IN THE SUPREME COURT OF THE STATE 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/Cross-Respondent,

vs.

THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE,
Respondent/Cross-Appellant.

IN THE MATTER OF THE ESTATE OF MILTON I. SCHWARTZ, DECEASED.

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

vs.

A. JONATHAN SCHWARTZ, EXECUTOR OF THE ESTATE OF MILTON I. SCHWARTZ,

Respondent.

No. 78341

No. 79464

RESPONDENT'S MOTION FOR LEAVE TO EXCEED WORD LIMIT FOR COMBINED ANSWERING BRIEF/OPENING BRIEF ON CROSS-APPEAL & APPELLANT'S OPENING BRIEF IN CASE NO. 79464

Respondent/Cross-Appellant the Dr. Miriam and Sheldon G. Adelson Educational Institute ("the School") respectfully requests leave

under NRAP 28(g) and NRAP 32(a)(7)(D) to file their Combined Answering Brief/Opening Brief on cross-appeal (Case No. 78341) and Opening Brief (Case No. 79464).

The School files this Motion out of an abundance of caution. The Court's October 24, 2019 Order directed the School to file a single combined answering brief (Case No. 78341), opening brief on cross-appeal (Case No. 78341), and opening brief (Case No. 79464) ("Combined Brief").

Pursuant to NRAP 28.1(e)(2)(B)(i), the School's Combined Answering and Opening Brief (Case No. 78341) cannot exceed 18,500 words. Pursuant to NRAP 32(a)(7)(A)(ii), the School's Opening Brief (Case No. 79464) cannot exceed 14,000 words. Thus, the School's Combined Brief cannot exceed 32,500 words (18,500 + 14,000). The Combined Brief contains 29,782 words and, therefore, is in compliance with the aggregate type-volume limitations set forth above.

However, to the extent the School is not entitled to aggregate the type-volume limitations for its Combined Brief, it hereby moves to exceed pursuant to NRAP 32(a)(7)(D). Due to the Court's October 24, 2019 Order directing the School to file a single, combined brief, the School had to address: (1) the numerous purported issues raised in Appellant's

Opening Brief; (2) the various issues raised on cross-appeal; and (3) the School's appeal of the district court's post-trial costs award. Despite diligence and a view toward brevity, the numerous issues the School had to address in a single brief necessitates the requested enlargement so the School can adequately address each issue. **Exhibit 1**, Declaration of J. Randall Jones, Esq. In addition, Appellant's Opening Brief exceeded the type-limitations by almost 1,000 words. This additional length necessarily required the School to expend a significant number of words in order to respond to all of the arguments raised in the Appellant's lengthy brief. Moreover, as set forth in Appellant's January 29, 2020 Motion to Exceed, the record in this case exceeds 7,000 pages and the relevant facts spanned over three decades. (Doc. 2020-04114).

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Therefore, to the extent necessary, the School respectfully requests that the Court permit the School to exceed any proscribed word limit and file the Combined Brief, attached hereto as **Exhibit 2**.

Dated this 27th day of July, 2020.

KEMP JONES, LLP

/s/ J. Randall Jones
J. Randall Jones, Esq. (#1927)
Joshua D. Carlson, Esq. (#11781)
Madison P. Zornes-Vela, Esq. (#13626)
3800 Howard Hughes Parkway, 17th Fl.
Las Vegas, Nevada 89169
Attorneys for Respondent/Cross-Appellant The Dr. Miriam and Sheldon G. Adelson Educational Institute

CERTIFICATE OF SERVICE

I certify that on the 27th day of July, 2020, I caused to be served via the District Court's e-filing system and pursuant to NRAP 25(b) and NEFCR 9, and electronically filed the foregoing MOTION FOR LEAVE TO EXCEED WORD LIMIT FOR COMBINED ANSWERING BRIEF/OPENING BRIEF ON CROSS-APPEAL & APPELLANT'S OPENING BRIEF IN CASE NO. 79464 with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-filing system (Eflex). Participants in the case who are registered Eflex users will be served by the Eflex system as follows:

Alan F. Freer
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Counsel for Appellant

/s/ Alisa Hayslett
An employee of Kemp Jones, LLP

Exhibit 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF MILTON I. SCHWARTZ, DECEASED.	No. 78341
A. JONATHAN SCHWARTZ, EXECUTOR OF THE ESTATE OF MILTON I. SCHWARTZ, Appellant/Cross-Respondent, vs. THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE, Respondent/Cross-Appellant.	No. 79464
IN THE MATTER OF THE ESTATE OF MILTON I. SCHWARTZ, DECEASED.	
THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE, Appellant, vs. A. JONATHAN SCHWARTZ, EXECUTOR OF THE ESTATE OF MILTON I. SCHWARTZ, Respondent.	

DECLARATION OF J. RANDALL JONES, ESQ. IN SUPPORT OF RESPONDENT'S/CROSS-APPELLANT'S MOTION TO EXCEED

J. RANDALL JONES, states and affirms as follows:

1. I am partner in the law firm of Kemp Jones, LLP, over 18 years of age, competent to testify to the matters set forth herein, and licensed to

practice law in the State of Nevada. I have personal knowledge of the matters stated herein and could and would competently testify thereto if called upon to do so.

2. I am counsel of record for Respondent/Cross-Appellant The Dr. Miriam and Sheldon G. Adelson Educational Institute (the "School"). I make this Declaration in Support of the School's Motion to Exceed.

3. The Court's October 24, 2019 Order directed the School to file a single combined answering brief (Case No. 78341), opening brief on cross-appeal (Case No. 78341), and opening brief (Case No. 79464) ("Combined Brief"). *See* **Exhibit A**.

4. Pursuant to NRAP 28.1(e)(2)(B)(i), the School's Combined Answering and Opening Brief (Case No. 78341) cannot exceed 18,500 words. Pursuant to NRAP 32(a)(7)(A)(ii), the School's Opening Brief (Case No. 79464) cannot exceed 14,000 words. Thus, it is my understanding that the School's Combined Brief cannot exceed 32,500 words in total.

5. To the extent the School is limited to 18,500 words under NRAP 28.1(e)(2)(B)(i), the School seeks to exceed this limitation by approximately 11,282 words. The School requires these additional words

to adequately: (1) respond to the numerous issues raised in Appellant The Estate of Milton I. Schwartz's Opening Brief; (2) brief the issues raised on the School's cross-appeal; and (3) brief the issues raised by the School's appeal of the district court's post-trial costs award in Case No. 79464. Despite diligence to maintain brevity, the sheer number of issues addressed in the School's Combined Brief required the use of the additional words requested in the Motion to Exceed.

Dated this 27th day of July, 2020.

/s/ J. Randall Jones

Exhibit A

IN THE SUPREME COURT OF THE STATE 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/Cross-Respondent,
vs.
THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE,
Respondent/Cross-Appellant.

No. 78341

FILED

OCT 24 2019

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

IN THE MATTER OF THE ESTATE OF MILTON I. SCHWARTZ, DECEASED.

THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE,
Appellant,
vs.
A. JONATHAN SCHWARTZ, EXECUTOR OF THE ESTATE OF MILTON I. SCHWARTZ,
Respondent.

No. 79464

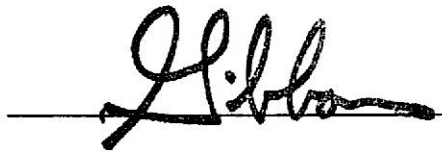
ORDER

Respondent/cross-appellant in Docket No. 78341 (Adelson) has filed an unopposed motion to consolidate these appeals and cross-appeal. Cause appearing, the motion is granted. NRAP 3(b)(2). These appeals and cross-appeal shall be consolidated for all appellate purposes.

The briefing schedule shall proceed as follows. Appellant/cross-respondent in Docket No. 78341 (Schwartz) shall have until November 15,

2019, to file and serve the opening brief on appeal.[1] Adelson shall have until January 14, 2020, to file and serve a single combined answering brief on appeal in Docket No. 78341, opening brief on cross appeal, and opening brief in Docket No. 79464.[2] Schwartz shall then have 30 days from service of Adelson's combined brief to file and serve a single combined reply brief on appeal in Docket No. 78341, answering brief on cross-appeal, and answering brief in Docket No. 79464. Adelson shall then have 14 days from service of Schwartz's combined brief to file and serve a reply brief in Docket No. 79464. *See* NRAP 28.1(f)(1).

It is so ORDERED.



, C.J.

cc: Lewis Roca Rothgerber Christie LLP/Las Vegas
Solomon Dwiggins & Freer, Ltd.
Kemp, Jones & Coulthard, LLP

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[1]Cause appearing, Schwartz's motion for a second extension of time to file the opening brief on appeal in Docket No. 78341 and appendix is granted. NRAP 31(b)(3)(B).

[2]Cause appearing, Adelson's request for an extension of time to file the combined brief is granted. NRAP 31(b)(3)(B).

Exhibit 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF MILTON I. SCHWARTZ, DECEASED.	No. 78341
A. JONATHAN SCHWARTZ, EXECUTOR OF THE ESTATE OF MILTON I. SCHWARTZ, Appellant/Cross-Respondent, vs. THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE, Respondent/Cross-Appellant.	No. 79464
THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE, Appellant, vs. A. JONATHAN SCHWARTZ, EXECUTOR OF THE ESTATE OF MILTON I. SCHWARTZ, Respondent.	

RESPONDENT/CROSS-APPELLANT'S ANSWERING BRIEF & OPENING BRIEF ON CROSS-APPEAL (NO. 78341) & OPENING BRIEF ON APPEAL (NO. 79464)

RESPONDENT/CROSS-APPELLANT'S ANSWERING BRIEF & OPENING BRIEF ON CROSS-APPEAL (NO. 78341), & OPENING BRIEF ON APPEAL (NO. 79464)

J. Randall Jones, Esq. (#1927)
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3800 Howard Hughes Parkway, 17th Fl.
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Attorneys for Respondent/Cross-Appellant The Dr. Miriam and Sheldon G. Adelson Educational Institute

NRAP 26.1 DISCLOSURE

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

No entities exist requiring disclosure under this Rule on behalf of Respondent/Cross-Appellant The Dr. Miriam and Sheldon G. Adelson Educational Institute.

Throughout this litigation, respondents/cross-appellants have been represented by attorneys at the law firms of Santoro Whitmire, Lewis Roca Rothgerber LLP, and Kemp Jones, LLP (formerly Kemp, Jones & Coulthard, LLP).

DATED this 27th day of July, 2020.

KEMP JONES, LLP

/s/ J. Randall Jones
J. Randall Jones, Esq. (#1927)
Joshua D. Carlson, Esq. (#11781)
Madison P. Zornes-Vela, Esq. (#13626)
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Attorneys for Respondent/Cross-Appellant The Dr. Miriam and Sheldon G. Adelson Educational Institute

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JURISDICTIONAL STATEMENT

Respondent/Cross-Appellant The Dr. Miriam and Sheldon G. Adelson Educational Institute (the "School") cross-appeal from (A) the Judgment on the Dr. Miriam and Sheldon G. Adelson Educational Institute's Petition to Compel Distribution, for Accounting, and for Attorneys' Fees, entered on February 20, 2019 (Case No. 78341); (B) the district court's Decision and Order regarding costs, entered on July 25, 2019 (Case No. 79464); and (C) any pretrial orders made appealable therefrom.

Case No. 78341: The Court has jurisdiction over the School's cross-appeal pursuant to NRAP 3A(b)(1). The School's cross-appeal was timely filed pursuant to NRAP 4(a)(2). Notice of Entry of the Judgment from which the School appeals issued on February 20, 2019. On March 8, 2019, the Estate filed a Notice of Appeal and on March 22, 2019, the School timely filed a Notice of Appeal. NRAP 4(a)(2).

Case No. 79464: The Court has jurisdiction over the School's appeal pursuant to NRAP 3A(b)(8). The Decision and Order from which the School appeals was entered on July 25, 2019 and the School timely filed a Notice of Appeal on August 16, 2019. NRAP 4(a)(1).

ROUTING STATEMENT

Case No. 78341: The School's cross-appeal is not presumptively retained by the Supreme Court pursuant to NRAP 17(a) or presumptively assigned to the Court of Appeals pursuant to NRAP 17(b). Therefore, the Supreme Court retains jurisdiction of this matter unless and until ordered otherwise.

Case No. 79464: The School's appeal is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(7).

ISSUES PRESENTED FOR REVIEW

I. Issues Presented by the Appeal

A. Whether the district court properly granted summary judgment on the Estate's claim for breach of an oral contract where the irrefutable evidence, including the Executor's own admissions, demonstrated the Executor was on actual or inquiry notice of facts he contends constitute a breach of the alleged naming rights contract more than four years before he filed suit?

B. Whether the district court correctly refused to provide an instruction on: (1) contract modification where the Estate failed to present evidence to support this late added (or asserted) theory and the

Estate cannot demonstrate prejudice because the jury determined no underlying naming rights contract existed and thus there was nothing to modify; and (2) breach of the implied covenant of good faith and fair dealing where the Estate failed to properly assert this cause of action, and the Estate cannot demonstrate prejudice because the jury's verdict finding no naming rights contract exists necessarily precludes this claim?

3. Whether the district court appropriately exercised its discretion in denying the Estate's request for revocation of Milton Schwartz's lifetime gifts where the Estate failed to present clear and convincing evidence that any of the gifts were conditional or that Milton Schwartz's mistaken belief he had a perpetual naming rights contract with the School was an invalidating mistake?

II. Issues Presented by the Cross-Appeal

1. The Bequest was unambiguous, as even the Estate concedes. Under Nevada law, parol evidence is not admissible to vary the terms of a testamentary instrument. Under these circumstances, did the district court err when it determined that the Bequest was ambiguous and then permitted the Estate to introduce parol evidence to add language to the Bequest?

2. Whether the district court abused its discretion in admitting and relying on inadmissible hearsay to interpret the Bequest based on what the district court believed Milton Schwartz meant to write as opposed to the express language of the Bequest in violation of Nevada law?

III. Issues Presented for Appeal in Case No.

1. Whether the district court arbitrarily and erroneously concluded that the Estate was the prevailing party despite the fact that the School prevailed on the most significant issue in the case?

2. Whether the district court abused its discretion in awarding costs to the Estate that were unnecessary, not recoverable under NRS 18.005, and/or for which the Estate failed to provide the requisite backup material?

STATEMENT OF THE CASE

This is a will contest turned breach of contract dispute regarding the name of a private school. At issue is an unambiguous $500,000 Bequest from Milton I. Schwartz to "the Hebrew Academy for the purpose of funding scholarships to educate Jewish children only." Milton Schwartz passed away on August 9, 2007.

Only after the School attempted for several years to receive the Bequest from Milton Schwartz's son as the executor of his estate, Jonathan Schwartz, to no avail, the School was forced to file a Petition to Compel Distribution of the Bequest, on May 3, 2013. The Petition also sought other relief.

On May 28, 2013, the Estate of Milton I. Schwartz (the "Estate") filed a counter–petition for declaratory relief, raising claims for breach of contract, fraud in the inducement, bequest void for mistake, offset of the bequest, revocation of gift and constructive trust, and construction of the will. One year later, on May 28, 2014, the Estate filed a supplemental petition for declaratory relief adding causes of action for specific performance and injunctive relief.

The Estate sought to avoid effectuating the Bequest, alleging that Milton Schwartz had an enforceable perpetual naming rights contract with the School, and that the Estate was in fact entitled to damages arising from the School's alleged breach of that contract, and the return of all of Milton Schwartz's additional Lifetime Gifts (donations to the School ranging from $50.00 to $135,277.00 over an almost twenty year period).

Before trial, the district court granted summary judgment on the Estate's claim for breach of an oral contract as time barred based on its finding that Jonathan Schwartz was or should have been on notice of the facts giving rise to that claim more than four years before the Estate filed its Petition.

A nine-day jury trial commenced on August 23, 2018. The jury found against the Estate on its contract claims and made certain factual findings regarding Milton Schwartz's subjective intent. The parties then submitted post-trial briefing on the remaining issue before the district court. Based on the jury's advisory findings, the parties' post-trial briefing, and oral argument, the district court determined that Milton Schwartz intended that the Bequest go only to a school that bore his name in perpetuity and that Milton Schwartz was mistaken regarding the existence of an enforceable naming rights contract with the School. The district court further denied the School's Petition and granted the Estate's competing "claims" for construction of will and bequest void for mistake. The district court denied the Estate's remaining claims.

Ultimately, the district court entered four judgments on the parties' claims:

1) October 4, 2018 Judgment on Jury Verdict, finding against the Estate on its claims for Breach of Contract, Specific Performance, and Injunctive Relief (NEO October 5, 2018);

2) February 20, 2019 Judgment on Jonathan A. Schwartz's, Executor of the Estate of Milton I. Schwartz, Claims for Promissory Estoppel and Revocation of Gift and Constructive Trust (NEO February 21, 2019);

3) February 20, 2019 Judgment on the Dr. Miriam and Sheldon G. Adelson Educational Institute's Petition to Compel Distribution, for Accounting, and for Attorneys' Fees, denying the Petition;

4) February 20, 2019 Judgment on Jonathan A. Schwartz's Petition for Declaratory Relief, granting in part the Petition with respect to the First Claim for Construction of Will and the Third Claim for Bequest Void for Mistake.

On March 8, 2019, the Estate filed a Notice of Appeal. On March 22, 2019, the School filed a Notice of Appeal.

On July 25, 2019, the district court's Decision and Order was entered, which designated the Estate the prevailing party under NRS 18.020 and awarded it $59,517.67 in costs. The School timely filed a Notice of Appeal of this Order on August 16, 2019.

On October 24, 2019, this Court consolidated the appeals.

///

STATEMENT OF FACTS

A. The Clear and Unambiguous Bequest.

This litigation began with the School's request for an order to effectuate the Bequest, which would provide scholarships to children. (1 App. 74-159).

In his Last Will and Testament (the "Will") dated February 5, 2004, Milton 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. No other conditions exist. The unambiguous Bequest to the Milton I. Schwartz Hebrew Academy states in full 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).

(27 App. 6640).

Milton Schwartz died on August 9, 2007, and the Executor, Jonathan Schwartz, filed the petition for probate of the Will on October 15, 2007. (1 App. 1-26). The probate petition identified the School as a beneficiary. (1 App. 3).

Jonathan Schwartz admits that the Bequest is unambiguous:

> 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.

(14 App. 3475-76). The Estate does not dispute that no mortgage existed for which Milton Schwartz or the Estate was obligated to pay off pursuant

to the Bequest. (17 App. 4005). In spite of this admission, as set forth herein, the Executor refused to pay the Bequest to the School so it could fund scholarships for Jewish children.

B. The Dynamic History of the School's Growth and Name Changes.

The School, now operating as the "Dr. Miriam and Sheldon G. Adelson Educational Institute," is a private Jewish school in Summerlin, Nevada for grades Pre-K through 12. (15 App. 3547). The School, first known as the Albert Einstein Hebrew Day School, humbly began as a private elementary school in rented space from Temple Beth Shalom. (12 App. 2986-87; 14 App. 3251. In 1980, the School's name was changed to the Hebrew Academy, under the direction of its principal, Dr. Tamar Lubin Saposhnik. 1 App. 101.

1. The School relocates due in part to a generous donation by Milton Schwartz.

By 1989, the School had outgrown its rented space in Temple Beth Shalom and Dr. Saposhnik began looking for a new location. (1 App. 101; 17 App. 4179-80). Through the efforts of Dr. Saposhnik, Howard Hughes Properties (Summa Corporation) granted the school a large parcel of land in Summerlin on which to construct a new school building. (12 App. 2988; 14 App. 3251-52; 17 App. 4099, 4181-82).

With real estate secured, Dr. Saposhnik started raising money to construct the school. (17 App. 4182-83, 4187-90, 4231). In August of 1989, Dr. Saposhnik, together with members of the Board of Trustees (the "Board"), initiated discussions with and solicited a donation from Milton Schwartz, a successful local businessman. (14 App. 3338; 17 App. 4180, 4184-85, 4238). Milton Schwartz graciously agreed to make a donation to contribute to the building project. By August 23, 1989, Mr. Schwartz wrote three checks to the Hebrew Academy totaling $500,000.00. (28 App. 6871). Due in part to Milton Schwartz's generous donations totaling $500,000, the Hebrew Academy constructed a new school building on the Summerlin property. (17 App. 4222).

The seminal issue in this case became whether Milton Schwartz and the Board entered into an enforceable perpetual naming rights contract at or near this time, August 1989. However, as the following evidence adduced during the litigation and at trial demonstrates, there never was a meeting of the minds between the School's Board Members and Milton Schwartz as there remained significant and material inconsistencies and a complete lack of clarity as to the material terms of

the alleged contract the Estate contends arose between Milton Schwartz and the Board members in 1989:

TABLE A		
Testimony	**Witness**	**Cite**
Q. Tell this jury exactly the specific details of this contract that you believe the school had with Mr. Schwartz. The exact details. A. A half million dollars for the name of the school. Q. That's it? A. At that point in time, the only thing we had for sure was his half a million dollars.	Lenard Schwartzer	13 App. 3071
Q. In your testimony yesterday, you told the jury that you believed it was **$500,000 that he gave, and $500,000 that he raised**. Do you recall that? A. That's my recollection, that he – he at this point in time, that he gave 500,000 and that **he raised approximately another 500,000**.	Lenard Schwartzer	13 App. 3069-70
"5. That Affiant **donated $500,000** to the Hebrew Academy with the *understanding* that the school would be renamed the MILTON I. SCHWARTZ HEBREW ACADEMY in perpetuity."	Milton I. Schwartz	28 App. 6880-82
Milton Schwartz told Dr. Adelson in an interview "that he **gave $500,000** and **raised $500,000** from others in exchange for naming the school the Milton I. Schwartz Hebrew Academy.	Milton I. Schwartz	29 App. 7008
Jonathan Schwartz, Executor of the Estate of Milton I. Schwartz stated "In August 1989, 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 Hebrew Academy."	Jonathan Schwartz	1 App. 232
Q. And it was your – was it your understanding that the agreement was that there would be 500,000 given to the school, or that there would be 500,000 given to the school, or that there was a million, ….. A. No. Here's –here's what the agreement was: **The agreement was that my father give 500,000 and raise 500,000**. That's how the million was arrived at, and that's what he did.	Jonathan Schwartz	7 App. 1612

TABLE A		
Testimony	**Witness**	**Cite**
Q. So my question to you, again, Mr. Schwartz, is tell me the dollar amount that your father paid in 1989 in order to secure all of the naming rights that you contend on behalf of the estate he got? THE WITNESS: That my father paid $500,000. Q. Not a penny more not a penny less, right? A. That my father **paid $500,000**. Q. In total, right? A. Correct. Q. **And he didn't have to do anything else, raise any money from anyone else** or give anymore money or anything else in exchange for those naming rights is that your testimony? A. **No.** Q. I just want to be clear A. No.	Jonathan Schwartz	14 App. 3485
Q. So I just want to find out clear and unequivocal so this jury will know what your position is for the estate as to whether or not there was any other part of the agreement that had to do with money. So with that in mind, your dad's 500,000 he gave away that's fine we already got that on the agreement side. Let's talk about the other side of the agreement. Was your dad required as part of an agreement for naming rights to raise another $500,000 from other people? A. Sitting here today, I'm not 100 percent certain.	Jonathan Schwartz	14 App. 3494
Q. And that recollection, as I understand it was very clear. A. Yes. Q. That whether he gave a million dollars at that time specifically or not, **he certainly promised to give a million dollars, right.** A. **That was my – that was my best recollection.**	Dr. Roberta Sabbath	14 App. 3316
Q. One of the representations that Mr. Schwartz made in that lawsuit in this declaration under oath was that he donated a half million dollars to the Hebrew Academy with the understanding that it would be renamed the Milton I. Schwartz Hebrew Academy in perpetuity. Do you agree or disagree with that statement under oath? …	Dr. Roberta Sabbath	14 App. 3285

TABLE A		
Testimony	**Witness**	**Cite**
A. **I disagree**. Q. Okay. How so? A. **I remember the million dollar commitment.**		
Q. Your memory is **he gave a million dollars** himself and **then he raised 500,000** from others? A. My recollection.	Dr. Neville Pokroy	17 App. 4243
Q. Doctor, I'm going to show you -- well, let me go back for a minute. Do you recall a time when Mr. Schwartz gave the 500,000 **and pledged a million** and gave half of it? A. Yes.	Dr. Tamar Lubin	17 App. 4190
THE WITNESS: You mean removing Milton Schwartz's name from the school? Q. Yes. A. **Because he didn't pay the other $500,000**. I thought you meant Mr. Sternberg. Q. Thank you. I'm sorry, my question probably wasn't clear. I meant why they were removing Milton Schwartz's name. A. Okay. Q. All right. So that's why they removed it is -- A. Yes. Q. -- **because he didn't pay the rest of the money?** A. **Correct**.	Dr. Tamar Lubin	17 App. 4200-01
Q. And you obtained – you were instrumental in getting Milton's donation, correct? A. Yes. Q. And you went to his house with Roberta Sabbath to get that? A. Yes, I went to his house. Q. And as a result of that, Milton donated? A. **He promised a million dollars**, yes, and we were very happy with that promise of his and ultimately **we got $500,000 and never got the other five.**	Dr. Tamar Lubin	17 App. 4207

As the foregoing evidence and testimony establishes, the Estate and none of the persons allegedly involved in making the contract agreed on

what the material terms regarding the consideration paid and whether it was all paid. In fact, the witnesses provided four substantially and materially different versions of the alleged consideration agreed to in exchange for purported perpetual naming rights:

1. $500,000 in cash only (Milton Schwartz, Jonathan Schwartz);
2. $500,000 cash plus agreed to raise $500,000 from others for a total of $1,000,000 (Milton Schwartz, Jonathan Schwartz, Leonard Schwartzer);
3. $1,000,000 in cash (Roberta Sabbath, Dr. Tamar Lubin); and
4. $1,000,000 in cash *plus* raise another $500,000 from others (Dr. Neville Pokroy).

Additionally, the witnesses either did not know, could not explain, or did not agree on the scope of the alleged naming rights contract — did it cover the corporation, the campus, the buildings, the elementary school, the letterhead, all forms of media, the entrance monument, future land acquisitions, buildings on future land acquisitions, all of the above or some portion of the above. (13 App. 3005-06, 3071-72, 3131, 3232; 14 App. 3452, 3255, 3322, 3461; 17 App. 4015; 4128-29).

Nevertheless, it is undisputed that the School, with Milton Schwartz sitting as the President of the Board, changed its name in

August 1990 to the Milton I. Schwartz Hebrew Academy. (27 App. 6607; 27 App. 6612). While the 1990 corporate Bylaws of the School's controlling entity reference "in perpetuity", the Bylaws also expressly provided that:

> "Amendments: The Board of Trustees shall have the power to make, alter, amend and repeal the bylaws of the corporation by affirmative vote of a majority of the full board at a meeting duly noticed therefor."

27 App. 6619.

2. The School changes its name back to The Hebrew Academy after a dispute between factions of the School Board.

The School remained known as the "Milton I. Schwartz Hebrew Academy" until 1993, when a dispute amongst the School's leadership arose regarding control of the School's corporate entity. (13 App. 3109; 27 App. 6622-25; Respondent's Appendix ("R.A.") 1-2). During this time, two competing Boards purported to maintain control of the corporate entity. (*Id.*). Eventually, Milton Schwartz and other non-controlling Board members left and began operating a different Jewish day school. (16 App. 3924, 3939; 17 App. 4097, 4102-04; 4244-45). The controlling Board changed the name of the entity back to the "Hebrew Academy." (14 App. 3291-92; R.A. 3-4). The Board also amended the School's Articles of

Incorporation to reflect its decision to change the name of the corporate entity back to the Hebrew Academy, deleting mention of Milton I. Schwartz. (R.A. 5; 14 App. 3328). Of critical importance, while he was alive and well and presumably able to do so, at no time did Milton Schwartz threaten or seek to enforce his alleged perpetual naming rights regarding the 1993 name change from the "Milton I. Schwartz Hebrew Academy" to the "Hebrew Academy". (14 App. 3335-36; 17 App. 4001-02; 18 App.4382).

3. The School repairs its relationship with Milton Schwartz as a gesture of 'shalom' and voluntarily changes its name back to the Milton I. Schwartz Hebrew Academy.

In due course, the dispute for control of the Hebrew Academy resolved and, for the good of the community, the School agreed to repair the rift with Milton Schwartz that had formed during the dispute. (14 App. 3298-3300, 3307; 27 App. 6626-28). On May 23, 1996, Dr. Roberta Sabbath, then head of the School, sent a letter to Milton Schwartz volunteering to take certain actions to make amends with him. (14 App. 3298-330, 3307; 27 App. 6697-98). The letter states that the purpose of the actions described therein was to repair the relationship with Milton Schwartz, **not** in recognition of a contractual right to such naming rights:

> The restoration of the name of the "Milton I. Schwartz Hebrew Academy" has been taken as a matter of "menschlackeit" [sic] in acknowledgment of your contribution and assistance to 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."
>
> Your invitation to me as new School Head to meet and resolve differences and to work with me and the Board to bring "shalom" to our Jewish community will serve as a much needed example of Jewish leadership."

Id. The letter uses the term Menschlackeit (or, spelled correctly, Menschlichkeit in German or Mentshlekhkeyt in Yiddish), which derives from the Jewish term, Mensch, and connotes the idea of a person who acts justly and with honor. (13 App. 3305; 14 App. 3340-41). Thus, by its own express terms, the letter makes clear the School agreed to undertake these actions out of a sense of gratitude and to **voluntarily honor** Milton Schwartz's general early support, as opposed to a purported contractual obligation. The letter does not mention or confirm any alleged prior naming rights contract, does not recite any consideration (current or past) – an obvious requisite for any binding/enforceable contract – and does not place any conditions on the proposed action the School describes. The letter is entirely consistent with a voluntary naming of a facility in

honor of an individual, rather than a contractual agreement for such naming rights in perpetuity.

After Dr. Sabbath's May 23, 1996 letter, the entity did not formally change its name back to the Milton I. Schwartz Hebrew Academy until March of 1999. (27 App. 6629-38).

4. The School transforms from a small day school to a comprehensive educational campus due to a substantial donation from Dr. Miriam and Sheldon Adelson.

As early as May of 2000, the Board expressed interest in constructing a high school. (R.A. 8-12). On or around November 12, 2002, at Milton Schwartz's request, Sheldon Adelson joined the Board of the School. (15 App. 3578-89, 3688; R.A. 25-37). Almost immediately after joining the Board, Mr. Adelson expressed his desire to build a high school. (R.A. 32-37). Then, on or around April 9, 2005, Dr. Miriam Adelson and Sheldon Adelson announced a $25,000,000 pledge to the School. (15 App. 3651; R.A. 13-14; 38-39). These funds would be used to not only construct the long-contemplated high school, but also to construct an athletic/aquatic center, refurbish the existing lower school building, relocate the campus' entrance, and perform other general updates to the entire campus. (15 App. 3345-46; 16 App. 3859-60; 17 App. 4106-07). This

gift far exceeded any previous donation the School had previously received.

The new high school building and campus expansion broke ground in October 2006 and opened in August of 2008. (15 App. 3563, 3722-23; R.A. 40-41). Almost overnight, a well-regarded but underfunded two building private Jewish day school transformed into a world-class private educational campus, offering grades Pre-K through 12. (14 App. 3629; 15 App. 3589-90; R.A. 24). The middle school (grades 5 through 8), which was housed in the old elementary school building, eventually moved to its own wing of the newly constructed high school building. (15 App. 3670-71). The lower school (grades Pre-K though 4) remained housed in the original elementary school building that also benefited from a substantial remodel, also accomplished as a result of the Adelson family's generosity. (15 App. 3575, 3658; 16 App. 3859-60).

a. The Board, including Milton Schwartz, recognized and discussed various naming rights opportunities and options as part of the comprehensive School campus expansion.

As early as 2004, the Board, **including Milton Schwartz**, discussed the importance of creating naming opportunities for the pre-school, lower school, middle school, and high school. (4 App. 768-772). As time went on,

the Board discussed and used various constructs of names for the high school and campus as part of the pre- and under construction marketing materials to prospective students and families. (13 App. 3219-20; 15 App. 3718, 3720-21, 3724-26; 17 App. 4131-33). Milton Schwartz was aware that the Adelsons were receiving naming rights for their significant financial contribution, a fact the Estate does not dispute. (2 App. 368; 13 App. 3217-19, 3182-83; 15 App. 3578, 3587-89, 3688-89, 3691).

Although the School originally planned on students remaining in the original elementary school building and then matriculating to the Adelson High School, by at least November 2006, it was decided that the Adelson High School building would also house the Adelson Middle School. (5 App. 1007; 15 App. 3670-71, 3735). The decision to relocate the middle school to the new high school building was known to the Board members, **including Milton Schwartz**, at or about the time construction commenced because the construction plans were regularly shown to and discussed by the Board. (15 App. 3671-74; 16 App. 3823-24; 17 App. 4131-33; R.A.15-17). Even after being shown the plans, Milton Schwartz never objected to the middle school being relocated or demanded that his name appear on the middle school. *See id.*

In 2006, Mr. Adelson and Milton Schwartz also discussed the concept that the campus, the high school, and middle school would bear the Adelson name, the lower school would continue to be called the Milton I. Schwartz Hebrew Academy **if** Milton Schwartz completed the remainder of his $1,000,000 pledge and paid off the School's then existing debt in the amount of $1,500,000. (15 App. 3564, 3584-88, 3641; 16 App. 3862-65). When Milton Schwartz died on August 9, 2007, he had not paid the additional $500,000 or paid off the existing $1,500,000 debt, and thus no new agreement, arrangement, or understanding concerning adding his name to the School along with the Adelson name was reached or agreed to. (15 App. 3632, 3641).

b. The School names the campus and the high school after the Adelsons and significantly alters the campus' layout.

Starting in late 2007, the Board began finalizing decisions for its branding with the impending opening of the new high school and the plans for the new middle school. (27 App. 6676-79). Consistent with the School's prior discussions and plans, on or about December 13, 2007, Dr. Miriam Adelson and Sheldon Adelson, through their Adelson Family Charitable Foundation, entered into a written perpetual naming rights contract with the School in exchange for an additional $3,000,000 (the

"Adelson Family Naming Rights Contract") donation to further fund construction at the expanding School. (16 App. 3752, 3845-47; 27 App. 6680-82). The School rebranded the entity to best take advantage of the Adelsons' transformational gifts (15 App. 3734; 16 App. 3798, 3888, 3892-93).

Pursuant to the Adelson Family Naming Rights Contract, the Adelsons and the School expressly agreed to name the future high school and middle school facilities "The Dr. Miriam and Sheldon G. Adelson Upper School" and "The Dr. Miriam and Sheldon G. Adelson Middle School," respectively. (27 App. 6680-82). It was also agreed as part of the grant contract that the entity would change its corporate name to the "Dr. Miriam and Sheldon G. Adelson Educational Institute" and the entire educational campus would be referred to as "The Dr. Miriam & Sheldon G. Adelson Educational Campus." (*Id.*). All of the foregoing naming rights contained in the Adelson Family Naming Rights Contract were expressly agreed to be in perpetuity, which was formally agreed to by a vote of a majority of the Board, expressly authorizing the Chairman of the Board, Victor Chaltiel, to execute the Adelson Family Naming Rights Contract on the School's behalf. (*Id.*; 27 App. 6676-79).

The name of the School's operating entity remained the Milton I. Schwartz Hebrew Academy until March 21, 2008 when it was renamed "The Dr. Miriam and Sheldon G. Adelson Educational Institute." (27 App. 6676-79, 6683). At that time, the Board resolved that the lower school would be named in honor of Milton I. Schwartz. (27 App. 6676). This decision was made after some Board members thought it was important to keep Milton Schwartz's name on the lower school, but a naming rights contract with Milton Schwartz was never a part of the discussion, and no written contract reflecting this resolution was ever executed. (16 App. 3753-54; 17 App. 4109, 4118). To honor Milton Schwartz, the building housing the lower school remained named the Milton I. Schwartz Hebrew Academy until summer 2013. (16 App. 3833, 3836-37, 3843).

As part of the campus expansion project, the School's main entrance was also moved several hundred feet down the road and a new entrance monument was installed in June 2008 showing only the Adelson Campus logo. (16 App. 3813-20; R.A. 24, 43-47). By the fall of 2008, the Adelson Campus, including the Adelson Middle School, was operational and publicly marketed as such. (16 App. 3793, 3817-18, 3884-85).

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c. In 2013, the Adelsons donate an additional $50,000,000 to the School.

On January 8, 2013, Dr. Miriam and Sheldon Adelson made yet another exceptionally generous donation to the School's controlling entity—a gift of $50,000,000 which was enough to resolve all of its outstanding debts, including any and all debts previously incurred by the lower school, all additional construction costs, and was anticipated to cover operating costs of two-years going forward. (16 App. 3790-92; R.A. 18-21, 42).

d. The Adelson's gifts pay off debt personally guaranteed by Milton Schwartz converting the Bequest into a scholarship for Jewish students.

The only condition on the Bequest provides that the $500,000 first be used to pay off an existing School debt guaranteed by Milton Schwartz. ("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…"). The Adelson gifts paid off the School's then approximately $1.8 million mortgage debt personally previously guaranteed by Milton Schwartz. (14 App. 3431, 3435; 15 App.

3629; 16 App. 3857-58; 17 App. 4164-65).[1] Thus, there is no dispute the Bequest would be used exclusively for scholarships.

C. Jonathan Schwartz Refuses to Distribute the Unambiguous Bequest to the School for Scholarships.

At the time Milton Schwartz drafted his Will in early 2004 and at the time Milton Schwartz passed away on August 9, 2007, the School, including both the building and the controlling corporate entity, was named the Milton I. Schwartz Hebrew Academy. (27 App. 6683-84, 6717).

On August 28, 2008, Jonathan Schwartz sent a letter to the Head of the School, Paul Schiffman, following a meeting at the School the same day. In that letter, Jonathan Schwartz acknowledged the Bequest, stating "I wanted to meet with you today in order to ensure that my father's intent is properly executed," and requesting that the Board send a letter acknowledging that the Bequest would be used to fund annual scholarships to the Milton I. Schwartz Hebrew Academy "for the purpose of educating Jewish children only." (27 App. 6685-86).

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[1] It is worth noting that had the Adelson gift not be used to pay off the mortgage personally guaranteed by Milton Schwartz on Milton Schwartz's death the Estate would have been facing a contingent liability of $1,300,000 ($1,800,000 mortgage debt minus the $500,000 Bequest = $1,300,000).

Even though Jonathan Schwartz admitted the Bequest was clear and unambiguous, and the Milton I. Schwartz Hebrew Academy existed at the time of Milton Schwartz's death, the Estate refused to distribute the $500,000 to fund scholarships.

Nevertheless, School representatives and Jonathan Schwartz continued to meet periodically to discuss the proper disbursement of the Bequest. After one such meeting in March of 2010, Jonathan Schwartz sent an email to then head master of the School, Victor Chaltiel, which included a draft agreement seeking to create expansive naming rights in favor of Milton Schwartz[2]:

> The Agreement makes sure that my Dad's intent is respected and followed ("the Agreement"). Primarily, the Agreement memorializes that which the School is already doing ***to commemorate*** my Dad's nearly thirty (30) year devotion to the School and it predecessors. Further, the Agreement makes sure that the original ***intent*** of the Board is complied with when it named the school; the Milton I. Schwartz Hebrew Academy. This Agreement does not attempt to "leverage" anything."[3]

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[2] Jonathan Schwartz's letter begs the question why he would want, or need, the School to sign this letter if his father already had a legally enforceable contract for perpetual naming rights with the School as he now claims.

[3] Jonathan Schwartz's use of the phrase "this Agreement does not attempt to 'leverage anything'" also begs the question if the letter was not an attempt to leverage the School, why was it necessary to even say such a thing.

27 App. 6710 (emphasis added). Jonathan Schwartz makes no mention in his email or proposed agreement of a prior contract between Milton Schwartz and the School.

On May 10, 2010, after a contentious meeting at the School where Jonathan Schwartz became irate when his outrageous and unsupported naming rights claims were not accepted by the Board[4], Jonathan Schwartz sent a follow-up letter via hand delivery, certified mail, and facsimile to the Board and a second proposed settlement agreement – it was in fact a demand letter gratuitously described by Jonathan Schwartz as a "settlement agreement" – due to what he claimed were violations by the School for the past 2 and-a-half years of Milton Schwartz's alleged naming rights contract. (17 App. 4114-16, 4136-43; 27 App. 6687-6713). The letter stated "the fact that the School has apparently been re-titled the Adelson Educational Campus and that the middle school has been re-named the Adelson Middle School violated the Agreement and the 2007 Gala Docs." (17 App. 4116-16, 4136-43; 27 App. 6688). The proposed

[4] At that meeting, Jonathan Schwartz told the School representatives he would "sue your ass," and told Mr. Chaltiel "If you were ten years younger, I would kick your ass right now." (17 App. 4142-43).

"settlement agreement" further stated that the Bequest would be paid contingent upon the Board agreeing:

- The school housing grades Pre-K through 4 shall be known as the Milton I Schwartz Hebrew Academy in perpetuity;

- Any and all bylaws, agreement, articles of incorporation, operating agreements or other documents associated with the School shall in perpetuity identify grades Pre-K through 4 as the Milton I. Schwartz Hebrew Academy;

- The Milton I. Schwartz Hebrew Academy signage shall be prominently displayed on the face of the building and at all entrances;

- All letterhead, stationary, correspondence, promotional material, websites, advertisements, cards, fundraisers ("media") associated with the school shall clearly identify Milton I. Schwartz Hebrew Academy as grades Pre-K through 4 grades in perpetuity;

- All Media shall depict a logo bearing the name, the Milton I. Schwartz Hebrew Academy (in bold, all capped letters), no smaller than any other logo located on the face of the Media; and

- The interior entrance of the Milton I. Schwartz Hebrew Academy shall prominently house a painting or photo of Milton Schwartz and a plaque identifying him as the founder of the Milton I. Schwartz Hebrew Academy.

(27 App.6690-93). The Board rejected Jonathan Schwartz's totally unsupported and ridiculous demands. (17 App. 4116-16; 4136-39).

D. After the School and the Estate Unsuccessfully Attempted to Resolve the Dispute about Payment of the Bequest, the School Initiates the Instant Suit.

After patiently waiting since late 2007 – over five years – and 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 School filed its petition to compel the Estate to honor the $500,000 Bequest in Mr. Schwartz's Will. (27 App. 6714 – 28 App. 6799). Rather than comply with the unambiguous terms of the Bequest, the Estate filed a counter-petition for declaratory relief on May 28, 2013,[5] asserting claims seeking to avoid paying the bequest and for breach of contract, fraud in the inducement, and revocation of gift and constructive trust. (28 App. 6800-67). 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.

The Estate further contends that Milton Schwartz and the School had an enforceable perpetual naming rights contract that obligates the School in every respect to hold itself out as the Milton I. Schwartz Hebrew

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[5] More than three (3) years after the Board declined Jonathan Schwarz's proposed settlement agreement. (27 App. 6687-6713).

Academy, forever. The Estate insists that in consideration of some something – the Estate was unable to show there was ever an agreement between Milton Schwartz himself, or even between or among the various Board Members as to what the consideration was Milton Schwartz had agreed to contribute (*see* Table A & Section (B)(1), *supra*) – Milton Schwartz received a perpetual right to have his name attached to all real estate and buildings, even those later acquired, and the corporate entity. (14 App. 3460; 15 App. 3504-08; 28 App. 6802-03). Further, the School is forever obligated to "appropriately" display Milton Schwartz's name on School signage, media, communications, etc. (*Id.*). As the Estate finally admits, no written contract exists memorializing the alleged perpetual naming rights it seeks to enforce. (Op. Br. 53; 15 App. 3507).

1. The Milton I. Schwartz name is removed from the lower school as a result of the actions by the Estate's Executor.

Due to the hostile actions of the Jonathan Schwartz, in both refusing to timely pay the Bequest and later filing suit against the School, the Board decided to remove the Milton I. Schwartz Hebrew Academy name from the lower school building in the summer of 2013. 16 App. 3787-88, 3855-57; 17 App. 4136). Paul Schiffman, the Head of School from 2009 to 2015, testified that from the date of Milton Schwartz's passing

up until Jonathan filed suit against the School, there was a Milton I. Schwartz Hebrew Academy. (16 App. 3832-33). Former Board member Sam Ventura also testified that Milton Schwartz's name would still be up on the lower school if the Estate would have paid the Bequest. (17 App. 4164). Thus, at the time the Bequest became operative, the lower school, the only school Milton Schwartz directly contributed to during his lifetime, continued to be known as the "Milton I. Schwartz Hebrew Academy," and Milton I. Schwartz's name was displayed on the School for almost six years after his death.

E. The District Court Determines the Estate's Breach of Oral Contract Claim is Time Barred, but Permits the Estate to Introduce Evidence of an Oral Contract and Submits the Issue to the Jury.

1. The district court finds the Executor was on actual or inquiry notice of the alleged breach of the alleged perpetual naming rights contract more than four years before he filed suit.

Based on Jonathan's Schwartz's unequivocal admissions that he was on notice of facts he believed constituted a breach of the alleged naming rights contract, the School moved for summary judgment, contending that the Estate's claim for breach of an oral contract was time barred under NRS 11.190. (7 App. 1524-41; 8 App. 1828-1986; 9 App. 2150-55, 2178-2209). The undisputed evidence demonstrated that

Jonathan Schwartz was or should have been on notice of facts giving rise to his breach of contract claims more than four years prior to May 23, 2013. (7 App. 1525-30; 9 App. 2179-87).

As discussed previously, in early March 2010, Jonathan Schwartz sent a proposed settlement agreement to both Paul Schiffman, the Head of the Schools, and Victor Chaltiel, President of the Adelson School and Adelson Educational Campus, regarding the Estate's purported naming rights claims. (*See supra* at 27-28). Additionally, on May 10, 2010, Jonathan Schwartz sent a letter to the Board and a second proposed settlement agreement due to what he perceived as naming rights violations by the School for the past 2 and a half years. (*See supra* 28-29).[6]

Jonathan Schwartz testified at his deposition that he heard from several people over the course of many years about what he considered to be the erosion of his father's naming rights:

> "I hear, you know, statements from board members, statements from, you know, people who sent their kids there, you know. 'They're – they're not respecting your dad's legacy,'

[6] It is hard to reconcile the notion that Jonathan Schwartz, a lawyer, could send a letter laying out alleged "violations" of an alleged naming rights agreement, then later contending that he was not aware of any violations of that alleged agreement.

> all of this kind of stuff. And this was, you know a series of events. And little by little, they diminished my father's naming rights and supplanted it completely with Adelson, which was not the agreement."

(7 App. 1526-27; 1540). Jonathan Schwartz confirmed that he learned of changes to the name of the School and diminishment of the perceived naming interest he alleges his father obtained as these events happened throughout the years "2007, '8, '9, '10, '11, '12, '13, '14 . . . ." (7 App. 1526-27, 1541; 10 App. 2424-27).

Based on the multiple admissions of the Estate's representative, Jonathan Schwartz, the district court determined that Jonathan Schwartz had actual or inquiry notice of facts giving rise to his breach of contract claim more than four years prior to May 23, 2013 and granted the motion. (10 App. 2463-67). The district court also denied the Estate's motion for reconsideration on this issue. (12 App. 2865-67; 19 App. 4536-66).

2. Jonathan Schwartz's trial testimony confirms he was or should have been on notice of alleged breaches more than four years before he filed the breach of contract claims.

The evidence adduced at trial further supported the district court's prior determination that Jonathan Schwartz was on actual or inquiry

notice of facts giving rise to the Estate's breach of contract claim more than four years before the Estate filed its counter–petition.

Jonathan Schwartz confirmed that, consistent with his deposition testimony and his March 2010 letter, he suspected that the School was in breach before he was "certain" in 2010. (17 App. 4026-28).

> Q. So again if you use two and a half years that you used in this letter from May of 2010, that takes you back to December of 2007, can we agree on a [sic] at least?
>
> A. Right, but I didn't learn of these until 2010. ***I suspected that they may have done*** – that some of this may have dated back further but I didn't know about it until 2010.
>
> Q. So you are saying in this document that the school has been breaching the agreement for the last two and a half years, right?
>
> A. I didn't know that for certain. I learned it in 2010.

(17 App. 4027) (emphasis added).

Jonathan Schwartz further testified that he visited the School in August 2008, during which time he received a tour of the entire facility. (14 App. 3433-34, 3436). Jonathan Schwartz admitted that when he came onto the School's campus in August 2008 to meet with Mr. Schiffman, he drove onto campus through the newly constructed main entrance. (16 App. 3819-20; 17 App. 4006-07, 09). But at the time Jonathan Schwartz visited the School's campus, the entrance

monument only contained The Adelson Campus name and logo. (16 App. 3819-20). Jonathan Schwartz further admitted that not having Milton Schwartz's name on the main entrance monument would be a breach of the purported perpetual naming rights contract that he was seeking to enforce. (17 App. 4010).

In addition to the above, during Jonathan Schwartz's tour of the School in August 2008, the Adelson Middle School was operational and marketed to the public. (16 App. 3793, 3817-18, 3884-85). At trial, Jonathan Schwartz reviewed a printout from the School's website dated September 7, 2008, and acknowledged that the middle school was referred to as the Adelson Middle School. (R.A. 22-23). He confirmed that the School's reference to the middle school on the Adelson Education Campus as "The Dr. Miriam and Sheldon G. Adelson Middle School" was a purported violation of his father's naming rights contract. (17 App. 4014-15). Yet he did nothing about these two alleged material violations until May of 2013.

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3. The Estate's witnesses confirm that no written agreement exists.

The Estate and its witnesses called in its case-in-chief admitted that no written naming rights agreement exists.

TABLE B		
Testimony	**Witness**	**Cite**
Q. There is nothing in 1989 that says his name should go on the letterhead, right? A. **Mr. Jones, it was an oral contract.**	Jonathan Schwartz	15 App. 3507
Q. There is no written agreement that says what Mr. Jonathan Schwartz says in that videotape deposition, is there? A. Correct. Q. So this is a verbal understanding that you had with Milton Schwartz. A. I think it's a verbal understanding that the board had with Milton Schwartz.	Lenard Schwartzer	13 App. 3082
Q. When you say the board had an understanding, again, this was a verbal understanding, right? A. Yes.	Lenard Schwartzer	13 App. 3083
Q. But that's not in writing anywhere, right? A. There is no contract signed by both sides in this case, is my understanding, because otherwise we wouldn't be here.	Lenard Schwartzer	13 App. 3086
A. That was -- no. My understanding is that in exchange for the 500,000 that the school would be named after him. Q. Okay. A. There was also an understanding, my understanding, that everyone else's understanding was that he was going to be on the board and he would be involved in the school doing fundraising, being on the chairman of the board or being on the board, and he would be heavily involved in the school forever, for as long as he could. Q. Okay. A. That was the assumption. Now whether or not that's in writing somewhere, I don't know.	Susan Pacheco	13 App. 3213-14

4. The district court denies the School's motion for directed verdict and the issue of the existence of an oral contract is submitted to the jury.

In light of the foregoing testimony, following the close of the Estate's case-in-chief, the School moved for a directed verdict on the Estate's breach of contract claim. (12 App. 2869-2902; 18 App. 4305-4333). The district court should have dismissed the Estate's breach of contract claim in light of the its summary judgment order because the Estate and its witnesses admitted that the alleged naming rights contract was an oral contract. (*Id.*). The district court denied the School's request for a directed verdict and permitted the Estate to submit the existence of an oral contract to the jury. (18 App. 4409-10; 19 App. 4513).

F. The Jury Determines No Enforceable Naming Rights Contract Between the School and Milton Schwartz Existed.

On September 5, 2018, the jury issued its verdict. (27 App. 6507-10). The jury determined that Milton Schwartz did not have an enforceable naming rights contract with the School – neither written nor oral. (*Id.*). The jury further rejected the Estate's claim for promissory estoppel. (*Id.*).[7]

[7] The Estate's sixth claim for relief, entitled "Revocation of Gift and

G. The District Court Denies the School's Petition to Compel Distribution of the Bequest Based on Its Erroneous Findings that Milton Schwartz Made the Bequest Based Solely on His Unilateral Mistake as to the Existence of a Perpetual Naming Rights Agreement.

After trial, the parties submitted briefing on the outstanding equitable issues, including whether the School would receive the Bequest and the Estate was entitled to revocation of all of Milton Schwartz's Lifetime Gifts. (22 App. 5456-23 App. 5693; 24 App. 5817-5293). The district court found against the School and for the Estate on the Bequest issue. (24 App. 5995-97). The Order granting in part the Estate's Petition states that "Milton I. Schwartz would have never made the [Bequest] had [he] known that he did not have a legally enforceable naming rights agreement with the school." (24 App. 5994). The Order further states: "Milton I. Schwartz intended that the bequest go to a school that bore his

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Constructive Trust," 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. (28 App. 6808-09). In the Estate's Pre-Trial Memorandum, the Estate inexplicably claimed that their sixth claim was actually one for "promissory estoppel" and later argued that this claim was to be decided by the jury. (9 App. 2250). In spite of this substantive alteration, the district court submitted the Estate's promissory estoppel "claim" to the Jury, over the School's objection. (19 App. 4501-04, 4516). The Jury rejected this "claim". (19 App. 4516).

name in perpetuity." (24 App. 5995). Based on these findings, the district court granted the Estate's first and third (counter) claims for construction of will and bequest void for mistake. (*Id.*).

After the jury rejected its promissory estoppel claim, the Estate reverted back to its position that its sixth claim for relief entitled it to revocation of Milton Schwartz's Lifetime Gifts.[8] (23 App. 5564). The district court ruled against the Estate on this issue, reasoning that the evidence adduced at trial did not support a finding that all of Milton Schwartz's Lifetime Gifts to the School were conditional. (24 App. 5977-78). This ruling was due in part to the fact that Milton Schwartz never sought to claw back the money from the School after the 1993 rift and corresponding name change of the School and controlling entity. (24 App. 5977).[9]

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[8] *See id.*

[9] Although the district court did not make any such finding or ruling at the hearing, the Order states that "absent an enforceable naming rights agreement that applies to each inter vivos gift, this Court cannot rescind Milton I. Schwartz's Lifetime Gifts." (24 App. 5995). However, the district court then removed the language denying this claim. Thus, it does not appear that this finding relates to the district court's decision to deny this claim and thus the Estate's arguments on this point are irrelevant.

H. The District Court Determines the Estate is the Prevailing Party and Awards the Estate Its Costs.

After the various Judgments were entered, both parties petitioned for an award of costs. (19 Ap. 4576-21 App. 5167; 24 App. 5789-5803, 5924-41; 25 App. 6111-26 App. 6489; 27 App. 6522-53). The School contended it was the prevailing party because it prevailed on the contract dispute, which was without question the most significant issue in the litigation.

In its Decision and Order filed on July 19, 2019, the district court recognized that neither party succeeded on its affirmative claims, but arbitrarily determined that the Estate was the prevailing party. (27 App. 6585-95). The district court failed to analyze the weight and importance of the issues in this litigation as required under Nevada law. Even in the face of obvious defects in its supporting material and legal basis for certain costs, the district court granted in part the School's motion to retax, and awarded the Estate $59,517.67 in costs. (27 App. 6594). The School timely appealed the district court's costs Order. (27 App. 6598-99).

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SUMMARY OF THE ARGUMENT

I.

Arguments in Support of the School's Responding Brief

This case began as a simple request to distribute a Bequest to be used for scholarships for Jewish children wishing to attend the School. The Estate asserted various theories to avoid its obligation to make the Bequest, all related to its contention Milton Schwartz and the School had a perpetual naming rights contract. The Estate's counter–petition attempted to rewrite the Bequest, and made the primary issue in this matter the existence of the purported contract. The jury found against the Estate on its contract claims, and the Estate effectively wants a "redo," even though the evidence presented at trial clearly demonstrated, and the jury so found, that no such contract – written or oral – existed. The Estate is not entitled to a second, or in the case of the oral contract, a third, chance.

This case is not about disrespecting the memory of Milton Schwartz, or his substantial contributions to the School in the past. The Estate is understandably disappointed in the outcome. However, due to the jury's verdict finding that no naming rights contract existed and the numerous factual and legal issues undermining the Estate's claims, the

Estate is not entitled to a redo or to any of the relief it seeks. The Court must deny the Estate's Petition in its entirety.

Issue No.1:

The Estate contends that this Court should reverse the district court's grant of summary judgment on the Estate's oral contract claim, vacate the judgment on the Estate's contract claims, and remand for a new trial. No factual or legal support exists for the Estate's assignments of error on this issue and the Court should refuse to grant any of the relief sought by the Estate.

At trial, the Estate admitted that any alleged naming rights contract was oral, but now contends that the alleged oral contract is subject to the longer limitations period under NRS 11.190(1)(b) for agreements "founded upon a writing." (15 App. 3507). This argument is unavailing because, as the Estate admits, no writing exists directly evidencing the School's obligations under the alleged naming rights contract. (15 App. 3507); *see also* Table B, *supra*. The miscellaneous documents, dated over ten years, which allegedly relate to the oral contract are insufficient under the law to support a finding the alleged contract was founded upon a writing. And, even if the alleged contract is

actually part oral and part written as the Estate now contends on appeal, the shorter limitations period still applies, which as set forth herein, bars the Estate's claims.

The Estate's contract claim is time barred because the uncontroverted evidence irrefutably demonstrates that Jonathan Schwartz was on actual or, at a minimum, inquiry notice of facts that gave rise to the Estate's breach of contract claim by May of 2009. The evidence, including Jonathan Schwartz's own admissions demonstrated that Jonathan Schwartz was, or by exercising reasonable diligence, would have been on notice of the School's purported breaches by at least May of 2009. (7 App. 1526-27; 1539-41; 16 App. 3793; 3813-20; 3884-85; 17 App. 4006-07; 4027; 4077; 27 App. 6687-89; R.A. 22-23, 47).

Nevada law requires a plaintiff to use reasonable diligence in determining the existence of a cause of action and starts the limitations period when the plaintiff knows or should have known of facts that would lead an ordinary prudent person to investigate further. Even if Jonathan Schwartz's admissions do not evidence actual notice (which they do), Jonathan Schwartz was on inquiry notice. Jonathan Schwartz's admissions that he "suspected" but did not know "for certain" the School

was in breach of the alleged contract, demonstrated he knew of or had access to facts that would have prompted an ordinary, prudent person to investigate further. (17 App. 4026-27). Even a cursory investigation would have revealed a purported breach given that as of at least August 2008, the School publicly held itself out as the Dr. Miriam and Sheldon G. Adelson Educational Campus, which included the new the Adelson Middle School. (16 App. 3793; 3813-20; 3884-85; 17 App. 4006-07, 4009; R.A. 22-23, 47). Jonathan Schwartz's admissions unequivocally demonstrate he did not exercise reasonable diligence, but instead chose to remain willfully ignorant of or close his eyes to pertinent facts reasonably accessible to him. *See Siragusa v. Brown*, 114 Nev. 1384, 1393-94, 971 P.2d 801, 807 (1998). Jonathan Schwartz's feigned ignorance constitutes a failure to comply with his duty to act in good faith to apply his attention to the facts available to him regarding his cause of action. Accordingly, Jonathan Schwartz's decision to sit back and wait to file suit until he was "certain" a breach occurred forecloses the Estate's oral contract claim.

The Estate's estoppel and equitable tolling arguments are equally unsupported by the law and the facts. This argument is nothing more

than a red herring. The Estate failed to introduce any evidence the School actively concealed facts or otherwise prevented Jonathan Schwartz from asserting his claims. In fact, the evidence demonstrated that the School publicly held itself out as the Dr. Miriam and Sheldon G. Adelson Educational Campus, which included the new the Adelson Middle School since at least August 2008. (16 App. 3793; 3813-20; 3884-85; 17 App. 4006-07, 4009; R.A. 22-23, 47). Given the Estate's position concerning the expansive scope of the alleged naming rights contract, the School was openly and obviously in violation of the alleged contract from the opening of the expanded campus in 2008. Thus, Jonathan Schwartz's self-serving testimony regarding alleged representations by the School's agents, even if true, have no bearing on whether Jonathan Schwartz was or should have been on notice of facts giving rise to the Estate's oral contract claim. The Estate's attempt to twist the facts in its favor on this issue is futile. Thus, the district court correctly rejected these contentions.

Finally, the Estate is not entitled to an extended limitations period based on the School's alleged "separate" breaches theory. The alleged naming rights contract is not subject to a separate breach analysis because it is not an installment or a divisible contract, or otherwise

subject to multiple statutes of limitations. As such, this argument lacks merit.

Therefore, the district court correctly determined that the Estate's oral contract claim was time barred and this Court must affirm the district court's ruling granting summary judgment in the School's favor on this claim.

However, even if the Court erred in granting summary judgment on the Estate's oral contract theory, the Estate still cannot show prejudice. Consistent with the evidence, the jury correctly found Milton Schwartz did not have a legally enforceable contract with the School imposing extensive naming obligations on the School **forever**. The jury's finding that no naming rights contract existed – either oral or written – forecloses the vast majority of the Estate's assignments of error. The Estate's arguments are further undermined by the fact that the district court allowed the Estate to present evidence on and submit its oral contract claim to the jury despite the district court's pretrial ruling that this claim was time barred, the Estate's second bite at the oral contract apple. (10 App. 2463-67; 12 App. 2865-67; 19 App. 4513, 4536-66; Op. Br. at 52-53). Consequently, even if the district court erred in its decisions

related to the Estate's breach of contract claim, the Estate cannot demonstrate prejudice.

In addition, the Estate's breach of contract claims fails as a matter of law under the statute of frauds. There is no dispute that the statute of frauds applies to the alleged perpetual naming rights contract. No writing or writings exist that contain all essential terms of the contract (as the jury correctly found), which operates as an independent basis to preclude the Estate's contract claim as a matter of law.

Therefore, even if the district court erred in granting summary judgment on the Estate's oral contract claim, no basis exists to vacate the jury's verdict on the Estate's contract claims.

Issue No. 2:

This Court must similarly reject the Estate's contention that the judgment on its contract claim should be vacated and remanded for a new trial based on the district court's refusal to provide jury instructions on contract modification and breach of the implied covenant of good faith and fair dealing. The Estate failed to provide the requisite evidence to place the modification instruction before the jury. Specifically, the Estate failed to produce any evidence of the consideration in support of the

alleged modification. The only evidence the Estate offered in support of its late-added modification theory was the Sabbath Letter. However, by its own express terms, the Sabbath Letter makes clear the School agreed to undertake the actions therein out of a sense of gratitude and to *voluntarily honor* Milton Schwartz's general early support, as opposed to a contractual obligation. (27 App. 6697-98). The letter does not mention or confirm any alleged prior naming rights contract, does not recite any consideration (current or past), and does not place any conditions on the proposed action the School describes. (*Id.*) Thus, no evidence existed to support the Estate's modification theory.

Regardless, the absence of a modification instruction did not prejudice the Estate. The jury determined no contract existed between Milton Schwartz and the School. Without an underlying enforceable agreement, no modification can exist. For many of the same reasons, no reasonable juror could have found a modification because the Estate failed to demonstrate by clear and convincing evidence that the Sabbath Letter or the parties' course of conduct constituted an enforceable modification.

The Estate was also not entitled to an instruction on breach of the implied covenant of good faith and fair dealing. Nevada law requires that this claim be specifically alleged to be considered. The Estate failed to properly plead or otherwise raise this separate and distinct claim at any time before or during trial. Furthermore, breach of the implied covenant requires the existence of contract. Since the jury determined no contract existed, the Estate could not be prejudiced by the refusal to give this instruction even if they had properly pled it, which they demonstrably did not. Therefore, the district court did not err in refusing to provide these jury instructions and even if it did, the Estate is not entitled to a new trial.

Issue No. 3:

Finally, the Estate is not entitled to the equitable remedy of revocation or rescission of Milton Schwartz's Lifetime Gifts to the School and its students.[10] The Estate should be judicially estopped at the outset

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[10] So it is clear to the Court, with the exception of the $500,000 Milton Schwartz donated in 1989, the gifts the Estate was seeking to recover here are not, and never were, directly tied to the naming rights issue. Rather the so-called Lifetime Gifts were other gifts ranging from $50 to $135,277 made over an almost 20-year period, and were never tied to any Board meetings or alleged agreements related to naming rights. (28 App. 6860).

from even seeking this relief given that the trial court allowed the Estate to convert this claim to the substantively different claim of promissory estoppel, over the School's objection, on the very eve of trial. Even though the district court permitted the Estate to submit its recast promissory estoppel claim to the jury, this claim was reasonably rejected by the jury. After this set back, the Estate is now trying to improperly defaulted back to its original position that it was entitled to *revocation* of all of Milton Schwartz's Lifetime Gifts. This Court should estop the Estate from its improper, opportunistic, unfair, and dare we say, inequitable attempt to get two bites at this apple.

Regardless, the district court did not abuse its discretion in denying this equitable relief to the Estate. First, the Estate's claim for revocation based on mistake is time barred under the three-year statute of limitations for mistake claims. (27 App. 6687-6713). Second, even assuming the Estate timely brought its claim for revocation, the Estate failed to meet its burden to demonstrate that these gifts, given over the course of almost two decades, were conditioned on the School holding itself out as the Milton I. Schwartz Hebrew Academy, whether for a year or **forever**. *See* footnote 9. Finally, Milton Schwartz's alleged unilateral

mistake regarding the existence of an enforceable perpetual naming rights contract is not an invalidating mistake. The Estate failed to adduce by a preponderance of the evidence, let alone by clear and convincing evidence as is required to sustain the claim that but for Milton Schwartz's mistaken belief he had an enforceable perpetual naming rights contract with the School, he would not have made any of the lifetime donations. Again, *see* footnote 9.

Ordering the School to return Milton Schwartz's donations now would in no sense or the word achieve equity. There can be no question that Milton Schwartz intended that his Lifetime 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. The School should not be forced to disgorge Milton Schwartz's Lifetime Gifts when the Estate utterly failed to produce a preponderance of evidence, let alone clear and convincing evidence, that these specific gifts were only made because Milton Schwartz thought he had a perpetual naming rights agreement, and not because he loved and believed in the School as a Jewish day school, and

thus sought to support it in many ways, including periodic monetary gifts. This result would be the exact opposite of equitable.

Accordingly, this Court must affirm the district court's ruling that the Estate was not entitled to the equitable remedy of revocation of Milton Schwartz's lifetime donations.

II.

Argument in Support of the School's Opening Brief on Cross-Appeal

The district court's decision to deny the School's Petition was erroneous. First, as a matter of law, the district court erred in concluding that the Bequest was ambiguous. As Jonathan Schwartz, the Estate's Executor, admitted at trial, the language in the Bequest was not subject to two interpretations. (14 App. 3475-76). Instead, the district court erroneously created an ambiguity based on extrinsic facts not at issue. (12 App. 2796-2810). As a result of this erroneous finding, the district court further erred in permitting the Estate to offer parol evidence (mostly in the form of self-serving inadmissible hearsay testimony) to attempt to add some alleged missing clarity to the language to the Bequest.

Second, even if the Bequest was ambiguous, the district court abused its discretion in permitting the Estate to introduce inadmissible hearsay, prejudicing the School. The only evidence the Estate adduced to connect the Bequest to the alleged naming rights contract was testimony from alleged witnesses to Milton Schwartz's purported statements made years, or sometimes decades before Milton Schwartz executed the Bequest. (13 App. 3072, 87-88, 3157-58, 3160-61, 3167, 3171-72, 3216-17; 14 App. 3388-89, 3420-23, 16 App. 3925-26, 3933, 3935, 3944, 17 App. 4058-59, 4066). A majority of these statements were inadmissible hearsay. Had the district court properly excluded this inadmissible hearsay, the Estate would have had no evidence supposedly linking Milton Schwartz's intent in making the Bequest to his alleged mistaken beliefs regarding his alleged perpetual naming rights contract. The School unquestionably was prejudiced by the district court's errors in admitting this evidence, as this inadmissible hearsay was the basis for the trial court's decision.

Finally, equity mandates that the Court vacate the district court's denial of the School's Petition. The Estate's delay in making its claims, and actions before and during the litigation created the circumstances on

which it now relies to escape its obligation to provide the Bequest to the School. The funds from the Bequest will be used to provide scholarships to children. There is nothing equitable in permitting the Estate to escape making the Bequest due to circumstances created by its own conduct.

Accordingly, Court must vacate and reverse the district court's judgment denying the Estate's Petition.

III.

Argument in Support of the School's Opening Brief in Docket 79464:

The district court erroneously and arbitrarily determined that the Estate was the prevailing party and entitled to its costs, despite the fact that while neither party prevailed on its affirmative claims, the School prevailed on what was unquestionably the most significant issue in the case.

Two central issues existed in this case: 1) whether the School was entitled to the Bequest; and 2) whether Milton Schwartz had an enforceable perpetual naming rights contract. The contract issue unquestionably dominated the litigation and the trial. The School prevailed on the naming rights contract issue (the Estate's affirmative claim against the School), but the Court found in favor of the Estate on the issue of the Bequest in the will (the School's affirmative claim against

the Estate). The Estate withdrew its fraud in the inducement claim on the eve of trial, after the School moved for summary judgment on statute of limitations grounds, and lost its other affirmative claims against the School for damages or equitable relief related to the contract issue.

The Estate sought $2.8 million in damages (consisting of Lifetime Gifts plus prejudgment interest). Moreover, the consequences of the Estate obtaining alternative relief, such as specific performance concerning its alleged naming rights claims, are staggering. For example, had the Estate prevailed on its perpetual naming rights claim, the School would have been in breach of its written naming rights contract with the Adelson family, and as a consequence could have been required to repay over $100,000,000 in gifts, and lost all future funding from the Adelson family, bankrupting the School. (15 App. 3622-23, 3625). On the other hands, had the Estate lost the Bequest issue it would have simply paid the $500,000 it already set aside in a blocked account, and was and is still required to pay to some Jewish day school. In other words, the Estate is never going to get that money back regardless of who it ends up going to. Stated another way:

- The Estate *lost* its affirmative claim of perpetual naming rights for Schwartz, the most significant claim made by the Estate. (19 App. 4526-32).
- As a result of the above, the School did not have to return over $100,000,000 in gifts (which as a practical matter would have resulted in bankruptcy), or lose all future funding from the Adelson family, which up through the time of trial, constituted many millions of additional funds each year (15 App. 3622-23, 3625);
- The Estate *lost* its affirmative claim for reimbursement or restitution from the School for Schwartz's past gifts in the approximate amount of $2,800,000 (25 App 6005);
- In comparison, the School *lost* its affirmative claim for the $500,000 in scholarship money that the Estate already had set aside in a blocked account, and would have to pay regardless because of the tax consequences of recognizing that bequest years before. (3 App. 685-90; 14 App. 3430-32; 24 App. 5994).

In summary, the Estate *lost* its primary objective (to get Milton Schwartz's name back on everything related to the School), the School got to keep well over $100,000,000 in past gifts, and future funding from the Adelson family; the Estate *did not* get back $2,800,000 in Lifetime Gifts and interest; but the School did not get the $500,000 bequest (that did not even go directly to the School anyway, it went to scholarships for students), and the Estate was bound to pay that money to someone regardless of who prevailed at trial.

Under the above, irrefutable facts, it is overwhelmingly clear that the School prevailed on the most consequential issues before the court. Accordingly, Nevada law dictates that the School should have been declared the "prevailing party" in this litigation and entitled to recover its costs under NRS 18.020. No legal or factual support exists for the district court's decision. This Court must vacate the district court's cost award to the Estate.

Even assuming the district court did not arbitrarily determine the Estate was the prevailing party, the district court erred in awarding $11,747.68 in costs to the Estate. This amount includes both costs that are not recoverable under NRS 18.005 and costs for which the Estate

failed to provide the proper backup and documentation. Therefore, at a minimum, the Estate's costs award must be reduced accordingly.

ARGUMENT

I. ARGUMENT IN RESPONSE TO THE ESTATE'S OPENING BRIEF.

A. This Court Must Affirm Summary Judgment on the Estate's Oral Contract Claim.

1. The Estate's breach of an oral contract claim is time barred.

The district court correctly determined that the Estate's claim for breach of an oral contract was time-barred. The four-year limitations period applies to the Estate's contract claims. The Estate admitted that the alleged naming rights contract was an oral contract. And even if the contract was part oral and part written, as the Estate now contends, the four-year limitations period still applies.

The undisputed admissible evidence demonstrates that Jonathan Schwartz was or should have been on notice of facts giving rise to his claim more than four years before the Estate filed its Petition. In an attempt to circumvent the statute of limitations issues, the Estate unpersuasively asserts that the School actively concealed the alleged breaches. To the contrary, under the Estate's claim regarding the terms

of the alleged contract, the Executor's interactions with the School would have put an ordinary prudent person on notice that the School was supposedly in breach[11], or at a minimum, that further inquiry was warranted. Therefore, the Estate failed to meet its burden and its claim for breach of contract is barred by the statute of limitations.

a. The four-year statute of limitations applies to the Estate's breach of contract claim because the alleged naming contract was oral, not written.

The Estate and its witnesses repeatedly admitted that the alleged naming rights contract was an oral contract. *See* Table B, *supra*. In spite of this admission, the Estate contends that the six-year statute of limitations in NRS 11.190(1)(b) should apply in this case. According to the Estate, the School's alleged obligation to name the school, the campus, and any later–acquired buildings and property after Milton Schwartz *in perpetuity*, as well as to display his name "appropriately" on both signage and all forms of communications and media is "founded

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[11] It is also worth noting that Estate's executor, Jonathan Schwartz, was not the average person when it came to understanding the legal consequences of his actions, or those of the Estate on whose behalf he was acting. Mr. Jonathan Schwartz was a graduate of Northwestern Law School, admitted to the bar of the State of Arkansas, and holds an MBA. (14 App. 3397, 3466-68).

upon an instrument in writing" because one sentence in one of many iterations of the controlling entity's bylaws states that the *corporation* would be named after Milton Schwartz in perpetuity. The Estate's position is legally and factually incorrect.

A cause of action is founded upon an instrument of writing when "the contract, obligation, or liability grows out of written instruments, **not remotely or ultimately, but immediately**." *El Ranco, Inc. v. New York Meat & Provision Co.*, 88 Nev. 111, 114, 493 P.2d 1318, 1321 (1972) (citing *Bracklein v. Realty Ins. Co.*, 95 Utah 490, 80 P.2d 471, 476 (1938)). The mere existence of a written document relating to the alleged agreement or forming a link in the chain of evidence establishing the existence of an agreement does not render the breach of contract cause of action founded upon a written instrument. *See Bracklein*, 95 Utah 490, 80 P.2d at 476 ("[T]he fact that a writing may be a link in the chain of evidence establishing the liability is not sufficient to say the cause of action is founded on such writing…"); *Restroom Facilities, Ltd. v. Kaufman*, 128 Nev. 929, 381 P.3d 655 (2012) (unpublished) (citing *Stephens v. McCormack*, 50 Nev. 383, 390, 263 P. 774, 776 (1928)); *McMahan v. Snap on Tool Corp.*, 478 N.E.2d 116, 123 (Ind.Ct.App.1985)

("The mere existence of a written document related to the cause of action does not establish the six-year statute of limitation; the writing must evidence a contract that goes to the heart of, and in some way forms the basis for, the claim asserted.").

> Courts have continued to recognize that, for [the longer statute of limitations applicable to agreements founded upon a writing], the obligation sued upon must be one immediately founded upon the written instrument. In *O'Brien v. King*, *supra*, 174 Cal. at p. 772, 164 P. 631, the California Supreme Court determined that for a cause of action " '... to be founded upon an instrument in writing, **the instrument must, itself, contain a contract to do the thing for the nonperformance of which the action is brought**.' [Citation.]" The court recognized the promise or obligation being sued upon must be "embodied in the language of the writing."

Century Indem. Co. v. Superior Court, 50 Cal. App. 4th 1115, 1122, 58 Cal. Rptr. 2d 69, 73–74 (1996) (emphasis added).

Thus, while this Court has held that the term "founded upon a writing" should be liberally construed*, El Ranco*, 88 Nev. at 116, 493 P.2d at 1321-22, the party advocating for the longer statute of limitations must produce a writing that **immediately and directly evidences** the parties' contract. No such writing exists here.

The 1990 Bylaws from the School's controlling entity relied upon by the Estate merely state that the *corporation* would be named after Milton

I. Schwartz in perpetuity and reference no contractual agreement with respect to such naming – and further expressly provide that the Board can amend the Bylaws with a simple majority vote. (27 App. 6612, 6619).[12] Notably absent from the bylaws is *any* mention of the multitude of the School's alleged obligations to *forever* 1) name the School (as opposed to the corporation), 2) the entire campus, 3) any future acquired land and/or buildings after Milton Schwartz, or 4) display his name "appropriately" on all signage, media, etc. (*Id.*; *see also* 14 App. 3460; 15 App. 3504-08; 28 App. 6802-03).[13] The same is true for the 1999 Bylaws. (27 App. 6629). This is a far cry from constituting "solid written proof" of the School's alleged contractual obligations. *See El Ranco*, 88 Nev. At 116, 493 P.2d at 1322.

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[12] In fact, as the Board voted to amend this particular provision of the Bylaws four times from 1989 to 2008.

[13] As such, the Estate's reliance on *Elec. Contractors' Ass'n of City of Chicago v. A.S. Schulman Elec. Co.*, 63 N.E.2d 392, 397 (Ill. 1945); *Texas W. Ry. Co. v. Gentry*, 8 S.W. 98 (Tex. 1888), *Gray v. Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers, Local No. 51*, 447 F.2d 1118, 1121 (6th Cir. 1971); and *Bankers' Tr. Co. v. Rood*, 211 Iowa 289, 233 N.W. 794, 801 (1930) is misplaced because in those cases the court determined that the entire agreement was actually contained in the corporate documents.

Even when read together (and assuming that miscellaneous documents created *years* after the alleged agreement could constitute the requisite writing), the 1990 and 1999 Bylaws and 1996 Sabbath Letter do not create the School's obligations as alleged by the Estate. The Bylaws are missing numerous material terms of the alleged naming rights contract, including most critically consideration. The Sabbath Letter also cannot be read to establish any enforceable obligation or liability on the School for many reasons, most notably it lacks in valid or recognized consideration received from Milton Schwartz to bind the School to a naming rights agreement. (27 App. 6884). Even if each of these documents could comprise a link in the chain of evidence to support the Estate's contract theory, they do not implicate the extended limitations period under NRS 11.190(1)(b). *See Kaufman*, 128 Nev. 929, 381 P.3d 655. And, the mere existence of documents addressing the name of the School does not transform the alleged naming rights contract into one founded upon an instrument in writing. *See Bracklein*, 95 Utah 490, 80 P.2d 471, 476.

The Estate's reliance on *El Ranco* and *Beazer Homes* is misplaced as these cases are factually distinguishable. In both cases, the obligation

at issue involved a simple exchange of payment for goods or services. *See El Ranco,* 88 Nev. at 116, 493 P.2d at 1321–22 (obligation to pay for plaintiff's sale of meat products to the defendant hotel); *Webster v. Beazer Homes Holdings Corp.*, No. 02:11-CV-00784-LRH, 2013 WL 271448, at *1 (D. Nev. Jan. 23, 2013) (obligation to pay for provision of construction cleanup at residential construction sites). And, in both cases, the Court found the written instrument(s) fairly imported an ***obligation to pay***. *See El Ranco*, 88 Nev. at 112, 493 P.2d at 1319 (obligation to pay for meat products evidenced by signed written receipts); *Beazer Homes*, 2013 WL 271448, at *1 (obligation to pay for provision of additional cleanup services evidenced by parties' contracts and written invoices). Further, in *Beazer Homes*, the parties had previously entered into *multiple contracts* related to the services at issue. *See Beazer Homes*, 2013 WL 271448, at *1.

Where the disparate, cobbled together after the fact documents do not contain the elements of a completed contract, they cannot be used to establish a contract in writing for purpose of determining the appropriate statute of limitations period. Here, unlike *El Ranco* and *Beazer Homes*, in which the plaintiffs sought to impose the straightforward obligation to

pay for goods or services it provided, and provided receipts or invoices as evidence of the obligation to pay, the Estate seeks to impose a multitude of different obligations on the School – in perpetuity – based solely on a smattering of documents, created over a ten year period, by Boards made up of different people with different memories of what the alleged obligation was in the first place, and none of which contain any consistent reference to, or which clearly and consistently set forth the School's alleged numerous obligations or the consideration paid by Milton Schwartz. Thus, *El Ranco* and *Beazer Homes* are clearly distinguishable from the matter at hand.

The Estate's reliance on *Hahn v. Strasser*, 484 F. App'x 155, 156 (9th Cir. 2012) (unpublished) is likewise unavailing. In supplying missing terms from the parties' letter agreement, the *Hahn* court relied on Washington law providing that courts can supply missing essential elements to find a written contract if they can be fairly implied from the writing itself. *Id.* at 156-57. The Estate points to no similar Nevada precedent. Even assuming the Court could supply missing terms, the essential elements of the agreement as alleged by the Estate, including Milton Schwartz's consideration and the School's numerous obligations,

cannot be fairly implied from the different vaguely worded bylaws, written at different times by different Boards, as proffered by the Estate.

Accordingly, NRS 11.190(1)(b) does not apply to the Estate's breach of oral contract claim because no writing exists immediately and directly evidencing the School's obligations under the alleged naming rights contract.

b. Even if the alleged contract was part oral, part written, it is time barred.

In spite of the fact that the Estate and its witnesses repeatedly admitted that the alleged contract was oral, the Estate now contends that the contract was "partly oral, partly written" and that the corporate bylaws evidence a partially written contract. Op. Br. at 53.[14] This is fatal

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[14] No support exists for the Estate's contention that an agreement can be part written and part oral under Nevada law. In *Ringle v. Bruton*, 102 Nev. 82, 90, 86 P.3d 1032, 1037, the appellant challenged the following instruction *for violation of the parol evidence rule*: "A contract may be oral, written, or partly oral and partly written. An oral, or partly oral and partly written contract is as valid and enforceable as a written contract." At no time did the Court hold that this was a correct statement of Nevada law. Rather, the Court determined that the instruction did not violate the parol evidence rule because "parol evidence is admissible to prove a separate oral agreement regarding any matter not included in the contract or to clarify ambiguous terms so long as the evidence does not contradict the terms of the written agreement." *Id.* at 91, 86 P.3d at 1037. Regardless, *Ringle* is inapplicable because the Estate does not contend a separate oral agreement existed and failed to establish the existence of a

to its contract claim. Even assuming the relied upon bylaws could constitute a partially written contract[15], the Estate's claim for breach of contract would be time barred because the shorter limitations period applies to part oral and part written contracts. "If resort to parol evidence is necessary to establish any material or essential element of a written contract, the contract is partly oral, and **the statute of limitations for oral contracts applies**." 51 Am. Jur. 2d Limitation of Actions § 117 (emphasis added) (citing *Armstrong v. Guigler*, 174 Ill. 2d 281, 220 Ill. Dec. 378, 673 N.E.2d 290 (1996); *Bogle & Gates, P.L.L.C. v. Zapel*, 121 Wash. App. 444, 90 P.3d 703 (Div. 1 2004); *see also Cahn v. Foster & Marshall, Inc.*, 33 Wash. App. 838, 658 P.2d 42 (1983) ("A written agreement for purposes of the [longer] statute of limitations must contain all the essential elements of the contract, and if resort to parol evidence is necessary to

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written contract.

[15] As the Estate later concedes, the School did not argue that bylaws could never constitute a contract, only that the bylaws *in this case* did not constitute a contract because material terms of the alleged contract were absent. Because of this, the bylaws did not create any contractual rights in Milton Schwartz's favor and thus could – and were – amended several times, one of which deleted all reference to Milton Schwartz, without any legal challenge by Milton Schwartz. (R.A. 3-4; 14 App. 3335-36; 17 App. 4001-02; 18 App. 4382). Notably, counsel for the Estate even admitted during closing argument that the 1990 Bylaws were not a contract. (18 App. 4375).

establish any material element, then the contract is partly oral and the [shorter] statute of limitations applies."). Therefore, the Estate's part written, part oral contract theory, even if recognized under Nevada law, is time barred under the four-year statute of limitations.

c. Jonathan Schwartz was on notice of the facts giving rise to his claims more than four years before he filed his breach of contract claim.

The "uncontroverted evidence irrefutably demonstrates" that the Estate knew or should have known facts giving rise to its claim for breach of the alleged oral naming rights contract more than four years before it filed its Petition on May 28, 2013.

The discovery rule applies to the Estate's claim for breach of contract. The discovery rule is an exception to the general rule that a cause of action accrues when the wrong occurs and a party sustains injuries for which relief can be sought. *See Petersen v. Bruen*, 106 Nev. 271, 792 P.2d 18 (1990). Under this rule, an action for breach of contract accrues "as soon as the plaintiff *knows or should know* of facts constituting a breach." *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025, 967 P.2d 437, 440 (1998) (emphasis added). This rule requires a plaintiff to use due diligence in determining the existence of a cause of action and

starts the limitations period when the plaintiff obtains inquiry notice. *Id.*; *see also Massey v. Litton*, 99 Nev. 723, 728 669 P.2d 248, 252 (1983) (holding that a plaintiff "discovers" his injury "when he knows or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on inquiry notice of his cause of action.").

Inquiry notice occurs when the plaintiff knows or should have known of facts that would lead an ordinary prudent person to investigate the matter further. *See Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 252, 277, P.3d 458, 462 (2012). To exercise reasonable diligence, plaintiffs cannot remain willfully ignorant of or close their eyes to pertinent facts reasonably accessible to them, and must in good faith, apply their attention to the pertinent facts within their reach. *See Siragusa v. Brown*, 114 Nev. 1384, 1393-94, 971 P.2d 801, 807 (1998) (*citing Spitler v. Dean*, 436 N.W.2d 308, 310–11 (Wis.1989)).

There can be no legitimate dispute that Jonathan Schwartz knew or, through the use of reasonable diligence, should have known of facts giving rise to his cause of action for breach of contract on or before May 28, 2009. Jonathan Schwartz, a lawyer with an MBA, admitted on at least four occasions throughout the litigation that he knew of, or at the

very least could have discovered, though reasonable diligence, conduct that would constitute a breach of the alleged perpetual naming rights contract more than four years before he finally asserted his breach of contract claim.[16] (14 App. 3397, 3466-68). First, in his May 10, 2010 letter to the School's Board, Jonathan Schwartz indicated that what the School had been doing with regards to diminution of his father's alleged naming rights for **the past two and a half years** was in violation of Milton Schwartz's alleged naming rights contract.[17] (27 App. 6687-89).

Second, at his deposition, Jonathan Schwartz confirmed that he learned of potential changes to the name of the School and diminishment of his father's alleged naming rights **as the events occurred** throughout the years "2007, '8, '9, '10, '11, '12, '13, '14…" (7 App. 1526-27, 1539-41). While the Estate may try to unsuccessfully explain away this testimony

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[16] Again, these admissions are particularly significant considering that Jonathan Schwartz would be in a far better position than a non-lawyer to know what conduct or actions could potentially amount to a breach of contract due to his education as a lawyer, and admission to the bar.

[17] It begs credulity, for a lawyer who writes a letter that specifically represents that the lawyer is aware of conduct over the preceding two and a half years that he claims was a violation of a naming rights contract, yet later argues to the court that he was unaware of the alleged contract breach. The Estate's representative cannot have his cake and eat it too.

as an error in Jonathan Schwartz's memory of the dates, the foregoing dates are consistent with his statement in his May 10, 2010 letter that the School had allegedly been diminishing his father's alleged naming rights for the past two and a half years. (27 App. 6689).

Third, at trial, in spite of the fact that the district court had already determined the Estate's breach of oral contract claim was time barred, the Estate attempted to cure this finding through Jonathan Schwartz's testimony. This tactic still failed.

Jonathan Schwartz admitted that he received a tour of the "entire facility" in August 2008, where Milton Schwartz's name was glaringly missing from many places the Estate claimed it was required to be prominently displayed. (14 App. 3433-34). For example, he admitted that when he came onto the School's campus for the August 2008 tour, he drove through the newly constructed main entrance. (17 App. 4006-09). But the evidence adduced at trial established that at that time, the entrance monument, that Jonathan Schwartz had to drive past to gain entrance to the School, only contained the Adelson Campus name and logo. (16 App. 3818-20; R.A. 47). Jonathan Schwartz even admitted that the "Adelson Campus" monument at the entrance to the School would

leave an impression that this designation applied to the entire place, as opposed to the high school only. (17 App. 4077). Because the Estate's position is the appearance of the Adelson Campus name and logo and the absence of any reference to the Milton I. Schwartz Hebrew Academy would constitute a clear, unequivocal breach of the purported perpetual naming rights contract, Jonathan Schwartz was or should have been on notice of a purported breach after his 2008 campus tour. (17 App. 4010).

Therefore, the additional evidence adduced at trial was entirely consistent with the district court's ruling that the Estate's breach of oral contract claim was time barred.

And, even if the Estate's executor and representative, Jonathan Schwartz's, own admissions do not constitute actual notice, there can be no dispute that he was on inquiry notice. Jonathan Schwartz confirmed that, consistent with his deposition testimony and his March 2010 letter, he suspected that the School was in breach before he was "certain" in 2010. (17 App. 4026-28). These admissions constitute inquiry notice under Nevada law. Jonathan Schwartz's suspicions would have, or certainly should have, lead an ordinary prudent person, let alone a licensed attorney acting as the executor of his father's estate, to

investigate the matter further. *See Winn*, 128 Nev. at 252, 277 P.3d 458, 462 (2012) (17 App. 4018, 4020; 27 App. 6687). Jonathan Schwartz's now-feigned ignorance of the School's actions he alleges constituted a breach of the alleged naming rights contract is irrelevant. Jonathan Schwartz's failure to investigate his suspicions until years later and to avoid his duty to act in good faith to apply his attention to the facts available to him regarding his cause of action cannot constitute reasonable diligence. Given that, as of at least August 2008, the School publicly held itself out as the Dr. Miriam and Sheldon G. Adelson Educational Campus, and the Adelson Middle School was operational, even a minimal investigation (such as visiting the School's website) would have revealed a purported breach. (16 App. 3793; 3813-20; 3884-85; 17 App. 4006-07, 4009; R.A. 22-23, 47). For instance, a brief internet search of the School would have revealed a purported breach as the School's website openly referenced the middle school on the Adelson Education Campus as "The Dr. Miriam and Sheldon G. Adelson Middle School" from the School's by at least September 7, 2008. (17 App. 4014-15; R.A. 22-23). Jonathan Schwartz's decision to remain willfully ignorant of or close his eyes to pertinent facts

reasonably accessible to him forecloses his claims under Nevada law. *See Siragusa*, 114 Nev. at 1393-94, 971 P.2d at 807.

Therefore, there is no genuine dispute that Jonathan Schwartz had actual or inquiry notice by at least May 28, 2009, and the district court correctly determined that the Estate's claim for breach of the alleged oral naming rights agreement was barred as untimely.

d. The district court correctly rejected the Estate's estoppel and equitable tolling argument.

Recognizing that its claims are time barred under the applicable four-year statute of limitations, the Estate now alternatively seeks reprieve under the theories of estoppel and equitable tolling. The Estate's reliance on these equitable theories is unavailing.

"The defense of estoppel requires a clear showing that the party relying upon it was induced by the adverse party to make a detrimental change in position, and the burden of proof is upon the party asserting estoppel." *Nevada State Bank v. Jamison Family P'ship*, 106 Nev. 792, 799, 801 P.2d 1377, 1382 (1990) (citing *In re MacDonnell's Estate*, 56 Nev. 504, 508, 57 P.2d 695, 696 (1936). While estoppel is generally a question of fact, if the facts are undisputed, then the existence of estoppel

is a question of law. *See Mills v. Forestex Co.*, 108 Cal. App. 4th 625, 652, 134 Cal. Rptr. 2d 273, 296 (2003).

The Estate claims letters from the School to Jonathan Schwartz and statements allegedly made by Paul Schiffman during Jonathan Schwartz's 2008 campus tour are evidence of concealment and justifies Jonathan Schwartz's delay in bringing suit.[18] Op. Br. at 40. This is demonstrably false.

This argument is just another red herring. To assert this argument, the Estate must conspicuously ignore its position on the terms of the alleged naming rights contract. According to the Estate's theory on the breadth of the naming rights contract, the School breached the alleged contract by affixing the Adelson name to, among other things, the corporation, the campus, and the middle school. (14 App. 3460; 15 App. 3504-08; 17 App. 4067; 28 App. 6802-03). Thus, if anything, the letters from the School and alleged statements by Mr. Schiffman provide

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[18] The Estate's contention that the School fraudulently concealed its purported breach of the alleged naming rights agreement is concerning, and further evidence of the Estate's desperation, because after the School filed a motion for summary judgment on the Estate's fraud claims, the Estate withdrew its fraud claims at the hearing on the motion. (Op. Br. at 39-40; 6 App. 1493-7 App. 1523; 10 App. 2422).

evidence of the School's purported breaches of the naming rights contracts.[19]

All of the letters from the School to Jonathan Schwartz contain some reference to the Adelson Educational Campus. The envelope on the handwritten note from Davida Sims, postmarked March 4, 2010, shows the Milton I. Schwartz Hebrew Academy Logo, with "The Dr. Miriam & Sheldon G. Adelson Educational Campus" printed directly below the logo. (29 App. 7001).

The December 2, 2011 letter actually displays the old "Hebrew Academy" logo and "Milton I. Schwartz Hebrew Academy" appears in typeface on the left side. (29 App. 7002). The body of the letter states: The Board of Trustees, staff and families at the ***Dr. Miriam and Sheldon G. Adelson Educational Campus*** want to offer our sincere appreciation for your donation of $12,500.00 to the In Pursuit of Excellence Gala honoring Alan Dershowitz. (*Id.*). The letter later states: "The ***Adelson Educational Campus*** not only offers students Jewish values and an excellent secular education, but our mission is to provide children with an Education for

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[19] This evidence also only provides further support for the fact that Jonathan Schwartz was on inquiry notice.

Life." (*Id.*). Further, the bottom of the letter contains the following notation: "This letter is your receipt to acknowledge your contribution of $12,500. ***The Adelson Educational Campus*** is a 501 (c)(3) nonprofit ***corporation*** as determined by the Internal Revenue Service, making the amount fully deductible to the extent allowed by law." (*Id.*). (emphasis added).

These open and repeated references to The Adelson Educational Campus are the direct opposite of active concealment, especially when the Estate has alleged that failure to mention Milton I. Schwartz on the letterhead in a manner co-equal to the Adelsons' was a direct violation of the alleged naming rights contract. (14 App. 3441-42; 27 App. 6691). The Estate also failed to identify any evidence that a School employee's use of the old Hebrew Academy letterhead was intentional. Thus, the Estate's assertion that these letters demonstrate **active concealment** of its alleged breach of the alleged naming rights agreement is not just inaccurate, it is patently false.

Similarly, Mr. Schiffman's reference to the "remaining symbol's" of Milton Schwartz's legacy[20] and his alleged statement to Jonathan

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[20] Op. Br. at 40. The Estate's characterization of the painting, the

Schwartz that the entrance monument (conspicuously displaying the words "The Dr. Miriam and Sheldon G. Adelson Education Campus")[21] applied only to the high school, even if true, cannot constitute active concealment by the School under the extensive terms of the naming rights contract as alleged by the Estate.

Jonathan Schwartz further testified that during his 2008 School tour and meeting with Mr. Schiffman, the School offered him a position on the Board. (14 App. 3436). This act also completely undermines the Estate's contention of active concealment by the Board.

The Estate's argument is further belied by Jonathan Schwartz's own statements in his May 10, 2010 letter to the Board wherein he asserted that some of the actions of the School in the last two and a half years breached the alleged naming rights agreement. (27 App. 6689). Based on this statement, it is overtly apparent that Jonathan Schwartz

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statute, and Milton Schwartz's name on the elementary school further proves the point that the School was openly in supposed breach of the alleged naming rights contract.

[21] *See* R.A. 47. This contention is also directly refuted by Jonathan Schwartz's admission that anyone driving by the Adelson Campus monument would be left with the impression "that the entire place is called the Adelson Campus" and that nothing on the monument would lead them to believe that the reference to the "Adelson Campus" was limited to the high school. (17 App. 4077).

was not ignorant to the true state of the facts and was aware of the name change of the School and the actions of the Board in the years leading up to his May 2010 letter. In fact, Jonathan Schwartz goes as far in the May 2010 letter to detail what he considered as the objectionable conduct:

> The fact that the School has apparently been re-titled the Adelson Educational Campus and that the middle school has been re-named the Adelson Middle School violated the Agreement and the 2007 Gala Docs.[22]

(27 App. 6688).

The Estate has woefully failed to meet its substantial burden to establish that the School **prevented or affirmatively deterred** Jonathan Schwartz from timely filing his claim.

The Estate's reliance on equitable tolling is wholly misplaced. "Equitable tolling operates to suspend the running of a statute of limitations when the only bar to a timely filed claim is a procedural technicality." *State Dep't of Taxation v. Masco Builder Cabinet Grp.*, 127 Nev. 730, 738, 265 P.3d 666, 671 (2011). The Estate does not contend that

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[22] Again, these "facts" were readily apparent when Jonathan Schwartz toured the School in 2008, and if he believed these facts constituted a breach of the naming rights agreement when he wrote his May 2010 letter, then his own letter stands as proof that he was aware of these facts when he toured the campus in 2008.

any procedural technicality precluded the Estate from timely bringing its oral contract claim. Regardless, the Estate cannot demonstrate excusable delay, or that despite its diligent efforts, it was unable to timely bring its oral contract claim in light of Jonathan's Schwartz's admissions and delay.

Accordingly, the district court correctly rejected the Estate's theories of estoppel and equitable tolling.

e. The alleged naming rights contract is not subject to a separate breach analysis.

The alleged breaches of the purported naming rights contract cannot be separated for limitations purposes. It is well settled that the period for the statute of limitations begins to accrue when the breach accrues. *See Schwartz v. Wasserburger,* 117 Nev. 703, 706, 30 P.3d 1114, 1116 (2001). Only contracts that are either (1) installment or (2) divisible, can accrue separate and independent breaches, thereby invoking multiple statute of limitations periods under the same contract. *See Wallace v. Smith*, No. 60456, 2014 WL 4810304, at *2 (Nev. Sept. 26, 2014) (citing *Dredge Corp. v. Wells Cargo, Inc.*, 82 Nev. 69, 73, 410 P.2d 751, 754 (1966); *Linebarger v. Devine*, 47 Nev. 67, 72, 214 P. 532, 534 (1923)).

There can be no legitimate dispute that the naming rights contract alleged by the Estate is neither installment, nor divisible. Unlike installment or divisible contracts, here, there can be no "partial" or "multiple" breaches for statute of limitations purposes because the Estate's alleged damages are the same regardless of whether multiple breaches occurred. The Estate's position is it could force the name change to Milton I Schwartz in the event of *any* breach, starting with the first alleged breach in 2008. Thus, any breach of the alleged contract would begin tolling the statute of limitations and any alleged subsequent breach is irrelevant.

The cases on which the Estate relies to support its position are inapplicable. In *Pritchard v. Regence Blue-cross Blueshield of Oregon*, the Oregon court addressed a claim for breach of an **insurance contract** holding that "independent acts cause independent injuries" and thus initiate independent statutes of limitations. 225 Or. App. 455, 460, 201 P.3d 290, 292 (2009), *rev. den*, 346 Or. 184 (2009) (reasoning that an insurance contract, unlike the alleged contract here, is breached each time the insurer denies an insured's request for benefits.") The nature of an insurance agreement (*i.e.* continued payments in exchange for

continued coverage) lends itself to a separate breach analysis. The nature of the alleged naming rights contract, on the other hand, does not.

Similarly, *Merrill v. DeMott*, which addressed a landlord's ability to collect rents despite prior waiver of monthly rental payment(s), is inapplicable to this case as monthly rental payments are not at issue. 113 Nev. 1390, 1400, 951 P.2d 1040, 1046 (1997).[23] In sum, the contracts underlying the Estate's supporting caselaw are entirely unrelated to the alleged contract at issue here.

Accordingly, the Estate's separate breach theory is without merit, and the Court must reject the Estate's attempt to avoid the statute of limitations on this basis.

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[23] *Seaboard Sur. Co. v. U.S. for Use & Benefit of C. D. G., Inc.*, 355 F.2d 139, 145 (9th Cir. 1966) and *Nix v. Heald,* 90 Cal.App.2d 723, 203 P.2d 847 (1949) concern waiver principles not at issue here. In *Ezra Co. v. Psychiatric Inst. of Washington, D.C.*, 687 A.2d 587, 589 (D.C. 1996), the court simply indicated in a footnote that the defendant failed to provide any authority for its contention that all of the plaintiff' contract claims were barred because its unjust enrichment claim was barred and determined the argument was "unpersuasive on the facts before us." Thus, these cases do not support the Estate's position.

2. Even if the district court erred in granting summary judgment on the Estate's oral contract theory, it cannot show prejudice because the existence of an oral contract was submitted to the jury.

The district court's entry of summary judgment on the Estate's claim for breach of an oral contract was harmless because, over the School's objection, the district court permitted the Estate to present evidence on and submit the issue of the existence of a naming rights contract, oral and written, to the jury. (18 App. 4350-21; 19 App. 4513-16; Op. Br. at 52-53).

The School's motion for judgment as a matter of law asserted that the School's breach of contract claim was time barred because the Estate and its witnesses admitted that the alleged naming rights contract, if it existed, was an oral contract. (12 App. 2869-2902; 18 App. 4305-4333). Thus, pursuant to the district court's pretrial ruling that the Estate's breach of oral contract claim was time barred, the School was entitled to judgment as a matter of law on the Estate's breach of contract claim. (*Id.*). The district court denied the School's request for directed verdict and permitted the Estate to submit its contract claim to the jury over the School's objection. (18 App. 4350-51, 4409-10; 19 App. 4513). This claim included the theory that the alleged contract was oral in nature. (*Id.*).

The Verdict form permitted the jury to find an enforceable ***oral*** naming rights contract, again over the School's objection. (19 App. 4513). But after the jury was properly instructed on the elements and the burden of proof to prove the existence of a valid and enforceable contract, the jury found that the Estate failed to prove the existence of a valid and enforceable naming rights contract – ***either written or oral***. (*Id.*).

In other words, because the Estate was allowed to present evidence on an issue submitted to the jury, in spite of the district court's pre-trail ruling, the Estate's argument that it "could not seek a jury instruction on oral contracts or argue that Mr. Schwartz had a valid oral contract" is wholly without merit. (Op. Br. At 51-52). The jury's verdict nullifies any alleged error in granting partial summary judgment on the Estate's breach of oral contract claim, precluding any demonstrable prejudice by the Estate.

Even assuming the School "falsely" argued that an enforceable contract requires a single writing signed by both parties, which is demonstrably false,[24] the Estate cannot show prejudice simply because

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[24] The School argued extensively that the Estate's proffered documents considered together did not constitute an enforceable agreement because they lacked the material terms, and the jury was instructed that a

the jury found against it on all aspects of the contract claim. The mere fact that the jury, after hearing and considering all the evidence, determined that no enforceable contract existed, either written or oral, does not, and cannot, constitute prejudice.

Therefore, the Estate cannot demonstrate that it suffered the requisite prejudice, and the district court's error, if any, was harmless because the Estate presented evidence on, and the jury considered and rendered a verdict on, the whether there was evidence presented to prove the existence of an enforceable oral agreement.

3. The Estate's contract claim fails under the statute of frauds.

Regardless, the Estate's contract claim fails as a matter of law under the statute of frauds. "Whether a writing is legally sufficient to comply with the statute of frauds presents a question of law." *Edwards Indus., Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1033, 923 P.2d 569, 574 (1996). The statute of frauds requires that any contract that cannot be fully performed within one year be in writing and signed by the party against whom enforcement is sought. *See* NRS 111.220(1).

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contract may consist of two or more separate documents. (12 App. 2960, 2965-68; 18 App. 4421, 4425, 4438-39, 4422, 4438-40, 4444, 4497).

To satisfy the statute of frauds, the writing must contain all essential elements of the contract. *See Stanley v. A. Levy & J. Zentner Co.*, 60 Nev. 432, 112 P.2d 1047, 1053 (1941). "The substantial parts of the contract must be embodied in the writing with such a degree of certainty as to make clear and definite the intention of the parties without resort to oral evidence." *Id.*

> A memorandum, in order to make enforceable a contract within the statute, may be any document or 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, (a) each party to the contract either by his own name, or by such a description as will serve to identify him, or by the name or description of his agent, and (b) the land, goods or other subject-matter to which the contract relates, and (c) the terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made.

Id. (citing Restatement of Law Contracts, § 207).

According to the Estate, the alleged naming rights contract was *in perpetuity*, which clearly implicates the statute of frauds. The Estate's Executor admitted that the alleged contract he sought to enforce was made orally. "Mr. Jones, **it was an oral contract**." (15 App. 3507) In addition to the Executor's admission at trial, the Estate cannot point to any writing that comes anywhere close to satisfying the statute of frauds.

Instead, the Estate sought to cobble together multiple documents, created over many years, by a mix of participants in an ill-fated attempt to satisfy the statute of frauds.[25] But, the documents cited by the Estate, even when viewed together, still do not create an enforceable contract that satisfies the requirements of the statute of frauds.

While separate writings may be considered together to establish a sufficient writing or memorandum even though one or more is not signed by the party to be charged, the disjointed and disparate documents the Estate relies on do not satisfy the statute of frauds, either individually or collectively. *Edwards*, 112 Nev. at 1032–33, 923 P.2d at 574 (citing *Ray Motor Lodge, Inc. v. Shatz*, 80 Nev. 114, 118–19, 390 P.2d 42, 44 (1964)). In *Edwards*, the appellant presented four documents which it contended constituted sufficient memoranda of the alleged agreement. *Id.* at 1032-33, 923 P.2d at 574. This Court determined that the documents were insufficient, either individually or collectively. *Id.* at 1033, 923 P.2d at 574. The *Edwards* Court reasoned that the statute of frauds precluded enforcement of the agreement given the conflicting testimony on two of

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[25] In its Opening Brief, the Estate appears to have abandoned its position that a written contract exists, and now contends that the alleged contract was part oral and part written. Ob. Br. at 52-55.

the documents, the fact that one of the 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 **did not establish the consequence of a default or establish liability**. *Id.*

Similarly, here, even when viewed together, the miscellaneous documents relied on by the Estate are not sufficient memoranda of an alleged oral contract because they do not sufficiently establish the substance, or definite terms and conditions or actual consideration exchanged, of the agreement as alleged by the Estate. (*See* Op. Br. at 48, fn. 21). First, the absence of a document signed by the School automatically violates the statute of frauds. Second, the Estate overlooks the absence of material terms of the alleged agreement, including the consequences of default or for establishing liability. Even assuming the checks from Milton Schwartz, the pledge list, and the 1999 Bylaws evidence Milton Schwartz's consideration,[26] the School's considerable obligations as alleged by the Estate (which involves many more alleged obligations than naming the corporation after Milton Schwartz) are

[26] *See* Statement of Facts, Section B(1), *supra*, identifying evidence of the material inconsistencies of Milton Schwartz's alleged consideration.

conspicuously absent from these documents. Consequently, the Estate's reliance on cases where the court determined that all requisite essential terms were present in two or more documents are entirely inapplicable. *Id.* There can be no legitimate dispute that the statute of frauds bars the Estate's breach of contract claim.

The facts and circumstances of this case exemplify why the statute of frauds exists. The Estate seeks to bind the School to a plethora of significant obligations *in perpetuity*. Yet, the Estate admittedly cannot point to a single contract document that contains all the material terms and conditions of the School's eternal naming obligations, and the jumble of unrelated and dissimilar documents the Estate points to as evidence of a meeting of the minds between Milton Schwartz and the School likewise provide no safe harbor from the statutes of frauds. This is especially problematic because the School, like any corporation, operates through its Board, the composition of which is constantly changing. Nevada law fairly and appropriately requires the Estate to produce sufficient evidence that the School's Board entered into a binding agreement to give Milton Schwartz perpetual naming rights. Yet the multitude of documents the Estate relies on to create this perpetual

obligation were considered by Boards made up of different individuals over a period of almost a decade, or were not Board members at all, like Roberta Sabbath, and each such document is different to some extent or another from the others. It goes without saying that you cannot have a meeting of the minds, especially one creating perpetual obligations on the obligor, when the obligor – in this case, the obligor is made up of the various Board members at any given time – changed over time. And none of the documents sets forth the consideration that Milton Schwartz conveyed in order to acquire his perpetual naming rights. Such a proposition is oxymoronic on its face. The Estate clearly failed to meet its burden overcoming the statute of frauds, and thus this is another, separate reason the Estate's claim fails.

B. The District Court Did Not Err in Refusing the Estate's Proposed Jury Instructions on Contract Modification and Breach of the Implied Covenant.

1. Standard of review.

A district court's decision to give or refuse a particular instruction will not be overturned absent an abuse of the district court's discretion or judicial error. *See Wyeth v. Rowatt*, 126 Nev. 446, 464, 244 P.3d 765,

778 (2010); *D & D Tire v. Ouellette*, 131 Nev. 462, 470, 352 P.3d 32, 37 (2015).

Although "a party is entitled to jury instructions on every theory of [its] case that is supported by the evidence," *Johnson v. Egtedar*, 112 Nev. 428, 432, 915 P.2d 271, 273 (1996), the offering party must demonstrate that the proffered jury instruction is warranted by Nevada law. *See* NRCP 51(a)(1); *D&D Tire*, 131 Nev. at470, 352 P.3d at 37. Under the harmless error rule, the trial court's alleged error, if any, should be disregarded. *See* NRCP 61. "To establish that an error is prejudicial, the movant must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached." *Wyeth v. Rowatt*, 126 Nev. at 465, 244 P.3d at 778. This is a fact-dependent inquiry that requires this Court to evaluate the alleged error in light of the entire record. *Id.*

2. The district court did not err in refusing to provide the contract modification instruction.

The district court properly refused the Estate's modification instruction. The modification instruction was not warranted or appropriate under Nevada law and the Estate cannot meet its burden to

demonstrate a different result would probably have been obtained if the instruction was permitted.

a. The Estate failed to provide evidence to support its late added contract modification theory.

The district court correctly determined the Estate was not entitled to a contract modification instruction. Critically, the Estate failed to present evidence regarding Milton Schwartz's alleged consideration to support the modification. For modification to an existing contract to be enforceable, the agreement must be supported by independent consideration; a promise to perform an act the promisor already owed a pre-existing duty to perform does not constitute independent consideration. *See Zhang v. Eighth Judicial Dist. Ct.*, 120 Nev. 1037, 1040-41, 103 P.3d 20, 22-23 (2004), *abrogated on other grounds by Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670 672 n.6 (2008) (holding a modification without new consideration to be unenforceable); *Clark County v. Bonanza No. 1*, 96 Nev. 643, 650-51, 615 P.2d 939, 943-44 (1980). The lack of evidence of **additional consideration** to support the claimed modification precluded the Estate from submitting this issue to the jury.

Contrary to the Estate's argument, the Sabbath Letter and the parties' so–called course of conduct do not constitute evidence of an enforceable modification. On its face, the Sabbath Letter provides **no evidence of additional consideration** and does not otherwise constitute evidence of an intent to modify a prior agreement. (28 App. 6883-84). In that letter, Dr. Sabbath clearly states that the School is making a voluntary undertaking to return its name to the Milton I. Schwartz Hebrew Academy and undertake the various corresponding actions "as a matter of 'menschlackeit' [sic] in acknowledgment of your contribution and assistance to 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.'" (*Id.*). Dr. Sabbath never mentions a prior contract and the Estate failed to provide any evidence that the parties intended for the Sabbath Letter to modify any alleged prior contract.

The Estate also failed to adduce evidence that the parties' so-called course of conduct warranted the modification instruction. Because the Sabbath Letter does not provide evidence of an enforceable modification to a prior enforceable contract, the School's voluntary name change, as

set forth in the Sabbath Letter, is not evidence of conduct consistent with the alleged modifications. The School's numerous name changes, including the change to and from the Milton I. Schwartz Hebrew Academy without any evidence that Milton Schwartz asserted or alleged a breach of his purported naming rights contract further demonstrates there was no enforceable contract to modify. Therefore, the district court correctly refused to provide this instruction.

b. The absence of a contract modification instruction did not prejudice the Estate because the jury determined that no contract ever existed.

Regardless, the Estate did not suffer prejudice and cannot demonstrate that a different outcome was probable had the district court provided the modification instruction. The district court's refusal to provide the proposed jury instruction is moot in light of the jury verdict that no naming rights contract existed. The proposed jury instruction states: "Parties to a **contract** may modify the **contract**, but all the parties to the **contract** must agree to the **new terms**…" (19 App. 4518). **The jury determined that no contract existed, either oral or written**. (19 App. 4513). As a result, the Estate's contention it suffered prejudice because the jury "did not understand" that the alleged agreement in 1989 could

be modified through subsequent writings such as the Sabbath Letter and through the parties' course of conduct is meritless. In enforceable pre-existing contract is requisite precursor to a modification. In other words, a nonexistent contract cannot be modified.

c. No reasonable juror could have found that the parties modified the alleged naming rights contract.

Even if the district court had given the jury instruction, the Estate failed to demonstrate by clear and convincing evidence that a modification occurred. To justify modification, the evidence must be clear and convincing. *See Clark Cty. Sports Enterprises, Inc. v. City of Las Vegas*, 96 Nev. 167, 172, 606 P.2d 171, 175 (1980).

For many of the same reasons justifying the district court's refusal to provide the modification instruction, no reasonable juror could have found that the parties subsequently modified the alleged contract. First, as set forth above, the Estate failed to present evidence regarding Milton Schwartz's alleged additional consideration to support the modification.

Second, no reasonable juror could find the Sabbath Letter constituted a modification to the parties' alleged naming rights contract. The Sabbath Letter cannot be interpreted to constitute evidence that the

parties had a prior contract, let alone constitute clear and convincing evidence that they intended to modify any prior contract.

Finally, the parties' so-called course of conduct did not provide clear and convincing evidence of a modification of any alleged prior contract. Conversely, the School's numerous name changes, including the change to and from the Milton I. Schwartz Hebrew Academy in early 1990's, prior to the Sabbath letter, without any evidence that Milton Schwartz asserted or pursued a breach of his earlier purported naming rights contract, further demonstrates there was no enforceable contract to modify.

Therefore, even assuming the Estate had proffered this instruction, it cannot demonstrate prejudice because no evidence exists the result would have been any different. Accordingly, the Estate is not entitled to a new trial on this issue.

3. The Estate is not entitled to a new trial because the district court correctly refused to provide an instruction on breach of the implied covenant of good faith and fair dealing.

Similarly, the district court did not abuse it discretion in refusing to provide an instruction on the implied covenant of good faith a fair dealing.

a. The Estate failed to properly raise this independent cause of action.

The Estate did not raise this claim before or during trial. The Estate's Petition does not state a claim for breach of the implied covenant of good faith and fair dealing. (27 App. 6800-6812). The Estate's Pre-Trial Memorandum also failed to mention or include this claim for relief to be decided by the jury at trial. (9 App. 2249-50). Further, the Estate never sought leave at any point to amend its Petition to assert a claim for breach of the implied covenant.

While the Estate relies on *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 233, 808 P.2d 919, 923 (1991), this case actually undermines the Estate's position. In *Hilton Hotels*, the Court noted that Hilton's claims for breach of the implied covenant was "problematical" because it did not specifically plead a "cause of action" under the implied covenant. *See id.* at 233-34, n. 5. In spite of Hilton's failure to plead the cause of action, the claim was litigated by consent of the parties and Hilton's proffered jury instruction for breach of the implied covenant received no objection. Here, the Estate also failed to properly plead a claim for breach of the implied covenant, but unlike in

Hilton Hotels, this claim was **not litigated by consent** and the School objected to the Estate's instruction. (18 App. 4345).

The Estate failed to properly raise this independent claim and was not entitled to the jury instruction. *See Clark Cty. Sch. Dist. v. Richardson Const., Inc.*, 123 Nev. 382, 395, n. 22, 168 P.3d 87, 95 (2007) (noting that affirmative defense of breach of the implied covenant of good faith and fair dealing must be pled affirmatively.). Hence, the district court cannot have abused its discretion in refusing to provide an instruction on a claim not plead or otherwise raised.

b. The Estate did not suffer prejudice as result of the district court's refusal to provide the instruction because the jury determined no contract existed.

Even if the district court erred in refusing to give the breach of the implied covenant of good faith and fair dealing jury instruction, this error is harmless. The Estate cannot meet its burden to show that this instruction would have changed the outcome.

The proposed jury instruction for "Performance/Breach: Implied Covenant of Good Faith and Fair Dealing" states: "In every **contract** there is an implied covenant of good faith and fair dealing, obligating the parties to pursue **their contractual rights** in good faith…" (19 App. 4519).

A claim for breach of the implied covenant of good faith and fair dealing "relates only to the performance of obligations under an extant contract...." *Wensley v. First Nat'l Bank of Nev.*, 874 F. Supp. 2d 957, 964 (D. Nev. 2012). "The implied covenant of good faith and fair dealing is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated by the contract." *Pasadena Live v. City of Pasadena*, 114 Cal. App. 4th 1089, 1094, 8 Cal. Rptr. 3d 233, 237 (2004); *see also Foothills Corp. v. Bank of Am., N.A.*, 131 Nev. 1279 (2015) (citing *Pasadena Live,* 114 Cal. App. 4th at 1094, 8 Cal. Rptr. 3d at 237).

The jury ultimately found that Milton Schwartz did not have a naming rights contract of any kind. (19 App. 4513). The absence of a contract necessarily precludes a claim for breach of the implied covenant.

Accordingly, the Estate failed to properly raise this claim and the Estate cannot meet its burden to demonstrate prejudice.

C. The Estate is not entitled to the equitable remedy of revocation of Milton Schwartz's lifetime donations to the School.

Even assuming the Estate is not estopped from seeking the remedy of revocation of Milton Schwartz's Lifetime Gifts to the School, the district court correctly denied the Estate's request to revoke Milton

Schwartz's lifetime donations to the School. The Estate failed to demonstrate that the gifts were conditional upon the School perpetually being known as the Milton I. Schwartz Hebrew Academy or that Milton Schwartz's alleged unilateral mistake as to the existence of a perpetual name rights contract was an invalidating mistake for each of his Lifetime Gifts.

1. Standard of review.

"A district court's findings [of fact] will not be disturbed unless they are clearly erroneous and are not based on substantial evidence." *Hannam v. Brown,* 114 Nev. 350, 357, 956 P.2d 794, 799 (1998). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC*, 130 Nev. 834, 838, 335 P.3d 211, 214 (2014) (internal citation and quotation marks omitted). The district court's conclusions of law based on its findings of fact are reviewed for an abuse of discretion. *Hannam*, 114 Nev. at 358, 956 P.2d at 799.

"[T]he decision to fashion and grant equitable remedies lies within the discretion of the district court. *Tropicana Pizza, Inc. v. Advo, Inc.*, 124 Nev. 1514, 238 P.3d 861 (2008) (citing *Bedore v. Familian,* 122 Nev. 5, 12

n. 21 125 P.3d 1168, 1174 n. 21 (2006) (stating that "the trial court has full discretion to fashion equitable remedies that are complete and fair to all parties involved").

2. The Estate is estopped from seeking the return of Milton Schwartz's donations and gifts to the School.

The Court should refuse to consider the Estate's improper attempt to get two bites at the apple on this claim. The Estate's sixth claim for relief, entitled "Revocation of Gift and Constructive Trust," 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. (Petition at 9-10).

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. (9 App. 2250). In spite of this blatant and substantive alteration, and the unfairness to the School in having to defend a claim at trial that had never been raised, let alone pled until the Pre-Trial Memorandum, the district court submitted the Estate's "claim" for promissory estoppel to

the Jury, over the School's objection. (19 App. 4501-04; 4516). The Jury rejected the Estate's "claim" for promissory estoppel. (19 App. 4516).

Because the Jury found against the Estate on its recast claim for promissory estoppel, the Estate reverted back to its original position in its post-trial briefing. The Estate argued that their sixth claim for relief is actually an equitable claim for revocation/rescission of Milton Schwartz's Lifetime Gifts under a mistake theory to be decided by the court. (23 App. 5564). In effect, the Estate pulled a bait and switch, and when it did not work they tried to pull another bait and switch. 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 on the eve of trial, and should refuse to consider this argument as the Estate is not challenging the jury's verdict on this issue.

3. Milton Schwartz's donations were not conditional.

Regardless, the district court did not abuse its discretion in denying the Estate's revocation claim seeking recover $2.8 million in gifts and

interest. The Estate failed to meet its burden to show that each of Milton Schwartz's Lifetime Gifts over a 20 year period were conditioned on the School bearing his name in perpetuity. (24 App. 5977-78).[27]

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*, 21 Nev. at 362, 31 P. at 1011; *see also* Restatement (Third) of Prop.: Wills & Other Donative Transfers § 6.1 (2003). According to this Court:

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[27] Although the Court did not make this finding or ruling at the hearing, the Order states that "absent an enforceable naming rights agreement that applies to each inter vivos gift, this Court cannot rescind Milton I. Schwartz's Lifetime Gifts." (24 App. 5995). The district court specifically removed language stating "with respect to the Sixth Claim for Relief (revocation of gift and constructive trust) and this denied claim is dismissed on the merits with prejudice" 24 App. 5995. Instead, the Judgment on the Sixth Claim for Relief appears in a separate Order. (25 App. 6002-10). Thus, it does not appear the district court intended this finding to apply to its ruling denying this claim and the Estate's contention this was error is moot.

> 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).

"Whether a gift is conditional or absolute is a question of the donor's intent, to be determined from any **express declaration** by the donor **at the time of the making of the gift** or from the circumstances." *Cooper v. Smith*, 155 Ohio App. 3d 218, 228, 800 N.E.2d 372, 380 (*citing* 38 American Jurisprudence 2d (1999) 767–768, Gifts, Section 72). Here, there is no evidence that: (1) Milton Schwartz expressly conditioned the donations on the School remaining named after him in perpetuity; and (2) the circumstances existing at the time Milton Schwartz made each of the Lifetime Gifts do not imply that the gifts were conditional.

As the Estate concedes, no evidence exists that Milton Schwartz expressly conditioned the Lifetime Gifts – some 15 gifts over a 20-year period, ranging in amounts from $50.00 to as much as $135,277.00 – on the School holding itself out as the Milton I. Schwartz Hebrew Academy forever at the time they were made. This alleged condition to payment does not expressly appear in any document related to any of the Lifetime Gifts, and the Estate likewise failed to adduce any other evidence to support this contention.

Instead, the Estate relies on the jury's (advisory) finding that Milton Schwartz made the specific *Bequest* in his last will and testament based on his subjective, mistaken belief he had a perpetual naming rights agreement, and argues this somehow conclusively demonstrates that each and every Lifetime Gift Milton Schwartz made to the School was conditioned on the School bearing his name in perpetuity. The Estate is comparing apples (the Bequest in the will) to oranges (the Lifetime Gifts made sporadically over almost 20 years) gifts). The Estate's conclusory argument is simply incorrect, and unsupported by any evidence.

Even if the jury's advisory finding related to a specific language contained in the *Bequest* in his last will and testament could somehow

be transferred to Milton Schwartz's *Lifetime Gifts*, his unexpressed subjective belief cannot automatically create a conditional gift subject to revocation.

Further, the circumstances under which a gift is determined to be conditional are not present here. For instance, the "unique essence and purpose of an engagement ring as being given in contemplation of marriage" is not [translatable] to Milton Schwartz's intermittent donations to the School. *Billittier v. Clark*, 43 Misc. 3d 1223(A), 992 N.Y.S.2d 157 (Sup. Ct.), *judgment entered sub nom. Billittier, Jr., v. Clark* (N.Y. Sup. Ct. 2014) (unreported).

In *Cooper v. Smith*, the court determined that gifts exchanged during an engagement period (excluding the engagement ring) are absolute and irrevocable unless the donor has expressly stated an intent that the gifts were conditional on the marriage. 155 Ohio App. 3d at 227, 800 N.E.2d at, 379. Thus, because the plaintiff offered no evidence that he gave the gifts on the express condition they be returned in the engagement ended, the gifts were irrevocable inter vivos gifts and the plaintiff was not entitled to their return. *Id.*

The Estate instead argues that the absence of donations during Milton Schwartz's separation from the School from 1993-1996 is conclusive proof that all of his donations were conditional. This contention conveniently ignores the pertinent facts. Milton Schwartz got into a feud with other Board members regarding control of the School, and as a result, Milton Schwartz left and started a competing Jewish day school. (16 App. 3924, 3939; 17 App. 4097, 4102-04; 4244-45). The School changed its name during the feud and fallout with Milton Schwartz. (14 App. 3291-92; R.A. 3-4). During this time, Milton Schwartz financially supported his newly created, competing day school. (16 App. 3922-25, 3939-40, 4102-05). The absence of donations during this time period only demonstrates a shift in Milton Schwartz's focus. While Milton Schwartz may have been more apt to donate to a school bearing his name, the absence of gifts does not establish that all of his lifetime donations were *conditioned on* and subject to revocation if the School ever changed its name. Furthermore, the circumstantial evidence proves that Milton Schwartz did not intend for his Lifetime Gifts to be conditional. It is undisputed that Milton Schwartz, while alive, never demanded the return of his Lifetime Gifts from the School when his name was taken off

the School, begging the question why the Estate should now, almost thirteen years after his death, be equitably entitled to the return (with interest) of the very same Lifetime Gifts Milton Schwartz, the actual donor never sought to recover.

The Estate's reliance on *Tenn. Div. of United Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98, 114-15 (Tenn. Ct. App. 2005) is unavailing because the gift condition was memorialized in a valid written agreement. In that case, the court noted that "[a] conditional gift is enforceable **according to the terms of the document or documents that created the gift**." *Id.* at 114. Thus, the court determined that "[i]n order to identify the conditions attached to the gift from the Tennessee U.D.C. to Peabody College, **we must first determine which contract or contracts govern the gift**." *Id.* at 115. Conversely, here, no enforceable contract exists setting forth the terms of the so-called condition of the donations for the Court to interpret. If anything, *United Daughters* only demonstrates why a written agreement is necessary if a party seeks to enforce perpetual conditions on gifts.

The Estate failed to adduce evidence that Milton Schwartz's Lifetime Gifts were conditional. Accordingly, the district court did not

abuse its discretion in denying the Estate's claim for revocation of Milton Schwartz's Lifetime Gifts to the School.

4. The Estate is not entitled to revocation based on Milton Schwartz's alleged unilateral mistake.

The Estate's claim for revocation pursuant to Milton Schwartz's alleged unilateral mistake is time barred because the Estate brought this claim more than three years after its alleged mistake claim accrued. Even assuming this claim is not time barred, the Estate failed to meet its burden to demonstrate by clear and convincing evidence that Milton Schwartz's mistaken belief of the existence of an enforceable perpetual naming rights agreement was an invalidating mistake, or that the alleged mistake motivated each and every donation Milton Schwartz gave to the School.

a. The Estate's claim for revocation of the Lifetime Gifts is time barred under NRS 11.190(3)(d).

"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." (28 App. 6804). 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 belief that he had a naming rights contract with the School in perpetuity is time barred under the applicable three-year statute of limitations.

b. Milton Schwartz's subjective belief that he had a perpetual naming rights contract does not constitute an invalidating mistake as to his Lifetime Gifts.

The Estate failed to meet its substantial burden to adduce clear and convincing evidence at trial that the sole reason Milton Schwartz donated money to the School for over 20 years was because he believed the School would be named after him in perpetuity.

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. at 607, 331 P.3d at 888. 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. at 605–06, 331 P.3d at 887 (emphasis added).

The Estate failed to prove by clear and convincing evidence that Milton Schwartz's Lifetime Gifts were not motivated by his desire to continue to support the School and promote Jewish education, but *only* because he thought he had perpetual naming rights at the School.

To the contrary, the evidence admitted during trial demonstrates that Milton Schwartz was motivated to make the various Lifetime Gifts to the school for innumerable uses and purposes over time because he was dedicated to and supported the School over approximately two decades.

As Jonathan Schwartz stated in his May 2010 letter to the Board: "To list everything my dad did for the MISHA and its predecessors would fill volumes… *Beyond the money, my dad loved the school and was proud*

to spend his time making certain that kids in Las Vegas could obtain a quality Jewish education." (27 App. 6687-89). (Emphasis added)

Jonathan Schwartz, discussed in detail his father's dedication and support of the school. (14 App. 3385-86 ("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….So he was dedicated to it like it was one of his businesses. He was managing at times, on a daily basis.")).

Several other witnesses similarly testified that Milton Schwartz loved the School and worked hard to see that the School and its students thrived. Susan Pacheco, Milton Schwartz's longtime assistant, testified that he loved the School and was all about it. (13 App. 3180-81, 3240). Former Board member Dr. Roberta Sabbath testified that Milton Schwartz worked toward the goal of making the Hebrew Academy a better place. (14 App. 3343-44).

The foregoing testimony provides substantial evidence that Milton Schwartz's Lifetime Gifts were motivated, at least in part, by his support and dedication to the School, not solely because he thought he had

perpetual naming rights. It is not sufficient that the Lifetime Gifts were premised in part on the fact that Milton Schwartz subjectively believed the School would be named after him "in perpetuity." Thus, the Estate failed to 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 any of the Lifetime Gifts to the School.

The Estate's reliance on conclusory statements without any reference to the record (Op. Br. at 71) and its unfounded attempt to apply the jury's advisory finding regarding Milton Schwartz's alleged intent in making the Bequest to each of Milton Schwartz's Lifetime Gifts (Ob. Br. at 72) are not enough to unwind two decades of gifts.

Therefore, the Estate cannot show that Milton Schwartz's alleged intent with regards to the gifts constitutes an invalidating mistake that would entitle the Estate to the equitable remedy of rescission.

c. Revocation of Milton Schwartz's donations will not achieve equity.

Irrespective, the Estate is not entitled to the equitable remedies of rescission/revocation of Milton Schwartz's Lifetime Gifts to the School. Under the circumstances, revocation of Milton Schwartz's Lifetime Gifts does not achieve equity 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 failed to show that the School and its students were unintentionally enriched by 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 the donations 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.

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 Jonathan Schwartz's actions. Thus, there is nothing equitable about the

Estate's position that it is entitled to $2,830,523.71 from the School, and the district court properly exercised its discretion by denying the Estate's claim.

Accordingly, the district court did not abuse its discretion by denying the Estate's rescission claim. This Court must affirm the district court's denial of the Estate's Sixth Claim for Relief for revocation of Milton Schwartz's Lifetime Gifts.

D. The Policies Supporting Honoring Legally Enforceable Naming Rights Agreements, While Important, Are Not a Consideration Because the Estate Failed to Prove Milton Schwartz had an Enforceable Perpetual Naming Rights Contract with the School.

The School does not dispute that naming rights agreements can be enforceable in appropriate legal situations. In fact, the Adelson family entered into a properly executed written perpetual naming rights contract with the School as voted on and approved by the School's Board. However, under the circumstances present here, the Estate did not and cannot demonstrate that the School is bound, *forever*, by an enforceable contract with Milton Schwartz. The School in no way seeks to diminish the good Milton Schwartz did for the School but, without an enforceable contract, the Estate simply cannot force the School to *forever* comply with a naming rights contract that was never agreed to by the School.

II. ARGUMENT ON CROSS-APPEAL

A. The District Court Erroneously Denied the School's Petition Seeking to Compel Distribution of the Bequest.

In its Petition, the School sought an order compelling the Estate to distribute the Bequest to the School to effectuate the stated purpose of "funding scholarships to educate Jewish children only."[28] The Estate sought to avoid paying the Bequest on various ground, all stemming from Milton Schwartz's alleged belief he had a perpetual naming rights contract with the School. (28 App. 6800-12).

After trial and the parties briefing the outstanding issues, the district court denied the School's request to compel the Bequest for scholarships. The district court found that: (1) "Milton I. Schwartz would have never made the $500,000 bequest to the Milton I. Schwartz Hebrew Academy pursuant Section 2.3 of his Last Will and Testament had Milton I. Schwartz known that he did not have a legally enforceable naming rights agreement with the school"; and (2) "Milton I. Schwartz intended

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[28] There is no dispute that the $1.8 million mortgage that existed on the property at the time of Milton Schwartz's passing was paid off and extinguished on or about November 2, 2010, from a portion of the proceeds from a $25 million donation made by the Adelsons to the school. Thus, the only condition in the Bequest is not at issue.

that the bequest go to a school that bore his name in perpetuity." (24 App. 5994-95). As a result, the district court denied the School's Petition and granted Schwartz's first and third (counter) claims for construction of will and bequest void for mistake. (24 App. 5994-97).

The district court's decision to deny the School's Petition was erroneous. The district court erred in concluding that the Bequest was ambiguous. The Bequest is unambiguous as a matter of law.[29] Contrary to the Estate's position, the language of the Bequest cannot be read to make perpetual naming rights a condition for the $500,000 gift. In spite of this, the district court determined that an ambiguity existed regarding Milton Schwartz's intent and permitted the Estate to elicit and introduce countless hearsay statements purporting to read conditions into the Bequest.

Even if the Bequest was ambiguous, the district court permitted the Estate to introduce inadmissible hearsay, which prejudiced the School. The only evidence purportedly connecting the Bequest and the alleged naming rights contract came from inadmissible hearsay.

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[29] Jonathan Schwartz admits that the Bequest in unambiguous. (14 App. 3475-76).

Equity also dictates that the School receive the Bequest. The Estate's delay and other actions created the circumstances on which it now seeks to rely to escape its obligation to provide the Bequest to the School. There is nothing equitable in permitting the Estate to escape making the Bequest due to its own action and inaction. This Court must reverse the district court's decision denying the Estate's Petition.

1. The district court violated black letter Nevada law by admitting and relying on parol evidence to interpret the unambiguous request.

a. Standard of review

"The interpretation of a will is typically subject to our plenary review. *In re Estate of Melton*, 128 Nev. 34, 43, 272 P.3d 668, 673 (2012) (citing *Matter of Estate of Meredith*, 105 Nev. 689, 691, 782 P.2d 1313, 1315 (1989)).

b. The Bequest for scholarships is not ambiguous.

As a matter of law, the Bequest is unambiguous. In the construction of a will, "the court seeks to ascertain intention of testatrix, **but such intention must be found in the words used by the testatrix**, and if such words are unambiguous there is no occasion for construction." *In re Walters' Estate,* 75 Nev. 355, 359 (1959) (emphasis added). "An ambiguous provision means simply that there are 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." *Gianoli v. Gabaccia*, 82 Nev. 108, 110 (1966).

It is error for the district court to construe will provisions the way the court believes the testator intended and "***not in accord with the meaning of the words used***." *Zirovcic v. Kordic*, 101 Nev. 740, 742 (1985) (emphasis added). "A court may not vary the terms of a will to conform to the court's views as to the true testamentary intent." *In re Jones' Estate*, 72 Nev. 121, 124 (1956). "The question before us is not what the testatrix actually intended or what she meant to write." *Id.* "In other words, the question in expounding a will is not—What the testator meant? as distinguished from—What his words express? but simply—**What is the meaning of his words**?" *Id.* (emphasis added); *see also* 80 Am. Jur. 2d Wills § 989 ("When the language of a will is clear and unambiguous, the testator's intent must be ascertained from the express terms of the will itself.").

The language used by Milton Schwartz is not subject to two interpretations. Milton Schwartz's intent that the Bequest go to the School "for the purpose of funding scholarships to Jewish children only"

in clearly and unambiguously manifested in the Bequest. Jonathan Schwartz confirmed the Bequest was unambiguous. (14 App. 3475-76). Therefore, no construction was necessary and the court should have ordered the Estate to pay the Bequest. *See In re Walters' Estate,* 75 Nev. at 359.

c. The district court erred in determining the Bequest was ambiguous.

The district court erroneously determined before trial that both a patent and latent ambiguity existed. (12 App. 2814). No patent or latent ambiguity exists on the face of the Bequest. *See* Section II(A)(1)(b), *supra*.

A latent ambiguity exists when the language of the will, though clear on its face, is susceptible to more than one meaning when applied to the extrinsic facts. *See*, *e.g., In re Frost's Will*, 89 N.W.2d (Wis. 1958); *see also Rubin v. State Farm Mut. Auto. Ins. Co.*, 118 Nev. 299, 303, 43 P.3d 1018, 1021 (2002). For instance, a latent ambiguity exists when a bequest is made to "my cousin, John Reynolds," and the testator has two cousins named John Reynolds. Or, where the testator leaves her "house in Clark County" to a devisee, but the testator owns three homes in Clark County. No such ambiguity exists here with regard to the extrinsic facts. The Estate did not contend that there were two schools named the Milton

I. Schwartz Hebrew Academy or any other facts that created a latent ambiguity.

Instead, and despite the fact that the Estate never argued a latent ambiguity existed on this basis, the district court found a latent ambiguity regarding whether Milton Schwartz intended that the money go to scholarships for the every grade (Pre-K through 12) or just the lower school (grades Pre-K through 4). (12 App. 2811, 2813, 2815).

This was error. At the time Milton Schwartz made the Bequest, the Milton I. Schwartz Hebrew Academy consisted of grades Pre-K through Eighth, all housed together in the same building. The fact that the Milton I. Schwartz Hebrew Academy later consisted of grades Pre-K through 4 – housed in the same building – and that grades 5 through 8 moved to the new building, does not create a latent ambiguity. The change in which grades were considered part of the Milton I. Schwartz Hebrew Academy does not create an ambiguity regarding the identity of the devisee. Further, grades 9 through 12 were never part of the Milton I. Schwartz Hebrew Academy. Whether Milton Schwartz intended to benefit grades 9 through 12 at the Adelson School is completely irrelevant.

Critically, if the only issue to be resolved was what grades the children Milton Schwartz intended the scholarship money to benefit – as opposed to whether the School was entitled to the Bequest at all – then no support exists for the district court's outright denial of the School's Petition.

Despite the district court's pretrial pronouncements regarding the alleged ambiguity, the extrinsic (mostly hearsay) evidence of Milton Schwartz's alleged intent the district court admitted had nothing to do with whether he intended that the money benefit only certain grades. Instead, the evidence presented by the Estate at trial concerned his alleged belief he had a perpetual naming rights contract with the School. (13 App. 3154-55, 3167, 3171-72, 3179-80, 3210-11, 3230, 3238; 14 App. 3383-85, 3392-93, 3410, 3412-13, 3420-22).

Thus, even assuming the Bequest contained a latent ambiguity, which it did not, the district court erred in admitting and relying on extrinsic evidence that did not relate or explain the supposed ambiguity. As a result, the district court further erred in denying the School's Petition because no evidence was adduced regarding the purported latent ambiguity to justify denying the School's Petition.

d. The district court's erred in admitting and relying on parol evidence to interpret the Bequest in a way that contradicted the language of the Bequest.

The district court erred in admitting and considering the Estate's self-serving parol evidence that sought to read a condition regarding the alleged naming rights contract into the Bequest conspicuously absent from the express language of the Bequest drafted by Milton Schwartz.

Extrinsic or parol evidence is not admissible to contradict or vary the terms of an unambiguous written instrument. *Frei ex rel. Litem v. Goodsell*, 129 Nev. 403, 409, 305 P.3d 70, 73 (2013). "[E]vidence is admissible which, in its nature and effect, simply explains what the testator has written; **but no evidence can be admissible which, in its nature or effect, is applicable to the purpose of showing merely what he intended to have written**." *In re Jones' Estate*, 72 Nev. at 124 (emphasis added).

The Estate's proffered ambiguity cannot be found anywhere in the language of the Bequest. Because the Bequest is unambiguous, the district court erred in permitting the Estate to introduce parol evidence to vary, interpret, or manufacture some other understanding or intent on behalf of Milton regarding the Bequest. *See Frei*, 129 Nev. Adv. Op. 42 at

*8, 305 P.3d at 73. Evidence supposedly demonstrating what Milton Schwartz intended to write (*i.e.*, the condition that the Bequest go to the School only if the School shall be named after him in perpetuity) or contradicting the express and unambiguous terms of the Bequest.

In *Frei*, 129 Nev. Adv. Op. 42 at * 9-10, 305 P.3d at 74, this Court determined that evidence of Frei's intent was manifested by the estate documents and that Frei was prohibited from offering parol evidence – in the form of Frei's own testimony – to vary their terms. Under *Frei*, Milton Schwartz himself would not have been able to offer parol evidence, including his own testimony, to vary or add to the language of the Bequest.

At trial, the Estate offered only self-serving, parol and inadmissible hearsay testimony to establish Milton Schwartz's alleged intent regarding the Bequest as it related to his alleged belief in the existence of an enforceable naming rights agreement. The district court unquestionably erred in admitting this evidence. *See Frei*, 129 Nev. Adv. Op. 42 at *8, 305 P.3d at 73.

The district court then erred in relying on this improper parol evidence to "vary the terms of a will to conform to the court's views as to

the true testamentary intent." *In re Jones' Estate*, 72 Nev. at 124. The district court erroneously concluded that what Milton Schwartz **intended to write** was that the Bequest would go to the School so long as it was named the "Milton I. Schwartz Hebrew Academy" and would remain that way forever. *See id.* ("The question before us is not what the testatrix ***actually intended*** or what she meant to write."). In other words, because the Estate's alleged condition does not exist on the face of the unambiguous Bequest, the district court erred by not limiting its inquiry into Milton Schwartz's intent from the actual words he used in the Bequest. *In re Walters' Estate*, 75 Nev. at 359. The district court incorrectly construed the Bequest the way that it (and the Estate) believed Milton Schwartz intended and not "in accord with the meaning of the words [Milton] used. *Zirovcic*, 101 Nev. at 742. Under Black letter Nevada law, there can be no dispute the district court erred in refusing to compel the Bequest on this basis.

e. The district court should have construed any ambiguity in the Bequest against the Estate as Milton Schwartz drafted the Will.

Even assuming the Bequest is somehow ambiguous, the district court should have construed any perceived ambiguity against the drafter

as required under Nevada law. According to Executor, Jonathan Schwartz, Milton Schwartz dictated the Will himself and the Will reflects his own words. (14 App. 3401). If an ambiguity exists in the Bequest, then the ambiguity must be construed against the drafter. *See Am. First Fed. Credit Union v. Soro*, 131 Nev. Adv. Op. 73, 359 P.3d 105, 106 (2015). Moreover, "[a] testamentary gift to a charitable organization is generally valid, even though the object is imperfectly designated, if it can be identified with reasonable certainty from the description in the will and the surrounding circumstances." 96 C.J.S. Wills § 1091, Therefore, any ambiguity should be construed against the Estate and in favor of the School as it can be determined with reasonable certainty that Milton Schwartz intended the $500,000 bequest to go to the School to fund scholarships for Jewish children.

f. Equity precludes the Estate from benefitting from the circumstances it created.

Equity further requires that the Estate be compelled to make the Bequest for scholarships. The Estate's primary argument to avoid paying the Bequest is that the School is no longer known as the Milton I. Schwartz Hebrew Academy. However, it was the actions of 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. 16 App. 3780; 17 App. 4136. 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. (17 App. 4164).

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's intentional delay and claims against the School, Milton Schwartz's name would still be on the lower school. (16 App. 3787-88, 3832-33, 3855-57; 17 App. 4136, 4164). The Estate created the very circumstances it now points to as the reason it does not have to honor the Bequest. Equity does not permit 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.

2. The district court abused its discretion by admitting inadmissible hearsay unrelated to the Bequest.

Even if this Court finds that district court did not commit legal error in admitting extrinsic evidence to vary the language of the Bequest to allegedly demonstrate what Milton Schwartz actually meant, the district court still erred by improperly admitted numerous hearsay statements. The admission of this evidence was not harmless. These inadmissible hearsay statements constituted the only evidence supposedly linking the Bequest to Milton Schwartz's purported belief he had an enforceable perpetual naming rights agreement with the School. Without this improperly admitted evidence, the Estate would not have any competent evidence to refute the School's Petition

This Court reviews the district court's admissibility and hearsay determinations under an abuse of discretion standard. *See Harkins v. State*, 122 Nev. 974, 980, 143 P.3d 706, 709 (2006); *Hansen v. Universal Health Servs.*, 115 Nev. 24, 27, 974 P.2d 1158, 1160 (1999).

NRS 51.105(2) provides: "[a] statement of memory or belief to prove the fact remembered or believed is inadmissible under the hearsay rule unless it relates to the execution, revocation, identification or terms of declarant's will." In the context of the terms of a will, an ambiguity in the

terms is a necessary prerequisite. *See Howard Hughes Med. Inst. v. Gavin*, 96 Nev. 905, 908, 621 P.2d 489, 490–91 (1980) (noting "a testator's declarations may be useful in interpreting **ambiguous terms** of an established will…) (emphasis added). As admitted by the Executor, Jonathan Schwartz in open court, the Bequest was not ambiguous. (14 App. 3475-76). Jonathan Schwartz, as the representative of the Estate, cannot dispute this. The Estate instead created the ambiguity by seeking to insert language not found in the Bequest *(i.e.*, "only if the Hebrew Academy is named after me in perpetuity").

To support this argument, the Estate relied solely on extrinsic evidence that was wholly unrelated to the terms of the Bequest. (13 App. 3154-55, 3167, 3171-72, 3179-80, 3210-11, 3230, 3238; 14 App. 3383-87, 3387, 3392-93, 3410, 3412-13, 3420-22). The district court erroneously admitted this improper hearsay evidence. (12 App. 2796, 2800-03, 2835-36, 2840-42; 13 App. 3154-55, 3172, 14 App. 3383-87, 3412-13, 3415-18; 15 App. 3527, 3529, 3537).

These statements had nothing to do with the *terms of Milton Schwartz's will*. They instead related to the alleged naming rights

contract.[30] The district court improperly allowed the Estate to back door these statements into evidence based on the Estate's argument that Milton Schwartz only made the Bequest due to his mistaken belief he and the School had an enforceable perpetual naming rights contract. However, this *argument* did not transform every single alleged statement Milton Schwartz made about the alleged contract with School into a statement *related to the terms of his will*. *See Lasater v. House*, 841 N.E.2d 553, 556 (Ind. 2006) ("a statement or declaration of a testator that is considered classic hearsay is not transformed into non-hearsay simply because it tangentially involves a state of mind."). Therefore, the district court abused its discretion in admitting these statements into evidence.

This error was far from harmless. *See* NRCP 61. The district court refused to compel the Bequest based on its findings as to Milton Schwartz's intent and belief as it related to the alleged naming rights contract. (24 App. 5994-95). This inadmissible hearsay was the ***only*** evidence supposedly connecting the unambiguous Bequest to Milton

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[30] Despite the fact the district court erroneously permitted the Estate's witnesses to offer countless instances of hearsay evidence to prove its contract claims, this is not at issue as the Jury determined no contract existed. (19 App. 4513).

Schwartz's alleged mistaken belief he had an enforceable naming rights contract. Thus, the district court's decision was based solely on inadmissible hearsay and, but for this error, the district court would have reached a different decision. *See Khoury v. Seastrand*, 132 Nev. 520, 539, 377 P.3d 81, 94 (2016); *McMonigle v. McMonigle,* 110 Nev. 1407, 887 P.2d 742 (1994), *overruled on other grounds by Castle v. Simmons*, 120 Nev. 98, 86 P.3d 1042 (2004) (explaining that in a bench trial when a court receives inadmissible evidence, it is presumed that the court disregarded the inadmissible evidence when there is other substantial evidence upon which the court based its findings). Therefore, this Court must reverse the district court's ruling on the School's Petition.

3. Milton Schwartz's subjective belief that he had a perpetual naming rights agreement is not an invalidating mistake.

The district court did not expressly determine that Milton Schwartz's subjective and mistaken belief that he had a perpetual naming rights agreement with the School was an invalidating mistake. However, its finding that he "would have never" made the Bequest had he known he did not have a legally enforceable agreement appears to correlate to this determination. (24 App. 5994). This finding was erroneous.

As set forth in Section I(C)(4)(b), *supra*, the Estate has not and cannot meet its burden to demonstrate that Milton Schwartz's subjective mistaken belief that he had an enforceable perpetual naming rights agreement with the School was an invalidating mistake. *See In re Irrevocable Tr. Agreement of 1979*, 130 Nev. at 607, 331 P.3d at 888.

The Estate's unilateral mistake defense required it prove by **clear and convincing** evidence Milton Schwartz's mistaken belief that he had a perpetual naming rights agreement with the School – as opposed to his desire to continue to support and promote Jewish education and help Jewish families afford a Jewish education for their children – induced the Bequest. The Estate failed to adduce clear and convincing evidence at trial showing that the sole reason Milton Schwartz made the Bequest was because he believed the School could be forced to name itself after him in perpetuity. While his belief he had enforceable naming rights in perpetuity may have been important to him, the evidence also shows that Milton Schwartz made both his Lifetime Gifts and the Bequest because of his support and dedication to the School, the students, and the promotion of Jewish education for over two decades. (13 App. 3180-81, 3240; 14 App. 3343-44, 3385-86; 27 App. 6687-89). Therefore, the district

court erred in refusing to compel the Bequest based on Milton Schwartz's alleged mistaken belief regarding naming rights.

Accordingly, for all the foregoing reasons, this Court must vacate the district court's judgment dismissing the Estate's Petition and remand for further proceedings.

III. ARGUMENT IN SUPPORT OF OPENING BRIEF IN CASE NO. 79464

The Court need not reach the following issues in the event it determines the district court erroneously denied the School's Petition to compel distribution of the Bequest and vacates the corresponding judgment.

A. The School and Not the Estate was the Prevailing Party Entitled to Its Costs under NRS 18.020.

NRS 18.020(3) required the district court to award costs to the prevailing party in this matter. The district court erroneously and arbitrarily concluded the Estate was the prevailing party despite the fact that the School succeeded on what was unquestionably the most significant issue in the litigation.

This case involved two primary issues: the Bequest and the alleged naming rights contract (*i.e.*, the contract issue). There can be no dispute

that the alleged existence of a valid perpetual naming rights contract was the central issue in this case and at the three week long jury trial.[31] The jury found in favor of the School on the contract issue and the district court found against the School on its request to compel payment of the Bequest. (19 App. 4513-16; 25 App. 6002-10).

After the parties both moved for costs, the district court found that although the School defended against the Estate's contract and equitable claims, the School could not be the prevailing party because it did not succeed on its affirmative claim. (27 App. 6591). The district court further found "[w]hile the Estate also did not recover on its counterclaims, it successfully defended against the School's claims." (*Id.*). The district court then inexplicably concluded that the Estate was the prevailing party. (*Id.*). In other words, although the district court recognized that neither party was successful on their affirmative claims (*i.e.*, they both successfully defended against the other party's claims), the district court arbitrarily concluded that Estate was somehow the prevailing party.

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[31] As counsel for the Estate noted in the Estate's opening that "if we had a naming rights agreement, we wouldn't be here today." (12 App. 2920).

Under the proper consideration of the nature of the parties' claims and the significance of the issues, the School is the prevailing party.

1. Standard of review.

This Court reviews the district court's determination that the Estate was the prevailing party under NRS Chapter 18 for an abuse of discretion. *See Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. 80, 90, 343 P.3d 608, 615 (2015). In *Blackjack Bonding*, the district court abused its discretion in failing to find that petitioner was the prevailing party where it succeeded on a significant issue and achieved at least some of the benefit sought. *Id.*

2. The School was the prevailing party because it succeeded on what was obviously the most significant issue in the litigation.

Because the School prevailed on the perpetual naming rights issue, which was undisputedly the most significant issue in the case, and also resulted in additional substantial benefits to the School such as defeating the Estate's request to repay Milton Schwartz's $1,055,903.75 in Lifetime Gifts (plus interest), it is the prevailing party.

A party can be considered a prevailing party for purposes of attorney's fees and costs under NRS Chapter 18 if it succeeds on any significant issue that achieves some benefit sought. *See Valley Electric*

Ass'n v. Overfield, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005); *see also Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 486, 851 P.2d 459, 464 (1993) (citing *Hornwood v. Smith's Food King No. 1*, 105 Nev. 188, 192, 772 P.2d 1284, 1287 (1989)). A party need not succeed on every issue in order to be a prevailing party so long as the action has proceeded to judgment. *See Blackjack Bonding, Inc.*, 131 Nev. Adv. Op. 10, 343 P.3d at 615. A party is a **prevailing party** "when actual relief on the merits of his claim **materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits** the plaintiff." *McMillen v. Clark County*, 214CV00780APGPAL, 2016 WL 8735673, at *3 (D. Nev. Sept. 23, 2016) (emphasis added) (citing *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992)). This Court broadly construes the term "prevailing party" to encompass plaintiffs, counterclaimants, and defendants. *See Valley Electric Ass'n*, 121 Nev. at 10, 106 P.3d at 1200.

Thus, even a defendant who successfully defends against a claim achieves some benefit sought for purposes of NRS Chapter 18. *See id.* Where, as here, claims and counterclaims are asserted, the determination of the prevailing party is based on an analysis of the case as a whole, not a claim-by-claim analysis. *See* C.J.S. Costs § 139.

Here, there were two major issues in the litigation – (1) whether the Estate should be compelled to pay the Bequest to the School; and (2) whether Milton Schwartz had an enforceable perpetual naming rights contract with the School. There can be no legitimate dispute that the naming rights contract was the most significant issue in this litigation. The vast majority of the parties' opening and closing statements, the testimony and evidence introduced at trial, and the jury instructions related to the alleged perpetual naming rights contract and this issue was the primary focus of the parties and the Court, and had by far the greatest economic implications in the case, and the most far reaching consequences. The School obtained a Judgment in its favor against the Estate on the contract issue. (19 App. 4526-32). Further, the School succeeded in defending against the Estate's related claims for "Revocation of Gift and Constructive Trust" (which the Estate later repackaged and submitted to the jury as a claim for promissory estoppel). Rather than being liable for $2,830,523.72 in Lifetime Gifts, other alleged damages, and prejudgment interest the Estate requested as part of its equitable claims, the School instead owed nothing. (23 App. 5558).

Though the Estate does not have to pay the $500,000 Bequest to the School, this limited victory did not materially alter the parties' legal relationship like the finding in the School's favor that Milton Schwartz did not have an enforceable naming rights contract. Nor did it have any financial impact on the Estate as the Estate is required, for tax reasons, to give the $500,000 to some Jewish day school regardless, and has already set aside those funds. (3 App. 685-90; 14 App. 3430-32; 24 App. 5994). The relief the School obtained altered the legal relationship of the parties in favor of the School in a way far more consequential than any other claim made in the case by either side, in addition to avoiding significant monetary liability for the School. Importantly, the School retains the incredibly valuable right and ability to continue to be named The Dr. Miriam and Sheldon G. Adelson Educational Institute, which it would have lost had the Estate prevailed on the naming rights claim. (16 App. 3582-55).

The Estate is not the prevailing party simply because it succeeded on its "claims" for construction of will and bequest void for mistake while the School did not prevail on its single claim to compel the Bequest. This argument fails for two reasons. First, this position ignores the fact that

the Estate's so-called "claims" are not claims at all. The claims in the Estate's Petition regarding the Will/Bequest are simply affirmative defenses, or at most, counterclaims, because relief sought by the parties is the flip side of the same coin. As such, only one party could prevail on claims regarding the Bequest. The Estate cannot "double dip" by claiming it prevailed on its counter-claim in addition to successfully defending against the School's affirmative claim for the Bequest.

Second, this position fails to consider the undeniable significance of the contract issue in light of the litigation as a whole. The School is the prevailing party under NRS 18.010 because it prevailed on what was unquestionably the most significant issue in the litigation, the existence of the alleged naming rights contract and the far-reaching consequences related thereto. Accordingly, the district court abused its discretion by arbitrarily determining that the Estate was the prevailing party entitled to its costs.

3. The Estate cannot recover unsupported, unreasonable, and unnecessary costs.

Assuming *arguendo*, the Estate is the "prevailing party," the district court erred in awarding the Estate certain costs. A prevailing party is entitled to recover only such costs as are reasonably, necessarily

and actually incurred in litigation. *See* NRS 18.020; NRS 18.005; *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. Adv. Op. 15, 345 P.3d 1049, 1054 (2015); *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 385-86 (1998) (citing *Gibellini v. Klindt*, 110 Nev. 1201, 1206, 885 P.2d 540, 543 (1994)). While the determination of allowable costs is within the sound discretion of the trial court, "statutes permitting the recovery of costs are to be strictly construed because they are in derogation of the common law." *Berosini*, 114 Nev. at 1352, 971 P.2d at 385. The prevailing party must provide sufficient documentation that the costs were reasonable. *See Village Builders 96 v. U.S. Laboratories*, 121 Nev. 261, 277, 112 P.3d 1082, 1093 (2005). ("[D]ocumentation is precisely what is required under Nevada law to ensure that the costs awarded are only those costs actually incurred.").

The district court erroneously awarded the Estate $11,747.68 in costs in contravention of NRS 18.005, and its costs award must be reduced accordingly.

a. The Estate is not entitled to recover deposition transcript costs for its excluded experts.

The district court erroneously awarded the Estate $586.75 for deposition transcript costs for its experts Layne Rushforth, Esq. and

Rabbi Wyne. Both of these "expert" witnesses were precluded from testifying as experts at trial. (11 App. 2520; 2526). These costs cannot be considered expert "fees" under NRS 18.005(5). The Estate otherwise failed to demonstrate that these costs were reasonable and necessary under NRS 18.005(17). That fact that Rabi Wyne testified at trial as a percipient witness does not entitle the Estate to recover costs related to his deposition transcript. As such, the district court erred in awarding the Estate $586.75 for deposition transcript costs for its excluded experts Layne Rushforth, Esq. and Rabbi Wyne and its cost award must be reduced accordingly. (27 App. 6593).

b. The Estate is not entitled to certain processor fees.

The district court erroneously awarded the Estate its costs for three categories of processor fees. (27 App. 6593). First, the district court improperly awarded the Estate $1,920 in expedited service fees. No basis exists to award the Estate $1,920 in costs resulting from unnecessary expedited service charges, especially without any explanation as to why expediting these services was necessary. Litigants are able to regularly effectuate service of process without the use of the significantly more costly expedited services. The Estate's delay or failure to plan accordingly

or to account for time to effectuate service without the need to resort does not render these costs necessary or reasonable.

Second, the district court erred in awarding the Estate $235 in process server fees to serve a trial subpoena on Dr. Neville Pokroy. Although Dr. Pokroy testified at trial, the School – not the Estate – called Dr. Pokroy and, therefore, the Estate cannot recover its service costs for Dr. Pokroy. *See* NRS 18.110(2) (providing that prevailing party can recover witness fees for its witnesses who actually are sworn in and testify); (17 App. 4235).

Third, the district court erred in awarding the Estate $510 in process server fees to serve Dr. Miriam Adelson with deposition subpoenas when Dr. Adelson was never actually deposed in the matter. (27 App. 6593). The Estate has not and cannot demonstrate any basis under NRS 18.005 for an award of process server fees for a deposition subpoena for a deponent who was never deposed.

Therefore, the district court erred in awarding the Estate these process costs and the Estate's request to recover processor fees should be reduced in total by $2,430.

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c. The Estate is not entitled to costs Westlaw legal research because it failed to properly document these costs.

The district court erroneously awarded the Estate $8,730.93 in Westlaw research costs despite the fact that the Estate failed to properly demonstrate the reasonableness and necessity of these charges under NRS 18.005(17). (27 App. 6593). The Estate's counsel eventually disclosed that it bills its clients a pro-rata share of the law firm's total monthly Westlaw charges, which is based on the total number of search transactions per month. (27 App. 6529-30). This method of billing does not permit a court to determine whether the costs were reasonably, necessarily and actually incurred. *See* NRS 18.020; NRS 18.005. The Estate also failed to include any mathematical or data demonstrating how the pro-rata share was determined. Accordingly, the district court erred in awarding the Estate its costs associated with legal research and its cost award must be reduced accordingly.

As the School is the prevailing party, the district court's costs award to the Estate must be vacated. However, should this Court affirm the district court's determination that the Estate is the prevailing party, then it must reduce the award by $11,747.68 due to the Estate's failure

to sufficiently support the costs as required by this Court, or which otherwise not recoverable per statute.

CONCLUSION

For the foregoing reasons this Court should affirm: (1) the district court's grant of summary judgment on the Estate's oral contract claim; (2) the Jury Verdict and corresponding Judgment on the Estate's breach of contract claim; and (3) the Judgment denying the Estate's claim for revocation of Milton Schwartz's Lifetime Gifts.

This Court should also vacate the Judgment on the Estate's Petition and remand with instructions that the district court grant the Petition.

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In the event the Court maintains the status quo, then it should vacate the district court's costs award to the Estate or, at a minimum, reduce the costs award by $11,747.68.

DATED this 27th day of July, 2020.

KEMP JONES, LLP

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word 2013 in size 14 font in Century.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 28.1(e)(2)(B)(i) and NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 29,782 words. The Court's October 24, 2019 Order directed the School to file a single combined answering brief (Case No. 78341), opening brief on cross-appeal (Case No. 78341), and opening brief (Case No. 79464) ("Combined Brief"). Pursuant to NRAP 28.1(e)(2)(B)(i), the School's Combined Answering and Opening Brief (Case No. 78341) cannot exceed 18,500 words. Pursuant to NRAP 32(a)(7)(A)(ii), the School's Opening Brief (Case No. 79464) cannot exceed 14,000 words. Thus, the School in under the impression its Combined Brief cannot exceed 32,500 words (18,500 + 14,000) in total. The Combined Brief contains 29,782 words and, therefore, is in compliance with the aggregate type-volume limitations set forth above.[32]

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not

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[32] Out of an abundance of caution, the School submits the instant Combined Brief in conjunction with a Motion to Exceed under NRAP 32(a)(7)(D).

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

Dated this 27th day of July, 2020.

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CERTIFICATE OF SERVICE

I certify that on the 27th day of July, 2020, I caused to be served via the District Court's e-filing system and pursuant to NRAP 25(b) and NEFCR 9, and electronically filed the foregoing RESPONDENT/CROSS-APPELLANT'S ANSWERING BRIEF & OPENING BRIEF ON CROSS-APPEAL (NO. 78341) & OPENING BRIEF ON APPEAL (NO. 79464) with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-filing system (Eflex). Participants in the case who are registered Eflex users will be served by the Eflex system as follows:

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