Case No. 78341

In the Supreme Court of Nevada

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

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

Appellant,

vs.

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

Respondent.

APPEAL

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

APPELLANT'S APPENDIX
VOLUME 18
PAGES 4251–4500

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CHRONOLOGICAL TABLE OF CONTENTS TO APPENDIX

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

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

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

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

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

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

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

ALPHABETICAL TABLE OF CONTENTS TO APPENDIX

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

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

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

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

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

participate in the meetings and the discussions with the board at least when he attended?

A. So the answer is that the board was pretty large and I can't remember well who attended meetings on a regular basis.

Q. Fair enough. Was there any discussion about -- well, when you got on the board, was there any discussion about building a high school?

A. Yes.

Q. Was there any discussion about the name that the school would have?

A. I don't recall discussion at the initial stages, no.

Q. And as it progressed, as things progressed, were there any -- well, let me withdraw that question.

Do you recall approximately when Mr. Schwartz passed away? I will make it easier and I will represent it was in August 2007 Dow does that sound about right?

A. I will accept that.

Q. I would like to refer you to Exhibit 42, which is in evidence. So this is a document -- we will put it on the screen for you we can go through the binders if you like. It's there right there in

front of you too. By the way we have the binders up there if you want to see the entire thing in context let me know and we can do that. Again I'm trying to do this as quickly as possible.

So you will see there it says board of trustee meetings means from December 13, 2007. And it indicates that certain people were there, do you see that? And in this particular -- on these particular minutes, it does appear that you were present. Do you have any recollection of a meeting in December of 2007?

A. I can't specifically remember a meeting in 2007.

Q. Fair enough.

So then let's -- if we could let's go through that a little bit. You will see down there that there is actually -- go down further -- there is a reference on the bottom of the page that's on the screen, Sam Ventura made the motion and Jill Hanlon seconded the motion to approve a resolution of board of trustees to grant the Adelson Family Charitable Foundation. Then it says, see amendment. During discussion Phil Kantor made a motion to approver the grant subject to clarification of the language of 4.i. this was seconded by Jill Hanlon

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and the motion passed unanimously. Do you see that?
A. Yes, I do.
Q. Can you tell the jury, do you have a recollection of that particular meeting?
A. Yes, I do.
Q. It specifically refers to you making, I guess, a condition or a slight modification of the motion that was made. What was the purpose of you making that comment?
A. It's may recollection that in the prior year -- this meeting was I'm sorry, when?
Q. December of 2007?
A. In December. So in that year, there was a rush to pass a resolution that would enable the school to obtain the very large gift that the Adelson family foundation was ready to make to the school. The Adelson foundation had some conditions attached to that gift, and some of the conditions were listed in a resolution that the board was being asked to pass. I think that that resolution -- and I'm not certain of how it came to be -- but I believe that it was drafted mostly by the attorneys in Boston for the Adelsons, and did not fully reflect the board of trustees' position on the items that were set forth in the resolution.

Q. Now this was a few months -- I'm sorry I didn't mean to cut you off if you were still answering?

A. I can complete the story if you like.

Q. Sure.

A. So among the provisions of the resolution were various resolutions regarding the religious practices of the school, and those -- some of those practices as drafted by the attorneys in Boston were not practices that I could personally accept as a board member, and other people on the board shared my view. But on the other hand, we were urged to pass the resolution in December so that the Adelsons could make their gift in that taxable year before the next taxable year in January. So we were asked to sign the resolutions, but it was clearly understood, and as you see by motion, that I put forward, that we would revisit some of the resolutions and that the -- some of the provisions of the resolution, and the resolution was not considered final.

Q. All right. Now, this was -- I will just represent to you, I don't think it's a point of contention. If Mr. Schwartz died in August of 2007, this was December so it's about four months later.

004254
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Was there any discussion that you recall about that in any way it was intended to reflect or relate or minimize or anything else the Milton Schwartz position with the school and the name of the elementary school?

A. No, not that I'm aware of.

Q. So let me show you, then, Exhibit 44 -- 43. And this is -- it says it's of course a resolution of the board of trustees dated December 13. If we could look down there in the first resolution. It says resolved. And the jury has seen this countless times, but do you -- take a moment, I don't know if you recall seeing this but if you need to take a moment to look at it does this comport with your recollection of the resolution that you were just explaining to the jury?

A. Yes, it does.

Q. And so is there anything in that particular resolution that was an issue that you called out as you just described, in the motion that was made in the meeting of the minutes we just saw?

A. Yes.

Q. Could you tell the jury what specific portion of that resolution was still as you understood it an issue with the board?

A. Yes, for sure the language that says the school as conducted by the corporation shall not be orthodox Judaic was unacceptable. Students in the school shall not be required to pray and should not be required to wear a kippa was controversial, and was being discussed. Those are the provisions that I specifically remember.

Q. All right. So let's look at the bottom of the page. It also references resolved that the corporation's elementary school shall be named in honor of Milton I. Schwartz in perpetuity. Do you recall that being part of the discussion?

A. I don't recall.

Q. Do you recall -- well, let's look at the last page, then -- I thought we had a signed version, I thought 43 was the signed version of the resolution. It is my recollection that we have a signed version.

MR. LEVEQUE: Keep scrolling down.

BY MR. JONES:

Q. Keep scrolling down. There we go. Do you see your name anywhere there?

A. Scroll down. I do, yes.

Q. So you signed that?

A. Yes, I did.

004256
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Q. When you signed that, what was your intention with the respect to the effectiveness of that resolution?

A. That it was tentative, that the resolution was accepted for purposes of the gift being able to change hands, but that these specific -- that specific provisions were going to be revisited.

Q. Do you recall if -- and if we can look through that if you like. I think you even have the binder up there. But do you recall in anywhere in this resolution that this resolution is tentative or is not binding or is not the final version?

A. I think the motion we were just looking at before that I made a motion to that effect.

Q. So the resolution itself that was signed, doesn't say it, but the motion we saw in the meeting minutes in Exhibit 42 is what you are referring to that makes it essentially as far as you understood clear that it was not a permanent decision?

MR. LEVEQUE: Objection. Leading.

THE COURT: Overruled.

THE WITNESS: Overruled.

THE COURT: Yes, you may answer if you know.

THE WITNESS: Yes.

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BY MR. JONES:

Q. So let's look at Exhibit 44 -- I'm sorry, let's go back to the top of this exhibit.

Let's see if we could go up a little bit, if you if to the top of the next page, right there, if you go to -- I think it's on the last page. There we go. It says: Resolved that Victor Chaltiel is authorized on behalf of the Corporation to execute and deliver that grant agreement, et cetera, et cetera, dated December 13, between the corporation and the Adelson family charitable trust.

Do you recall something about that subject as part of this process?

A. Yes. That was what was driving the process forward was the ability to deliver to the Adelson foundation the go ahead to give the gift in December.

Q. So this is a separate resolution in this particular exhibit, Exhibit 43, this resolution authorizing Mr. Chaltiel to sign the letter grant is separate from the first resolution we saw that said that they are resolving to change the name of the corporation and other things in perpetuity?

MR. LEVEQUE: Objection. Leading.

MR. JONES: It's just preliminarily.

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THE COURT: Sustained.

MR. JONES: All right. That's fine. Just trying to speed things up.

THE COURT: Appreciate that.

BY MR. JONES:

Q. You will see that this talks about the letter grant, right? So let's go back and see the paragraph number 1, first resolution on the first page. I know this is very tedious. Sorry for everybody.

And do you see anything in that resolution that talks about authorizing Mr. Chaltiel to sign the grant letter?

A. No, I do not.

Q. Do you see any reference to Exhibit A anywhere in that paragraph?

A. No, I do not.

Q. Hopefully there will be some method to my madness here and everybody will not be upset with me.

So now let's look at Exhibit 44. So let's look at the top. This is dated December 13, 2007. It's to Mr. Chaltiel as the chairman of the board of trustees. Do you recall ever having seen this letter?

004259
004259

A. Yes.
Q. And could you tell the jury what this letter is, as you understand it?
A. That was the grant letter. That was the condition under which the gift was going to be made.
Q. It says AFCF agrees to make a grant of 3 million to the corporation. Do you see that?
A. Yes.
Q. Do you know if the foundation had already made any substantial grants to the school prior to that date?
A. I don't recall specifically.
Q. Fair enough.
So let's go to the last page you will see does that appear to be Mr. Chaltiel's signature?
A. Yes, I know it very well.
Q. Thank you. Now if we could, let's go to -- and I don't know that this is in evidence, Exhibit 910 so you may have to look at that first?
MR. JONES: Ms. Clerk is that in. I just want to make sure it's not in.
THE CLERK: No.
MR. JONES: It might be up here. Let me just check. It's not but Your Honor do you mind?
THE COURT: Okay.

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MR. JONES: Here we go.
BY MR. JONES:
Q. It's near the bottom. Mr. Kantor, I'm showing you what's been marked for identification as Exhibit 910 and ask you if you recognize generally that document?
A. Yes, I do.
Q. What do you recognize it to be?
A. I recognize it to be the minutes of a board meeting that occurred in January 2008.
Q. And so first?
MR. JONES: First of all Your Honor move for admission.
MR. LEVEQUE: No objection.
THE COURT: It will be admitted.
THE CLERK: 910?
THE COURT: Yes.
BY MR. JONES:
Q. By the way, does it appear that you were in attendance at this meeting?
A. Yes, it does.
Q. Let's go down and see if there is any discussion about the minutes in the meetings -- excuse me, the December discussions. Going down there. Maybe it's further down. There we go. The

004261

resolution of the articles of incorporation were discussed: The motion had passed at the December 13, 2007, meeting. Do you see clarification on the wording is still being reviewed by the Adelson family. At the meeting a discussion ensued whether kippas should be mandatory or strongly encouraged for beit midrash the Adelson review, et cetera, et cetera. Do you see that?

A. Yes, I do.

Q. Do you remember this process?

A. Yes, I do.

Q. Is this what you were referring to as this huh not being fully resolved in December?

A. Yes, it is.

Q. And as far as you know, did it get resolved at this January meeting?

A. No, it did not get resolved at that meeting.

Q. So if we may, let's go to Exhibit 46. I believe Exhibit 46 is in evidence. I hope.

THE CLERK: Yes, 1 through 64 are all in.

BY MR. JONES:

Q. This is the very next month. Here we are now in February. If you look at the language regarding the religious purpose of the school, so

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you will see -- I think it's under ii, romanette i. Is this a part of a continuation of that discussion?

A. Yes, it is.

Q. Do you know if there was a resolution meaning a resolution meaning the parties all agreed to a final disposition of this issue as of that meeting, if you recall?

A. So I don't recall specifically whether at that meeting everything was resolved, but clearly we were moving towards resolution over the course of those months.

Q. Let me ask you to look at Exhibit 49. We will bring that up for you. This was from March of 2008. And again, does it appear you were at this meeting?

A. Yes, it does.

Q. So now let's see if we may look at the language about the discussion of the resolution. I think it's right there. Resolution of the articles of incorporation were signed at the board of trustees members in attendance. This motion had passed.

Do you see that?

A. Yes, I do.

Q. Now let's look at the resolution if we can,

004263

which I believe is Exhibit 50. And again it's March of 2008. Let's look at the first resolution. Now, do you see in that first resolution a reference to Exhibit A?

A. Yes.

Q. And do you recall we talked about the first resolution back in December and there was no reference to Exhibit A?

A. Yes, I do recall that.

Q. So again what is your understanding of the purpose of this resolution by the board?

A. My understanding of and my recollection is not perfect on this, but my understanding is that all these discussions remained in flux for the early months of 2008 and they were actively discussed at board meetings, and ultimately got resolved in March. And I believe that the grant letter was adapted also to what was acceptable to the board, and the resolutions of the board were fully clarified at that point.

Q. So why -- do you have a recollection as to why the process needed to be done in December but still was ongoing up and through March before it got finalized?

A. Yes.

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Q. Could you tell the jury what your recollection of is why --

A. My recollection is that the Adelsons wanted to be sure that they were funding the school that they wanted to have. And they had certain conditions in particular, religious conditions for that. And the board needed to agree to those conditions, but the conditions needed to be negotiated and took time to negotiate. But on the other hand, the gift needed to be made in 2007 in order, I believe, to have a deduction in that year.

Q. Okay.

A. So we needed to finalize enough of the process to bag the gift in 2007, but needed to finish the discussion of what the specific provisions would be. And that carried over to 2008.

Q. Was any of this process, as far as you recall, any discussion with the board in any way directed towards Milton I. Schwartz or his legacy?

A. So I don't recall one way or the other, to be honest, because the particular issues that we have been talking about were the issues that were very important to me, and that was not an issue that was compelling me one way or the other.

Q. Fair enough. Certainly.

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Do you recall if -- and I know this is a problem we have had in this case some of these go back many years sometimes decades. Do you recall if in March of 2008 the lower -- what's been referred to as the lower school still had Milton Schwartz's name up on the pediment?

A. I believe so, yes.

Q. And did you recall any discussion by the board after Mr. Schwartz's death up until 2013 about -- at any time before 2013, removing the name Milton I. Schwartz off the of the lower school?

A. There was discussion about it, I do recall.

Q. Do you recall approximately when that happened?

A. No, I don't.

Q. All right. When there was discussion, do you recall the context of what the discussion was as to why it was being brought up?

A. It was talked about in connection with a gift that the estate was supposed to make to the school and that did not come through. So there was discussion whether it was fair to keep the name up in circumstances where the gift was not actually made to the school. It was not actually tendered. And that was the basis of the discussion.

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MR. JONES: Mr. Kantor, I have no further questions. Thank you, sir.

MR. LEVEQUE: I'm my own Shane, so this takes a little bit longer than the school.

THE COURT: Shane is the IT guy. Couldn't do without him, and Mr. LeVeque.

EXAMINATION

BY MR. LEVEQUE:

Q. Good afternoon, Mr. Kantor. Do you remember me?

A. Yes, I do.

Q. Do you remember I deposed you two years ago?

A. It was a long time ago. I don't remember exactly when.

Q. I'm going to try keeping my examination as brief as possible. And really I'm just going to go to the last topic that Mr. Jones asked you about. It had to do with the 2007 resolution and what was going on there. So I'm just going to walk you through this stuff again, and I promise this is the last witness so this is the last time.

So if you could follow along with me, Mr. Kantor --

A. I'm going to have to ask you please to

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expand the --
Q. I'm going to.
A. I can't read them.
Q. Again these are the minutes that Mr. Jones went over from December 13, 2007; is that right?
A. Well, yes.
Q. And my recollection from your testimony is that the reason why you were trying to get a resolution passed was so that the Adelsons could take the benefit of taking a tax deduction at the end of 2007 as opposed to having the deduction in 2008; is that right?
A. That's right, although I will say that I was not exactly privy to that. I believed it had something to do with the gift needing to occur in 2007 specifically whether it was a tax deduction or what the nature of the imperative was, I don't know.
Q. But in any case there was some sort of imperative imposed by the Adelsons to get this done ASAP, correct?
A. Yes and by the school as well, I would add. The school wanted to get that gift.
Q. Of course. And then the resolution itself, I just want to walk through some things with you here. First of all, Mr. Jones asked you the

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question but I don't know if you actually answered it. This resolution doesn't say tentative anywhere, does it? If you want to read the whole thing, it's Exhibit 42 in your book?

A. I don't recall that it did.

Q. I'm going to walk you through each one of these. With respect to the first resolution, this is the resolution that talks about actually a lot of things, in fact there is three romanettes. The first one is that the Corp. name is going to be changed, do you see that, that's romanette (i)?

A. Yes.

Q. And the second romanette is talking about this issue that I think that you and some other board members had some issues with, with respect to how religious the school was going to operate; is that correct?

A. Yes, it is.

Q. And in this version, at least agreed upon as of December of 2007, the school would not be run orthodox Judaic and the kids should not be required to pray and should not be required to wear a kippa, is that right, except in holy studies; is that correct?

A. No.

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Q. That's not correct?
A. It wasn't agreed upon.
Q. I'm just asking you, as of the date this resolution was signed, this is what the language was?
A. Yes.
Q. And, again, it doesn't say anything tentative about this resolution, does it?
A. Not in the verbiage that's here in the text.
Q. Did you draft this?
A. No, I did not.
Q. Do you know who drafted it?
A. I believe the Adelsons' lawyers drafted it.
Q. Did you review it?
A. Yes.
Q. In the context of being a lawyer?
A. Oh, no.
Q. And then romanette (iii) talks about amending the corporate articles to restate some specific language about the governing board and how long term limits are for board members; is that right? Fair characterization?
A. Yes.
Q. We have three things, we have the change

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the school's corporate name, we got how the school is going to be run in the context of religious operation and then we have some discussion about how the board is going to operate with respect to term limits; is that fair?

A. Yes.

Q. And then of course we have the resolution after that that talks about naming the school after Milton Schwartz in perpetuity, at least with respect to the elementary school. My recollection is you don't recall that provision being discussed; is that right?

A. Right, I don't recall it.

Q. And if we go to the third one, the third resolution talks about Mr. Chaltiel being authorized by the board to execute the grant agreement and to do anything that's necessary to make sure that agreement is in full force and affect is that a fair characterization of that paragraph?

A. Yes.

Q. And then the last paragraph talks about kind of the same thing. It's Victor Chaltiel and all of the officers of the corporation authorized to do anything necessary to implement the resolutions that are above it; is that right?

004271

A. Yes.
Q. Okay. We have gone through those resolutions. There is no dispute that you signed this, correct?
A. No, there is not.
Q. So let me go to the grant letter. And the grant letter you can peruse it if you want. But what I really want to do is call out the attention in paragraph 4. Paragraph 4 talks about system things that are similar to the resolution but I'm really concerned about how the school is going to be conducted with respect to religious perspective. You would agree with pee that this language is exactly the same as in the resolution from December 2006?
A. I can't agree that it's exactly the same I can't read it fast enough and compare it fast enough but it appears to be highly similar if not the same.
Q. Students shall not be required to pray; students shall not be required to wear a kippa except in holy studies and classes. That's consistent with what the resolution said, correct?
A. Yes.
MR. JONES: For the record, reference the exhibit number.

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MR. LEVEQUE: I'm trying. I will try harder.

BY MR. LEVEQUE:

Q. So then we go to what Mr. Jones showed you is the March 11 resolution and this one I believe you also signed; is that correct?

A. Yes.

Q. This is Exhibit 50?

A. Yes, it is.

Q. Now this resolution, the first resolution of this date is very similar to one we saw if December right that this is authorizing Mr. Chaltiel to compute and deliver the grant agreement and that he and the Ferris of the corporation are empowered to do whatever is necessary to effectuate the contents there of; is that right?

A. Yes.

Q. So is there any Exhibit A by the way attached to this document?

A. I don't know.

Q. Exhibit 50 in your book?

A. Exhibit?

THE COURT: 50. So it would be in the other volume.

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A. Okay I'm at Exhibit 5.
BY MR. LEVEQUE:
Q. Any Exhibit A?
A. No, I don't see one.
Q. Would you agree with me that the grant agreement we have already seen was signed as of December 13, 2007?
A. I don't recall.
Q. Do you want to see it?
A. If you want me to answer the question, I would have to, yes.
Q. Sure. We can go back to it. Exhibit 44. What's the date on that?
A. December 13, 2007.
Q. Okay. And we have a signature at the bottom on behalf of the school. Do you see that?
A. Yes.
Q. Any reason to believe that that wasn't signed on December 13, 2007?
A. No, I don't.
Q. So this is -- with respect to the March resolution, that grant agreement is the grant agreement that's being discussed in the first resolution, correct?
MR. JONES: Object to the form of the

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question, assumes facts not in evidence.
THE COURT: I don't know what we are talking about.
THE WITNESS: I also got lost.
THE COURT: Thank you.
MR. LEVEQUE: Maybe I'm getting ahead of myself.
BY MR. LEVEQUE:
Q. This resolution talks about the grant agreement letter dated December 13, 2007, correct?
A. Yes.
Q. And we just looked at a grant agreement dated December 13, 2007, signed by Mr. Chaltiel?
A. Yes.
Q. So this is referring to the December 13, 2007, grant letter, correct?
MR. JONES: Objection. Assumes facts not in evidence.
THE COURT: Overruled.
THE WITNESS: I don't know that I can answer it.
MR. JONES: Your Honor, may we approach.
(Bench conference.)
THE COURT: For purposes of this question, gentlemen, we are going to need to publish the

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deposition of Mr. Kantor. Give us a second. Let us talk about this.

(Off the record.)

THE COURT: You are going to need that. That's your resolution.

We are ready to proceed?

MR. LEVEQUE: Yes.

BY MR. LEVEQUE:

Q. Mr. Jones has clarified for me there were two December 13, 2007, letters. I guess the exhibit binders were a little messed up. So I will ask you about this one.

MR. LEVEQUE: Do we have this one in anything?

MR. JONES: We don't because we thought it was duplicate we took it out. Your Honor. I apologize to counsel, the court, and the jury. That was our office's screw-up. We a thought they were identical so we deleted the one that's slightly different version.

THE COURT: But that was, I believe, in Mr. Kantor's transcript so he could look at his transcript.

MR. JONES: He can also look at the exhibits themselves. So those are copies for you.

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Your Honor, assuming Mr. LeVeque is okay with it, we can mark this next in order but I will legal that to him.

THE COURT: You can do that.

MR. LEVEQUE: Okay. Leave these here for now.

BY MR. LEVEQUE:

Q. We are back on the March 2008 resolution. And I will ask you again about the grant agreement because I guess there was one that was -- that came after, but before I get there, I wanted to ask you about the other things that were resolved here. There was apparently a resolution as part of this March 1 to take out a couple loans from the Adelsons; is that correct?

A. According to this document, yes.

Q. And these two resolutions weren't part of the December 1, correct?

A. I don't recall.

Q. Will accept my representation that they weren't?

A. I don't have a basis to accept it or deny it you.

MR. LEVEQUE: I will go back to it.

MR. JONES: To make it easier for

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Mr. Kantor and counsel I will stipulate I don't believe they were in there so he doesn't have to look. It's not a contested issue.

MR. LEVEQUE: Thank you.

THE COURT: Thank you for the stipulation so noted.

BY MR. LEVEQUE:

Q. Would you agree with me Mr. Kantor, that that's really all that was discussed in March 2008, I guess, just a reaffirmation of Mr. Chaltiel and the board having the power to execute a grant agreement letter that was back dated to December 2007, and then resolutions to take out loans, one for 670,000 and one for 500,000; is that right?

A. Yes.

Q. And this makes no mention -- this resolution makes no mention amending or restating or superseding or revoking anything in the prior resolution that we saw; is that correct?

A. Yes.

Q. Was this resolution the March 2008 resolution intended to finally resolve the debate over whether to wear a kippa and where and when and whether the school was going to run as an orthodox

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school?
A. Yes.
Q. Are you sure?
A. I think so, yes. Hard to remember these things happened a long time ago.
Q. I understand do you remember a subsequent grant agreement that was negotiated by the school and signed for a $50 million pledge?
A. Very generally, not specifically.
Q. Let's take a look at it. Marked and admitted as Exhibit 59 Mr. Kantor is a gift agreement I will call out the first paragraph to try refreshing your memory dated December 31, 2012, by the school and the Adelsons. Do you see that?
A. Yes.
Q. Were you on the board at this time?
A. Yes.
Q. And then I will call out the gift. It says, "Concurrently with the execution and delivery of this agreement, the donors will make a gift of $50 million." Do you see that?
A. Yes, I do.
Q. Do you remember this generous gift the Adelsons gave?
A. I remember generally. I don't remember the

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specifics, by day, et cetera, but I certainly do remember that they made that gift.

Q. Sure.

Then do you remember there was a condition imposed on the gift. And that condition had a few things, but one of them was that the Adelson School shall provide both secular education and special Judaic studies for children of Jewish families, shall afford students the opportunity to absorb in the Jewish culture heritage to the language.

And then it goes on the next page where it's talking about students not being required to pray, and male students being strongly recommended to wear a kippa during prayer and religious ceremonies; no students shall be required to wear a kippa at any time. Do you remember this?

A. Yes, again, generally.

Q. So this was four years after this debate started with respect expect to how the religious school was going to operate?

MR. JONES: Object to the form.

THE WITNESS: Is that a question.

MR. JONES: Assumes facts not in evidence.

THE COURT: Yes. Seek foundation.

BY MR. LEVEQUE:

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Q. There was a debate going on in late 2007 and early 2008 with respect to how religious the school was going to be, correct?
A. Yes.
Q. All right. And we saw the March 2008 resolution just a few minutes ago. Do you remember seeing that?
A. Yes.
Q. Did that resolution resolve this issue with respect to how religious the school was going to be?
A. It certainly resolved it to a point, yes. I mean, it's an ongoing thing. The board is constantly reviewing the school and constantly updating its practices in conformity to what the board wants to do as boards can and to do.
Q. Let's me ask you this Mr. Kantor what part of the March 2008 resolution talks about how religious the school is going to be?
THE COURT: Do you have that in front of you?
THE WITNESS: Yes, he has the March resolution in front of me.
THE COURT: Is it big enough?
THE WITNESS: It's not very big but I'm so familiar with it at this point that I know what it's

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saying.

So it's not in here, no.

BY MR. LEVEQUE:

Q. And that's because this issue wasn't finally resolved until December 2012, correct?

A. No.

MR. JONES: Object to the form.

THE WITNESS: No. I don't agree with that.

BY MR. LEVEQUE:

Q. When was it resolved?

A. It was resolved around then, around March.

Q. Was there a resolution that memorialized that?

A. I think so. I think it was in the prior one in February.

Q. The prior one in February?

A. Right.

Q. Let's take a look at that.

A. Okay.

Q. That's Exhibit 46. Is this the one you are talking about?

A. Yes.

Q. February 12, 2008?

A. Yes.

Q. Do you see any signatures there?

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A. I do not.
Q. How about the next page?
A. I do not.
Q. Have you seen any resolution like this that's been signed?
A. I don't recall.
Q. Let me ask you a question about the February 12, 2008. Do you see this language here, the first resolution of the board dated December 13, 2007, be amended and restated?
A. Yes, I do see that.
Q. You are an attorney Mr. Kantor, correct?
A. Yes.
Q. What is your understanding of what that language does?
A. It alters the prior language and restates it as to what follows.
Q. Does the March 11, 2008, resolution have that language anywhere?
A. No, it does not.
Q. Do you believe that the March 11, 2008, resolution was intended to supersede or restate or modify the December 13, 2007, resolution?
A. I'm sure that the December 1 was not final. As to exactly which resolution -- which subsequent

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resolution succeeded it or whether there was any one resolution that succeeded it I don't know. I don't recall.

Q. We have seen nothing today that expressly revokes, modifies, supercedes, or restates the December 13, 2017, resolution?

A. Well, you are showing me a copy of the February 1 that's not signed, but I don't know if there is one which was not signed. So I don't know.

Q. Now, Mr. Jones showed you, I believe -- maybe not, amendments to the articles. Have we seen these yet?

A. No.

Q. Well, we did see the board meeting minutes from March 11. See if I can pull those up. That was Exhibit 49. Do you remember seeing these at the bottom Mr. Jones asked you about this the resolution of the articles of incorporation were signed?

A. Okay.

Q. Okay. Remember that date, March 11th. Then the amendments themselves to the articles came ten days later on March 21, 2008. Do you see that?

A. I mean I'm just seeing -- you are showing me just little excerpts of things.

Q. Do you see that the file stamp on this

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document is March 21, 2008?
A. Yes.
Q. Do you remember an amendment to articles of incorporation?
A. I honestly don't.
Q. Let me just ask you this question. Do you see that the name of the corporation in box one is the Milton I. Schwartz Hebrew Academy?
A. Yes.
Q. Do you see that box two says, "Article one is hereby deleted in its entirety and replaced with the following. This corporation shall be known in perpetuity as the Dr. Miriam and Sheldon G. Adelson Educational Institute"?
A. Yes, I do.
Q. Do you recall that the first part of the resolution from December authorized the board to amend its articles?
A. Yes.
Q. Okay. Exhibit 28. I asked you about this in your deposition. I know there is a typo up there but do you see a these are board meeting minutes from April 10, 2008?
A. Right. There is a typo, it says 2006 at the top.

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Q. Right. In fact if you look at the very bottom of the document, it also references 2008.

Would you agree with me that April 10, 2008, would be the board meeting right after the next month -- strike that.

April 10, 2008, meeting would be the meeting after the March 11, 2008, meeting, right?

A. Yes. Typically yes.

Q. And in between the March 11 and April 10 meetings, we saw that the articles of incorporation were amended on March 21, correct?

A. Yes.

Q. Now, there was a motion made in this meeting to confirm that each and every trustee be held harmless and indemnified for all liabilities related to their functions as trustees of the school and incurring all costs incurred. And you seconded the motion; do you see that?

A. Yes, I do.

Q. Was this motion made and passed out of a concern with respect to any liability for changing the articles of incorporation about 20 days before?

A. No. No, they were not.

Q. That was just a coincidence?

A. Yes. I can elaborate on that.

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Q. Mr. Jones may be able to help you out with that. No question pending.

Mr. Kantor, who is presently on the board right now, other than you?

A. Sheldon Adelson.

Q. Yes.

A. Dr. Miriam Adelson, Sivan Dumont.

Q. All right.

A. Benny Yerushalmi, Yohan Lowie.

Q. Tom Spiegel?

A. Tom Spiegel, and of course, Ercy Rosen.

Q. Okay. So I've got eight. I've got Mr. Adelson, you, Ercy Rosen, Tom Spiegel, Dr. Adelson, Sivan Dumont, Yohan Lowie, and Benny Yerushalmi; is that correct?

A. Yes.

Q. Who is Sivan Dumont?

A. She is the daughter of Dr. Miriam Adelson.

Q. So we have got Doctor and Mr. Adelson, we have a daughter of Dr. Adelson, correct?

A. Yes.

Q. Do you know if Tom Spiegel is personal friends with Mr. Adelson?

A. Yes.

Q. We have Tom Spiegel.

004287
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Who asked you to join the board?
A. Specifically, Victor Chaltiel.
Q. What about Sheldon Adelson?
A. He also encouraged me to be on the board.
Q. Did you have a relationship with Mr. Adelson before joining the board?
A. No.
Q. Do you know why he asked you?
A. Yes, because I took a great interest in creating a high school. And he was creating a high school.
Q. What about Yohan Lowie, do you know if he has any prior relationship with Doctor or Mr. Adelson?
A. I don't know the nature of it, other than socially they are friendly, yes.
Q. Do you remember a purge of the board back in 2010?
MR. JONES: Object to the form of the question, Your Honor. Assumes facts not in evidence.
THE COURT: Overruled.
MR. LEVEQUE: I will restate, Your Honor.
BY MR. LEVEQUE:
Q. Do you remember a number of board members

004288

leaving in 2010?
A. Yes, I do.
Q. How many left?
A. I don't recall specifically how many, but it was on the order of, I believe, five or six.
Q. Do you know if they were asked to leave?
A. Yes.
Q. Do you know why?
A. Yes. They were not particularly active or productive on the board doing board business. I think were absent often, didn't contribute much to discussion and the decision was made to have a board that was going to act more professionally and more actively.
Q. Do you remember receiving a letter from my client in about May of 2010?
A. Yes.
Q. Do you remember -- do you have a recollection of what that letter was about?
A. Just very general recollection that it had to do with the naming of the school.
Q. Do you remember that letter having a bunch of documents attached to it?
A. Very generally.
Q. Do you remember if the board reviewed the

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letter and the documents that were attached to it?
A. I -- I would say we probably did.
Q. Did you take -- do you know if you and the board took those documents into consideration when it accepted the Adelsons' gift in 2012?
A. No.
Q. Did not?
A. No.
Q. All right.
MR. LEVEQUE: May I approach the witness Your Honor?
THE COURT: You may.
BY MR. LEVEQUE:
Q. There are apparently two December 13, 2007, letters. I want to have you compare them. I don't know which one is the more recent one.
A. This is going to be interesting.
Q. I could blow it up on that, if that helps?
A. I will make it happen. I will manage.
MR. JONES: Since the witness is looking, can we have them identified -- marked for identification at least?
THE COURT: We have the one that's in evidence.
MR. LEVEQUE: The one that's in evidence

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is.

MR. JONES: 44 I believe. Yes, Exhibit 44, Your Honor.

MR. LEVEQUE: So I guess what we need to do just to make sure we have a clean record is we will have you look at the one that's in the book. That's the old -- maybe the old one, I don't know. And this would be the one that we just got from Mr. Jones.

THE COURT: So that would be marked as 44A or do you want to mark it as next in order.

MR. JONES: Next in order is fine with me.

MR. LEVEQUE: Next in order makes more sense.

THE CLERK: Is it going to be yours, Mr. LeVeque?

MR. LEVEQUE: Yes.

THE CLERK: So it would be 184. Is it meeting minutes?

MR. LEVEQUE: It's a grant agreement letter.

THE WITNESS: I need a question or an instruction or something.

THE COURT: You asked him to review --

BY MR. LEVEQUE:

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Q. I just want to know Mr. Kantor, what's different in them?
A. Gosh.
Q. Sorry I'm making you do the work instead of me.
A. I don't know if it's going to be accurate work anyway. I mean, I can't detect it easily. They look very similar.
THE COURT: There is highlighting on one of them. Whose highlighting is that?
MR. LEVEQUE: Oh, might be Mr. Jones highlighting.
THE COURT: Oh.
MR. LEVEQUE: Maybe the highlighting helps.
THE WITNESS: I'm going to the highlighting. Oh, yes, of course they are different, yes. The highlighted area is different.
BY MR. LEVEQUE:
Q. How are they different?
A. The one that's marked Exhibit 44 has the language which was unacceptable. And this version, which I'm not sure what exhibit is that is.
THE COURT: 184.
THE WITNESS: Plaintiffs 184.
BY MR. LEVEQUE:

004292
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Q. Estate. We go by "estate" and 'school' in this case.

A. Has the acceptable language.

Q. Just give me the gist of what the difference is.

A. The difference is, in gist, that the first one was written in a way to be anti-orthodox. And the second one was written in a way to be more accommodative and to define the school as a community school.

MR. LEVEQUE: What was that 183? 186.

THE COURT: 184.

BY MR. LEVEQUE:

Q. With respect to 184, is there any way to discern when that was actually signed?

A. No, not that I can tell.

MR. LEVEQUE: Thank you, Mr. Kantor.

THE COURT: Mr. Kantor, Mr. Jones has his opportunity now to follow up. And in case -- you may know, jurors have an opportunity to ask questions when he is finished. So just hang tight. This is a really attentive jury.

THE WITNESS: I never knew that.

THE COURT: Isn't that bizarre? It's new to old people like me and Mr. Jones.

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THE WITNESS: I'm just in federal court so I don't know anything that's going on. Cool.

THE COURT: This is a good jury. They ask a lot of questions.

EXAMINATION

BY MR. JONES:

Q. Mr. Kantor, I just have a couple follow-ups. And actually Mr. LeVeque helped because of our office screwed up with the mixup of the two. My paralegal didn't realize it, so I apologize again. So he covered that so I don't have to go over that.

He did ask you if you could tell when the second one was signed. It does have a date on it?

A. Yes, it does have a date on it.

Q. In your practice as a lawyer, I'm not asking as a legal opinion, I'm asking as your practice as a lawyer, do you deal with corporate resolutions?

A. Yes, to some degree.

Q. On occasion for clients?

Is it common in your practice, and if you are aware, is it common in other lawyer's practices so have an agreement that may be backdated but ratified at a certain point saying that it will be

effective as of a prior date?
A. Yes. "Backdating" has a negative connotation to it. I would call it either "nunc pro tunc" or "effective as of." But this document appears to be intended to be effective as of December 2007, whenever it was signed.
Q. Are you aware of anything that's inappropriate or illegitimate or anything like that that by doing that process?
A. No, I don't.
Q. Are you --
A. I mean, in this context. Obviously there are context where back dating is unacceptable but this is not one of them.
Q. Mr. LeVeque asked you also about Exhibit 50. It had some references to some loans that the Adelsons gave to the school. Do you know why they had to give those loans or make those loans? Do you know if there was any kind of a funding shortfall or if there was any gap in funding? If you know, if you don't --
A. I don't specifically recall.
Q. Let me ask it then a different way. Are you aware of whether or not the Adelsons gave -- assuming they gave some loans to the school for I

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think it was a little over a million dollars between the two, are you aware of whether or not they ever got paid back for those loans or they gave a bunch more money?

A. So --

MR. LEVEQUE: Objection. Leading.

THE COURT: Overruled.

THE WITNESS: In all events, my recollections are general on those things. There are unquestionably there were times when the Adelsons made further gifts. There were small loans which were retired based on interest rates, et cetera. You know, all different reasons. And I don't recall the specifics of those things.

BY MR. JONES:

Q. If you look at Exhibit 46, this is the -- and we will get them up on the screen for you. That's the February minutes. Mr. LeVeque asked you to look at where it says first line is resolved.

A. Yes.

Q. That the December resolutions from the December meeting be amended and restated as follows. And I think he indicated -- asked you if that looks like it appeared in the March 1 and I think you said no. But with that said, do you see anywhere on this

resolution, you can look at this page and we can show you the next one -- but do you see anywhere on this resolution a resolution of naming the Milton I. Schwartz Hebrew Academy elementary school in perpetuity?

A. No, I do not.

Q. So if this one was a resolution that got passed, then it certainly would appear to have been restated and amended to delete that reference that was in there in December?

A. Yes.

Q. Thank you. One more question, sir.

Mr. LeVeque asked you about the board meeting in April of 2008 and the minutes from that board meeting. And he asked -- drew your attention particularly with respect to some board getting liability insurance. Do you recall that?

A. Yes.

Q. First of all, have you ever sat on other boards?

A. Yes.

Q. Is that an uncommon feature for the -- a corporation it to indemnify the board?

A. It's a very normal feature.

Q. Let me put it this way. Is it more common

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or less common in your experience to have that provision?

A. It's more common.

Q. So you wanted to elaborate and Mr. LeVeque said you had no question pending. So this would be my request that you then elaborate to the jury about that subject.

A. The process from 2008 onward was a process of creating a much more professional board and more professional school and professional environment. And part of that was to have directors and officers insurance, which is a completely standard practice. And we were just upping our game as a board to be more professional.

Q. At least as far as you were aware, as far as you were concerned, did it ever enter your mind about having to do whatever with Milton Schwartz?

A. No, it did not.

MR. JONES: Fair enough. I have no further questions.

THE WITNESS: I'm sure a discussion -- I remember the discussion, and it was only a discussion about making the board more professional.

MR. JONES: Thank you, Mr. Kantor. I have no further questions.

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THE COURT: Ladies and gentlemen, this is your opportunity. Mr. Kantor being our final witness, it's your last chance to get in a question. Do we have any questions for Mr. Kantor? We do have a question for Mr. Kantor. Give us a second and you will see how this works.

(Bench conference.)

THE COURT: So Mr. Kantor, here in state court, unlike federal court where your practice is, jurors are entitled to ask questions of witnesses. They must ask fact questions. And I have to read the question in which the juror who wrote it wrote it.

This is from Juror 9, Sarah Langlois: You said there was discussion about removing Milton Schwartz's name because of the money he was supposed to leave in his will. Do you remember how much money were the board or you expecting from Mr. Schwartz in his will?

THE WITNESS: So my answer is I could never get it straight whether it was 500,000 or a million. I remember both being talked about, but I could never get that straight. But it was one of those two, 500,000 or a million.

THE COURT: Thank you. The second part of

the question: In those discussions, was there anyone to represent Mr. Milton's naming rights that he may or may not have had?

THE WITNESS: May I ask you to repeat it?

THE COURT: Yes.

In those discussions was there anyone to represent Milton's naming rights that he may or may not have had?

THE WITNESS: So the simple answer is no. There was nobody from the Schwartz's estate, if you will, on the board at that time. But I can tell you that the board was very kindly disposed to Mr. Schwartz and was trying to find a way to accommodate that desire.

THE COURT: Any follow-up on that Mr. LeVeque?

MR. LEVEQUE: Mr. Jones get gets to go back.

THE COURT: I'm sorry, this was Mr. Jones's witness.

Mr. Jones?

MR. JONES: Not really, Your Honor, no.

THE COURT: Thank you very much. Now Mr. LeVeque?

MR. LEVEQUE: No, I have nothing else.

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THE COURT: All right. Thank you, sir. Unless the jurors have any other questions? Seeing none, Mr. Kantor, thank you very much for your time. You are excused.

THE WITNESS: Thank you.

THE COURT: Thank you very much.

MR. JONES: Sorry, Your Honor. I didn't mean to stop the process.

THE COURT: Thank you. So Mr. Jones, do you have any further witnesses?

MR. JONES: No, Your Honor. We would rest as well.

THE COURT: So both petitioners having rested their cases, is there any rebuttal from the estate.

MR. LEVEQUE: No.

THE COURT: There being no rebuttal from the estate, Mr. Jones would there be any rebuttal from the school.

MR. JONES: I don't think as a practice California matter if they don't have a rebuttal so the answer would be no, Your Honor.

THE COURT: Ladies and gentlemen. Big moment. All of the evidence has come in that you will hear or see when you retire to your

deliberation room. As we mentioned, we have a 5:00 deadline today. And so for that reason, we cannot finish. The process that we have to do now is a bunch of post-evidentiary stuff that I need to do with the attorneys. We need to do that outside your presence. Then we have to read you jury instructions. That usually takes maybe half an hour because we have to read them you to it's required. It's tedious, I apologize you know how fast I talk let me know on Tuesday if I get ahead of myself. But we have to get those finalized for you and be able to read to you on Tuesday. So for that reason when you come back on Tuesday at 1:00 p.m. you will see the instructions of the court. You may have heard us a couple of times saying no, I get to do that, I get to tell them what the law is. That's my job. I will tell you what the law is on Tuesday. But we cannot get that finished in time to get people out of here by 5:00 p.m. we just cannot do it, because then you will be hearing arguments from counsel and they are going to tell you how that jury instructions wrap up with their openings statements. That process will take us a couple hours. We had hoped to be further along. All the witnesses noted it's 30 years. So it's taken us a little time to

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tell that story. We appreciate your patience with this and we are grateful. We would request over this holiday weekend that you remember, what I have to read to you every time, over the holiday weekend, during this recess, you are admonished not to talk or converse among yourselves or with anyone else on any subject connected with this trial; or read, watch or listen to any report of or commentary on the trial or any person connected with this trial by any medium of information, including, without limitation, to newspapers, television, the internet and radio; or form or express any opinion on any subject connected with the trial until the case is finally submitted to you.

That will be on Tuesday, but we have a lot of things to do just among us attorneys beforehand so we are going to excuse you for the weekend. We appreciate your time. We will be ready to go on Monday at one.

MR. JONES: Tuesday.

THE WITNESS: I keep forgetting Monday is a holiday Tuesday. Tuesday 1:00 p.m., usual place. Thank you all.

THE COURT: Counsel, do you want to take a brief recess to get your things together and we are

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going to address now the 50 motion, and maybe just a little bit about jury instructions and things like that.

MR. JONES: Sure.

THE CLERK: Counsel, one thing.

THE COURT: Deal with the exhibits so we have them all in. So we will take a recess and maybe 3:30 reconvene.

THE CLERK: Just to confirm any exhibits not brought in will be returned to counsel.

MR. JONES: You don't want to keep all of those binders and binders?

THE CLERK: No.

THE COURT: We will make sure that we are all on the same page for what will go in and what the jury will have when they are deliberating on Tuesday. We will take care of that during the break and we will come back.

MR. JONES: Thank you, Your Honor.

(Off the record.)

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of: MILTON I. SCHWARTZ, Deceased	Case No.: 07P061300 Dept.: 26/Probate Hearing Date: September 4, 2018 Hearing Time: 10:00 a.m.

OPPOSITION TO MOTION FOR JUDGMENT AS A MATTER OF LAW REGARDING BREACH OF CONTRACT AND MISTAKE CLAIMS

A. Jonathan Schwartz, Executor of the Estate of Milton I. Schwartz ("Executor"), by and through his counsel, Alan D. Freer, Esq. and Alexander G. LeVeque, Esq., of the law firm of Solomon Dwiggins & Freer, Ltd., hereby submits the Executor's Opposition to Motion for Judgment as a Matter of Law Regarding Breach of Contract and Mistake Claims ("Opposition"). This Opposition is made and based upon the pleadings and papers on file herein, the attached Memorandum of Points and Authorities, all attached exhibits, and any oral argument that this Honorable Court may entertain at the time of hearing.

DATED this 3rd day of September, 2018.

SOLOMON DWIGGINS & FREER, LTD.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In an attempt to seek judgment as a matter of law, the Adelson School selectively uses of misleading "soundbites" taken out of context intentionally mischaracterizing the testimony and evidence at trial. For example, contrary to the Adelson School's assertion, Mr. Freer never admitted in his oral argument that the Estate only had a claim for an oral contract, but that the contract was not a formal, single contract. Rather, the statement when placed in context provides: "...you might ask, why aren't you just showing me a naming rights agreement...they had terms they wrote on various documents."[1] Mr. Freer clearly stated that a naming rights agreement was not contained in a single document, but that it was formulated through "various documents."

Likewise, contrary to the soundbite obtained from the Executor, the Executor consistently maintained throughout his testimony that the agreement by and between Milton and the school was founded upon multiple writings: "Q. But I think you testified you have never seen a written contract to that effect, have you? A. I have seen a series of documents that form a contract."[2] These misleading soundbites and mischaracterization of the evidence presented at trial are insufficient for this Court to enter a judgment as a matter of law because, as set forth exhaustively below, sufficient evidence exists as to all of the Estate's remaining claims to enable the jury to grant relief in favor of the Estate. For the reasons set forth below, the Court should deny the Adelson School's motion.

[1] *See,* Appendix of Trial Transcripts ("ATT"), filed concurrently herewith, at Ex. 1, 08/23/18 Opening Argument of Alan Freer at 14:14-19.

[2] *See,* ATT Ex. 3, 08/27/18, Testimony of Jonathan Schwartz ("Schwartz Testimony") at 192:23—193:1. *See also, e.g., id.* at 200:9-23 ("Q. Let me ask you it a different way can you tell this jury the date that your father allegedly entered into this naming rights contract? A. Not the specific date, I believe it was sometime in 1989. Q. But it wasn't in 1990, right? A. No. Q. It wasn't in 1996, right? A. No. Q. It wasn't in 1999, right? A. All of the dates in the documents that you are referring to demonstrate the agreement. They demonstrate the contract. It's a series of documents that, together, form a contract. It doesn't have to be in a single document."); 201:2-10 ("Q. To answer my question I don't think you actually answered it the contract that your father entered into for these naming rights that you say exist wasn't entered into in 1999, right? I don't think you ever actually answered that question. A. If you are referring to a document, a set of bylaws from 1999, like I said there is a series of documents that demonstrate what the agreement was.").

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II. LEGAL STANDARD FOR A MOTION FOR DIRECTED VERDICT

When considering a motion for directed verdict under NRCP 50(a)[3], the district court must act "cautiously,"[4] and may only direct a verdict "where the evidences is so overwhelming for one party that any other verdict would be contrary to the law."[5] Directed verdict where "the facts are disputed or if reasonable men could draw different inferences from the facts."[6] When making a determination, the district court must "view the evidence and all inferences most favorably to the party against whom the motion is made."[7] To that end, the non-moving party need only "present sufficient evidence such that the jury could grant relief to that party"[8] to defeat a directed verdict. Similar to a motion for summary judgment, the district court cannot determine "[t]he credibility of witnesses and the weight of evidence" in making its determination.[9] Indeed, "where there is testimony that is conflicting on material issues, the court should not direct a verdict."[10]

Contrary to the Adelson School's assertion, this Court's prior ruling regarding partial summary judgment does not prevent the issue of an oral contract from proceeding to a jury determination because: (1) the Court has not entered an order specifying the scope of the partial summary judgment and the only basis the Court could render judgment would be for a date on or

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[3] NRCP 50(a) provides: "(1) If during a trial by jury, a party has been fully heard on an issue and on the facts and law a party has failed to prove a sufficient issue for the jury, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue. (2) Motions for judgment as a matter of law may be made at the close of the evidence offered by the nonmoving party or at the close of the case. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment."

[4] *Dudley v. Prima*, 84 Nev. 549, 551, 445 P.2d 31, 32 (1968) (citing *Clarke v. Chicago & N.W. Ry. Co.*, 63 F.Supp. 579 (D.Minn.1945)).

[5] *Bliss v. DePrang*, 81 Nev. 599, 602, 407 P.2d 726, 727–28 (1965) (citing *Greene v. Werven*, 275 F.2d 134 (8th Cir. 1960)).

[6] *Id.*, 81 Nev. at 602, 407 P.2d at 728 (citing *Troop v. Young*, 75 Nev. 434, 345 P.2d 226 (1959); *Weck v. Reno Traction Co.*, 38 Nev. 285, 149 P. 65 (1915)).

[7] *Bliss supra,* 81 Nev. at 601, 407 P.2d at 727 (citing *Wisconsin Liquor Co. v. Park & Tilford Distillers Corp.*, 267 F.2d 928 (7th Cir. 1959); 2B Barron and Holtzoff, Fed.Prac. & Procedure, Sec. 1075, at 378)).

[8] D & D Tire v. Ouellette, 131 Nev. Adv. Op. 47, 352 P.3d 32, 35 (2015) (quoting *Bielar v. Washoe Health Sys., Inc.*, —— Nev. ——, ——, 306 P.3d 360, 368 (2013)).

[9] *Bliss supra*, 81 Nev. at 601–02, 407 P.2d at 727 (citing *Schnee v. Southern Pac. Co.*, 186 F.2d 745 (9th Cir. 1951); *Sano v. Pennsylvania R. Co.*, 282 F.2d 936 (3rd Cir. 1960)).

[10] *Bliss, supra*, 81 Nev. at 602, 407 P.2d at 727–28 (citing Greene v. Werven, 275 F.2d 134 (8th Cir. 1960)).

after May 10, 2010, which is well within the four-year statute of limitation period for an oral contract where the Estate filed its Petition on May 28, 2013; (2) adopting the Adelson School's proposed date of "prior to May 28, 2009" would be reversible error because it is no specific finding can support such date and the evidence presented at trial demonstrates genuine issues of material fact as to both inquiry notice and whether equitable estoppel or tolling would toll any discovery period prior to March 9, 2010; and (3) even should the Court enter partial summary judgment as to the Estate's claim for breach of oral contract, the determination of whether an oral contract existed should still proceed to the jury since the Estate has asserted an affirmative defense of offset for breach of contract, which is not governed by statute of limitations.

Consistent with Estate's proposed Order Granting Partial Summary Judgment submitted to the Court concurrently herewith, the Estate is informed and believes that this Court found: (a) that the date of inquiry notice for the breach of any alleged agreement as a matter of law was May 10, 2010; and (b) such inquiry notice was triggered by Jonathan Schwartz's letter to the Adelson Campus of the same date.[11] Should the Court enter the Estate's proposed Order, the notice period of May 10, 2010 does not bar any oral contract claims since the estate filed it Petition for Declaratory Relief on May 28, 2013, well within the four-year statute of limitations. *See*, NRS 11.190(1)(b).

However, adopting the Adelson Campus' proposed Order that only contains a generic finding that inquiry notice occurred "on or before May 28, 2009," would constitute plain and reversible error. The Adelson Campus' proposed Order contains no detailed findings of undisputed material facts or conclusion to support a grant partial summary judgment that only prohibits pursing an oral contract.[12] Moreover, a district court can only find inquiry notice as a matter of law where

[11] *See*, Trial Exhibit 55 (05/10/2010 Schwartz Letter to Adelson).
[12] *See,* NRCP 56(c); *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 656-57, 173 P.3d 734, 746 (2007) (reversing summary judgment where order failed to set forth undisputed material facts and legal determinations to support its decision).

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"uncontroverted evidence proves that the plaintiff discovered or should have discovered the facts giving rise to the claim…."[13]

Here, the only "uncontroverted evidence" that "irrefutably demonstrates" when the Executor knew of the facts giving rise to his claims is his letter dated May 10, 2010. Prior to that date, the testimony and evidence at trial demonstrate that material issues of fact that must be determined by the jury such as the Executor's testimony that he did not see the Adelson Campus sign in 2008,[14] but rather saw it in March of 2010.[15] Additionally, issues of material fact exist regarding equitable estoppel and equitable tolling due to the statements of Paul Schiffman, who informed the Executor the sign only applied to the high school,[16] and the multiple items of "embarrassing" correspondence the Adelson School provided to the Executor bearing the Milton I. Schwartz Hebrew Academy ("MISHA") logo, even though the School had changed its name and had discontinued use of letterhead bearing the MISHA logo.[17]

Finally, even should the Court enter partial summary judgment as to the Estate's claim for breach of oral contract, the Jury must still find whether an oral contract existed because the estate has asserted breach of contract as an affirmative defense to the payment of the bequest.[18] An estate

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[13] *See, Siragusa v. Brown*, 114 Nev. 1384, 1401, 971 P.2d 801, 812 (1998). *See also Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 252-53, 277 P.3d 458, 462-63 (2012) ("only when evidence irrefutably demonstrates this accrual date may a district court make such a determination as a matter of law.")

[14] See, ATT Ex. 6, 08/30/2018, Schwartz Testimony at 156:17-19 ("Q. Do you remember seeing that sign when you went to the campus in 2008? A. I do not.").

[15] See, *id.* at 156:20-22 (Q. When is the first time you remember seeing it? A. Years later."). *See also, id. a*t 157:2-11 ("Q. Does it refresh your recollection that you may have visited 2010th of March? A I know I was there in 2010. Q. What did you do when you first recognized the sign? A. I remember having a discussion with Paul Schiffman about it.").

[16] *See, id.* at 129:4-13.

[17] *See*, ATT Ex. 5, 08/29/2018, Testimony of Paul Schiffman ("Shiffman Testimony") at 79:1-5 ("Q. And this again was sent two years after you testified that the letterhead changed in May of 2008? A. Yes. If I can add this is the first time I have seen this and I'm embarrassed by it."); Trial Ex. 157 (04/17/2008 Letter from Paul Schiffman); Trial Ex. 159 (05/28/2008 Letter from 2008 Gala Committee); Trial Ex. 162 (03/04/2010 Letter from Davida Simms); Trial Ex.165 (12/02/2011 Letter from The 2011-2012 Gala Committee).

[18] *See,* Trial Ex. 62 (05/28/2013 Petition for Declaratory Relief) at 9:4-16.

is entitled to offset bequests of beneficiaries.[19] The affirmative defense of offset is not barred by statute of limitations.[20]

IV. THE STATUTE OF LIMITATIONS DOES NOT BAR THE ESTATE'S CLAIM FOR MISTAKEN INTERVIVOS GIFT OR BEQUEST.

Contrary to the Adelson School's assertion, the statute of limitations for mistake, NRS 11.190(3)(d), does not bar the Estate's claims for mistaken intervivos gift or bequest[21] as the statute of limitations for those claims has not yet even began to run.

NRS 11.190(3)(d) provides:

> Except as otherwise provided … actions other than those for the recovery of real property, unless further limited by specific statute, may only be commenced as follows… [w]ithin 3 years … [for] an action for relief on the ground of fraud of mistake, but the cause of action in such a case shall be deemed to accrued upon the discovery by the aggrieved party of the facts constituting the fraud of mistake.

In this case, the mistake at issue is not a contractual mistake. Rather, it is an "invalidating mistake" in the donative transfer context. As recognized by the Supreme Court of Nevada, contractual mistake is inapplicable in the donative transfer context because "it is only the grantor whose intent and acts matter."[22] Nevada recognizes two types of unilateral mistakes that may occur in the donative transfer context: (1) invalidating mistakes and; (2) mistakes in the content of a document.[23] "An invalidating mistake occurs when 'but for the mistake the transaction in question

[19] *See, In re Smith's Estate*, 179 Wash. 417 (1934) (concluding a debt due from heir that is otherwise barred by the statute of limitations "may nonetheless be retained and offset against the heir's share of the estate" because "[t]he right of an executor to retain a legacy or distributive share and apply such indebtedness against a distribution has long been recognized by the law.").

[20] *See, Nevada State Bank v. Jamison Family Partnership*, 106 Nev. 792, 798, 801 P.2d 1377, 1382 (1990) (while statute of limitations may prevent defendant from prosecuting a counterclaim, a defendant is not barred to assert a related affirmative defense).

[21] *See*, Trial Ex. 62 (05/28/2013 Petition for Declaratory Relief) at 8:3-8 (Third Claim for Relief); 9:19-10:18 (Sixth Claim for Relief).

[22] *See, In re Irrevocable Tr. Agreement of 1979*, 130 Nev. Adv. Op. 63, 331 P.3d 881, 885 (2014) (citing *Twyford v. Huffaker,* 324 S.W.2d 403, 406 (Ky.Ct.App.1958)).

[23] *Id.*, at 63, 887 (citing Restatement (Third) of Restitution & Unjust Enrichment § 5 (2011); Restatement (Third) of Prop.: Wills & Other Donative Transfers § 12.1 (2003)).

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would not have taken place.'"[24] Here, if the jury ultimately determines that Milton Schwartz did not obtain contractual naming rights as consideration for his 1989 gift, the gift should be invalidated because Milton mistakenly believed that he did obtain legally enforceable rights and would not have made the gift had he known otherwise. Under Nevada law, "[r]escission is an appropriate remedy to address an invalidating mistake."[25]

The Estate has no redressable injury on an invalidating mistake theory unless and until there is first a predicate determination by the jury of whether a legally enforceable contract exists between Milton and the School.[26] If the jury determines that there is a legally enforceable contract, there could be no invalidating mistake with respect to the gift because Milton would have received what he intended: perpetual naming rights.

For this reason, the School's statute of limitations argument is without merit because a statute of limitations does not start to run until a party "sustains injuries for which relief could be sought."[27] Here, the Estate's claim for rescission of the gift based on an invalidating mistake does not begin to accrue until there is a judicial determination that there is no contract. Accordingly, the three-year statute of limitation for a claim based on mistake has not yet even begun to run.[28] Moreover, the statute itself expressly states that accrual does not begin until the aggrieved party discovers the facts constituting the mistake. NRS 11.190(3)(d). The predicate fact constituting the mistake in this case would be a judicial finding that Milton had no legally enforceable naming rights agreement.

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[24] *Id.* (quoting Restatement (Third) of Restitution & Unjust Enrichment § 5(2)(a) (2011)).
[25] *Id.*
[26] The Estate's claim for mistake was pled as an alternative theory for relief in the event the jury determines that there is no contract. *See* NRCP 8(e)(2) (in pleadings, parties may set forth as many inconsistent and alternative claims as they have).
[27] *See, Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990) ("The general rule concerning statutes of limitation is that a cause of action accrues when the wrong occurs and a party sustains injuries for which relief could be sought.").
[28] For this reason, the case cited by Adelson Campus, Nevada *Dep. of Transp. v. EJDC*, --Nev. --, 402 P.3d 677, 683-84 (2017), is inapplicable. In that case, the Nevada Supreme Court found that the three-year statute of limitations had ran on the plaintiff's claim for recission of a settlement agreement due to unilateral mistake because the claimed mistake was as to undisclosed NDOT plans which were publicly available at the time the settlement agreement was entered. *See id.* at 680.

The Estate's interpretation of NRS 11.190(3)(d) is the only logical one. The School's interpretation, on the other hand, would yield absurd results.[29] In this case, for example, the Estate would have been required to file a lawsuit for donative mistake within three years upon its discovery of a breach of the Schwartz naming rights agreement even though the Court had not determined whether such naming rights agreement was enforceable and the Estate had four years to bring a claim to enforce an oral agreement, and six years to enforce an agreement founded upon an instrument in writing. Such an interpretation is nonsensical because relief for the Estate's invalidating mistake claim cannot, as a matter of law, be available unless and until the jury finds that there is no legally enforceable naming rights agreement.

The accrual of the Estate's mistake claim is analogous to the accrual of certain legal malpractice claims and insurance bad faith claims. With respect to legal litigation malpractice claims, the Supreme Court of Nevada has determined that a client's injury does begin to accrue until the underlying legal action has been resolved.[30] This general rule is based on the rationale that "apparent damage may vanish with successful prosecution of an appeal and ultimate vindication of an attorney's conduct by an appellate court."[31] With respect to insurance bad faith claims, many jurisdictions recognize that a cause of action against an insurer for failing to reasonably settle a case cannot begin to accrue until an excess judgment is entered against the insured.[32] All of these scenarios deal with one common legal tenet which is that having knowledge of wrongdoing does

[29] Interpretation of statutes "should be in line with what reason and public policy would indicate the legislature intended, and should avoid absurd results." *State v. Quinn*, 117 Nev. 709, 713 (2001).

[30] *See, Hewitt v. Allen,* 118 Nev. 216, 221, 43 P.3d 345, 348 (2002).

[31] *Id.*

[32] *See, e.g. Branch Banking and Trust Co. v. Nevada Title Co.*, 2011 WL 1399810 (D.Nev.2011) (holding that insurance bad faith claim and breach of good faith and fair dealing claim were not ripe because underlying quiet title action was still on appeal); *Mercado v. Allstate Ins. Co.*, 340 F.3d 824, 827 (9th Cir. 2003)(holding that it is only after a litigated excess judgment is obtained that an insurer's refusal to settle becomes actionable); *Hernandez v. Great Am. Ins. Co. of New York*, 464 S.W.2d 91, 95 (Tex. 1971) ("When we decide the time the cause of action accrues, we also decide the period of limitations. Assuming no concealment of the act of negligence and no tolling of the statute, limitations will bar the suit two years after the excess judgment becomes final.").

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not start the clock on a statute of limitations if the claim asserted to redress the wrongdoing first requires a predicate legal finding. In the case of legal malpractice, it is a full adjudication of the underlying litigation wherein the attorney committed malpractice; in the case of an insurer's unreasonable refusal to settle a claim, it is an excess judgment against the insured; in the instant case, it is a finding that no valid contract was formed between Milton and the school.

V. THE STATUTE OF FRAUDS DOES NOT PREVENT THE JURY FROM HEARING THE CONTRACT CLAIMS.

The statute of frauds is inapplicable and does not prevent the Estate's contract-based claims from proceeding to the jury because: (1) Milton fully performed as to his obligations under the 1989 Offer; (2) the school accepted Milton's performance; and (3) sufficient memoranda concerning both the agreement entered into by and between the school and Milton in 1989 ("1989 Agreement") and/or the Modification/Memorialization of the 1989 Agreement and/or new agreement occasioned by the 1996 Robert Sabbath Letter ("1996 Agreement")[33] exist to satisfy any requirements under the statute of frauds.

While NRS 111.220(1) requires an agreement that cannot be performed within one year to be in writing, the Nevada Supreme Court has established several exceptions to enforcement. Specifically, where a party fully performs its obligation, the statute of frauds is inapplicable: "Full performance by one party may also remove a contract from the statute of frauds."[34]

Here, the evidence at trial demonstrates that Milton fully performed on his obligations. He provided the payment for $500,000.[35] Further, the school accepted Milton's payment as full

[33] *See,* Trial Ex. 139 (05/23/1996 Sabbath Letter). The evidence presented to the jury could lead it to conclude that the 1996 Sabbath Letter constituted either modification or definitions of the terms of the 1989 Offer or constituted a completely separate offer.

[34] *See, Edwards Industries, Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1032, 923 P.2d 569, 574 (1996) (citing 2 Arthur L. Corbin, Corbin on Contracts Sec. 457). *Cf.* 4 Corbin on Contracts (2018) at Sec. 19.13 (accord).

[35] *See, e.g.*, Trial Ex. 113 (checks).

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performance.[36] Indeed, although the individual board members may have varying recollections concerning the exact nature of Milton's performance, their respective individual recollections are insufficient to bind the school.[37] Moreover, even if Milton's performance could somehow be determined to be part performance, such performance satisfies the statute of frauds because the school accepted Milton's performance.[38]

Likewise, "Separate writings may be considered together to establish a sufficient writing or memorandum" sufficient to satisfy the statute of frauds.[39] Here, sufficient writings to constitute memoranda exist for the 1989 Agreement and/or the 1996 Agreement to satisfy any requirements under the statute of frauds. As to the 1989 Agreement, the existence of the checks, school minutes, resolutions, bylaws and/or 1996 Sabbath Letter constitute sufficient writings to satisfy the statute of frauds.[40] Similarly, the 1996 Agreement Offer is supported by the 1996 Sabbath Letter, the minutes and resolutions of the school related thereto, the amended bylaws, and Milton's participation and contributions, including his gift in the Last Will.[41] Accordingly, the statute of frauds is inapplicable to the Estate's claims and defenses for breach of contract.

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[36] *See, e.g.,* Trial Ex. 112 (08/14/89 Minutes); Trial Ex. 384 (11/29/1990 Minutes); Trial Ex. 5 (12/19/1990 Bylaws); Trial Ex. 118 (01/18/1990 Minutes and attached donor spreadsheet showing that Milton's pledge of $500,000 was accepted and extinguished).

[37] *See, Barnhardt v. Gray*, 15 Cal. App. 2d 307, 311, 59 P.2d 454, 456 (1936).

[38] *See, Masters v. Redwine*, 615 S.E.2d 118, 120 (Ga. 2005) (affirming jury's determination of breach of oral contract and overturning court of appeals' reversal on basis of statute of frauds where defendant accepted plaintiff's performance in oral contract for real property and then subsequently refused to perform constituted satisfaction of the statute of frauds: "For a court to sanction that kind of opportunistic fraud would undermine both the purpose of the statute of frauds and the concept of justice."); *Brockport Developers, Inc.*, v. 47 Ely Corporation, 369 N.Y.S.2d 601, 606 (1975) (where defendant knowingly and intentionally acquiesces to the partial performance of plaintiff, the statute of frauds is satisfied: "sometimes there is no surer way to find out what the parties meant or what they have agreed to do than to see what they have done"; "equity will not countenance a ritualistic invocation of the Statute of Frauds, especially where the party claiming its protection has acquiesced in and profited from the very agreement it now seeks to abjure."); Harding Co. v. Sendero Resources, Inc., 365 S.W.3d 732, 746 (Tex.App. 2012) (holding that where defendant accepted plaintiff's performance, the statute of frauds cannot thereafter bar defendant's performance); *Berg v. Ting*, 886 P.2d 564 (1995).

[39] *See, Edwards Industries, Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1033, 923 P.2d 569, 574 (1996).

[40] *See, supra* fn. 34. *See also*, Trial Ex. 139/139A (05/23/1996 Sabbath Letter).

[41] *See*, Trial Ex. 14 (05/19/1996 Minutes); Trial Ex. 139/139A (05/23/1996 Sabbath Letter); Trial Ex. 17 (04/13/1999 Bylaws); Trial Ex. 103B (1990 donations totaling $10,000); Trial Ex. 103D (2000 donation of $1,800); Trial Ex. 103A (2004 donation of $135,278)(sample of Milton's contributions post 1996) and Trial Ex. 22 (02/05/2004 Las Will and Testament of Milton I. Schwartz).

VI. THE ESTATE INTRODUCED SUFFICIENT EVIDENCE TO PERMIT ALL OF THE ESTATE'S CONTRACT CLAIMS AND DEFENSES TO PROCEED TO THE JURY.

As demonstrated during the seven days of trial, the Estate has presented sufficient to enable the jury to grant relief with respect to Estate's claims and affirmative defenses arising from breach of contract. As set forth below, the Estate has presented sufficient evidence that: (1) an enforceable agreement existed by and between the Decedent, Milton I. Schwartz, and the Adelson School; (2) Decedent performed on his obligations; (3) the Adelson School failed to perform without justification or excuse; and (4) the Estate has incurred damages as a result of the Adelson School's breach.[42] For the reasons demonstrated below, the Court should permit the jury to determine the Estate's breach of contract claims and defenses and provide the jury with Nevada Civil Jury Instruction 13CN.1.[43]

1. The Estate Has Presented Sufficient Evidence to Support a Finding That an Enforceable Agreement Existed.

Contrary to the Adelson School's contention, the Estate has presented sufficient evidence that a jury could return a verdict finding a valid offer, acceptance, meeting of the minds and consideration occurred sufficient to create an enforceable agreement.[44] Accordingly, the Court should permit the jury to determine whether each requirement: (a) offer; (b) acceptance; (c) meeting of the minds; and (d) consideration has been established by providing the jury with Nevada Civil Jury Instruction 13 CN.2.[45]

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[42] *See*, *e.g., Nevada Contract Services, Inc. v. Squirrel Companies*, 119 Nev. 157, 161, 68 P.3d 896, 899 (2003); May v. Anderson, 121 Nev. 668, 119 P.3d 1254 (2005); Keddie v. Beneficial Ins., Inc., 94 Nev. 418, 421, 580 P.2d 955, 956 (1978) (Batjer, C.J., concurring).

[43] 13CN.1: ("ELEMENTS: PROOF REQUIREMENTS. The essential elements of a claim for breach of contract are: 1. The existence of an enforceable agreement between the parties; 2. Plaintiff's [or counter-claimant's] performance [, or ability to perform]; 3. Defendant's [or counter-defendant's] unjustified or unexcused failure to perform; and 4. Damages resulting from the unjustified or unexcused failure to perform.).

[44] *See, May v. Anderson*, 121 Nev. 668, 119 P.3d 1254 (2005); Keddie v. Beneficial Ins., Inc., 94 Nev. 418, 421, 580 P.2d 955, 956 (1978) (Batjer, C.J., concurring).

[45] 13 CN.2 ("ELEMENTS: CONTRACT REQUIREMENTS An enforceable contract requires an offer and acceptance, a meeting of the minds, and consideration.").

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a. Sufficient Evidence of an Offer Exist.

Under Nevada law, a valid offer occurs where one party promises to make payment or perform an action in exchange for a return promise or payment.[46] Here, sufficient evidence was presented at trial for a jury to find that Milton offered $500,000 in exchange for naming the school the Milton I. Schwartz Hebrew Academy in perpetuity as to the 1989 Agreement and/or that the school offered Milton the naming rights set forth in the 1996 Sabbath Letter in exchange for his future contributions and involvement as to the 1996 Agreement. For example, the records of the school reflect and memorialize that Milton offered $500,000 in exchange for perpetual naming rights.[47] In addition, the board members of the school in 1989 all testified that the Decedent offered a donation in exchange for naming the school the Milton I. Schwartz Hebrew Academy in perpetuity.[48] Indeed, the Decedent likewise recalled the terms of the deal.[49] The fact that the board members had different recollections from each other and the records of the school is immaterial for purposes of a directed verdict.[50]

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[46] *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85 (1961). cf. Gulf Oil Corp. v. Clark County, 94 Nev. 116, 118, 575 P.2d 1332, 1333 (1978); McCone v. Eccles, 42 Nev. 451, 457, 181 P. 134, 136 (1919).

[47] *See*, Trial Ex. 118 at Ex. A attached thereto (donation spreadsheet); Trial Ex. 3 (08/22/1990 Certificate of Amendment of the Articles of Incorporation of The Hebrew Academy); Trial Ex. 17 (04/13/1999 Bylaws).

[48] *See*, ATT Ex. 1, 08/23/2018, Testimony of Lenard Schwartzer ("Schwartzer Testimony") at 82:24-83:25 ("Q. So, in addition to a half million dollars that he donated, he also had friends he also solicited friends for donations as well? A. He was the main – the main fundraiser. I mean, if there was a million dollars raised, he raised nine hundred thousand of it or 800,000 of it everybody else donated a couple thousand dollars and maybe got another friend to donate a thousand but he got people to donate $200,000. Q. What did the school give in return? A. Well, the board agreed to name the school the Milton I. Schwartz Hebrew Academy. Q. How long? A. My recollection is in perpetuity, meaning forever."); ATT 08/24/18 347: 7-13 ("Q. Dr. Sabbath what was your understanding of the agreement? A. The agreement was quid pro quo of the donation, which I had remembered would be a million dollars. And to have the school be named after him in perpetuity. And that was the spirit of what the board intended."); ATT Ex. 7, 08/31/18, Testimony of Dr. Tamar Lubin Saposhnik ("Lubin Testimony") at 14:11-18 ("Q. The school. Mr. Schwartz, correct me if I'm wrong, but he gave the school a half million dollars and then he orchestrated the financing of the $1.5 million. What did he get in return from the school? A. He got to have his name on the school. Q. Would that be for in perpetuity? A. Yeah.").

[49] *See*, Trial Ex. 134 (03/31/1993 Second Supp. Aff. Milton I. Schwartz at ¶ 5 ("The 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. That subsequent to that donation being made the By-Laws were changed to specifically raise the fact and that as a result of the change, Article I, Paragraph 1 of the By-Laws read "The name of this corporation is the Milton I. Schwartz Hebrew Academy (hereinafter referred to as The Academy) and shall remain so in perpetuity.")

[50] *See, Bliss v. DePrang*, 81 Nev. 599, 602, 407 P.2d 726, 727-28 (1965) ("where there is testimony that is conflicting on material issues, the court should not direct a verdict….A directed verdict is proper only in those instances where the evidence is so overwhelming for one party that any other verdict would be contrary to the law.")

Likewise, sufficient evidence was presented at trial for a jury to render a verdict that the 1996 Roberta Sabbath letter constituted a separate offer by the school to provide Milton perpetual naming rights in exchange for his renewed participation with the school.[51]

Accordingly, the Court should permit the jury to determine whether one or more offers existed to support the finding of an enforceable contract and provide the jury with Nevada Civil Jury Instruction 13CN.6.[52]

b. Sufficient Evidence of Acceptance Exists.

Under Nevada law, valid acceptance of an offer occurs where a party manifests mutual assent by accepting the terms and conditions set forth in the offer without modification or alteration.[53] Here, sufficient evidence was presented at trial for a jury to find that the school accepted the Milton's 1989 Agreement. For example, the school records reflect that it accepted the Decedent's donation of $500,000 and performed in like regard by amending the bylaws, the articles of incorporation and the title to the property.[54] Further, Dr. Sabbath testified that by accepting the checks from Milton she and the board intended to be bound by the promise that the school would be named MISHA in perpetuity.[55] The varying testimony of the individual board members as to

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[51] *See, e.g.,* Trial Ex. 14 (Minutes 05/19/96); Trial Ex. 139 (05/23/1996 Sabbath Letter); ATT Ex. 3, 08/27/18, Testimony of Dr. Robert Sabbath ("Sabbath Testimony") at 34:8-15: ("Q. Dr. Sabbath, to your knowledge and understanding what was the board's intent by sending this letter to Milton Schwartz? A. I believe I said that earlier we were trying to rebuild bridges and goodwill, as well as credibility in not only the Jewish community by the community at large, and one of the first important steps was reaching back out to our biggest donor. Q. And to your knowledge, as a result of this letter, did Mr. Schwartz come back and get involved with the school again? A. Yes.").

[52] 13CN.6 ("FORMATION: OFFER An offer is a promise to do or not do something on specified terms that is communicated to another party under circumstances justifying the other party in concluding that acceptance of the offer will result in an enforceable contract. [A party making an offer may revoke the offer at any time before acceptance of the offer, by communicating notice of revocation of the offer to the party or parties to whom the offer was made before the communication of an acceptance of the offer by a party to whom the offer was made.").

[53] *See, Keddie v. Beneficial Insurance, Inc.*, 94 Nev. 418, 421-22, 580 P.2d 955, 956 (1978) (Batjer, C.J., concurring). *See also McCone v. Eccles*, 42 Nev. 451, 457, 181 P. 134, 136 (1919); *Morrill v. Tehama Consolidated Mill & Mining Co.*, 10 Nev. 125, 136 (1875).

[54] *See*, Trial Ex. 112 (08/14/1989 Minutes accepting Decedent's donation); Trial Ex. 121 (11/29/1990 Minutes resolving to amend bylaws to change the name of school to MISHA in perpetuity); Trial Ex. 5 (12/19/90 Bylaws at Art. 1 ¶1 ("Name: The name of this corporation is The Milton I. Schwartz Hebrew Academy (hereinafter referred to as The Academy) and shall remain so in perpetuity."); Trial Ex. 118 (Building Fund Pledges 07/01/88—02/21/90)).

[55] See, ATT Ex. 2, 08/24/18, Sabbath Testimony at 345:19-346:19 ("Q. So in your capacity as representing the board, did you agree to accept the money that Mr. Schwartz gave you in exchange for perpetual naming rights to the school? A. That

what performance was accepted is irrelevant as the corporate records reflect the acceptance of a $500,000 donation without any further obligations for performance.[56]

Likewise, sufficient evidence was presented at trial to send the matter to the jury that Milton accepted the school's 1996 Agreement, which resulted renewed participation, contributions, and, ultimately, the bequest set forth in his 2004 Last Will.[57] Therefore, the Court should permit the jury to determine whether acceptance occurred for the 1989 Offer and/or the 1996 Offer to support the finding of an enforceable contract and provide the jury with Nevada Civil Jury Instruction 13CN.7.[58]

c. <u>Sufficient Evidence of Contractual Intent/"Meeting of the Minds" Exists.</u>

Under Nevada law, the parties possess requisite contractual intent or "meeting of the minds" where the parties have agreed upon the terms and conditions of performance.[59] Here, sufficient evidence was presented at trial for a jury to find that both Milton and the school intended the 1989

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was the gentleman's agreement. And we were representing the board and the intention of the board and the goodwill that generous gift engendered. Q. But did you agree to be bound by that promise that the school would be named for him in perpetuity? A. I did not personally agree to be bound. As a board member, that was the intention that I understood. Q. Of the whole board? A. Yes.").

[56] *See, e.g.*, NRS 82.196 and 82.201 (corporate resolutions and bylaws constitute actions of the corporation). *See also*, *Barnhardt v. Gray,* 15 Cal. App. 2d 307, 311, 59 P.2d 454, 456 (1936)(individual acts of board members do not bind corporation unless authorized by board."

[57] *See, e.g.*, ATT Ex. 2, 08/24/2018, Testimony of Susan Pacheco ("Pacheco Testimony") at 270:20-21 and 271:1-6 ("Q: Do you know how this letter came about, why it was sent to Mr. Schwartz? A. It came about because Mr. Schwartz wanted his name back on the school. He wanted it in perpetuity. He wanted to be back on the board as well."); *Id.* at 278:1-15 and 278:1-18; ATT Ex. 3, 08/27/2018, Schwartz Testimony at 121:3-6 ("Q. Are you aware of any actions that your father took after receiving the letter? A. He went back on the board, and he started resuming donations to the school."); Trial Ex. 103B (1990 donations totaling $10,000); Trial Ex. 103D (2000 donation of $1,800); Trial Ex. 103A (2004 donation of $135,278)(example of Milton donations from Pacheco spreadsheet); Trial Ex. 628 (05/13/2003 Minutes reflecting donations from Milton); Trial Ex. 22 (Last Will at par. 2.3); Trial Ex. 20/638 (05/13/2013 The Milton I. Schwartz Hebrew Academy Minutes (minutes reflecting Milton's participation and involvement).

[58] 13CN.7 ("FORMATION: ACCEPTANCE An acceptance is an unqualified and unconditional assent to an offer without any change in the terms of the offer, that is communicated to the party making the offer in accordance with any conditions for acceptance of the offer that have been specified by the party making the offer, or if no such conditions have been specified, in any reasonable and usual manner of acceptance. A qualified or conditional acceptance or one that changes any terms of the offer is a rejection of the offer that terminates the offer, and is a counteroffer, which, in turn, must be accepted without any qualifications, conditions or changes in terms for a contract to be formed.").

[59] *See, James Hardie Gypsum (Nevada) Inc. v. Inquipco*, 112 Nev. 1397, 1402, 929 P.2d 903, 906-07 (1996) (case has since been overruled); Hotel Riviera, Inc. v. Torres, 97 Nev. 399, 400-01, 632 P.2d 1155, 1157 (1981); *Morrill v. Tehama Cons. Mill & Mining Co.*, 10 Nev. 125, 134 (1875); *Hillyer v. The Overman Silver Mining Co.*, 6 Nev. 51, 56-7 (1870).

Agreement to be binding. For example, all parties involved at the time concur that they mutually intended to be bound by the 1989 Agreement to name the school MISHA in perpetuity in consideration for Milton's donation.[60] Although witnesses provided varying testimony as to the term "school," such ambiguity does not render the contract void for lack of meeting of the minds.

Likewise, the evidence presented indicates a mutuality of intent to be bound by the terms and conditions set forth in the 1996 Offer as memorialized in the 1996 Sabbath Letter.[61] As such, the Court should permit the jury to determine whether the parties formed the requisite contractual intent or "meeting of the minds" regarding the 1989 Offer and/or the 1996 Offer to support the finding of an enforceable contract by providing the jury with Nevada Civil Jury Instruction 13CN.8.[62]

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[60] *See supra* fn. 31, 40 and 41. *See also,* ATT Ex. 1, 08/23/2018, Schwartzer Testimony at 82:24-83:25 ("Q. So, in addition to a half million dollars that he donated, he also had friends he also solicited friends for donations as well? A. He was the main – the main fundraiser. I mean, if there was a million dollars raised, he raised nine hundred thousand of it or 800,000 of it everybody else donated a couple thousand dollars and maybe got another friend to donate a thousand but he got people to donate $200,000. Q. What did the school give in return? A. Well, the board agreed to name the school the Milton I. Schwartz Hebrew Academy. Q. How long? A. My recollection is in perpetuity, meaning forever."); ATT Ex. 2, 08/24/2018, Sabbath Testimony at 347: 7-13 ("Q. Dr. Sabbath what was your understanding of the agreement? A. The agreement was quid pro quo of the donation, which I had remembered would be a million dollars. And to have the school be named after him in perpetuity. And that was the spirit of what the board intended."); ATT Ex. 7, 08/31/2018, Lubin Testimony at 14:11-18 ("Q. The school. Mr. Schwartz, correct me if I'm wrong, but he gave the school a half million dollars and then he orchestrated the financing of the $1.5 million. What did he get in return from the school? A. He got to have his name on the school. Q. Would that be for in perpetuity? A. Yeah."); Trial Ex. 134 (03/31/1993 Second Supp. Affidavit of Milton I. Schwartz at ¶ 5 ("The 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. That subsequent to that donation being made the By-Laws were changed to specifically raise the fact and that as a result of the change, Article I, Paragraph 1 of the By-Laws read "The name of this corporation is the Milton I. Schwartz Hebrew Academy (hereinafter referred to as The Academy) and shall remain so in perpetuity."); Trial Ex. 112 (08/14/1989 Minutes accepting Decedent's donation); Trial Ex. 384 (11/29/1990 Minutes (resolving to amend bylaws to change the name of school to MISHA in perpetuity); Trial Ex. 5 (12/19/90 Bylaws at Art. 1 ¶1 ("Name: The name of this corporation is The Milton I. Schwartz Hebrew Academy (hereinafter referred to as The Academy) and shall remain so in perpetuity."); Trial Ex. 118 (Building Fund Pledges 07/01/88—02/21/90)).

[61] *See*, *supra* fn. 41 and 47. *See, e.g.,* Trial Ex. 14 (05/19/1996 Minutes); Trial Ex. 139/139A (05/23/1996 Sabbath Letter; ATT Ex. 3, 08/27/2018, Sabbath Testimony at 34:8-15 ("Q. Dr. Sabbath, to your knowledge and understanding what was the board's intent by sending this letter to Milton Schwartz? A. I believe I said that earlier we were trying to rebuild bridges and goodwill, as well as credibility in not only the Jewish community by the community at large, and one of the first important steps was reaching back out to our biggest donor. Q. And to your knowledge, as a result of this letter, did Mr. Schwartz come back and get involved with the school again? A. Yes."). *See also*, *supra* fn. 55. *Further see*, Trial Ex. 19 (02/11/2003 Minutes); Trial Ex. 32 (11/08/2006); Trial Ex. 639 (06/10/2003 Minutes)(minutes reflecting Milton's participation and involvement) and Trial Ex. 536A (2000-2001 Capital and Annual Gifts).

[62] 13CN.8 ("FORMATION: CONTRACTUAL INTENT A contract requires a "meeting of the minds," that is, the parties must assent to the same terms and conditions in the same sense. However, contractual intent is determined by the objective

d. Sufficient Evidence of Consideration Exists.

Under Nevada law, valid consideration occurs where "a performance or return promise … is sought by the promisor in exchange for his promise and is given by the promise in exchange for that promise."[63] Here, sufficient evidence exists for a jury to find that the 1989 Offer constituted bargained for consideration. Specifically, the evidence unequivocally demonstrates that Milton's donation was a bargained for exchange for receiving perpetual naming rights to the school as to the 1989 Agreement.[64] For example, Dr. Sabbath specifically testified that Milton's donation was directly proffered in exchange for a promise to name the school MISHA in perpetuity.[65] Milton similarly testified under penalty of perjury that the donation was provided directly in exchange for the school's promise to be named MISHA in perpetuity.[66]

Moreover, the 1996 Sabbath Letter could be considered either a modification or memorialization of the terms of the 1989 Agreement,[67] or separately constitute a 1996 Agreement, that is supported by separate consideration of an offer to perform actions with respect to naming rights in exchange for future participation and contributions.[68]

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meaning of the words and conduct of the parties under the circumstances, not any secret or unexpressed intention or understanding of one or more parties to the contract.").

[63] *See, Pink v. Busch*, 100 Nev. 684, 688, 691 P.2d 456, 459 (1984); *County of Clark v. Bonanza No. 1*, 96 Nev. 643, 650-51, 615 P.2d 939, 943-44 (1980); *Walden v. Backus*, 81 Nev. 634, 637, 408 P.2d 712, 714 (1966).

[64] *See*, *supra* fn. 32.

[65] *See,* ATT Ex. 2, 08/24/2018 Sabbath Testimony at 346:4-11 ("Q. So in your capacity as representing the board, did you agree to accept the money that Mr. Schwartz gave you in exchange for perpetual naming rights to the school? A. That was the gentleman's agreement. And we were representing the board and intention of the board and the goodwill that the generous gift engendered.").

[66] *See, supra* fn. 45.

[67] *See*, e.g., *Jensen v. Jensen*, 104 Nev. 95, 98, 753 P.2d 342, 344 (1988); *Joseph F. Sanson Inv. Co. v. Cleland*, 97 Nev. 141, 625 P.2d 566 (1981); *Clark County Sports Enterprises, Inc. v. City of Las Vegas*, 96 Nev. 167, 172, 606 P.2d 171, 175 (1980); *Silver Dollar Club v. Cosgriff Neon*, 80 Nev. 108, 110-11, 389 P.2d 923, 924 (1964); see also, *J.A. Jones Const. Co. v. Lehrer McGovern Bovis, Inc.*, 120 Nev. 277, 294-95, 89 P.3d 1009, 1020-21 (2004). _____ parties ok to modify terms or define/memorialize terms to contract.

[68] *See,* Trial Ex.139/139A, 05/23/1996 Sabbath Letter; ATT Ex. 3, 08/27/2018, Sabbath Testimony at 34:8-19 ("Q. Dr. Sabbath, to your knowledge and understanding what was the board's intent by sending this letter to Milton Schwartz. A. I believe I said that earlier we were trying to rebuild bridges and goodwill, as well as credibility in not only the Jewish community but the community at large, and one of the first important steps was by reaching back out to our biggest donor. Q. And to your knowledge, as a result of this letter, did Mr. Schwartz come back and get involved with the school again? A. Yes.").

Further, even if Milton's promise to participate and contribute in the future would be considered insufficient consideration, the doctrine of promissory estoppel would still render the 1996 Agreement enforceable.[69] Specifically, sufficient evidence has been presented that the school knew that and intended for Milton to act on the 1996 Sabbath Letter that formed the basis of the 1996 Agreement,[70] Milton believed that the 1996 Agreement was an enforceable promise to name the school after him in perpetuity,[71] and he relied upon that belief to his detriment by donating to the school and leaving a $500,000 bequest in his Last Will.[72] Accordingly, the Court should permit the jury to determine whether consideration or consideration substitute existed as to the 1989 Offer and/or the 1996 Agreement to support the finding of an enforceable contract and provide the jury with Nevada Civil Jury Instructions 13CN.9,[73] 13CN.10,[74] and 13CN.15.[75]

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[69] *See*, e.g., *Pink v. Busch*, 100 Nev. 684, __, 691 P.2d 456, __ (1984) ("Promissory estoppel, of course, can be used as a "consideration substitute" to support the release of liability under a guaranty contract."(citing Tally v. Atlanta Nat. Real Estate Trust, 146 Ga.App. 585, 246 S.E.2d 700 (1978)).

[70] *See*, *supra* fn. 67.

[71] *See,* Trial Ex. 134 at par. 5.

[72] *See*, Trial Ex. 103B (1990 donations totaling $10,000); Trial Ex. 103D (2000 donation of $1,800); Trial Ex. 103A (2004 donation of $135,278); Trial Ex. 22 (Last Will).

[73] 13CN.9 ("FORMATION: CONSIDERATION Consideration is either money paid or some other benefit conferred (or agreed to be conferred) upon the party making the promise, or an obligation incurred or some other detriment suffered (or agreed to be suffered) by the party to whom the promise is made. Promises by the parties that are bargained for and given in exchange for each other constitute consideration, but to constitute consideration, a performance or return promise must be bargained for. A performance or return promise is bargained for if it is sought by the party making the promise in exchange for the promise made and is given in exchange for that promise. However, a benefit conferred or detriment incurred in the past is not adequate consideration for a present bargain, and consideration is not adequate when it is a mere promise to perform that which the party making the promise is already legally obligated to do.")

[74] 13 CN.10 ("FORMATION: PROMISSORY ESTOPPEL If there is no consideration for a promise but the promisor acted in a matter in which the promisor should reasonably expect to induce reliance and which does induce detrimental reliance that is foreseeable, reasonable and serious, the promise is enforceable if injustice can be avoided only by enforcing the promise.").

[75] 13 CN.15 ("ALTERATION: MODIFICATION Parties to a contract may modify the contract, but all parties to the contract must agree to the new terms. An oral agreement can modify a written contract even if the written contract states that any modification of its terms must be in writing. To prove modification, there must be clear and convincing evidence of: 1. A written or oral agreement of the parties to modify the contract; or 2. Conduct of the parties that recognizes the modification, such as a course of performance that reflects the modification; or 3. Other evidence sufficient to show the parties' agreement to modify their contract, such as acquiescence in conduct that is consistent with the modification and a failure to demand adherence to the original contract terms.").

2. Sufficient Evidence as to the Certainty of the Terms of an Agreement Exist.

As set forth above, the Estate has demonstrated substantial evidence from which a jury could enter a finding that a sufficiently definite and enforceable contract exits through the integration of multiple writings and the parties' performance. Although Milton's naming rights agreement(s) are not set forth in a single formal written agreement, Nevada law does not require complete or formal terms bur rather only certain minimal terms to constitute a binding contract.[76] Further these minimal terms may be: (i) implied by the parties' performance and course of conduct;[77] (ii) formed through integration of several documents;[78] and (iii) supplemented by subsequent writings.[79] Therefore, the Court should permit the jury to determine whether the 1989 Offer and/or the 1996 Offer are sufficiently definite and enforceable by providing the jury with Nevada Civil Jury

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[76] *See, In Estate of Kern*, 107 Nev. 988, 991, 823 P.2d 275, 277 (Nev. 1991)(only minimal terms such as "such as subject matter, price, payment terms, quantity and quality" are necessary for existence of enforceable agreement).
[77] *See, Warrington v. Empey*, 95 Nev. 136, 590 P.2d 1162 (1979); *Smith v. Recrion Corp.*, 91 Nev. 666, 541 P.2d 663 (1975).
[78] *See, Lincoln Welding Works, Inc. v. Ramirez*, 98 Nev. 342, 345, 647 P.2d 381, 383 (1982); *Haspray v. Pasarelli*, 79 Nev. 203, 208, 380 P.2d 919, 921 (1963); *Chung v. Atwell*, 103 Nev. 482, 484, 745 P.2d 370, 371 (1987); *Blosser v. Wilcox*, 83 Nev. 124, 424 P.2d 886 (1967).
[79] *See, May v. Anderson*, 121 Nev. 668, 119 P.3d 1254 (2005); *Tropicana Hotel Corp. v. Speer*, 101 Nev. 40, 692 P.2d 499 (1985); *Loma Linda University v. Eckenweiler*, 86 Nev. 381, 469 P.2d 54 (1970); *Dolge v. Masek*, 70 Nev. 314, 268 P.2d 919 (1954); *Micheletti v. Fugitt*, 61 Nev. 478, 489, 134 P.2d 99, 103-04 (1943).

Instructions in the following order: 13CN.13,[80] Rev. Ariz. Jury Instr. (Civil) 4th Contracts 26,[81] 13CN.12,[82] 13CN.11,[83] and 13CN.20.[84]

3. <u>The Issue of Whether an Enforceable Oral Agreement Exists Should Proceed to the Jury.</u>

For the reasons previously set forth in Section III of this Opposition, the Court should permit the jury to determine whether the 1989 Agreement and/or the 1996 Agreement are valid oral contracts. In so determining, sufficient evidence also exists for the jury to determine when inquiry notice occurred and whether equitable estoppel tolled the running of the statute of limitations.

Under Nevada law, a cause of action does not accrue for statute of limitations purposes until "the plaintiff discovers or should have discovered ALL of the necessary facts constituting a

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[80] 13 CN.13 ("FORMATION: UNCERTAINTY To be enforceable, a contract must be sufficiently definite and certain that the contract's exact meaning can be determined and the legal liability of the parties can be fixed. If any of the essential terms of a contract are left for future determination, there is no binding contract until all essential terms have been determined. However, if an essential term is uncertain, but the contract provides a means or formula by which the essential term can be determined, or the parties' performance has rendered the uncertain term definite and certain, then the contract becomes enforceable.").

[81] REVISED ARIZONA JURY INSTRUCTIONS (CIVIL) 4th, Contracts 26. "DETERMINING INTENT OF PARTIES In deciding what a contract provision means, you should attempt to determine what the parties intended at the time that the contract was formed. You may consider the surrounding facts and circumstances as you find them to have been at the time that the contract was formed. To determine what the parties intended the terms of a contract to mean, you may consider the language of the written agreement; the acts and statements of the parties themselves before any dispute arose; the parties' negotiations; any prior dealings between the parties; any reasonable expectations the parties may have had as the result of the promises or conduct of the other party; and any other evidence that sheds light on the parties' intent."

[82] 13CN.12 ("FORMATION: NEGOTIATIONS Preliminary negotiations do not constitute a binding contract unless the parties have agreed upon all material terms, but a contract can be formed when all the material terms are definitely understood and agreed upon, even though the parties intend to sign a writing later that includes all of the essential terms of the contract. If the parties agree that the terms of a contract must be reduced to writing and signed before the contract is effective, then there is no binding agreement on any of the terms of the contract until the written agreement is signed. However, if the parties have orally agreed on all material terms and conditions of a contract and that their agreement is binding, but also agree that a formal written contract embodying the terms and conditions of their agreement will be prepared and signed later, then the oral agreement is binding regardless of whether or not a written contract is subsequently signed [, unless the law requires that the contract be in writing].").

[83] 13CN.11 ("FORMATION: IMPLIED CONTRACTS A contract may be implied as well as express. For an implied contract, the existence and terms of the contract are inferred from the conduct of the parties, but both an express and implied contract require a manifestation by the parties of an intent to contract and an ascertainable agreement.").

[84] 13CN.20 ("A single contract may consist of two (or more) separate documents. Two (or more) separate writings may be sufficiently connected by evidence contained in the documents themselves without any express references. The character of the subject matter and the nature of the terms may show that two (or more) writings refer to the same transaction and state the terms thereof when construed together. Where one document makes other writings a part of the contract by annexation or reference, all such writings are to be construed together, but if a reference to another writing is made for a particular and specified purpose, the other writing becomes a part of the contract for that specified purpose only.").

conspiracy claim."[85] "In order to demonstrate inquiry notice, the defendant must demonstrate plaintiff acquired information that suggested the 'probability' [of the injury] not merely the 'possibility.'"[86] However, inquiry notice is tolled and a party is estopped from asserting the statute of limitations where the defendant concealed from the plaintiff material facts thereby preventing the plaintiff from discovering a potential cause of action.[87]

Here sufficient evidence exists for the jury to determine when the Executor was placed on inquiry notice sufficient to trigger the Nevada's four-year statute of limitations for an oral agreement[88] and whether such notice was tolled by the Adelson School's conduct. For example, although the Executor testified that he saw the Adelson Campus sign until March of 2010,[89] evidence was also presented that the School Head, Paul Schiffman, represented to the Executor that the sign only applied to the Adelson High School and the school further misled the Executor by sending multiple items of "embarrassing" correspondence bearing the Milton I. Schwartz Hebrew Academy ("MISHA") logo, even though the School had changed its name and had discontinued use of letterhead bearing the MISHA logo.[90] Accordingly, the Court should instruct the jury as to

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004324

[85] *See, Siragusa v. Brown*, 114 Nev. 1384, 1391-92, 971 P.2d 801, 806-07 (1998). *See also Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983) ("[A litigant] discovers his legal injury when he knows, or, through the use of reasonable diligence, should have known of the facts that would put a reasonable person on inquiry notice of his cause of action.").

[86] *de la Fuente v. DCI Telecommunications, Inc.,* 206 F.R.D. 369, 381 (S.D.N.Y. 2002) (emphasis added) (citing *Lenz v. Associated Inns and Restaurants Co. of America*, 833 F.Supp. 362, 371 (S.D.N.Y.1993)).

[87] *See, Harrison v. Rodriguez*, 101 Nev. 297, 299, 702 P.2d 1015, 1016-17 (1985) ("If the jury were to find that the statements were made with the intent to mislead [plaintiff] as to the total amount [defendant] would pay, or to cause him to refrain from filing suit, such an intent could give rise to an estoppel to assert the statute of limitations as a defense."); *Mahban v. MGM Grand Hotels, Inc.*, 100 Nev. 593, 596, 691 P.2d 421, 423 (1984) (equitable estoppel occurs where defendant's affirmative conduct, consisting of either acts or representations, misleads another who is ignorant of the true facts and relies on such acts or representations to his detriment); *Copeland v. Desert Inn Hotel*, 99 Nev. 823, 825-27, 673 P.2d 490, 491-92 (1983) (equitable tolling may apply where a defendant deceived or provided false assurances to plaintiff); *Fager v. Hundt*, 610 N.E.2d 246, 251 (Ind. 1993) (stating that a defendant is estopped "from asserting the statute of limitations when he has, either by deception or by a violation of a duty, concealed from the plaintiff material facts thereby preventing the plaintiff from discovering a potential cause of action.") (internal quotations and citations omitted).

[88] NRS 11.190(2)(c): Except as otherwise provided in NRS 40.4639, 125B.050 and 217.007, actions other than those for the recovery of real property, unless further limited by specific statute, may only be commenced as follows: … Within 4 years: …An action upon a contract, obligation or liability not founded upon an instrument in writing."

[89] *See*, *supra* fn. 10.

[90] *See*, *supra* fn. 15.

004324

these issues by providing jury instructions similar to 13CN.39[91] and providing an instruction(s) substantially similar to "ORAL OR WRITTEN CONTRACT TERMS: Contracts may be partly written and partly oral. Oral contracts are just as valid as written contracts."[92]

4. **The Issue of Whether an Agreement Is Founded Upon an Instrument in Writing Should Go to the Jury.**

Additionally, sufficient evidence also exists for the jury to determine whether the 1989 Offer and/or the 1996 Offer are founded upon an instrument in writing sufficient to fall under the six-year statute of limitations under NRS 11.190(1)(b).[93] Under Nevada law, two or more documents may be considered together to establish an instrument in writing.[94] Here, sufficient evidence exists for the jury to determine that the 1989 Agreement is founded upon an instrument in writing.[95] Similarly, sufficient evidence exists for the jury to determine that the 1996 Agreement is founded upon an instrument in writing.[96] Accordingly, the Court should instruct the jury as to these issues by providing the following jury instruction 13CN.20[97] and providing an instruction(s) substantially

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[91] 13CN.39 ("PERFORMANCE/BREACH: EQUITABLE ESTOPPEL A party cannot assert legal rights that, in equity and good conscience, they should not be allowed to assert because of their conduct [including their silence]. In order to prove that a party is so precluded from asserting their legal rights, the other party must prove that: 1. The party to be precluded was aware of the true facts; 2. The party to be precluded intended that their conduct [including their silence] be acted upon or acted in such a way that the other party had a right to believe that the conduct was so intended; 3. The party seeking preclusion was ignorant of the true facts; and 4. The party seeking preclusion has relied to their detriment on the conduct of the party to be precluded from asserting their legal rights. However, the party to be precluded need not have had actual knowledge of the true facts if their affirmative conduct, consisting of either acts or representations, has misled another.").

[92] CACI 304 ("Oral or Written Contract Terms. [Contracts may be written or oral.] [Contracts may be partly written and partly oral.] Oral contracts are just as valid as written contracts."

[93] NRS 11.190(1)(b): "An action upon a contract, obligation or liability founded upon an instrument in writing, except those mentioned in the preceding sections of this chapter."

[94] *See, Lincoln Welding Works, Inc. v. Ramirez*, 98 Nev. 342, 345, 647 P.2d 381, 383 (1982); *Edwards Industries, Inc. v. DTE/BTE*, Inc., 112 Nev. 1025, 1032-33, 923 P.2d 569, 574 (1996); Haspray v. Pasarelli, 79 Nev. 203, 208, 380 P.2d 919, 921 (1963). See also *Webster v. Beazer Homes Holdings Corp.*, 02:11-CV-00784-LRH, 2013 WL 271448, at *4–5 (D. Nev. Jan. 23, 2013) (noting that receipts, invoices, acknowledgments are sufficient writings for 6 year statute to apply); *Lande v. Southern California Freight Lines*, 193 P.2d 144, (Cal.App. 1948) ("but oral or written evidence may be received to establish the terms of the contract or agreement between the parties. . . . A so-called partly written and partly oral contract is in legal effect a contract, the terms of which may be proven by both written and oral evidence.")

[95] *See, supra* fn. 38.

[96] *See, supra* fn. 39.

[97] 13CN.20 ("INTERPRETATION: MULTIPLE WRITINGS A single contract may consist of two (or more) separate documents. Two (or more) separate writings may be sufficiently connected by evidence contained in the documents themselves without any express references. The character of the subject matter and the nature of the terms may show that two (or more) writings refer to the same transaction and state the terms thereof when construed together. Where one

similar to the following: "In the State of Nevada the statute of limitations for an oral contract is four years. This means that the Estate of Milton I. Schwartz must have commenced its breach of oral contract claim against the School within four years of discovering the School's breach of any alleged agreement. In the State of Nevada the statute of limitations for a contract founded upon an instrument in writing or writings is six years. This means that the Estate of Milton I. Schwartz must have commenced its breach of contract claim founded upon a writing(s) against the School within six years of learning of the School's breach of any alleged agreement."[98]

5. <u>The Determination of Whether a Breach Occurred Should Go to the Jury</u>

Under Nevada law, a defendant breaches an agreement when plaintiff has performed and defendant materially fails or refuses to perform its contractual obligations.[99] Here, sufficient evidence was presented to enable the jury to find that Milton performed his obligations under the 1989 Agreement[100] and/or the 1996 Agreement.[101] Accordingly, this Court should instruct the jury regarding Adelson's breach of contract by providing an instruction substantially similar to 13CN.42.[102]

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004326

document makes other writings a part of the contract by annexation or reference, all such writings are to be construed together, but if a reference to another writing is made for a particular and specified purpose, the other writing becomes a part of the contract for that specified purpose only.").

[98] *See, McNelton v. State*, 115 Nev. 396, 409, 990 P.2d 1263, 1272 (1999); NRS 11.190(1)(b).

[99] NGA #2 Ltd. Liability Co. v. Rains, 113 Nev. 1151, 946 P.2d 163 (1977); Goldston v. AMI Investments, Inc., 98 Nev. 567, 655 P.2d 521 (1982); Canepa v. Durham, 62 Nev. 417, 153 P.2d 899 (1944).

[100] *See, e.g.*, Trial Ex. 113 (checks); Trial Ex. 112 (08/14/1989 Minutes; Trial Ex. 3 (08/22/1990 Certificate of Amendment of Articles of Incorporation of The Hebrew Academy); Trial Ex. 384 (11/29/1990 Minutes); Trial Ex. 5 (12/19/1990 Bylaws; Trial x. 118 (01/18/1990 Minutes and attached donor spreadsheet showing that Milton's pledge of $500,000 was accepted and extinguished).

[101] *See,* Trial Ex. Trial Ex. 113 ($500,000 donation); Trial Ex. 103A ($135,277 in donations); Trial Ex. 103B ($10,000 in donations); Trial Ex. 103C ($5,000 donation); Trial Ex. 103D ($1,800 donation).

[102] 13CN.42 ("PERFORMANCE/BREACH: MATERIAL BREACH If one party materially fails or refuses to perform their contractual obligations or materially delays their performance until after their performance was due, then the other party is no longer obligated to perform and has a claim for damages resulting from the first party's breach of contract. A failure or refusal to perform is material if it defeats the purpose of the contract, makes it impossible to accomplish that purpose, or concerns a matter of such prime importance that the contract would not have been made if such a failure to perform had been foreseen. A delay in performance is material only if the time of performance was made of the essence (that is, timely performance was made of vital importance) by the express language of the contract or by its importance under the circumstances. A failure or refusal to perform, or a delay in performance, that is not material does not excuse the other party from performing their obligations under the contract, but gives that party a claim for damages resulting from the failure or delay in performance.").

6. Whether Adelson Campus Committed Separate Breaches Occurred Should Go to the Jury.

Where a party commits separate successive injuries, each such separate injury constitutes a new action for the accrual of the statute of limitations.[103] Here, sufficient evidence was presented for a jury to determine that the Adelson Campus engaged in multiple, separate breaches including changing the corporate name and removing Milton's name from the building.[104] Accordingly, the Court should permit this issue to proceed to the jury and issue an instruction substantially similar to the following, "SEPARATE BREACHES: The Estate maintains that the Adelson School has engaged in wrongful conduct that constitutes separate causes of action for breach of contract. For the jury to find separate causes of action, it must find that the Adelson School's conduct violated separate and independent obligations under an agreement."

7. Implied Covenant of Good Faith and Fair Dealing.

Nevada law imposes in every contract an implied covenant of good faith and fair dealing.[105] Here, sufficient evidence exists for the jury to determine that even if the Adelson Campus complied with the technical requirements of the 1989 Agreement and/or 1996 Agreement it breached the covenant of good faith and fair dealing when changing the corporate name, removing the MISHA

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[103] *See, Roemmich v. Eagle Eye Development, LLC*, 386 F.Supp.2d 1089 (D. ND 2005) (recognizing that when there is a recurring cause of action involving separate and successive injuries, the new action accrues and the statute of limitations begin to run from the date of each cause of action) (citing *Young v. Young*, 709 P.2d, 1254, 1259 (Wyo. 1985)); Allapattah Services, Inc. v. Exxon Corp., 188 F.R.D. 667, 680 (S.D. Fla. 1999), aff'd, 333 F.3d 1248 (11th Cir. 2003) ("To decide the propriety of invoking the continuous breach doctrine for evaluating the time of accrual of a cause of action, the Court must first determine whether the contract is continuous or severable in nature. Where the nature of the contract is continuous, statutes of limitations do not typically begin to run until termination of the entire contract. However, if the nature of the contract is severable, the statutes of limitations generally commence to run on each severable portion of the contract when a party breaches that portion of the contract."); Builders Supply Corp. v. Marshall, 88 Ariz. 89, 95–96 (1960) ("A 'cause of action accrues' – in the terms of the statute of limitations – each time defendant fails to perform as required under the contract.").

[104] *See,* Trial Ex. 51 (03/21/2008 Certificate of Amendment to Articles of Incorporation), ATT Ex. 5, 08/29/2018, Shiffman Testimony at 88:5:17 ("Q. Mr. Shiffman, were you ever instructed by the board to remove the Milt Schwartz signage from the building? A. Yes. Q. Can you tell me when that was? A. I can't remember the exact date. Q. Was it after the lawsuit was filed? A. Yes. Q. Do you remember why? A. It was the board's feeling if there was going to be a lawsuit filed that they wanted the name to be removed from the building and the portrait to be taken down.")

[105] *See, Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*, 107 Nev. 226, 232-34, 808 P.2d 919, 922-24 (1991).

logo and taking name off building.[106] Accordingly, the Court should allow the issue to proceed to the jury by providing an instruction substantially similar to 13CN.44.[107]

8. <u>The Determination of Contract Damages Should go to the Jury.</u>

Nevada law permits the Estate to recover damages against the Adelson School upon a finding of breach.[108] While a plaintiff bears the burden of proving both the fact and amount of damages, such "need not be met with mathematical exactitude, but there must be an evidentiary basis for determining a reasonably accurate amount of damages."[109] Here, sufficient evidence exists to permit the jury to find determine the existence and amount of damages suffered by the Estate.[110] Accordingly, the Court should permit the issue to proceed to the jury and issue

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[106] *See,* Trial Ex. 51 (03/21/2008 Certificate of Amendment to Articles of Incorporation, Trial Ex. 43 (12/13/2007 Resolution of the Board of Trustees), Trial Ex. 172 (08/03/2018 Affidavit of Christopher Butler, Office Manager at Internet Archieve). *See also*, ATT Ex. 5, 08/29/2018, Shiffman Testimony at 88:5-17 ("Q. Mr. Shiffman, were you ever instructed by the board to remove the Milt Schwartz signage from the building? A. Yes. Q. Can you tell me when that was? A. I can't remember the exact date. Q. Was it after the lawsuit was filed? A. Yes. Q. Do you remember why? A. It was the board's feeling if there was going to be a lawsuit filed that they wanted the name to be removed from the building and the portrait to be taken down.").

[107] i. 13CN.44 ("PERFORMANCE/BREACH: IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING In every contract there is an implied promise of good faith and fair dealing, obligating the parties to pursue their contractual rights in good faith and not engage in arbitrary, unfair acts that interfere with any other party receiving the benefits of the contract. This obligation is independent of the express provisions of the contract. Consequently, if the terms of the contract are literally complied with, but one party to the contract deliberately contravenes the intention and spirit of the contract, or performs their contractual obligations in a way that is unfaithful to the purpose of the contract and the justified expectations of the other party to the contract are thereby denied, there is a breach of the implied duty of good faith and fair dealing.").

[108] *See, Dynalectric Co. of Nevada, Inc. v. Clark & Sullivan Constructors, Inc.*, 127 Nev. 480 (2011) (citing Restatement (Second) of Contracts § 344(b) (1981)).

[109] *See, Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co. Inc.*, 105 Nev. 855, 857, 784 P.2d 954, 955 (1989).

[110] *See, e.g.*, Trial Ex. 113 ($500,000 donation); Trial Ex. 103A ($135,277 in donations); Trial Ex. 103B ($10,000 in donations); Trial Ex. 103C ($5,000 donation); Trial Ex. 103D ($1,800 donation). *See also,* Trial Ex. 536A (2000-2001 Capital and Annual Gifts).

004328

instructions substantially similar to 13CN.46,[111] 13CN.48[112] and the following custom instruction: "RELIANCE DAMAGES: In Nevada, a plaintiff can recover reliance damages for breach of a contract or in reliance on a promise. Reliance damages attempt to restore the damaged party to the position he or she would have occupied if the breached contract or promise had never been made."[113]

9. <u>The issue of additional remedies such as specific performance should go to the jury in an advisory capacity</u>

Nevada law permits a jury to determine an issue if previously consented to by the parties, or in the capacity of an advisory jury if directed by the Court. *See* NRCP 39(c).[114] Here, this Court has previously entered orders stating that all matters shall proceed to jury trial from which the Adelson Campus had not challenged in the ordinary course.[115] Additionally, the Estate has

[111] 13CN.46 ("DAMAGES: MEASURE OF DAMAGES The measure of damages for a breach of contract is that amount which will reasonably compensate an injured party for all the detriment, harm or loss naturally flowing from the breach and which was reasonably foreseeable (that is, which might have been reasonably contemplated by the parties) as the probable result of the breach when the contract was made, together with any additional damages which resulted from special circumstances known or which should have been known to the breaching party when the contract was made. If the contract was one entire contract that was enforceable as to its future performance and not divisible into separate promises each made in exchange for a separate consideration, then the damages awarded should be sufficient to place the injured party in the position that they would have been in had the entire contract been fully performed, but the injured party is not entitled to damages in a greater amount or duplicate awards for the same detriment, harm or loss. If the contract was divisible or terminable at will or could not be performed or enforced as to its future performance, then the damages awarded should only make the injured party whole for the detriment, harm or loss they suffered while the contract terms were being performed. Generally, damages are to be measured as of the date the contract was breached. However, if special circumstances give rise to damages resulting from the breach that are greater than existed on the date of the breach, then damages may be measured as of a date different than the date of breach.").

[112] 13CN.48 ("DAMAGES: UNCERTAINTY AS TO AMOUNT A party seeking damages has the burden of proving both that they did, in fact, suffer injury and the amount of damages resulting from that injury. The amount of damages need not be proved with mathematical exactitude, but the party seeking damages must provide an evidentiary basis for determining a reasonably accurate amount of damages. There is no requirement that absolute certainty be achieved; once evidence establishes that the party seeking damages did, in fact, suffer injury, some uncertainty as to the amount of damages is permissible. However, even if it is provided by an expert, testimony that constitutes speculation not supported by evidence is not sufficient to provide the required evidentiary basis for determining a reasonably accurate award of damage.").

[113] *See, Dynalectric Co. of Nevada, Inc. v. Clark & Sullivan Constructors*, Inc., 127 Nev. 480 (2011) (citing Restatement (Second) of Contracts § 344(b) (1981)).

[114] NRCP 39(c): "Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion may try any issue with an advisory jury or, the court, with the consent of all parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right."

[115] *See, e.g.,* 06/10/16 Second Order Setting Civil Jury Trial; 01/25/16 Order Setting Civil Jury Trial; 03/30/17 Order Setting Civil Jury Trial; 12/15/17 Order Setting Civil Jury Trial; 05/11/18 Adelson Campus Motion to Continue Trial (recognizing that "this matter is currently scheduled to be heard on a four week stack" citing to the 12/15/17 Order Setting Civil Jury Trial). *See also, 3300 Partners, LLC v. Advantage 1, LLC*, 410 P.3d 981 (table), 2018 WL 678465 at *1 (Nev. 2018) (noting that a party's laches may prevent it from objecting to a jury trial for issues no triable right otherwise exists); *Broadmax v. City of New Haven*, 415 F.3d 267, 270-272 (2nd Cir. 2005) (holding defendant's failure to object to plaintiff's demand for jury trial on equitable remedy was deemed consent to non-advisory jury determination under FRCP 39(c)); *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 501 (7th Cir. 2000) (holding that failure to object to a jury trial constitutes consent to trial

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requested an advisory jury for the issue of specific performance.[116] As stated in the prior sections, sufficient evidence was presented at trial to enable a jury to determine that Adelson Campus breached its agreement(s) with Milton. Where such breach occurs, specific performance may be an appropriate remedy.[117] Accordingly, the Court should permit the issue to proceed to the jury and provide the following instruction: "SPECIFIC PERFORMANCE ELEMENTS When a damages award would be inadequate for a breach of contract, specific performance may be an appropriate remedy. Specific performance is remedy whereby the court issues an order requiring a party to perform a specific act. In Nevada, the remedy of specific performance is available where: (1) The terms of the contract are definite and certain; (2) The remedy at law is inadequate; and (3) The party has tendered performance."[118]

10. <u>The Issue of Mistaken Intervivos Gift Should Go to the Jury</u>

Nevada law provides that an intervivos gift may be rescinded where the donor has made a unilateral mistake such that "but for the mistake, the transaction in question would not have taken place."[119] Here, adequate evidence exists to enable a jury to determine that at the various times Milton made donations to the Milton I. Schwartz Hebrew Academy, he did so under the mistaken belief that the school would bear his name in perpetuity and that but for such mistaken belief, Milton would not have made those gifts.[120] Accordingly, the Court should permit the jury to make a factual

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by jury under 39(c), noting "for purposes such as this, implied consent is as good as express consent"); *Simonelli v. U.C. Berkeley*, 2007 WL 3144863, *4 (N.D.Cal. 2007) ("where plaintiff made timely jury demand for equitable remedies case at bar Plaintiff made a timely jury demand for a non-jury claim, his claim for lost wages, an equitable remedy. Defendants did not object and therefore implied their consent to a jury trial of this claim.").

[116] *See* Opposition to Motion for Partial Summary Judgment Regarding Breach of Contract and Countermotion for Advisory Jury, 07/06/18.

[117] *See, Dynalectric Co. of Nevada, Inc. v. Clark & Sullivan Constructors, Inc.*, 127 Nev. 480, 485, 255 P.3d 286, 289 at fn. 7 (2011) (citing Restatement (Second) of Contracts § 359 (1981)); *Mayfield v. Koroghli*, 124 Nev. 343, 351,184 P.3d 362, 367-68 (2008).

[118] *Id.*

[119] *See, In re Irrevocable Trust Agreement of 1979*, 130 Nev.Adv.Op. 63, 331 P.3d 881, 887 (2014).

[120] *See,* Trial Ex. 5 (12/19/1990 Bylaws); Trial Ex. 8 (07/27/1992 Bylaws); Trial Ex. 134, (03/31/1993 Second Supplemental Affidavit of Milton I. Schwartz); Trial Ex. 17 (04/13/1999 Bylaws). *See also,* ATT Ex. 3, 08/27/2018, Schwartz Testimony at 111:22-112:10 ("Q. Now, Jonathan, what was your understanding of what your father believed the terms of his agreement with the school were? A. That the school was going to be named the Milton I. Schwartz Hebrew Academy in perpetuity, and that with that agreement, there were naming rights over the entire campus on Hillpointe, that his name was going to be on the letterhead of the school, his name was going to be on the pediment of the building. His name was going to be at the entrance to the school. I specifically recall the former sign at the entrance of the school. And that the school was going to be publicly be known as the Milton I. Schwartz Hebrew Academy forever."). *See id* at 129:20-24 ("Q. What were the discussions you had with your father concerning 2.3? A. That he wanted $500,000 to go to the Milton I. Schwartz Hebrew Academy, and that he didn't want it to go anywhere else.").

finding as to Milton's intent and mistaken belief at the time the intervivos gifts were made by providing the following instruction: "Nevada recognizes two types of mistakes that may occur when someone makes a gift during their lifetime: (1) invalidating mistakes and; (2) mistakes in the content of a document. "An invalidating mistake occurs when 'but for the mistake the transaction in question would not have taken place.'" Rescission of a gift is an appropriate remedy to address an invalidating mistake."[121]

11. <u>The issue of Mistaken Bequest Should Go to the Jury.</u>

Nevada law similarly provides that a mistaken bequest may be reformed or rescinded where the donor has made a unilateral mistake with respect to the bequest.[122] Here, adequate evidence exists to enable a jury to determine that at the time Milton executed his Last Will in 2004, he made a gift to the Milton I. Schwartz Hebrew Academy under the mistaken belief that the school would bear his name in perpetuity and, but for such mistaken belief, Milton would not have made the bequest.[123] Accordingly, the Court should permit the jury to make a factual finding as to Milton's intent and mistaken belief at the time the bequest to the Milton I. Schwartz Hebrew Academy was made in 2004: Our Proposed Custom Instruction: "A mistake may cause a gift to be made in a will that otherwise would not have been made. The mistake must be such that except for the mistaken belief, the person making the will would not have made the gift."[124]

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[121] *See,* In re Irrevocable Trust Agreement of 1979, 331 P.3d 881 (Nev. 2014) (citing Restatement (Third) of Restitution & Unjust Enrichment § 5 (2011); Restatement (Third) of Prop.: Wills & Other Donative Transfers § 12.1 (2003)).

[122] *See, Concannon v. Winship*, 94 Nev. 432, 434, 581 P.2d 11, 13 (1978). *See also* Restatement (Second) of Property, Don. Trans. § 34.7 (1992)

[123] *See*, Trial Ex. 22 (02/05/2004 Last Will). *See also,* ATT Ex. 3, 08/27/2018, Schwartz Testimony at 111:22-112:10 ("Q. Now, Jonathan, what was your understanding of what your father believed the terms of his agreement with the school were? A. That the school was going to be named the Milton I. Schwartz Hebrew Academy in perpetuity, and that with that agreement, there were naming rights over the entire campus on Hillpointe, that his name was going to be on the letterhead of the school, his name was going to be on the pediment of the building. His name was going to be at the entrance to the school. I specifically recall the former sign at the entrance of the school. And that the school was going to be publicly be known as the Milton I. Schwartz Hebrew Academy forever."). *See id* at 129:20-24 ("Q. What were the discussions you had with your father concerning 2.3? A. That he wanted $500,000 to go to the Milton I. Schwartz Hebrew Academy, and that he didn't want it to go anywhere else.")

[124] Restatement (Second) of Property, Don. Trans. § 34.7 (1992).

12. The Issue of Offset Under Will Should Go to the Jury.

An executor is entitled to offset a testator's bequest against amounts owed to the testator by the beneficiary.[125] Here, if the jury determines that the Adelson Campus breached an agreement with Milton and determines that the bequest in 2.3 is otherwise valid, this Court should instruct the jury to offset the amount of the bequest against the value of the bequest by providing an instruction substantially similar to the following: "Setoff is a doctrine used to extinguish the mutual indebtedness of parties who each owe a debt to one another. In fact, the claims that give rise to a setoff need not arise out of the same transaction; they may be entirely unrelated. If you find that the Estate of Milton I. Schwartz is indebted to The Dr. Miriam and Sheldon G. Adelson Educational Institute for the $500,000 bequest, and that The Dr. Miriam and Sheldon G. Adelson Educational Institute is likewise indebted to the Estate of Milton I. Schwartz for the gifts that Milton I. Schwartz made during his lifetime, you should offset any amounts owed accordingly."[126]

VI. CONCLUSION

For the above and foregoing reasons, the Court should deny the Adelson Campus' Motion for Directed Verdict.

DATED this 13th day of August, 2018.

SOLOMON DWIGGINS & FREER, LTD.

/s/ -- Alan D. Freer

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[125] *See In re Smith's Estate*, 179 Wash. 417 (1934) (concluding a debt due from heir "may nonetheless be retained and offset against the heir's share of the estate" because "[t]he right of an executor to retain a legacy or distributive share and apply such indebtedness against a distribution has long been recognized by the law.").

[126] *See Aviation Ventures, Inc. v. Joan Morris, Inc.*, 121 Nev. 113, 119, 110 P.3d 59, 63 (2005) (footnote omitted).

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September, 2018, service of the foregoing THE ESTATE'S MOTION FOR RECONSIDERATION OF: THE COURT'S ORDER GRANTING SUMMARY JUDGMENT ON THE ESTATE'S CLAIM FOR BREACH OF ORAL CONTRACT -AND- *EX PARTE* APPLICATION FOR AN ORDER SHORTENING TIME was electronically served on counsel for the Dr. Miriam and Sheldon G. Adelson Educational Institute via the Court's electronic filing system.

/s/ -- Sherry Curtin-Keast

An employee of Solomon Dwiggins & Freer, Ltd.

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Attorneys for A. Jonathan Schwartz,
Executor of the Estate of Milton I. Schwartz

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of: MILTON I. SCHWARTZ, Deceased	Case No.: 0707P061300 Dept.: 26/Probate Hearing Date: Hearing Time:

THE ESTATE'S MOTION FOR JUDGMENT AS A MATTER OF LAW REGARDING CONSTRUCTION OF WILL

A. Jonathan Schwartz, Executor of the Estate of Milton I. Schwartz ("Executor"), by and through his counsel, Alan D. Freer, Esq. and Alexander G. LeVeque, Esq., of the law firm of Solomon Dwiggins & Freer, Ltd., hereby submits the Executor's Motion for Judgment as a Matter of Law ("Motion") pursuant to NRCP 50(a) on the Estate's First Claim for Relief ("Construction of Will"). This Motion for Reconsideration is made and based upon the pleadings and papers on file herein, the attached Memorandum of Points and Authorities, all attached exhibits, and any oral argument that this Honorable Court may entertain at the time of hearing.

DATED this 3rd day of September, 2018.

SOLOMON DWIGGINS & FREER, LTD.

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Attorneys for A. Jonathan Schwartz,
Executor of the Estate of Milton I. Schwartz

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NOTICE OF MOTION

TO: All Interest Parties; and

TO: All Counsel of Records

PLEASE TAKE NOTICE that A. Jonathan Schwartz, Executor for the Estate of Milton I. Schwartz, deceased, will be bringing the foregoing MOTION FOR JUDGMENT AS A MATTER OF LAW REGARDING CONSTRUCTION OF WILL on for decision on the 4 day of October, 2018 at 9:30 a.m./~~p.m.~~ in front of the above-entitled Court.

Dated this 3rd day of September, 2018

SOLOMON DWIGGINS & FREER, LTD.

/s/ -- Alan D. Freer

By:_____

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The uncontroverted evidence in this case is that in the Decedent, Milton I. Schwartz, drafted section 2.3 of his Last Will with the intention to only benefit an entity bearing his name and not to any other entity. For example, the Executor testified that Milton wanted $500,000 to go to the Milton I. Schwartz Hebrew Academy, and that he didn't want it to go anywhere else; likewise, the Decedent directly expressed this belief in his sworn testimony that the school would be named "the Milton I. Schwartz Hebrew Academy in perpetuity." Similarly, Rabbi Lorne Wyne, the Decedent's friend and religious leader, testified that in 2004 Milton wanted his name associated with a gift due to religious beliefs. Further, the uncontroverted evidence shows that Decedent dictated knew and

understood the significance of a successor clause and chose to omit such clause when drafting the gift provided to the Milton I. Schwartz Hebrew Academy.

In contrast, the Adelson Campus has introduced no evidence to contradict the evidence of Milton's intent when drafting the provisions of Section 2.3.

Accordingly, the Court must enter judgment as a matter of law in favor of the Estate's first claim for relief pursuant to NRCP 50(a).

II.

LEGAL STANDARD FOR A MOTION FOR RECONSIDERATION

NRCP 50(a) permits a party to bring a motion or judgment as a matter of law after the presentation of evidence by the opposing party at trial or at the close of the case. Specifically, the Rule states:

> If during a trial by jury, a party has been fully heard on an issue and on the facts and law a party has failed to prove a sufficient issue for the jury, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.[1]

The Nevada Supreme Court authorizes a district court to grant relief under NRCP where the opposing party fails "to prove a sufficient issue for the jury" sufficient to maintain a claim under controlling law.[2] Although the district court must "view the evidence and all inferences in favor of the moving party,"[3] a directed verdict is appropriate "where the evidence is so overwhelming for one party that any other verdict would be contrary to law."[4]

III.

THE COURT MAY ENTER A DIRECTED VERDICT IN FAVOR OF THE ESTATE'S CLAIM FOR CONSTRUCTION OF THE WILL BECAUSE THE ADELSON SCHOOL HAS PRESENTED NO CONTRADICTORY EVIDENCE

The overwhelming evidence presented by the Estate is that Milton I. Schwartz understood and intended to provide his bequest solely to an entity bearing the name "Milton I. Schwartz Hebrew

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[1] *See*, Nev. R. Civ. P. 50(a)(1).
[2] *See, Nelson v. Heer*, 163 P.3d 420, 424 (Nev. 2007).
[3] *See, Chowdhry v. NLVH, Inc.*, 851 P.2d 459, 461-62 (Nev. 1993).
[4] *See, Bliss v. DePrang*, 81 Nev. 599, 602, 407 P.2d 726, 727-28 (1965).

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Academy." The polestar of the construction of a will is to divine the intent of the testator.[5] When construing a will, the interpretation of the testator's intent is governed by what the testator meant by the words used.[6]

In this case, section 2.3 of the Will provides:

> 2.3 The Milton I. Schwartz Hebrew Academy, I hereby give, devise and bequesath the sum of five hundred thousand dollars ($500,000.00) to the Milton I. Schwartz Hebrew Academy (the "Hebrew Academy"). This gift is to be in the form of securities (stocks, bonds or cash) with the largest profit sot that my estate can take advantage of the low cost basis and increased price as directed by my Executor in his sole discretion. 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 $500, 000.00 gift shall go first to reduce and or expunge the mortgage. In the event that the lender will not release my estate or my heirs, successors or assigns, no gift shall be given to the Hebrew Academy. 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.[7]

In its Petition for Declaratory Relief, the Executor has requested in his First Claim for Relief that the Court declare the bequest to the Milton I. Schwartz Hebrew Academy set forth in Paragraph 2.3 of the Last Will to be void on the grounds that Milton intended his gift to go solely to an entity bearing his name in perpetuity. Specifically, the Executor asserted that because "Milton's express intent as reflected in the will … was not to benefit a charitable organization generally, but to benefit an entity bearing his name perpetually," the Court should declare the $500,000 bequest lapses "[b]ecause there is no existing entity named after Milton I. Schwartz on a perpetual basis."[8]

Here the undisputed evidence at trial is that Milton understood and believed that the Milton I. Schwartz Hebrew Academy would bear his name "in perpetuity."[9] Further, Milton was an

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[5] *See, Adkins v. Oppio*, 105 Nev. 34, 36 (1989) (primary purpose in construing the terms of a testamentary document is to give effect, to the extent consistent with law and policy, to the intentions of the testator).
[6] *See, In re Jones' Estate*, 72 Nev. 121, 123, 296 P.2d 295, 296 (1956).
[7] *See*, Trial Ex. 22, Last Will at Par. 2.3.
[8] *See*, Trial Ex. 66, 05/28/2013 Petition for Declaratory Relief at 6:15-7:3.
[9] *See, e.g.*, Appendix of Trial Transcript ("ATT") at filed concurrently herewith, at Ex. 7, 08/27/2018, Jonathan Schwartz Testimony ("Schwartz Testimony") at 111:22-112:10 ("Q. Now, Jonathan, what was your understanding of

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intelligent and sophisticated[10] individual who drafted the very language of his own will.[11] Additionally, Milton understood the meaning and significance of a successor clause when preparing estate planning documents.[12]Indeed, he had used successor clauses when drafting a prior 1999 codicil:

> C. (1) If either of the two named recipients shall have ceased to exist at the time that this bequest takes effect, the sum of $250,000 shall go to the Jewish Federation of Las Vegas or its successor organization, to be used for the express purpose of educating Jewish Children.
>
> (2) I hereby direct that the funds distributed from the proceeds of my $500,000 gift be used only in the form of scholarships to be distributed by The Jewish Community Day School and the Milton I. Schwartz Hebrew Academy or their respective successor organizations in order to educate Jewish Children only.
>
> (3) If both the named recipients have ceased to exist at this time that this bequest takes effect, the entire sum of $500,000 shall go to the Jewish Federation of Las Vegas or its successor organization.
>
> (4) In the event that Provision C(1) or C(3) becomes effectuated, the Jewish Federation, or its successor organization, is hereby instructed to use the sum received in order to support Jewish education for

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what your father believed the terms of his agreement with the school were? A. That the school was going to be named the Milton I. Schwartz Hebrew Academy in perpetuity, and with that agreement there were naming rights over the entire campus on Hillpointe, that his name was going to be on the letterhead of the school, his name was going to be at the entrance to the school….And that the school was going to publicly be known as the Milton I. Schwartz Hebrew Academy forever."). Trial Ex. 134 (Second Supplemental Affidavit Milton I. Schwartz at par. 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.").

[10] *See*, ATT Ex. 2, 08/24/2018, Lenard Schwartzer Testimony ("Schwartzer Testimony") at 154:19-24 ("Q. Okay. Was it your understanding that he was a knowledgeable and sophisticated businessman? A. I would have come to that – I came to that conclusion, yes."); *see also* ATT Ex. 3, 08/27/201, Schwartz Testimony at 205:15-25 ("Q. And in fact, you testified under oath that your father was a genius, right? A. He was. Q. In fact, if you could put it in your dad's case what we might call a certifiable genius? A. He was it's not a description. He was certified as a genius. Took a test and certified it. Q. That's the MENSA that I was referring to in my opening statement? A. Correct.").

[11] *See*, ATT Ex. 3, 08/27/2018, Schwartz Testimony at 128:7-24 ("Q. Did you have any involvement with the drafting of this will? A. He dictated it to me. Q. Can you describe that situation where you were taking dictation? A. He took the preexisting copy of his will and all of the codicils to it and studied it for several days and called me into his office and dictated what he wanted. Q. Do you have an understanding as to why your father chose to dictate changes to his will to you as opposed to sending it to an attorney? A. He did send it to an attorney – outside attorney. He dictated it to me because it was easier, faster, and he had done it in the past, and had experience with doing it. Plus I did go to law school so I assume he wanted some return in his invested capital by having me do it.").

[12] *See*, ATT Ex. 3, 08/27/2018, Schwartz Testimony at 132:7-13 ("Q. Did your dad use a successor clause in any other -- actually, let me do this. Pull up paragraph 2.7. Did injure father know what a secretary says sore clause was? A. He absolutely did because he used it in other documents and instructed me to use it in other documents.")

> young Jewish people within the Las Vegas Jewish Community. The Jewish Federation is authorized to carry out this purpose in any manner that it deems appropriate, including using the sum received to create an endowment fund named the Milton I. Schwartz Endowment Fund that will distribute its assets in a manner that the Jewish Federation deems appropriate to carry out my stated charitable intent.[13]

Additionally, in section 2.7 of his Last Will, Milton expressly employs a successor clause when addressing gifts to other entities: "Termination of Gifts. I hereby terminate and revoke any gift to the following: Las Vegas Jewish Federation or any successor thereto; Las Vegas Jewish Federation Day School in Formation or any successor thereto…."[14]

Lastly, Milton intentionally chose not to use a successor clause when drafting section 2.3 of his Last Will because he understood and intended it to go only to an entity that would bear his name in perpetuity.[15] Likewise, when drafting his subsequent 2006 codicils, Milton also intentionally chose not to amend section 2.3 of his Last Will because he still believed that the Milton I. Schwartz Hebrew Academy was to be named after him in perpetuity.

In response, the only evidence that the Adelson School has remotely obtained is a yes-no question concerning whether the Executor that he believes Section 2.3 of the Last Will is not ambiguous.[16] However, when asked to elaborate why the Executor believes Section 2.3 of the Last Will is unambiguous, the Executor responded:

> Because of the language of the will and my conversations with my father about his intent. To me it's clear. To him it's clear. I think the language is clear. There is either Milton I. Schwartz Hebrew Academy or there isn't. In this case there isn't."[17]

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[13] *See*, Trial Ex. 141A, Second Codicil at Sec. 2.5(C).
[14] *See*, Trial Ex. 22 at sec. 2.7
[15] *See*, ATT Ex. 6, 08/27/2018, Schwartz Testimony at 137:8-18 ("Q. So given that your father understood how to draft language with respect to gifts and what happens if those entities cease to exist and having alternate gifts, why did your dad choose -- do you have an understanding as to why your dad chose not to include similar language in the 2004 will? A. If the Milton I. Schwartz Hebrew Academy didn't exist as the Milton I. Schwartz Hebrew Academy, he didn't want it going to any other school on that land. It was only supposed to go to a school named the Milton I. Schwartz Hebrew Academy.").
[16] *See*, ATT Ex. 3, 08/27/2018, Schwartz Testimony at 201:16-17 (Q. Just to be clear too, we have been talking about the will today. Some of the things we talked about was the will. But your confident, as you sit here today, that your father's will is not ambiguous, right? A. I don't believe it is.")
[17] *See*, ATT Ex. 6, 08/30/2018, Schwartz Testimony at 167:15-20.

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Accordingly, the undisputed expressed intention by Milton is that he intended the $500,000 bequest identified in Section 2.3 of his Last Will and Testament to be made only to an entity named after him and bearing the name "Milton I. Schwartz Hebrew Academy."

VI.

CONCLUSION

For the above and foregoing reasons, the Court should enter directed verdict in favor of the Estate's first claim for relief, Construction of Will.

DATED this 3rd day of September, 2018.

SOLOMON DWIGGINS & FREER, LTD.

/s/ -- Alan D. Freer
By:_____

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of September, 2018, service of the foregoing THE ESTATE'S MOTION FOR JUDGMENT AS A MATTER OF LAW REGARDING CONSTRUCTION OF WILL was electronically served on counsel for the Dr. Miriam and Sheldon G. Adelson Educational Institute via the Court's electronic filing system.

/s/ -- Sherry Curtin-Keast

An employee of Solomon Dwiggins & Freer, Ltd.

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DISTRICT COURT

CLARK COUNTY, NEVADA

IN THE MATTER OF THE ESTATE OF MILTON SCHWARTZ, Decedent.	CASE#: 07P061300 DEPT. XXVI

BEFORE THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE

TUESDAY, SEPTEMBER 4, 2018

RECORDER'S PARTIAL TRANSCRIPT: JURY INSTRUCTIONS

APPEARANCES:

For the Petitioner: ALAN D. FREER, ESQ.

For the Participant: JON RANDALL JONES, ESQ.

RECORDED BY: PATRICIA SLATTERY, COURT RECORDER

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Las Vegas, Nevada, Tuesday, September 4, 2018

[Hearing began at 9:59 a.m.]

THE COURT: -- 061300 for the purpose of settling jury instructions.

Let's start with you, State. Is counsel for the State familiar with the jury instructions numbered 1 through 45, which the Court intends to give?

MR. FREER: Yes, Your Honor.

THE COURT: With respect to the instructions that the jury -- that the Court is going to give, are there any objections to any instructions the Court is giving?

MR. FREER: With respect to the ones that the Court is giving, no, Your Honor.

THE COURT: Okay. So then with respect to the school, Mr. Jones, is the school familiar with the instructions numbered 1 through 45, which the Court will be giving?

MR. JONES: Yes, Your Honor.

THE COURT: With respect to the instructions the Court will be giving, do you have any that you wish to argue against or object to?

MR. JONES: No, Your Honor.

THE COURT: Okay.

Then, Mr. Freer, with respect to the instructions which the Court had refused to give, are there any which the Estate wishes to

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offer?

MR. FREER: Yes. The Estate wishes to offer --

THE COURT: And if you could give us a page number reference.

MR. FREER: Yes. The alteration modification, which was page 34 of the Estate's exhibits, we wish to offer that. You want a basis for the objection or just state it.

THE COURT: If you can give us those first, and then we'll go through them one-by-one.

MR. FREER: Okay. And then the second was Exhibit page number 41, breach of the implied covenant of good faith and fair dealing.

THE COURT: Okay. So with respect to your instruction on alteration, do wish to speak in favor of giving that instruction?

MR. FREER: Yes. Real briefly, Your Honor.

The -- we -- the Estate asserts that it has erred to not include that, because the facts show that there was a modification to the contract throughout the performance, as the evidence will show. We will believe it's error not to include that instruction.

With respect to the breach of the implied covenant and good faith, the Estate believes that it properly alleged this claim at pages 9 -- page 9, lines 12 through 16. And although it was not specifically pled as a claim, it believes that it is permitted under the Hilton Hotel's Birch Lewis [phonetic] case at footnote 5.

Thank you, Your Honor.

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THE COURT: Thank you.

All right. So with respect to the two proposed instructions from the Estate, Mr. Jones, does the school wish to argue against those?

MR. JONES: Just one, Your Honor. It was -- on our page 22 of our proposed instructions, it was the instruction with respect to ambiguity for a provision and a will to be ambiguous, there must be two instructions or interpretations which may be given to a provision of a will. It may be understood in more senses than one. Based on the evidence that was educed during trial, we believe that the instruction should be given.

THE COURT: All right. Do you have anything that you wish to say with respect to either of the instructions which the Estate is arguing in favor of, alteration and good faith and fair dealing?

MR. JONES: I'm sorry?

THE COURT: Did you wish to be heard at all on either of the instructions that the State offered -- the Estate offered, alteration of the contract terms or breach of the covenant of good faith and fair dealing?

MR. JONES: Only what we discussed off the record, Your Honor. I believe that those instructions are not appropriate under the circumstances and facts as they developed during the course of the trial and, therefore, should not be given.

THE COURT: And so, Mr. Freer, do you wish to be heard on the issue of ambiguity?

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MR. FREER: Yes, Your Honor. As we discussed off record, we believe that that instruction is an appropriate based on the other instructions that were previously provided and the evidence produced at trial. Thank you.

THE COURT: Okay. With respect to alteration, the Court has refused to give that instruction on the grounds that it's not relevant to the issues before the Court in this case. And so, for that reason, the Court is not going to give alteration. Similar with respect to good faith and fair dealing, there is no claim here for breach of good -- covenant of good faith and fair dealing. It's a very specific business tort that doesn't really apply to the facts that we have here, where we are arguing simply about a -- this thing where it's agreement and/or the intent of Mr. Schwartz under that when he wrote his will. So good faith and fair dealing doesn't really apply.

With respect to the school's request that we instruct on ambiguity, the Court has already found the will to be ambiguous and, for that reason, is not going to instruct on ambiguity.

The contract -- the other issues relating to the contract that are being argued and are being instructed on adequately cover the issue of missing terms, such that we don't need ambiguity with respect to the contract claim either.

So with those rulings, then as soon as the finalized packet has been provided to the Court, we'll mark our sets and bring the jury in to read these instructions.

MR. FREER: Thank you, Your Honor.

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MR. JONES: Thank you, Your Honor.

THE COURT: Okay. So we're going to need -- I'll get Len to put the specific pages, so we'll have a set of each.

[Court and clerk confer.]

[Recess taken from 2:12 p.m. to 3:30 p.m.]

THE COURT: All right. So let's go on the record. This is 061300. The jury is waiting. We're ready to bring them in as soon as we have confirmed our verdict form and jury instructions, as agreed.

The form of the verdict form that has been provided to me that I believe is the final one, the only problem with it was question 6. And question 6 had added to it, in addition to elementary school building, elementary school. Other than that, it is the same one that was --

MR. JONES: Mr. -- yes, Your Honor. Mr. Leveque asked that that be added. I had no objection to that.

THE COURT: So that's going to be put in the legal count for the jurors.

With respect to jury instructions, I've been handed a set of jury instructions that I believe are those that we have settled on. And so we'll number them for the record. And then the jurors will be -- we'll print copies of the final set for the jurors to take the deliberation room.

Instruction number 1. It is my duty as judge to instruct you.

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Number 2. If in these instructions any rule.

Number 3. Masculine form is used as in instructions.

4. One of the parties in this case is a nonprofit.

5. Nonprofit corporation X.

6. In proceedings, conclusions or actions of an individual board member.

7. If during the trial I've said or done anything.

8. The evidence you are to consider in this case consists of the testimony.

9. You must decide all questions of fact in this case from the evidence received.

10. Although you are to consider only the evidence in the case in reaching your verdict.

11. There are two kinds of evidence, direct and circumstantial.

12. In determining whether any proposition has been proved, you should consider all the evidence bearing on the question.

13. Credibility or believability of the witness.

14. Discrepancies in witness testimony.

15. The preponderance or weight.

16. You are the sole and exclusive judge of [indiscernible].

17. Whether in these instructions, clear and convincing evidence is that measure and degree of proof. Is that where we're

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putting it? Okay. I thought that was going somewhere else, but if that's where you want it, that's where we'll put it.

19. Milton Schwartz's claims for relief.

20. One of the claims is breach of contract.

21. Essential elements of breach of contract.

22. And enforceable contract requires.

23. An offer is a promise.

24. An acceptance is an unqualified and unconditional ascent.

25. A contract requires meeting of the minds.

26 Consideration is money paid.

27. A party adopts a contract.

28. A single contract may consist of more documents.

29. If one party materially fails.

30. A plaintiff can recover reliance damages.

31. A party seeking damages has the burden to prove.

32. One of the claims brought against the estate -- by the estate. Sorry. So that was 32.

33. If there is no consideration.

34. A promise giving rise to a cause of action.

35. Promissory estoppel.

36. One of the claims brought by the estate is void.

37. Unilateral mistake.

38. The campus seeks declaratory relief.

39. When construing the language of a will.

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40. It is your duty.

41. If during your deliberations.

42. When you retire to consider your verdict.

And 43. Now you will listen to the arguments of counsel.

Are we in agreement on the numbering?

MR. LEVEQUE: Yes, Your Honor.

THE COURT: Okay. All right. So we have a form of verdict which has been provided to the clerk. We have 43 instructions that have been numbered. And we just need to take down the closing arguments screen for the duration of reading. And then we're otherwise -- are we ready to have Mr. Lee bring in the jurors?

MR. JONES: Almost, Your Honor. Making sure we got everything right.

THE COURT: We need to review on the various motions that were pending. As indicated after a lengthy argument on Friday, my concern about granting a motion -- the motion to dismiss the contract claim is just the law of unintended consequences. In a vacuum, that would make sense. But where we need the various elements to be answered by the jury, because they are relevant to our second part of the case, which is the estate portion of the case, the probate portion of the case, I feel we need answers to some of those questions to be able to rule, as the Court will need to rule based on findings of facts that the jury makes. So I just don't see any way to cut them off from making those findings, because we

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need them for the various claims and/or remedies.

So similarly then, with respect -- we didn't really talk, Mr. Freer, about your motion. Kind of the same --

MR. FREER: Understood, Your Honor.

THE COURT: -- issue.

MR. FREER: And I think as Mr. Jones probably did the same thing, we did that to preserve it. We can always renew it as a JNOB after and argue about it at that point.

THE COURT: Okay. And so you had an opposition on your own motion?

MR. FREER: Yes.

THE COURT: Anything else that you filed. I think the only other thing was this, the order --

MR. JONES: It was just the proposed order [indiscernible].

THE COURT: Just the proposed order.

Anything else then, Mr. Jones, with respect to the fact that the parties are reserving all their arguments with respect to those motions? I just think we have to instruct the jury on all these issues, get their responses. I think the verdict form leads them as far as they are able to go. And then with their findings, if there's anything else, the Court rules on those as a matter of equity and/or probate law.

MR. JONES: Understood, Your Honor. I, of course, as you know -- and just for the record, we disagree as it relates to the contract claim, but I understand your ruling. And I made my record,

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and I appreciate that.

THE COURT: Thank you. Anything else? Are we ready then to have Mr. Lee bring the jurors in?

MR. FREER: Yes, Your Honor.

THE COURT: Okay.

So, Mr. Lee, do you want to bring the jurors in?

THE MARSHAL: Yes, Judge.

[Recess taken from 3:39 p.m. to 3:41 p.m.]

THE COURT: As always, we are in here working. And we are now prepared.

We have -- are ready now to go on the record in the case P061300, Estate of Milton Schwartz. We are here with counsel and their respective clients.

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And, Counsel, stipulate to the presence of our jury?

MR. JONES: Yes, Your Honor.

MR. LEVEQUE: Yes.

THE COURT: Okay.

Ladies and Gentlemen, as I just mentioned, we have been working diligently on jury instructions. I have to read these instructions to you, because these are the instructions you are going to follow as you deliberate and make findings of fact.

Yes, I do have to read them to you. I wish I didn't. But part of what has taken us so long is every word matters. And we need a record read into the record of what your instructions say as opposed to just the written form themselves. So I have to read, so

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that it can be recorded, everything that I'm telling you. And so, I apologize if I start going too fast. Raise your hand. Tell me to slow down or stop.

If you need to note that a certain instruction seemed relevant to you or you hear from counsel during their arguments that a certain instruction seemed relevant to you or you hear from counsel during the arguments that a certain instruction is particularly relevant, make a note of that on your paper. You don't have to copy these down word for word. You will have a set for each of you who deliberate in the jury room with you during your deliberations. So please keep in mind, just note a number if you think it's going to be relevant. You can go back and read it later. You don't have to write down the words yourself. You will have a written copy with you in the jury room.

After I've completed with these -- reading these jury instructions, counsel, as you note, because they both have claims, will each have an opportunity to make their closing statements. We'll start with Mr. Leveque and then Mr. Jones. And they'll each have an opportunity to make a wrap-up statement, at which time the jury is then released to discuss the matter and only at that time is the jury released to return to their jury room and discuss the matter. So we will go through all this, the instructions and the arguments of counsel, before it's in your hands. But we're there. So give us just a moment here. We're going to read you the jury instructions, and then we'll turn it over to counsel.

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And again, if somebody needs a break, let us know, and will take a break.

Ladies and Gentlemen of the jury, it is my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence. You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law are to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

If in these instructions any rule, direction, or idea is repeated or stated in different ways, no emphasis they are on is intended by me, and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others. What you are to consider all the instructions as a whole and regard each in the light of all the others. The order in which the instructions are given has no significance as to the relative importance.

3. The masculine form, as used in these instructions, if applicable, as shown by the text of instruction and the evidence, applies to a female person or corporation.

4. One of the parties in this corporation is a nonprofit corporation. A corporation is entitled to the same fair and unprejudiced treatment as an individual would be under the

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circumstances. And you should decide the case with the same impartiality you would use and deciding a case between individuals.

5. A nonprofit corporation acts through resolutions and decisions made by its board.

6. Any proceedings, conclusions, or actions of individual board members outside of an official meeting of the board acting as a board cannot be construed as legal actions by the school will be found to be binding upon the school unless the board directs an individual to so act.

7. If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or positions of any party, you will not be influenced by any such suggestion. I have not expressed nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, or what influence should be drawn.

We thought we had every typo. That's a typo. Okay. I'll read it the way it should read.

What facts are or are not established or what inference, not influence, what inference should be drawn from the evidence.

I apologize. Seriously. We thought we caught everything. This is what takes so long. We thought we had caught every single typo.

Okay. What inference should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating

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to any of these matters, I instruct you to disregard it.

8. The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted to or agreed upon by counsel. Statements, arguments, and opinions of counsel are not evidence in this case. You must not speculate to be true any insinuation suggested by a question asked of a witness. A question is not evidence and may be considered only as it supplies meaning to the answer. You must disregard any evidence to which an objection was sustained by the Court and any evidence ordered stricken by the Court. Anything you may have seen or heard outside the courtroom is not evidence. It must also be disregarded.

9. You must decide all questions of fact in this case from the evidence received in this trial and not from any other source. You must not make any independent investigation of the facts or the law, or consider or discuss facts as to which there is no evidence. This means, for example, that you must not, on your own, conduct experiments or consult reference works for additional information, as you know.

10. Although you want to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited to solely what you see and hear as the witnesses testify, you may draw reasonable inferences from the evidence which you feel are justified

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in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess. A verdict may never be influenced by sympathy, prejudice, a public opinion. Your decision should be the product of sincere judgment and sound discretion, in accordance with these rules of law.

11. There are two kinds of evidence, direct and circumstantial. Direct evidence is direct proof of the fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists even though it has not been proven directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence. It is for you to decide whether a fact has been proved by circumstantial evidence.

12. In determining whether any proposition has been proved, you should consider all the evidence bearing on the question without regard to which party produced it.

13. The credibility or believability of a witness should be determined by his or her manner up on the stand, his or her relationship to the parties, his or her fears, motives, interests, or feelings, his or her opportunity to have observed the matter to which he or she has testified, the reasonableness of his or her statements, and strength or weakness of his or her recollections. If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any

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portion of this testimony which is not approved by the evidence.

14. Discrepancies and a witness testimony or between his testimony and that of others, if there were any discrepancies, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience. An innocent miss recollection is not uncommon. It is a fact also that two persons witnessing an incident or transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

15. A preponderance or weight of evidence is not necessarily with the greater number of witnesses. The testimony of one witness where the of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary. If from the whole case, considering the credibility of witnesses, and after weighing the various factors of evidence you believe that there is a balance of probability pointing to the accuracy and honesty of the one witness, you should accept his testimony.

16. You are the sole and exclusive judges of believability of witnesses, and the weight to be given to the testimony of each witness. The credibility or believability of a witness should be determined by his or her manner upon the stand, his or her relationship to the parties, his or her fears, motives, interests and feelings, his or her opportunity to have observed that the matter to which he or she has testified, the reasonableness of his or her

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statements, and strength or weakness of his or her recollection. If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of this testimony which is not proved by other evidence.

17. Whenever in these instructions I state that the burden or the burden of proof rests upon a certain party to prove a certain allegation made by him, the burden of proof is the preponderance of the evidence unless you are otherwise instructed. The burden of proof turned preponderance of the evidence means such evidence, as when weighed with that opposed to it, has more convincing force and for which it appears the greater culpability of truth lies therein.

Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the jury a firm belief or conviction as to the allegations sought to be established. It is an intermediate degree of proof being more than the mere preponderance but not to the extent of such certainty as is required to prove an issue beyond a reasonable doubt. Proof by clear and convincing evidence is proof which persuades the jury that the truth of the contention is highly likely.

19. The Respondent, the Estate of Milton Schwartz, claim for relief are as follows: breach of contract, promissory estoppel, bequest void from mistake.

20. One of the claims brought by the Estate of Milton Schwartz against the Dr. Miriam and Sheldon G. Adelson Educational Institute is breach of contract.

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I will now instruct you on the law related to this claim.

21. The essential elements of the claim for breach of contract are:

1) the existence of an enforceable agreement between the parties;

2) Milton I. Schwartz's performance or ability to perform;

3) the school's unjustified or unexcused failure to perform; and,

4) damages resulting from the unjustified or unexcused failure to perform.

22. And enforceable contract requires:

1) an offer and acceptance;

2) a meeting of the minds; and,

3) consideration.

23. An offer is a promise to do or not to do something unspecified terms. It is communicated to another party by circumstances justifying the other party in concluding that acceptance of the offer will result in an enforceable contract.

24. An acceptance is an unqualified and unconditional ascent to an offer without any change in the terms of the offer that is communicated to the party making the offer in accordance with any conditions or acceptance of the offer that have been specified by the party making the offer, or if no such conditions have been specified in any reasonable and usual manner of acceptance.

25. A contract requires a meeting of the minds. That is,

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the parties must ascent to the same terms and conditions in the same sense. However, contractual intent is determined by the objective meaning of the words and conduct of the parties under the circumstances not in a secret or unexpressed intention of understanding of one or more of the parties to the contract.

26. Consideration is either money paid or some other benefit conferred or agreed to be conferred upon the party making the promise, or an obligation incurred, or some other detriment suffered or agreed to be suffered by the party to whom the promise has been made. Promises by the parties that are bargained for and given in exchange for each other constitute consideration. But to constitute consideration, a performance or return promise must be bargained for. A performance or return promise is bargained for if it is sought by the party making the promise in exchange for the promise made, and is given in exchange for that promise. However, a benefit conferred or a detriment incurred in the past is not adequate consideration for a present bargain. And consideration is not adequate when it is me a promise to perform that which the party making the promise is already legally obligated to do.

27. A party that adopts a contract that was made for the party's benefit or account with knowledge of the making of the contract and all material terms of the contract is bound to the contract's terms and entitled to all of its benefits. The party's intent to be bound by the contract may be evidenced by express agreement or inferred from the party's contract. My fault. Inferred

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from the party's conduct.

28. A single contract may consist of two or more separate documents. Two or more separate writings may be sufficiently connected by evidence contained in the documents themselves without any express references. The character of the subject matter and the nature of the terms may show that two or more writings refer to the same transaction and state the terms thereof when construed together. Where one document makes other writings a part of the contract by annexation or reference, all such writings are to be construed together. But if a reference to another writing is made for a particular and specified purpose, the other writing becomes a part of the contract for that specified purpose only.

29. If one party materially fails or refuses to perform their contractual obligations or materially delays their performance until after the performance was due, then the other party is no longer obligated to perform and has a claim for damages resulting from the first party's breach of contract. A failure or refusal to perform is material if it defeats the purpose of the contract, makes it impossible to accomplish that purpose, or concerns a matter of such prime importance that the contract would not have been made if such a failure to perform had been foreseen. A failure or refusal to perform or a delay in performance that is not material does not excuse the other party from performing their obligations under the contract but gives that party a claim for damages resulting from the failure or delay in performance.

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30. In Nevada, a Plaintiff can recover reliance damages for breach of a contract or in reliance on a promise. Reliance damage is attempt to restore the damaged party to the position he or she would have occupied if the breached contract or promise had never been made.

31. A party seeking damages has the burden of proving both that they did, in fact, suffer injury and the amount of damages resulting from that injury. The amount of damages need not be proved with mathematical exactitude, but the party seeking damages must prove -- provide an evidentiary basis for determining a reasonably accurate amount of damages. There is no requirement that absolute certainty be achieved. Once evidence establishes that the party seeking damages did, in fact, suffer an injury, some uncertainty as to the amount of damages is permissible.

32. One of the claims brought by the Estate of Milton Schwartz against the Dr. Miriam and Sheldon G. Adelson Educational Institute is for revocation of the $500,000 bequest and all other gifts during the lifetime of Milton Schwartz under the theory of promissory estoppel. I will now instruct you on the law of this claim.

33. If there is no consideration for a promise, but the promisor acted in a manner in which the promisor should reasonably expect to induce reliance, and which does induce detrimental reliance is foreseeable, reasonable, and serious, the promise is enforceable if injustice can be avoided only by enforcing

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the promise.

34. The promise giving rise to a cause of action for promissory estoppel must be clear and definite, unambiguous as to essential terms, and the promise must be made in a contractual sense.

35. The doctrine of promissory estoppel, which embraces the concept of detrimental reliance, is intended as a substitute for consideration and not as a substitute for the agreement between the parties.

36. One of the claims brought by the Estate of Milton I. Schwartz against the school is that bequest is void from mistake. I will now instruct you on the law relating to this claim.

37. A testator's unilateral mistake in executing a bequest may warrant relief from that bequest. And invalidating mistake occurs when, but for the mistake, the transaction in question would not have taken place. A testator's mistake must have induced the gift. It is not sufficient for the testator was mistaken about the relevant circumstances. A finding of unilateral mistake in the execution of a bequest begins on the testator's intent at the time of the execution of the testamentary instrument. The party advocating the mistake has the burden of proving the testator's intent and alleged mistake by clear and convincing evidence.

38. The Adelson campus seeks declaratory relief to compel the executor of the Milton I. Schwartz Estate to distribute the $500,000 bequest to the school that was set forth in Mr. Schwartz's

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will.

39. When construing the language of the well, the jury must determine what Milton I. Schwartz meant by the words used in or omitted from his will. When construing what Milton I. Schwartz meant, you may consider any evidence that explains what he has written or omitted. The question before the jury is not what the testator actually intended or what he meant to write but, rather, it is confined to a determination of the meaning of the words he used or omitted in his will.

40. It is your duty as jurors to consult with one another and to deliberate with a view towards reaching an agreement can do so without violence to your individual judgment. Each of you must decide the case for yourself, but you do so only after consideration of the case with your fellow jurors. And you should not hesitate to change your opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors or any of them they were such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors. Whatever your verdict is, it must be the product of careful and impartial consideration of all of the evidence in the case under the rules of law as given to you by the Court.

41. If during your deliberations you should desire to be

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further informed on any point of law or hear again portions of the testimony, you must reduce your request to writing signed by your foreperson. The officer, Mr. Lee, will then return you to court where the information sought will be given to you in the presence of the parties or their attorneys.

Read backs of testimony are time consuming and are not encouraged unless you deem it necessary. Should you require a read back, you must carefully describe the testimony to be read back, so that the court reporter can arrange his or her notes. Remember, the Court is not at liberty to supplement the evidence.

42. When you retire to consider your verdict, you must select one of your number to act as foreperson who will preside over your deliberations and will be your spokesperson here in court. During your deliberations, you will have all the exhibits which were admitted into evidence, these written instructions, and a special verdict form which has been prepared for your convenience.

In civil actions, three fourths of the total number of jurors may find and return a verdict. This is a civil case. As soon as six or more of you have agreed upon each answer required by the directions in the special verdict form, you must have the verdict signed and dated by your foreman and return with it to this room.

Now you listen to the arguments of counsel, who endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence, and by showing the application thereof to the law. But whatever counsel may say, you will bear in mind that it is

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your duty to be governed in your deliberations by the evidence as you are understand it and remember it to be, and by the law given to you in these instructions, and return a verdict which, according to your recent and candid judgment, is just and proper.

For the record, I'm signing and dating this the 4th day of September, given in open court.

[End of requested portion]

* * * * * * *

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

/s/ Antoinette M. Franks

Antoinette M. Franks, CET-683
Transcriber

Date: October 22, 2018

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DISTRICT COURT

CLARK COUNTY, NEVADA

IN THE MATTER OF THE ESTATE OF: MILTON SCHWARTZ	CASE#: 07P061300 DEPT. XXVI

004368

BEFORE THE HONORABLE GLORIA STURMAN
DISTRICT COURT JUDGE
TUESDAY, SEPTEMBER 4, 2018

004368

RECORDER'S PARTIAL TRANSCRIPT OF JURY TRIAL
CLOSING ARGUMENTS

APPEARANCES:

For the Petitioner:	ALAN D. FREER, ESQ.
For Jonathan A. Schwartz:	ALEX G. LEVEQUE, ESQ.
For The Dr. Miriam and Sheldon G. Adelson Educational Institute	JON RANDALL JONES, ESQ. JOSHUA D.E. CARLSON, ESQ. MADISON ZOMES-VELA, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

004368

INDEX

004369

004369

004369

Las Vegas, Nevada, Tuesday, September 4, 2018

[Designated proceedings begin at 4:02 p.m.]

THE COURT: At this point in time, ladies and gentlemen, you will now hear from counsel. And as mentioned previously, you'll hear first from Mr. Leveque on behalf of the Estate. You'll then hear from Mr. Jones on behalf of the School.

ESTATE CLOSING ARGUMENT

MR. LEVEQUE: Thank you, Your Honor. Well, it's not evening yet, so I guess I can say good afternoon. I just want to take a moment and thank you all for the time commitment that you've all invested in this trial. I fully understand -- we all fully understand that this is in large part an inconvenience with work and family obligations, so we really appreciate the fact that you've sat attentively thought this trial. And you know, the questions that you actually posed of every witness was a pretty good indication that you are -- you have been very attentive and that is very much appreciated certainly by my client and I can probably say on behalf of School as well.

Trials, in my mind, are very much like documentary movies, you know, producing a documentary movie. What occurs in trial is really only probably 2 percent of a case. And this case, as you all know, goes back to 2013. And there's been a lot of time investment on both sides for this case. And you know, just to give you an example, we were deliberating jury instructions. That's why it took so long to get in here today, but rest assured that we worked as efficiently and quickly as we

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could to get you in here. Sometimes things just take a while, so apologize for that, but we both have a duty to our clients to make sure that we're getting the law right before it's stated to you.

Judge Sturman indicated at the very beginning of this trial that is your right and responsibility to be a juror. And again, it's just very much appreciated that you've been taking this seriously. With respect to the Estate's claim in this case, it really is a breach of contract case. And the Judge just instructed you on breach of contract. I'm going to show you some jury instructions as my argument today on things that I would suggest you focus on.

And Judge Sturman also said that -- and I agree that this is an unusual case. This is a probate case with a contract component and we're going back in time 29, 30 years. So for that reason, you know, it's to be expected that witness are not going to have the exact same recollection of things that occurred 29, 30 years ago. And this isn't a typical type of contract. This isn't the type of contract where someone's upset about the size and shape and color of widgets that were purchased.

This is a very personal contract in nature. And it's a dispute over a family legacy. It is a very personal claim to my client, which is probably why you saw, we all saw a spectrum of emotions from Jonathan when he was being examined in this case. Jonathan has had to handle this and live with this case for well over a decade now. Unfortunately, the School and the Estate do not see eye to eye in this case and unfortunately, they weren't able to reach a decision on their

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own without having to go into court, so you're here to make decision for them. That's the -- the beauty of our system is that when two parties can't agree, a bunch of strangers come in and make the decision for them. So that's why you're here and that is your duty in this case.

I'm going to walk you through a PowerPoint that's going to go through some of the evidence in this that I believe proves the elements for our claim for breach of contract and some of the other evidence with respect to the claims concerning mistake under the will of promissory estoppel. One thing that I'd like to point out is the fact that we're going back 29, 30 years. We're talking about a School that is a lot smaller now than it is today.

We talked -- we examined a lot of witnesses that were on that board. Those witnesses were parents of students. It was a much different paradigm than Adelson campus is today. So I -- as we go through this, I'd like you to keep that in mind, that what the School was in 1989 is substantially different than what it is in 2018 and even going back to 2010 and 2013, where a lot of events occurred in this case.

Finally, after the PowerPoint, I'm going to walk through the verdict form and give you my suggestions on how I think the verdict form ought to be filled out. And I might have an opportunity, depending at the end, after Mr. Jones has an opportunity to speak with you to come up here once more on a lot shorter time chain to discuss any rebuttal points that might need to be discussed.

So without further adieu, we'll start right into the PowerPoint. And some of these slides are going to be very similar to the

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slides that you saw in opening, because now, instead of showing you what we intended to prove, now we can show you what we believe we did prove in this case. So we believe that we proved that there is a legally enforceable agreement between Milton and the School, and we believe that we've proved the School breached the agreement starting in December of 2007 and it continues to breach the agreement to this day. We also believe we've proved that Milton did not intend to leave the gift in his will to a school that did bear his name and that he wanted leave a $500,000 gift only to the Milton I. Schwartz Hebrew Academy and not to the Adelson campus.

Now, this is one of your jury instructions, and I believe it's Jury Instruction 28. It is. And this jury instruction talks about separate writings to form a contract and this is, in our opinion, one of the most important jury instructions in this case. If you all recall, when we went through voir dire, we asked a ton of questions about contracts, right? Because the general common understanding of a contract is a piece of paper where you've got a bunch of terms and it's signed by both parties and it's all black and white and there's nothing confusing about it. But under Nevada law, as this jury instruction states, a single contract may consist of two or more separate documents.

Two or more separate documents may be sufficiently connected by evidence contained in the documents themselves without any express references. The character of the subject matter and the nature of the terms may show that two or more writings, refer to the same transaction and state the terms thereof when construed together.

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Where one document makes other writings a part of the contract by annexation or reference, all such writings are to be construed together. But if a reference to another writing is made for a particular and specified purpose, the other writing becomes a part of the contract for that specified purpose only.

As to this case, we're going to go through the documents that we believe under this jury instruction that are separate documents form a single contract. The first thing we have are the three checks that Milton drafted and gave to the School. Two were from August 14th, 1989 and the one for 350 came a week later on August 23rd, 1989. They totaled $500,000 and if you wanted to look at this in the exhibit book when you go to deliberate, it's Exhibit 113. And by the way, I'm going to have exhibit numbers on everything. I'm not going to say what it is. If you think it's important, write it down. But to save some time, I'm not going to reference each one.

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And here we have an actual photo of the three checks being handed to Dr. Lubin and you can see that there are three checks. In addition to the checks, we also have the board meeting minutes from August 14th, the same day that two of the checks were issued. And in those minutes, a resolution was passed that stated a letter should be written to Milton Schwartz stating the academy will named [sic] after him. On August 22nd, 1990, the School did, in fact, amend its articles of incorporation to change the corporate name of the school to the Milton I. Schwartz Hebrew Academy.

On November 29th, 1990, the board resolved to amend its

004374

bylaws to name the corporation after the Milton I. Schwartz Hebrew Academy in perpetuity. Let me go back to that one for a minute, because the point was made that in these same minutes on November 29th, 1990, the motion was made to honor Dr. Lubin and that the name of the elementary school be named after her and that was also passed unanimously. I'm going to speak a little bit more about that, but what's important here in this Exhibit 121 is that there was no language with respect to perpetuity for the naming of Dr. Lubin's elementary school.

And following that resolution December of 1990, the board signed bylaws that stated the name of the corporation should be the Milton I. Schwartz Hebrew Academy in perpetuity. Now, the bylaws themselves are not a contract, but in -- and I'll talk a little bit more about amending bylaws and whether that's relevant or not. But you don't -- you can't just look at the bylaws themselves. You have to look at several documents to make a determination of whether it's a single contract and this document specifically says that the school is to be named the Milton I. Schwartz Hebrew Academy in perpetuity.

And it was signed. It was signed by a lot of people that testified in this case. Dr. Lubin signed it. Dr. Sabbath signed it. Dr. Pokroy signed it. Mr. Schwartzer signed it. So there is no dispute. This was signed by the board with the intent and purpose of naming the school after Mr. Schwartz in perpetuity. And even though the bylaws can be amended, the School cannot renege on its binding promises to Milton Schwartz. It just -- it wouldn't make sense.

Why would you draft bylaws, where you state something like

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this? That the School is to be named after someone in perpetuity and then say well, we don't really mean that, because we can amend the bylaws to completely eliminate it if we want to. And if it doesn't jive, that would be bad faith, and it's certainly not the intent of the School back in 1989 and 1990. And the bylaws, again, say nothing about Dr. Lubin and her elementary school. It only speaks about Mr. Schwartz and his naming rights.

A little bit about the elementary school that was temporarily named in honor of Dr. Lubin. First of all, the agreement implies that the entire school, everything about the school, was to be named after Mr. Schwartz in perpetuity. Unless you saw some sort of exclusionary provision anywhere that limited it, the implication is is that the entire School was to be named after Mr. Schwartz in perpetuity. And clearly Mr. Schwartz, as evidenced by the November 29th board meeting minutes, where he was present, had no problem with honoring Dr. Lubin by agreeing to name the elementary school grades after her.

And in fact, we had an exhibit in this case, the Estate's proposed Exhibit 123. These were the news articles where Mr. Schwartz was honoring Dr. Lubin for her excellence and dedicating the elementary school to her. But to give you an analogy, this is very similar to like owning a house and allowing one of your friends to stay in one of your rooms. It's still you're house, even though they're using one of your rooms. It's very similar in that respect. The school also signed a quitclaim deed transferring title to all the property, the 17 acres, from the Hebrew Academy to the Milton I. Schwartz Hebrew Academy in April of

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1991.

So to recap, under Jury Instruction 28, what was the contract? Three checks totaling a half million dollars, the August 14, 1989 board meeting, the pledge memo, which we haven't showed you yet, but you've seen it a million times. I'll get to it in a minute. The August 22nd, 1990 amendment to the articles. The November 29th, 1990 board meeting minutes. The December 19th, 1990 school bylaws, the April 9th, 1991 deed. The contract was clearly formed.

You heard from a lot of witnesses that confirmed the agreement. Heard from Sam Ventura, Lenny Schwartzer, Dr. Sabbath, Mr. Schwartz and Dr. Pokroy. All these people did not dispute that Milton named perpetual naming rights in exchange for donation efforts. Question was asked of Mr. Schwartzer, what was your understanding of why the School named the Milton I. Schwartz Hebrew Academy in perpetuity? His answer at trial.

> "Well, the fact that Milton Schwartz had donated a half million dollars and arranged for most of the other donations for the school and he was by far the largest supporter financially, the largest supporter of the school was the reason why we decided to name the school in his honor. I mean I think it was sort of a quid pro quo that in exchange for all he had done for the school we were naming the School in his honor."

He goes on and he testifies. In perpetuity means, in his opinion, anyway, "Which is for a long time, as long as the School exists."

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That was his understanding then and that's his understanding now. Mr. Schwartzer was asked about a letter that was not signed, but we admitted Exhibit 114 into evidence. I asked him a question.

"Is that document consistent with your recollection of how much Mr. Schwartz donated?"

His answer was, "Yes. The letter states that Hebrew Academy acknowledges and thanks for the generous gift tax of $500,000 to use in the Academy's building program for the construction of the new campus in Summerlin."

Then I asked another question. "Is that document consistent with your recollection of what the School gave in return?"

His answer,

"Yes. The letter states in appreciation and recognition of his give, the board of trustees of Hebrew Academy has decided to name the new campus the Milton I. Schwartz Hebrew Academy in perpetuity, so long as the Hebrew Academy exists and for so long as may be permitted by law, your name to be appropriately commemorated and memorialized on the academy campus."

Mr. Schwartzer also testified that the corporation's name was supposed to be the Hebrew Academy, that the land was owned by Milton I. Schwartz Hebrew Academy, that the building was supposed to be included with the Milton I. Schwartz Hebrew Academy and appropriate signage was supposed to be part of the naming rights agreement with Mr. Schwartz.

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Dr. Sabbath, I asked her, "Do you understand, at least from the documents that we look at in 1989 and 1990 that the school resolved to amend its bylaws to name the school in perpetuity as Milton I. Schwartz Hebrew Academy, correct?"

Answer, "I remember that, of course."

Dr. Sabbath also testified, "Ultimately, the entire campus and the property would be Milton I. Schwartz Hebrew Academy. We have acreage behind the elementary school for subsequently other buildings constructed."

She also testified, "There was a discussion of the perpetuity piece and that was very important to him."

I asked a question. "Did you agree to accept the money that Mr. Schwartz gave you in exchange for naming rights?"

Answer, "That was a gentleman's agreement and we were representing the board with the intention of the board and the goodwill that the generous gift engendered."

Mr. Ventura, I asked him a very similar question. "Correct me if I'm wrong, but Milton gave the school a half millions dollars. Then he orchestrated the financing at one and a half million. What did he get in return from the School?"

His answer, "He got to have his name on the school."

Question, Would that be for perpetuity?"

Answer, "Yeah."

Dr. Pokroy, I think he was probably the one who had the least recollection, but in any case, a question was asked about whether he had

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any reason to dispute the 1990 bylaws and his answer was, "I presumed that I was absolutely correct, because I don't sign documents unless I have read them."

We even heard from Milton himself, if you recall, in a declaration he signed in 1993. Milton is testifying here under oath in that old litigation from the early 90s, that he donated a half million dollars to the Hebrew Academy with the understanding that the school would be renamed the Milton I. Schwartz Hebrew Academy in perpetuity. Now, we've heard varying recollections of what occurred in 1989 and 1990, but I submit to you guys that the best evidence of what happened a long time ago are documents. Documents don't have problems with recollection. These documents were prepared at the time that this was all going on.

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So I believe that the best evidence in this case are the documents in this case. And we have a pledge memo that was Exhibit 118 that shows exactly what Milton Schwartz promised to pledge. He promised to pledge a half million dollars. He paid a half million dollars and there was nothing unpaid. Dr. Lubin, by the way, was there at that meeting. She approved the minutes and did not object to the pledge memo. Dr. Pokroy testified the documents that were prepared by the school contemporaneously with the events would be more reliable than his recollection from 29 years ago.

And Dr. Sabbath testified the pledge memo is the document that seems to reflect appropriately the status of the pledge memos at that time. The School's board must have been satisfied with whatever

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Milton provided, because the school unquestionably and indisputably named the school after him in perpetuity. The School fully performed on that promise for years. Then we get to December 16th, 1992 and if you remember a few months before this, there was some testimony about conflicting boards and a fight over what board controlled and there was some litigation. But following that complaint being filed, the school resolved on December 16th of 1992 to do some things to remove Milton's namesake from the school.

They resolved to let the letterhead run out. They resolved to stop answering the phone in Milton I. Schwartz Hebrew Academy. They were talking about taking pictures off the wall. And it appeared from those board meeting minutes that that had to do more with publicity relating to Milton's cab company. There was no mention of Mr. Schwartz not donating another half million dollars and that being the reason why they took the stuff off. And it would seem that if that were a reason why they were taken the name off, that would have been stated in some board minutes and it's not in any evidence in this case in documentary form for that matter.

Shortly after the school removed the name, Susan Pacheco testified that in 1993 to 1996, during the time period when his name was removed, he stopped making donations. And she testified that he stopped making donations, because his name was taken off the school. Now, some time goes by between December of 1992 and the next event that happens. And it's about approximately one and a half years.

And we heard testimony that during this one and a half year

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period, Mr. Schwartz, Sam Ventura, I think actually Rabbi Wyne to a certain degree, were busy trying to put together the Jewish Community Day School. They were working on a different school. I think it was in Henderson. And during that period of time, Milton could have sued the Hebrew Academy, but he chose not to. And the reason why he chose not to is because a couple years later, on May 7th, 1996, the School terminated Dr. Lubin from her employment.

And as you'll see, as you've seen in the minutes from the May 7th, 1996 meeting, the board lost confidence with Dr. Lubin and that they were concerned about not only her competence with running the School but also they believed that she lost confidence in the community and therefore could no longer serve as School head, be a suitable representative of Hebrew Academy. And the board also came to its conclusion that their fiduciaries as trustees of the board required them to immediately terminate Dr. Lubin.

In fact, those minutes stated that the board believed the very existence of the school was put in jeopardy by Dr. Lubin's actions. Less than two weeks after that, the board resolves to reaffirm its commitments to Mr. Schwartz. And that's reflected in the minutes from May 19th, 1996, where the board unanimously passes a resolution to send Milton a letter and also passes as resolution returning the name of the School to the Milton I. Schwartz Hebrew Academy. And in those minutes, it states the name will be returned outside of the school as well as the school letterhead and all other appropriate places.

The letter that was the product of that meeting was what

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we've been referring to as the Sabbath letter and that's from May of 1996. And the Sabbath letter cures the School's breach with the Schwartz naming right agreement. The main points of the letter are that the School committed to restore the names of the Milton I. Schwartz Hebrew Academy, to amend articles to reflect the name change, to restore the marker in front of the School, to change the School stationary to reflect Milton I. Schwartz Hebrew Academy and to display the Milton I. Schwartz Hebrew Academy name in all advertising.

Dr. Sabbath stated in that latter, "You have our pledge that we are committed to make the Milton I. Schwartz Hebrew Academy a source of honor and a place of Jewish learning, of which you and your family will always justify, be able to take great pride. You will always justly be able to take great pride." Sorry. The Sabbath letter affirms that the agreement is in perpetuity.

I asked Dr. Sabbath a question. "What were you trying to convey to Mr. Schwartz?"

Answer, "This certainly reflected the in perpetuity piece. It doesn't say that, but that it would be a legacy for him and his family."

My next question was, "This reflects the in perpetuity piece. Is that because you used word always?"

Answer, "Yes, it is there. That's what made me think of that connection."

Oh, sorry. The next thing we see after the Sabbath letter is sent in May of 1996 is that the School actually started to perform its promise under the May 1996 letter and to reinstate the corporate name

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of the school to the Milton I. Schwartz Hebrew Academy. In 1999, the bylaws were amended, again, to clarify that the school will be the Milton I. Schwartz Hebrew Academy in perpetuity.

Now, Milton was doing thing as well during this time period, now that his relationship with the school was reestablished. In 1999 -- this wasn't his last will, but this was the will that he had at least effective of 1999, that he was going to give money to the Milton I. Schwartz Hebrew Academy. He continues donating to the School. We saw in the capital and annual gifts from the 2000/2001 school year that Mr. And Mrs. Milton Schwartz made a gift of $50,000 or higher.

Now, when I was thinking about the School's case and what I heard in the opening statement and the questions I heard in voir dire and even the examination of the witnesses, it reminded me of a movie, and I'll play a little clip of it and then I'll follow up.

(Whereupon, a video recording was played in open court from 4:27 p.m. to 4:28 p.m.)

MR. LEVEQUE: All right. So what it reminded me of is Men in Black, the little flashy thing that they show to people and say flash, remove the memory and then we'll come up with a new story that makes sense to us. And that's kind of what it felt like as we went through trial that the School is trying to rewrite history and convince you all that something that clearly happened didn't it. We've seen the evidence. We've seen all the documents. We've heard all the witness testimony. It clearly happened. There clearly was an agreement and it clearly was performed for a number of years.

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It also made me think of the idiom you can't see the forest for the trees. And it appeared during trial that the School was only focusing on small soundbites, inconsistencies in testimony of witness from 20, 39 years ago and not looking at the picture, the forest, if you will of what really happened. And if you look at the case from the big picture, you'll see, I think, that it was clear what happened. There was an agreement, there was money paid and there was a promise for naming rights in perpetuity.

So the 2004 will is the one we're all here about and I'm going to go over this a little bit more later on, but it's the Estate's position in this case that the first sentence of Section 2.3, "I hereby give, devise and bequeath the sum of $500,000 to the Milton I. Schwartz Hebrew Academy," meant that that was only for the Milton I. Schwartz Hebrew Academy. It was not meant for a school that the board had renamed and that if the school is not named the Milton I. Schwartz Hebrew Academy, the gift lapses.

I'd also like to point out something that I think is important when we're looking at the language of the 2004 will. The 1999 will has successorship language. It states in there that at least in 1999, that Mr. Schwartz directed that funds be distributed in the amount of $500,000 to the Jewish Community Day School and the Milton I. Schwartz Hebrew Academy their respective successor organizations. Okay, that was the language in 1999. What we don't seen in 2004 is that language, or their respective successor organizations.

And if you remember Jonathan Schwartz's testimony, he had

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a part in drafting the 2004 will and it was expressly explained to him to not have a successor provision in the 2004 will. If Mr. Schwartz intended for that money to go to a successor to the Milton I. Schwartz Hebrew Academy, you would have seen that language in the 2004 will. So let's fast forward a little bit. January 2016, you remember hearing about Mr. Schiffman testify. He testified that he moved to Vegas in July of 2006 and started as the head of the school I think in August of 2006.

And this is a photo we saw during trial. This is the school in the fall of 2006. You can see at the time Mr. Schiffman arrived, there was some grading going on, but no buildings had been built yet. This was the original building that Mr. Schwartz and the old board in 1989, 1990 built. And this little building here is where Mr. Schiffman testified that Dr. Lubin's name at one point was on, but had to be demolished for the bigger project after the Adelson's got involved. In March 14th of 2007 -- and by the way, Mr. Schiffman is still alive during this period of time.

You see the board meeting minutes identify two different schools in all their minutes during this time period. They identify the Milton I. Schwartz Hebrew Academy and then there's different iterations of what it's called, but at least in Exhibit 34, the minutes from March 14, 2007, they were calling it the Dr. Miriam and Sheldon G. Adelson School. An issue was brought up during that meeting and it was whether there would be one or two boards for the Milton I. Schwartz Hebrew Academy and the Adelson high school. And I called this out, because the discussion at that point in time was two boards. One for the Hebrew

004386
004386
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Academy and then one for the School for Adelson's at that time was defined as the high school.

Now, in May 6, 2007 is when they had the gala honoring Mr. Schwartz and we saw some documents -- I'll show you some here -- from the commemorative booklet that was created for the May 6, 2007 gala. One of them was this letter signed by Dr. and Mr. Adelson. And it is our position that what's in this letter is what Milton agreed to. It states,

> "It's our pleasure and privilege to chair the Milton I. Schwartz Hebrew Academy Gala. It's an inspiration to see so many in the community supporting not only the Milton I. Schwartz Hebrew Academy, but also the Adelson School. At last year's event, we presented plans to create a world class high school adjacent to the Milton I. Schwartz Hebrew Academy."

This is what Milton understood that the deal was between him and Mr. Adelson. And in fact, we saw promotional materials in that commemorative booklet from May of 2007, where it was clearly identifying this school as a high school. And some of the copy in there stated that that the high school was going to be located adjacent to the Milton I. Schwartz Hebrew Academy. The Adelson School opens in the fall of 2007 for grades 9 and 10, with grades 11 opening in the fall of 2008 and 12 in 2009. There's no mention in there of the Adelson School grades 6, 7 or 8 opening up. This was clearly the plan, at least in May of 2007 that the Adelson School was just going to be a high school.

On the flip side of that coin, there was promo materials in

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that booklet for the Hebrew Academy. And the Hebrew Academy, there's some language in that promo material that says, "Students in good stand matriculate from the Milton I. Schwartz Hebrew Academy to the Dr. Miriam and Sheldon G. Adelson School, the first Jewish high school in the Las Vegas area."

Asked Mr. Schiffman about this and he testified that he had a hand in preparing it. This was an advertisement that was for a open house to be held on October 23rd, 2006 that stated that Adelson School was going to be at the Milton I. Schwartz Hebrew Academy, not the other way around, and that it was going to be a Jewish high school located in Las Vegas, nothing else.

So approximately one month after the May 6th, 2007 Gala, Mr. Schwartz is interviewed by Dr. Adelson. And he was interviewed on June 12th, 2007. You saw this portion of his video during trial. I'm going to cue it up real quick here.

(Whereupon, a video recording was played in open court from 4:35 p.m. to 4:36 p.m.)

MR. LEVEQUE: Okay. So the Estate submits that as of June 12, 2007 and you heard from Mr. Schwartz that he understand, at least as of that point in time, that it was going to be the Adelson High School and the Milton I. Schwartz Hebrew Academy. And less than two months later in August of 2007, Mr. Schwartz passed away. And as of the date of his death, the school, the Adelson School anyway, was still being treated as a separate entity, separate school and apart from Milton I. Schwartz Hebrew Academy.

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Milton believes when he die -- strike that -- Milton died believing that the Hebrew Academy would continue to be grades K through 8 and the Adelson School would be 9 to 12. And the only evidence provided by the School in this case that Milton understood something different was Sheldon Adelson's self-serving testimony, which is not corroborated by any other evidence in this case. In fact, Mr. Ventura, who actually is the one that made the motion to change the school's name in 2007, testified that he had no intent to change the name of the school before Milton passed away.

I asked him the question. "To your knowledge, did you as a board member at that time have any intent to change the name of the school before Mr. Schwartz passed away?"

His answer was no.

I followed up. "So that didn't occur until after Mr. Schwartz passed away?"

Mr. Ventura's answer, "That occurred after Mr. Adelson pledged his pledge and that's when that happened."

We've all seen this document. Exhibit 43 is the December 13, 2007 board resolution, where it was resolved that the articles of the incorporation would be restated to be the Dr. Miriam and Sheldon G. Adelson Educational Institute in perpetuity. And it also resolved to change the corporate elementary school in honor of Milton I. Schwartz in perpetuity.

So within a period of 126 days from the day Milton died and the day this resolution was passed, what was the Milton I. Schwartz

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Hebrew Academy with the Adelson High School became the Adelson campus with the Milton I. Schwartz Hebrew Academy as part of it. This was a breach of contract. I asked Mr. Schiffman some questions, if you recall, during trial about any efforts he or the school made with respect to looking into whether there was any naming rights agreement the School had with Mr. Schwartz before December of 2007.

He testified he didn't look records before December 13, 2007. He only looked after the lawsuit was filed. He found the Sabbath letter, but he only shared it with Victor Chaltiel and the School's attorney, not the other board members.

I asked him a question. "So the review of the letter and giving it to Mr. Couvillier," -- that was the attorney -- "was essentially hindsight that was several years after the naming rights agreement was entered into with the Adelson's, correct?

The answer was yes.

Now, if you recall, Mr. Kantor testified. He was explaining a little bit about why that resolution occurred in December of 2007 and he testified that there was a rush to pass a resolution to enable the school to obtain the very large gift that the Adelson Family Foundation was ready to make and that they were used to pass the resolution in December, so that the Adelson's could make their give in that taxable year before the next taxable year. So the rush was due to the Adelson's, who wanted to make sure the gift was made in December as opposed to January for tax purposes. Nothing was going to stop the Adelson train.

Now, we've seen the pledge agreement as Exhibit 144, and I

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believe that the newer version has been marked as Exhibit 184. We submit it's an invalid naming rights agreement and it's invalid, because Mr. Schwartz already had one. And a couple things I'd like to point in this thing. Number one, we heard testimony from the Adelson's that they gave in excess of $100 million dollars for the school and I'd be silly to say that that was not an extremely generous gift for any institution, and I'd be silly that that wasn't a transformative gift for the School.

But the fact of the matter remains. The amount of money that Mr. Adelson actually pledged for his supposed naming rights was $3 million. Not 25 million, not 50 million, not 100 million. It's also important to point out that that the grand agreement purposely excludes any mention of the elementary school grades, because the board resolved on that exact same day to name the elementary grades in perpetuity in honor of Milton Schwartz.

Now, even though the School kept the elementary grades as the Milton I. Schwartz Hebrew Academy, it still breached the contract, because the school had no authority to change the name of the property to the Adelson campus and they had no authority to refer to grades 5 through 8 as the Adelson Middle School.

Now, there was some testimony about this March 11th, 2008 resolution for the proposition that it somehow superseded the December 13th, 2007 resolution for the purpose of arguing that the resolution to name the elementary school portion was somehow eliminated. But if you recall, I asked Mr. Kanter questions about this. The March 11th one deals with different issues than December. It deals with loans, a couple

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loans from the Adelson's and had different subject matter than the December 2007 resolution.

And it also doesn't say that it's amending, restating, revoking or superseding the previous December 2007 resolution. We saw a draft of one that wasn't signed. And if there was an intent to completely restate the December resolution, you would have seen language like this, that the first resolution of the board be amended and restated as follows. And that language wasn't anywhere in the March 2008 resolution. Now, following March 11, 2008, the board resolves to actually file with the Secretary of State the amendment of articles, which changed the name from the Milton I. Schwartz Hebrew Academy to the Adelson School. This was also a breach of the contract.

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Now, the very next meeting on April 10th of 2008, the board makes a motion to confirm that each and every trustee will be held harmless and indemnified for all liabilities related to their functions as trustee of the school, including all legal costs incurred. This isn't a coincidence. This isn't a coincidence that the very next board meeting after the School passed a resolution to change the name of the School to amend its articles of incorporation, that they're now seeking indemnification to hold each other harmless for any act that they do.

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You saw some correspondence that the School sent Jonathan Schwartz over a period of time. And we pulled them up here. One was from April 17th, 2018. One was from, I think, March of 2010 and then one was from December of 2011. And the purpose of these letters were to solicit donations from the Schwartz family. And they all

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have Milton I. Schwartz Hebrew Academy logos on it. In fact, the most recent one, December of 2011, just has the Milton I. Schwartz Hebrew Academy logo on it. I blow that -- I blew it up for you to see that it says nothing about Adelson campus on there on December 2 of 2011. It just says the Milton I. Schwartz Hebrew Academy.

Now, Mr. Schiffman said he was embarrassed about that, but what's important to take away from those letters are a couple things. The first is the school, either unintentionally or intentionally was sending correspondence to Mr. Schwartz for the purposes of soliciting donations from him for a period of three years. And on September 19th, 2011, we showed in this case some images of the School's website in certain periods of time from the way-back machine and this one is a snapshot from one of the pages of the School's website on September 19, 2011. And bear in mind, this was three months before that last letter we saw, where it just showed the Hebrew Academy logo on the letterhead.

This website, on December 19th, 2011, defines the elementary school as the lower school of the Adelson campus. As of September 19th, 2011, there was no Milton I. Schwartz Hebrew Academy. And this was a website that was over one and a half years before the School filed its lawsuit. The reason why that's important is you heard testimony in this case that the reason why they took the name off the School was because my client filed the lawsuit in 2013. That makes no sense, if the school is holding itself out on its website to have no reference whatsoever to Milton I. Schwartz Hebrew Academy and only referring to the elementary school as the lower school of the

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Adelson Educational Campus.

And this was changed in September, because we also saw in August of 2011, at least until that period, it was holding itself out at least with respect to the elementary school as the Milton I. Schwartz Hebrew Academy. So what really was Milton's namesake as of September of 2011? It was reduced to nothing more than a sign on the building. And yes, Mr. Schiffman was embarrassed that the School continued to send Jonathan correspondence on MISHA letterhead.

We submit that Jonathan was duped and lead to believe that the Milton I. Schwartz Hebrew Academy was a separate school apart from the Adelson School. It was all for the purpose of inducing Jonathan to continue making donations to the School. Meanwhile, the School was sending incorrect letterhead and not telling him that the website had been changed. Jonathan was attempting to reach a win-win solution with the School concerning the naming rights and payment of the bequest.

In August of 2008, he sent the letter that we've seen as Exhibit 52 wanting confirmation in writing that the $500,000 was going to be for the purpose of funding scholarships for Jewish children in perpetuity as the Milton I. Schwartz Hebrew Academy. The School never responded to his letter. And again on May 10th, 2010. This is the Lankley [phonetic] settlement letter that we've seen in this case as Exhibit 55. The school never responded to this letter, either. Not even -- no response. And if you look at the terms of these, are they really that ridiculous?

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Mr. Schwartz wanted to make sure that the elementary school was to be known as Milton I. Schwartz Hebrew Academy in perpetuity. Even though the Estate had the right for the entire campus and middle school, Mr. Jonathan Schwartz was willing to accept naming rights for just the elementary school grades. He requested signage on the face of the building that housed the elementary school. And the sign was already there, and he was fine with it. He has asked that media be associated with the School clearly and prominently identify the Milton I. Schwartz Hebrew Academy as grades pre-K through fourth in perpetuity and that logos for the Hebrew Academy should be no smaller than the other logos.

Is that unreasonable? That the interior of the Milton I. Schwartz Hebrew Academy building shall house a painting or photo of Milton. Is that unreasonable?

MR. JONES: Your Honor, I would object. Whether that's reasonable or not is not the issue in this case and I would ask that that be --

THE COURT: Sustained.

MR. JONES: -- stricken from --

THE COURT: Sustained.

MR. JONES: Thank you.

THE COURT: Sustained.

MR. JONES: Okay.

MR. LEVEQUE: And that the website shall say Milton I. Schwartz Hebrew Academy is home to the lower school and a little

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statement about Mr. Schwartz and the history of being a businessman here in Las Vegas. This, by the way, is what the school was already doing as of May 10th, 2010. Three years later, the School files a lawsuit against the Estate to seek the executor to compel distribution of $500,000 gift. And a little over three weeks later, the School [sic] filed its petition against the School for breach of contract and promissory estoppel. Sometime after the lawsuit is filed, Mr. Schiffman testified that there is a decision by the board to remove the sign on the old building.

Mr. Jones indicated in his opening statement that there was mention of Mr. Schwartz on the Adelson campus' website. This is it. This is all that's left. After the school did what it did, it attempts to make up a story to justify its breach after the fact. Mr. Kantor testified. We went through all the current board members of the school in the data book. At least half of them are Adelson friends or family. We of course have Mr. Adelson and Dr. Adelson. We have Tom Spiegel, who Mr. Kantor testified is a very good friend of Sheldon Adelson. We have Sivan Dumont, who is Dr. Adelson's daughter. That's just four. That's half of the board, either a friend or a family member of the Adelson's. Clearly, they have different motivation than what the board had in 1989 and 1990. And clearly they have a conflict of interest.

Mr. Adelson, based on his testimony, believes that he's entitled to naming rights, because he designed it, built it and paid for it and why should I name it for somebody else? Well, what Mr. Adelson seems to forget is that there was a building there. There was land there and there was a Milton I. Schwartz Hebrew Academy there. Now, a

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question was asked about Mr. Adelson deposition testimony and whether he testified that he thought it would be ridiculous to have equal naming rights. And I'd like to show a clip of that deposition, based on that comment of ridiculous.

(Whereupon, a video recording was played in open court from 4:52 p.m. to 4:52 p.m.)

MR. LEVEQUE: Sheldon also testified that Milton's contribution was infinitesimal.

(Whereupon, a video recording was played in open court from 4:52 p.m. to 4:52 p.m.)

MR. LEVEQUE: He further testified that it's silly to think that Milton's original agreement with the School couldn't be trumped by a bigger donor.

(Whereupon, a video recording was played in open court from 4:52 p.m. to 4:53 p.m.)

MR. LEVEQUE: Now, we submit that Mr. Adelson's testimony is not credible nor is supported by any other evidence in this case. Mr. Adelson testified that he would consider letting letter Milton have some naming rights, so long as he agreed to personally pay off a $1.5 million loan taken out by the School and pay an additional $1 million. Well, he'd consider? Mr. Schwartz already had a naming rights agreement. Mr. Adelson also testified, "We had an agreement. Milton agreed to put up the money. That's all he agreed to do, to pay off the loan. He was already signed on to contribute money. He committed to half million and then the second half million."

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Is there evidence of that in this case? Is there any board meeting minutes that talk about this commitment? Are there any other documents that the School showed you in this case, showing that that in fact occurred? In fact, did you hear any witness testimony that said that they were at this meeting where this was discussed? There's zero corroborating evidence of this alleged agreement in the record. There's no board minutes before Milton's death reflecting any agreement that the entire school would be called the Adelson Educational Campus and that only elementary grades would be named after Milton Schwartz.

There's no witness who testified that they were present with Milton and Sheldon Adelson and Victor Chaltiel allegedly had this verbal discussion. There are no other documents reflecting that Milton committed to paying of a $1.5 loan on the school's mortgage debt or that he committed to an initial $1 million. There's no evidence that the school filed a claim to Milton's estate seeking payment of 2.5 million on those alleged promises. If there was 2.5 million in obligations, there would have been a claim made on the estate.

Now, you saw some testimony -- you heard some testimony and saw some documents about a loan. And this was brought up originally in the School's petition. Mr. Schiffman, as a representative of the school signed under oath the petition where he claimed that there was a $1.8 million mortgage on the School's property. And that was the only one. There was only one mortgage talked about in that petition under oath and that that was paid off on September 2nd, 2010 and then Mr. Milton Schwartz guaranteed up to a million dollars of the debt.

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Now, what you'll see is in the footnote, he's referring to a promissory note dated December 7th, 2006 and that would be a date before Milton Schwartz died. That would be about nine months before Milton Schwartz died. But the promissory note that Mr. Schiffman also attached to the petition and his declaration under oath shows the date of the note September 7th, 2006, but December 6th, 2007, four months after Milton Schwartz died. This note -- and the loan obligation was taken out four months after Mr. Schwartz died. There's no way he could have guaranteed this note and you saw no other loan document in this case showing an obligation of the personal guaranty that Mr. Schwartz had to pay.

Without Milton Schwartz, there wouldn't have been a school in the first place. He planted the seed. And remember Mr. Ventura testifying about what seed money was. He planted the seed money to make the school grow into what it ultimately became. In fact, Mr. Schwartzer testified there wouldn't be any way that school could have been built without his first half million dollars. You also heard from his Rabbi. Rabbi Wyne testified that he thought Milton understood and believed that in the Jewish faith, his namesake had eternal significance.

A question was asked by the School's attorney about naming rights agreements and the Jewish faith. Mr. Jones asked, "And so in a situation like Mr. Schwartz had, it was anticipated there would be a naming rights agreement entered into for the millions of dollars, would you agree that that would have been formalized typically?"

Rabbi Wyne's answer, "Not necessarily, no." These -- a lot of

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these things are done in good faith."

And that mirrors what Dr. Sabbath testified about, about this being a gentleman's agreement, one intended to rectify and build a bridge back between the School and Mr. Schwartz. So I had to change the slide, so I want to make sure it's correct. The Estate's claims against the School -- oh, I completely deleted it. We were deliberating claims. That's probably the reason why we had to wait and some of the things that had come out, so that's why that slide is [indiscernible], but anyway, there are some jury instructions that we ought to look at and I wrote down what these numbers actually are, because we don't get the jury instruction numbers until right before you guys come in.

So breach of contract, the elements, jury instruction is 21 and the contract requirements is 22. So breach of contract. Well, the essential elements of a breach of contract claim are one, the existence of an enforceable agreement between the parties. Well, I think we've demonstrated with more than ample evidence that there was an enforceable agreement between these parties.

Number two, the question of whether the Plaintiff, which really is Mr. Schwartz in this case, performed. He clearly performed. He paid the half million dollars. And three, was there an unjustified or unexcused failure to perform by the School? Yeah. They had no basis to breach that agreement. They breached the agreement for another naming rights agreement for more money and a bigger school, but that doesn't excuse their failure to perform. And four, were there damages resulting from the failure to perform? And we'll get to that slide in a little

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bit, but we submit that all of the elements of the breach of contract have occurred.

Now, the second instruction con -- the one right below it talks about formation of a contract, what a contract requires. It requires an offer and acceptance, a meeting of the minds with consideration. Well, the offer in this case was a million dollars -- excuse me -- a half a million dollars for perpetual naming rights. That's reflected in the bylaws and the November 29th, 1990 minutes and all the other documents that we've seen. A meeting of the minds. Clearly, both sides understood the agreement, because they both began performing on the agreement. And consideration, consideration is a really long jury instruction, but the consideration here was Mr. Schwartz gave money and in return, the School agreed to name itself in honor of him in perpetuity.

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And this an instruction on intent. Intent -- contractual intent, anyway, is determined by the objective meaning of the words and the conduct of the parties. And I focus on the conduct of the parties with the circumstances, because that's what you gotta look at in this case. What was the conduct of Mr. Schwartz and the School? Was the conduct that Mr. Schwartz did something and they did something in return? Yes, clearly. They named the school after him.

And again, we looked at this instruction in the beginning. This is the multiple writings instruction. Again, it's instruction number 28 and again, it's for the proposition that several documents can form a single contract in writing, and we believe that that has occurred in this case. Another instruction that you can look at when you get back to the

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jury deliberation room is ratification and I, of course, did not write this one down. But ratification states, a party that adopts a contract that made for the party's benefit or account with knowledge of making the contract and all material terms of the contract is bound by the contract's terms.

Now, ratification is important, because the Sabbath letter, we submit, was ratification of the School's already existing agreement. Dr. Sabbath adopted the contract that was made for the School's benefit. It received a half million dollars. With knowledge of making the contract and all material terms. We'll see all the terms of the Sabbath letter in a minute. And the School was bound by those contract terms and is held to --

MR. JONES: Your Honor, may we approach?

THE COURT: Sure.

[Sidebar begins at 5:02 p.m.]

MR. JONES: I believe the reason he didn't write down the ratification instruction is because I believe it was not given. We just checked our -- and I don't remember that. I remember we talked about it and remember the Court did not give it.

THE COURT: We didn't give it.

MR. JONES: And he just told the jury about it.

MR. LEVEQUE: I thought that we did. I -- are you sure? Let me -- can I double-check?

MR. JONES: I would defer to the Court, but we just double-checked our jury instruction. It's not there. That's my recollection. So

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that's why I went and looked, because he said he didn't know the number.

MR. LEVEQUE: It's 27.

THE COURT: I thought [indiscernible]

MR. LEVEQUE: It's 27.

MR. JONES: It is there?

MR. LEVEQUE: It's 27. That's the medication.

MR. JONES: Okay. So it's modified. That's why -- if it's there, it's there, Judge. I just want to be sure, because I didn't see it. So it's modified. The one that you have up there is not the one I have here.

MR. LEVEQUE: Oh, okay. All right.

MR. JONES: So you need to tell them it's 27 and take that down.

MR. LEVEQUE: Okay.

THE COURT: Thank you.

MR. LEVEQUE: All right.

[Sidebar ends at 5:02 p.m.]

MR. LEVEQUE: In the process of jury instructions, we're doing a lot of editing. There is a ratification instruction that's not -- it's a little bit different from this, so it's jury instruction 27, so just take a look at when you're in the deliberation room and go with that language, not the slide I just showed you. We talked about the Sabbath letter. The question was asked about Dr. Sabbath.

"Dr. Sabbath, do you know and understanding, what was the board's intent by sending this letter to Mr. Schwartz?"

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Her answer was, "I believe I said earlier we were trying to rebuild bridges and goodwill as well as credibility in not only the Jewish community, but the community at large. And one of the first important steps by reaching back to our biggest donor."

I followed up.

"And to your knowledge, as a result of this letter, did Mr. Schwartz come back and get involved with the School again?"

Answer, "Yes."

We submit that the Sabbath letter could also be construed as a new contract, because in this case, we have Dr. Sabbath admitting under oath that the purpose of that letter was to induce Mr. Schwartz to come back to the school. She said plain and clear it was to increase the credibility of the school in the Jewish community, of the community at large and that as a result of the letter, Mr. Schwartz did in fact come back and get involved with the School again.

And that's evidenced -- well, we already went over it. It's evidenced by the fact that in 1999, he amended his will to provide a bequest in the will. He continued making contributions to the School, which we'll see in a little bit. So from 1996 from when this letter was sent, Mr. Schwartz came back to the school, continued to contribute money, continued to be involved.

MR. JONES: Your Honor, again, just for the record. I hate to object, but Exhibit 141 is not in evidence. Exhibit 141-A is in evidence. That's a second codicil.

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THE COURT: Okay.

MR. JONES: And I would move to strike any reference to a 1999 will.

THE COURT: Okay. So they should be look for 141-A?

MR. JONES: 141-A is in evidence, Your Honor and you can check with the Clerk, but I believe --

THE COURT: And that's the School --

MR. JONES: -- that 141 did not come into evidence and so --

MR. LEVEQUE: The 1991 codicil, which is the will. Well, I'm sorry. I should have said 141-A, instead of 141.

THE COURT: 141-A.

MR. JONES: Okay.

MR. LEVEQUE: 141-A.

MR. JONES: As long as we're talking about the same thing, that's fine.

MR. LEVEQUE: It's just the codicil.

MR. JONES: The codicil is -- I thought you referenced the 1999 will.

THE COURT: I think -- yeah, we only saw the codicil, I believe.

MR. LEVEQUE: We only saw the codicil. We didn't see the will.

MR. JONES: Again, I apologize for interrupting. I just want to make sure we'll talking about the same thing.

THE COURT: We don't want to define codicil for the jury,

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so --

MR. LEVEQUE: No.

THE COURT: 141-A.

MR. FREER: I think we called it the 1999 amendment to a will.

THE COURT: There we go.

MR. LEVEQUE: And that's -- well, I can't say what a codicil is. That's not a jury instructions, but Your Honor can.

MR. JONES: Fair enough. As long as we're all taking about the same --

THE COURT: Yeah, I would have to give you another instruction.

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MR. JONES: -- I'm good.

THE COURT: You don't want any more instructions.

MR. LEVEQUE: Okay.

MR. JONES: I'm sorry to interrupt.

THE COURT: Sorry.

MR. LEVEQUE: There was this question about good faith. Rabbi Wyne talked about it. If you recall, he testified that his own synagogue on the land is named after one of his benefactors and there is no formalized written agreement. It was made in good faith. And Dr. Sabbath said pretty much the same thing in her testimony. It's not good faith to take a position that what Mr. Schwartz had is not a valid naming rights agreement.

Okay. Now, we're going to talk about the remedies for a

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breach of contract and this is a jury instruction that is jury instruction number 30. And it states,

> "In Nevada, a Plaintiff can recover reliance damages for breach of a contract or a reliance of a promise. Reliance damages attempt to restore the damaged party to the position he or she would have occupied if the breached contract or promise had never been made."

And we submit that Mr. Schwartz donated a lot of money over the years and reliance damages are an attempt to restore the damaged party to a position that he would have had had the contract not been breached. So we submit that the reliance damage in this case is the amount of money that Mr. Schwartz donated over the years, based on that contract. And this table I prepared, but it comes from two things. It comes from the testimony of Jonathan Schwartz and Susan Pacheco, but it also comes from a spreadsheet Ms. Pacheco prepared that's attached to exhibits petition 62-U. That's one of the joint exhibits. And if you add all this up from 1989 to 2007, Mr. Schwartz, in reliance up on that contract, gave the school $1,110,606.66.

We also see that consistent with Ms. Pacheco's testimony, there really weren't any substantial contributions anyway, from 1992 all the way to 1997. And if you recall, that's the period of time that the School had his name taken off. He was doing things at the Jewish Community Day Center. But you'll also see when he came back after the Sabbath letter in 1999, he continued to make donations through the year of his death.

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So promissory estoppel -- I'm confusing jury instructions. It says,

"If there's no consideration for a promise, but the promisor acted in a manner in which the promisor acted in a manner in which the promisor could reasonably expect to induce reliance and which does not induce detrimental reliance that is foreseeable, reasonable and serious, the promise is enforceable if the justice can be avoided only be enforcing the promise."

What the Estate is asking in this case in this case -- and it's alternative theory or believe, is if you all don't find that there's a contract, there still is a remedy at law under the theory of promissory estoppel.

So you've heard some testimony and some questioning in this case about well, when we filed the petition in May 2013, the building still had the sign, Milton I. Schwartz Hebrew Academy. Well, the building can't cash a check and as we've seen from the website, as of September of 2011, the lower school, the elementary school was no longer being held out at the Milton I. Schwartz Hebrew Academy. It was the lower school of the Adelson campus.

So we've got a verdict form that you're going to get once you go into deliberation. And I'm going to go through it and show you what I suggest, what I believe are the appropriate responses, based upon the evidence that has been presented in this case and the claims that I believe we've proven in this case. Okay. So the first question -- let me

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zoom a little bit out here. Okay. So the first question asks if you the jury find, three-fourths of you, anyway -- six people find that Milton Schwartz had a naming rights agreement. Well, we submit that he did.

If you answered yes question to question 1, please proceed to answer questions 2, 3, 4, 5, 6 and 7. Okay. Was the contract oral or founded upon a writing or writings? Well, as we've showed you in his -- and we demonstrated under jury instruction 28 that there were several writings that formed a single contract, so we submit that there was a contracted founded upon writing or writings.

Question 3 asks, if we answered yes to question 1, was the contract in perpetuity? Yes, it was.

The second page of the verdict form. What was the consideration, amount of money that Milton Schwartz was required to pay in exchange for the naming rights contract? Well, if you looked at the pledge memo and the pledge memo said that he pledged 500, he paid 500 and then there was nothing that was unpaid. You also heard from Mr. Schwartzer, who said it was $500,000 and you heard from Mr. Schwartz himself in his affidavit that it was $500,000. So the amount of consideration was $500,000.

Did Milton Schwartz perform all the obligations under the terms of the contract? Yes, he did.

In addition to the consideration, what were the other specific terms of the contract? Well, if you recall, at the time in 1989, 1990, there was no Adelson campus. There was one piece of property. There was one school building that housed the elementary school, the pre-K and

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the middle school through 8th grade. So I submit that all these should be yes. The corporation was the Milton I. Schwartz Hebrew Academy and under the bylaws, that should have been in perpetuity. The campus, the elementary school building, the elementary school grades, the middle school grades, the entrance monument, letterhead should bear his name.

I guess if you want to make it really easy on yourself, you could just hit all of the above, and then you wouldn't have to do this. But if you disagree with any of these, then you can just check no for any of the ones that you believe were not part of the specific terms of the contract. It goes on to say in question 2, if you found the contract was a written agreement, please answer question 7. If you could the contract was an oral agreement, please skip to question 8. So we submit that it was a written agreement and that question 7 would then need to be answered.

Did the School breach the contract? Clearly it did. Starting in December of 2007, from the change of the corporate name to removing the MISHA namesake from the elementary school and the middle school, the change of the name of the campus to the Adelson campus to completely removing any mention whatsoever of Mr. Schwartz, other than what you saw just now on their website. There was definitely a breach and multiple breaches of the contract.

You then go to question 8 and this is a question that has to do with interpreting Mr. Schwartz' intent with respect to his 2004 will. And it states, "Do you find that in 2004 when Milton I. Schwartz wrote the

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following" -- that should be an I. That's a typo. "The Milton I. Schwartz Hebrew Academy, I hereby give, devise and bequeath the sum of $500,000 to the Milton I. Schwartz Hebrew Academy."

Okay. Do you believe when he wrote that language, either A, he intended that the bequest be made only to a school known as the Milton I. Schwartz Hebrew Academy for the purposes set forth in the bequest, or he intended the bequest to be made to the school present known as the Adelson Educational Campus? And we think that the -- excuse me -- the evidence overwhelmingly supports A.

Question 9 talks about your belief, the jury's finding with respect to why Mr. Schwartz made the bequest and it states, "Do you find that the reason Milton I. Schwartz made the bequest was based on his belief that he had a naming rights agreement with the School, which was in perpetuity?" We submit the answer to that question should be yes.

Question 10 -- and you gotta look at this parenthetical, because it can be confusing. You answer question 10, only if you find yes to questions 1, 2, 5 and 7. So 1 was whether there was a contract, 2 was whether it was written, 5 was whether he performed all of his obligations under the contract and 7 was whether the School breached. And if you answer all those, then you answer question 10. What was the appropriate amount of damages that the School should pay the estate to remedy the breach of contract? And I showed you the slide, but I'll state it again. If you add up all the contributions that Mr. Schwartz made from 1989 through 2007, that number is $1,110,606.66.

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Last page. Now, question 11, you only answer if you answered no to question 1 and question 1 was was there a contract for naming rights between the School and Milton Schwartz? So if you answered no to that, you still need to answer this question. Do you believe that the School acted in a manner in which the School should have reasonably expected to induced Milton Schwartz' reliance and which did induce Milton I. Schwartz' detrimental reliance.

So if you find that there's no contract, answer question 11. And even though, I believe that there clearly was a contract, this would be yes, because we have established evidence in this case that Mr. Schwartz was induced to his detriment to make bequest to the school under the assumption that he had a binding and enforceable naming rights agreement with the school.

Question 12 goes to the claim for mistake. And again, this is a question that you only answer, if you answer no to question 1, which is was there a contract. Did you find that Milton I. Schwartz believed he had a naming rights agreement with the School but was mistaken? Again, if you find no contract, we believe the answer to that question is yes. And this is somewhat of a similar question, but here you only answer if you answered no to question 1 and yes to question 12. So if you answer no to contract, but yes to question 12 that he was mistaken, then the question you need to answer is did Milton Schwartz make this bequest to the school based on his mistaken belief. And we believe the answer would be yes.

Okay. So that's it for the Estate. I might come up again after

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Mr. Jones on rebuttal. You've also been so very gracious on patience so far. I know these can be tedious, but I respectfully request your patience and attention for the remainder, so that when the time comes to make a decision, you will make the right one. Thank you.

THE COURT: Thank you, Mr. Leveque.

Ladies and gentlemen, since we're going to hear from Mr. Jones next, it'll be about the same amount of time. If you want to take a break, now would be the time to do it. That gives them time to switch out the electronics and just a five minute break, just so that you can run to the ladies room. And remember, you don't have the case yet.

So during the recess, you cannot communicate with anyone in any way regarding the case or its merits, either by phone, email, text, internet or other means. Do not read, watch or listen to any new or video accounts or commentary about this case. Do not do any research, such as consulting dictionaries, using the internet or using reference materials. Do not make any investigations, test any theories, recreate any aspects of the case or otherwise investigate or learn about it and do not form or express any opinion on any subject until the case is finally submitted to you, which will hopefully be when you come back, you'll hear from Mr. Jones and then it'll be your turn.

So go with Mr. Lee. Five minutes. That's it. And we'll have you come right back, and we'll be ready for Mr. Jones. Thank you.

[Jury out at 5:20 p.m.]

[Outside the presence of the jury]

THE COURT: Okay. Two things, gentlemen. Mr. Lee did tell

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me that the jurors had hoped to stay no later than 7:00, so just FYI. And dinner will be here at 6:00, so that if we finish, we can at least send them back there. They can have their dinner, and you know, pick their foreman and if they need to come back tomorrow, they can come back tomorrow. Yeah, I don't think they're going to --

MR. JONES: Sure, Your Honor. I will not be done by 6:00.

THE COURT: They're not -- I don't think they're going to --

MR. LEVEQUE: 7:00, I think.

THE COURT: 7:00.

MR. JONES: No, I know, but I will not be done by 6:00, just so you know.

THE COURT: No, no, no, no. That's what I said. I mean by the time we finish with them, they might have time to eat their dinner and pick a foreman, but they'll probably be back tomorrow, just -- you know, if you're planning on being done tonight. I think they probably will leave. We are going to have her give them their checks and their dinner and so hopefully that will -- that might induce them to stay. Who knows?

[Recess taken from 5:21 p.m. to 5:30 p.m.]

THE COURT: Thank you. Can we go back on the record? Ladies and gentlemen, hopefully the last time. The parties are present with their respective clients and counsel stipulate to the presence of our jury?

MR. JONES: Yes, Your Honor.

MR. LEVEQUE: Yes.

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THE COURT: Hopefully the last time. Thank you.

MR. JONES: May I proceed, Your Honor?

THE COURT: You may. Thank you.

SCHOOL CLOSING ARGUMENT

MR. JONES: Well, good afternoon and kind of echoing Mr. Leveque, it's probably more like good evening. I get the unenviable position of starting to talk to you at 5:30, when we were hoping you would all be out of here by 5:30. So -- and I -- this is my job. This is what I do for a living. I've been doing it now actually longer than I ever thought I would. So it never ceases to amaze me and that's why I -- every lawyer I've ever seen wants to thank the jury, because it's important. And I always see people who do their best to get off juries. But once they're on, that's the amazing part.

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And you people have been those kind of jurors. Once you're here, you're committed, you're listening and you're taking your job very seriously. And you know, for our system to work, you have to be here, and this is not just a minor inconvenience. This is a big pain in the rear to have to do this, to come here every day. You have important things to do and you're here so that our system works. So again, agreeing with Mr. Leveque. He said it. I would probably agree with him. He's absolutely right. I do agree with him. And thank you very much for your service and thank you for your attention.

It's really important and you all have done a fabulous matter with a subject matter that you have no interest in. It's probably the most interesting thing you've listened to in your life and I'm probably making

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the biggest understatement in the world and yet you've listened, so thank you. So I'm starting this and I'm going to try to go as fast as I can without cutting my client short, because my client has obviously the right to present our position to you.

First thing I would say, ladies and gentlemen is, we do, we have a fundamental difference, not just of opinion, but of a reality of what happened and the evidence that you saw in this case. And I'm going to go through that and I'm going to actually show you, because of the technology we have. I didn't used to be able to do this. We've actually got the DVDs from the testimony of the witnesses, so instead of showing you slides of what somebody said, you're going to be reminded of what they said, so there's no question of you hearing it, what they told you in the evidence in this case.

And I want to go to the next slide. That's the campus. And I start with this, because here's the thing. And I'll tell you. It's really -- it is important. Mr. Schwartz is saying -- Jonathan Schwartz is saying his father made an agreement, a binding agreement back in 1989 that precluded that school up there -- whatever you want to call it -- precluded that school from ever doing what it does now, ever growing to this size, because as Mr. Adelson said, nobody is going to put their name on that -- or nobody's going to give $100 million or $50 million or $25 million, unless they have the ability to put their name on it. That was important to them, just as important as it was to Milton Schwartz, it was important to Dr. and Mr. Adelson to put their name on it.

And the only thing up there that Milton Schwartz had any

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involvement within terms of building was that lower school. That cost approximately a million dollars back in 1989. Now, remember the testimony, the Adelson's testified and there's no con -- actually, Mr. Schiffman testified, who was involved -- well, the head of the school. The Adelson's put $3.8 million into that building as part of the refurbishment. They put three times, five times -- if you want to take their $500,000 number, five times the amount of money that Milton Schwartz put into that building and yet -- Jonathan Schwartz says my father's name goes on everything. And it is infinitesimally small. That's just the reality we're dealing with.

So the next thing I want to show you is a jury instruction. This is instruction number 10. And I'll tell you, I always refer to this instruction in every case I've ever tried to a jury. Instruction 10 is a commonsense instruction. And it says, "You may bring to the consideration of evidence your everyday common sense and judgment as reasonable men and women." And why do I say that? That is critical to you doing your job. We get to get up here and argue to you, but that doesn't mean you have to abandon your common sense. Use your common sense when you hear the evidence.

I understand -- by the way, Mr. Leveque did a great job. He made a very persuasive argument about well, he had a contract. Well, the argument, as the Court told you in those instructions, is not evidence. Let's look at the actual evidence in the context of your common sense. Use your common sense of what makes sense to you. What did you see? What did people say? What do those documents

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show? Use your common sense in this case.

Now, I want to talk about now in the context -- before we roll that tape. This is testimony from Mr. Jonathan Schwartz. This is testimony about the kind of person that his father was. Remember I -- in opening statement, I talked to you about what a genius he was and meticulous. Let's play this tape. This was from August 27th, your trial, in front of you. Be helpful if we had audio.

MR. GODFREY: Madam Recorder, are we getting audio through the system?

THE COURT RECORDER: Let's see. Well, I can put one of my speakers online. That'll help.

MR. JONES: Okay. So let's try that again. We've got the transcript below, but this also gives you the audio.

MR. GODFREY: Still not getting it.

[Pause]

MR. GODFREY: Let me try it again.

[Pause]

THE COURT RECORDER: Shane, would it help if I go to auto log? Maybe we can try that real quick.

MR. GODFREY: I just had to relaunch it. My apologies.

[Pause]

MR. JONES: Apologies, ladies and gentlemen. Live by technology, die by technology.

[Pause]

MR. JONES: So since we've got -- Shane, you keep working

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on that. In the meantime, let's just run through it. And so they can see the testimony that scrolls underneath. They've been very patient and sitting here a long time, so we don't want to keep them here forever. Testified your father was a genius.

Answer, "He was." I'm hearing something.

MR. JONES: I know we got it before to work.

MR. GODFREY: Yeah.

THE COURT RECORDER: Yeah. It's just picking up what you're saying, Mr. Jones, but it's not playing what's on the video.

MR. GODFREY: Even with the speaker on?

[Pause]

MR. JONES: Well Shane, let's just roll. I don't want to keep the --

MR. GODFREY: I can try --

MR. JONES: -- jury waiting. This is not good.

MR. GODFREY: Let me try one more time. It'll come through the computer here.

MR. JONES: There it is.

(Whereupon, a video recording, was played in open court from 5:39 p.m. to 5:41 and transcribed as follows:)

MR. JONES: All right, so why did I play that? I wanted to remind you this man, Milton Schwartz -- by the way, this is a case -- as I said in the very beginning, it's not here to disrespect Mr. Schwartz' rights or his legacy. It's here to say look, he did some good things, but he didn't have an agreement. He didn't have an agreement that precluded

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that school from ever naming other parts of the school or the entire school after someone else, who ultimately came on to be the Adelson's. So he knew.

The point is this was a very smart, very sophisticated, very meticulous businessman who knew how to write a contract, wouldn't sign a contract that he didn't agree with the terms of and yet he's doing something according to them -- common sense, ladies and gentlemen, that here's a guy who his habit is meticulous. He negotiates. He knows what a contract is and yet he didn't have a contract? Well, let's look at what he did have. So Milton Schwartz never had a written contract. That's completely contrary to what Mr. Leveque told you. He points to a couple of documents.

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Let's talk about the evidence. And before we get to that, I want to talk about the burden of proof. Oops. The burden of proof -- the burden of proof term, preponderance of the evidence means such evidence as when weighed as that posed to it is more convincing in force, which appears to be the greater probability of truth lies therein. Well, more legal mumbo-jumbo. What does that mean? They have to prove to you with more evidence that they're right. They have to -- the way a lot of lawyers use the scales of justice. You know, you put a little more weight on their side. They have to make the scales go down on their side, on the contract claim.

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They have to prove to you. We don't have to prove anything. They have the burden of proof on the written contract, not us. No written contract. Now remember, this is in the context of Mr. Jonathan

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Schwartz' testimony that his father's a genius, he wouldn't sign anything he didn't agree to and he knew what it'd take to make a contract. Let's play the next tape. Oh, actually, I don't think you have that. This is -- we didn't have the video from opening statement. This is -- so I'm going to give you the actual evidence related to written contract. This is the statement of Mr. Freer on August 23rd opening statement.

Will that play, Shane? Oh, great.

MR. GODFREY: Audio only.

MR. JONES: Oh, you'll play it. So go ahead and play it. This is what Mr. Freer told you the first day of trial. Does it work?

MR. GODFREY: It's just very low.

MR. JONES: All right. Well, you see what it says. You ask yourself, why don't we just show you a naming rights agreement? Why isn't there -- where -- why isn't it there? It wasn't the way these people operated. They had terms that they wrote on various documents. If there were a naming right agreement, we wouldn't be here today. So he told you right in the beginning. He admits it. They don't have a written agreement.

So what about the testimony of Mr. Schwartzer? Could we play that?

(Whereupon, a video recording was played in open court From 5:44 p.m. to 5:45 p.m.)

MR. JONES: Okay. So now, that's their witness. That's who they called to support their claim, Mr. Schwartzer, who was actually there at the time. He told you under oath there was no written

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agreement. So let's look at what he said next. I don't think -- Shane, I'm on slide 10. Okay, we'll I've got my slides mixed up. Oh, I'm sorry. Go ahead. Yeah, play that. Can you play that?

(Whereupon, a video recording was played in open court from 5:46 p.m. to 5:46 p.m.)

MR. JONES: So again, Mr. Schwartzer testified to you that they bylaws that they harp on -- that's the only document that has any reference to in perpetuity. Their witness told you that's not a contract. It's not a written contract, unless there's other agreement that says that's a contract. Let's see what the next slide -- Shane. What did Mr. Schwartzer say further in his testimony?

(Whereupon, a video recording was played in open court from 5:47 p.m. to 5:47 p.m.)

MR. JONES: Think about that, ladies and gentlemen. Use your common sense. If there was a written contract, we wouldn't be here. That's what Mr. Freer told you in opening statement. And yet, Mr. Leveque gets up here and tells you there was a written contract. All of their witnesses say that. Let's go to the next slide.

(Whereupon, a video recording was played in open court from 5:47 p.m. to 5:47 p.m.)

MR. JONES: Ladies and gentlemen, didn't you see who was asking that question? That was Mr. LeVeque. He asked Mr. Schwartzer and he testified there was no written contract, yet they want you to now say ignore our witnesses, ignore our statements and create something from the air. That's not the burden of proof.

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Let's see what Mr. Schwartz himself said. This is Jonathan Schwartz, the Petitioner for the Estate. He represents the estate. This is his position under oath in front of you at this trial.

(Whereupon, a video recording was played in open court from 5:48 p.m. to 5:48 p.m.)

MR. JONES: Mr. Jones, it was an oral contract. I'm going to get to oral contract later. Ladies and gentlemen, it doesn't get any better for my client than that. The person who brought this lawsuit alleging a contract told you under oath there is no written contract. It was oral. It doesn't get any better than that, yet they stand up here in front of you and say, oh, well, you can cobble together a bunch of documents that say different things and make a contract out of it, but their own witnesses told you under oath something entirely different. What did Ms. Pacheco say?

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(Whereupon, a video recording was played in open court from 5:49 p.m. to 5:49 p.m.)

MR. JONES: So Ms. Pacheco, who was Mr. Schwartz' long-time secretary was there at the beginning. She's not aware of any document, even though she testified about what a meticulous person he was. He kept everything. She doesn't know of any written agreement. Dr. Sabbath.

(Whereupon, a video recording was played in open court from 5:50 p.m. to 5:50 p.m.)

MR. JONES: By the way, two things about that. One is that wasn't one of my questions. That was actually one of your questions. I

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think it was Ms. Samlaska [phonetic] is the one that asked that question and the Judge asked it of Dr. Sabbath. Could be wrong about that, but that's what I recall.

And there's two things about that. So here's a board member. They call a member. You don't typically that are going to testify in ways that hurt your case. And we'll get to that in a moment. Every witness they call contradicts their theory of the case, that there was a contract. We'll get to that a little bit later. But another thing about Dr. Sabbath's testimony. Remember, she says right there, the million dollars. We're going to talk about the money later. She said oh, it must have been something in verbal, because that's why we got the million dollars. Keep that in the back of your head.

So she agreed. Gentlemen's agreement. No written agreement. Sam Ventura. Let's see what Mr. Ventura said, who was also a witness they called, who was there at the time.

(Whereupon, an audio recording was played in open court From 5:51 p.m. to 5:51 p.m.)

MR. JONES: So let's just recap here just for a second. Sam Ventura, Lenny Schwartzer, Dr. Sabbath, three board members that they called to testify about -- to support their claim there was a contract. Every single one of them has specifically said to you under oath there was no written contract. Every single one. Those are the people who were there at the time back in 1989 and 1990. The other person that testified there was no written contract was Mr. Jonathan Schwartz himself. There is no witness, period, that testified there was a written

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contract.

So what they -- since they don't have that, they need to try to cobble together some things to convince you, contrary to the testimony and the facts, that there are other documents you can push together to be an oral contract. So they have to contradict their own witnesses in order to cobble together this written contract argument. Use your common sense, ladies and gentlemen.

Let's now talk about this jury instruction. And I want to just mention for a second. This is a jury instruction that Mr. Leveque also pointed out. So here's the point, ladies and gentlemen. They cannot prove, and in fact, it has been disproved by their own witnesses that there was a written contract. So they have to try to then try to make an argument there was some other kind of contract, because there have been witness that testified it was an oral contract, but to have an enforceable contract, whether it's written or oral, you have to have certain things.

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They have to prove to you -- burden of proof -- that there are certain things that were met in order to have an enforceable contract. In other words, did Milton Schwartz have a basis and did the Estate have a basis to put Milton Schwartz' name back on everything? Can't do that, unless he had a contract. So let's talk about what it takes to be a contract. The existence of an enforceable agreement. Let's look at the next -- well, by the way, that's 21.

Twenty-two, the jury instruction Number 22. An enforceable contract requires an offer and acceptance. And this is a key instruction,

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because this is what it takes to make an enforceable contract. You look at this. Okay, did the estate meet its burden which each one of these things? And offer and acceptance, okay? I offer to pay you something, 500,000, 500 plus 500,000, a million, a million plus 500,000? But something. And you give me back naming rights of some kind. And that's where we come into the second one, a meeting of the minds. A meeting of the minds.

Did the parties actually agree to what it was that they were talking about? If there's no meeting of the minds, you can't have a contract. If one party thinks that I'm going to pay a million dollars and the other party thinks that they're only going to get $500,000 in exchange for the naming rights, you don't have a meeting of the minds, you don't have a contract. Simple. Simple as that. Consideration? That in this case, is the money. What was the money. So that's what they have to prove, their burden of proof.

Instruction Number 25. To be enforceable, a contract must be sufficiently definite and certain that the contract's exact meaning can be determined, and the legal liability of the parties can be fixed. That's why they want to talk about a written contract. That's what the Adelson's have. Everybody knows what the Adelson's got in exchange for their money. Nobody's quite sure what it was Milton Schwartz got. In fact, Milton Schwartz isn't quite sure what he gave up or what he was going to get back in return and we'll talk about that in a minute. But if it's not definite and certain enough, there's no contract.

So let's talk about this. Meeting of the minds. That's what I

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just told you about. The parties must assent to the same terms and conditions. If there's no meeting of the minds, you don't have a contract. I don't care what he gave, and I don't care what he thought he got. If the school and him were not on the same page, you do not have a contract, period. So no meeting of the minds on money. Let's just talk about the money first. Let's talk about what Mr. Schwartzer said was the consideration, that's the money, that was supposedly paid and agreed to.

(Whereupon, a video recording was played in open court From 5:56 p.m. to 5:57 p.m.)

MR. JONES: Okay. So two things about that. At this point in time -- it's almost 30 years ago. That's why, if you're going to do something like this, you need to have a written contract, because as Mr. Leveque said, this is 30 years ago. So now they want you to guess what the deal was. And the guess has consequences. And you heard what he told you at the end. They want you to say that the agreement with the Adelson's is a breach of Milton Schwartz' agreement, which means as Mr. Schiffman told you, the Adelson agreement would be null and void. Do they -- I guess they want the School to pay back the Adelson's a hundred million dollars.

That's what that would mean. That's what he is asking you without being obvious about it. Oh, well, forget their deal, because my dad had a deal 30 years ago. But that meticulous man, who knew and understood contracts, Mr. Schwartz, all he had to do was put it in a contract, a written contract. And as Mr. Freer told you in opening

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statement. If he did that, we wouldn't be here today. And as Mr. Schwartzer told you, you just saw, if he did that, we wouldn't be here today, too. So instead, they're asking you to guess. That's not a preponderance of the evidence or what the deal was.

And he said approximately 500,000, so that's why I've got these boards up that are probably too hard to see. It's just basically saying what you already heard. But he says 500 plus approximately 500. That's how precise they are. On this issue that has substantial consequences, that's how precise they understand what the deal was. Approximately. So what did Mr. Schwartzer say otherwise, about meeting of the minds?

(Whereupon, a video recording was played in open court From 5:59 p.m. to 5:59 p.m.)

MR. JONES: Ladies and gentlemen, that's their witness, not mine. Okay. This is Milton Schwartz' affidavit, 1993. He wrote this affidavit under oath in connection with this lawsuit about control of the school, not naming rights. And that's important, because during his lawsuit, his name was taken off the corporation. He had every opportunity to sue and say hey, you breached your agreement with me, but he didn't do it. Why did this meticulous man who loved the school who would have done anything to make sure his name was there in perpetuity not sue the school? When he sued for control, he certainly could have sued for the naming rights, but he didn't do it.

But what did it he tell in this affidavit? I -- he donated 500,000 to the Hebrew Academy with the understanding the School

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would be renamed the Milton I. Schwartz Hebrew Academy in perpetuity. By the way, the interesting thing is, he doesn't talk about a contract. He says oh, and subsequently, they changed the bylaws. He didn't say they had a contract. He said that was my understanding. He didn't say it was a contract and he said it was $500,000.

So here's the first contradiction of Milton Schwartz about what his consideration was and whether there was a meeting of the minds. Under oath in a court process, he said it was only $500,000. He made no mention of a requirement to raise any more money. This is the meticulous genius, who understands contracts. Now, what did he say, what, how many years later? '93 -- more than 13 or so years later? What did he say in the video?

(Whereupon, a video recording was played in open court from 6:01 p.m. to 6:01 p.m.)

MR. JONES: Okay. Let's talk about that. I gave her a half a million dollars. I didn't think I could afford a million dollars at the time. He just confirmed what Dr. Lubin said, what Dr. Sabbath, what Dr. Pokroy said, that it was a million dollars. But he was asked for a million, but I didn't think I could afford it at the time, so I only gave half and then I decided I'd go raise the other half. That wasn't the deal and it also contradicted his sworn testimony in 1993.

A burden of proof? They're proving my case for me, ladies and gentlemen. You can't get any better testimony than out of the mouth of the person who claims to have the basis of the contract, when he contradicts himself in a sworn affidavit and a video made 13 years

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later. It does not get any better than that.

Here's the petition for declaratory relief. This was filed by the estate in this case on March 31st of 2013. Jonathan Schwartz did this and did it under oath. In August 1989, Milton Schwartz donated 500,000 to the academy in return for what the academy would guarantee that its name would change in perpetuity to Milton I. Schwartz. By the way, guaranty? We all -- we know what a guaranty is. A guaranty is in writing. We have a written agreement. That's a guaranty. There's no guaranty in this case.

And Mr. Jonathan Schwartz did this under oath. He signed that under oath in May of 2013. What did he tell us in his deposition in July of 2016? Under oath. The same oath that he did when he filed the petitions, the same oath he did when he took his deposition. What did he tell you?

(Whereupon, a video recording was played in open court From 6:03 p.m. to 6:03 p.m.)

MR. JONES: Okay. So now we have a categorical, direct contradiction under oath of what Mr. Schwartz told the Court in his petition in 2013. Ladies and gentlemen, there is an instruction that I didn't pull, but it's right in there. It's one of the very important ones about believability and credibility of the witnesses. Read it. It will tell you, if something says something that his contradictory and is repeatedly different than what they told you before, then you don't have to believe a word they said.

And what does that imply [sic] to? Your common sense. If

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somebody says something under oath and then directly contradicts it later, are you going to believe them? Well, what did Mr. Schwartz say in trial?

(Whereupon, a video recording was played in open court From 6:04 p.m. to 6:05 p.m.)

MR. JONES: So he goes back to what he said in the petition. Believability and credibility of a witness. That's the person that's here representing the Estate claiming there was an enforceable contract cannot be even consistent with you as to what the amount of money was his father was required to pay for a naming rights agreement. Now, let me just point a point to you here that ladies and gentlemen, most people have bought a car. So if you're going to buy a car and you agree to pay $10,000 and that's the deal, that's what -- the meeting of the mind. You agree to pay $10,000.

And now here, Mr. Schwartz has had it was a million dollars, it was $500,000, a million being 500 plus raise 500. Let's just say it was a deal for $10,000 for a car. You can't give him $5,000 and keep the car. If you did that, what's going to happen? Your car is going to be repossessed, because you breached your promise. You breached your contract. It's a simple concept. That's the problem they've got. They don't know. What it 500? Because they're sticking to 500 now, because we know and we don't dispute he gave the 500, but that's not what Milton Schwartz told you in the video in 2007. That's not what Mr. Schwartzer told you in the video.

And what else did other people say? Ms. Pacheco.

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(Whereupon, a video recording was played in open court from 6:06 p.m. to 6:07 p.m.)

MR. JONES: Okay. So now she contradicts her boss, Mr. Schwartz in his video in 2017, where he said, I couldn't afford a million bucks, so I gave 500,000 and I raised another 500,000. That's why they named the school after me. So what did Dr. Sabbath say about this situation?

(Whereupon, an video recording was played in open court from 6:07 p.m. to 6:07 p.m.)

MR. JONES: So, now she's telling you -- by the way, remember, she testified that she went with Dr. Lubin to Mr. Schwartz' house to get the original deal. So she was asking -- besides doctors, three people that know about what -- best about what that deal was -- Dr. Lubin, Dr. Sabbath and Milton Schwartz. Two of the three have testified in this trial and Milton Schwartz told you that he didn't think he could afford a million dollars. Sounds suspiciously like what Dr. Lubin and Dr. Sabbath said. So he decided to change the deal up and give $500,000.

So what did Dr. Sabbath say in response to questions from the Estate?

(Whereupon, an audio recording was played in open court From 6:08 p.m. to 6:08 p.m.)

MR. JONES: Okay. That's really important, ladies and gentlemen. So that's him asking the question, Mr. Leveque. That's kind of a rule of thumb in -- for lawyers. Don't ask a question you don't know the answer to. So I can guarantee you that Mr. Leveque didn't like that

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answer, because he was expecting something else. He tried to guide her through the document and say 500, right? She said no, no, I disagree. I remember it was a million dollars. So where's the meeting of the minds? Can't be. Cannot be, based on the evidence they elicited. Dr. Pokroy, who was also a board member back at the time.

(Whereupon, a video recording was played in open court From 6:09 p.m. to 6:09 p.m.)

MR. JONES: So here, we even have another one where it was -- remember, it was a million dollars, but he also raised another half a million. And by the way, the evidence -- you have not seen, and they did not show you evidence that he ever raised a half a million dollars. Milton Schwartz -- we showed you this during trial. He talks about Paul Sogg. He talks about Mr. Cohen and he talks about some other people. They can't come up with the other $500,000. They -- Mr. Sogg, we showed -- I think the best you ever get is $200,000 out of Mr. Sogg. And Mr. Cohen paid a million -- or $100,000, so that's 300.

The Rudiak's -- assuming you give credit to Milton Schwartz for those pledges, which we disagree with. We think Dr. Lubin testified I was responsible for getting that money. But even if you gave him credit, they don't get to the mil -- the $500,000. So even if you believe Milton Schwartz was 500 plus 500, burden of proof, ladies and gentlemen. They don't get there, as a matter of fact. Dr. Lubin.

(Whereupon, an video recording was played in open court From 6:10 p.m. to 6:11 p.m.)

MR. JONES: Remember, she was the one -- and there was

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no dispute about this -- that went to Milton Schwartz to get the money. So that's what she testified to. So let's talk about what she said. Oh, this is in instruction 29. Remember, they talk about a broken promise. The School broke the promise. That's their contract claim, that the School didn't live up to its promise. But if Mr. Schwartz didn't live up to his promise, the School has no obligation to do anything for him.

MR. LEVEQUE: Your Honor, objection. May we approach for a minute, please?

THE COURT: Sure.

[Sidebar begins at 6:12 p.m.]

MR. LEVEQUE: I was concerned about this argument, Your Honor. This is why we had the instruction for waiver of performance, because it was anticipated Mr. Jones was going to argue that my client first breached the contract. The purpose of that instruction was to argue that they waived any alleged obligation of Milton to continue performing on the other half million or million. And the Court excluded that instruction, so now I'm prejudiced by Mr. Jones making any argument and me not having an instruction on waiver.

MR. JONES: I totally disagree, Your Honor.

THE COURT: Uh-huh.

MR. JONES: I totally disagree. It's always been our argument that Mr. Schwartz didn't live up to his -- I said it in opening statement. I don't know how they can ever suggest that. He breached first. There's no issue. There's no proof of waiver.

MR. LEVEQUE: Well, sure there is. They named the school

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after him for years.

MR. JONES: That has to do with a situation that happened in 1996, the first time his name went on the school, and we have a document they put in evidence that explains that circumstance. We have a different agreement -- or belief about that, but it does not involve waiver, Your Honor.

THE COURT: I mean, the issue here [indiscernible] that. If anybody [indiscernible] because he wouldn't -- as you said yourself he wouldn't [indiscernible]. So the question is after he [indiscernible] then where is the [indiscernible].

MR. JONES: Exactly my point.

MR. LEVEQUE: My argument is that if they want to argue that there is no formation or there is no obligation to perform, because our client breached first, we have a defense to that in that they waived any possible breach by my client by continuing to perform all the way through 1992 and then they carried on after 1996. That was the whole point of that instruction.

THE COURT: But the problem is that's not [indiscernible] as you said didn't [indiscernible].

MR. JONES: Your Honor, I'm sorry, but this is closing argument and we've got limited time so --

THE COURT: So [indiscernible] --

MR. LEVEQUE: I have to make my record with this. It just -- this --

THE COURT: -- but I I think that the waiver is not

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[indiscernible] he could have done it and he chose not to [indiscernible].

MR. LEVEQUE: I've made my record. I don't want to take up any more time, so I understand the Court's ruling.

THE COURT: Thank you.

[Sidebar ends at 6:15 p.m.]

THE COURT: Thank you. Overruled.

MR. JONES: Thank you, Your Honor. So here's the point. If Milton Schwartz actually thought he had a contract, he had to perform under that contract, right? Both sides have an obligation. If they have a contract, both sides gotta do what it's supposed to do. If Milton Schwartz -- if you believe the evidence that we've been talking about, that Milton Schwartz said he was going to give a million dollars or even 500 plus raise 500,000, and that was a contract -- which by the way, we're going to get to some other reasons why that -- he had never had a contract, never had an enforceable contract.

He may have thought he had a contract, which I find hard to believe of a guy that was as familiar with contracts as Milton Schwartz, they admit he was, who understood contracts, who understood negotiating contracts. But the bottom line is he didn't perform. And there's a jury instruction that's jury instruction 29. Read it for yourself. So let's talk about whether he performed or not. Testimony of Dr. Lubin on this subject.

(Whereupon, a video recording was played in open court between at 5:16 p.m. and 5:17 p.m.)

MR. JONES: Okay. So let's go to her testimony again.

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(Whereupon, a video recording was played in open court between at 5:17 p.m. and 5:17 p.m.)

MR. JONES: Okay. That's in response to questions from the Estate's attorney. What did she say following?

(Whereupon, a video recording was played in open court between at 5:18 p.m. and 5:18 p.m.)

MR. JONES: They kept after Dr. Lubin on this point, so here they asked him again -- asked her again.

(Whereupon, a video recording was played in open court between at 5:18 p.m. and 5:19 p.m.)

MR. JONES: All right. And so let's go to the -- I'm going to pass this. She says it again, but we're running out of time and you've been sitting her patiently, so I'm not going to play it more time. She said no meeting on the -- so ladies and gentlemen, there clearly was no meeting of the minds on the money and that's what these boards show you, but this is just summarizing all the testimony you just heard. They can't tell you want the deal was. No meeting of the minds on money. No contract. Simple as that. There was no meeting of the minds also with respect to what the naming rights covered.

And by the way, remember that Dr. Pokroy, Dr. Sabbath and Dr. Lubin are the only three members of the board who -- well, and Mr. Schwartzer, who were actually there at the time and they are the ones whose testimony is the most reliable. They show you that pledge. That pledge has said that's what he paid up to that point. That didn't say that he had a naming rights agreement in perpetuity, because he paid

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$500,000, so don't let that mislead you, versus all the testimony you heard, including from Milton Schwartz himself, in 2007, when he said it was a million bucks, but I couldn't afford it, so I said I'd raise 500 and give you 500.

This is the August board meeting. This is -- so what do the rights cover? Here's the other problem they've got. They can't tell you exactly what this supposed agreement covered. This is the original meeting minutes that gave rise to this whole idea. Milton Schwartz is there and -- I'm sorry -- and you'll see that a donation -- doesn't say how much -- and it says the academy will be named after him. That's why you have a contract, as opposed to this document, that says nothing about in perpetuity. It says nothing about how much and it says the academy.

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That's why you do what the Adelson's do. You have a written contract that is clear, and everybody can understand it 30 years later, so you don't end up in a courtroom like this. Here's the corporate resolution that's based upon those meeting minutes from 1989. The following resolution was adopted by the board. Milton I. Schwartz Hebrew Academy. Nothing about the school building. Nothing about the letterhead. Nothing about anything else. It's about the academy. And what doesn't it say? Nothing about in perpetuity. This is the resolution that the board passed about the corporation.

The August 14, '89 board minute meetings [sic] of the original corporate minutes, which the Estate basis its entire claim in connection with the donation. They say nothing about the academy

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other than the academy and the corporation and nothing about in perpetuity. The elementary school could not be covered by the naming rights agreements when Milton Schwartz voted to name the School after Dr. Lubin. He showed you this, because he knew this was going to be a problem. How can it -- remember, they claim it's a breach of contract to take Mr. Schwartz' name down off the school, a contract that came about in 1989, not 1996, not 1999, not 2007, in 1989. And Milton Schwartz was there, and you've seen this before. No need to belabor it. Milton Schwartz voted to put her name on the school.

This is the -- this is from the newspaper article that's in evidence. By the way, all the evidence numbers are there on the bottom left. This is the Milton Schwartz -- whoops, I shouldn't have hit that -- Milton Schwartz -- going too fast. I'm trigger happy here. Okay. So why is this interesting? This is not only where Milton Schwartz is we're putting your name on the school that he claims is -- that's part of the breach of their contract. That's a big deal. You took my dad's name off the school.

Well, his dad put Dr. Lubin's name on the school. And think about that. Why did they do that? She didn't pay a bunch of money. She didn't pay a bunch of money. They did it to honor her. That's in honor or Dr. Lubin-Saposhnik's devotion to the School. So that proves the point that you can have your name on the school, which is what happened later on with the Adelson's. They wanted to honor the legacy of Milton Schwartz, not because he had a contract, because he did some good things for the School. Use your common sense. They want to say

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this was something that wasn't any kind of -- related to what they did later with the Adelson's and the school.

This is something different. It's the same thing. Milton Schwartz did it himself. And what happened? The name went right on the front of that school, ladies and gentlemen. And there you go. In 1990 to 1996, was the Dr. Lubin-Saposhnik Elementary School. Same building. Same school. Later on, it got moved. When they put Milton Schwartz' name on in 1996, they moved her name to that auditorium building that Mr. Schiffman told you about. They left her name on a building, just not the front of that one. Okay.

The evidence is clear and uncontestable. You've just seen it. No written contract. No meeting of the minds on the consideration, the money. No agreement about the naming rights, what that would cover. No agreement about in perpetuity. There's not even any agreement about that he ever paid the money. In other words, there was never an enforceable naming rights agreement of any kind, written or oral, because Mr. Milton Schwartz didn't have a meeting of the minds with the School and he certainly didn't pay what the board members who were there at the time said he was -- he obligated himself to pay.

Jury instruction number 34. A promise that gives rise to a cause of action for promissory estoppel must be clear and definite, unambiguous as to the essential terms. Promise must be made in a contractual sense. This is really important too, because it -- he said, well the alternative. We can't prove to you we have a contract. We got a fallback position. This is the fallback position. Promissory estoppel. The

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problem with that argument, ladies and gentlemen, is it has the same problem the contract has.

You still have to have something that -- an agreement that was clear and definite, ambiguous as to the essential terms to have promissory estoppel. If you clearly don't have essential terms and it's not definite and nobody knows exactly what it is, you can't have promissory estoppel. It says the promise must be made in a contractual sense. Same kind of thing. So by the way, just use your common sense. If Mr. Schwartz, Milton Schwartz believed he had a breach of the naming rights agreement, he certainly knew how to sue. He did sue in 1992, but he didn't sue for naming rights.

That was a breach, according to them. So why did he sue? Use your common sense. Because he knew. He filed an affidavit with the Court. He didn't sue to get the naming rights back on. He sued to take back control. Common sense. Why did he do that? You gotta ask yourself. Let's look at -- well, they talk about the articles and the perpetuity in the Sabbath letter. The Sabbath letter -- remember, there was a resolution in 1996 to say okay, let's put Milton's name back on the school. They amended the articles. That actually proves our case. The articles can be amended.

They amended the articles to take Milton Schwartz' name off. He didn't sue for breach. They amended the articles to put the name back on. And in 2007, they amended the articles to take Milton Schwartz' name off the corporation. This is entirely consistent, ladies and gentlemen. Milton Schwartz -- they can't argue that Milton Schwartz

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wasn't there in 1992 and 1996. He saw. He knew. You can take it off. He saw they changed the bylaws in 1992. Take his name off in perpetuity. That's why in 1999, they put it back on. You don't need to put it back on, if it's off.

Article 8 of those bylaws -- look at it in the exhibits. Article 8 of the bylaws and Mr. Schwartzer agreed, and we played that testimony. Bylaws are not a contract. They say right on them they can be amended, just like articles, just like resolutions. Milton Schwartz was very aware of that and here's what we're going to talk about. Testimony. There's the dispute. So here's the testimony of Roberta Sabbath.

(Whereupon, an video recording was played in open court from 6:28 p.m. to 6:29 p.m.)

MR. JONES: So here's the point, ladies and gentlemen. When he was -- when she was shown that resolution that said we're taking his name off -- and we're going to look at it right now. This is December 16, 1992 removing board member pictures from the wall and Milton Schwartz' name from the school. They try to say well, it had to do with the cab company. They took his name off the school ladies and gentlemen. I mean, come on. Whatever reason it was, they took his name off the school. And Dr. Sabbath has said, well, I can't remember why we did it. That's why you need a written contract, because now we have to go rely on memories.

But if you look at what she said there at the bottom, here's why she did it. "Roberta Sabbath suggested we speak to our attorney, Scott Kantor and get his opinion with regard to the name of the school."

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So obviously they talked to their lawyer and they said yeah, you don't have a contract. You can take his name off. And they did. There it is. 1994 they took his name off. No lawsuit. He sued to get control, but he didn't sue for his name. Hebrew Academy from -- it was up here, the Milton I. Schwartz Hebrew Academy, amended to say now the Hebrew Academy. By the way, up on the top one, they talk about all these documents.

The deed was in the Hebrew Acad -- Milton I. Schwartz' name. The articles. The bylaws. The resolution. One document said perpetuity, bylaws, which is the thing it's probably the easiest of all those documents to change. Said it right in the bylaws. Okay. Testimony of Mr. Schwartzer on the same subject. Wait a minute. You're on the board. You're a lawyer. Why'd you take his name off?

(Whereupon, an video recording was played in open court from 6:31 p.m. to 6:31 p.m.)

MR. JONES: Except that it was done. What else does Mr. Schwartzer say?

(Whereupon, an video recording was played in open court from 6:31 p.m. to 6:31 p.m.)

MR. JONES: Common sense, ladies and gentlemen. So Mr. Schwartzer said that would clearly be a violation of what they claim to be the contract. Milton Schwartz didn't sue. He certainly could have. What does Roberta Sabbath say?

(Whereupon, an video recording was played in open court from 6:32 p.m. to 6:32 p.m.)

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MR. JONES: Okay. The evidence shows that Milton Schwartz knew the board could pass a new resolution taking his name off the corporation or anything else to do with the School. Reconciles with the board in 1996. Gets his name back on the corporation, but nothing said about perpetuity. This is 1997 when they filed the new articles. It goes from the Hebrew Academy to the Milton I. Schwartz Hebrew Academy. Nothing about perpetuity. This critical term that they tell you about, critic -- that's the lynchpin of the case. If it's not in perpetuity, even if he had a contract, it doesn't matter. But it doesn't show up anywhere, except in a couple of bylaws.

Board meeting minutes. They pass a resolution naming the school back to the Milton I. Schwartz Hebrew Academy outside of the school, blah, blah, blah. Nothing about perpetuity. Remember, by the way, in perpetuity is prominently displayed in the resolution the Adelson's got in 2007 and 2008. It's on the document recorded with the Secretary of State's office. And let's talk about this letter. Mr. LeVeque talked about the Sabbath letter, but it says that were always going to do it. She ad -- he admits Dr. Sabbath said nothing in the letter about in perpetuity, but here's this -- on the second page, it's Exhibit 139.

The restoration of the name, Milton I. Schwartz has been taking as a matter of Menschlichkeit. In other words, he's an honorable guy. Not that he put up any money. Not that he -- that they agreed in perpetuity to name the school for him forever. It's the same reason that Milton Schwartz agreed with the other board members in 1990 to name the school for Dr. Lubin, to honor him. That's what that word,

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Menschlichkeit means. Not a contract in perpetuity. And by the way, let's see the testimony.

(Whereupon, an video recording was played in open court from 6:34 p.m. to 6:35 p.m.)

MR. JONES: Ladies and gentlemen, it doesn't get any better than that for us. He just told you it wasn't in 1996. That wasn't when his dad entered a contract. Wasn't in 1990. Sometime in 1989. That's when he says his dad entered a contract. It wasn't the Roberta Sabbath letter. They're making that up now, because they got nothing else. Milton Schwartz and the estate have never claimed that the Roberta Sabbath letter constitutes a contract for naming rights. Milton Schwartz was present when they had this meeting in 2004.

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And this contradicts their whole argument that Milton Schwartz was there at that meeting, that he agreed that the School would always be in his name, all these schools. They're talking about at this meeting, funding issues, naming opportunities for the pre-school, the elementary and the middle school. Those are the things that he says he has the exclusive rights to in perpetuity. Why would he be talking about that, if there was some other agreement that he had that said you couldn't do that? Common sense. That doesn't make sense. Testimony of Mr. Schiffman.

(Whereupon, an video recording was played in open court from 6:36 p.m. to 6:37 p.m.)

MR. JONES: So -- well -- so ladies and gentlemen, here. Again, this directly contradicts their claim that Milton Schwartz said if

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you put the name on the middle school the Adelson name on the middle school, that's a breach of my agreement. Milton Schwartz looked at the plans. Mr. Adelson said the same thing. They broke ground in, I think it was November 21st, 2006. The plans was there. Milton Schwartz was in those meetings. He can obviously look and see the middle school's going to be in the new building. It's not going to be in the old building. Here's the petition to compel for accounting. This is the petition that was filed by the School. I'm sorry.

This is part of the treasurer's report from minutes. This shows -- by the way, this was in from June 12th of 2007. It's Exhibit 2012. This is before Mr. Milton Schwartz passed away. We just saw this during trial. I'm just reminding you of it. A million-seven dollar note from Bank of America will become due in September. Nevada State Bank loan has 11 months left with $9,600. This clearly proves that that loan was coming due. That's the loan that Milton Schwartz guaranteed. So yeah, that's consistent with Mr. Adelson's testimony and Mr. Schiffman's testimony.

Okay. We're getting to the resolutions. I'm going to go through this fairly quickly, but you'll see that Mr. Kantor, if you recall -- Phil Kantor is, I think our last witness. And Paul Schiffman both testified that that agreement in 2007 was not final. Why is that important? Because they referenced down below. You'll see it says there's a resolution in December of 2007 that the lower school, the elementary school is going to be named after Mr. Schwartz in perpetuity. It's a resolution. It says that. And it also says that the corporation will be

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changed, but if you look at the resolution -- and this is just more of that resolution you've already seen about the naming rights for the Adelson's.

But look at February 12, 2008. It specifically says the executive committee commit and decided to nominate Milton Schwartz, son of Jonathan Schwartz, son of Milton Schwartz on the board. Why is that important? They try to suggest somehow that there was trickery going on here and they were not trying to tell Jonathan everything that he needed to know. This is February of 2008. They invite him on the board, and he testified he turned it down, so use your common sense. If they had something to hide, if they were really trying to trick him and not tell him what was going on, why would they have invited him to join the board?

They wanted him on there, because his family had been good to the school. They wanted to give him a seat at the table and he turned it down. And now he wants to turn it around n them and say you tricked me. You didn't tell me stuff. You can't get any better than saying well, if you come to the table, there's no way to hide anything, if you're on the board, what we're doing and when we're doing it. This is the resolution from February 2008. I just want to show that, because this shows that the first resolution of the board meeting on December 13, 2007 will be amended and restated as follows.

And the importance there is, ladies and gentlemen -- and you look at it as Exhibit 930. It doesn't mention Milton I. Schwartz Elementary School in perpetuity. They took it off. Not that it was a

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binding contract, by the way. That just proves the point. Resolutions can change. The final version was in March 11, 2008. It creates a binding contract. There's the agreement. It gives the family -- got a little problem there. Looks like it -- oh, there you go. Finally came up. It gives the family the right to name everything, including the classroom buildings, which is where the elementary school was, and it says, "Upon request of the family, at any time, the corporation will immediately change and remove the name selected by the family or the foundation."

So they could take Milton's name off of that school, if they wanted to, signed by Mr. Chaltiel. That's Exhibit 184, based on a resolution authorizing him to sign the contract. There he is. That's what they should have done. If they were really going to give it to him in perpetuity, they could have put it right there in the document they filed with the Secretary of State's office. Go ahead.

(Whereupon, an video recording was played in open court from 6:42 p.m. to 6:42 p.m.)

MR. JONES: That's really what they're wanting. We've got -- the Adelson's have -- they did it right. They got a resolution authorizing the signing of a contract that all the board looked at. It has the details. It tells you everything you need to know, so there's no guessing. And now Mr. Jonathan Schwartz wants to come along and say that's -- throw that out. Throw that out and all the money the Adelson's gave, because my dad thought he had an agreement back in 1989 that he failed to document. So what they want to do is they want to blame somebody else for the conduct of Milton Schwartz, who was a sophisticated --

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admittedly genius, sophisticated businessman, who was familiar with contracts, how to make contracts and how to enforce contracts.

But they don't want to -- they want to blame that on somebody else. We would ask you not to let them get away with that. And we would believe that is actually not honoring Milton Schwartz' legacy. It's dishonoring it by the harm it would do to that school. These are the corporate resolution amendments. That's from 1990. No in perpetuity. 1997, no in perpetuity. 2008, in perpetuity. Jonathan Schwartz knew about the changing of the name. This is 2008. Sends the letter. He goes out there. We met today with Paul Schiffman. There's the monar -- the only way you get in the school. Mr. Schiffman testified you gotta run right past it.

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He said, well, Paull Schiffman told me in 2008 that just applied to the high school. Read it for yourself. Common sense. If he was so involved and so careful about his father's legacy and protecting his father's rights and somebody said well, the main name of the school doesn't have anything to do with your dad now, because it used to. Remember, there was another exhibit that shows two signs before they replaced it. And he claims, oh, I just didn't think about that anymore. I just let it go.

Common sense, ladies and gentlemen. That is not credible. It's not believable. And based upon Mr. -- Jonathan Schwartz' prior testimony, we would submit that his credibility is not good. Let's just leave it at that. There was some other testimony there, but because of the lateness of the hour, I'm going to pass it. This is Mr. Schwartz' email.

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This is important. He says, "Because of the various discussions we've had, I -- we gotta have this agreement. This was March 2005. The only reason I put a deadline is in need to know, so I can tell -- sell some securities.

Why is that important? Credibility. He -- this is 2010, this email. He says I'm ready to pay. I gotta sell some securities, so I can pay you the money. What did he tell you? Well, I couldn't pay the money until 2013, because of the IRS. Oh, that's interesting. Need to know. I can sell the securities. This is his demand letter of May of 2010. This is when he sent the letter saying they better pay and said it was my duty to fulfill my dad's wishes. I take them extremely seriously. I got him to testify in front of you that if he knows he's got a claim, he's going to bring it right away. 2010.

May 2010. I regret having to say the following. I'm going to -- but if -- I have no choice. My dad's memory and his commemoration. I will be compelled to take appropriate legal action. The fact that the school has apparently been retitled the Adelson's campus, blah, blah, blah. He's going to take action. Over the last two and a half years, he knows about breaches, despite the fact that some of what the School has done in the last two and a half years breaches the agreements. He's done nothing. If he really believed he had a naming rights agreement, his dad did and he was breaching it, he would have -- according to him, he took his obligations very seriously. His fiduciary duties. Highest duties in the law. But he didn't sue.

But he does say I'm giving you until May 31st or my offer will

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terminate. Well, it terminated. There was a response to this, by the way. He didn't mention that in his closing, Mr. Leveque didn't. So here's the deal. Jonathan Schwartz tries to leverage the School into signing a naming rights agreement that he knows his father didn't have. Common sense tells you that if Milton I. Schwartz really had a naming rights agreement in perpetuity, why did his lawyer's son need the school to sign another agreement? Common sense, ladies and gentlemen. If you have an agreement that's enforceable, you don't need to have him sign another one. That's just plain common sense. And remember, his son, Jonathan graduated from Northwestern Law School. That's one of the better law schools in this United States.

The trial testimony of Sam Ventura regarding the March meeting with Victor Chaltiel, Paul Schiffman and Jonathan Schwartz. Let's play that and see what really happened in this meeting in 2010. This is -- remember, 2010.

(Whereupon, an video recording was played in open court from 6:47 p.m. to 6:48 p.m.)

MR. JONES: Okay. So what else did Mr. Ventura tell us?

(Whereupon, an video recording was played in open court from 6:48 p.m. to 6:48 p.m.)

MR. JONES: I could check right now. March of 2010, but he told you under oath that he couldn't do it. Mr. Ventura also said in his testimony that he brought a check -- they're all happy. He brought a check for $500,000 in his briefcase, but he demanded they sign the letter agreement first that gave all these rights that Milton Schwartz didn't

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have in exchange for the $500,000.

Ladies and gentlemen, here's the deal. Jonathan Schwartz was trying to leverage the deal where to -- I'll give you the money, but you gotta sign this agreement. And Mr. Chaltiel rightfully got upset and said no. Heck no. I'm not going to do that. Why would we do that? The evidence is overwhelming that Mr. Schwartz never had an enforceable naming right agreement, let alone one in perpetuity.

Now, I'm going to play this one last thing about the -- this is to do with their damages. They claim they have -- they want damages of a million dollars. They want the money the Milton Schwartz gave back of 500,000 plus other contributions he's made -- a hundred -- a million-ten, I think, 1,100,000 or something. So what did Ms. Pacheco say about her chart that you were showed?

(Whereupon, a video recording was played in open court from 6:50 p.m. to 6:50 p.m.)

MR. JONES: So in other words, the evidence -- and some of you asked questions about that. She -- after the lawsuit was filed, 2013, she was -- prepared the chart, but she destroyed the backup, or she got rid of the backup or whatever. So --

MR. LEVEQUE: Objection, Your Honor. Misstates testimony.

THE COURT: Sustained.

MR. JONES: You know what, it does misstate the testimony. She said he destroyed it. It got -- I think she said something that they didn't have the evidence or whatever. So the bottom line is we were never able to verify the backup material. So the credibility issues we

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believe the Estate has -- and by the way, think about this. They want to get naming rights back on everything, plus he wants to get all his money back. It's not surprising. They want their cake and eat it, too. Give us all the money that Milton Schwartz donated after all those years, plus give him the naming rights. Claims under the will. This is our claims. Testament -- the will.

So Mr. LeVeque said you can't -- a building can't cash a check. The money isn't going to a building. It's going to scholarships. The school holds the money in trust for the scholarships, so that's just plain wrong. That's misleading. This money doesn't go to build anything at the school. It's held for the kids themselves.

Jury instruction on mistake. Or excuse me. They've claimed that this was a mistake, that Milton Schwartz -- if you didn't have a contract, you made a mistake. Well, this tells you as with respect to mistake, you have to have clear and convincing evidence. That's a higher burden, even, that a preponderance of the evidence. And so if you think there was some kind of mistake, you have to use this standard and this is instruction number 18. So it's even a higher burden of proof for them on that. Here's the school's petition in 2013. What does it say? The lower school of preschool, grade 4 through -- preschool through 4 is known as the Milton I. Schwartz Hebrew Academy. You've seen this before. There's a picture.

In 2013, they filed a suit asking for the Estate to pay. They said themselves under oath that the name was still up there. It also says Mr. Schwartz guaranteed the loan and he didn't pay it. That's consistent

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with what Mr. Adelson told you under oath. And when I showed you the resolution from one of the board meeting minutes from 2007, when Mr. Schwartz was still alive, when they said the loan was running out. Of course Mr. Schwartz didn't sign the loan in December of 2007, because he was dead. The School had to take on that obligation that the Adelson's ultimately paid off.

The 1-point million dollar mortgage was paid off and Mr. Schwartz' guaranty was extinguished. And it wasn't extinguished. That's not even -- that's not correct. It was extinguished, actually, back in December or so of 2007, when the Adelson's paid it off in their 25 million and $50 million gifts. No such agreement exists. Importantly, the executor, Mr. Jonathan Schwartz drafted the so-called settlement agreement long after the will and Mr. Schwartz' death after Petitioner, School, asked for the money.

He came up with this deal after -- they asked for the money in 2007. All of a sudden he's got some kind of agreement. He says the settlement is grossly a misnomer. It doesn't -- that's not true. The document is merely relied upon as an attempt to extort Petitioner, the School, by withholding the gift, until the executor, Jonathan Schwartz' personal and onerous demands are satisfied. That's how they felt about Mr. Milton Schwartz' claim on naming rights.

All right. So let's just play real quickly some testimony of Mr. Schiffman.

(Whereupon, a video recording was played in open court from 6:54 p.m. to 6:55 p.m.)

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MR. JONES: Okay. So let's look at the next testimony of Mr. Schiffman about this subject. I've got a couple left and then I'm done.

(Whereupon, a video recording was played in open court from 6:55 p.m. to 6:56 p.m.)

MR. JONES: So ladies and gentlemen, if the agreement is not enforceable -- and it's not clear. But the will said I want the money to go to the Milton I. Schwartz Hebrew Academy, because that's what it says, paragraph 2.3 of the will. He wants it to go to Hebrew Academy for scholarships. So think about this. I believe the evidence is overwhelming. I've never seen anything where it's overwhelming as the evidence in this case that there was no enforceable agreement, written or oral. But let's talk about the bequest. The bequest is clear. He wanted to build the Hebrew Academy.

Well, up until Jonathan Schwartz sued, there was something called the Hebrew Academy that did honor the memory of Milton I. Schwartz. So if -- and there's no evidence, not a speck of evidence that had Jonathan Schwartz not sued, that anybody was going to take it down. They were honoring the memory of Milton I. Schwartz. Who knows how long they would have done it? Maybe forever, until that building went away. Maybe for another year or two. But the point is, for five and a half years, until Jonathan Schwartz sued the school, there was a Milton I. Schwartz Hebrew Academy. It existed.

And think about this. So what they're telling you is, because of the actions of Jonathan Schwartz, the name was changed, therefore he doesn't have to pay. So he created the very circumstance that he's

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now relying upon as an excuse not to pay the money. Ladies and gentlemen, that is complete outrageous, inappropriate and unfair and should not be tolerated. Milton Schwartz didn't make any mistakes. He understood at the outset he could have had a written agreement. He knew how to make written agreements. And consequently, when there's a school -- from 1996 to 2003, that's what the school was until Jonathan Schwartz sued.

This is the verdict form. I want to go through it with you, which obviously you'll be glad to hear, because that's the last. Did Milton Schwartz have a naming rights contract? No. Clearly, categorically, unquestionably, no. The evidence could not be more overwhelming. Did Milton Schwartz perform all the obligations under the terms of the contract? I put that in there, just because I don't think he had a contract. I think the evidence is clear. But if you say he had some kind of an oral contract, he didn't perform the terms, based upon -- let's see, every witness that testified.

The only ones that testified were Jonathan Schwartz said it was a half a million dollars and Milton Schwartz said it was a half a million dollars in 1993, but then they contradicted their own testimony, so it was a half a million plus a half a million. So he clearly never complied with -- and the burden of proof -- their obligation. He never complied with his obligations, if he had a contract, because they never proved to you that they -- he raised another half a million dollars. He raised some more money, allegedly. Dr. Lubin would argue with that and she did on the witness stand.

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So did the Claimant breach the contract? Clearly absolutely not. There was no contract to breach. If you find -- did you find that the -- Milton I. Schwartz wrote the following -- and this is from the will, paragraph 2.3. He intended the bequest be made to the school presently known as the Adelson Education Institute. In other words, when he talked about the sum should go to the Hebrew Academy, that's the -- basically that building that was there that had his name on it, until the son sued. So we ask you to circle B on question 8. Was it -- what is the appropriate amount of money? Obvious we say zero. He shouldn't get anything -- get any of his money back.

Do you believe the School acted in a manner which should have been reasonably expected to induce Milton Schwartz' reliance? We would argue clearly there was nothing that the School did that should have induced Mr. Schwartz to do what he did. He was a meticulous, sophisticated guy. If anybody understood what their rights were, it was Milton Schwartz, as compared to Dr. Lubin, who is not a sophisticated businessperson in terms of what was agreed to. Do you find that Milton Schwartz believed he had a naming rights contract with the School, but was mistaken? He can't have believed that, because of his own testimony.

Was it 500,000? Was it 500 plus 500,000? Did Milton Schwartz make the bequest to the school based on his mistaken belief? We would again say no, because we don't believe it's possible for him to be mistaken about what he clearly understood better than any of the other board members who were there at the board in 1989. Ladies and

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gentlemen, thank you very much for your patience and your attention and I appreciate it. Thank you. And my client appreciates it, too.

THE COURT: Thank you, Mr. Jones. As mentioned, we have an opportunity for rebuttal. Mr. LeVeque?

MR. LEVEQUE: Yes.

THE COURT: You going to do that? Okay?

THE ESTATE REBUTTAL CLOSING ARGUMENT

MR. LEVEQUE: See what happens when you do rebuttal.

[Pause]

MR. LEVEQUE: So it's impossible to go through everything in rebuttal, because we're limited on time and I quite frankly had a lot of water to drink. But here are, I think the main points that need to be addressed. First, there's a jury instruction, jury instruction 14 that talks about discrepancies in witness testimony and it states that if are any discrepancies does not necessarily mean that the witnesses should be discredited. Fairly of recollection is a common experience. An innocent mis-recollection is not uncommon. And I think that both the Estate and the School acknowledge the fact that recollection from 29 to 30 years ago is a difficult thing.

Another instruction that I think is related to that, especially with what I just heard from Mr. Jones. I think he spent about 45 minutes talking about all the different recollections of the board members during this period of time for the proposition that well, because they all seem to recall different things, there can't be a contract. And I just direct you guys to jury instruction number 6, which is actually an instruction that

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was proposed by the School. I'm going to put it on the document camera, because I don't have it on the PowerPoint. So jury instruction number 6 says,

> "Any proceedings, conclusions or actions -- any conclusions or actions of individual board members outside of an official meeting of the board acting as a board cannot be construed as legal actions by the School or found to be binding upon the School, unless the board directs an individual so to act."

The only thing we know of what the actual board did was accept $500,000 and name the school the Milton I. Schwartz Hebrew Academy in perpetuity. The fact that there is different accounts as to what Milton promised doesn't really matter, given that the only thing that the corporation did was accept the $500,000 and it continued to perform for years. We looked at -- both of us showed -- the exhibit escapes my mind, but it's the meeting minutes from the December 1992 meeting, where the board moved to remove the name of Mr. Schwartz.

And there's nothing in there, nothing in those board meeting minutes that talk about the reason why the School did that is because he didn't pay another $500,000. The only person that testified to that is Dr. Lubin, who by the way, her son has been, as you've seen, in this trial almost every single day and Dr. Lubin has been here on a number of days and Dr. Lubin actually wrote a book about her experience with the School all the way to the point of her termination. So to say that we look at witness credibility, I submit to you that you might want to take into consideration Dr. Lubin's credibility in this case.

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On that point, another thing that's an issue here in rebuttal is that I can't go back and look at every single piece of witness testimony to rebut the witness testimony that was presented by the School. But what I can tell you -- and I will show you specific examples -- that you weren't getting all of the witness testimony. You only saw soundbites and that goes back to exactly what I said in my closing is that they're trying to look the trees. They're not look at the forest and they're not giving you the entire testimony on a relevant subject. But with respect to what Dr. Sabbath said, you recall Mr. Jones saying that Dr. Sabbath said well, her recollection was a million dollars. Well, if you remember on the first day she testified.

THE COURT: You mean Dr. Sabbath?

MR. LEVEQUE: Dr. Sabbath. An answer to a question was, "I definitely remember there was a promise of a million dollars and that was my recollection."

And by the way, I don't have the video from the actual trial. This comes from the transcript that we received every day that the Court Reporter was giving us.

So my after that was, "Dr. Lubin told you that?" And the answer was, "Dr. Lubin and whether I had a specific recollection with Milton to that effective, I can't remember."

Dr. Sabbath couldn't remember what Milton said. Her whole recollection with respect to what was promised was derived from what Dr. Lubin said. Mr. Jones didn't give you the full testimony of Dr. Sabbath. Similarly -- on a similar note, Mr. Jones was talking about

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what we said, what Mr. Freer said in his opening and what I said in a question to Mr. Schwartzer. I asked Mr. Schwartzer whether there was a written contract, but if you heard what I said, it was whether there was a formal written contract and I've never made a representation in this case -- in fact, I said in the very beginning of my closing as did Mr. Freer, that there isn't a formal contract.

The reason why we're here is that we have Nevada law that's provided in jury instruction number 28 is that if there are several writings that form a single contract, that's a contract. And I have what Mr. Freer said. Mr. Freer, in the beginning of his opening, talked about a lot of evidence that we believe evidenced the contract. And then he said,

> "In addition, you're likely to hear testimony from several people involved in the transaction that Milton himself understood these documents reflected the agreement and belief that the School will be named after him in perpetuity."

Mr. Freer didn't make a representation that there was no written agreement. What Mr. Freer said is that there was an agreement and that Mr. Schwartz understood by the documents reflected the agreement. Mr. Jones makes a big to-do about the fact that Milton Schwartz didn't sue after December of 1992, when they were in the School. Well, just because you can sue doesn't mean you have to, and it doesn't mean you have sue the very next day. If you remember, Mr. Schwartz in his -- in the testimony of Mr. Ventura, Rabbi Wyne and Jonathan Schwartz that Milton Schwartz was busy with another school for two years.

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I think that -- I shouldn't say I think, but it appears based from the record that Mr. Schwartz was more involved and interested in putting together another school and making sure it ran thank filing a lawsuit against Milton I. Schwartz Hebrew Academy. In other words, just because he didn't sue between 1993 and 1996 didn't mean that he waived any right.

Mr. Jones showed you testimony from Mr. Schwartzer about what his understanding of the agreement was. The testimony he didn't tell you -- and this was on August 24th. The question was posed,

"Do you believe the school had a legally enforceable agreement?"

Answer, "Yes."

Question, "But is there a writing?"

Answer, "Yes."

Question, "Is there a writing showing what the School was going to do?"

Answer, "Yes."

Question, "Is there more than one writing?"

Answer, "Yes." Another answer, "My understanding, it was going to be Milton I. Schwartz Hebrew Academy in perpetuity and changing the school would be a violation."

He didn't show you that testimony.

Dr. Sabbath. Question was posed to her. "Do you know if there were any documents that were prepared to memorialize this agreement?"

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Answer, "Well, in the minute -- the minutes were."

Question, "You testified that there was an agreement to name the school after Milton I. Schwartz in perpetuity. Do you have an understanding as to what that -- to what school means?"

Answer, "At that time, if I recall correctly, there was the elementary school and then there was another building, a gymnasium and I can't remember if they were built at the same time. But ultimately, the entire campus and the property would be Milton I. Schwartz Hebrew Academy. And we had acreage behind the elementary school for subsequently the other buildings construction."

I guess I agree with one thing from Mr. Jones. Common sense. I trust you to use your common sense in this case. When you look at the big picture, you look at the forest and not the trees. It's pretty clear what happened here, and you know, in a perfect world, I agree. It would have been a lot nicer if there was a naming rights agreement that the Adelson's had that Mr. Schwartz had back in 1989 and 1990 and that didn't happen. And that didn't occur. And I submit to you -- and I said this in the very beginning of our -- of my closing argument is that you gotta look at the circumstances at the time.

You gotta look at the fact that this was a small school. The Jewish was small in 1989 and 1990. The board was comprised of parents, Dr. Pokroy, Mr. Schwartzer, Dr. Sabbath. Who else? Mr. Ventura? And they did it the way they did it and it's just that is it. The facts are the facts and it's up to you to make a determination with respect to whether you believe what they did was sufficient to form a

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contract under Nevada law and what we showed you with respect to jury instruction 28. And I'm almost done here.

Mr. Jones made an argument that if the Adelson's somehow don't have a naming rights agreement, all the money has to go back to the Adelson's. Well, that's not the position we take in this case. The position we take in this case is the Adelson's got the high school. They got tennis courts, gymnasium, swimming pool. We've never taken a position that the entire school is going to have to go back to the Milton I. Schwartz Hebrew Academy. The campus does. The name of the campus. The middle school and the elementary school.

But what -- with respect to the high school and everything else that was built separate and apart from the middle school and the elementary school, we've never taken a position that that is supposed to be named after Milton Schwartz. We're not seeking to take away the Adelson credit. What we're seeking is to enforce the agreement that existed with my client and no amount of money should deprive someone of their contractual right. I don't care if it's 5 million, 3 million 100 million or a billion dollars.

If you have a contractual agreement, you have an understanding, you have to live by that agreement. Again, going back to this idea of the deal. What was the deal? Mr. Jones said well, five different people thought the deal was different. Whatever the deal was, the School accepted it. The School performed. The School kept the name of the school for years. And then it took it off and then it put it back on again when Dr. Sabbath tried to make amends on behalf of the

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School with Mr. Schwartz. And what happened after that? Mr. Schwartz got involved again, began contributing again.

Mr. Jones showed you a slide on the May 10th, 2004 -- I guess it was some sort of chairman's report and there was naming opportunities discussed. Well, a couple things on that. Number one, the minutes don't say anything about whether any naming was entered into. It was just the subject was discussed. And number two, this is 2004. This is two years, almost two years before the Adelson's got involved. Mr. Schiffman did testify that Milton Schwartz probably walked around and knew that the new middle school classrooms were part of the new construction.

Well, so what. We're not saying that -- it's sort of a non sequitur. We're not saying that the building, the middle school building should be named after Milton Schwartz. What we're saying are the middle school grade, wherever they're housed. They used to be housed in the old building. Now they're housed in the new building. And just because Mr. Schwartz might have understood that new classrooms were being built for the middle school, that doesn't mean that he -- there's no evidence to suggest that he agreed to name the middle school grades after the Adelsons.

Mr. Jones showed you -- and this was Exhibit 930 and I pointed this out in my closing some. A resolution from February 12th, 2008. What he didn't show you in his closing is that was an unsigned resolution. There's no evidence in this record to show that that resolution was actually passed. It was a draft resolution, so it has no

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force and effect in this case. Mr. Jones also made a representation that -- and it actually wasn't his representation. It was the School's representation in its petition for declaratory relief that as of May 2013, the elementary school grades were known as the Milton I. Schwartz Hebrew Academy.

That's demonstrably false by the website. I showed you the website from two years before, September of 2011, showing that the website said the lower school was the Adelson lower school for the elementary school grades. The website doesn't lie. The evidence in this case is what it is. To me, to us it's pretty clear what happened. Obviously Mr. Jones has a very -- and the School have a very different take on what happened, but I agree.

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Please use your common sense and look at the picture as a whole, instead of the super technical arguments that Mr. Jones has made in asking you to look at leaves and branches on a tree and look at the big picture of the forest. It's abundantly clear that Mr. Schwartz did have a binding agreement with the School. It's abundantly clear that that agreement was breached in 2007. It's abundantly clear that the School took no effort whatsoever to see if there was a binding agreement by the testimony of Mr. Schiffman, that he didn't bother to look until after the fact. And when he did find the Sabbath letter, he didn't tell anybody, except for Victor Chaltiel, an attorney.

I've taken up more time of yours than I had hoped, and I apologize for that. I thank you and we'll see you soon.

THE COURT: Mr. Jones.

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SCHOOL REBUTTAL CLOSING ARGUMENT

MR. JONES: Ladies and gentlemen, you've been patient enough. I mean, we've gone way beyond what we thought we were going to do. I don't -- you've got your notes. You heard the testimony. You know, saying something doesn't make it so. Look at your notes. I didn't cherry-pick anything. I told you what I believe -- actually what people said. That's why I didn't show you slides. I actually showed you what they said, so now it's time for you to go do your work. You finally get to do something here in this case.

THE COURT: Okay.

MR. JONES: And we would ask you to follow the evidence and -- not what I said, what Mr. Leveque said, what the people that were up that witness stand said and that actual documents and that will bring you to the right result. Thank you.

[Designated proceedings concluded at 7:19 p.m.]

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

Jessica B. Cahill

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

Jonathan A Schwartz

Plaintiff,

-vs-

Adelson Educational Institute

Other.

CASE NO. P061300

DEPT. NO. XXVI

AMENDED JURY LIST

1. BLANCA MARTINEZ
2. CHERYL SAMLASKA
3. SARAH MORTON
4. WILLIAM HALL
5. MARIA KENNEMER
7. JAKE PETTITT
9. SARAH LANGLOIS
10. CANDACE GARRETT

ALTERNATES

6. MARTISE HAWKINS
8. GIOVANA CORONA-DROUAILLET

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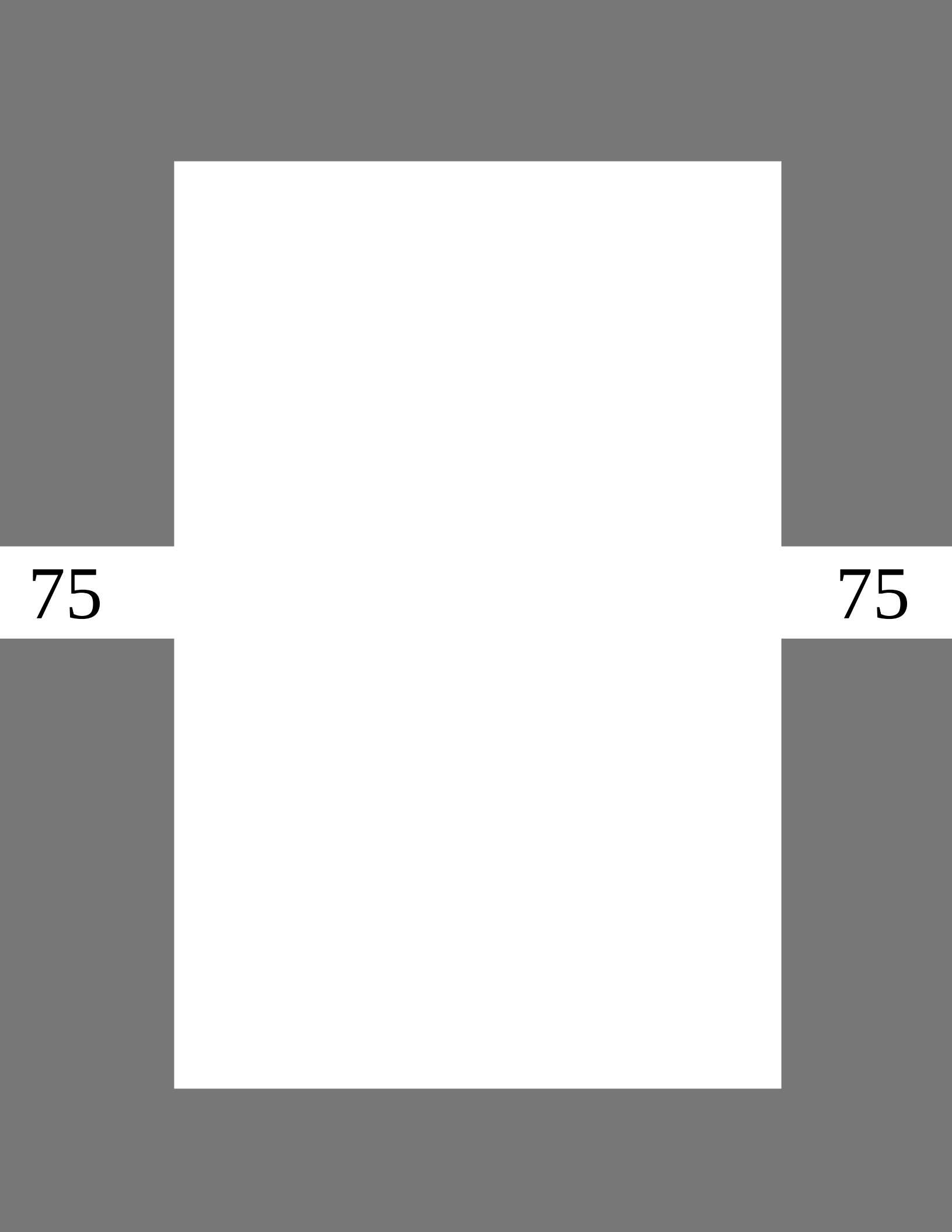
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FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

SEP 05 2018

BY, Lorna Shell
LORNA SHELL, DEPUTY

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of MILTON I. SCHWARTZ, Deceased.	Case No. P061300 Dept. No.: 26/Probate

JURY INSTRUCTIONS

07P061300
INST
Instructions to the Jury
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JURY INSTRUCTION NO. 1

LADIES AND GENTLEMN OF THE JURY:

It is my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.

You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

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JURY INSTRUCTION NO. 2

If, in these instructions, any rule, direction or idea is repeated or stated in different ways, no emphasis thereon is intended by me and none may be inferred by you. For that reason, you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

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JURY INSTRUCTION NO. 3

The masculine form as used in these instructions, if applicable as shown by the text of the instruction and the evidence, applies to a female person or a corporation.

JURY INSTRUCTION NO. 21

One of the parties in this case is a non-profit corporation. A corporation is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and you should decide the case with the same impartiality you would use in deciding a case between individuals.

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JURY INSTRUCTION NO. 5

A non-profit corporation acts through resolutions and decisions made by its board.

JURY INSTRUCTION NO. 6

Any proceedings, conclusions or actions of individual board members outside of an official meeting of the board acting as a board, cannot be construed as legal actions by the School or be found to be binding upon the School, unless the Board directs an individual to so act.

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JURY INSTRUCTION NO. 7

If during this trial I have said or done anything which has suggested to you that I am inclined to favor the claims or positions of any party, you will not be influenced by any such suggestion.

I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are or are not worthy of belief, what facts are or are not established, or what ~~influence~~ inference should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

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JURY INSTRUCTION NO. 8

The evidence which you are to consider in this case consists of the testimony of the witnesses, the exhibits, and any facts admitted to or agreed to by counsel.

Statements, arguments and opinions of counsel are not evidence in the case.

You must not speculate to be true any insinuations suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

You must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court.

Anything you may have seen or heard outside the courtroom is not evidence and must also be disregarded.

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JURY INSTRUCTION NO. 9

You must decide all questions of fact in the case from the evidence received in this trial and not from any other source. You must not make any independent investigation of the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that you must not on your own conduct experiments or consult reference works for additional information.

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JURY INSTRUCTION NO. 10

Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women. Thus, you are not limited solely to what you see and hear as the witnesses testify. You may draw reasonable inferences from the evidence which you feel are justified in the light of common experience, keeping in mind that such inferences should not be based on speculation or guess.

A verdict may never be influenced by sympathy, prejudice or public opinion. Your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

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JURY INSTRUCTION NO. 11

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is indirect evidence, that is, proof of a chain of facts from which you could find that another fact exists, even though it has not been proved directly. You are entitled to consider both kinds of evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give to any evidence. It is for you to decide whether a fact has been proved by circumstantial evidence.

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JURY INSTRUCTION NO. 12

In determining whether any proposition has been proved, you should consider all of the evidence bearing on the question without regard to which party produced it.

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JURY INSTRUCTION NO. 13

The credibility or "believability" of a witness should be determined by his or her manner upon the stand, his or her relationship to the parties, his or her fears, motives, interests or feelings, his or her opportunity to have observed the matter to which he or she testified, the reasonableness of his or her statements and the strength or weakness of his or her recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of this testimony which is not proved by other evidence.

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JURY INSTRUCTION NO. 41

Discrepancies in a witness's testimony or between his testimony and that of others, if there were any discrepancies, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

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JURY INSTRUCTION NO. 15

The preponderance, or weight of evidence, is not necessarily with the greater number of witnesses.

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary. If, from the whole case, considering the credibility of witnesses, and after weighing the various factors of evidence, you believe that there is a balance of probability pointing to the accuracy and honesty of the one witness, you should accept his testimony.

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JURY INSTRUCTION NO. 16

You are the sole and exclusive judges of the believability of the witnesses and the weight to be given the testimony of each witness.

The creditability or "believability" of a witness should be determined by his or her manner upon the stand, his or her relationship to the parties, his or her fears, motives, interests or feelings, his or her opportunity to have observed the matter to which he or she testified, the reasonableness of his or her statements and the strength or weakness of his or her recollections.

If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of this testimony which is not proved by the other evidence.

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JURY INSTRUCTION NO. 17

Whenever in these instructions I state that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him. The burden of proof is preponderance of the evidence unless you are otherwise instructed.

The burden of proof termed "preponderance of the evidence" means such evidence as, when weighed with that opposed to it, has more convincing force, and from which it appears that the greater probability of truth lies therein.

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JURY INSTRUCTION NO. 18

Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the jury a firm belief or conviction as to the allegations sought to be established. It is an intermediate degree of proof, being more than a mere preponderance but not to the extent of such certainty as is required to prove an issue beyond a reasonable doubt. Proof by clear and convincing evidence is proof which persuades the jury that the truth of the contentions is highly likely.

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JURY INSTRUCTION NO. 19

Respondent, the Estate of Milton I. Schwartz's claims for relief are as follows:

- Breach of Contract
- Promissory Estoppel
- Bequest Void for Mistake

JURY INSTRUCTION NO. 20

One of claims brought by The Estate of Milton I. Schwartz against The Dr. Miriam and Sheldon G. Adelson Educational Institute is for Breach of Contract. I will now instruct on the law relating to this claim.

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JURY INSTRUCTION NO. 21

The essential elements of a claim for breach of contract are:

1. The existence of an enforceable agreement between the parties;
2. Milton I. Schwartz's performance, or ability to perform;
3. The School's unjustified or unexcused failure to perform; and
4. Damages resulting from the unjustified or unexcused failure to perform.

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JURY INSTRUCTION NO. 22

An enforceable contract requires:

(1) an offer and acceptance;

(2) a meeting of the minds; and

(3) consideration.

JURY INSTRUCTION NO. 23

An offer is a promise to do or not to do something on specified terms that is communicated to another party under circumstances justifying the other party in concluding that acceptance of the offer will result in an enforceable contract.

JURY INSTRUCTION NO. 24

An acceptance is an unqualified and unconditional assent to an offer without any change in the terms of the offer, that is communicated to the party making the offer in accordance with any conditions for acceptance of the offer that have been specified by the party making the offer, or if no such conditions have been specified, in any reasonable and usual manner of acceptance.

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JURY INSTRUCTION NO. 25

A contract requires a "meeting of the minds," that is, the parties must assent to the same terms and conditions in the same sense. However, contractual intent is determined by the objective meaning of the words and conduct of the parties under the circumstances, not any secret or unexpressed intention or understanding of one or more parties to the contract.

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JURY INSTRUCTION NO. 26

Consideration is either money paid or some other benefit conferred (or agreed to be conferred) upon the party making the promise, or an obligation incurred or some other detriment suffered (or agreed to be suffered) by the party to whom the promise is made.

Promises by the parties that are bargained for and given in exchange for each other constitute consideration, but to constitute consideration, a performance or return promise must be bargained for. A performance or return promise is bargained for if it is sought by the party making the promise in exchange for the promise made and is given in exchange for that promise.

However, a benefit conferred or detriment incurred in the past is not adequate consideration for a present bargain, and consideration is not adequate when it is a mere promise to perform that which the party making the promise is already legally obligated to do.

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JURY INSTRUCTION NO. 27

A party that adopts a contract that was made for the party's benefit or account, with knowledge of the making of the contract and all material terms of the contract, is bound by the contract's terms and entitled to all of its benefits. The party's intent to be bound by the contract may be evidenced by an express agreement or inferred from the party's conduct.

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JURY INSTRUCTION NO. 28

A single contract may consist of two (or more) separate documents.

Two (or more) separate writings may be sufficiently connected by evidence contained in the documents themselves without any express references. The character of the subject matter and the nature of the terms may show that two (or more) writings refer to the same transaction and state the terms thereof when construed together.

Where one document makes other writings a part of the contract by annexation or reference, all such writings are to be construed together, but if a reference to another writing is made for a particular and specified purpose, the other writing becomes a part of the contract for that specified purpose only.

JURY INSTRUCTION NO. 29

If one party materially fails or refuses to perform their contractual obligations or materially delays their performance until after their performance was due, then the other party is no longer obligated to perform and has a claim for damages resulting from the first party's breach of contract.

A failure or refusal to perform is material if it defeats the purpose of the contract, makes it impossible to accomplish that purpose, or concerns a matter of such prime importance that the contract would not have been made if such a failure to perform had been foreseen.

A failure or refusal to perform, or a delay in performance, that is not material does not excuse the other party from performing their obligations under the contract, but gives that party a claim for damages resulting from the failure or delay in performance.

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JURY INSTRUCTION NO. 30

In Nevada, a plaintiff can recover reliance damages for breach of a contract or in reliance on a promise. Reliance damages attempt to restore the damaged party to the position he or she would have occupied if the breached contract or promise had never been made.

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JURY INSTRUCTION NO. 31

A party seeking damages has the burden of proving both that they did, in fact, suffer injury and the amount of damages resulting from that injury. The amount of damages need not be proved with mathematical exactitude, but the party seeking damages must provide an evidentiary basis for determining a reasonably accurate amount of damages. There is no requirement that absolute certainty be achieved; once evidence establishes that the party seeking damages did, in fact, suffer injury, some uncertainty as to the amount of damages is permissible.

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