES: Right.

THE COURT: Yeah, so we're going back to Rabbi Wyne, because the other issue --

MR. JONES: You asked them to come back and make --

UNIDENTIFIED SPEAKER: Alan.

THE COURT: The other issue --

UNIDENTIFIED SPEAKER: And I don't know if it's going to be short either.

MR. FREER: Okay, then you guys can --

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UNIDENTIFIED SPEAKER: I'll see --

MR. FREER: We were trying to accommodate --

THE COURT: Yeah.

MR. FREER: -- the other but they're saying it's probably going to be long and I don't think he's here.

THE COURT: Okay. All right. So with respect to motion in limine number 1, the issue that was reserved was that I view Rabbi Wyne as having two roles. He was asked to provide expert testimony which I think is inappropriate as it goes to issues of faith and how can he know -- I mean he had conversations with Milton, but how can he make a global statement as to the Jewish faith. That was my problem.

However, he is a percipient witness. He had these conversations with Milton. Much like a doctor might have records related to a medical visit, he might not be appropriate as an expert, certainly a percipient witness.

MR. FREER: Right, and that's what we did supplement on, as we talked about last time, and I'll be brief. We just feel we meet the salami test; wasn't a surprise, the declaration was provided in May of 2014 in opposition to the original motion for summary judgment, he was disclosed as an expert six months later. No prejudice occurred because they already deposed him on those fact --

THE COURT: Right.

MR. FREER: -- witness bases. So the fact that we listed him as 16.1(a) as an expert, the percipient stuff was there anyway so that's our basis --

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THE COURT: Okay.

MR. FREER: -- they had actual notice. Appreciate --

THE COURT: All right. Great.

I don't know who was responding. Is that yours, Mr. Jones?

MR. JONES: Your Honor, it's the same arguments we made about the hearsay issue so that's all -- on the factual issue so I don't need to belabor that.

THE COURT: Okay. So again, then I think Dr. Wyne can testify as a percipient witness. This is -- as Mr. Freer pointed out, a ruling on a motion in limine is always without prejudice for proper objections or motions at the time of trial. And so I believe that there is no surprise, he's been deposed, you had all this information and you had a chance to cross-examine him, so I'm not concerned about there being any surprise here. I think he can testify.

What he testifies to is subject to questions as ask and whether the question's appropriate, again with the context and the way the question's asked. And the response, if the response is appropriate, can always be --

MR. JONES: Understood, Your Honor.

THE COURT: -- stricken if it's inappropriate.

MR. JONES: All right, thanks.

THE COURT: Okay, so --

MR. JONES: I think that's -- motions in limine are done I believe.

MR. FREER: Motion in limines are done.

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THE COURT: Okay. So now --

MR. FREER: Just the motion for reconsideration.

THE COURT: And the motion for reconsideration and a countermotion.

MR. JONES: Yes, Your Honor.

THE COURT: Okay. All right.

MR. JONES: Think you're up, Alan.

THE COURT: Okay. There's Mr. Grover now. Okay. So reconsideration.

MR. FREER: Thank you, Your Honor. The reason we're back here is you had asked several questions and made some statements with respect to wanting to know some issues in terms of why he waited too long. We provided those answers to you by way of Jonathan's declaration and also it highlights why we think is inappropriate for the issue that notice be found as a matter of law. It may -- they point out an order hasn't been entered. It may be better titled a motion for clarification at this point. Obviously because trial's starting though we wanted to clear up any reversible error before we got to it.

THE COURT: Sure.

MR. FREER: The first purpose of submitting it is you had asked the question basically why did he wait until 2013 to do it. We provided that in the declaration. Obviously I couldn't testify as to why he didn't do it and so we did that. Paragraph 5 he couldn't make distributions until 2013 because the IRS issues were not settled. We did include the IRS letter that's signed basically saying February of 2013

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that's when he accepted their final determination and so immediately after that we see that this thing gains a lot of steam with respect to increasing going back and forth and ultimately coming to bear with respect to this whole naming rights and gift issue.

Just as a point of clarification, the chron order on that declaration is wrong. Paragraph 5 is out of order. That was a 2013 it's wedged in between a bunch of 2010 statements. That's scrivener's error due to the time -- lack of time. If Your Honor wants, we can go ahead and do an errata on that.

But the issue is the declaration also points in additional information that the Court had with respect to what was going on with these meetings and there was vagueness and if you remember, the testimony that they cited from the deposition and the letter, there's really not any type of specific issues or timelines in which notice is provided. That's a big problem because during the initial motion and the motion was drafted, we were focused on statute of limitations for fraud. Obviously that's a three-year statute and that is an issue we abandoned.

But the issue that now arises and why we need clarification, if not a reconsideration, is talking about an oral statute of limitations. That falls right in between. And there isn't any definition with respect to if he knew in 2010, that's within the statute of limitations.

So the information that we want to point out is -- highlights three basic issues. Is the finding that he was put on notice prior to May 10th, 2010. That letter is unclear because there's no uncontroverted evidence as to when Jonathan knew or should have known for notice

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purposes. That's what's required for notice to be pled as a matter of law and that's the finding is important -- hang on, I just lost my place on my notes.

So just saying that prior to May 10th when that letter was introduced -- that's the Randall Jones letter that we talked about being highlighted -- that doesn't resolve anything. The court in *Siragusa versus Brown* said if its susceptible to opposing inferences, it's a question of fact and it goes to the jury with respect to the notice.

The second issue highlighted is, was at any time prior to the May 10th letter tolled by assurances of the school --

THE COURT: May or March?

MR. FREER: May of --

MR. LEVEQUE: March.

MR. FREER: March, I'm sorry.

MR. LEVEQUE: March 10.

THE COURT: Yeah. Okay.

MR. FREER: March 10. It's been a long day.

[Colloquy between counsel]

MR. FREER: And just for the record, the issue that we're -- I was talking about is the statute of limitations would be May 28th of 2009 because we filed in 2013. And so when we're looking at triggering events, it's -- we have to have basically uncontroverted evidence that he knew prior to May 2009.

Now, and I'll submit that it's just not there because we have in addition to the vagueness of his statements, we also have statements

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that he was meeting with Schiffman and at the same time the school saying hey look, your dad's name is still up on the building. And so that could -- you know, that creates an issue of fact with respect to whether or not there's tolling or equitable estoppel.

The third issue to highlight and clarify is that there were other breaches occurring even after -- Mr. Jones testified they took the name off the school, took down the painting, took down the bust after the litigation started. And so if we're going to have a notice of some period of time, how does that apply to a subsequent breach? Because there were different obligations. And we point that out in our brief that we're saying just as a breach -- breach as to one is not a breach as to all. There's many different obligations and some of these obligations came in after the litigation started.

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THE COURT: Okay. So on the IRS determination letter that was when?

MR. FREER: That was 2013. I believe it was February of 2013.

THE COURT: So under either estate tax --

MR. FREER: So --

THE COURT: -- tax law --

MR. FREER: Correct, under --

THE COURT: -- or just general probate law, our there certain obligations, duties, like the duty to distribute, that are tolled --

MR. FREER: Yes.

THE COURT: -- pending getting that determination? In other

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words, some -- there are things that key off of the IRS determination.

MR. FREER: Correct. And you ask -- with respect to state law and I don't have the cite, I'd have to look it up real quick and I'll look it up while Mr. Jones is talking. But with respect to state law, a beneficiary can petition any time after six months, but one of the grounds for nondistribution is the fact that there is an outstanding IRS obligation.

Now with respect to federal tax law, the reason nobody ever distributes when the owe the federal government is it imposes personal liability upon the executor for any distributions that are made to anyone while there's federal tax due and owing. And so that's the whole reason why we have the existence of the state law is to protect them under state law so they don't get hosed under federal law.

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THE COURT: So is that tolling? In other words, does that -- is that tolling? I guess because if -- so say you -- there's no question you knew about it in 2010, it's uncontroverted you knew about it in 2010, but you aren't able to take any action because state law -- and in fact they did, they filed in 2013. That's the first petition they filed in 2013 when that was ripe because you have the IRS -- I don't know if you did or not, but assuming you had the IRS determination prior to that, then they had the right under state law they could pursue it at that point in time. So it was an appropriate defense to raise at the time because it wasn't brought until you can go forward on such petitions.

MR. FREER: Right. I think Your Honor brings up a good point.

THE COURT: Is that the same as tolling?

MR. FREER: If you have no duty under statute to make a distribution, then I think that would be a tolling because how can you go ahead and assert defenses to that distribution if it can't even be raised until 2013?

THE COURT: Because the -- it would -- the motion would have been to stay -- if they filed in 2010 --

MR. FREER: It would have been a motion to stay everything because you can't --

THE COURT: -- there would have been a motion to stay.

MR. FREER: -- even make the distribution, because it's automatic under state law there's no obligation to distribute.

005388

THE COURT: Okay.

MR. FREER: So and then the other issue is when was Jonathan placed on inquiry notice? Because it's -- the law is it needs to irrefutably demonstrate as a matter of law; that's the *Wynn* case. They cannot irrefutably demonstrate that he was on notice at a particular point in time. There are issues of fact with respect to when he was on notice, what he was on notice about.

And I think it's even more appropriate to have the whole notice issue tried at the same time because we've already said there are issues of fact with respect to the contract and the contract terms. And so just kind of sitting here kind of aw shucksing it is if there's a contract and we don't know what the terms are, how can we know what the breaches are and how can we know when he's put on notice of those

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breaches? It's all a factual issue that needs to be determined at the same time.

THE COURT: Mr. --

MR. FREER: The issue of the irrefutable -- irrefutably demonstrates also especially important in context of the estoppel tolling issues and I think it's even more important with respect to the subsequent breaches in 2013.

THE COURT: Okay. If Mr. Jones were to stand up and say why are we talking about this now, where was all of this last week, why only now are we finding out about the IRS letter and how that may or may not have affected legal -- the statute of limitations. How that might actually have a legal impact on the statute of -- because that's the one thing that to me may.

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MR. FREER: All right.

THE COURT: That's a good point.

MR. FREER: You bring up a very good point for Mr. Jones.

THE COURT: Okay, so shall we let him make his argument?

MR. FREER: No, I will -- I'll go ahead and respond to it right now, Your Honor. Issue's a couple fold. Is number one, Your Honor's the first person that raised the issue with respect to -- I mean whether or not he's got a legal obligation or not, that's an issue of law. And so the fact that Your Honor astutely pointed out with respect to the duty to distribute, that was something that quite frankly I didn't know because we came on this litigation at a later point. We came on at the time this was filed so we didn't --

THE COURT: Right, only when the litigation was filed.

MR. FREER: So --

THE COURT: You weren't advising him prior to that.

MR. FREER: Correct. And on top of that --

THE COURT: His tax attorney was advising him prior to that, Mr. Oshins. Was Mr. Oshins handling it?

MR. FREER: Yes, but he wasn't advising him with respect to any of the issues in the litigation.

So and here's the other issues, the school only focused on the breach in 2007. We didn't really talk about any of the breaches with respect to later in time. So, you know, really focusing -- you know, they were focusing on those earlier breaches --

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THE COURT: And so those are --

MR. FREER: Well the way they kind of get --

THE COURT: I guess my --

MR. FREER: -- back into 2007 is they back up the 2010 letter where he says well, some of these breaches the school has been doing in the last two, two and a half years, but it doesn't say when he knew about it, it just says these breaches are happening for the last two and a half years. And so they back up into a 2007 or 2008 timeframe using that one sentence, ignoring all the other issues all fact that we point out in our original brief and that we point out again in the motion for reconsideration or clarification.

THE COURT: Okay. So if we talk about 2013, wasn't that just after the litigation was filed then they took the name off the building --

MR. FREER: Correct.

THE COURT: -- and -- and so --

MR. FREER: And so it wouldn't be barred by statute of limitation at all.

THE COURT: But it already had been raised. He -- the complaint -- the first petition already filed and the counterpetition filed, right?

MR. FREER: Correct.

THE COURT: So isn't that immaterial to why it was filed when it was -- are you -- I mean is the argument there --

MR. FREER: I'm saying that's a separate breach.

THE COURT: -- that even if he hadn't filed it for these prior things, he could have filed it in 2013 saying now you've really done it, you filed your motion for this distribution, I raised this issue that -- about in perpetuity and then you took my name -- my dad's name off the building so --

MR. FREER: And that's another breach.

THE COURT: -- that's just punitive.

MR. FREER: And that -- and that's -- we actually talk about that in the prior stuff we made -- we jumped up and down once they took the name off in the pleadings in terms of that constituting a breach because quite frankly I find it offensive. I mean he has no -- the man that built the place, not a shadow of recognition or name anywhere on the place. So -- and I may be missing something. Was there another question you wanted me to answer?

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THE COURT: I think there may be an error in Jonathan's affidavit.

MR. FREER: That's what I said the scrivener error was, is the notice with respect to the 2013 is sandwiched in with the 2010 stuff and so there's a little clause that's right there that -- just to make the paragraphs follow. That's scrivener error. That's my office that did that wrong.

THE COURT: Okay.

MR. FREER: It was in the heat of trying to get this back --

THE COURT: Okay.

MR. FREER: -- in front of Your Court because we're right before trial.

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THE COURT: So just to be clear -- clear up the record that when it says that in February 2013, we -- 2013 we resolved the last issues with the IRS, I accepted the deficiency, we're good to go, and then the next paragraph, after accepting and resolving the IRS deficiency, and he has specific date, on February 23, 2010. No, that's 2013 because the IRS --

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MR. FREER: Correct.

THE COURT: -- letter came on the 12th.

MR. FREER: That is absolutely correct, Your Honor.

THE COURT: Okay.

MR. FREER: And --

THE COURT: That makes it a little easier to understand.

MR. FREER: Yeah, I -- and just to clear up for the record the

paragraph with respect to the 2013, that should probably be inserted after paragraph 7.

THE COURT: Yeah. So again --

MR. FREER: If we're going chronological.

THE COURT: Yeah, see we're getting -- February 2010 and February 2013. Okay. All right. Yeah. Okay.

[Colloquy between counsel]

THE COURT: Okay. If you want to wait and let Mr. Jones make his statement because you're going to have another opportunity --

MR. FREER: Yeah, and I just --

THE COURT: -- Mr. Freer.

MR. JONES: Go ahead.

MR. FREER: Do you want to do the --

MR. JONES: Go ahead.

MR. FREER: I'm just wondering about the countermotion --

THE COURT: The countermotion.

MR. FREER: Do you want me to just wait till you're done and respond to that?

THE COURT: Yeah. You can just do it in response, yeah. Okay.

MR. FREER: Okay.

MR. JONES: Your Honor, I -- this is troubling to me. I thought we were supposed to play by the rules. This isn't a motion to clarify. They're not trying to clarify anything, they're trying to reverse your decision. So you can't call it a motion to clarify when clarification would

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be I said Monday but I meant Tuesday. They're trying to get you to go diametrically opposed to the decision you made, and for them to suggest they didn't know what our motion was in the first place is hard for me to listen to. This is their motion for reconsideration.

By the way, they don't call it a motion to clarify, they call it a motion for reconsideration and they say of the court's order granting summary judgment on the estate's claim for breach of oral contract. So they identify specifically that it was a separate motion for summary judgment on oral contract and they come in here now and tell you well we were really focused on the fraud claim which we gave up because they knew they'd blatantly blown the statute of limitations on that one so they were trying to figure well let's fight about one that we might have a shot at. And you listened to an hour of argument last Thursday --

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THE COURT: Right.

MR. JONES: -- a week ago today and as is your penchant, you went back and forth and listened to both sides and asked questions. You are a, at least in my experience, a contemplative person. You do not make rash decisions. In spite of lawyers' best attempts to get you to go their way, if you think it's something else, you make a decision. And everything I saw that you did last Thursday is that you considered all aspects of this, and in talking to counsel even afterwards, I think both of us agreed that -- we weren't sure which way you were going to go because you were thinking real hard about what the issues were.

And you came to a conclusion and they didn't like it so now they want a do-over. And I guess the question is going to be are we

going to have a do-over every time you make a ruling in this case because I've seen those cases happen. I tried a case with Judge McGroarty and every decision he made, opposing counsel got up and asked for reconsideration because they thought he was a judge who was susceptible to that, and it ended up meaning -- that case went on for over three months. And I would ask this Court to nip this process in the bud before we get started.

They have blatantly violated the rules on their face. 2.24(b), you cannot bring a motion like this without an order. Can't do it. And you can't call it a disguised motion for clarification after you file a motion for reconsideration and then try to say oh we know -- we realize now because you -- the other side pointed it out that is blatantly improper.

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A court's oral pronouncement from the bench, the clerk's minute order and even a unfiled written order are ineffective for any purpose, period. Moreover, reconsideration at the district court level is only appropriate in very rare instances when a party raises new issues of law or fact that render the court's prior holding erroneous.

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The declaration of Jonathan Schwartz cannot be considered under Nevada law and is not new evidence that could support a request for reconsideration. The overwhelming weight of authority is that the failure to file documents in an original motion or opposition does not turn the late filed documents into newly discovered evidence. A federal -- Ninth Circuit case; evidence available to a party before it filed its opposition was not newly discovered evidence warranting reconsideration of summary judgment.

They have not -- this oh well the IRS, well we didn't think about this, we didn't know about this. They have violated -- by their own admission now, they have violated Rule 16.1 and they want to now come in and ask you to ignore their violation of Rule 16.1 and allow this new evidence that they should have produced years ago. Evidence available to a party before it filed its motion is not newly discovered evidence.

This whole issue and I don't know if the Court wants me to address it, this so-called separate breaches argument, on its face it is a completely specious argument.

THE COURT: It keys off the first one.

MR. JONES: Pardon me?

THE COURT: It would key off the -- whatever it is the -- you would key off the very first notice.

MR. JONES: That is correct, Your Honor. This is not an installment contract. A contract where you have separate breaches is I owe you monthly rent and I let five rents -- months rent go and then you sue me and you can sue me for the five months, but you -- and if you got an acceleration clause, you can sue me for the rest of the rent too.

THE COURT: Right. And --

MR. JONES: But my statute doesn't run or your statute wouldn't run in that example on the subsequent breaches over the years because they're new breaches. Now you may not be able to get the old damages, depending on how the contract's written, but this is by no stretch of the imagination -- fact I'd like them to say in open court this is

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an installment contract sometime. That's one of the problems we have. They can't even tell you what the contract is --

THE COURT: So -

MR. JONES: -- but they certainly haven't said it's an installment contract.

THE COURT: And this new issue and I found and I'll read it into the record, 143.037, the duty to close the estate within 18 months and one of the excuses why you may have to making a distribution, paragraph 3, a court shall not enter an order distributing the assets of an estate pursuant to this section if such a distribution will result in there being insufficient assets to enable the personal representative to discharge any tax liability. Doesn't say you can't do it, they just have to reserve however much the IRS has told them you need to reserve.

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MR. JONES: And to that very point, Your Honor, when you brought this up -- again they didn't bring it up, but you brought up is this -- are you saying this is some kind of tolling. And then of course Mr. Freer latched on yeah, yeah, that's right, it's tolling, it's tolling, I agree with the Court. Well you didn't say it was tolling, you asked him the question and what did he do? He couldn't give you any legal authority for the proposition that it was tolling.

Again, they have to show, and we've cited the case law, that your decision was clearly erroneous. It's a higher burden in a situation where you're asking for reconsideration assuming reconsideration is proper.

And by the way, that's the whole point of reconsideration, you

have to get the order first so that they can see what you said to determine whether or not they have a basis for reconsideration, assuming there are some actual new facts, not old facts that they now throw out to the Court for the first time.

And by the way, there's been no statement whatsoever that these facts were not otherwise available to them, to Mr. Schwartz prior to this motion. They just say well we started looking harder because of something you said, Your Honor, during the motion. There's nothing in our motion that did not alert them to the arguments we made last week that you agreed with, and I don't -- I think it's totally inappropriate to get into the substance of that motion because they have to have the motion for reconsideration granted first before we ever get to the merits.

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But I would just say this, that -- and this is what I think was one critical fact for the Court. Mr. Schwartz cannot say in a letter in 2010 that I've known about these issues for two and a half years that are eroding my father's rights. It's like I said to you at that time, that's like saying well, I'm just a little bit pregnant. If there's a breach there's a breach there's a breach.

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And Mr. Schwartz has sued my client on the basis that every issue that he claims that he has a contract right for, the letterhead, the name of the school, the name of the corporation, the website, the signage, all those -- virtually all those things and some of those things started as you've pointed out yourself in 2000- -- early 2000- or late 2007.

So, you know, you made a well-thought-out decision after

lengthy argument by both counsel. They're trying to come in here in direct violation of Rule 2.34, so that should be the end -- excuse me, 2.24(b). That should be the end of the discussion right there, but there are multiple reasons that I've just pointed out as to why this motion is improper and if we're going to have a motion for reconsideration and the Court even entertain this, then I can assure you that I'm going to be considering my options every time this Court makes a ruling against me and I think that would lead to chaos and which is why the rule is in place that it is. You can't do this unless there's some legitimate reason to do it and then you can only do it after a written order has been entered. Thank you, Your Honor.

THE COURT: Thanks. Okay. Mr. Freer.

MR. FREER: All right. With respect to the evidence that was produced, I want to just raise two things and then I'm going to cut to the heart of it, is first, Your Honor asked why something wasn't done until 2013. We provided the information with respect to that. That was -- that wasn't an issue. It's not anything with respect to the statute of limitations because anything happening in 2013 is well within the statute of limitations. So that's why we provided it to Your Honor.

Now second they keep going on and on about how outrageous it is with respect to these emails and everything that weren't produced. Number one, they were used to refresh his recollection, but number two, they never requested those in discovery. Number three, with respect to all the emails with respect to Schiffman, those are -- that's his school account. They have those. They never produced them

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to us. So what's the harm?

Now, we talk about motion for reconsideration versus motion for clarification. Here's the pragmatic question I want -- because we've got a jury trial starting on Monday. What is the order going to say, when was Jonathan Schwartz put on notice that there was a breach of contract? What date is that going to be? Because that is the date that we're going to be stuck with going forward with respect to what the jury's going to determine or not determine and so we need to know that before we proceed to trial.

Also, with respect to what is the fact that put him on notice, because I think that's also needs to be included in the order. Because not only does he have -- we have to have a triggering event, we have to have a date for him to put on notice. And those things need to be addressed and they need to be addressed now with respect to --

THE COURT: Okay. Well, okay. All right. Thanks.

MR. FREER: Thank you.

THE COURT: As stated with all due respect, I don't think I can or even that I should reconsider this decision. As we discussed at great length a week ago, as of March 10th -- am I giving the right date -- 2010 --

MR. JONES: Yes.

THE COURT: -- Jonathan, as I read it, admitted I'm on notice and he -- I mean he didn't use those terms, but he talked about things that essentially show the Court he had inquiry notice. He acknowledged those things in that letter. That was my -- my problem was that -- and I

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appreciate these subsequent events and as I said if this has ever been a cause of action where Jonathan says I was misled, I was duped, I was lulled into a sense of false comfort that I didn't need to pursue something because they kept assuring me we were in settlement negotiations which I'm not sure you can ever use that really, I don't know. Maybe we'd be talking about something different, but since we're talking about here a duty to administer and again, I understand that as a legal defense if it had been -- if there'd been a motion to -- they filed their motion in January of 2013 and he still didn't have his IRS determination letter within the time the answer was due, okay, so let's call it December of 2012. He still doesn't have the letter for another eight weeks. Proper response would have been stay this, I don't have a determination letter yet.

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So I don't think I can go back and read into this case that we were relying on that since we don't have anything telling us that he received that tax advice, you know, don't do anything, put them on notice that I'm not going to be distributing anything to you if I owe you anything for my dad because I still don't have a tax determination.

So absent that kind of evidence that there was some reason to think that it was tolled by some sort of an agreement that let's wait for the tax determination, I don't think I can use that also for reconsideration although I do find it to be a interesting question as to whether that safe harbor which I think you -- you're right, would entitle the estate to at least ask for a stay tolls the statute of limitations. I think that's different.

So for this reason, I'm going to respectfully deny the request

for reconsideration. I don't -- although technically new issues were raised, I don't think that they, if considered, would result in any different outcome. So who's --

MR. JONES: Your Honor, we'll prepare the order and I hope we don't see a new affidavit from Mr. Schwartz --

THE COURT: Okay.

MR. JONES: -- based on what you just said today.

THE COURT: All right, are we done and I see you've got your technical expert present.

MR. JONES: We do and I was going to talk to counsel about that with your --

THE COURT: Okay.

MR. JONES: -- staff to see -- make sure that what we're --

THE COURT: Okay.

MR. JONES: -- thinking about doing is acceptable to the Court.

THE COURT: Okay. Do you need a moment to discuss that and I can see how long these guys are going to take?

MR. JONES: Sure.

THE COURT: They've been out in the hallway for the whole time so hopefully they're talking.

MR. JONES: Sure, we'll get out of your way, Your Honor, and we'll --

THE COURT: So if you can go get the folks in the hallway, that's Mr. Luszeck and Mr. Grover, and ask them to come in. We'll talk

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to them about their matter and then we can make sure we've got everything lined up technically.

MR. JONES: We'll stick around as long as we need to, Your Honor --

THE COURT: Okay. All right.

MR. JONES: -- if we can today to help try to get that resolved.

THE COURT: Well we'll just find out --

[Proceedings concluded at 3:35 p.m.]

* * * * * *

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual proceedings in the above-entitled case to the best of my ability.

Tracy A. Gegenheimer, CER-282, CET-282
Court Recorder/Transcriber

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EXHIBIT “6"

DISTRICT COURT

CLARK COUNTY, NEVADA

ESTATE OF MILTON SCHWARTZ PETITIONER, -vs- ADELSON EDUCATIONAL INSTITUTE OTHER.	CASE NO. P061300 DEPT. NO. XXVI

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PROPOSED JURY INSTRUCTIONS NOT USED AT TRIAL

Attached hereto are the proposed jury instructions which were offered to the Court, but not submitted to the jury in the above entitled action.

DATED: This 4th day of September, 2018.

Steven D. Grierson, Clerk of the Court

By: Lorna Shell
Lorna Shell, Deputy Clerk

INSTRUCTION NO. _____

ALTERATION: MODIFICATION

Parties to a contract may modify the contract, but all parties to the contract must agree to the new terms. An oral agreement can modify a written contract even if the written contract states that any modification of its terms must be in writing.

To prove modification, there must be clear and convincing evidence of:

1. A written or oral agreement of the parties to modify the contract; or
2. Conduct of the parties that recognizes the modification, such as a course of performance that reflects the modification; or
3. Other evidence sufficient to show the parties' agreement to modify their contract, such as acquiescence in conduct that is consistent with the modification and a failure to demand adherence to the original contract terms.

SOURCE/AUTHORITY

Nev. J.I. 13CN.15 (2011); *Jensen v. Jensen,* 104 Nev. 95, 98, 753 P.2d 342, 344 (1988); *Joseph F. Sanson Inv. Co. v. Cleland,* 97 Nev. 141, 625 P.2d 566 (1981); *Clark County Sports Enterprises, Inc. v. City of Las Vegas,* 96 Nev. 167, 172, 606 P.2d 171, 175 (1980); *Silver Dollar Club v. Cosgriff Neon,* 80 Nev. 108, 110-11, 389 P.2d 923, 924 (1964); *see also, J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc.,* 120 Nev. 277, 294-95, 89 P.3d 1009, 1020-21 (2004).

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INSTRUCTION NO. _____

PERFORMANCE/BREACH: IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

In every contract there is an implied promise of good faith and fair dealing, obligating the parties to pursue their contractual rights in good faith and not engage in arbitrary, unfair acts that interfere with any other party receiving the benefits of the contract. This obligation is independent of the express provisions of the contract. Consequently, if the terms of the contract are literally complied with, but one party to the contract deliberately contravenes the intention and spirit of the contract, or performs their contractual obligations in a way that is unfaithful to the purpose of the contract and the justified expectations of the other party to the contract are thereby denied, there is a breach of the implied duty of good faith and fair dealing.

SOURCE/AUTHORITY

Nev. J.I. 13CN.44 (2011); *J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc.,* 120 Nev. 277, 286, 89 P.3d 1009, 1015-16 (2004); *Frantz v. Johnson,* 116 Nev. 455, 465, n.4, 999 P.2d 351, 358 n.4. (2000); *Perry v. Jordan,* 111 Nev. 943, 948, 900 P.2d. 335, 338 (1995); *Morris v. Bank of America Nevada,* 110 Nev. 1274, 1278-79, 886 P.2d 454, 457 (1994); *Hilton HotelsCorp. v. Butch Lewis Productions, Inc.,* 107 Nev. 226, 232-34, 808 P.2d 919, 922-24 (1991).

JURY INSTRUCTION NO. ____

For a provision in a will to be ambiguous there must be two constructions or interpretations which may be given to a provision of a will and that it may be understood in more senses than one.

KEMP, JONES & COULTHARD, LLP
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Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

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SOURCE/AUTHORITY

Gianoli v. Gabaccia, 82 Nev. 108, 110, 412 P.2d 439, 440 (1966) (reversing district court's finding that anti-lapse statute did not apply to testator's will).

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EXHIBIT “7"

07P061300

DISTRICT COURT
CLARK COUNTY, NEVADA

Probate - General Administration **COURT MINUTES** **September 04, 2018**

07P061300 In the Matter of the Estate of Milton Schwartz

September 04, 2018 10:30 AM Jury Trial

HEARD BY: Sturman, Gloria **COURTROOM:** RJC Courtroom 10D

COURT CLERK: Shell, Lorna

PARTIES PRESENT:

Milton I Schwartz, Decedent, Not Present	**Alan D. Freer, Attorney, Present**
Jonathan A Schwartz, Other, Petitioner, Present	**Alan D. Freer, Attorney, Present** **Alex G. LeVeque, Attorney, Present**
Abigail R Schwartz, Beneficiary, Not Present	**Pro Se**
The Dr Miriam and Sheldon G Adelson Educational Institute, Other, Not Present	**Jon Randall Jones, Attorney, Present** **Joshua D. Carlson, ESQ, Attorney, Present**
Parties Receiving Notice, Other, Not Present	

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JOURNAL ENTRIES

Also present was Todd Peters, School Representative and Sherry Keast, Paralegal for estate.

OUTSIDE THE PRESENCE OF THE JURY PANEL:
Mr. Jones argued regarding the interpretation of the intent of the will, paragraph 2.3 of the will, and that all witnesses from the estate side said there was an oral contract and the Pet.'s were trying to contradict that.

Upon inquiry by the Court regarding whether counsel had any objections to jury instructions 1-45, Mr. Freer and Mr. Jones stated they did not.

Mr. Freer argued to not include jury instruction page 34 regarding alteration: modification, and page 41 regarding performance/breach: implied covenant of good faith and fair dealing, was in error.

Mr. Jones argued pursuant to the Hilton case, jury instruction page 22 regarding ambiguity was properly plead.

COURT FINDS the alteration: modification instruction was not relevant; and as to the performance/breach: implied covenant of good faith and fair dealing, there was no claim for breach which is a specific business tort that doesn't apply here; and as to ambiguity the COURT FINDS the will to be ambiguous; therefore there would not be an instruction as to that and lastly, there were other instructions regarding missing terms so the ambiguity instruction was not needed AND THEREFORE ORDERED, these three instructions would not be given.

JURY PANEL PRESENT:

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Court instructed the Jury. Closing arguments by Mr. Freer and Mr. Jones. At the hour of 7:23 PM, the Jury retired to deliberate.

OUTSIDE THE PRESENCE OF THE JURY PANEL:
Court Clerk advised counsel all exhibits not entered in the case would be returned to the respective parties.

JURY PANEL PRESENT:
Jury panel ADMONISHED, and EXCUSED for the evening with instructions to return tomorrow at 9:30 AM to continued deliberation.

COURT ORDERED, Trial CONTINUED.

CONTINUED TO: 09/08/18 9:00 AM

INTERIM CONDITIONS:

FUTURE HEARINGS:

Sep 05, 2018 9:30AM Jury Trial
RJC Courtroom 10D Sturman, Gloria

Oct 04, 2018 9:30AM Motion
Motion for Judgment as a Matter of Law Regarding Breach of Contract and Mistake Claims
RJC Courtroom 10D Sturman, Gloria

Oct 04, 2018 9:30AM Motion
The Estate's Motion for Judgment as a Matter of Law Regarding Construction of Will
RJC Courtroom 10D Sturman, Gloria

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of MILTON I. SCHWARTZ, Deceased.	Case No. P061300 Dept. No.: 26/Probate

JURY INSTRUCTIONS

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JURY INSTRUCTION NO. 1

LADIES AND GENTLEMN OF THE JURY:

It is my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

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JURY INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

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JURY INSTRUCTION NO. 3

The masculine form as used in these instructions, if applicable as shown by the text of the instruction and the evidence, applies to a female person or a corporation.

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JURY INSTRUCTION NO. 21

One of the parties in this case is a non-profit corporation. A corporation is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and you should decide the case with the same impartiality you would use in deciding a case between individuals.

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JURY INSTRUCTION NO. 5

A non-profit corporation acts through resolutions and decisions made by its board.

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JURY INSTRUCTION NO. 6

Any proceedings, conclusions or actions of individual board members outside of an official meeting of the board acting as a board, cannot be construed as legal actions by the School or be found to be binding upon the School, unless the Board directs an individual to so act.

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JURY INSTRUCTION NO. 7

If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or positions of any party, you will not be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, or what ~~influence~~ inference should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

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JURY INSTRUCTION NO. 8

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted to or agreed to by counsel.

Statements, arguments and opinions of counsel are not evidence in the case.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

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JURY INSTRUCTION NO. 9

You must decide all questions of fact in the case from the evidence received in this trial and not from any other source. You must not make any independent investigation of the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that you must not on your own conduct experiments or consult reference works for additional information.

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JURY INSTRUCTION NO. 10

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

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JURY INSTRUCTION NO. 11

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence. It is for you to decide whether a fact has been proved by circumstantial evidence.

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JURY INSTRUCTION NO. 12

In determining whether any proposition has been proved, you should consider all of the evidence bearing on the question without regard to which party produced it.

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JURY INSTRUCTION NO. 13

The credibility or "believability" of a witness should be determined by his or her manner upon the stand, his or her relationship to the parties, his or her fears, motives, interests or feelings, his or her opportunity to have observed the matter to which he or she testified, the reasonableness of his or her statements and the strength or weakness of his or her recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of this testimony which is not proved by other evidence.

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JURY INSTRUCTION NO. 61

Discrepancies in a witness's testimony or between his testimony and that of others, if there were any discrepancies, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

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JURY INSTRUCTION NO. 15

The preponderance, or weight of evidence, is not necessarily with the greater number of witnesses.

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary. If, from the whole case, considering the credibility of witnesses, and after weighing the various factors of evidence, you believe that there is a balance of probability pointing to the accuracy and honesty of the one witness, you should accept his testimony.

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JURY INSTRUCTION NO. 16

You are the sole and exclusive judges of the believability of the witnesses and the weight to be given the testimony of each witness.

The creditability or "believability" of a witness should be determined by his or her manner upon the stand, his or her relationship to the parties, his or her fears, motives, interests or feelings, his or her opportunity to have observed the matter to which he or she testified, the reasonableness of his or her statements and the strength or weakness of his or her recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of this testimony which is not proved by the other evidence.

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JURY INSTRUCTION NO. 17

Whenever in these instructions I state that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him. The burden of proof is preponderance of the evidence unless you are otherwise instructed.

The burden of proof termed "preponderance of the evidence" means such evidence as, when weighed with that opposed to it, has more convincing force, and from which it appears that the greater probability of truth lies therein.

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JURY INSTRUCTION NO. 18

Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the jury a firm belief or conviction as to the allegations sought to be established. It is an intermediate degree of proof, being more than a mere preponderance but not to the extent of such certainty as is required to prove an issue beyond a reasonable doubt. Proof by clear and convincing evidence is proof which persuades the jury that the truth of the contentions is highly likely.

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JURY INSTRUCTION NO. 19

Respondent, the Estate of Milton I. Schwartz's claims for relief are as follows:

- Breach of Contract
- Promissory Estoppel
- Bequest Void for Mistake

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JURY INSTRUCTION NO. 20

One of claims brought by The Estate of Milton I. Schwartz against The Dr. Miriam and Sheldon G. Adelson Educational Institute is for Breach of Contract. I will now instruct on the law relating to this claim.

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JURY INSTRUCTION NO. 21

The essential elements of a claim for breach of contract are:

1. The existence of an enforceable agreement between the parties;
2. Milton I. Schwartz's performance, or ability to perform;
3. The School's unjustified or unexcused failure to perform; and
4. Damages resulting from the unjustified or unexcused failure to perform.

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JURY INSTRUCTION NO. 22

An enforceable contract requires:

(1) an offer and acceptance;

(2) a meeting of the minds; and

(3) consideration.

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JURY INSTRUCTION NO. 23

An offer is a promise to do or not to do something on specified terms that is communicated to another party under circumstances justifying the other party in concluding that acceptance of the offer will result in an enforceable contract.

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JURY INSTRUCTION NO. 24

An acceptance is an unqualified and unconditional assent to an offer without any change in the terms of the offer, that is communicated to the party making the offer in accordance with any conditions for acceptance of the offer that have been specified by the party making the offer, or if no such conditions have been specified, in any reasonable and usual manner of acceptance.

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JURY INSTRUCTION NO. 25

A contract requires a "meeting of the minds," that is, the parties must assent to the same terms and conditions in the same sense. However, contractual intent is determined by the objective meaning of the words and conduct of the parties under the circumstances, not any secret or unexpressed intention or understanding of one or more parties to the contract.

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JURY INSTRUCTION NO. 26

Consideration is either money paid or some other benefit conferred (or agreed to be conferred) upon the party making the promise, or an obligation incurred or some other detriment suffered (or agreed to be suffered) by the party to whom the promise is made.

Promises by the parties that are bargained for and given in exchange for each other constitute consideration, but to constitute consideration, a performance or return promise must be bargained for. A performance or return promise is bargained for if it is sought by the party making the promise in exchange for the promise made and is given in exchange for that promise.

However, a benefit conferred or detriment incurred in the past is not adequate consideration for a present bargain, and consideration is not adequate when it is a mere promise to perform that which the party making the promise is already legally obligated to do.

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JURY INSTRUCTION NO. 27

A party that adopts a contract that was made for the party's benefit or account, with knowledge of the making of the contract and all material terms of the contract, is bound by the contract's terms and entitled to all of its benefits. The party's intent to be bound by the contract may be evidenced by an express agreement or inferred from the party's conduct.

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JURY INSTRUCTION NO. 28

A single contract may consist of two (or more) separate documents.

Two (or more) separate writings may be sufficiently connected by evidence contained in the documents themselves without any express references. The character of the subject matter and the nature of the terms may show that two (or more) writings refer to the same transaction and state the terms thereof when construed together.

Where one document makes other writings a part of the contract by annexation or reference, all such writings are to be construed together, but if a reference to another writing is made for a particular and specified purpose, the other writing becomes a part of the contract for that specified purpose only.

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JURY INSTRUCTION NO. 29

If one party materially fails or refuses to perform their contractual obligations or materially delays their performance until after their performance was due, then the other party is no longer obligated to perform and has a claim for damages resulting from the first party's breach of contract.

A failure or refusal to perform is material if it defeats the purpose of the contract, makes it impossible to accomplish that purpose, or concerns a matter of such prime importance that the contract would not have been made if such a failure to perform had been foreseen.

A failure or refusal to perform, or a delay in performance, that is not material does not excuse the other party from performing their obligations under the contract, but gives that party a claim for damages resulting from the failure or delay in performance.

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JURY INSTRUCTION NO. 10

In Nevada, a plaintiff can recover reliance damages for breach of a contract or in reliance on a promise. Reliance damages attempt to restore the damaged party to the position he or she would have occupied if the breached contract or promise had never been made.

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JURY INSTRUCTION NO. 31

A party seeking damages has the burden of proving both that they did, in fact, suffer injury and the amount of damages resulting from that injury. The amount of damages need not be proved with mathematical exactitude, but the party seeking damages must provide an evidentiary basis for determining a reasonably accurate amount of damages. There is no requirement that absolute certainty be achieved; once evidence establishes that the party seeking damages did, in fact, suffer injury, some uncertainty as to the amount of damages is permissible.

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JURY INSTRUCTION NO. 32

One of claims brought by the Estate of Milton I. Schwartz against The Dr. Miriam and Sheldon G. Adelson Educational Institute is for revocation of the $500,000 bequest and all other gifts made during the lifetime of Milton I. Schwartz under the theory of promissory estoppel. I will now instruct on the law relating to this claim.

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JURY INSTRUCTION NO. 33

If there is no consideration for a promise but the promisor acted in a matter in which the promisor should reasonably expect to induce reliance and which does induce detrimental reliance that is foreseeable, reasonable and serious, the promise is enforceable if injustice can be avoided only by enforcing the promise.

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JURY INSTRUCTION NO. 34

The promise giving rise to a cause of action for promissory estoppel must be clear and definite, unambiguous as to essential terms, and the promise must be made in a contractual sense.

JURY INSTRUCTION NO. 25

The doctrine of promissory estoppel, which embraces the concept of detrimental reliance, is intended as a substitute for consideration, and not as a substitute for an agreement between the parties.

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JURY INSTRUCTION NO. 36

One of claims brought by The Estate of Milton I. Schwartz against School is that the bequest is void for mistake. I will now instruct on the law relating to this claim.

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JURY INSTRUCTION NO. 37

A testator's unilateral mistake in executing a bequest may warrant relief from that bequest.

An invalidating mistake occurs when but for the mistake the transaction in question would not have taken place. The testator's mistake must have induced the gift; it is not sufficient that the testator was mistaken about the relevant circumstances.

A finding of unilateral mistake in the execution of a bequest depends on the testator's intent at the time of the execution of the testamentary instrument.

The party advocating the mistake has the burden of proving the testator's intent and the alleged mistake by clear and convincing evidence.

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JURY INSTRUCTION NO. 38

The Adelson Campus seeks declaratory relief to compel the Executor of Milton I. Schwartz's Estate to distribute the $500,000 bequest to the school that was set forth in Mr. Schwartz's Will.

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JURY INSTRUCTION NO. 57

When construing the language of the will the Jury must determine what Milton I. Schwartz meant by words used in or omitted from his will. When construing what Milton I. Schwartz meant, you may consider any evidence that explains what he has written or omitted. The question before the Jury is not what the testator actually intended or what he meant to write, but rather it is confined to a determination of the meaning of the words he used or omitted in the will.

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JURY INSTRUCTION NO. 40

It is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors. Whatever your verdict is, it must be the product of a careful and impartial consideration of all the evidence in the case under the rules of law as given you by the court.

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JURY INSTRUCTION NO. 41

If, during your deliberation, you should desire to be further informed on any point of law or hear again portions of the testimony, you must reduce your request to writing signed by the foreperson. The officer will then return you to court where the information sought will be given to you in the presence of the parties or their attorneys.

Read backs of testimony are time consuming and are not encouraged unless you deem it a necessity. Should you require a read back, you must carefully describe the testimony to be read back so that the court reporter can arrange his or her notes. Remember, the court is not at liberty to supplement the evidence.

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JURY INSTRUCTION NO. 42

When you retire to consider your verdict, you must select one of your number to act as foreman, who will preside over your deliberation and will be your spokesman here in court.

During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and a special verdict form which has been prepared for your convenience.

In civil actions, three-fourths of the total number of jurors may find and return a verdict. This is a civil action. As soon as six or more of you have agreed upon each answer required by the directions in the special verdict form, you must have the verdict signed and dated by your foreman, and then return with it to this room.

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JURY INSTRUCTION NO. 43

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberations by the evidence as you understand it and remember it to be and by the law as given you in these instructions, and return a verdict which, according to your reason and candid judgment, is just and proper.

GIVEN this 4th day of September, 2018.

DISTRICT JUDGE

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of

MILTON I. SCHWARTZ,

Deceased.

Case No.: 07-P-061300
Dept. No.: 26/Probate

ADELSON CAMPUS' POST-TRIAL BRIEF ON OUTSTANDING CLAIMS

Hearing Date: January 10, 2019

Hearing Time: 9:30 a.m.

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COMES NOW The Dr. Miriam and Sheldon G. Adelson Educational Institute's (the "Adelson Campus" or the "School") by and through its undersigned counsel, and hereby submits its Post-Trial Brief on Outstanding Claims. This Brief is made pursuant to and is based on the following points and authorities, supporting documentation, the papers and pleadings on file in this action, and any oral argument the Court may allow.

DATED this 16th day of November, 2018.

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I.

INTRODUCTION

The Estate continues to hide from the express language of the Will that Milton Schwartz drafted because it forecloses its arguments and claims. The $500,000 bequest to the Milton I. Schwartz Hebrew Academy is clear, unambiguous, and contains only one express condition, that the money be used to fund scholarships for Jewish students only (the "Bequest"). The admitted evidence and testimony demonstrates that the school, both the corporation and the building, was named the Milton I. Schwartz Hebrew Academy at the time Milton passed away in August 2007. Thus, there is no written condition that permits the Estate to avoid paying the Bequest. Yet, the Estate still refused to pay the Bequest. After unsuccessfully attempting over a 6 year period to amicably resolve the dispute with the Estate, the School was forced into filing suit in hopes of compelling the payment of the Bequest.

In response, the Estate filed its own petition seeking a declaration from the Court that the Bequest is void and requesting repayment of all monies donated by Milton to the school since 1988 on the grounds that Milton would not have donated any money or made the Bequest, but for his mistaken belief that he had perpetual naming rights. While Milton may have been mistaken about the alleged existence of perpetual naming rights, this is not enough to successfully void the Bequest and receive repayment of *inter vivos* gifts under Nevada law. *See In re Irrevocable Tr. Agreement of 1979*, 130 Nev. 597, 605–06, 331 P.3d 881, 887 (2014) (emphasis added). The Estate's unilateral mistake defense requires it prove by **clear and convincing** evidence that Milton Schwartz's Bequest was not motivated by desire to continue to support and promote Jewish education and helping Jewish families afford a Jewish education for their children, but only because Milton Schwartz thought he had perpetual naming rights at the school. The Estate cannot meet its substantial burden because it failed to adduce clear and convincing evidence at trial showing that the sole reason Milton donated money to the School for 20 years and included the Bequest in his Will was because he believed the School would be named after him in perpetuity. Instead, the evidence shows that Milton Schwartz made both his lifetime donations and the Bequest because of his support and dedication to the school, the students, and the promotion of Jewish education for almost 2 decades. *See* III(B)(2), *supra*.

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For the Court to reach the conclusion asserted by the Estate the Court would have find that Milton was only interested in making sure his name was affixed to every tangible and intangible thin related to the School, rather than giving scholarships to Jewish students who wanted to attend the School but need financial assistance to do so. This construct, when weighed against the evidence of Milton's philanthropy for the best interests of the School during the prior 20 years, does not stand the scrutiny. The Estate's cynical position is that Milton was far more interested in making sure his name was front and center than actually helping the School and its students succeed. The Estate cannot come close to carrying its burden with clear and convincing evidence in this respect. Accordingly, the School respectfully requests the Court issue an order compelling the Executor of the Estate to pay the $500,000 Bequest to the School to be used to fund scholarships to educate Jewish children only. The School also requests that the School prevail on all of the Estate's claims for Bequest Void for Mistake, Will Construction, and Revocation of Gift and Constructive Trust.

II.

STATEMENT OF SALIENT FACTS

A. The Clear and Unambiguous Bequest.

In his Last Will and Testament ("Will") dated February 5, 2004, Milton I. Schwartz bequeathed a $500,000.00 gift to the Milton I. Schwartz Hebrew Academy to be used to reduce or expunge the mortgage on the school, or if no mortgage existed, to fund scholarships to educate Jewish children only. The unambiguous Bequest to the Milton I. Schwartz Hebrew Academy states the following:

> **2.3 The Milton I. Schwartz Hebrew Academy. I hereby give, devise, and bequeath the sum of five hundred thousand dollars ($500,000.00) to the Milton I. Schwartz Hebrew Academy (the, "Hebrew Academy")**... If, at the time of my death, there is a bank or lender mortgage (the "mortgage") upon which I, my heirs, assigns or successors in interest are obligated as a guarantor on behalf of the Hebrew Academy, the gift shall go first to reduce or expunge the mortgage... In the event that no mortgage exists at the time of my death the entire $500,000.00 amount shall go to the Hebrew Academy for the purpose of funding scholarships to educate Jewish children only. (emphasis added).

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Last Will and Testament, Trial Exhibit 22. When asked at trial if the Bequest clearly and unambiguously provides for a $500,000 gift to the Milton I. Schwartz Hebrew Academy to pay for scholarships for Jewish children, Jonathan Schwartz testified as follows:

> Q. And your opinion, this will provision of your dad's, 2.3, paragraph 2.3 of the will, it cannot be read two different ways it's not ambiguous at all to you?
>
> A. It was clear to me and it was clear to him.
>
> Q. It said at the time of your father's death under paragraph 2.3 of the will, at the time of your father's death, that your father bequeathed, gave, gave a gift of $500,000 to the Milton I. Schwartz Hebrew Academy, right?
>
> A. Correct.
>
> …
>
> Q. And if there was no mortgage, then the money would go to the Hebrew Academy to pay for scholarships for Jewish students, right?
>
> A. Correct.
>
> Q. And that is absolutely clear on -- as far as you are concerned?
>
> A. Correct.

August 27, 2018 Trial Transcript, Vol. 3 at 202:9-203:7, **Exhibit 1**.Milton Schwarz died on August 9, 2007, and the Executor, Jonathan Schwartz, filed the petition for probate of the Will on October 15, 2007. At the time Milton Schwartz drafted his Will in early 2004 and at the time Milton Schwartz passed away on August 9, 2007 (Trial Exhibit 38), the school, including both the building and the corporate entity, was named the Milton I. Schwartz Hebrew Academy. *See* Certificate of Amendment to Articles of Incorporation filed March 21, 2008, Trial Exhibit 51, **Exhibit 2**; and Petition to Compel Distribution for Accounting and for Attorneys' Fees ("Petition for Declaratory Relief"), Trial Exhibit 61 at p. 4. Even though Jonathan Schwartz admitted the Bequest was clear and unambiguous and the school was named the Milton I. Schwartz Hebrew Academy at the time of Milton Schwartz's death, the Estate failed to distribute the $500,000 gift to the school.

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B. The Corporate Entity Changes its Name to The Dr. Miriam and Sheldon Adelson Educational Institute.

The name of the school corporation remained the Milton I. Schwartz Hebrew Academy until March 21, 2008, when a Certificate of Amendment to Articles of Incorporation was filed with the Nevada Secretary of State indicating that the corporation known as the "Milton I. Schwartz Hebrew Academy" was being renamed "The Dr. Miriam and Sheldon G. Adelson Educational Institute." *See* Ex. 2, Trial Exhibit 51. Even though the corporate name changed over 7 months after Milton's death, the lower school remained named the Milton I. Schwartz Hebrew Academy.

C. The School and the Estate Unsuccessfully Attempted to Resolve the Dispute about Payment of the Bequest and Lawsuits are Ultimately Filed.

The Board of the School became aware of the Bequest to the school in Milton Schwartz's Will and entered into discussions with Jonathan Schwartz to properly disburse the Bequest, but the Estate ultimately refused. Nevertheless, School representatives and Jonathan Schwartz continued to periodically meet to discuss the proper disbursement of the Bequest. One such meeting in March of 2010 resulted in a verbal altercation wherein Jonathan Schwartz threatened physical harm to the then head master of the School, Victor Chaltiel. *See* August 31, 2008 Trial Transcript, Vol. 7, at 54:21-56:2, **Exhibit 3**.

After patiently waiting since late 2007, and after several failed attempts to amicably resolve the School's outstanding claim for the Bequest, the School had no choice but to seek judicial relief. On May 3, 2013, The Adelson Campus filed its petition to compel the Estate to honor the $500,000 Bequest in Mr. Schwartz's Will. *See* Petition for Declaratory Relief, Trial Exhibit 61. In response, the Estate filed its own petition for declaratory relief on May 28, 2013, asserting claims for breach of contract, fraud in the inducement, voiding the Bequest for a mistake, offset of the Bequest, revocation of gift and constructive trust, and construction of the Will. The Estate's position remains that payment of the Bequest is contingent on the "school" being named the Milton I. Schwartz Hebrew Academy in perpetuity. This alleged condition to payment, however, does not expressly appear anywhere and is founded only upon extrinsic evidence that the law states should not be considered due to the unambiguous nature of the Bequest.

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D. The Milton I. Schwartz Name is Removed from the Lower School as a Result the Actions by the Estate's Executor.

As a result of the actions of the Estate's Executor, Jonathan Schwartz, in both refusing to timely pay the Bequest and later filing suit against the School on May 28, 2013, the Board decided to remove the Milton I. Schwartz Hebrew Academy name from the lower school building in the summer of 2013. *See* August 29, 2018 Trial Transcript, Vol. 5, at 88:5-12, **Exhibit 4**; Ex. 3, August 31, 2018 Trial Transcript, Vol. 7, at 49:5-22. Paul Schiffman confirmed that from the date of Milton Schwartz's death up until May 28, 2013, there was a Milton I. Schwartz Hebrew Academy. *See* Ex. 4, August 29, 2018 Trial Transcript, Vol. 5, at 134:5-9. Former Board member, Sam Ventura, also testified at trial that Milton Schwartz's name would still be up on the lower school if the Estate would have paid the Bequest. *See* Ex. 3, August 31, 2018 Trial Transcript, Vol. 7 at 77:3-10.

III.

ARGUMENT

A. The School Should Prevail on its Claim to Compel the Distribution of the Bequest and Defeat the Estate's Competing Claim for Construction of Will.

Pursuant to its Petition to Compel Distribution, the School requests the Court to compel the Executor of the Estate, Jonathan Schwartz, to distribute the Bequest to the School to effectuate the stated purpose of "funding scholarships to educate Jewish children only." In opposition, the Estate's claim for Construction of Will seeks a declaration that the Bequest lapses because the school is no longer named the Milton I. Schwartz Hebrew Academy. *See* Estate's Petition for Declaratory Relief at p. 6-7. Contrary to the Estate's contention, the unambiguous Bequest to the Milton I. Schwartz Hebrew Academy never expressly makes perpetual naming rights a condition for the $500,000 gift:

> **2.3 <u>The Milton I. Schwartz Hebrew Academy</u>. I hereby give, devise, and bequeath the sum of five hundred thousand dollars ($500,000.00) to the Milton I. Schwartz Hebrew Academy (the, "Hebrew Academy")**... If, at the time of my death, there is a bank or lender mortgage (the "mortgage") upon which I, my heirs, assigns or successors in interest are obligated as a guarantor on behalf of the Hebrew Academy, the gift shall go first to reduce or expunge the mortgage... In the event that no mortgage exists at the time of my death the entire $500,000.00 amount shall go to the Hebrew Academy **for the purpose of funding scholarships to educate Jewish children only**. (emphasis added).

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Last Will and Testament, Trial Exhibit 22. As discussed in greater detail below, the Estate should be compelled to pay the Bequest to the School for the stated purpose because at the time of Milton Schwartz's death, and up and until May 28, 2013, there was a "Milton I. Schwartz Hebrew Academy."

1. The Milton I. Schwartz Hebrew Academy existed at the time Milton Schwartz executed his Will and at the time he died.

After carefully reviewing all of the evidence presented at trial, the Jury found that Milton Schwartz intended that the Bequest be made only to a school known as the "Milton I. Schwartz Hebrew Academy" for the purposes set forth in the Bequest. *See* **Exhibit 5**, Verdict, Question No. 8. At the time Milton Schwartz passed away on August 9, 2007 (Trial Exhibit 38), the school, including both the building and the corporate entity, was in fact named the Milton I. Schwartz Hebrew Academy. *See* Ex. 2, Certificate of Amendment to Articles of Incorporation filed March 21, 2008, Trial Exhibit 51 and Petition to Compel Distribution for Accounting and for Attorneys' Fees, Trial Exhibit 61 at p. 4. Paul Schiffman testified at trial that from the date of Milton Schwartz's passing up until May 28, 2013, there was a Milton I. Schwartz Hebrew Academy. *See* Ex. 4, August 29, 2018 Trial Transcript, Vol. 5. at 134:5-9. Mr. Schiffman further confirmed that the building housing the lower school (grades pre-school through 4th grade) continued to be known as the "Milton I. Schwartz Hebrew Academy" until Jonathon Schwartz instituted an action against the School on May 28, 2013, over 5 years later. *See id* at 88:5-12. Mr. Schiffman also testified that if Jonathan Schwartz would have written a check in May 2013 made out to the "Milton I. Schwartz Hebrew Academy" the School could have still cashed the check as it was doing business under the name "Milton I. Schwartz Hebrew Academy." *See id* at 179:11-22.

Based on the foregoing admitted evidence and testimony elicited at trial, the Estate should be compelled to pay the Bequest to the School because at the time of Milton Schwartz's death in August 2007, both the building and the corporate entity, was named the Milton I. Schwartz Hebrew Academy. Moreover, had the Bequest been disbursed within 5 years of Milton's death, the funds clearly would have gone to a Jewish day school where one of the buildings was named the Milton I. Schwartz Hebrew Academy.

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2. A change of the corporate name in no way creates a new entity or effects its rights.

The Estate may also argue that the change of the corporate name from the "Milton I. Schwartz Hebrew Academy" to "The Dr. Miriam and Sheldon G. Adelson Educational Institute" on March 21, 2008 obviates the need to pay the Bequest. However, it is well settled that the Board-approved corporate name change after Milton Schwartz's death does mean the Milton I. Schwartz Hebrew Academy ceased to exist or somehow became a new entity. *See In re VHA Diagnostic Services, Inc.*, 65 Ohio St. 3d 210, 215, 602 N.E. 2d 647, 651-652 (Ohio 1992)("'A change of name in no way affects the legal existence of the corporation or the nature of the corporation. Appellants cite no authority or rationale for their bare assertion that a corporation ceases to exist by a change of name.); *Pro Source Roofing, Inc. v. Boucher,* 822 So. 2d 881, 884 (La. App. 2 Cir. 2002)(change in a corporation's name does not create a new entity); *Bankers Life & Cas. Co. v. Kirtley,* 338 F.2d 1006, 1013)(8th Cir. 1964)(change in name of corporation does not affect its rights); *Goodwyne v. Moore,* 170 Ga. App. 305, 308, 316 S.E. 2d 601, 603 (Ga. App. 1984)("A corporate name change is routinely accomplished by merely amending the articles of incorporation .... Such a procedure does not cause a new corporation to come into 'existence.'") which is exactly what was done here; 6 Fletcher Cyc. Corp. § 2456 ("A change of name by a corporation has no more effect upon the identity of the corporation than a change of name by a natural person has upon the identity of such person. It is the same corporation with a different name.").

In *Ratcliffe v. Seaboard Nat. Bank of New York,* 46 S. W. 2d 750 (Tex. Civ. App. 1932), the corporation designated as executor in a will changed its name several times without affecting its rights and obligations under the will. There, the will named "Mercantile Trust Company" as executor. The Mercantile Trust Company changed its name twice. First, to "Mercantile National Bank of New York" and then to "Seaboard National Bank of New York." The Court held that "such changes of name did not destroy the identity of the corporation named as executor in the will nor affect its property, rights, or obligations." *Ratcliffe,* 46 S.W. 2d at 752. *See also* 96 C.J.S. *Wills* § 1091 "The mere fact that a corporate charity has changed its name does not render a gift to it under its former name void for uncertainty.")

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On March 21, 2008, a Certificate of Amendment to Articles of Incorporation was filed with the Nevada Secretary of State indicating that the corporation known as the "Milton I. Schwartz Hebrew Academy" was being renamed "The Dr. Miriam and Sheldon G. Adelson Educational Institute." *See* Ex. 2. As held in the cases cited above, the mere fact that the Board changed the school's corporate name does not render the Bequest to the Milton I. Schwartz Hebrew Academy void for uncertainty. Any argument that the Milton I. Schwartz Hebrew Academy ceased to exist or somehow became a new entity as result of the corporate name change is uncompelling as the change in a corporation's name does not create a new entity, and is inconsistent Nevada law. Therefore, the change of the school's corporate name in March 2008 is not a legal basis to avoid paying the Bequest.

3. Equitable considerations also justify the distribution of the Bequest to the School.

Equity also requires that the Estate should be compelled to pay the Bequest to the School. The Estate's primary argument to avoid paying the Bequest is that the Milton I. Schwartz Hebrew Academy does not currently exist. However, it was the actions of the Estate's Executor, Jonathan Schwartz, in both refusing to timely pay the Bequest and later filing suit against the school in May 2013 that resulted in the Board deciding to remove the Milton I. Schwartz Hebrew Academy name from the lower school building in the summer of 2013. *See* Ex. 4, August 29, 2018 Trial Transcript, Vol. 5, at 88:5-12; Ex. 3, August 31, 2018 Trial Transcript, Vol. 7, at 49:5-22. Former Board member, Sam Ventura, testified at trial that Milton Schwartz's name would still be up on the lower school if the Estate would have paid the Bequest. *See id* at 77:3-10. In addition to refusing to pay the Bequest, Jonathan Schwartz's antagonistic conduct further supported the Board's decision to remove his father's name from the lower school in the summer of 2013. A meeting in March of 2010 between School representatives and Jonathan Schwartz about payment of the Bequest quickly resulted in a strongly worded verbal altercation wherein Jonathan was screaming, threatened to sue the School, and then threatened Victor Chaltiel, stating "[i]f you were ten years younger, I told Victor, I will kick your ass right now." *See id* at 54:21-56:2. But for Jonathan Schwartz's acts, the lower school would more likely than not bear Milton Schwartz's name.

The Estate has manufactured its own defense to the School's request to compel the Bequest based on the Executor's dilatory and antagonistic conduct. But for the Estate delaying payment, and

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then suing the School, Milton's name would still be on the lower school. The Estate created the very circumstance it now points to as the reason it does not have to honor the Bequest. Equity does not countenance such conduct as noted in the maxim, he who comes in equity must come with clean hands. *See Tracy v. Capozzi*, 98 Nev. 120, 123, 642 P.2d 591, 593 (1982). Therefore, based on the foregoing equitable considerations, the School must prevail on its claim for Declaratory Relief to compel the distribution of the $500,000 Bequest.

B. The School Should Also Prevail on the Estate's Claim for Bequest Void for Mistake.

1. The Estate's request to declare the Bequest void is barred as a matter of law.

The Estate seeks to void the Bequest because it asserts that Milton Schwartz was induced into making the Bequest due to his alleged mistaken belief that the school would be named after him in perpetuity. *See* Estate's Petition for Declaratory Relief at 8:10-12. NRS 137.080 requires anyone seeking to contest a will must do so within 3 months after the order admitting the will to probate is entered. According to the Court's docket, the Order admitting the Will to probate was entered on January 23, 2008. So the final day to contest the Will was on April 23, 2008. Yet, the Estate's claim to void the Bequest due to an alleged unilateral mistake was not made until it filed its Petition for Declaratory Relief on May 28, 2013.

Pursuant to the Estate's claim for Bequest Void for Mistake, the Executor is clearly contesting the Will because it seeks to "declare the bequest void," which is prima facie a will contest. *See In Re Estate of Moore*, 889 S.W.2d 136, 137 (Mo. App. E.D. 1994) (an action couched as one "to construe a will" which seeks to void any provision of a will is really a will contest)(further held the will contest was barred by the six month statute of limitations); *see also Williams v. Bryan Cave, et al.* 774 S.W.2d 847, 848 (Mo. App. E.D. 1989)(an action to void will or any part thereof is a will contest no matter how couched). To be sure, courts routinely reject similar machinations where litigants disguise a will contest through deceptive naming. *See In Re Estate of Hutchins*, 875 S.W.2d 564, 568 (Mo. App. S.D. 1994) ("**Although plaintiffs characterize this action [to void a will provision] as one for construction of a will, that position is untenable.**") (emphasis added); *Johnson v. Wheeler*, 360 Mo. 334, 337,228 S.W.2d 714, 716 (Mo. 1950)(one "**cannot under the guise of construing it bring a suit to have [a will] (or the part involved) declared void**") (emphasis added).

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The Estate's "claim" seeking to have the Bequest declared void due to an alleged unilateral mistake is in actuality a will contest instituted 5 years too late. Therefore, the Estate's claim for Bequest Void for Mistake should be dismissed as a matter of law.

2. Milton Schwartz's Bequest was motivated by his support and dedication to the School, not simply because he thought he had perpetual naming rights.

A court would normally refuse to invalidate a will provision, because the testator duly executed the will with the intent that it dispose of his estate. *See Holmes v. Campbell College*, 125 P. 25 (Kan. 1912) (The court stated it did not have the power to change the terms of the will "merely because it was the result of a mistake of fact on her [the testator's] part." The primary justification for denying relief is to maintain the integrity of the will as a written instrument against attack based upon extrinsic, and often oral, evidence. *See* Warren, *Fraud, Undue Influence, and Mistake in Wills*, 41 Harv. L. Rev. 309, 329-30 (1928). Also, reliable proof of the mistake is difficult to obtain: the mistake is wholly subjective in nature, yet the subject is never available to testify. *See* Henderson, *Mistake and Fraud in Wills*, 47 B.U.L. Rev. 303, 318 (1967). Finally, inquiry into what the testator would have done had he not been mistaken is too conjectural to be undertaken, on the basis of extrinsic evidence. See *id* at 323.

Notwithstanding the foregoing, the party advocating the unilateral mistake as a basis for obtaining relief from a donative transfer has the burden of proving the testator's intent and the alleged mistake by clear and convincing evidence. *See In re Irrevocable Tr. Agreement of 1979*, 130 Nev. 597, 607, 331 P.3d 881, 888 (2014). An invalidating mistake occurs when "but for the mistake the transaction in question would not have taken place." Restatement (Third) of Restitution & Unjust Enrichment § 5(2)(a) (2011). "**The donor's mistake must have induced the gift; it is not sufficient that the donor was mistaken about the relevant circumstances.**" *Id.* § 11 cmt. C; *In re Irrevocable Tr. Agreement of 1979*, 130 Nev. 597, 605–06, 331 P.3d 881, 887 (2014) (emphasis added).

The Estate's unilateral mistake defense requires it prove by clear and convincing evidence that Milton Schwartz's Bequest was not motivated by his desire to continue to support and promote Jewish education and helping Jewish families afford a Jewish education for their children, but only because Milton Schwartz thought he had perpetual naming rights at the School. Invalidating the

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Bequest is not appropriate here because the evidence admitted during trial proves that Milton Schwartz was likely motivated to donate $500,000 to the school for use for scholarships because he was dedicated to and supported the school over approximately 2 decades. The Executor, Jonathan Schwartz, discussed his father's dedication and support of the school as follows:

> Q. How did your father -- what is your understanding with respect to your father's dedication to the Milton I. Schwartz Hebrew Academy?
>
> A. He was incredibility dedicated to the school. He was involved with the school on a daily basis. It wasn't just, you know, write a big check and get some naming rights. He was involved with the day to day operations of the school. I remember he had a speakerphone in his car. I remember being in the car with him and him getting phone calls about parents requesting scholarships, about hiring staff members, about raising money. He was constantly raising money for the school to keep it operating. These kind of schools never cover their operating expenses, so every single summer, the school would be at a deficit and my dad would get on the phone and raise a bunch of money from people, and he would write a large check himself to keep it operating. So he was dedicated to it like it was one of his businesses. He was managing at times, on a daily basis.

Ex. 1, Vol. 3, August 27, 2018 at 112:11-113:6. Several other witnesses likewise testified that Milton loved the school and worked hard to see that the school thrived. Susan Pacheco, Milton's longtime assistant, testified that Milton loved the school and was all about the school. *See* August 24, 2018, Trial Transcript Vol. 2 at 332:15-19, **Exhibit 6**. Also, former Board member Dr. Roberta Sabbath testified that Milton worked toward the goal of making the Hebrew Academy a better place. *See* Ex. 1 at 70:17-24. The foregoing testimony demonstrates Milton Schwartz's Bequest was motivated by his support and dedication to the school, not solely because he thought he had perpetual naming rights. Thus, the Estate cannot establish by clear and convincing evidence that but for Milton Schwartz's mistaken belief that he had perpetual naming rights of the school he would have **never** made the Bequest.

The Estate's claim that Milton was induced to make the Bequest solely because of the existence of alleged perpetual naming rights is further unsupported because the Bequest does not contain any express language making the gift conditional upon the existence of the perpetual naming rights. Thus, if Milton intended for the Bequest to be given only if he had perpetual naming rights, the

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circumstances would have compelled him to have stated such in the Will. For such an admittidly fastidious and meticulous man that had a propensity to memorialize everything in writing, Milton's failure to include any reference to perpetual naming rights must be construed as purposeful in light of the evidence adduced by the Estate's own witnesses and the unambiguous language of the Will itself.[1] Milton's only clear manifestation of his sole intent of the purpose of the Bequest is "for the purpose of funding scholarships to educate Jewish children only." *See* Last Will and Testament, Trial Exhibit 22.

Even if Milton was mistaken about the existence of perpetual naming rights, the Estate cannot prove by clear and convincing evidence that he would not have made the Bequest in light of the evidence at trial demonstrating that Milton supported and dedicated himself to the school and its operation for almost 2 decades. The only express stated purpose behind the Bequest was to support the school and its students through a scholarship fund. Therefore, the School should prevail on the Estate's claim for Bequest Void for Mistake.

C. The Estate is not Entitled to the Equitable Remedy of Rescission of Milton Schwartz's Lifetime Gifts to the School.

The Estate seeks to claw back all of Milton Schwartz's *inter vivos*/lifetime gifts to the School and its students because Milton Schwartz allegedly had the subjective belief that he had an enforceable naming rights contract with the School in perpetuity. Under the facts of this case, the Estate is not entitled to the equitable remedy of rescission of Milton Schwartz's lifetime gifts that date back to 1988.

In its Petition, the Estate alleged that Milton Schwartz's lifetime gifts were conditioned on the School bearing his name in perpetuity and "fulfilling its promises as memorialized in its May 23, 1996 letter" and that even if the School never agreed to bear his name in perpetuity or the School's alleged promise is unenforceable, the Estate would still be entitled to recover "all funds Milton contributed in reliance on his belief that an agreement existed." Estate's Pet. at 10:2-6. In support of

[1] Milton Schwartz's long-time assistant, Susan Pacheco, testified that Milton was really precise when it came to important documents and he would never leave anything to chance. *See* Ex. 6, August 24, 2018, Trial Transcript Vol. 2 at 296:3-8.

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these allegations, the Estate cited authority stating that a gift can be rescinded if it was induced by fraud, material misrepresentation, or a mistake as to a basic fact.[2]

At the outset, the Court must note the inconsistencies in the Estate's representations of the substance of this claim. As set forth above, under the Estate's sixth claim for relief, "Revocation of Gift and Constructive Trust," the Estate sought a declaration that it was entitled to revocation of all funds Milton Schwartz donated to the School because the gifts were conditional and/or because they were induced by fraud, material misrepresentation, or mistake.[3] Then, in the Estate's Pre-Trial Memorandum, the Estate took the position that their sixth claim was actually a claim for "promissory estoppel" and later argued that this claim was to be decided by the jury. *See* **Exhibit 7**, The Estate's Pre-Trial Memorandum at 5:15-19. The Estate was then permitted to obtain jury instructions (Jury Instructions Nos. 32-35) and verdict form questions on promissory estoppel. At trial, the Jury rejected the Estate's "claim" for promissory estoppel. *See* Verdict, at Question 11.

Now, because the Jury found against the Estate on its newly-alleged or recast claim for promissory estoppel, the Estate will likely seek to revert back to their original position and contend that their sixth claim for relief is actually an equitable claim for revocation/rescission under a mistake theory that must be decided by the Court. The Estate is judicially estopped from having it both ways. *See United States v. Real Prop. Located at Incline Vill.*, 976 F. Supp. 1327, 1339 (D. Nev. 1997) (citation omitted). The Court must hold the Estate to their decision to convert their sixth claim into a claim for promissory estoppel and confirm the Jury's findings on this claim.

Regardless, the Estate is not entitled to rescission of Milton Schwartz's lifetime gifts. The Estate's claim for revocation of the lifetime gifts is time barred under NRS 11.190(3)(d). Furthermore, the Estate cannot meet its substantial burden to demonstrate that it is entitled to take back Milton Schwartz's lifetime gifts to the School. Milton Schwartz's lifetime gifts were **irrevocable gifts** that could only be rescinded if the Estate can demonstrate by clear and convincing

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[2] As the Estate dropped its fraud claim prior to trial and failed to present evidence at trial that the School made a material misrepresentation, the only basis on which the gifts could be rescinded is mistake.

[3] The Estate's third claim, "Bequest Void for Mistake" makes no reference whatsoever to anything other than the Bequest. Thus, the Estate's sixth claim, "Revocation of Gift and Constructive Trust," is the only basis on which the Estate can even seek rescission of Milton Schwartz's lifetime gifts.

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evidence that Milton's belief that the School would be named after him in perpetuity was **the** motivating factor in his decision to make the gifts to the School and its students. The Estate cannot meet this heavy burden. The Estate has utterly failed to meet this burden as the Estate can point to no evidence that the sole reason Milton made each and every one of the alleged gifts – some 15 gifts in random amounts, ranging from as little as $50.00 to as much as $135,277.00, occurring sporadically over a 20 year time period – was because he believed the School, and everything ever remotely related to it, would bear his name in perpetuity. The Court must also exercise its considerable discretion and reject the Estate's claim because forcing the School to return all of Milton Schwartz's lifetime gifts, some of which are almost 30 years old, to the Estate would not achieve equity under the circumstances. Moreover, the Estate failed to provide any documents or evidence demonstrating how the yearly lifetime gifts amounts it purports it should recover were tabulated because the supporting documents were destroyed after litigation was instituted or never produced. *See* Ex. 6, August 24, 2018 Vol. 2 at 313:4-314:22

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1. The Estate's claim for rescission based on Milton Schwartz's alleged mistake is time barred.

"An action for relief on the grounds of mistake is subject to a three-year limitations period, which 'shall be deemed to accrue upon the discovery by the aggrieved party of the facts constituting the…mistake.'" *State Dep't of Transportation v. Eighth Judicial Dist. Ct.*, 402 P.3d 677, 683 (Nev. 2017), reh'g denied (Nov. 29, 2017) (citing NRS 11.190(3)(d)).

The Estate affirmatively stated in its Petition for Declaratory Relief filed on May 28, 2013, that the "Executor became aware of the Academy's breach on or about March 2010." *See* Estate's Petition for Declaratory Relief filed May 28, 2013 at 5:10-11. The Court may also recall that in Jonathan Schwartz's May 10, 2010 letter to the Board that the School's actions over the past 2 ½ years preceding the letter breached a purported perpetual naming rights agreement. *See* May 10, 2010 letter, Trial Exhibit 55 at EST-00001-27, **Exhibit 8**. The facts giving rise to the Estate's claim for rescission based on mistake are the same facts giving rise to the Estate's claims for breach of contract. Therefore, the Estate's claim for rescission based on Milton Schwartz's alleged mistaken

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belief that he had a naming rights contract with the School in perpetuity is time barred under the applicable three-year statute of limitations.

2. Milton Schwartz's lifetime gifts are irrevocable and the Estate cannot demonstrate by clear and convincing evidence that Milton Schwartz's mistake was an invalidating mistake or that the Estate is entitled to the equitable remedy of rescission.

a. Under Nevada law, gifts are irrevocable once transferred to and accepted by the donee.

Under Nevada law, the general rule is that **gifts are irrevocable once transferred to and accepted by the donee.** *See Simpson v. Harris*, 21 Nev. 353, 362, 31 P. 1009, 1011 (1893). A valid inter vivos gift requires a donor's intent to voluntarily make a present transfer of property to a donee without consideration, the donor's actual or constructive delivery of the gift to the donee, and the donee's acceptance of the gift. *See Schmanski v. Schmanski*, 115 Nev. 247, 252, 984 P.2d 752, 756 (1999); *Edmonds v. Perry*, 62 Nev. 41, 61, 140 P.2d 566, 575 (1943); *Simpson v. Harris*, 21 Nev. 353, 362, 31 P. 1009, 1011 (1893); *see also* Restatement (Third) of Prop.: Wills & Other Donative Transfers § 6.1 (2003). According to the Nevada Supreme Court:

> Unless conditional, a gift becomes irrevocable once transferred to and accepted by the donee. *Simpson*, 21 Nev. at 362–63, 31 P. at 1011 (noting that a donor giving a gift may not reclaim or expect repayment for the gift). In this regard, **Nevada's long-standing position on the issue** is consistent with that of other jurisdictions that have also opined, in more recent decisions, that **a gift becomes irrevocable once the transfer and acceptance of that gift have occurred**. *See Albinger v. Harris*, 310 Mont. 27, 48 P.3d 711, 719 (2002) ("Such a gift, made without condition, becomes irrevocable upon acceptance."); *Cooper v. Smith*, 155 Ohio App.3d 218, 800 N.E.2d 372, 379 (2003) ("Generally, a completed inter vivos gift is absolute and irrevocable.").

In re Irrevocable Tr. Agreement of 1979, 130 Nev. 607, 603-04, 331 P.3d 881, 885-86 (2014).

One exception to the general rule that gifts are irrevocable includes certain unilateral mistakes by the donor. "[A] donor's unilateral mistake in executing a donative transfer **may** allow a donor to obtain relief from that transfer if the mistake and the donor's intent are proven by clear and convincing evidence." *Id.* at 607, 331 P.3d at 888. (emphasis added).

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Rescission of a gift is an available remedy only where the donor can show that an invalidating mistake occurred. *Id.* at 606, 331 P.3d at 887. "A donor whose gift is induced by invalidating mistake has a claim in restitution as necessary to prevent the unintended enrichment of the recipient." Restatement (Third) of Restitution and Unjust Enrichment § 11 (2011). An invalidating mistake occurs when "but for the mistake the transaction in question would not have taken place." *In re Irrevocable Tr. Agreement of 1979*, 130 Nev. at 605, 331 P.3d at 887 (citing Restatement (Third) of Restitution & Unjust Enrichment § 5(2)(a) (2011)). "The donor's mistake must have induced the gift; it is not sufficient that the donor was mistaken about the relevant circumstances." Restatement (Third) of Restitution & Unjust Enrichment § 11 cmt. c.

To demonstrate unilateral mistake in the execution of a gift, the party advocating for relief must provide **evidence of the donor's intent at the time the gift is made**. *In re Irrevocable Tr. Agreement of 1979*, 130 Nev. at 603, 331 P.3d at 885 (emphasis added). Unlike unilateral mistake principles under contract law, in a gift context, only the donor's intent and acts matter, whether a donee knew of or caused the mistake is likely irrelevant. *Id.* at 603, 331 P.3d at 885. "Thus, unilateral mistakes cannot be said to have been made without first determining the donor's intent **at the time when delivery** and all other elements necessary to complete a donative transfer were completed." *Id.* at 607-08, 331 P.3d at 888. The issue of a donor's donative intent and beliefs is a question for the finder of fact. *Id.*

The Nevada Supreme Court has expressly stated that district courts have full discretion to fashion and grant equitable remedies. *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428, 245 P.3d 535, 538 (2010) (citing *Bedore v. Familian*, 122 Nev. 5, 11–12 & n. 21, 125 P.3d 1168, 1172 & n. 21 (2006)). A district court's decision to grant or deny an equitable remedy is reviewed for an abuse of discretion. *Id.*

b. The Estate failed to adduce clear and convincing evidence at trial to support its claim for revocation of Milton Schwartz's irrevocable lifetime gifts.

Milton Schwartz's alleged mistake regarding the existence of an enforceable naming rights contract in perpetuity does not constitute an invalidating mistake that would entitle the Estate to rescission. This is not a case where the donor mistakenly transferred a gift to the wrong person,

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mistakenly gifted the wrong gift, or mistakenly donated more than intended as contemplated by the law on mistake in the gift context. *See* Restatement (Third) of Restitution & Unjust Enrichment § 11 (2011). Instead, the mistake alleged by the Estate is an improper attempt to backdoor its abandoned fraud claim and to ask the Court to set aside the Jury's finding on the Estate's breach of contract and promissory estoppel claims. The Estate is thus attempting to cram a square peg in a round hole to now try and take back Milton Schwartz's irrevocable gifts to punish the School. Regardless of how the Estate chooses to label its claim, the Estates is not entitled to claw back all of Milton Schwartz's lifetime gifts, some of which are now almost 30 years old.

i. The Estate cannot demonstrate that Milton Schwartz's mistake was an invalidating mistake.

The Estate cannot establish by clear and convincing evidence that Milton made an invalidating mistake that would entitle to Estate to rescission of **all** of Milton Schwartz's lifetime gifts to the School. According to the Estate, Milton Schwartz mistakenly believed that he had an enforceable naming rights contract with the School in perpetuity. And that but for Milton Schwartz's reliance on that alleged mistake, he would have never donated a single penny to the School and its students.

The Estate cannot show that Milton's alleged mistake that he had an enforceable naming rights contract with the School in perpetuity was the sole motivating factor in Milton's decision to donate to the School and its students. For rescission to even constitute an available remedy the Estate must show that Milton's mistake **induced each one of the gifts** and that, **but for the mistake, the gifts over a period of 20 years would not have taken place**. *See* Restatement (Third) of Restitution & Unjust Enrichment § 5(2)(a) & § 11 cmt. c (2011).

The Estate cannot meet its substantial burden because it failed to adduce clear and convincing evidence at trial showing that the sole reason Milton donated money to the School for over 30 years was because he believed the School would be named after him in perpetuity. It is not sufficient that the gifts were premised in part on the fact that the School was named after Milton Schwartz at the time he made them and that Milton Schwartz subjectively believed that it would remain so "in perpetuity." As set forth above, the evidence showed that Milton Schwartz made the donations

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because of his support and dedication to the school, the students, and the promotion of Jewish education, and not solely because he thought he had perpetual naming rights. *See* Section III(B)(2), *supra*. Taken together, this evidence refutes the Estate's position that but for Milton Schwartz's mistaken belief that the School would be named after him in perpetuity, he would not have made any gifts to the School and its students. Therefore, the Estate cannot show that Milton's alleged intent with regards to the gifts constitutes legally cognizable invalidating mistake that would entitle the Estate to the equitable remedy of rescission.

ii. The Estate's position that it is entitled to claw back Milton Schwartz's irrevocable lifetime gifts would not achieve equity.

In addition, the relief the Estate seeks would not achieve equity. Under the circumstances, revocation of Milton's irrevocable lifetime gifts does not serve the purpose of the rules regarding restitution in the gift context. As set forth in the Restatement, the rules related to mistake in *inter vivos* gifts "allow a claim in restitution only as necessary to avoid the unintended enrichment of the gratuitous transferee." Restatement (Third) of Restitution and Unjust Enrichment § 11 (2011). Here, the Estate cannot show that the School and its students were the unintended beneficiaries of Milton Schwartz's gifts. There can be no question that Milton Schwartz intended that his gifts go to the school and its students. No evidence exists that the school used Milton Schwartz's lifetime gifts for anything other than to improve the school and provide benefits to its students. Forcing the School to now return Milton Schwartz's lifetime gifts, despite naming the school after him for decades, simply because the School changed its name years, in some instances decades, after Milton Schwartz made donations to the school does not amount to equity under any circumstance. This is especially true in light of the Jury's finding that no naming rights contract existed.

Moreover, the Estate's position fails to account for all the years that the School was known as the Milton I. Schwartz Hebrew Academy. Under the Estate's theory, if the School continued to call itself the Milton I. Schwartz Hebrew Academy from now until 2087 and then changed its name, the School would still have to return every single penny Milton Schwartz gave to the School. **The Estate's claim seeks nothing more than to punish the School for seeking to compel distribution of the Bequest** and the events that transpired since the instant proceedings commenced as a result of

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Jonathan Schwartz's actions. Thus, there is nothing equitable about the Estate's position, and this Court must exercise its broad discretion and deny the Estate's claim.

iii. Milton Schwartz's lifetime gifts were not conditional gifts.

In the event the Estate intends to re-assert the allegations in its Petition that the lifetime gifts were conditional and subject to revocation on that basis, the School addresses that argument herein. Although the Estate alleged that Milton Schwartz's lifetime gifts were conditioned on the School bearing his name in perpetuity, the Estate failed to introduce sufficient evidence at trial to support this allegation. Milton's subjective belief in the existence of an enforceable naming rights agreement in perpetuity is not sufficient to transform Milton's lifetime gifts into conditional gifts. The Estate failed to adduce evidence that each one of Milton's *inter vivos* donations was expressly conditioned on the School bearing his name in perpetuity and that the School understood and agreed that it would have to return the donation in the event the School ceased being known at the Milton I. Schwartz Hebrew Academy. The evidence is quite to the contrary. Milton Schwartz never demanded the School return his the gifts he made to the School before 1993 and when he was well aware the School changed the name of the corporation back to the Hebrew Academy. Such evidence is irrefutable proof that Milton Schwartz did not intend his gifts to be conditional and that no such agreement or understanding existed.

Accordingly, the Estate is not entitled to any equitable relief and the Court must deny the Estate's Sixth Claim for Relief for revocation of Milton Schwartz's lifetime gifts.

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IV.

CONCLUSION

For the foregoing reasons, the School respectfully requests the Court issue an order compelling the Executor of the Estate to pay the $500,000 Bequest to the School to be used to fund scholarships to educate Jewish children only. The School should also prevail on the Estate's remaining claims for Bequest Void for Mistake and Revocation of Gift and Constructive Trust.

DATED this 16th day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on 16th day of November, 2018, a true and correct copy of the foregoing **ADELSON CAMPUS' POST-TRIAL BRIEF ON OUTSTANDING CLAIMS** was served on all parties through the Court's e-filing system.

An employee of Kemp, Jones & Coulthard, LLP

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EXHIBIT 1

In the Matter Of:

Schwartz vs Adelson Educational Institute

TRANSCRIPT TRIAL

August 27, 2018

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Discovery Legal Services, LLC 702-353-3110 production@discoverylegal.net

Q. But you didn't?
A. We didn't.
Q. And if we could go on and go on, and if you want to look, I don't want to belabor it. I understand your schedule. I believe you already said this, but there is no place in that letter it pledges to put Milton Schwartz's name anywhere in association with the school, in the stone, on the letterhead on the corporation, on the front of the school, anywhere at all; it never says you are going to do that in perpetuity, does it?
A. It does not, to my best recollection of this letter.
MR. JONES: Thank you Dr. Sabbath.

EXAMINATION

BY MR. LEVEQUE:
Q. Dr. Sabbath, do you believe Mr. Milton Schwartz loved the Hebrew Academy?
A. I do.
Q. Do you believe he tirelessly worked to make the Hebrew Academy a better place when he was around?
A. "Tirelessly" is a big word. He certainly worked toward that goal, as far as I know. I'm not a friend of the man. I'm not of the family. I was

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Milton I. Schwartz Hebrew Academy in perpetuity, and that with that agreement, there were naming rights over the entire campus on Hillpointe, that his name was going to be on the letterhead of the school, his name was going to be on the pediment of the building. His name was going to be at the entrance to the school. I specifically recall the former sign at the entrance of the school. And that the school was going to publicly be known as the Milton I. Schwartz Hebrew Academy forever.

Q. How did your father -- what is your understanding with respect to your father's dedication to the Milton I. Schwartz Hebrew Academy?

A. He was incredibility dedicated to the school. He was involved with the school on a daily basis. It wasn't just, you know, write a big check and get some naming rights. He was involved with the day to day operations of the school. I remember he had a speakerphone in his car. I remember being in the car with him and him getting phone calls about parents requesting scholarships, about hiring staff members, about raising money. He was constantly raising money for the school to keep it operating. These kind of schools never cover their operating expenses, so every single summer, the

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school would be at a deficit and my dad would get on the phone and raise a bunch of money from people, and he would write a large check himself to keep it operating. So he was dedicated to it like it was one of his businesses. He was managing at times, on a daily basis.

Q. How did your father refer to the Milton I. Schwartz Hebrew Academy?

MR. JONES: Your Honor hate to say it but that is clearly directly hearsay.

THE COURT: Sustained.

THE WITNESS: I'm sorry, Your Honor I didn't hear you.

THE COURT: Sustained.

BY MR. FREER:

Q. Did you ever hear your father -- what was your understanding with respect to your -- the words in perpetuity with respect to the Milton I. Schwartz Hebrew Academy?

A. It was incredibly important to him. He would say it with emphasis, underlined. I can -- I can hear it in my head right now, he would always say this, Milton I. Schwartz Hebrew Academy --

MR. JONES: I'm sorry to cut you off but what your father said I would object to as being

means it's clear -- excuse me, ambiguous means it's not clear and you could have two possible meanings for the words, right; would you agree with that?

A. I'm sorry, say that again.

Q. The word ambiguous could be defined as a situation where a document is possibly could be interpreted two different ways?

A. Correct.

Q. And your opinion, this will provision of your dad's, 2.3, paragraph 2.3 of the will, it cannot be read two different ways it's not ambiguous at all to you?

A. It was clear to me and it was clear to him.

Q. It said at the time of your father's death under paragraph 2.3 of the will, at the time of your father's death, that your father bequeathed, gave, gave a gift of $500,000 to the Milton I. Schwartz Hebrew Academy, right?

A. Correct.

Q. And just so -- I don't think your counsel got into it, but to be clear, it also went on to say if there was a mortgage on the property where the building sat then that $500,000 would go to pay off any mortgage, right?

A. Correct.

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Q. And if there was no mortgage, then the money would go to the Hebrew Academy to pay for scholarships for Jewish students, right?

A. Correct.

Q. And that is absolutely clear on -- as far as you are concerned?

A. Correct.

Q. Now, you talked a little bit early on about some of the businesses that you own. You have at this point a real estate development company, a banking company, and transportation, advertising, all those things, correct?

A. Correct.

Q. Those are all businesses your father started or are those businesses that you started?

A. Some are and some are not.

Q. So tell the jury which ones are the ones your dad started.

A. My dad started Yellow Checker Star cab company. I separately started bank of George in Las Vegas. It has two branches. I have started numerous LLCs that represent different development projects that I have started after my dad died.

Q. I think you told the jury, your dad actually, I guess, built Valley Hospital?

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EXHIBIT 2

ROSS MILLER
Secretary of State
204 North Carson Street, Ste 1
Carson City, Nevada 89701-4299
(775) 684 5708
Website: secretaryofstate.biz

Filed in the office of	Document Number
Ross Miller Secretary of State State of Nevada	20080195694-74
	Filing Date and Time 03/21/2008 11:20 AM
	Entity Number C1073-1980

Nonprofit Amendment (After First Meeting)

(PURSUANT TO NRS 81 AND 82)

USE BLACK INK ONLY - DO NOT HIGHLIGHT — ABOVE SPACE IS FOR OFFICE USE ONLY

Certificate of Amendment to Articles of Incorporation For Nonprofit Corporations

(NRS Chapters 81 and 82 - After First Meeting of Directors)

1. Name of corporation:

The Milton I. Schwartz Hebrew Academy

2. The articles have been amended as follows (provide article numbers, if available):

Article I is hereby deleted in its entirety and replaced with the following: "This Corporation shall be known in perpetuity as 'The Dr. Miriam and Sheldon G. Adelson Educational Institute'."

See attachment for additional amendments.

3. The directors (or trustees) and the members, if any, and such other persons or public officers, if any, as may be required by the articles have approved the amendment. The vote by which the amendment was adopted by the directors and members, if any, is as follows: directors [11], and members [N/A].*

4. Officer Signature (Required):

X _____ Chairman
Signature Title

*A majority of a quorum of the voting power of the members or as may be required by the articles, must vote in favor of the amendment. If any proposed amendment would alter or change any preference or any relative or other right given to any class of members, then the amendment must be approved by the vote, in addition to the affirmative vote otherwise required, of the holders of a majority of a quorum of the voting power of each class of members affected by the amendment regardless of limitations or restrictions on their voting power. An amendment pursuant to NRS 81.210 requires approval by a vote of 2/3 of the members.

FILING FEE: $50.00

IMPORTANT: Failure to include any of the above information and submit the proper fees may cause this filing to be rejected.

This form must be accompanied by appropriate fees.

Nevada Secretary of State AM 81-82 Amendment
Revised on 01/01/07

Attachment to
Certificate of Amendment to Articles of Incorporation
of The Milton J. Schwartz Hebrew Academy

Article II is hereby amended by adding a paragraph at the end of Article II to state the following specific language: "The schools conducted by the corporation shall be community schools of mixed gender, not affiliated with a specific denomination of Judaism. Students in the schools shall not be required to pray. Male students shall be strongly recommended (but not required) to wear a kippa during prayer and other religious ceremonies. Also, no student shall be required to wear a kippa at any time."

Article IV is hereby deleted in its entirety and replaced with the following specific language: "The governing board of the corporation shall be known as the Board of Trustees and the Board of Trustees shall constitute the corporation. The term of office of each Trustee shall be three years. The number of Trustees may from time to time be increased or decreased by the Board of Trustees but in no event shall the number of Trustees be fewer than seven (7) or more than twenty (20). If for any reason a Trustee shall not be elected in the time and manner provided for herein, or in the Bylaws, such Trustee shall continue to serve as Trustee until his or her successor has been elected."

[redacted]

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EXHIBIT 3

In the Matter Of:

Schwartz vs Adelson Educational Institute

TRIAL TRANSCRIPT

August 31, 2018

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Discovery Legal Services, LLC 702-353-3110 production@discoverylegal.net

can answer if he believes it's true or not.
BY MR. JONES:
Q. Isn't that true?
A. Can you repeat the question?
Q. I certainly can. The reason the board removed Mr. Schwartz's name from building was because the commitments he made were not fulfilled?
MR. FREER: Objection. Lacks foundation.
THE COURT: Overruled.
THE WITNESS: Are you asking me the reason or the timing?
BY MR. JONES:
Q. I'm just asking you in general.
A. That was the reason.
Q. In general.
A. Yes, that was the reason.
Q. That was the reason.
After he passed away there was a donation made for the half million dollars, and that Jonathan Schwartz didn't pay it, that was when the decision was made to take the name down?
A. That's correct.
Q. Mr. Schwartz, Jonathan Schwartz -- Mr. Jonathan Schwartz presented to the school -- you have already told the jury about this -- with an

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know -- I don't know about you, but as things go, every year probably gets harder for me to remember what happened last year.

A. Me too.

Q. This would be a couple years ago, so your memory was probably better back then; is that true?

A. Yes.

Q. I would like to refer you to page 31 of your deposition.

A. Which page?

Q. 31.

A. Yes.

Q. When you get there, take a look starting at line 4, and read down to about line 6, just to yourself. When you are done reading, let me know. Actually, why don't you start at line 1, just at the top of the page.

A. Okay.

Q. Do you follow me?

A. Yes, I am.

Q. Does that refresh your recollection that you testified that, "So as I said, he lost his temper. He got up. The meeting was 10, 15 minutes. He got up and he was screaming."

MR. LEVEQUE: Objection, Your Honor. It's

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improper use of the deposition. There is no question pending.

THE COURT: Yes, there is.

MR. JONES: Thank you, Your Honor.

BY MR. JONES:

Q. "And he was screaming. And he was walking out. And I said, Jonathan, cool down and be nice."

Do you see that?

A. Yes, I do.

Q. So does that refresh your memory that he actually was screaming at the time?

A. Yes.

Q. And do you recall that Mr. Schiffman went after him and tried to get him to cool down too?

A. Yes, I remember that.

Q. And do you remember that he said to you and Mr. Schiffman, "I will sue your ass"?

A. Yes, I do.

Q. And he lost his temper. Do you remember Mr. Chaltiel saying, "You are going to sue me? You are going to sue us?"

A. They talked about lawsuits, both sides, yes.

Q. And then do you recall Mr. Schwartz saying, "If you were ten years younger, I told Victor, I

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will kick your ass right now"?

A. Yes, it's true.

Q. It was almost a fistfight at that point?

A. I wouldn't call it a fistfight. Lost temper, and he told him what he told him and he walk away, but I don't know about a fistfight.

Q. If you look at your testimony, at some point you said, it was "Almost a fistfight," did you not?

A. I said that? Where?

Q. At line 15.

A. Oh, really. "Almost a fistfight." Well, it was very hot, let me tell you. But I don't know if . . .

Q. So that's how it that meeting ended, right?

A. Yes.

MR. JONES: Mr. Ventura, I have no further questions. Thank you, sir.

THE WITNESS: Thank you.

THE COURT: Mr. LeVeque.

EXAMINATION

BY MR. LEVEQUE:

Q. We will start where Mr. Jones left off. Mr. Ventura, this altercation, this verbal argument that occurred between Mr. Chaltiel and Mr. Schwartz,

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THE WITNESS: It was understanding of Mr. Schwartz elementary school.

THE COURT: "You said the school's name was removed because Mr. Schwartz didn't leave the money in his will. Are we still talking about the $500,000 towards MISHA? If so, if Jonathan had just paid that money, is it your understanding that the elementary school's name would have stayed as Milton I. Schwartz Hebrew Academy?"

THE WITNESS: Yes, I am.

THE COURT: Now I have questions for you from the juror seat Number 7, Jake Pettitt: Back when the arrangements for the land from Howard Hughes Corporation were being made, did we hear correctly that you stated there was a mortgage on the land that was not paid for in full?

THE WITNESS: Yes, there was. This is after -- you are talking about when we already started, we had to get a mortgage to build the facilities? That mortgage was arranged by Mr. Schwartz, and he actually was responsible for it because his name was on it. Responsible for it. As I recall, that mortgage was paid by Mr. Adelson.

THE COURT: I think that's his second question here. The second question was: If so, do

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EXHIBIT 4

In the Matter Of:

Schwartz vs Adelson Educational Institute

TRIAL TRANSCRIPT

August 29, 2018

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Discovery Legal Services, LLC 702-353-3110 production@discoverylegal.net

A. She was disappointed and told me that she would think about it. And we never discussed it again.

Q. Thank you.

Mr. Schiffman, were you ever instructed by the board to remove the Milt Schwartz signage from the building?

A. Yes.

Q. Can you tell me when that was?

A. I can't remember the exact date.

Q. Was it after the lawsuit was filed?

A. Yes.

Q. Do you remember why?

A. It was the board's feeling if there was going to be a lawsuit filed that they wanted the name to be removed from the building and the portrait to be taken down.

Q. What's the portrait? Tell me about that.

A. The portrait of Milton Schwartz and (inaudible) they also wanted that down as well.

Q. Was there an instruction given by a specific board member to do that?

A. I took all of my instructions from Mr. Chaltiel.

Q. Mr. Chaltiel, who was your close friend,

be a building for over -- I think I call of calculated he died in August of 2007, and Mr. Jonathan Schwartz sued the school in May 28 of 2013, I calculated that approximately five years and about I think nine months or so. So would it be true to say that from the date of Mr. Milton Schwartz's death up until May 28, 2013, there was a Milton I. Schwartz Hebrew Academy?

A. Yes.

Q. Have you asked at the school and you personally asked Jonathan Schwartz to pay the $500,000 bequest during that five and a half or five and a half plus years time period?

A. I was present when Mr. Chaltiel asked. I did not ask.

Q. And with respect to that issue, can you tell the jury, as far as you know, was there anybody on the board, anybody at the school talking about taking Mr. Milton Schwartz's name off of that elementary school until his son sued the school?

A. No.

MR. FREER: Objection misstates facts.

THE WITNESS: Yes.

THE COURT: Overruled. He answered it.

BY MR. JONES:

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EXHIBIT 5

STEVEN D. GRIERSON
CLERK OF THE COURT

SEP 05 2018

BY Lorna Shell
LORNA SHELL, DEPUTY

COPY

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of MILTON I. SCHWARTZ, Deceased.	Case No. P061300 Dept. No.: 26/Probate

VERDICT FORM

In the Matter of the Estate of MILTON I. SCHWARTZ, we the jury find as follows:

Question 1:

Do you find that Milton I. Schwartz had a naming rights contract?

Yes ____ No X

If you answered YES to Question 1, please proceed to answer Questions 2, 3, 4, 5, 6 and 7. If you answered NO, skip to Question 8.

Question 2:

Was the contract oral or founded upon a writing or writings?

Oral ____ Written ____

Question 3:

If you answered YES to Question 1, was the contract in perpetuity?

Yes ____ No ____

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Question 4:

What was the consideration (amount of money) that Milton I. Schwartz was required to pay in exchange for a naming rights contract?

_____

_____

Question 5:

Did Milton I. Schwartz perform all of his obligations under the terms of the contract?

Yes ____ No ____

If you answered NO, please skip to Question 8. If you answered YES to Question 5, please proceed to answer Question 6.

Question 6:

In addition to the consideration (amount of money Milton I. Schwartz agreed to pay), what were the other specific terms of the contract?

Corporation	Yes ___	No___
Campus	Yes ___	No___
Elementary School Building	Yes ___	No___
Elementary School	Yes ___	No___
Middle School	Yes ___	No___
Entrance Monument	Yes ___	No___
Letterhead	Yes ___	No___
None of the Above	_____	
All of the Above	_____	

In Question 2, if you found that the contract was a written agreement, please answer Question 7. If you found the contract was an oral agreement, please skip to Question 8.

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