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

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SECOND SUPPLEMENTAL AFFIDAVIT OF MILTON I. SCHWARTZ

STATE OF NEVADA)
: SS
COUNTY OF CLARK)

MILTON I. SCHWARTZ, being first duly sworn, upon oath deposes and says:

1. This Affidavit of made of my own personal knowledg except where stated on information and belief, and as to thos matters, Affiant believes them to be true, and if called as witness, Affiant would competently testify thereto.

2. That Affiant hereby affirms under penalty of perjur that the assertions of this Affidavit are true.

3. This Affidavit is submitted in support of Plaintiff' Second Reply to Defendants' Supplemental Points and Authorities i Opposition to Plaintiff's Motion for Declaratory Judgment ar Injunctive Relief.

4. That Affiant has been a member of the Board c Directors of the MILTON I. SCHWARTZ HEBREW ACADEMY since 1989, ar the Board of Directors have never allowed the use of proxies at a meetings.

5. That Affiant donated $500,000 to the Hebrew Acade with the understanding that the school would be renamed the MILT I. SCHWARTZ HEBREW ACADEMY in perpetuity. That subsequent to th donation being made the By-Laws were changed to specifically refle that fact and that as a result of the change, Article I, Paragra 1 of the By-Laws read "The name of this corporation is the Milt I. Schwartz Hebrew Academy (hereinafter referred to as The Academ and shall remain so in perpetuity."

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6. That Affiant solicited contributions from Paul Sogg and Robert Cohen. That as a result of Affiant's efforts, Paul Sogg pledged to donate $300,000, and that as a result of Affiant's efforts Robert Cohen pledged to donate $100,000.

7. That Summerlin only donated 17 acres for the Hebrew Academy after Affiant donated $500,000, and Paul Sogg pledged and donated $300,000 and Robert Cohen pledged and donated $100,000.

8. That the donation of $500,000 by Affiant was condition precedent to the donation of the land by Summerlin; that Affiant believes that the donation of $400,000 by Mr. Sogg and Mr Cohen was also a condition precedent to the donation of the land by Summerlin.

FURTHER AFFIANT SAYETH NAUGHT.

MILTON I. SCHWARTZ

SWORN and SUBSCRIBED to before me
this 31st day of March, 1993.

Notary Public

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
SUSAN TURNER
My Appointment Expires Nov. 10, 1995

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EXHIBIT G

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * * *

In the Matter of the Estate of,

MILTON I. SCHWARTZ,

Deceased.

Case No. P061300
Dept. No. 26/Probate

VIDEOTAPED DEPOSITION OF

JONATHAN SCHWARTZ

Volume I

Las Vegas, Nevada

July 28, 2016

9:40 a.m.

Reported by: Heidi K. Konsten, RPR, CCR
Nevada CCR No. 845 - NCRA RPR No. 816435
JOB NO. 322729

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time.

Q Okay. But in any event, your understanding is that the board came to your father's house, and that's when this agreement was made?

A Correct.

Q And is this based on what your father told you, or is this based on your being present at the meeting?

A It's based on what my father told me. And it's also based on testimony I've heard during this litigation. And it's based upon conversations I've had with Sam Ventura. It's based on lots and lots of information and discussion and -- and practice over many, many years.

Q Okay. And it was your -- was it your understanding that the agreement was that there would be 500,000 given to the school, or that there was a million, as Dr. Lubin said in her book?

A No. Here's -- here's what the agreement was: The agreement was that my father give 500,000 and raise 500,000. That's how the million was arrived at, and that's what he did. He

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EXHIBIT H

In the Matter Of:

Schwartz vs Adelson Educational Institute

TRIAL TRANSCRIPT

August 31, 2018

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Discovery Legal Services, LLC 702-353-3110 production@discoverylegal.net

the school.

Q. Sure. Of course. Let me ask a similar question about Mr. Cohen.

As between you and Milton Schwartz, who do you believe was responsible for Mr. Cohen giving money to the school?

A. I was very aggressive. I don't know about Milton Schwartz knowing Mr. Cohen at all. It was me. I went to him.

Q. Thank you.

Doctor, I'm going to show you -- well, let me go back for a minute. Do you recall a time when Mr. Schwartz gave the 500,000 and pledged a million and gave half of it?

A. Yes.

Q. Even though he didn't give the other half, was there ever any process or any board minute meetings where there was a vote to name the school or some parts of the school after Mr. Schwartz?

A. There was a definite response from the board to put the Milton I. Schwartz name on the school when he would give us the next $500,000 that he promised. And unless he does that, it's not going to happen.

Q. All right. So let me go, if I can, I want

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before somebody had to remind me.

Dr. Lubin, do you recall being asked about this in your deposition? It was a while ago so maybe you don't.

A. Probably not.

Q. Why do you think it was that you removed his name from the school? Do you have a recollection as to what would have caused you to remove his name from the school?

A. No.

MR. JONES: So what I would like to do is I would like to publish Dr. Lubin's --

THE WITNESS: You mean removing Milton Schwartz's name from the school?

BY MR. JONES:

Q. Yes.

A. Because he didn't pay the other $500,000. I thought you meant Mr. Sternberg.

Q. Thank you. I'm sorry, my question probably wasn't clear. I meant why they were removing Milton Schwartz's name.

A. Okay.

Q. All right. So that's why they removed it is --

A. Yes.

Q. -- because he didn't pay the rest of the money?

A. Correct.

Q. The last sentence says, "Robert Sabbath suggested that we speak to our attorney Scott Kantor and get his opinion with regard to the name of the school."

Do you recall if you were relying on legal advice in making sure it was okay to remove Mr. Schwartz's name from the school, if you remember? I know it's been a long time.

A. Yeah. Vaguely, yes.

Q. That would have been a prudent thing to do to ask the lawyer before you did that?

MR. FREER: Objection. Leading.

THE WITNESS: Yes.

THE COURT: Overruled.

MR. JONES: Your Honor, I need to get a binder because this is an exhibit that's not in evidence. I will get it.

BY MR. JONES:

Q. It's kind of hard to read. Before you say anything about it, let me just ask you some questions.

THE COURT: What are you looking at?

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Does that ring a bell?

A. Well, he promised to give us a contribution of $300,000 and ultimately we did get it.

Q. Do you remember speaking to Milton for the first time in August of 1989?

A. I remember speaking to Milton Schwartz many times.

Q. Okay.

A. This date, that date, or the other.

Q. Do you remember him coming on to the board on August 4, 1989?

A. Yes, he did come on to the board, yeah.

Q. And you obtained -- you were instrumental in getting Milton's donation, correct?

A. Yes.

Q. And you went to his house with Roberta Sabbath to get that?

A. Yes, I went to his house.

Q. And as a result of that, Milton donated?

A. He promised a million dollars, yes, and we were very happy with that promise of his and ultimately we got $500,000 and never got the other five.

Q. We will get to that in a minute. Why don't we pull up Exhibit 115?

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understanding was of the amount of money that Milton Schwartz agreed to pay for those naming rights?

A. Well, my recollection is that we needed about $1.5 million collected and changed to start the process to construct the new school. May understanding originally was that he was offering about $1 million, and he had -- he solicited another 500 from several members of the community, and obviously on the board, we also gave our share. Not in those numbers but what we could.

Q. Your memory is he gave a million dollars himself and then he raised 500,000 from others?

A. My recollection.

Q. Do you remember any particular bylaws that said anything to the effect that Milton Schwartz's name would remain on the corporation in perpetuity?

A. I don't recall that, as I sit here at this moment.

Q. So it may or may not be true, you just don't remember?

A. Subsequently, four years ago, we had a deposition and I was presented with a document that I was present and that it was discussed at that meeting. And if I signed that document, then I must have read it.

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EXHIBIT I

cc Fred Berkley

THE HEBREW ACADEMY
Minutes of the Board of Trustees
Special Meeting
August 14, 1989

388-6171 / 10AM

Present:

Elliott Klain
Gerri Rentchler
Neville Pokroy
Fred Berkley
George Rudiak
Tamar-Lubin
Milton Schwartz
Roberta Sabbath
Susan McGarraugh

Milton Schwartz called the meeting to order at 1:30p.m.

The minutes were approved as read.

Because of the change in format in 1988, the Jewish Federation will not give the Hebrew Academy the $41,000 allocation for scholarships provided. The Hebrew Academy provided $28,000 worth of scholarships in 1988 and has a policy not to give the recipient's names to anyone. The Jewish Federation is now requesting this information due to their "new" format.

Milton Schwartz would like to meet with Lenny Schwartzer, Tamar-Lubin Saposhnik, and Norm Kaufman tomorrow (8-15-89) to discuss the "new" format of the Jewish Federation because the "rules" for 1988 were changed after the school year. (That is: they now request the recipients names for the scholarships).

George Rudiak moved that the Board accepts, with thanks, the donations from Milton Schwartz, George and Gertrude Rudiak, and Paul Sogg. A letter should be written to Milton Schwartz stating the Academy will be named after him. A letter should be written to Paul Sogg stating that a room or building will be named after him and Mr. Sogg has 60 days in which to choose. A letter should be written to George and Gertrude Rudiak stating that they have until December 31, 1989 as to which room they would like to named after their daughter, Gerri Rentchler.

The Board decided to add six additional class-rooms to the existing plans for an additional $360,000.

A motion was made by Roberta Sabbath to honor Milton Schwartz at the next Gala (10-28-89). And also to have Milton Schwartz present a special award to Paul Sogg at the Gala. Tamar-Lubin Saposhnik seconded. All approved.

Motion to ajourn meeting at 2:15pm. Seconded and approved.

Susan McGarraugh
Susan McGarraugh
Acting Secretary

EST-00010

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EXHIBIT J

FILED
IN THE OFFICE OF THE
SECRETARY OF STATE OF THE
STATE OF NEVADA

AUG 22 1990

No. 1623

FILED

CERTIFICATE OF AMENDMENT OF THE
ARTICLES OF INCORPORATION OF
THE HEBREW ACADEMY
A Nevada Non-Profit Corporation

Aug 29 2 43 PM '90

CLERK

The undersigned, being the President and Secretary of the Board of Trustees of THE HEBREW ACADEMY, hereby certify as follows:

1. The original Articles of Incorporation were filed in the Office of the Secretary of State for the State of Nevada on the 27th day of February, 1980.

2. That on the 14th day of August, 1989, at a special meeting of the Board of Trustees of said corporation, duly called and convened, at which a quorum for the transaction of business was present, notice of said meeting having been previously waived by the Trustees of said corporation in writing, the following resolution was adopted by the Board of Trustees of said corporation:

> RESOLVED: That it is advisable and in the best interests of this Corporation that its Articles of Incorporation be amended by changing the language of Article I of said Articles to read as follows:
>
> ARTICLE I
>
> This corporation shall be known as:
>
> THE MILTON I. SCHWARTZ HEBREW ACADEMY

IN WITNESS WHEREOF, the undersigned, the President and Secretary of the Board of Trustees of THE HEBREW ACADEMY, a

///

///

///

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Nevada non-profit corporation, have executed and acknowledged these presents this 14th day of August, 1990.

MILTON I. SCHWARTZ, President

LENARD E. SCHWARTZER, Secretary

STATE OF NEVADA)
ss:
COUNTY OF CLARK)

On this 13th day of August, 1990, personally appeared before me, a Notary Public in and for said County and State, MILTON I. SCHWARTZ, known to me to be the President, and who is authorized to execute this instrument on behalf of THE HEBREW ACADEMY, a Nevada non-profit corporation. He acknowledged to me that he executed this instrument and, upon oath, did depose and say that he is the officer of the corporation as designated above, that he is acquainted with the seal of the corporation, and that the seal affixed to this instrument is the corporate seal of the corporation; that the signatures on this instrument were made by the officers of the corporation as indicated after their signatures; that the corporation executed this instrument freely and voluntarily, and for the uses and purposes therein mentioned.

WITNESS MY HAND AND OFFICIAL SEAL.

KATHRYN D. HARDESTY
Notary Public - State of Nevada
Appointment Recorded in Clark County
My Appointment Expires July 30, 1992

Kathryn D. Hardesty
NOTARY PUBLIC

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AC402080

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STATE OF NEVADA)
ss:
COUNTY OF CLARK)

On this 14 day of August, 1990, personally appeared before me, a Notary Public in and for said County and State, LENARD E. SCHWARTZER, known to me to be the Secretary, and who is authorized to execute this instrument on behalf of THE HEBREW ACADEMY, a Nevada non-profit corporation. He acknowledged to me that he executed this instrument and, upon oath, did depose and say that he is the officer of the corporation as designated above, that he is acquainted with the seal of the corporation, and that the seal affixed to this instrument is the corporate seal of the corporation; that the signatures on this instrument were made by the officers of the corporation as indicated after their signatures; that the corporation executed this instrument freely and voluntarily, and for the uses and purposes therein mentioned.

WITNESS MY HAND AND OFFICIAL SEAL.

Linda Daugherty
NOTARY PUBLIC

LINDA DAUGHERTY
Notary Public - Nevada
Clark County
My appt. exp. Apr. 2, 1994

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EXHIBIT K

THE MILTON I. SCHWARTZ HEBREW ACADEMY

BOARD OF TRUSTEES MEETING

November 29, 1990

AGENDA

1. Picture Taking
2. Approval of Minutes
3. Gala Evaluation
4. Gala Proceeds
5. Shlomo Ertel - Fee
6. By-laws Revision (Amendments)
7. Student Pick-up Procedures
8. Distribution of Harvard Business School article and discussion of Board's responsibilities
9. Parents - School Contractual Agreement
10. Fund Raising

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REMINDERS

1. Open House, December 5, 1990, at 7:00 P.M.
2. Dedication of School - Affixing of Mezzuza Sunday, December 16, 1990, 2:30 - 4:30 P.M.
3. Chanukkah School Assembly, Friday, December 14, 1990, 8:30 A.M., 10:15 A.M. and 2:15 P.M.

MINUTES OF THE BOARD OF TRUSTEES OF

THE MILTON I. SCHWARTZ HEBREW ACADEMY

November 29, 1990, 5:00 p.m.

PRESENT:
Milton I. Schwartz
Geri Rentchler
Frederic I. Berkley
Lenard E. Schwartzer
Roberta Sabbath
Elliot Klain
Dr. Tamar Lubin
Dr. Richard Ellis
Neville Pakroy
Sam Ventura
George Rudiak

The Board voted to accept the minutes as corrected.

The Board corrected the draft of the revised By-Laws by eliminating paragraph 6 of Article II and naming the corporation after Milton I. Schwartz in perpetuity.

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The Gala was evaluated. Concerns were expressed that not enough parents participated. The financial results were as follows:

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Receipts	$80,500
Receivables	17,500
Total	97,000
Expenses	(30,000)
Net	$68,000

Further evaluation needs to be done.

Board congratulated Roberta Sabbath for a job well done.

Shlomo Ertel's bill for $3,635 was not well earned but due under his contract. R. Sabbath moved, Elliot Klain seconded, to pay Mr. Ertel.

Student pickup was discussed. It was proposed to institute a system of valet pickup by car pool number. A letter of the procedures and an explanation of the reason for adopting the procedure. Motion made to adopt procedure by M. Schwartz and seconded by Geri Rentchler. Motion passed 9 to 2.

Student contract form may have to be amended to provide that the payment of subsequent deposits be considered adoption of the contract for the upcoming school year.

A tuition increase was discussed. It was tabled to next meeting.

Mr. Schwartz discussed a meeting with a Mr. Kreiger and Tracy Weiss, parents, concerning a PTO meeting at which it was alleged that Tamar Lubin said the school was a dictatorship. Geri Rentchler said that Dr. Lubin did respond to the question whether this is a democracy by saying "No, it is a school." Dr. Lubin responded that Mr. Kreiger has a private agenda that includes taking over control of the school. She confirmed what Mr. Rentchler said. Dr. Lubin said that the proper channel of communications must be used and parents should not be allowed to go outside the channels of communications. It was discussed that Dr. Lubin should try and diffuse the problem by reaching out to the disgruntled parents.

A motion was made by Roberta Sabbath and seconded by George Rudiak that Dr. Lubin should be honored by naming the Tamar Lubin-Saposhnik Elementary School. The motion was passed unanimously.

Geri Rentchler recommended and the Board approved a resolution that Board members should attend the Northwest School and Colleges Association convention and seminars in Las Vegas on December 8, 9 and 10.

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Richard Ellis was unanimously elected to the Board of Trustees.

The meeting was adjourned at 7:00 p.m.

Lenard E. Schwartzer
Secretary

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Julie
These
minutes
were
corrected
Please ask Lenny
mail us the
version + the
corrected By-Laws

MINUTES OF THE BOARD OF TRUSTEES OF

THE MILTON I. SCHWARTZ HEBREW ACADEMY

November 29, 1990, 5:00 p.m.

PRESENT: Milton I. Schwartz
Geri Rentschler
Frederic I. Berkley
Lenard E. Schwartzer
Roberta Sabbath
Elliot Klain
Dr. Tamar Lubin
Dr. Richard Ellis
Neville Pakroy
Sam Ventura
George Rudiak

The Board voted to accept the minutes as corrected.

The Board corrected the draft of the revised By-Laws by eliminating paragraph 6 of Article II.

The Gala was evaluated. Concerns were expressed that not enough parents participated. The financial results were as follows:

Receipts	$80,500
Receivables	17,500
Total	97,000
Expenses	(30,000)
Net	$68,000

Further evaluation needs to be done.

Board congratulated Roberta Sabbath for a job well done.

Shlomo Ertel's bill for $3,635 was not well earned but due under his contract. R. Sabbath moved, Elliot Klain seconded, to pay Mr. Ertel.

Student pickup was discussed. It was proposed to institute a system of valet pickup by car pool number. A letter of the procedures and an explanation of the reason for adopting the procedure will be sent to the parents by Milton Schwartz. Motion made to adopt procedure by M. Schwartz and seconded by Geri Rentschler. Motion passed 9 to 2.

Student contract may have to be amended to provide that subsequent deposits will be considered adoption of the current contract and school policies.

A tuition increase was discussed. It was tabled to next meeting.

Mr. Schwartz discussed a meeting with a Mr. Kreigher and Tracy Weiss, parents, concerning a PTO meeting at which it was alleged that Tamar Lubin said the school was a dictatorship. Geri Rentschler said that Dr. Lubin did respond to the question whether this is a democracy by saying "No, it is a school." Dr. Lubin responded that Mr. Kreiger has a private agenda that includes taking over control of the school. She confirmed what Mrs Rentschler said. Dr. Lubin said that the proper channels of communications must be used, ~~and parents should not be allowed to go outside the channels of communications.~~ It was discussed that Dr. Lubin should try and diffuse the problem by reaching out to the disgruntled parents.

A motion was made by Roberta Sabbath and seconded by George Rudiak that Dr. Lubin should be honored naming the ~~Dr.~~ Tamar Lubin Elementary School. The motion was passed unanimously.

Geri Rentschler recommended and the Board approved a resolution that Board members should attend the Northwest School and Colleges Association convention and seminars in Las Vegas on December 8, 9 and 10.

Richard Ellis was unanimously elected to the Board of Trustees.

The meeting was adjourned at 7:00 p.m.

Lenard E. Schwartzer
Secretary

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EXHIBIT L

MINUTES

HEBREW ACADEMY EMERGENCY BOARD MEETING

MAY 19, 1996

The meeting was called to order at 12:15 p.m. by President Geri Rentchler. Present at the meeting were Ira David Sternberg, Geri Rentchler, Jacalyn Glass, Dr. Roberta Sabbath, and Anita Lederman in a non-board member capacity. Gertrude Rudiak was absent.

A motion was made by Ira David Sternberg to approve the minutes of the meeting of May 7, 1996 with the corrections that had been made. The motion was seconded by Jacalyn Glass and the motion passed unanimously. Ira David Sternberg made an additional motion that we accept the May 13,1996 minutes with the corrections made. Jacalyn Glass seconded that motion and it also passed unanimously.

A discussion was had regarding inviting Stuart Deane of the Parents Coalition to sit on the Board in an advisory or liaison capacity. The Board determined that additional thought would have to be put into that at this stage.

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Dennis Sabbath reported that efforts were being made to continue to try and obtain officer and director liability policies for the board members.

Dennis Sabbath also discussed the text of the Milton Schwartz letter and a general discussion was had regarding the contents of the letter. Jacalyn Glass moved to accept the letter to Milton Schwartz as to the substance and form; however, leaving the form of the letter to the discretion of the school head. Ira David Sternberg seconded the motion and it passed unanimously. The Board passed a resolution returning the name of the school to the Milton I. Schwartz Hebrew Academy. The name would be returned to the stone outside of the school as well as the school letterhead and other appropriate places.

Dennis Sabbath discussed with the Board the letter he had prepared regarding the Jewish Community Day School. A discussion was had regarding the letter and the Board had Dennis delete the second paragraph on Page 2. Jacalyn Glass moved to accept the wording of the letter and leaving the form up to the discretion of the school head. Ira David Sternberg seconded the motion and the motion passed unanimously.

Dennis Sabbath had the Board review a letter he had prepared regarding the termination of Dr. Tamar Lubin. The letter contains language that Dr. Lubin's salary benefits would continue to be paid through the end of the term of her current contract, which is June 30,

1996. Dr. Lubin would be notified of the availability of Cobra to continue her insurance coverage on her own for 18 months. The school will continue to pay for her insurance coverage through the 60 day notification period. Jacalyn Glass moved that the Board accept the language of the letter as edited during the meeting to take out the other language regarding any other monies that may be paid to Dr. Lubin. The motion was seconded by Ira David Sternberg and it passed unanimously.

There was a discussion regarding the amount of bad debt that the school has with parents who have removed their children from the school over the last few years. A motion was made by Jacalyn Glass to forgive the bad debt of all students who have been removed from the school up until this point. It would be up to the discretion of the school head, Roberta Sabbath, to deal with the monies owed by parents of students currently enrolled in the school. Ira David Sternberg seconded the motion. The vote was held and it passed unanimously.

Dennis Sabbath discussed with the Board the Nancy Clayton lawsuit. He explained the advantages and disadvantages of settling the case at this point. It appears that this is one of the issues that concerns the Parent Coalition. Jacalyn Glass moved that the Board authorize Dennis Sabbath to instruct Scott Cantor to talk to the attorney for Nancy Clayton to settle the case in an amount not to exceed the remainder of the balance of Nancy Clayton's contract with the school. That he attempt to obtain a no admission of liability clause in the release and that Nancy Clayton, as a part of the settlement, to refrain from any further actions and communications regarding the school. Ira David Sternberg seconded the motion and the motion passed unanimously.

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It should also be noted that Stuart Deane and Mort Winer met with the Board informally, before the regular Board meeting, to present them their concerns and bring to the Board information regarding a group of parents and the school. A motion was made to adjourn by Ira David Sternberg at 1:20 p.m. The motion was seconded by Jacalyn Glass and it passed unanimously.

PRESIDENT

SECRETARY

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EXHIBIT M

FILED
IN THE OFFICE OF THE
SECRETARY OF STATE OF THE
STATE OF NEVADA

MAR 21 1997

- NRS 82.356 -

CERTIFICATE OF AMENDMENT OF ARTICLES OF INCORPORATION

(after first meeting of directors)

No. C1073-80

Dean Heller
DEAN HELLER, SECRETARY OF STATE

THE HEBREW ACADEMY
Name of Corporation

Filed in the office of	Document Number
Dean Heller Secretary of State State of Nevada	C1073-1980-010
	Filing Date and Time 03/21/1997 12:00 AM
	Entity Number C1073-1980

We the undersigned Jacalyn Glass-Wolfson
President or Vice Presi

Geri Rentchler of The Hebrew Acad
Secretary or Assistant Secretary Name

do hereby certify:

That the public officers or other persons, if any, required by the articles have approved the amendment. The vote of the members (if there are members) and directors by which the amendment was adopted is as follows: members n/a, and directors 4.

They hereby adopt the following amendment(s) to the articles of incorporation:

Article number(s) I is amended to read as follows:
This corporation shall be krown as The Milton I. Schwartz Hebrew Academy

Joseph Milton Wilfson
President or Vice President (or Chairman)

Geri Rentchler
Secretary or Assistant Secretary

State of NEVADA
County of CLARK } ss.

On 11th Day of December 1996, personally appeared before me, a Notary Public,

Jacalyn Glass-Wolfson and Geri Rentchler, who acknowledged
Names of Persons Appearing and Signing Document

that they executed the above instrument.

Cathleen F Brickstein
Signature of Notary

(NOTARY STAMP OR SEAL)

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
CATHLEEN R. BRICKSTEIN
No. 96-1121-3
My Appointment Expires June 18, 2001

DEPOSITION EXHIBIT
20
Schwartz

FILED # C-1073-80

FEB 0 2 2000

IN THE OFFICE OF
Dean Heller
DEAN HELLER SECRETARY OF STATE

$25

CERTIFICATE OF AMENDMENT

OF ARTICLES OF INCORPORATION

OF

THE MILTON I. SCHWARTZ HEBREW ACADEMY

The undersigned, being the President and Secretary of THE MILTON I. SCHWARTZ HEBREW ACADEMY, a Nevada corporation, do hereby certify as follows:

1. That on February 2, 2000, the Trustees of the corporation, by the affirmative vote of 9-0, adopted and consented to the adoption of resolutions setting forth the proposed amendment to the Articles of Incorporation of the corporation, as hereinafter set forth.

2. Said resolution called for the following amendment to said Articles of Incorporation:

Articles IV of the Articles of Incorporation shall be deleted in its entirety and amended to read as follows:

ARTICLE IV

TRUSTEES

The members of the governing board of the corporation shall be styled Trustees. The number of Trustees of the corporation may be increased or decreased from time to time by the Board of Trustees as shall be provided in the Bylaws of the corporation. The term of office of each Trustee shall be three (3) years. Each trustee shall be elected by the board of trustees of the Corporation in the manner provided in the Bylaws.

3. The corporation does not have any members entitled to vote on the amendment to the Articles of Incorporation of the corporation.

4. That the Articles of Incorporation of The Milton I. Schwartz Hebrew Academy are hereby amended as set forth above and the undersigned make this certificate pursuant to Sections 82.351 and 82.356 of the Nevada Revised Statutes.

RECEIVED
FEB 02 2000
SECRETARY OF STATE

DATED: February 2, 2000.

Abbie Friedman, President

Geri Rentchler, Secretary

IPD/12601-0003
01-0201600.01

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EXHIBIT N

ROSS MILLER
Secretary of State
204 North Carson Street, Ste 1
Carson City, Nevada 89701-4299
(775) 684 5708
Website: secretaryofstate.biz

Filed in the office of	Document Number
	20080195694-74
Ross Miller	Filing Date and Time
Secretary of State	03/21/2008 11:20 AM
State of Nevada	Entity Number
	C1073-1980

Nonprofit Amendment (After First Meeting)

(PURSUANT TO NRS 81 AND 82)

USE BLACK INK ONLY - DO NOT HIGHLIGHT — ABOVE SPACE IS FOR OFFICE USE ONLY

Certificate of Amendment to Articles of Incorporation For Nonprofit Corporations

(NRS Chapters 81 and 82 - After First Meeting of Directors)

1. Name of corporation:

The Milton I. Schwartz Hebrew Academy

2. The articles have been amended as follows (provide article numbers, if available):

Article I is hereby deleted in its entirety and replaced with the following: "This Corporation shall be known in perpetuity as 'The Dr. Miriam and Sheldon G. Adelson Educational Institute'."

See attachment for additional amendments.

3. The directors (or trustees) and the members, if any, and such other persons or public officers, if any, as may be required by the articles, have approved the amendment. The vote by which the amendment was adopted by the directors and members, if any, is as follows: directors [11], and members [N/A].*

4. Officer Signature (Required):

X _____ Chairman

Signature Title

*A majority of a quorum of the voting power of the members or as may be required by the articles, must vote in favor of the amendment. If any proposed amendment would alter or change any preference or any relative or other right given to any class of members, then the amendment must be approved by the vote, in addition to the affirmative vote otherwise required, of the holders of a majority of a quorum of the voting power of each class of members affected by the amendment regardless of limitations or restrictions on their voting power. An amendment pursuant to NRS 81.210 requires approval by a vote of 2/3 of the members.

FILING FEE: $50.00

IMPORTANT: Failure to include any of the above information and submit the proper fees may cause this filing to be rejected.

This form must be accompanied by appropriate fees.

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Attachment to
Certificate of Amendment to Articles of Incorporation
of The Milton I. Schwartz Hebrew Academy

Article II is hereby amended by adding a paragraph at the end of Article II to state the following specific language: "The schools conducted by the corporation shall be community schools of mixed gender, not affiliated with a specific denomination of Judaism. Students in the schools shall not be required to pray. Male students shall be strongly recommended (but not required) to wear a kippa during prayer and other religious ceremonies. Also, no student shall be required to wear a kippa at any time."

Article IV is hereby deleted in its entirety and replaced with the following specific language: "The governing board of the corporation shall be known as the Board of Trustees and the Board of Trustees shall constitute the corporation. The term of office of each Trustee shall be three years. The number of Trustees may from time to time be increased or decreased by the Board of Trustees but in no event shall the number of Trustees be fewer than seven (7) or more than twenty (20). If for any reason a Trustee shall not be elected in the time and manner provided for herein, or in the Bylaws, such Trustee shall continue to serve as Trustee until his or her successor has been elected."

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EXHIBIT O

THE HEBREW ACADEMY
9700 West Hillpointe Road
Las Vegas, Nevada 89134
Tel: (702) 255-4500 Fax: (702) 255-7232

Dr. Roberta Babbath
School Head

May 23, 1996

Milton I. Schwartz
3130 Silver Ave.
Las Vegas, NV 89102

Dear Milton:

On behalf of myself, President, Gerd Rentchler and the entire Board of Directors of the Milton I. Schwartz Hebrew Academy, I am pleased to inform you that we will immediately commence action to implement as soon as practicable the following:

(1) Restore the Hebrew Academy's name to the "Milton I. Schwartz Hebrew Academy."

(2) Amend the Hebrew Academy's articles of incorporation to restore its former name of the "Milton I. Schwartz Hebrew Academy."

(3) Restore the marker in front of the Hebrew Academy identifying it as the "Milton I. Schwartz Hebrew Academy."

(4) Change the Hebrew Academy's formal stationary to include its full name, the "Milton I. Schwartz Hebrew Academy", in a form consistent with this letterhead and include our full name on future brochures.

(5) Where practicable, display the full name of the Hebrew Academy. In print advertising of sufficient size, the full name of the school will be displayed in a design consistent with the letterhead. Where impractical by reason of size, utilization of voice media, informal correspondence, informal memoranda, etc., and in answering the telephone, the school will utilize the shorthand version of its name as Hebrew Academy or simply, its logo. You can rest assured it is the intention of the School Head and the school's officers and Directors that the utilization of the school's full name will be consistent with an intent to recognize and honor your contribution and assistance.

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The restoration of the name of the "Milton I. Schwartz Hebrew Academy" has been taken as matter of "mesechtzackeit" in acknowledgement of your contribution and assistance to the Academy; your continued commitment to Jewish education reflected by the establishment of the "Jewish Community Day School" and last but not least, your recent action as a man of "shalom."

Your invitation to me as new School Head to meet and resolve differences and to work with me and the Board to bring "shalom" to our Jewish community will serve as a much needed example of Jewish leadership.

Please accept our assurance and commitment that we welcome with joy the establishment of the Jewish Community Day School which will provide Jewish parents a choice between the Jewish education offered by the "Milton I. Schwartz Hebrew Academy" during normal school hours and a school composed entirely of students with a Jewish parent and many more hours of Jewish education than can be offered in a normal school day.

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 justly be able to take great pride.

Please accept our wishes for you and your family to have long, healthy, prosperous and joyous lives.

Very truly yours,

Dr. Roberta Sabbath
School Head

MAY-24-1996 11:18 1 702 2397232 P.01

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The Milton I. Schwartz
HEBREW ACADEMY
9700 West Hillpointe Road
Las Vegas, Nevada 89134
Tel: (702) 255-4500 Fax: (702) 255-7232

Dr. Roberta Sabbath
School Head

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EST-00013

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J. Randall Jones, Esq. (#1927)
Joshua D. Carlson, Esq. (#11781)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of

MILTON I. SCHWARTZ,

Deceased.

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

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

Hearing Date: January 10, 2019
Hearing Time: 9:30 a.m.

The Dr. Miriam and Sheldon G. Adelson Educational Institute (the "Adelson Campus" or the "School") by and through its counsel, hereby submits its 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.

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This Opposition is made and based upon the following Points and Authorities, any exhibits attached thereto, the pleadings and papers on file herein, the oral argument of counsel, and such other or further information as this Honorable Court may request.

DATED this 21st day of November, 2018.

KEMP, JONES & COULTHARD, LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

After a jury trial spanning nearly three weeks, the Adelson Campus successfully defeated the Estate's claims for breach of contract, specific performance and injunctive relief. Now, as the prevailing party, the Adelson Campus seeks to recover its costs which were reasonably, necessarily, and actually incurred in the litigation. The Adelson Campus filed its verified memorandum of costs totaling $94,758.51 on October 11, 2018. These costs are allowed under Nevada law, which provides that "[c]osts must be allowed of course to the prevailing party against any adverse party against whom judgement is rendered. . .." *See* NRS 18.020.

The Estate filed its motion to re-tax the Adelson Campus' Memorandum of Costs, claiming that somehow the Adelson Campus is not the prevailing party in this action, or, alternatively, seeking a reduction in the Adelson Campus' costs by approximately two-thirds. Incredulously, the Estate claims that the Adelson Campus' Memorandum of Costs was filed prematurely and that this Court should not award any costs at all because it is still possible for the Estate to be a prevailing party in this action. However, judgment has been already entered on those claims tried at trial, and the few remaining issues will be fully adjudicated on January 10, 2019, contemporaneous with the hearing on the instant motion.

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Regardless, it is not necessary for all claims to be reduced to judgment in order for this Court to determine prevailing party status for the purposes of awarding costs. The Estate's motion fails to demonstrate that the Adelson Campus' sought-after costs are unreasonable or unnecessary. Accordingly, this Court should award the Adelson Campus all of its costs in the amount of $94,758.51, which are properly documented pursuant to Nevada law.

II.

LEGAL ARGUMENT

A. The Adelson Campus Is Entitled to Recover Its Costs Pursuant to Nevada Law Because It Was the Prevailing Party at Trial.

A prevailing party is one who succeeds "on at least one of its claims." *Golightly & Vannah, PLLC v. TJ Allen, LLC*, 132 Nev. Adv. Op. 41, 373 P.3d 103, 107 (2016). Indeed, a party need not succeed on every issue in order to be a prevailing party so long as the action has proceeded to judgment. *See Bentley v. State, Office of State Engineer*, 2016 WL 3856572, at *11 (Nev. 2016) (citing *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 615 (2015)). A party can prevail under NRS 18.010 "if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit." *Valley Electric Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) (internal quotations omitted).

As this Court is aware, the Adelson Campus initiated this action seeking to compel the Estate to pay $500,000 to the Adelson Campus pursuant to a gift contained in Mr. Schwartz's Last Will and Testament. The Estate then brought claims against the Adelson Campus claiming the breach of an alleged naming rights agreement with the late Milton I. Schwartz. At trial, the jury found that **there was no naming rights agreement between the Adelson Campus and Milton Schwartz**. *See* Verdict Form, filed on September 5, 2018, at Question 1 (emphasis added). As the Court is aware, whether there existed a naming rights contract was one of the most significant issues in this litigation, encompassing the vast majority of the Parties' time during litigation. As such, the Estate's primary claims, those for breach of contract, specific performance, and promissory estoppel, were tried at trial and the Adelson Campus prevailed on these claims. *See id* at Question Nos. 1 and 11. Furthermore, a

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judgment has already been entered on these claims. *See* Judgment on Jury Verdict, filed on October 4, 2018.

The Estate urges that this Court cannot yet make a determination that the Adelson Campus is a prevailing party because not all issues have been decided and a judgment rendered as to each individual claim. As already discussed, all claims presented at trial were fully resolved and a judgment was entered in favor of the Adelson Campus. Furthermore, the few remaining issues, whether to compel distribution of the additional $500,000 promised in Milton Schwartz's Last Will and Testament, or whether to compel the return of the monetary sums Milton Schwartz dedicated to the school prior to his passing, will be fully adjudicated at the same time as the instant hearing. Therefore, the Estate has failed to provide any basis by which this Court must refrain from determining that the Adelson Campus is a prevailing party in this action.

B. The Adelson Campus Has Demonstrated That Its Claimed Costs Were Reasonable and Necessarily Incurred Pursuant to NRS 18.110(1).

Overlooking the hundreds of pages of detailed itemization of the costs sought by the Adelson Campus, the Estate erroneously argues that the Adelson Campus is not entitled to recover the requested costs because the Estate cannot determine whether several of the Adelson Campus' claimed costs were reasonable and necessary to this litigation. *See* Motion at 10. The Adelson Campus' Memorandum of Costs contains a sworn statement from the undersigned counsel verifying that the detailed and individually itemized costs were necessarily incurred in this action, in accordance with the plain language of NRS 18.110(1), thus the Estate's argument must be rejected. Furthermore, the Adelson Campus has also provided detailed "justifying documentation" which shows that not only were these costs actually incurred, the requested costs were also reasonable.

Nevada law provides the court with wide discretion to award costs to prevailing parties. *See Cadle Co. v. Woods and Erickson, LLP*, 131 Nev. Adv. Op. 15, 345 P.3d 1049, 1054 (2015). Pursuant to NRS 18.110, the party in whose favor judgment is rendered must file a verified memorandum of costs within five days after the entry of judgment, or such further time as the court may grant. *See* NRS 18.110(1). NRS 18.110(1) further provides that the memorandum containing the prevailing party's items of cost "must be verified by the oath of the party, or his attorney or agent...stating that to the best of his knowledge and belief the items are correct, and that the costs have been necessarily

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incurred in the action or proceeding." NRS 18.110. Finally, a prevailing party's memorandum of costs must include "justifying documentation" supporting the claimed costs. *See Cadle Co.*, 345 P.3d at 1054 (quoting *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352–53, 971 P.2d 383, 386 (1998)).

The Adelson Campus has undoubtedly met its burden under NRS 18.110(1) with respect to its claimed costs. The Adelson Campus' Memorandum of Costs specifically details each item it is claiming as its recoverable costs, and includes ample justifying documentation as well as an affidavit from its counsel affirming that all such costs were "actually and necessarily incurred in order to defend and prosecute this action . . .." *See* Affidavit of J. Randall Jones, Esq., affixed to Memorandum of Costs filed on October 11, 2018. The Adelson Campus has indisputably satisfied its burden under NRS 18.110(1) through the inclusion of detailed itemization of each cost it seeks to recover. Accordingly, this Court should exercise its discretion to deny the Estate's motion in its entirety and award the Adelson Campus the full amount of the costs it reasonably, actually, and necessarily incurred in this action.

1. As the prevailing party at trial, the Adelson Campus is entitled to reimbursement of all of its costs, including those costs the Parties previously agreed to share.

A prevailing party is entitled to recover costs which were previously split by the parties. *See Foster v. Dingwall*, 126 Nev. 56, 72–73, 227 P.3d 1042, 1053 (2010). The Estate argues that it should not be required to pay costs for the Adelson Campus' share of costs which the parties previously agreed to split, including transcripts of court proceedings and pre-trial mediation efforts. *See* Motion at 8:15–9:9; 10 at fn. 5. While the parties did agree to share those costs *pendente lite*, there was no agreement that the prevailing party would not later be entitled to reimbursement for its half of those costs. As with the Adelson Campus' other claimed expenses, these costs were actually and necessarily incurred in this action and as such, are recoverable by the Adelson Campus as a prevailing party at trial. Accordingly, the Court should reject the Estate's request to reduce the Adelson Campus' recoverable costs for transcript and pre-trial mediation costs and permit the Adelson Campus to recover the full amount that it advanced for these costs.

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2. The Adelson Campus has sufficiently itemized its costs to determine that the amounts claimed are reasonable, necessary, and recoverable.

The Estate complains that the Adelson Campus should not be reimbursed for costs incurred "years before trial". *See* Motion at 10:23–24[1]. However, the plain language of NRS 18.110 does not limit the Adelson Campus' recovery to only those costs incurred during trial. As the prevailing party at trail, the Adelson Campus is entitled to recover *all* of its costs which were actually, reasonably, and necessarily incurred in order to prevail on its claims and defenses, regardless of when those costs were incurred.

a) The Adelson Campus properly documented its request to recover costs under NRS 18.110 for staff overtime.

In *Cadle Co.*, the Court found an affidavit of counsel stating that the requested costs were necessary and reasonable was sufficient to support its request for several categories of costs where it was accompanied by "justifying documentation" demonstrating that the costs were actually incurred. *See Cadle Co., supra*, 345 P.3d at 1054 (Nev. 2015) (citing to *Gibellini v. Klindt*, 110 Nev. 101, 1206, 885 P.2d 540, 543 (1994)). The Adelson Campus' Verified Memorandum of Costs demonstrates that the secretarial staff for its counsel actually incurred a total of 17.79 hours of overtime during the course of the trial in this action, including documentation of how much time was incurred by each individual and how much it cost the Adelson Campus for that time. *See* Appendix Volume II filed on October 11, 2018, at APP0500. Counsel for the Adelson Campus also affirmed that this cost was necessary in order to defend and prosecute this action. *See* Affidavit of J. Randall Jones, Esq., affixed to Memorandum of Costs filed on October 11, 2018. Accordingly, the Adelson Campus' request for staff overtime is reasonable, properly documented, and should be awarded.

b) The Adelson Campus' book purchases were reasonable and necessary and are thus recoverable costs pursuant to NRS 18.110.

The Estate complains that the Adelson Campus should not be reimbursed for its purchase of three books "more than two (2) years prior to trial", including "From Chaos to Order", "Naming Rights", and "Charitable Giving: Taxation, Planning and Strategies". *See* Motion at 10:14–16. The timing of when the Adelson Campus purchased these items is irrelevant to the question of whether

[1] The Estate erroneously claims that items (1) Secretarial/Staff Overtime and (6) Lunch Costs were costs incurred years before trial. *See* Motion at 10:23–24. However, as detailed *infra*, both of these costs were incurred at or immediately surrounding the trial dates in this matter.

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they were reasonable and necessary to the prosecution and defense of this action. Furthermore, and more importantly, each of these books were ultimately utilized as proposed trial exhibits, and a photograph from one of the books, "Chaos to Order" was admitted at trial. *See* Relevant Excerpt of The Adelson Campus' Pre-Trial Memorandum, filed on August 7, 2018, at Proposed Exhibit Nos. 203, 217, and 1120; *see also* Trial Exhibit 217A (photo from "Chaos to Order").

c) The Adelson Campus properly documented its request to recover costs under NRS 18.110 for conference call charges.

The Estate also objects to a $3.15 charge for teleconference services, questioning why this charge was reasonable and necessary to this litigation. *See* Motion at 10. The Adelson Campus' Memorandum of Costs demonstrates when this cost was incurred and which company it had to pay for teleconference services. *See* Appendix Volume II filed on October 11, 2018, at APP00492. Counsel for the Adelson Campus has already provided an affidavit which affirms that this cost was necessary in order to defend and prosecute this action. *See* Affidavit of J. Randall Jones, Esq., affixed to Memorandum of Costs filed on October 11, 2018. The Adelson Campus' request for costs in the amount of $3.15 is reasonable, properly documented, and should be awarded.

d) The Adelson Campus' costs for working lunches were reasonable and necessary and are thus recoverable costs pursuant to NRS 18.110.

Meal costs incurred may be properly awarded under the "catchall" provision of NRS 18.005(17). *Las Vegas Land Partners, LLC v. Nype*, 408 P.3d 543 (Nev. 2017) fn. 3 (noting that several other jurisdictions also allow for the recovery of meal costs). The Estate objects to the Adelson Campus' recovery of meal costs totaling $334.25. *See* Motion at 10. These costs were properly documented and incurred by the Adelson Campus, and an inspection of the supporting documentation demonstrates the reasonableness of these charges. *See* Appendix Volume II filed on October 11, 2018, at APP512–523. Furthermore, the provided documentation clearly shows that these charges were incurred during hearings and/or trial in this matter. *See id.* Each of these costs were reasonably, necessarily, and actually incurred and are thus recoverable pursuant to NRS 18.005(17).

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e) The Adelson Campus properly documented its request to recover costs under NRS 18.110 for professional services.

NRS 18.005(17) permits a prevailing party to recover "[a]ny other reasonable and necessary expense incurred in connection with the action . . .." Included in the Adelson Campus' Verified Memorandum of Costs is an itemization of all professional service costs amounting to $21,409.70. *See* Appendix Volume II filed on October 11, 2018, at APP527-530. The Adelson Campus also provided itemized documentation for its costs incurred for professional services connected to editing the video interview of Milton Schwartz and for Audio Transcription of the same. *See id.* at APP525-526.

The Estate complains that the Adelson Campus "has failed to differentiate the services performed between the claims/defenses it prevailed upon versus the claims/defenses it did not prevail upon." *See* Motion at 11:2–3. As discussed at length *supra*, the Adelson Campus was the prevailing party for all claims at issue at trial. *See supra* at Section II(A). Furthermore, the Adelson Campus' professional services for video editing, audio transcription, and trial support were all reasonable and necessary to the Adelson Campus' prosecution and defense of this action/trial strategy/presentation **at trial**. *See* Affidavit of J. Randall Jones, Esq., affixed to Memorandum of Costs filed on October 11, 2018.

In *Brochu v. Foote Enterprises, Inc.*, 128 Nev. 884, 381 P.3d 596 (2012), the Nevada Supreme Court found that the district court did not abuse its discretion in awarding prevailing party's costs for and visual equipment for trial; given the Court's general knowledge of ordinarily incurred costs and familiarity with the actual proceedings, the prevailing party's generic memorandum and affidavit provided a sufficient basis upon which the court could determine the actual and reasonable nature of these costs. *See Brochu v. Foote Enterprises, Inc.*, 128 Nev. 884, 381 P.3d 596 (2012).

The Adelson Campus had to prepare and conduct a jury trial which spanned over several weeks. In preparation for the trial, the Adelson Campus hired professionals in connection with the videotaped interview of Milton Schwartz, as well as a third-party to assist with the exhibits and programming during trial. Here, the specific itemized costs detailing each of the claimed trial support costs along with the Court's familiarity with the actual proceedings provides the requisite support that the Adelson Campus' claimed costs were necessarily incurred and reasonable. The Court witnessed

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the resources expended by the Adelson Campus during trial, including the large amount of printing and binders for exhibits and deposition testimony, the use of trial support personnel during trial to run trial presentation software and prepare the video presentations and power point slides that were shown to the jury throughout the trial. Therefore, the detailed itemized trial support costs and affidavit of the Adelson Campus' counsel provide a sufficient basis upon which the court could determine the actual and reasonable nature of these costs.

f) The Adelson Campus' costs for legal research were reasonable and necessary and are thus recoverable costs pursuant to NRS 18.110.

NRS 18.005(17) expressly allows a prevailing party to recover "reasonable and necessary expenses for computerized services for legal research." The Estate asserts that the Adelson Campus' itemized costs of computerized legal research and supporting declaration of counsel fail to demonstrate that the requested sum of $25,531.92 was reasonably and necessarily incurred simply because the provided documentation does not detail which legal issue(s) were researched each time that research was conducted. *See* Motion at 11:9–18.

The Adelson Campus' legal research costs are itemized, documented, and fully supported by the declaration of counsel. *See* Appendix at APP353–79 and Affidavit of J. Randall Jones, Esq., affixed to Memorandum of Costs filed on October 11, 2018. As this Court is well aware, the most up to date and efficient mode of legal research available is through online services such as Westlaw and/or LexisNexis, which the Adelson Campus utilized in this case to provide the Court with the most recent applicable caselaw on various points of dispute throughout pre-trial motions and during the course of trial, including but not limited to researching the correct statements of the law in order to instruct the jury. The Adelson Campus also utilized computerized legal research services to investigate potential claims and defenses, plan for discovery, prepare for depositions, and a multitude of other case-related purposes throughout this entire action.

The Adelson Campus' attorneys ("KJC") have computerized legal research plans with Westlaw. KJC annually reviews and renews its plan with Westlaw to select a plan that encompasses various resources to research. *See* **Exhibit 1** (Declaration of Joshua D. Carlson, Esq.). To recoup its costs, KJC charges its clients a rate of $4.00 per minute while KJC timekeepers are conducting their legal research on the specific case. *Id.* Every KJC case has a unique client and matter number. To

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track their legal research costs, and to ensure that the costs relate to the case in which the research is required, KJC timekeepers must enter the unique client and matter number in order to log in to Westlaw. *Id.* They do not log in to Westlaw unless they are conducting legal research that is necessary to a case. *Id.* KJC's timekeepers are informed and, upon information and belief, are well aware of the time and costs associated with their legal research and do not stay logged into Westlaw when they are not actively conducting legal research. *Id.*

In support of their requested legal research costs, the Adelson Campus attached documentation confirming that all of these costs were incurred in this case. This documentation shows the unique client and matter number for this case (2051.2), the date of the legal research, the computerized legal research account (i.e., Westlaw, Pacer, or Accurint), and the amount charged for the research. If the amount charged for Westlaw research is divided by four, the resulting number is the number of minutes that were spent researching. Between June 2015 and August 2018, Plaintiffs logged approximately 106 hours of computerized legal research through Westlaw (less than three hours of legal research per month). Given the complex legal issues involved in this litigation, the amount of legal research costs incurred are extremely reasonable. The Adelson Campus' attorneys do not have to detail which legal issues or concepts were researched on each occasion, nor do they have to detail why each individual issue was "necessary". The Adelson Campus' computerized legal research costs in the amount of $25,531.92 are reasonable, properly documented, and recoverable under Nevada law. Accordingly, they should be awarded in their entirety.

III.

CONCLUSION

The Adelson Campus' claimed costs were reasonable, necessary, and actually incurred in this matter. As the Adelson Campus prevailed on its claims and defenses against the Estate at trial, the Adelson Campus' costs are recoverable under NRS Chapter 18. The costs are supported by the verification of counsel and hundreds of pages of itemized, descriptive documentation in compliance with controlling Nevada case law.

For all the reasons indicated above, the Adelson Campus respectfully requests that this Court to deny the Estate's Motion to Retax Costs Pursuant to NRS 18.110(4) and to Defer Award of Costs

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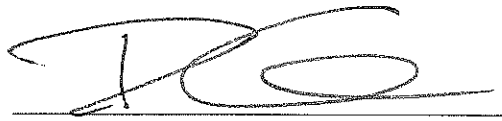
Until All Claims are Fully Adjudicated in its entirety and award the Adelson Campus its costs totaling of **$94,758.51**.

DATED this 21st day of November, 2018.

Respectfully Submitted,

KEMP, JONES & COULTHARD, LLP



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CERTIFICATE OF SERVICE

I hereby certify that on the 21ST day of November, 2018, I served a true and correct copy of **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** via the Eighth Judicial District Court's CM/ECF electronic filing system, addressed to all parties on the e-service list.

Erica Bennett

An employee of Kemp, Jones & Coulthard, LLP

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EXHIBIT 1

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of MILTON I. SCHWARTZ, Deceased.	Case No.: 07-P-061300 Dept. No.: 26/Probate **DECLARATION OF JOSHUA D. CARLSON, ESQ. IN SUPPORT THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE'S VERIFIED MEMORANDUM OF COSTS AND 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**

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DECLARATION OF JOSHUA D. CARLSON, ESQ.

JOSHUA D. CARLSON, ESQ., state and affirm as follows:

1. I am an associate in the law firm of Kemp, Jones & Coulthard, LLP ("KJC"), over 18 years of age, competent to testify to the matters set forth herein, and licensed to practice law in the State of Nevada. I am admitted to practice before the State Court of Nevada. I have personal knowledge of the matters stated herein and could and would competently testify thereto if called upon to do so.

2. The Dr. Miriam and Sheldon G. Adelson Educational Institute (the "Adelson Campus") retained KJC to prosecute its claims against the Estate of Milton I. Schwartz (the "Estate") and defend against the Estate's claims asserted in its competing Petition for Declaratory Relief.

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3. KJC has a computerized legal research plan with Westlaw. KJC annually reviews and renews its plan with Westlaw to select a plan that encompasses various resources to research.

4. To recoup its costs, KJC charges its clients a rate of $4.00 per minute while KJC timekeepers are conducting their legal research on the specific case. Every case at KJC has a unique client and matter number. To track their legal research costs, and to ensure that the costs relate to the case in which the research is required, KJC timekeepers must enter the unique client and matter number in order to log in to Westlaw. They do not log in to Westlaw unless they are conducting legal research that is necessary to a case.

5. KJC's timekeepers are informed and, upon information and belief, are well aware of the time and costs associated with their legal research and do not stay logged into Westlaw when they are not actively conducting legal research.

6. Attached in The Appendix of Exhibits to the Dr. Miriam and Sheldon G. Adelson Educational Institute's Verified Memorandum of Costs Vol. 2 at APP00352-379 is a summary of legal research fees incurred in this case on behalf the Adelson Campus This summary shows the unique client and matter number for this case (2051.2), the employee conducting the research, the date of the legal research, the computerized legal research account (i.e., Westlaw, Pacer, or Accurint), and the amount charged for the research.

7. Between June 2015 and August 2018, attorneys at KJC logged approximately 106 hours of computerized legal research through Westlaw (less than three hours of legal research per month) necessary to support of the prosecution of the Adelson Campus' claims and in defense of the Estate's claims. Given the complex legal issues involved in this litigation, the computerized legal research costs in the amount of $25,531.92 are reasonable.

DATED this 21 day of November, 2018.

Joshua D. Carlson, Esq.

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

THE ESTATE'S REPLY TO ADELSON CAMPUS'S OPPOSITION TO MOTION FOR POST-TRIAL RELIEF FROM JUDGMENT ON JURY VERDICT ENTERED OCTOBER 4, 2018

A. Jonathan Schwartz, Executor of the Estate of Milton I. Schwartz ("Jonathan"), by and through his counsel, hereby replies to the Adelson Campus' Opposition to the Estate's Motion for Post-Trial Relief from Judgment on Jury Verdict Entered October 4, 2018, and asserts as follows:

1. Post-Trial Relief Should Be Granted Due to the Court's Grant of Summary Judgment Against the Estate on Its Claim for Breach of Oral Contract.

a. The Summary Judgment Ruling was Error.

As set forth in the motion, the Estate's oral contract claim was not barred by the statute of limitations. There are disputed issues of fact as to whether the Executor had even "inquiry notice" before March 2010, well within the four-year limitation period for oral contracts. (See Mot. 5-6).

b. The Summary Judgment Ruling Prejudiced the Estate.

Contrary to Adelson Campus's assertion, the grant of partial summary judgment (holding the claim of oral contract to be barred by the statute of limitations) greatly prejudiced the Estate's ability to proceed at trial as it forced the Estate to focus on the existence of a written contract to the exclusion of an oral contract. Indeed, because of the partial summary judgment ruling, the Estate

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was relegated to proving the existence of a written contract formed by several writings where it otherwise would have had opportunity to demonstrate existence of an oral contract.[1]

For Adelson Campus to claim that the grant of partial summary judgment is not prejudicial is disingenuous. A major theme raised by Adelson Campus was the lack of a written contract and it highlighted the issue in practically all of the witnesses examined at trial.[2] But for the prior partial summary judgment ruling, the Estate would have pursued and expanded upon proving the existence of an oral contract. For example, when Adelson Campus's counsel extracted statements from board members, such as Lenny Schwartzer and Roberta Sabbath, that the agreement was oral, the Estate

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[1] *See, e.g.,* ATT at Vol. 1, 08/23/18, Testimony of Lenard Schwartzer ("Schwartzer Testimony") at 208:11-25 ("Q. Now I believe Mr. Jones asked you a question about whether this agreement was in writing or it wasn't. Mr. Schwartzer is this a writing? A. This is a writing. I mean, I think he was aiming it is there a signed agreement signed by both sides saying we agree and here is all the terms. There isn't a separate written contract. We didn't, I guess, nobody thought it was necessary."), and 214:4-13 ("Q. Are there any writings that we have seen today or that you are otherwise aware of that memorialize the agreement that the school had with Milton Schwartz concerning naming rights? A. I think whatever writings were in the board minutes and the articles and the bylaws. I don't recall a -- and possibly there was a letter written to Mr. Schwartz, but -- draft of, but other than that I don't see anything that you would call a contract where both sides signed it."), and at 214:21—215:7 ("Q. Not a formal contract that you would typically see? A. No. There is no formal written contract. Q. But is there a writing showing how much money Milton Schwartz promised to pay? A. Yes. Q. Is there a writing showing what the school was going to do for Milton Schwartz? A. Yes. Q. Is there more than one writing that shows what the school was going to do for Mr. Schwartz? A. Yes.").

[2] *See e.g.,* ATT at Vol. 2, 08/24/2018 Schwartzer Testimony at 174:10-13 ("Q. There is no written agreement that says what Mr. Jonathan Schwartz says in the videotape deposition, is there? A. Correct.") and 178:4-14 ("Q. …In your mind, what you believe the agreement was, is that Mr. – if Mr. Schwartz was not able to get up to a half a million dollars, it would not be a breach of the contract? A. Yes, that's correct. Q. All right. But that's not in writing anywhere, right? A. There is no contact signed by both sides in this case, is my understanding, because otherwise we wouldn't be here."); Vol. 2, 08/24/2018 Pacheco Testimony at 310:20-24 ("Q. Let me put it this way. You don't recall any written agreements coming out of any of those meetings between Mr. Adelson and Mr. Schwartz, do you? A. No."); Vol. 3, 08/27/2018 Schwartz Testimony at 234:8-17 ("Q. And so, by the way, the – at the time your dad gave the gift in – the $500,000, 1989, there is nothing in writing anywhere that says his name should go on the monument, right? A. in 1989? Q. Yes, sir. A. No. Q. There is nothing in 1989 that says his name should go on the letterhead, right? A. Mr. Jones, it was an oral contract."); ATT at Vol. 7, 08/28/2018 Ventura Testimony at 40:10-13 ("Q. You don't recall any kind of written contract between Mr. Schwartz and the school about naming rights, is that true? A. I didn't see any.").

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would have otherwise pursued and expanded upon that testimony to demonstrate the validity and enforceability of an oral contract.[3] The ability to demonstrate the validity of an oral contract would have likely impacted the jury's deliberation. However, the Court's partial summary judgment ruling precluded such argument relegating the Estate to focus solely on the formation of a written contract where it otherwise would have developed testimony and presented evidence and argument to prove the existence of an oral contract. Accordingly, the grant of summary judgment on the Estate's claim for breach of oral contract warrants the post-trial relief as set forth in the Estate's Motion.

2. Post Trial Relief Should Be Granted Due to the Refusal to Provide a Jury Instruction For the Alteration/Modification of Contract.

Contrary to Adelson Campus's position, the absence of a formal, written agreement does not preclude an instruction for alteration or modification of a contract: any contract, including an oral contract, may be subsequently altered or modified absent an express statutory prohibition.[4]

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[3] ATT at Vol. 1, 08/23/18, Schwartzer Testimony, at 174:10—176:8 ("Q. When you say the board had an understanding, again, this was a verbal understanding, right? A. Yes. Q. So this would be what you would call -- would you consider this, as a board member of this situation, a verbal contract with Mr. Schwartz? … A. The answer is yes, I believe that we had an agreement that in exchange for his half a million dollar donation and for his efforts in raising the additional money that the school would be named the Milton I. Schwartz Hebrew Academy in perpetuity."); 222:23-224 ("Q. And you told this jury you thought it was an oral contract, right? A. What it was, was an orally stated, mutual understanding between the members of the board and Milton Schwartz, that in exchange for his donation and raising additional funds and making sure the school got built, that the school would be named after him in perpetuity."); ATT at Vol. 2, 08/24/18, Testimony of Roberta Sabbath 346:4-19 ("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 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.").

[4] *See, e.g., James Hardie Gypsum (Nevada) Inc. v. Inquipco*, 112 Nev. 1397, 1408, 929 P.2d 903, 910 (1996) (finding that that the district court did not err in finding the existence of an oral contract with a written modification) *disapproved of by Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 35 P.3d 964 (2001) on other grounds; *Clark County Sports Enterprises, Inc. v. City of Las Vegas*, 96 Nev. 167, 172, 606 P.2d 171, 175 (1980) ("Parties may mutually consent to enter into a valid agreement to modify a former contract. And parol evidence

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The refusal to include this instruction constituted error because the Estate presented evidence of course of both the conduct of the parties and the 1996 Sabbath letter, which could have been found by the jury to constitute an alteration or modification of the agreement reached between the parties in 1989.[5] This refusal prejudiced the Estate by preventing it from asserting two arguments at trial: (1) that the course of conduct by the school constituted a modification of terms of the naming rights agreement (especially as to any terms that might otherwise have been believed to be missing and/or vague); and (2) the terms and promises set forth in the Roberta Sabbath Letter constituted a modification and/or memorialization of the terms of the naming rights agreement. As such, the Court should grant the Estate's motion and permit the Estate during a new trial to place the evidence introduced at trial in the context of law permitting parties to alter or modify a contract.

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may be used to show an agreement to modify. Similarly, consent to a modification may be implied from conduct consistent with an asserted modification."); *Silver Dollar Club v. Cosgriff Neon*, 80 Nev. 108, 110-11, 389 P.2d 923, 924 (1964) ("'Parties may change, add to, and totally control what they did in the past. They are wholly unable by any contractual action in the present, to limit or control what they may wish to do contractually in the future. Even where they include in the written contract an express provision that it can only be modified or discharges by a subsequent agreement in writing, nevertheless their later oral agreement to modify or discharge their written contract is both provable and effective to do so.'"). *See also* "An oral contract may be modified or terminated orally." 17A Am. Jur. 2d Contracts § 527 *citing Vincent v. City_Colleges of Chicago,* 485 F.3d 919, 922 (7th Cir. 2007) ("The license to print the book was oral; an oral contract may be modified or terminated orally."). *Cf. Jensen v. Jensen*, 104 Nev. 95, 98, 753 P.2d 342, 344 (1988) ("We have noted that parties to a written contract who agree to new terms may orally modify the contract. Moreover, parties' consent to modification can be implied from conduct consistent with the asserted modification."); *Joseph F. Sanson Inv. Co. v. Cleland*, 97 Nev. 141, 625 P.2d 566 (1981) ("Although parties to a written contract may orally modify it and parol evidence of the subsequent agreement is not summarily excluded, all parties must agree to the new terms.").

[5] *See* Trial Exhibit 139, 1996 Sabbath Letter; *see also* ATT at Vol. 3, 08/27/18 at 34:81-5 Testimony of Roberta Sabbath ("Sabbath Testimony") ("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.").

3. Post-Trial Relief Should Be Granted Due to the Refusal to Provide a Jury Instruction Relating to the Implied Breach of the Covenant of Good Faith and Fair Dealing.

Contrary to Adelson Campus's assertion, the Estate did plead breach of the implied covenant of good faith and fair dealing. As recognized in *Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*, the Nevada Supreme Court noted that a cause of action for breach of implied covenant of good faith and fair dealing could be derived general language in the complaint that "defendant breached their obligations to plaintiff under the agreement."[6] Such language was invoked by the Estate in its Petition for Declaratory Relief, asserting Adelson Campus breached its "obligations and promises" and further "has breached its agreements and promises" under the naming rights agreement, which includes obligations imposed as a matter of law.[7] Accordingly, the Estate sufficiently established that the covenant of good faith and fair dealing was pleaded and the failure to include the instruction with consideration of the rest of the instructions constituted prejudicial error. Accordingly, the Court should vacate the judgment and grant a new trial to permit the Estate the ability to place the evidence introduced at trial in the context of law establishing that Adelson Campus breached an implied covenant of good faith and fair dealing concerning the naming rights agreement between Milton Schwartz and the school.

4. The Evidence Irrefutably Demonstrates the Jurors Manifestly Disregarded Jury Instructions Relating to an Offer and Acceptance.

Contrary to Adelson Campus's contention, the inconsistences concerning the board members' recollection of the amount provided by Milton does not absolve the jurors of manifest disregard of jury instructions. Such argument myopically overlooks the uncontradicted evidence that the school accepted Milton's offer and admitted the same through its own official books and

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[6] *Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*, 107 Nev. 226, 232-34, 808 P.2d 919, 922-24 at fn. 5 (1991); *see also Beidel v. Sideline Software Inc.*, 842 N.W.2d 240, 257 (Wis. 2013) ("There is no requirement that a claim be pled as a breach of the covenant of good faith and fair dealing in order for the doctrine to play a part in the analysis of the case.").

[7] Trial Exhibit 62, Petition for Declaratory Relief, 05/28/2013 at 8:15-16 and 9:12-16.

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records. A party who accepts the benefits from a party's proffered performance is estopped from questioning the existence, validity or effect of a contract.[8] At trial, the Estate presented uncontradicted evidence that Milton donated $500,000 and the school accepted such donation, as set forth in its own books and records.[9] Likewise, uncontradicted evidence demonstrates that the 1996 Sabbath Letter was formally adopted by the school and offered to Milton as a means of inducing him to resume his relationship with and contributions to the school, which Milton accepted.[10] Because the school had accepted Milton's performance (as admitted in its records), for

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[8] *See, e.g.,* "Where the essential elements of such estoppel are present, a person may be estopped from questioning the existence, validity, and effect of a contract by accepting or claiming benefits thereunder, provided the contract is not void as against public policy or against an express mandate of law." 31 C.J.S. Estoppel and Waiver § 164. The rule, that by accepting benefits a person may be estopped from questioning the existence, validity, and effect of a contract, has been applied in various circumstances, such as a contract was without consideration. *See, e.g.,Douglas Cty. Mem'l Hosp. Ass'n v. Newby*, 45 Wash. 2d 784, 278 P.2d 330 (1954) (Where hospital, pursuant to written contract, had accepted 10 monthly payments by husband and wife on their hospital bill, which they were unable to pay in a lump sum when it was incurred, hospital was estopped to deny that there was a valid consideration for the contract."); *Wyatt v. Brown*, 39 Tenn. App. 28, 281 S.W.2d 64 (1955) (the acceptance of benefits estops a person from questioning the validity and effect of a contract).

[9] *See, e.g.,* Trial Ex. 112 (08/14/1989 Minutes accepting Milton'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).

[10] *See* Trial Ex. 14 (Minutes 05/19/96); Trial Ex. 139 (05/23/1996 Sabbath Letter); ATT at Vol. 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."); *See, e.g.,* ATT at Vol. 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 at Vol. 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

the jurors to conclude that no contract existed constituted manifest disregard of jury instructions, especially those pertaining to the actions of a corporation.[11] To the contrary, had the jurors followed such instructions, they would have been required to conclude that the contractual requirements of offer and acceptance had been met.[12]

5. The Jurors Manifestly Disregarded the Instructions Pertaining to Meeting of the Minds as the Evidence Irrefutably Demonstrates the School and Milton Mutually Intended to Enter Into a Binding Agreement.

Under Nevada law, requisite meeting of the minds sufficient to form an enforceable contract occurs where each party accepts the other's performance and, in turn, performs.[13] Contrary to the

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$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).

[11] *See* Ex. 8, Jury Instructions at Instruction Nos. 5 ("A non-profit corporation acts through resolutions and decisions made by its board") and 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."); c.f. NRS 82.196 and NRS 82.201 (corporate resolutions and bylaws constitute actions of the corporation).

[12] *See Weaver Bros., Ltd. v. Misskelley*, 98 Nev. 232, 234 (1982).

[13] *See, e.g.,* Marshall & Co. v. Weisel, 242 Cal. App. 2d 191, 196 (1966) ("It is well-settled law that, although an agreement may be indefinite or uncertain in its inception, subsequent performance by the parties under the agreement will cure this defect and render it enforceable. When one party performs under the contract and the other party accepts his performance without objection it is assumed that this was the performance contemplated by the agreement.").

Adelson Campus's assertion, the evidence unequivocally demonstrates that Milton and the school accepted and intended to be bound by each other's performance in both 1989[14] and in 1996.[15]

Here, there was overwhelming testimony that the school would be named after Milton "in perpetuity."[16] Although Adelson Campus extracted differing recollection from board members

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[14] *See e.g.,* ATT at Vol. 1, 08/23/2018 Schwartzer Testimony at 82:24-83:25 ("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 at Vol. 2, 08/24/18 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 at Vol. 7, 08/31/18 Lubin Testimony at 14:11-18 ("Q. 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 Milton'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)).

[15] *e.g.,* Trial Ex. 14 (05/19/1996 Minutes); Trial Ex. 139/139A (05/23/1996 Sabbath Letter; ATT at Vol. 3, 08/27/18 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).

[16] See, e.g., ATT at Vol 1, 08/23/18 Schwartzer Testimony at 83:24—84:25 ("…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."); Vol. 2 08/24/18 Pacheco Testimony at 244:11-25 ("…Q. Do you remember discussions about Milton Schwartz receiving naming rights to the school during this meeting or any other meeting that you had while you are in your capacity as acting secretary? A. Yes, they talked about him having his – a school named after him.

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regarding the meaning of the term "school," such ambiguity does not render the agreement void for want of meeting of the minds. To the contrary, such ambiguity is merely to be resolved by resorting to the parties' conduct or other extrinsic evidence. [17]

Therefore, because the uncontradicted evidence demonstrates an intent of all parties to enter into an agreement and be bound thereby, the jury manifestly disregarded the Court's instructions relating to meeting of the minds and this Court should grant the instant Motion and relief requested by the Estate.

Throughout the years, you are talking about just now or throughout the whole years? Q. Talking about August of 1989. A. Okay. Yes. He was going to give $500,000 to the Hebrew Academy in return he was going to have the school named after him, Milton I. Schwartz Hebrew Academy. It was going to be named after him."); Vol. 2 08/24/18 Sabbath Testimony at 345:11—346:19 ("Q.· ·Do you remember being present with Milton Schwartz when he gave the money to the school? A. Yes, Dr. Lubin and I went to his home. She had arranged everything.· And we had a short meeting and he handed us a check. Q. Okay.· Do you remember how many checks he handed you? A. One check is what I recalled. Q. Do you remember if anything was discussed during this meeting when he handed you the check? A. There was discussion of the perpetuity piece that was very important to him. He wanted the school named after himself in perpetuity. Q. Is that something that you and Dr. Lubin agreed to? A. Yes. Well, I didn't personally agree to it. Dr. Lubin was representing the school. And I was representing the board so . . . 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 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.").

[17] *See, e.g.*, *Phung v. Thu-Le Doan*, 420 P.3d 1029 (Nev. 2018) ("An instrument need not incorporate all the terms agreed upon, if there is 'reasonable certainty' as to the underlying contract.... [A] statement of the substance of the agreement in general terms is sufficient ... [a] trial court may [then] construe an ambiguity in the writing by receiving parol evidence.") (citations omitted). *Holyoak v. Holyoak*, No. 67490, 2016 WL 2957146, at *2 (Nev. May 19, 2016) ("When interpreting an ambiguous contract, this court looks beyond the express terms and analyzes the circumstances surrounding the contract to determine the true mutual intentions of both parties."); 17 C.J.S. Contracts § 42 ("A court will not upset an agreement where the indefinite provision is not an essential term, and a patent ambiguity which renders a clause of a contract uncertain and void will not invalidate the remainder of the instrument if there is enough left to constitute a complete contract, or where the valid promise is separable from the invalid."); 15A C.J.S. Compromise & Settlement § 7 (an agreement is not void by reason of an ambiguity that may be cured by parol evidence as where it omits to express the consideration.").

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6. The Jurors Manifestly Disregarded the Instructions on Contractual Consideration as the Evidence Irrefutably Demonstrates Mutual Performance and Acceptance.

Contrary to Adelson Campus's opposition, the evidence introduced at trial irrefutably demonstrated that both Milton and the School performed and accepted the other's performance, which constitutes valid consideration.[18] Specifically, in 1989 Milton's contribution was directly proffered in exchange for a promise to name the school MISHA in perpetuity.[19] Likewise, again in 1996, the school again offered and/or reestablished the terms of the agreement through the 1996 Sabbath Letter in exchange for Milton's return and future participation and involvement, which was accepted by Milton.[20]

Moreover, even absent consideration, the Estate introduced uncontroverted evidence that the 1996 Sabbath Letter was offered with the express intent to induce Milton's renewed and future

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[18] *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).

[19] *See supra. See also* ATT at Vol 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."); Trial Ex. 134, Second Supplemental Affidavit of Milton Schwartz at par. 5. .

[20] *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);Trial Ex.139/139A, 05/23/1996 Sabbath Letter; ATT at Vol. 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."); ATT at Vol. 2, 08/24/18 Pacheco Testimony at 245:25—246-8 ("Q. Did you have discussions with Mr. Schwartz personally about this idea that he was going to give $500,000 in exchange for the school to be named after him? A. Yes. Q. Do you know one way or the other if Mr. Schwartz actually paid the $500,000? A. Yes. Q. Do you know one way or the other if the school actually changed its name? A. Yes."). Trial Ex. 134 at par. 5; 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).].

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involvement and contributions in exchange for naming the school after him in perpetuity, which he relied upon to his detriment.[21] Under Nevada law, such inducement satisfies any want of consideration through the application of the doctrine of promissory estoppel.[22] In the wake of such uncontroverted evidence, the jurors clearly and manifestly disregarded instructions pertaining to consideration and promissory estoppel. Thus, Court should grant the instant Motion and amend the judgment to find judgment in the Estate's favor on the existence of a naming rights contract, or vacate the judgment and grant a new trial.

7. <u>As Set Forth in the Motion, the Appropriate Vehicle for Relief in a Bench Trial is NRCP 52.</u>

To the extent that NRCP 50 applies, however, relief under NRCP 50(b) is not entirely foreclosed due to a party's failure to assert relief under NRCP 50(a). As pointed out in the Estate's Motion, courts in other jurisdictions have considered an NRCP 50(b) motion in certain circumstances such as where the issue is a matter of law: "It is generally true that defendants' failure to raise an issue in a motion for directed verdict will preclude its assertion in a motion for judgment notwithstanding the verdict. However, rigid application of this rule is inappropriate … where such application serves neither of the rule's rationales—protecting the Seventh Amendment right to trial by jury, and ensuring that the opposing party has enough notice of the alleged error to permit an attempt to cure it before resting."[23]

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[21] *See* 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 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."); Trial Ex. 134 at par. 5; 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).

[22] *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)).

[23] *Fed. Sav. And Loan Ins. Co. v. Reeves*, 816 F.2d 130, 138 (4th Cir. 1987); *See also Peer v. Lewis*, 2008 WL 2047978 at *10 (S.D.Fl. 2008) (considering issue of damages raised in FRCP 50(b)

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For the above and foregoing reasons, the Court should grant the Estate's Motion and either amend the Judgment or vacate the Judgment and grant a new trial regarding the Estate's claim for breach of contract.

DATED this 21st day of December, 2018.

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By: _____
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Executor of the Estate of Milton I. Schwartz

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motion despite failure to file FRCP 50(a) motion where issue was a matter of law and district court could make such finding on its own accord). Indeed, NRCP 50(b) relief has been granted notwithstanding failure to assert NRCP 50(a) motion where the issue constitutes a matter of law and the district court is capable of making a finding of its own accord.

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of December, 2018, service of the foregoing THE ESTATE'S REPLY TO ADELSON CAMPUS'S OPPOSITION TO MOTION FOR POST-TRIAL RELIEF FROM JUDGMENT ON JURY VERDICT ENTERED OCTOBER 4, 2018, 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 I. SCHWARTZ, Deceased.	Case No.: 07-P-061300 Dept. No.: 26/Probate **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**

COMES NOW The Dr. Miriam and Sheldon G. Adelson Educational Institute (the "Adelson Campus" or the "School") by and through their undersigned counsel of record, J. Randall Jones, Esq. and Joshua D. Carlson Esq., of the law firm of KEMP, JONES & COULTHARD, LLP, hereby submits its Opposition to the Estate's Post-Trial Brief Regarding the Parties' Equitable Claims and for Entry of Judgment.

This Opposition is made pursuant to and is based on the following points and authorities, supporting documentation, the papers and pleadings on file in this action, and any oral argument the Court may allow.

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I.

INTRODUCTION

Noticeably absent from the Estate's Post-Trial Brief is any mention that Nevada law requires the Estate prove its remaining equitable claims for relief by clear and convincing evidence. The Estate cannot avoid the substantial burden it faces in attempting to prevail on its remaining equitable claims premised around the unilateral mistake defense. As demonstrated both in this Opposition and the School's Post-Trial Brief on Outstanding Claims, the Estate has failed to prove by clear and convincing evidence that Milton Schwartz's Bequest was not motivated by a desire to continue to support and promote Jewish education and helping Jewish families afford a Jewish education for their children, but only because Milton Schwartz thought he had perpetual naming rights at the School. The Estate cannot meet its substantial burden because it failed to adduce clear and convincing evidence at trial showing that the sole reason Milton donated money to the School for 20 years and included the Bequest in his Will was because he believed the School would be named after him in perpetuity. Instead, the evidence shows that Milton Schwartz made both his lifetime donations and the Bequest because of his support and dedication to the School, the students, and the promotion of Jewish education for almost two decades.

Even though the Estate continues to assert that all of Milton Schwartz's gifts to the School for over 20 years, including the Bequest, were conditional upon the existence of perpetual naming rights, it cannot point to any express written contingency language supporting its position. At trial, the Estate failed to elicit any evidence as to the purpose and Milton's intent at the time each of the lifetime gifts was made as required under Nevada law in order to seek to rescind what are generally considered irrevocable gifts. Accordingly, the School respectfully requests the Court issue an order compelling the Executor of the Estate to pay the $500,000 Bequest to the School to be used to fund scholarships to educate Jewish children only. The School also requests that the School prevail on all of the Estate's claims for Bequest Void for Mistake, Will Construction, and Revocation of Gift and Constructive Trust.

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II.

ARGUMENT

A. NRCP 50(b) and 52(c) Are Not Applicable.

The Estate requests that judgment be entered in its favor on all remaining equitable claims pursuant to NRCP 50(b) or 52(c). However, neither of these rules of civil procedure are applicable in this instance. The Estate cannot raise issues in the Post-Trial Brief under Rule 50(b) that were not first raised in the Rule 50(a) motion filed at the close of evidence. *See Nelson v. Heer*, 123 Nev. 217, 163 P.2d 420, 424 n. 9 (2007). While the Estate cites to the NRCP 50(b) legal standard in its Post-Brief, most of the proffered arguments were not contained in the Estate's narrowly focused Motion for Judgment as a Matter of Law Regarding Construction of Will ("Estate's Rule 50(a) Motion") brought pursuant to NRCP 50(a). In its Rule 50(a) Motion, the Estate only requested a directed verdict be entered on its first claim for relief, Construction of Will, that Milton Schwartz intended that the $500,000 bequest in his Will only go to an entity named after him and bearing the name "Milton I. Schwartz Hebrew Academy." *See* Estate's Rule 50(a) Motion, filed on Sept. 3, 2018, at p. 7. The Estate should not be allowed to ambush the Court or the School with any new Rule 50 arguments. Because the arguments presented in the Estate's Post-Trial Brief were not made in the Estate's Rule 50(a) Motion, they have not been preserved and should be summarily denied as procedurally improper.

NRCP 52(c) is likewise not applicable in the case at bar. NRCP 52(c) states in pertinent part that "**[i]f during a trial without a jury** a party has been fully heard on an issue **and the court finds against the party on that issue**, the court may enter judgment as a matter of law against that party…" NRCP 52(c)(emphasis added). This rule is not applicable in light of the fact that the Estate filed its Post-Trial Brief **not during a bench trial**, but after the jury trial concluded. Additionally, the Court has not made any findings against the Estate on its construction of will claim. Therefore, NRCP 52(c) is not applicable and cannot be the basis for any of the Estate's requested relief.

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B. The Court Should Compel the Estate to Pay the Bequest to the Adelson Campus

1. The Bequest names the Milton I. Schwartz Hebrew Academy which existed at the time Milton Schwartz executed his Will and at the time he died.

The Estate seeks a declaration that the Bequest is void or has lapsed on several unsupported grounds. The Estate's leading argument is that the Bequest is void because it names an entity that no longer exists.[1] *See* Estate's Post-Trial Brief at 5:1. The Estate's argument however, ignores the fact that at the time Milton Schwartz passed away on August 9, 2007, *see* Trial Exhibit 38 (Certificate of Death), the School, including both the building and the corporate entity, was in fact named the Milton I. Schwartz Hebrew Academy. *See* Certificate of Amendment to Articles of Incorporation filed March 21, 2008, Trial Exhibit 51 and Petition to Compel Distribution for Accounting and for Attorneys' Fees, Trial Exhibit 61 at p. 4. Additionally, at trial, Paul Schiffman confirmed that the building housing the lower school (grades pre-school through 4th grade) continued to be known as the "Milton I. Schwartz Hebrew Academy" until Jonathon Schwartz instituted an action against the School on May 28, 2013. **Exhibit A** (August 29, 2018, Trial Transcript Vol. 5) at 88:5-12. Mr. Schiffman also testified that if Jonathan Schwartz would have written a check in May 2013 made out to the "Milton I. Schwartz Hebrew Academy" the School could have still cashed the check as it was doing business under the name "Milton I. Schwartz Hebrew Academy." *See id* at 179:11-22.

The Bequest should be paid to the School as it is without dispute that had the Bequest been disbursed within 5 years of Milton's death, the funds clearly would have gone to a Jewish day school where one of the buildings was named the Milton I. Schwartz Hebrew Academy.

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[1] While the Estate cites *In re Estate of Melton*, 128 Nev. 34, 48, 272 P.3d 668, 677 (2012) in support of its proposition that a bequest to a nonexistent entity fails and must be stricken, in actuality the Nevada Supreme Court only discusses the validity of a disinheritance clause in the cited portion of the decision. Thus, the Estate's reliance on *In re Estate of Melton* is mistaken.

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2. Even the change in the School's charitable corporation's name does not create a latent ambiguity.

While the Estate argues that renaming the school's charitable corporation creates a latent ambiguity that is to be resolved in the Estate's favor, this argument is unsupported. A latent ambiguity exists when otherwise clear language, when applied to the facts at issue, renders uncertain results. *See Rubin v. State Farm Mut. Auto. Ins. Co.*, 118 Nev. 299, 303, 43 P.3d 1018, 1021 (2002). Here, there is no uncertainty. As explained above, at the time Milton Schwartz passed away, the School, including both the building and the corporate entity, was named the Milton I. Schwartz Hebrew Academy. *See supra* at Section II(B)(1). There has also been no evidence presented that another school or entity at the time of Milton's death was also named the Milton I. Schwartz Hebrew Academy. Applying the unambiguous Bequest to the facts at the time of Milton Schwartz's death, it is clear that the Bequest should have been paid to the School. Therefore, the facts demonstrate that a latent ambiguity just does not exist.

Additionally, Courts generally construe the language of a will liberally when applying the rules of construction to charitable gifts—because **the law favors charitable gifts**. *See Citizens Nat. Bank of Paris v. Kids Hope United, Inc.*, 386 Ill. App. 3d 1084, 1090, 898 N.E. 2d 734, 740 (2008), *aff'd*, 235 Ill. 2d 565, 922 N.E.2d 1093 (2009); *Nixon v. Brown*, 46 Nev. 439, 214 P. 524, 530 (1923), *superseded by statute on other grounds as recognized in Kelly v. Kelly*, 86 Nev. 301 (1970); *In re Estate of Clementi*, 166 Cal. App. 4th 375, 385, 82 Cal. Rptr. 3d 685, 692 (2008); *Citizens Nat. Bank*, 386 Ill. App. 3d at 1090; *Ratcliffe v. Seaboard Nat. Bank of New York,* 46 S. W. 2d 750 (Tex. Civ. App. 1932). Courts void a charitable gift only if the court cannot possibly ascertain the intended beneficiary or purpose of the gift. 96 C.J.S. Wills § 1091; *In re Seabury's Estate*, 107 Misc. 705, 177 N.Y.S. 91 (Sur. Ct. 1919), *aff'd*, 229 N.Y. 636, 129 N.E. 938 (1920); *Smith v. Snow*, 106 S.W.3d 467 (Ky. Ct. App. 2002). "**All gifts for the promotion of education are charitable, in the legal sense.**" *Russell v. Allen*, 107 U.S. 163, 172, 2 S. Ct. 327, 334 (1883) (emphasis added).

And while a court may consider circumstances existing at the time that the testator executed the will if ambiguities exist in the plain language of the will, **the fact that a charitable corporation changed its name does not create uncertainty**. *See Walsh v. Fid. & Deposit Co. of Maryland*, 131

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Misc. 138, 227 N.Y.S. 96 (Sup. Ct. 1928); *Elnell v. Universalist General Convention*, 76 Tex. 514, 13 S.W. 552 (1890). Courts instead enforce payment of charitable gifts to the successors of named beneficiaries and if the successor continues with the same purpose of the intended beneficiary. *See Citizens Nat. Bank*, 386 Ill. App. 3d 1084; *U.S. Bank v. Hospice of CincinnatiI*, 2006-Ohio-1222, 2006 WL 664135 (Ohio Ct. App. 1st Dist. Hamilton County 2006). *Gustafson v. Wesley Foundation*, 266 Ga. 679, 469 S.E.2d 160 (1996); *Mercy Hosp. of Willston v. Stillwell*, 358 N.W.2d 506 (N.D. 1984); Restatement (Third) of Trusts § 67 cmt. c, e (2003).

Contrary to the Estate's request, the Bequest is not void because the Court can ascertain the intended beneficiary, the School, even though the charitable corporation changed its name in March 2008. It is relevant to emphasize once again that at the time Milton Schwartz passed away, the School, including both the building and the corporate entity, was named the Milton I. Schwartz Hebrew Academy. The Bequest also unambiguously states Milton Schwartz's purpose for the gift: to fund scholarships for Jewish children only. The Adelson Educational Campus continues with the same purpose of the Milton I. Schwartz Hebrew Academy by providing exceptional education to Jewish students from pre-K through high school. Accordingly, the Court should enforce the payment of the Bequest to the non-profit School for the purpose of funding scholarships for Jewish children only.

As a throw away argument, the Estate asserts in a footnote that even if the Bequest does not lapse, it is void due to Milton's alleged mistaken belief that he had perpetual naming rights agreement with the School. *See* Estate's Post-Trial Brief at fn. 20. The placing of this argument in a footnote is telling about the weakness of the argument. Nevertheless, in order to rebut this argument and in an effort to avoid redundancy and save valuable judicial resources, the School incorporates by references its arguments demonstrating that the School should prevail on the Estate's alleged claim for Bequest Void for Mistake. *See* the School's Post-Trial Brief on Outstanding Claims, filed on November 16, 2018, at Section III(B).

3. Perpetual naming rights is not an expressly stated condition to the Bequest.

As it has throughout this litigation, the Estate continues to argue that Milton Schwartz only intended the Bequest to go to an entity that would bear his name in perpetuity. But the Estate's argument fails to recognize that the Bequest to the Milton I. Schwartz Hebrew Academy is clear, unambiguous, and contains only one express condition, that the money be used to fund scholarships for Jewish

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students only. The admitted evidence and trial testimony demonstrates that the School, both the corporation and the building, was named the Milton I. Schwartz Hebrew Academy at the time Milton passed away in August 2007. The Estate discusses how intelligent and sophisticated Milton was and understood the meaning of successor clauses, yet this discussion actually highlights a glaring hole in the Estate's argument: if Milton Schwartz intended for the Bequest to be given only to a school perpetually named after him, the circumstances would have compelled him to have stated such in the Will. Milton's failure to include any reference to perpetual naming rights must be construed as purposeful in light of the evidence adduced by the Estate's own witnesses and the unambiguous language of the Will itself.[2] Milton's only clear manifestation of his intent of the purpose of the Bequest is "for the purpose of funding scholarships to educate Jewish children only." *See* Last Will and Testament, Trial Exhibit 22. If the Bequest is found to be void then the true stated purpose of the Bequest will not be accomplished. Therefore, the Estate should be compelled to pay the Bequest to the School to accomplish the stated purpose of the Bequest.

C. The Estate is Not Entitled to the Equitable Remedy of Rescission of Milton Schwartz's Inter Vivos Gifts.

1. No evidence was elicited at trial regarding Milton's intent, any alleged contingencies, and the specific purpose of each lifetime gift over the 20 year period.

Milton Schwartz's lifetime gifts were **irrevocable gifts** that could only be rescinded if the Estate can demonstrate by clear and convincing evidence that Milton's belief that the School would be named after him in perpetuity was **the** motivating factor in his decision to make each one of the gifts to the School and its students. An inter vivos gift must be absolute and irrevocable to be valid. *See Gardella v. Santini*, 65 Nev. 215, 222, 193 P.2d 702, 705 (1948). To demonstrate unilateral mistake in the execution of a gift, the party advocating for relief must provide **evidence of the donor's intent at the time the gift is made**. *In re Irrevocable Tr. Agreement of 1979*, 130 Nev. 597, 603, 331 P.3d 881, 885 (2014) (emphasis added). Further, the Estate has burden of proving the testator's intent and the alleged

[2] Milton Schwartz's long-time assistant, Susan Pacheco, testified that Milton was really precise when it came to important documents and he would never leave anything to chance. *See* **Exhibit B** (August 24, 2018, Trial Transcript Vol. 2) at 296:3-8.

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mistake by **clear and convincing evidence**. *See id.*, 1130 Nev. at 607, 331 P.3d at 887 (emphasis added).

The Estate cannot meet its heavy burden. The Estate failed to meet this burden as it points to no evidence that at the time Milton gave **each gift**, the sole reason he made each and every one of the alleged gifts – some 15 gifts in random amounts, ranging from as little as $50.00 to as much as $135,277.00, occurring sporadically over a 20-year time period – was because he believed the School, and everything ever remotely related to it, would bear his name in perpetuity. *See generally* Estate's Post-Trial Brief. The evidence admitted during trial proves that Milton Schwartz was likely motivated to donate $500,000 to the School for use for scholarships and the various lifetime gifts because he was dedicated to and supported the school over approximately two decades. The Executor, Jonathan Schwartz, discussed his father's dedication and support of the school as follows:

> Q. How did your father -- what is your understanding with respect to your father's dedication to the Milton I. Schwartz Hebrew Academy?
>
> A. He was incredibility dedicated to the school. He was involved with the school on a daily basis. It wasn't just, you know, write a big check and get some naming rights. He was involved with the day to day operations of the school. I remember he had a speakerphone in his car. I remember being in the car with him and him getting phone calls about parents requesting scholarships, about hiring staff members, about raising money. He was constantly raising money for the school to keep it operating. These kind of schools never cover their operating expenses, so every single summer, the school would be at a deficit and my dad would get on the phone and raise a bunch of money from people, and he would write a large check himself to keep it operating. So he was dedicated to it like it was one of his businesses. He was managing at times, on a daily basis.

See **Exhibit C** (August 27, 2018, Trial Testimony, Vol. 3) at 112:11-113:6. Several other witnesses likewise testified that Milton loved the school and worked hard to see that the school thrived. Susan Pacheco, Milton's longtime assistant, testified that Milton loved the school and was all about the school. *See* Ex. B (August 24, 2018, Trial Transcript, Vol. 2) at 332:15-19. Also, former Board member Dr. Roberta Sabbath testified that Milton worked toward the goal of making the Hebrew Academy a better place. *See* Ex. C (August 27, 2018, Trial Testimony, Vol. 3) at 70:17-24. The foregoing testimony demonstrates Milton Schwartz's inter vivos gifts were motivated by his support and dedication to the School, not solely because he thought he had perpetual naming rights.

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The Estate continues to argue that all of Milton Schwartz's lifetime gifts were conditioned on the School bearing his name in perpetuity. However, the Estate failed to introduce sufficient evidence at trial to support this tenuous argument. Milton's subjective belief in the existence of an enforceable naming rights agreement in perpetuity is not sufficient to transform all of Milton's lifetime gifts into conditional gifts. In §5.4 of his Will, Milton Schwartz expressly confirmed his inter vivos gifts: "I hereby ratify and confirm all gifts made by me prior to my death…" *See* Last Will and Testament, Trial Exhibit 22, at §5.4. Milton's Will also does not include any express reference to any lifetime gifts or the Bequest to the School being conditional. *See generally id.*

Significantly, the Estate also failed to adduce evidence at trial that each one of Milton's inter vivos gifts was expressly conditioned on the School bearing his name in perpetuity and that the School understood and agreed that it would have to return the donation in the event the School ceased being known at the Milton I. Schwartz Hebrew Academy. *See In re Irrevocable Tr. Agreement of 1979*, 130 Nev. at 603, 331 P.3d at 885. This failure to elicit this essential evidence is fatal to the Estate's requested relief and must result in the Court refusing the Estate's request to rescind Milton's lifetime gifts.

While Milton Schwartz did not allegedly make any gifts between 1993 and 1996, he also never demanded the School return the gifts he made to the School before 1993, even though he was well aware the School changed the name of the corporation back to the Hebrew Academy. Such evidence is irrefutable proof that Milton Schwartz did not intend his gifts to be conditional and that no such agreement or understanding existed. If Milton, while alive, never demanded the return of his lifetime gifts to the School be returned when his name was taken off the School, then why should the Estate, almost eleven years after his death be equitably entitled to the return of the very same lifetime gifts? Therefore, under Nevada law, Milton's gifts over a 20-year period are assumed to be irrevocable and, as such, the Estate cannot now seek to enforce any *post-hoc* conditions.

2. The former board members failed to provide any consistent testimony as to terms of any alleged agreement.

As the Estate readily admits, the jury concluded that there is no legally enforceable contract between Milton Schwartz and the School concerning naming rights. *See* Estate's Post-Trial Brief at 11:6-7. Yet, the Estate now contends that it is entitled to recover Milton's lifetime gifts because the

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board members allegedly testified about an alleged perpetual naming rights agreement. *See id.* at 13:9-10. As analyzed in greater depth in the School's Opposition to the Estate's Motion for Post-Trial Relief from Judgment on Jury Verdict, and incorporated by reference herein, the Estate failed to carry its burden at trial and prove the existence of a naming rights agreement. *See* The School's Opp'n. to the Estate's Mot. for Post-Trial Relief from Judgment on Jury Verdict, filed on Nov. 21, 2018 at Section III(C). First of all, the Estate failed to demonstrate the exact amount of Milton's pledge (i.e. $500,000 or $1 million), whether the Board accepted Milton's offer, and whether Milton in fact paid the pledged amount in full. *See id.* Despite the Estate's attempt to argue this issue once again, to state there was an agreement between Milton and the School ignores the facts presented at trial and the jury's ultimate verdict that there was not a legally enforceable naming rights agreement between Milton and the School. Secondly, all the board members who testified about the alleged naming rights agreement testified that it was an oral agreement, not written. As this Court ruled prior to the trial, the statute of limitations had run on any oral contracts well before the Estate filed its complaint.[3]

3. The Estate failed to demonstrate at trial how it arrived at the alleged lifetime gift principal amount that it now seeks to recover.

The Estate contends that since there was no binding and enforceable naming rights contract then the School should not benefit from Milton Schwartz's alleged lifetime gifts in the amount of $1,110,606.66. However, the Estate failed to provide any documents or evidence demonstrating how the yearly lifetime gifts amounts it purports it should recover were tabulated because the supporting documents were destroyed after litigation was instituted or never produced. *See* Ex. B (August 24, 2018 Trial Transcript, Vol. 2) at 313:4-314:22. Ms. Pacheco also confirmed at trial that she **cannot verify the accuracy of the chart** (Trial Exhibit 62) of alleged gift by Milton Schwartz to the School because the supporting documents were missing. *See id.* at 315:12-316:6. Ms. Pacheco also never provided any testimony regarding her understanding of the amounts Milton Schwartz allegedly donated to the School

[3] Even Jonathan Schwartz admitted that the only contract that his father had was an oral contract. An interesting admission considering that the Estate's counsel tried, unsuccessfully, to get the jury to buy into counsels' argument that there was a written contract made up of various and sundry inconsistent and contradictory documents created over a period of more than five years, and authored by boards made up of differing members, and by others who were never board members.

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in the years 1992-1999 and 2001-2003. *See id.* at 277:4-280:18. This failure to provide a foundation or basis for the alleged lifetime gift amounts is fatal to the Estate's request for recessionary damages under alleged equitable principles.

4. The Estate is not entitled to pre-judgment interest.

In the event the Court entertains the Estate's request to recover Milton Schwartz's lifetime gifts, which the School strongly contends is improper and unequitable, no pre-judgment interest should be awarded by the Court. **Pre-judgment interest is discretionary**. *See U.S. v. Nye County, Nev.*, 178 F.3d 1080, fn. 11 (9th Cir. 1999) (emphasis added). Pre-judgment interest is not designed as a penalty. *See Ramada Inns, Inc. v. Sharp*, 101 Nev. 824, 826, 711 P.2d 1, 2 (1985). To enable trial court to make an appropriate award of interest, determination of the applicable rate of interest, the time when it commences to run, and the amount of money to which the rate must be applied is necessary. *See Paradise Homes, Inc. v. Central Sur. & Ins. Corp.*, 84 Nev. 109, 116, 437 P.2d 78, 83 (1968).

The Estate's request for discretionary pre-judgment interest is not warranted and should be denied in its entirety. First, the obligation to repay Milton Schwartz's lifetime gifts and the amount remains uncertain until the date this Court ultimately rules on the equitable claim of revocation of gifts. "Prejudgment interest on a damage award is only allowed where the damage award is known or ascertainable at a time prior to entry of judgment. . .." *See Hornwood v. Smith's Food King No. 1*, 807 P.2d 209, 214 (Nev. 1991) (citing *Jeaness v. Besnilian*, 101 Nev. 536, 541, 706 P.2d 143, 147 (1985)). As analyzed above, the Estate failed to provide any documents or evidence demonstrating how the yearly lifetime gifts amounts it purports it should recover were tabulated because the supporting documents were destroyed after litigation was instituted or never produced and the Estate's witness who prepared a summary of the alleged gifts confirmed she now has no way of verifying the accuracy of the alleged gift amounts. *See supra* at Section II(C)(3). Without any certainty as to the amount of the lifetime gifts actually given by Milton Schwartz or the amount the Court may order returned to the Estate, awarding pre-judgment interest would be improper. *See id.* Second, it would be inequitable to award the Estate pre-judgment interest in light of the Estate's substantial delay in bringing this claim. The Estate waited almost six years after Milton's death to assert that Milton's lifetime gifts should be returned. The Estate's delay alone, resulting in years of unnecessary interest, is reason enough to deny

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the Estate's request for pre-judgment interest in its entirety to prevent the Estate from being unjustly enriched as result of its delay.

Even if the Court is inclined to award pre-judgment interest, the Court must next determine the interest begins to accrue. Nevada has enacted two statutes specifically addressing when pre-judgment interest begins to accrue. NRS 17.130, the general interest statute, limits pre-judgment interest to the period from the date of service of the complaint, while NRS 99.040, applicable only to contract damages, allows interest from the date payment became due under the contract. It is the date established in these statutes that currently apply to pre-judgment interest calculations in Nevada. The Estate argues that the pre-judgment interest accrual date is governed by NRS 99.040(1)(c). Pre-judgment interest is permitted in contract cases pursuant to NRS 99.040 only where there is no express written contract fixing a different rate of interest, then interest is permitted upon all money from the time it becomes due, in the following cases:

> "(d) Upon money received to the use and benefit of another and **detained without his or her consent**."

NRS 99.040(1)(c). As the lifetime gifts are not under any contract, NRS 99.040 is not applicable in this case. Additionally, as stated previously, Milton's monetary lifetime gifts were not retained by the School without his consent as evidenced in §5.4 of his Will wherein Milton Schwartz expressly **ratified and confirmed all of his lifetime gifts**. *See* Last Will and Testament, Trial Exhibit 22, at §5.4. Further, neither Milton nor the Estate ever demanded the return of any of the alleged lifetime gifts until the Estate filed its competing petition on May 28, 2013. The Estate's request for the return of Milton's alleged lifetime gifts is clearly meant to punish the School, not because the gifts were retained without his consent at the time of the gift. Thus, NRS 99.040 is not applicable and cannot govern when pre-judgment interest allegedly begins to accrue. If pre-judgment interest is awarded, interest could only begin to run on May 30, 2013 – the date the Estate served its Petition and Summons.

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E. The Jury Already Found That Promissory Estoppel and/or Detrimental Reliance Is Not Applicable under the Facts.

The Estate's last argument appears to be an attempt to take a second bite of the apple on its claim of promissory estoppel/detrimental reliance[4]. The issue of promissory estoppel/detrimental reliance was expressly presented to the jury and the jury received specific instructions on the concept of promissory estoppel. *See* Jury Instruction Nos. 34-35. After hearing all of the evidence, the jury found that the Adelson Campus did not act in a manner in which it should have reasonably expected to induce Milton Schwartz's reliance. *See* **Exhibit D** (Verdict) at Question No. 11. Thus, the Estate's argument concerning promissory estoppel is without merit and should be disregarded as being contrary to the jury's specific findings.

The Court should also ignore the Estate's argument that the only reason the School is not honoring an alleged "naming rights promise" is because the School's current board has an alleged vested interest in maintaining the Adelson name. This argument is completely irrelevant and premised solely on speculation as demonstrated by the lack of citation to any actual evidence. Therefore, the Court should adopt the jury's findings that Milton Schwartz did not have a legally enforceable naming rights contract and that promissory estoppel/detrimental reliance is not applicable in this matter.

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[4] The Estate's reliance on the *Idaho State University Foundation v. Rogers*, A-15-723710-C, is nothing more than a misguided attempt to distract from the jury's finding as that matter is factually dissimilar from the instant case.

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III.

CONCLUSION

For the foregoing reasons, the School respectfully requests the Court issue an order compelling the Executor of the Estate to pay the $500,000 Bequest to the School to be used to fund scholarships to educate Jewish children only. The School should also prevail on the Estate's remaining claims for Bequest Void for Mistake and Revocation of Gift and Constructive Trust.

DATED this 21st day of December, 2018.

KEMP, JONES & COULTHARD, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on 21st day of December, 2018, a true and correct copy of the foregoing **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** was served on all parties through the Court's e-filing system.

Pamela Montgomery

An employee of Kemp, Jones & Coulthard, LLP

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Exhibit A

In the Matter Of:

Schwartz vs Adelson Educational Institute

TRIAL TRANSCRIPT

August 29, 2018

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Discovery Legal Services, LLC 702-353-3110 production@discoverylegal.net

A. She was disappointed and told me that she would think about it. And we never discussed it again.

Q. Thank you.

Mr. Schiffman, were you ever instructed by the board to remove the Milt Schwartz signage from the building?

A. Yes.

Q. Can you tell me when that was?

A. I can't remember the exact date.

Q. Was it after the lawsuit was filed?

A. Yes.

Q. Do you remember why?

A. It was the board's feeling if there was going to be a lawsuit filed that they wanted the name to be removed from the building and the portrait to be taken down.

Q. What's the portrait? Tell me about that.

A. The portrait of Milton Schwartz and (inaudible) they also wanted that down as well.

Q. Was there an instruction given by a specific board member to do that?

A. I took all of my instructions from Mr. Chaltiel.

Q. Mr. Chaltiel, who was your close friend,

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MR. JONES: Object to the form of the question your again lacks foundation.

THE COURT: If he knows.

THE WITNESS: I don't know.

BY MR. LEVEQUE:

Q. We did look at the amendment to the articles of incorporation that changed the corporate name to the Dr. Miriam and Sheldon G. Adelson Educational Institute in March 2008, correct?

A. Yes.

Q. Let's assume for a moment that the check was made out to Milton I. Schwartz Hebrew Academy in May of 2013. Okay?

A. Yes.

Q. How is the bank going to cash that check?

A. We actually had the department state I'm not sure what the terminology is we actually had many names that we were doing business under.

Q. So you were doing business under the Milton I. Schwartz Hebrew Academy?

A. That was, I believe, one of the things still registered.

Q. The building that was demolished that had Dr. Lubin Saposhnik's name on it, what was is demolished for?

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Exhibit B

In the Matter Of:

Jonathan A. Schwartz vs Adelson Educational Institute

VOL 2 TRANSCRIPT

August 24, 2018

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Discovery Legal Services, LLC 702-353-3110 production@discoverylegal.net

Q. You can use anything to refresh your memory.
A. That was --
Q. Let me tell you where what it is. 103, I think it is.
A. It is. 1990 you asked?
Q. Yes.
A. Yes, he gave money.
Q. How much?
A. 9,000.
MR. JONES: Your Honor, again, I would -- I'm going to object. It lacks foundation based upon deposition testimony that Ms. Pacheco does not provide us the opportunity to examine the witness about the issue.
THE COURT: Overruled. She can answer.
THE WITNESS: Yes, $9,000.
BY MR. LEVEQUE:
Q. And what about 1991?
A. $150.
MR. JONES: Sorry, just for the record.
THE COURT: Ongoing objection.
MR. JONES: Yes, ma'am.
THE COURT: Understood.
BY MR. LEVEQUE:

Q. In 2000?
MR. JONES: Same objection.
THE WITNESS: 2000, 7,400.
BY MR. LEVEQUE:
Q. And 2004?
MR. JONES: Same objection.
THE WITNESS: 135,277.
BY MR. LEVEQUE:
Q. 2005?
MR. JONES: Same objection.
THE COURT: Same.
THE WITNESS: 9,622.
BY MR. LEVEQUE:
Q. 2006?
A. 100,000.
MR. JONES: Same objection.
THE WITNESS: Oh, sorry.
THE COURT: Same response.
MR. JONES: I'm just doing it for the record.
MR. LEVEQUE: Do you want a standing objection?
MR. JONES: I would, but I think the rules say you can't actually do that, or I would. I don't like to interrupt you.

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THE COURT: It would be nice if we could just say I object to everything and then the whole trial could just go. Unfortunately, that's not the rule. Sorry, Mr. LeVeque, for interrupting you.

MR. LEVEQUE: Let's do it as we do.

BY MR. LEVEQUE:

Q. Where was I? 2006?

A. 2006.

MR. JONES: Same objection.

THE WITNESS: A hundred thousand.

BY MR. LEVEQUE:

Q. 2007?

MR. JONES: Same objection.

THE WITNESS: It's on the schedule or what actually happened.

BY MR. LEVEQUE:

Q. What actually happened?

A. A hundred thousand.

THE COURT: She is refreshing her recollection so she has to respond with what that document refreshes her recollection to.

MR. LEVEQUE: Unless she has a different recollection as to other than the document.

THE COURT: She is looking at this so we need the answer as to what this says. We will get

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into the other issue in a minute.

MR. JONES: Your Honor may we approach about that.

THE COURT: Yes.

MR. JONES: Thank you.

(Bench conference.)

THE COURT: We have got it figured out. So Mr. LeVeque is going to restate his question to you.

BY MR. LEVEQUE:

Q. Is the document that you are looking at Ms. Pacheco, for 2007?

A. Yes.

Q. All right. Do you have an independent recollection as to what the amount Mr. Schwartz contributed in 2007 is?

A. Yes.

Q. How much?

A. A hundred thousand.

Q. Thank you. In addition to Mr. Schwartz contributing to the school, did any of his -- do you know if any of his entities, his cab company or anything else?

A. Yes.

Q. What entities also contributed?

MR. JONES: Objection, Your Honor,

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letter. He didn't use a stamp, right?
A. Correct.
Q. So he was a really precise guy, would you say that when it came to documents of importance?
A. Yes.
Q. He wasn't going to leave l leave anything to chance, would you agree with that?
A. I would agree with that.
Q. Now, there have been some discussion here -- well, I will withdraw that.
Let's look at, if we could for a minute, Exhibit 112. I think it's in evidence. And we will put it up on the screen too Ms. Pacheco but if you have it there you are welcome to look at the binder.
A. It's easier to see here.
Q. Okay.
A. All right.
Q. So we have seen this before. This is -- these are the minutes that you signed as the secretary with your maiden name do you remember that?
A. Yes.
Q. You were there says Susan McGarrah at the bottom, attending/present?
A. Uh-huh.

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did my best.

Q. Okay.

A. But I did produce this schedule, yes.

Q. You understood when you were under subpoena that the school was asking you to collect all of the information, all of the backup so they would have a chance to review it, right? That was part of the process, right?

A. It was part of the process. But that's not in the order it happened.

Q. Okay. So let me ask a different way.

You got a subpoena?

A. Yes.

Q. It asked you to collect all of the information?

A. To come up with the schedule to -- of donations so that's what I did.

Q. And that's information that one of the other attorneys was able to ask you about for the school. They asked you about -- it wasn't me, it was somebody else, right?

A. Correct.

Q. And at that time, 2014, you told them, as Mr. LeVeque had you testify, that it was your belief that you shredded all of that information -- orb you

shredded -- I'm sorry. All of the information except what you were able to produce that day, it was your understanding had been shredded, right?

A. Correct. Because I was given that date to find the backup from this original schedule.

Q. And you believe that in fact your best recollection at that time or understanding at that time in 2004 was that only -- the only backup you had was what you gave a day to the lawyers for the school?

A. At that time, yes, because I -- yes, that's what I found that day, correct.

Q. So and you said in your deposition and we can look at it and I can ask you about that, but is it your understanding and recollection that you told the attorney for the school at that time when you were under oath that to the best of your understanding, all the other backup had been shredded?

A. At that time, to the best of my understanding, yes. That was not a hundred percent. Okay.

Q. Okay.

A. All right.

Q. So the fact is that we didn't get all of

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the backup information, right, at that time?

A. No, because I didn't have it at that time, correct.

Q. By the way, you are a bookkeeper, you understand --

A. I'm not a bookkeeper but I do understand the concept of it.

Q. But you understand the concept of backup as a person who keeps books because that's what you are doing, right, you are kind of keeping the books?

A. Yep. Yep.

Q. You understand that the whole point of the backup is to be able to check to make sure that all of the anonymous for example in that chart are correct, right?

A. Correct.

Q. That's why you want the backup so you can double-check to make sure that the information on the chart, the summary, is all accurate and true, right?

A. Absolutely.

Q. And unfortunately, because in 2014, you thought it had all been shredded, my client wasn't allowed the opportunity to look at all of the rest of the backup, was it?

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A. No.

Q. And so we weren't able to check the backup material to see if you had got all of the information on that chart accurately projected, right? Would you agree with that?

A. Yes.

MR. JONES: I have no further questions for Ms. Pacheco. Thank you, ma'am.

THE COURT: Any redirect?

MR. LEVEQUE: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. LEVEQUE:

Q. Ms. Pacheco, could you go flip to the Tab 62, which is a joint exhibit? Let me know when you are there.

A. Almost. Yes.

Q. All right. First page of the document which also should be showing up on your screen, do you see a file stamp at the top right corner of that screen?

A. Yes.

Q. What's the file stamp say?

A. May 28, 2013.

Q. Do you see where the title of this document is?

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vote?

A. Uh-huh.

Q. You have to say "yes."

A. Yes. I'm sorry. Yes.

Q. So based on what you understood is, for whatever reason, a majority of the board voted not to reelect Mr. Milton Schwartz at that time, right?

MR. LEVEQUE: Objection. Lacks foundation.

MR. JONES: I think that's what she just testified.

THE COURT: Overruled.

MR. JONES: Thank you.

THE WITNESS: Yes.

BY MR. JONES:

Q. And Mr. Schwartz, who clearly was -- as you have already said, he loved this school?

A. Yep.

Q. He was all about this school?

A. Yep.

Q. And he was extremely angry when the board decided that he shouldn't be on the board anymore, right? Right?

A. Yes.

Q. And he said I'm not going to stand for that, I'm going to sue and say that was not a proper

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Exhibit C

In the Matter Of:

Schwartz vs Adelson Educational Institute

TRANSCRIPT TRIAL

August 27, 2018

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Discovery Legal Services, LLC 702-353-3110 production@discoverylegal.net

Q. But you didn't?
A. We didn't.
Q. And if we could go on and go on, and if you want to look, I don't want to belabor it. I understand your schedule. I believe you already said this, but there is no place in that letter it pledges to put Milton Schwartz's name anywhere in association with the school, in the stone, on the letterhead on the corporation, on the front of the school, anywhere at all; it never says you are going to do that in perpetuity, does it?
A. It does not, to my best recollection of this letter.
MR. JONES: Thank you Dr. Sabbath.

EXAMINATION

BY MR. LEVEQUE:
Q. Dr. Sabbath, do you believe Mr. Milton Schwartz loved the Hebrew Academy?
A. I do.
Q. Do you believe he tirelessly worked to make the Hebrew Academy a better place when he was around?
A. "Tirelessly" is a big word. He certainly worked toward that goal, as far as I know. I'm not a friend of the man. I'm not of the family. I was

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Milton I. Schwartz Hebrew Academy in perpetuity, and that with that agreement, there were naming rights over the entire campus on Hillpointe, that his name was going to be on the letterhead of the school, his name was going to be on the pediment of the building. His name was going to be at the entrance to the school. I specifically recall the former sign at the entrance of the school. And that the school was going to publicly be known as the Milton I. Schwartz Hebrew Academy forever.

Q. How did your father -- what is your understanding with respect to your father's dedication to the Milton I. Schwartz Hebrew Academy?

A. He was incredibility dedicated to the school. He was involved with the school on a daily basis. It wasn't just, you know, write a big check and get some naming rights. He was involved with the day to day operations of the school. I remember he had a speakerphone in his car. I remember being in the car with him and him getting phone calls about parents requesting scholarships, about hiring staff members, about raising money. He was constantly raising money for the school to keep it operating. These kind of schools never cover their operating expenses, so every single summer, the

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school would be at a deficit and my dad would get on the phone and raise a bunch of money from people, and he would write a large check himself to keep it operating. So he was dedicated to it like it was one of his businesses. He was managing at times, on a daily basis.

Q. How did your father refer to the Milton I. Schwartz Hebrew Academy?

MR. JONES: Your Honor hate to say it but that is clearly directly hearsay.

THE COURT: Sustained.

THE WITNESS: I'm sorry, Your Honor I didn't hear you.

THE COURT: Sustained.

BY MR. FREER:

Q. Did you ever hear your father -- what was your understanding with respect to your -- the words in perpetuity with respect to the Milton I. Schwartz Hebrew Academy?

A. It was incredibly important to him. He would say it with emphasis, underlined. I can -- I can hear it in my head right now, he would always say this, Milton I. Schwartz Hebrew Academy --

MR. JONES: I'm sorry to cut you off but what your father said I would object to as being

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Exhibit D

DISTRICT COURT

CLARK COUNTY, NEVADA

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

VERDICT FORM

In the Matter of the Estate of MILTON I. SCHWARTZ, we the jury find as follows:

Question 1:

Do you find that Milton I. Schwartz had a naming rights contract?

Yes ____ No X

If you answered YES to Question 1, please proceed to answer Questions 2, 3, 4, 5, 6 and 7. If you answered NO, skip to Question 8.

Question 2:

Was the contract oral or founded upon a writing or writings?

Oral ____ Written ____

Question 3:

If you answered YES to Question 1, was the contract in perpetuity?

Yes ____ No ____

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Question 4:

What was the consideration (amount of money) that Milton I. Schwartz was required to pay in exchange for a naming rights contract?

_____

_____

Question 5:

Did Milton I. Schwartz perform all of his obligations under the terms of the contract?

Yes ____ No ____

If you answered NO, please skip to Question 8. If you answered YES to Question 5, please proceed to answer Question 6.

Question 6:

In addition to the consideration (amount of money Milton I. Schwartz agreed to pay), what were the other specific terms of the contract?

Corporation	Yes ___	No___
Campus	Yes ___	No___
Elementary School Building	Yes ___	No___
Elementary School	Yes ___	No___
Middle School	Yes ___	No___
Entrance Monument	Yes ___	No___
Letterhead	Yes ___	No___
None of the Above	_____	
All of the Above	_____	

In Question 2, if you found that the contract was a written agreement, please answer Question 7. If you found the contract was an oral agreement, please skip to Question 8.

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Question 7:

Did the School breach the Contract?

Yes ____ No ____

Question 8: (Please circle one)

Do you find that in 2004, when Milton I. Schwartz wrote the following:

> 2.3 The Milton I. Schwartz Hebrew Academy. I hereby give, devise, and bequeath the sum of five hundred thousand dollars ($500,000.00) to the Milton I. Schwartz Hebrew Academy (the, "Hebrew Academy") that:

(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

b. He intended the Bequest be made to the school presently known as the Adelson Educational Institute.

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Question 9:

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?

Yes X No ____

Question 10: (ONLY IF YOU FIND YES TO QUESTION NOS. 1, 2, 5, AND 7)

What was the appropriate amount of damages that the School should pay the Estate to remedy the breach of contract?

$_____

Question 11: (ONLY IF YOU ANSWERED "NO" TO QUESTION NO. 1.)
Do you believe that the School acted in a manner in which the School should have reasonably expected to induce Milton I. Schwartz's reliance and which did induce Milton I. Schwartz's detrimental reliance?
Yes ____ No X

Question 12: (ONLY ANSWER IF YOU ANSWERED "NO" TO QUESTION NO. 1)
Do you find that Milton I. Schwartz believed that he had a naming rights contract with the School but was mistaken?
Yes ____ No X

Question 13: (ONLY ANSWER IF YOU ANSWERED "NO" TO QUESTION NO. 1 AND "YES" TO QUESTION NO. 12)
Did Milton I. Schwartz make the Bequest to the School based on his mistaken belief?
Yes ____ No ____

Chef
FOREPERSON

Sept. 5, 2018
DATE

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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.: 07-P061300-E Dept.: 26/Probate Hearing Date: January 10, 2019 Hearing Time: 9:30 a.m.

THE ESTATE'S RESPONSE TO THE ADELSON CAMPUS' POST-TRIAL BRIEF ON OUTSTANDING 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 Estate's Response to the Adelson Campus' Post-Trial Brief on Outstanding Claims ("Estate's Response").

The Estate's Response is made and based upon the pleadings and papers on file herein, the attached Memorandum of Points and Authorities, all evidence admitted during trial, and any oral argument that this Honorable Court may entertain at the time of hearing.

DATED this 21st day of December, 2018.

SOLOMON DWIGGINS & FREER, LTD.

By: _____
Alan D. Freer (#7706)
Alexander G. LeVeque (#11183)

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

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

THE SCHOOL'S ARGUMENTS CONCERNING THE ENFORCEABILITY OF THE BEQUEST ARE UNAVAILING.

A. THE JURY HAS DETERMINED WHAT MILTON MEANT WHEN HE USED THE TERM "MILTON I. SCHWARTZ HEBREW ACADEMY" IN HIS LAST WILL.

In the beginning of this case, both the Estate and the School argued that the bequest is not ambiguous. The School, however, focused on the purpose of the bequest: to fund scholarships for Jewish children.[1] There has never been any disagreement that the purpose of the bequest was to provide financial assistance to Jewish students. The disagreement is, and has always been, who the intended beneficiary is. The Estate has always argued that there is also no ambiguity with regard to who the beneficiary is: "The Milton I. Schwartz Hebrew Academy." The bequest lapsed, however, because there is no Milton I. Schwartz Hebrew Academy.[2]

In 2014, the Court determined that there is ambiguity concerning what Milton meant when he used the phrase "Milton I. Schwartz Hebrew Academy" in the bequest. The Court further

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[1] *See* School's Motion for Partial Summary Judgment, filed with the Court on April 22, 2014, at p. 3.

[2] Under the consensus of common law, a lapse occurs where the testator's intent respecting a bequest has been thwarted by events occurring after the execution of the will. *See e.g., Carpenter v. Miller*, 26 S.W.3d 135, 138 (Ark. Ct. App. 2000) (defining the term "lapse" to mean any devise that fails or takes no effect). For example, courts have held that a bequest lapses where:

a. The beneficiary has died before distribution. *See e.g., Jackson*, 106 Ariz. at 83, 471 P.2d at 279; *In re Estate of Bickert*, 447 Pa. 469, 290 A.2d 925, 926 (1972). *See also* Bancroft, Probate Practice § 1146 ("[i]t is clear that a decree distributing a portion of an estate to a dead person is absolutely void.");
b. A corporate beneficiary ceases to exist prior to distribution. *See e.g., In re Joseph's Estate*, 62 N.Y.S.2d 197, 198 (N.Y.Sur. 1946); or
c. The donor's intent has been thwarted by beneficiary's act of total abandonment of the corporate purpose existing at the time the bequest was made. *See e.g., Greil Memorial Hospital v. First Alabama Bank of Montgomery, N.A.*, 387 So.2d 778 (Ala. 1980).

Indeed, as a general matter, courts find that bequests lapse where an event or condition has or has not occurred after the making of a will that thwarts the intent of the testator in making the bequest. *See e.g., In re Estate of Zilles*, 300 P.3d 1024, 1029-1031 (Ariz.App.2008). Further, common law generally recognizes that the question of whether a bequest lapses is subject to the testator's intention. *See* 80 Am.Jur.2d Wills § 1412; *Sorrels v. McNally*, 105 So. 106, 107 (Fla. 1925).

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determined that such ambiguity would have to be resolved by the factfinder.[3] Accordingly, that issue of fact was submitted to the jury for a determination. The jury rightfully concluded that Milton intended that the bequest be made only to a school known as the Milton I. Schwartz Hebrew Academy.[4]

In an effort to evade the jury's finding, the School now argues that there was, in some form or fashion, a Milton I. Schwartz Hebrew Academy at or near the time Milton died and, therefore, the bequest should be paid. When Milton executed his Last Will in 2004, it is undisputed that the Milton I. Schwartz Hebrew Academy *was* the school. MISHA was the legal name of the school; the common name for the land and campus; and served students in pre-kindergarten through 8th grade. There was no Adelson school; no Adelson campus; no Adelson high school; no Adelson Lower, Middle or Upper School. Just four months after Milton's death, the School's board resolved to change its corporate name to the Dr. Miriam & Sheldon G. Adelson Educational Institute; the School renamed grades 5 through 8 the Adelson Middle School; and reduced "MISHA" to the old building which housed the elementary school grades.[5] Indeed, there was zero evidence presented by the School during trial that Milton understood before his death that the Adelsons would have anything more than a high school located on the MISHA property.

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[3] *See* Order Denying Partial Summary Judgment, entered on September 9, 2014, a true and correct copy being attached hereto as **Exhibit 1**; 7/9/2014 Hearing Transcript, at p. 39, a true and correct copy being attached hereto as **Exhibit 2**; *Zirovcic v. Kordic*, 101 Nev. 740, 741-42, 709 P.2d 1022, 1023 (1985) ("The question before the court [] is confined to a determination of the meaning of the words used by [the testator]."); *In re Jones' Estate*, 72 Nev. 121, 123-24, 296 P.2d 295, 296 (1956) ("any evidence is admissible, which, in its nature and effect, simply explains what the testator has written; but no evidence can be admissible which, in its nature or effect, is applicable to the purpose of showing merely what he intended to have written. In other words, the question in expounding a will is not – What the testator meant? As distinguished from – What his words express? But simply – What is the meaning of his words?").

[4] *See* Verdict Form, Question 8, attached as Exhibit 1 to the Estate's Post-Trial Brief Regarding the Parties' Equitable Claims and for Entry of Judgment ("Estate's Post-Trial Brief"), filed on November 16, 2018. *Cf. Obermeyer v. Bank of Am.*, 140 S.W.3d 18, 24 (Mo. 2004) (holding in the context of a charitable trust that if the grantor's intent—as a factual matter—is specific to aid only an organization of a particular name and "the particular means failed, the gift failed"); *In re Estate of Beck*, 649 N.E.2d 1011, 1016 (Ill. App. Ct. 1995) (deferring to factual determination that testator had specific intent to aid a now-defunct orphanage, therefore causing the gift to lapse).

[5] *See* The Milton I. Schwartz Hebrew Academy Resolutions of the Board of Trustees, dated December 13, 2007, a true and correct copy being attached hereto as **Exhibit 3** (Trial Exhibit 43).

At the time the will was executed, the Adelson expansion plan was not even an ethereal thought. But what Milton did have were resolutions and representations made to him in 1989 and again in 1996 that the School would be MISHA in perpetuity. Based on the plain language of the bequest, and the jury's finding that Milton believed there to be an enforceable naming agreement, there is simply no evidence that Milton intended that the bequest go to any school or entity that used to be known as the Milton I. Schwartz Hebrew Academy. The jury could not rationally interpret it this way; that is why it expressly declined to find that Milton intended the bequest be made to the school presently known as the Adelson Educational Institute.[6]

While it is true that the School's erosion and elimination of the MISHA namesake was systematic over a period of time rather than immediate, that does not change the fact that there is no MISHA to speak of today. Moreover, the School's post-trial attempt to blame the Executor for why it removed the MISHA signage on the old building is not only irrelevant but is belied by the School Chairman's self-serving post hoc testimony, which was that the School eliminated the MISHA namesake because Milton did not perform on several alleged commitments he made to the School before his death; not because the Executor got into a verbal altercation with Mr. Chaltiel after Milton's death.[7]

The trial record speaks volumes about intent and equity. Equity does not favor the School. The School should not receive any money from the Estate where it is clear that Milton intended that his gift be made only to a school that bore his name.

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[6] *See* footnote 4, supra.

[7] *See e.g.,* ATT at Vol. 4, 08/28/2018 Sheldon Adelson Testimony at 107:22-108:13, 17-22 ("Q. So after Milton died, the board took Milton's name off the school. Do you recall that? A. Several years later. Q. And the reason for that was because it was the school's position that Milton did not live up to the verbal promise that he had entered with you, correct? A. Yes. Q. And so – A. Not only with me, with the school."

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B. THE EXECUTOR IS NOT CONTESTING THE WILL. NRS 137.080, THEREFORE, DOES NOT APPLY.

Contrary to the School's resurrected argument previously rejected by this Court[8], the Executor's request for instruction from this Court and his claims for relief are not barred by the statute of limitations. Contrary to the School's misguided assertion, NRS 137.080 is inapplicable to the present case. Indeed, this Court has already considered and rejected the Adelson Campus' contention.[9] Section NRS 137.080 expressly applies only to *contests* of wills, and the current proceedings are not a contest over the admission of a will to probate. A request for instruction or to construe the terms of a will is not a will contest.[10] Here, the Estate is not contesting the validity of the will. Rather, it has requested this Court to construe the terms of the Will and instruct the Executor how to proceed with respect to a bequest to a beneficiary against whom the Estate has substantial claims, and under circumstances that have radically altered the ability of the Executor to carry out the testator's known intent.[11]

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[8] *See* footnote 3 *supra.*

[9] See Order Denying Adelson Campus' Motion to Dismiss Executor's Petition for Declaratory Relief without Prejudice & Allowing Limiting Discovery, filed with the Court on November 11, 2013; and Order Denying Partial Summary Judgment, filed with the Court on September 4, 2014.

[10] NRS 137.005(3)(c) (2011), 2011 Nev. Stat. 1436, at § 73(3)(c) (seeking to "[o]btain a court ruling with respect to the construction or legal effect of the will" is not a contest); *see also, e.g., In re Estate of Waterloo*, 250 P.3d 558, 561(Ariz. Ct. App. 2011) (holding that will contest involves the singular issue of whether the will is valid and that questions concerning will construction do not constitute a challenge to the validity of the will and are resolved after the will is admitted to probate); *In re Estate of Eden*, 99 S. W.3d 82, 87 (Tenn. Ct. App. 1995) ("Will contests differ from will constructions. The two types of proceedings have different purposes and, accordingly, different rules of evidence and procedure .... A will contest is a proceeding brought for the purpose of having a will declared void because the testator lacked the requisite mental capacity to make a will or because the will was procured by undue influence or fraud .... The purpose of a suit to construe a will is to ascertain and give effect to the testator's intention.").

[11] In support of this proposition, the Adelson Campus misquotes a string of cases from Missouri that are inapposite to their position. Indeed, in the matter entitled *In re Estate of Hutchins,* 875 S.W.2d 564 (Mo. App. S.D. 1994), the court made it clear that an executor "may sue for a construction of a will without statutory limitations. The word 'construe', as used with reference to wills means to determine the intention of the testator as set forth in an ambiguous but *lawful* provision of the will." Similarly, in *Johnson v. Wheeler,* 360 Mo. 334, 228 S.W. 2d 714 (Mo. 1950), the court found that an "heir, claiming as distributee under will, can bring a bona fide suit to construe will without being barred by statute of limitations, but if heir has been disinherited by will, he cannot, under guise of construing will, bring a suit to have will declared void without subjecting himself to the statute of limitations." This rule of law obviously does not apply to an executor. The Missouri Court of Appeals relied upon this same rule of law in the matter entitled *In re Estate of*

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The Estate's claim for declaratory relief concerning the validity of the bequest due to mistake is ultimately a claim which is founded upon the construction of the Last Will. The salient inquiry is whether Milton would have made a gift to the School at all if he knew that he had no legally enforceable naming rights contract at the time he executed the Last Will. Both Milton and has Estate have always taken the position that Milton has a perpetual naming rights agreement with the School , and the bequest could be validly distributed by enjoining the school to restore its name to the Milton I. Schwartz Hebrew Academy. There was no conceivable way to know that Milton did not have such an agreement until the jury in the case determined that he did not. Accordingly, the claim for invalidation of the bequest due to mistake really did not become ripe until the jury made its determination on the contract claim, for the first time making clear that Adelson campus need not change its name and thus leaving no entity that matches the name beneficiary in Milton's will.[12] The Estate's claim, therefore, is not barred by any applicable the statute of limitations.

II.

THE ESTATE HAS SUFFICIENTLY PROVEN THAT THE EQUITABLE REMEDY OF RESCISSION IS WARRANTED FOR THE LIFETIME GIFTS

The jury has already determined that the reason Milton made the bequest to the School in his Last Will was his mistaken belief that he had a naming rights agreement with the School which

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Moore, 889 S.W. 2d 136, 137 (Mo. App. E.D. 1989). Finally, the Adelson Campus' parenthetical for *Williams v. Bryan Cave. et al.,* 774 S.W.2d 847, 848 (Mo. App. E.D. 1989) is misleading. Indeed, the court's ruling from such case was not that "an action to void will or any part thereof is a will contest no matter how couched," but rather a will contest is a proper remedy against attorneys for negligent drafting of a will. In fact, the court never even used the words "contest," "couched" or "void."

[12] See NRS 11.190(3)(d) which provides than a cause of action for relief on the ground of mistake does not accrue until the facts constituting the mistake are discovered. Here, the fact constituting the mistake – that Milton did not have a legally enforceable perpetual naming rights contract – did not come into existence until the jury made its determination on the Estate's breach of contract claim. *See e.g. Ell v. Ell*, 295 N.W.2d 151 (N.D. 1980) (holding that actions for the reformation of a written instrument on the ground of mistake accrue not at the time the instrument in question is executed, but at the time the facts which constitute the mistake and form the basis for reformation have been, or in the exercise of reasonable diligence should have been, discovered by the party applying for relief).

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was in perpetuity.[13] It stands to reason, therefore, that Milton made his lifetime contributions to the School based on the same mistaken belief. The evidence admitted during trial overwhelmingly supports this position.[14]

The School argues that Milton loved the School, its students and made his generous donations to promote Jewish education in Las Vegas. This is all absolutely true. The School, however, then leaps to its conclusion that Milton, therefore, would not want the gifts refunded even if he did mistakenly believe that he had a perpetual naming rights contact with he School. There is no evidentiary support for the School's conclusion. To the contrary, it is undisputed that Milton made no gifts to the School during the period of time it removed his namesake.[15] Milton would have continued to make regular donations to the School but for the School removing his name in the early to mid-1990s. Moreover, the trial testimony demonstrates that Milton was extremely upset when the School removed his name during his lifetime and conditioned his contributions to the school's honoring what he understood to be the naming rights agreement.[16]

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[13] *See* Verdict Form, Question 9, attached as Exhibit 1 to the Estate's Post-Trial Brief Regarding the Parties' Equitable Claims and for Entry of Judgment ("Estate's Post-Trial Brief"), filed on November 16, 2018.

[14] *See generally,* Estate's Post-Trial Brief.

[15] *See e.g.,* ATT at Vol. 2, 08/24/2018 Susan Pacheco Testimony ("Pacheco Testimony") at 216:4-23 ("Q. Do you remember any period of time where Mr. Schwartz stopped donating to the school? A. Yes. Q. Do you remember when that time period was? A. '93 to '96, I believe. I believe 99 percent sure. Q. Let's do this. A. Leaving that 1 percent open. Q. If you could go to Tab 103 in the binder. A. Yes. Q. Does that refresh your memory looking at that what years he did not donate any money? A. Yes. That was 1993 through 1996. Q. Okay. Do you know why he stopped making donations? A. Because his name was taken off the school and that was the main reason, and that was the main reason. But he was disputing with – I'm not going to say that. I'm just going to say the one that it was because his name was taken off the school."

[16] *See id.*, Pacheco Testimony at 263:15-264:2 ("Q: What was your impression on how Mr. Schwartz felt about these things that occurred? A. He was extremely unhappy, to say it nicely. He was furious would be a better way of putting it. Q. Okay. A. He was – well he told me we were going to go to war is what he told me. He was very – he was extremely upset that they took his name off because he gave the money and the name of the school is Milton I. Schwartz Hebrew Academy. And he really did not like the idea of his picture coming off the wall. He likes things on walls. And the letterhead also upset him." *See also,* ATT at Vol. 3, 08/27/2018 Jonathan Schwartz Testimony ("Schwartz Testimony") at 116:19-117:4 ("Q. Now, what were you doing in or around – let me call your attention to April 1994. What were you doing in April of 1994? A. April of '94 I was in my first year of law school at Northwestern. Q. And if you recall from the other testimony that we have heard around that time, the school voted and removed your father's name. Do you

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A. THE ESTATE'S CLAIM FOR RESCISSION IS NOT TIME BARRED.

The School argues that NRS 11.190(3)(d) – a three-year statute of limitation – bars the Estate's claim for rescission of *inter vivos* gifts due to unilateral donative mistake. To get where it needs to go, the School presumes that "the facts giving rise to the Estate's claim for rescission … are the same facts giving rise to the Estate's claims for breach of contract." The School then provides no further analysis in its brief. As stated *supra*, the mere *breach* of an agreement does not provide notice that the nonbreaching party has made a mistake about the contract's enforceability; to the contrary, a nonbreaching party in that situation may sue for enforcement of what is presumed to be a valid contract. Rather, the fundamental fact giving rise to a claim for rescission based on mistake is that there is no binding contract between the School and the Estate, and fact that did not become clear until the jury returned its verdict. As proven by the Estate during trial, Milton and the Board members who made the agreement with him in 1989 and 1996 each believed Milton had a perpetual naming rights contract with the School. Milton held such belief to his death. A cause of action could not accrue for a claim for mistake before there was a legal determination whether a contract existed, indeed, the two positions contradict one another. The School's argument makes no sense and is not supported by their cited law. The School relies on *State Dep't of Transportation v. Eighth Judicial District Court*, 402 P.3d 677, 683 (2017) for its proposition that the Estate's claim for donative mistake is barred by NRS 11.190(3)(d). The facts in that case, however, are not analogous. In *State Dep't of Transportation*, the Supreme Court of Nevada determined that the plaintiff's action for relief on the grounds of unilateral mistake for entering into a settlement agreement with NDOT concerning a condemnation action should have been dismissed by the district court because there was no dispute that the plaintiff had notice of NDOT's plans for the development project which included plans for a potential flyover bridge (the fact allegedly not disclosed to by NDOT to the plaintiff) approximately a year before he entered into a settlement agreement with NDOT. Plaintiff did not file his action for relief on grounds of unilateral mistake until four years after he had notice of the plans.

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have any understanding of that event? A. I recollect that he was off the board, and that he was upset about it.

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In the case at bar, the predicate fact for the Estate's mistake claim is that there was never a legally enforceable contract between Milton and the School for naming rights. This did not become a fact until the jury returned its verdict.

The instant case is analogous to a claim for insurance bad faith where an insurer fails to reasonably accept an offer of judgment or settlement before trial. While an insurer could very well breach its duty to act in good faith by refusing to accept a settlement offer made by a plaintiff to their insured, such a claim does not become an actionable claim until an actual damage is sustained by the defendant.[17] Indeed, the statute of limitations for the Estate's claim for rescission of gifts based on a donative mistake did not begin running until September __, 2018, the date the judgment was entered on the Estate's breach of contract claim. Moreover, the School never denied the existence of a legally enforceable naming rights agreement until it filed its Objection to the Estate's Petition for Declaratory Relief on June 14, 2013.

B. THE ESTATE HAS PROVEN WITH CLEAR AND CONVINCING EVIDENCE THAT MILTON WOULD NOT HAVE MADE THE LIFETIME GIFTS BUT FOR HIS MISTAKE.

In its Post-Trial Brief, the School concedes that the law provides this Court the remedy of rescission of lifetime gifts if the Estate has established with clear and convincing evidence[18] that

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[17] *See e.g. Pemberton v. Farmers Ins. Exch.*, 858 P.2d 380, 384 (1993) (holding that no bad faith claim will lie until the insured establishes "legal entitlement," meaning that the insured must be able to establish fault on the part of the tortfeasor which gives rise to the damages and to prove the extent of those damages); *Evans v. Mut. Assur., Inc.*, 727 So.2d 66, 67 (Ala. 1999) ("[A] cause of action arising out of a failure to settle a third-party claim made against the insured does not accrue unless and until the claimant obtains a final judgment in excess of the policy limits."); *Connelly v. State Farm*, 135 A.3d 1271 (Del. 2016) ("The majority rule of courts [] is that a bad-faith failure-to-settle claim accrues when the excess judgment becomes final and non-appealable."); *Taylor v. State Farm*, 185 Ariz. 174, 913 P.2d 1092, 1097 (Ariz. 1996) ("Sound judgment and public policy convince us to follow the final judgment accrual rule. Thus, we hold that a third-party bad faith failure-to-settle claim accrues at the time the underlying action becomes final and on-appealable."); J.H. Cooper, Annotation, *Limitation of Action Against Liability Insurer for Failure to Settle Claim or Action Against Insured*, 68 A.L.R.2d 892, 894 (1959) ("The courts are generally in accord that an action against a liability insurer for failure to settle a claim or action does not accrue and the pertinent statue of limitations does not begin to run at least until the judgment in favor of the injured person against the insured is final.").

[18] "Clear and convincing evidence must be satisfactory proof that is so strong and cogent as to satisfy the mind and conscience of a common man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest. It need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference may be drawn." *In re Discipline of Drakulich*, 908 P.2d

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Milton would not have made an otherwise irrevocable gift but for Milton's mistaken belief that he had a legally enforceable naming rights contract with the School. The Estate has exceeded its evidentiary burden.[19]

As a preliminary matter, the School raises two misdirecting arguments that must be dispelled.

1. The Estate' claim for rescission of lifetime gifts is not a fraud claim.

First, the School argues that the Estate's claim for rescission of lifetime gifts is "an improper attend to backdoor its abandoned fraud claim[.]" This is wrong.[20] The Estate's Petition for Declaratory Relief asserts separate claims for fraud and mistake. The Estate's Second Claim for Relief for fraud in the inducement alleged that gifts were induced by intentional misrepresentations made by the School.[21] That claim was voluntarily abandoned. The Estate's Sixth Claim for Relief, titled "Revocation of Gift and Constructive Trust," seeks revocation and rescission of Milton's lifetime gifts due to Milton's mistake in fact. Indeed, the Petition for Declaratory Relief expressly alleges:

> Milton understood and believed that the Academy had agreed to bear his name in perpetuity. **Even if the Academy denies that it made such promises or contends that such promises are not enforceable, the Estate is still entitled to recover all funds Milton contributed in reliance on his belief that an agreement existed.** *See Earl v. Saks & Co.,* 226 P.2d 340, 344-45 (Cal. 1951) ("A gift can be rescinded if it was induced by fraud or material misrepresentation (whether of the donee or a third person) **or by mistake as to a basic fact.** A failure by the donee to reveal material facts when he knows that the donor is mistaken as to them is fraudulent nondisclosure. **A mistake which entails the substantial frustration of the donor's purpose entitles him to restitution.**" (Citations omitted); *see also* Restatement (First) of Restitution § 15, Comment e **("[W]here one makes a payment to another in the mistaken belief that the other has promised to assume a duty in return for or with reference to the payment ... the payor is**

709, 715, 111 Nev. 1556, 1566 (1995) (quoting *Gruber v. Baker*, 20 Nev. 453, 477, 23 P. 858, 865 (1890)).

[19] *See generally,* Estate's Post-Trial Brief.

[20] It is also irrelevant because, without a final judgment in this case, the abandonment of one of several claims does not have any preclusive effect on what issues can be tried via the remaining claims. *See Kirsch v. Traber*, 134 Adv., Op. 22, 414 P.3d 818, 822 (2018) (defining "final judgment").

[21] *See* Estate's Petition for Declaratory Relief, filed with the Court on May 28, 2013, at p. 7.

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> **entitled to a return of his money upon disclaimer or refusal of the other to perform**"). **Accordingly, the Estate seeks a declaration that it is entitled to a revocation of the bequest and all gifts made during Milton's lifetime.** Further, the Estate seeks supplemental relief in the form of a ruling that the Adelson School holds such funds in constructive trust in favor of the Estate.[22]

The Estate's claim for rescission of lifetime gifts has always been an independent cause of action which focuses on Milton's mistake; not the School's alleged fraudulent inducement to make the gift.

2. The doctrine of judicial estoppel is inapplicable.

Second, the School makes a drive-by argument that because the Estate titled its Sixth Claim for Relief as "promissory estoppel" in its Pre-Trial Memorandum, that somehow precludes the equitable relief of rescission of *inter vivos* gifts expressly pleaded in the Petition for Declaratory Relief. This is also nonsensical and elevates form over substance. As this Court and the School are well-aware, Nevada is a pleading jurisdiction which requires plaintiffs to set forth the facts which support a legal theory, but does not require the legal theory upon to be expressly or correctly identified.[23] Moreover, a plaintiff is not required to use the precise legalese in describing a claim and Nevada trial courts are required to "liberally construe pleadings to place into issue matters which are fairly noticed to the adverse party."[24]

The Estate's Sixth Claim for Relief put the School on notice of both claims. The Estate alleged that the School made a promise to Milton that Milton relied and performed upon. There are two equitable theories where relief can be provided by the Court that are recognized under Nevada law. The first is a rescission/restitution of a gift based upon a donative invalidating mistake.[25] The second is specific performance of the School's promise under the doctrine of promissory estoppel. Under well-settled law, the equitable doctrine of promissory estoppel permits the Court to enforce an otherwise unenforceable promise if reliance on the promise is foreseeable, reasonable and

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[22] *Id.*, at pp. 9-10 (emphasis added).

[23] *See Liston v. LVMPD*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995).

[24] *See Id.;* and *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984).

[25] *See In re Irrevocable Trust Agreement of 1979*, 130 Nev. 597, 607, 331 P.3d 881, 888 (2014).

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serious, and injustice cannot otherwise be avoided.[26] The Estate has never abandoned its equitable claims which were always understood to be determined by the Court, not the jury.

The School asks the Court to invoke the doctrine of judicial estoppel. Judicial estoppel is a discretionary doctrine that has no relevance to the issue raised by the School. The Estate has not taken any inconsistent positions on its claims for relief. Alternative claims are not inconsistent positions.[27] Moreover, even if the Court were to find that the Estate did take inconsistent positions with respect to its claims for relief, "[j]udicial estoppel does not preclude changes in position that are not intended to sabotage the judicial process."[28] Rather, judicial estoppel is a discretionary doctrine that is primarily intended to protect the judiciary's integrity and applies only when (1) the same party has taken two positions; (2) the position were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position; (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud or mistake.[29] Here, the Estate has asserted two claims for relief which involve the same facts but have different elements. That is not inconsistency and adopting the School's position (that the Estate can only advance one legal theory for relief based on an unenforceable promise) would yield absurdity.[30] Moreover, the Estate has not yet been successful on any of its claim. Accordingly, the doctrine of judicial estoppel should not and cannot be invoked.

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[26] *See American Sav. & Loan Ass'n v. Stanton-Cudahy Lumber Co.*, 85 Nev. 350, 354, 455 P.2d 39, 41 (1969); *Lear v. Bishop*, 86 Nev. 709, 476 P.2d 18 (1970).

[27] *See Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 733, 192 P.3d 243, 248 (2008) (acknowledging that plaintiffs are permitted to plead alternative or different theories of relief based on the same facts).

[28] *NOLM, LLC v. County of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004).

[29] *Id.*

[30] In support of its absurd position, the School cites to *United States v. Real Prop. Located at Incline Vill.*, 976 F.Supp. 1327, 1339 (D. Nev. 1997), which is a federal case where the United States District Court for the District of Nevada refused to apply the doctrine. The court noted two important things. First, that the doctrine is "not designed as a trap for the unwary" but rather is to "prevent the deliberate manipulation of the court through two-facedness." There is no evidence whatsoever in the case at bar that the Estate has attempted to deliberately manipulate the Court with regard to any matter. Second, that many jurisdictions hold that judicial estoppel applies *only* to matters of inconsistent facts. Here, there is no allegation let alone evidence that the Estate has intentionally advanced inconsistent facts for the purpose of deliberately manipulating the Court.

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3. Clear and convincing evidence shows that Milton would not have given the School $1,110,606.66 but for his mistake in fact.

In its Post-Trial Brief, the Estate has already summarized the trial evidence supporting its claim for rescission of *inter vivos* gifts and incorporates the same herein.

4. The equities strongly favor restitution of Milton's lifetime gifts.

The School argues that the gifts should not be refunded because the school and its students were the intended beneficiaries. The School misses the point and creates another "either/or" situation where it claims that Milton cannot have two concurrent intentions. It would be like saying that a parent cannot both want to fund a trust for education and also limit distributions to specific educational institutions. Of course Milton wanted his gifts to benefit the school and its students. That does not mean, however, that Milton could not premise is gifts upon a belief that he was making such gifts to a school that would bear his name in perpetuity. Moreover, the Executor testified at trial that the Estate and its beneficiaries all agree to use the bequest to fund a gift in Milton's name.[31]

The School also complains that the duration of time from when Milton made his first gift in 1989 through when he made his last gift in 2007 creates an inequitable situation for restitution. It cannot be forgotten that the School did not break its promise to Milton until just shortly after he passed away. Milton believed he had an enforceable agreement as did most of the School's 1989 board members. Although the School ultimately prevailed at trial on the contract claim, that does not absolve the School of unjustly reaping the benefits of over $1 million it received from Milton – the School's largest benefactor until the Adelsons got involved shortly before his death.

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[31] *See*, ATT at Vol. 6, 08/30/2018, "Schwartz Testimony" at 143:5-9 ("Q. You are going to try and find another Jewish or Hebrew school that will honor your father's name to give it to? A. Uh-huh. I have already discussed it with my siblings.")

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III.

CONCLUSION

For the above and foregoing reasons, the Court should enter judgment as follows:

1. Judgment in favor of the Estate on the School's *Petition to Compel Distribution, for Accounting and for Attorneys Fees*, declaring that the School takes nothing by way of its Petition;
2. Judgment in favor of the Estate on its equitable claim for rescission of *inter vivos* gifts in the amount of $2,830,523.71, including prejudgment interest; or alternatively, an order requiring the School to perform its promise to maintain the Milton I. Schwartz Hebrew Academy name in perpetuity under the doctrine of promissory estoppel.

DATED this 21st day of December, 2018.

SOLOMON DWIGGINS & FREER, LTD.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of December, 2018, service of the foregoing POST-TRIAL BRIEF REGARDING THE PARTIES' EQUITABLE CLAIMS AND FOR ENTRY OF JUDGMENT 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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EXHIBIT 1

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CLERK OF THE COURT

ORDR
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Attorneys for A. Jonathan Schwartz

DISTRICT COURT

COUNTY OF CLARK, NEVADA

In the Matter of the Estate of MILTON I. SCHWARTZ, Deceased.	Case No. P061300 Dept. No.: 26/Probate Date of Hearing: July 9, 2014 Time of Hearing: 9:00 a.m.

ORDER DENYING THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

On July 9, 2014, the Court heard The Dr. Miriam and Sheldon G. Adelson Educational Institute's Motion for Partial Summary Judgment. Maximiliano D. Couvillier III, Esq. appeared on behalf of The Dr. Miriam and Sheldon G. Adelson Educational Institute ("Adelson Campus"), and Alan D. Freer, Esq. appeared on behalf of the Executor A. Jonathan Schwartz ("Executor").

After review of the briefs, consideration of the argument from Counsel, and for good cause shown:

The Court makes the following findings:

1. The Estate's Ex Parte Application to Exceed Page Limit is hereby granted.

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2. The Adelson Campus' Motion for Partial Summary Judgment is hereby denied because there are questions of fact and the Estate has requested a jury trial.

3. The Court has found that there were genuine issues of material fact to be decided by the trier of fact.

4. The Court further finds, *sua sponte*, that the cy pres doctrine will also be an issue to be tried in this case.

Good cause being found,

IT IS HEREBY ORDERED that the Estate's Ex Parte Application to Exceed Page Limit is hereby GRANTED;

IT IS FURTHER ORDERED that the Adelson Campus' Motion for Partial Summary Judgment is hereby DENIED; and

IT IS FURTHER ORDERED that this matter shall be set for a status check on August 13, 2014 at 9:00 a.m.

DATED this 3rd day of ~~August~~ September, 2014.

DISTRICT COURT JUDGE

Respectfully submitted,

SOLOMON DWIGGINS & FREER

By: _____

Mark A. Solomon, Esq.
Alan D. Freer, Esq.
Steven E. Hollingworth, Esq.
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Approved As To Form And Content:

BLACK & LOBELLO

By: Refused to sign

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EXHIBIT 2

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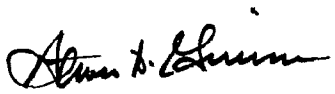

CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

In the Matter of the Estate of MILTON SCHWARTZ	CASE NO. P-061300 DEPT. NO. XXVI **Transcript of Proceedings**

BEFORE THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE

MOTION FOR SUMMARY JUDGMENT

WEDNESDAY, JULY 9, 2014

APPEARANCES:

FOR THE PETITIONER: MAXIMILIANO D. COUVILLIER, ESQ.

FOR THE ESTATE: ALAN D. FREER, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER
TRANSCRIBED BY: JULIE POTTER, TRANSCRIBER

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LAS VEGAS, NEVADA, WEDNESDAY, JULY 9, 2014, 9:51 A.M.

(Court was called to order)

THE COURT: P061300.

(Off-record colloquy)

THE COURT: Okay. All right. So this is a motion for partial summary judgment filed by the Adelson Campus. Will counsel state their appearances.

MR. FREER: Good morning, Your Honor. Alan Freer on behalf of the Executor, and I have with me Jonathan Schwartz, the Executor.

THE COURT: Uh-huh.

MR. COUVILLIER: Good morning, Your Honor. Max Couvillier on behalf of the Adelson Campus.

THE COURT: All right. Okay. It's your -- your motion.

MR. COUVILLIER: Thank you, Your Honor. Your Honor, we're here just on the limited issue which the Court couched in its November 11, 2013, order, which is whether the purpose and condition of the bequest under Section 2.3 of Mr. Milton's Schwartz's will was for the school to be named the Milton I. Schwartz Hebrew Academy in perpetuity. And the answer is a resounding no. As the Court recognized during that October 8, 2013, hearing, the purpose of Section 2.3 is to fund scholarships for Jewish children.

There the Court said that the will doesn't say so long

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as the school keeps the name Milton I. Schwartz Hebrew Academy on it, then I'm going to give my 500,000. The Court went on to say that it seems pretty clear to me that Mr. Schwartz wanted to do, he had a genuine interest demonstrated throughout his life in educating the Jewish children of Nevada in parochial school setting. And that's at the transcript page 32, 1 through 5 and 16 through 9.

Your Honor, the dispositive facts here are undisputed. Milton Schwartz cared about education, and the sole purpose of 2.3 of his will, which Milton Schwartz prepared himself, and in his words he said the purpose is -- he said it's for the purpose of funding scholarships to educate Jewish children only. There is no naming rights provision or condition in Section 2.3 or anywhere else in the will. The will is clear, unambiguous, and speaks for itself.

No lapse has occurred. The corporate entity that was formerly the Milton I. Schwartz Hebrew Academy continues to exist. It merely changed its corporate name, the same way that an individual changes her name and still continues to exist. And we've cited numerous authorities, Your Honor, at pages 12 and 13 of our reply, and page 9 -- 4 of our motion to that affect. And that is unrefuted, Your Honor.

The last dispositive fact is that Milton I. Schwartz did not intend for Section 2.3 to include a naming right or condition. Because it's undisputed and clear that if Milton

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Schwartz did not intend, he did not memorialize it. This is what the Executor admitted during his deposition, that Milton Schwartz never let time lapse between creating an intent and memorializing it in some fashion. We cite that in Executor depo at page 27, lines 2 to 5, which was attached to our motion as Exhibit 5.

Therefore, Your Honor, we ask that the Court grant our motion, order the release of the blocked funds to the school, and deny the Executor's counter-request for 66(f) discovery. As the Court has seen, we've conducted the discovery that was needed, the Court was early skeptic about what could change. I think that the undisputed facts have demonstrated that nothing has changed and that the Court's initial reaction about this case was correct.

Your Honor, the real beneficiaries here are the Jewish children. The school here is merely a vehicle to deliver the scholarship funds and we ask that the Court grant our motion.

THE COURT: Well, the -- the two different pleadings, they're really interesting. And I read all of the depositions because I pretty much knew everybody. So it was kind of interesting to read what they had to say. The -- it's very interesting to me that there's this whole history, previous history, and I saw that throughout all of the depositions there was a dispute over we really shouldn't be going into what happened in 1990 and 1994 and 1996. It's not got anything to

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do with what was Mr. Schwartz intended when he wrote his will, and he wrote it.

MR. COUVILLIER: That's correct, Your Honor.

THE COURT: That's really -- real -- I mean, he is unique in that respect in that he actually wrote this will himself. He wrote his will in 2004. So that seemed to be sort of a dispute between the party as to what was intended here, and I think that there was some vision that the -- that the trustee had, I guess, that -- well, I guess it's more -- it's the -- we're talking about the Estate here. That he had somehow -- that this was sort of litigating to enforce an agreement that his father had for permanent -- permanent naming rights versus what the petitioner had which is the view that this is just about what did Mr. Schwartz intend when he wrote his will in 2004. So that's the first question.

MR. COUVILLIER: Uh-huh.

THE COURT: And the second question is that -- the simple point that the Executor makes which is that there is no successor clause. As you point out, you cite to authority that says if there's a successor they make it -- you know, the successor takes it. Because it's not as if the Milton I. Schwartz Academy closed and there is no more Jewish school in Las Vegas. There is and it's just called by a different name now. So that's the second question.

And then the third one is this whole issue of what was

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going on after he wrote the will and before he passed away. And there was the whole period of time where they were doing the -- the dinner to honor him and the discussions with how much of Mr. -- the principal or whatever they call him, Mr. Schiffman, during that period of time that he was being hired and there was this -- this plan going forward that there was going to be -- the high school was going to be built and what it was, apparently, that Mr. Schwartz viewed as his understanding was with Mr. Chaltiel and Mr. Adelson and how the thing actually got renamed. So that's the third one.

Let's see, then I had a fourth one, but that'll probably -- so taking those things in order, our first issue what are we really litigating about? I mean, because the -- because the disputes seem to always be, you know, are we -- why are we talking about 1990, 1994, 1996. This is just about what Mr. Schwartz intended in 2000. So how does that history inform in any way the Court's decision or is it your position that none of that matters, it's just historical?

MR. COUVILLIER: Your Honor, none of that matters. This is a motion for a partial summary judgment. There are other issues that have been raised through counterclaims that have been asserted by the Executor, but those aren't before the Court today.

THE COURT: Uh-huh.

MR. COUVILLIER: What is before the Court today is

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just the issue of what Mr. Milton -- what -- what the will says. And the will says, it's clear, it's unequivocal, what the purpose of Section 2.3 is and we've demonstrated that. For the purposes of this motion and what we're asking the Court to decide, none of that 1980s historical turmoil matters. It doesn't matter because it's not relevant. It doesn't matter because the evidence itself demonstrates that it has nothing to do with the will. Nothing. There has been no talks about the will, none of the -- the documentary evidence talks about the will. It has nothing to do with the will.

And it doesn't matter for the third reason that the Supreme Court says you cannot consider it. Under *Frei versus Goodsell*, you cannot consider it. So we're only here to ask what Mr. Milton Schwartz intended when he prepared his will in 2004. And the language clearly says, Mr. Milton Schwartz said it himself, it's for the purpose of educating Jewish Children. Those were his words.

We also know what was going on around at that time. In 2004 Mr. Schwartz was on the school board. And there was a meeting in March of 2004 and there was a proposal made. And the proposal was made that that school was contemplating offering naming rights to the various schools, the preschool, to the elementary school, to the junior high, and eventually to the high school as a way to raise money, as a way to take this school to the next level, to the level it has achieved now.

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And that was discussed in March, and Mr. Schwartz then had over a month to consider the minutes, to review the proposal, and contemplate. And in April, Your Honor, he affirmed the minutes. He affirmed that discussion. He affirmed the accuracy of what was discussed, and that was the April 20, 2004, board minutes which is at our reply in Exhibit 14. And he never went back and changed his will and he had several opportunities to do that.

In fact, in 2006 he revisited and affirmed his will when he executed two codicils. The first one in January of 2006 and the second one in June of 2006, but he elected not to revisit and revise the bequest to the Adelson Campus. So even if we were to look at what was going on outside the four corners of the will at the time that he executed the will, you know that Mr. Schwartz was aware that the school was contemplating naming rights and didn't go back and change the will. We also know that Mr. Schwartz had the capacity to do so. He -- he is an astute business man. He had the legal acumen that excelled most lawyers. He prepared his own will.

And even the evidence that is submitted by the Estate in the affidavit of Dr. -- or Rabbi Wyne in which he said in 2004, the same year that Mr. Schwartz executed his will, Mr. Schwartz contacted Mr. Wyne about making a donation to the shul. And he said I will give you a donation on the condition that it be named after me. He knew. It's not rocket science. It's

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very simple language. On the condition that it be named so-and-so in perpetuity. And he expressed that to Rabbi Wyne and he made his gift.

He did not do so in his will. He had a greater purpose, Your Honor, and the greater purpose is emphasized by his own words, which was to provide for scholarships for educating Jewish children. And that's what we know, Your Honor. And so the historical turmoil, that's for another day, Your Honor. What we're asking the Court here is to rule on the will.

THE COURT: And so then the 2000 -- what happened after that? As you have pointed out he made modifications to his will, a couple modifications. One was dealing with like I think it was the Executor who said, yeah, the minute he had this dispute over the house with his ex-wife, all that worked out, and he put in the codicil to make it very clear.

And about that same time they were in the phase of hiring the new head of school and there were some discussions with -- with the other board members, Mr. Adelson and Mr. Chaltiel, about, you know, their expansion. I saw they talked about, you know, should it be separate, two separate companies running two separate schools. So all -- but all that happens after the fact. Again, it cannot be considered interpreting what did he mean in 2004.

MR. COUVILLIER: That is correct.

THE COURT: Because all of that comes after the fact.

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MR. COUVILLIER: That is correct, Your Honor.

THE COURT: Okay. All right. All right. Okay. And then I think I had my fourth one. I still don't remember my fourth question. Okay.

MR. COUVILLIER: And then your second question, Your Honor, had to do with the successor clause. But we're not --

THE COURT: Yeah.

MR. COUVILLIER: And, again, as you said, Your Honor, we're not dealing with a successor clause because the school -- the school continues to exist and all that it did is change its name. I think it's very instructive the law that we cited. Again, Your Honor, it's unrefuted. But even if that wasn't enough, Your Honor, we cite a case that is particularly sort of on point factually with what's happening here, and that's the *Walsh versus Fidelity and Deposit Co. of Maryland*, which is a New York Supreme Court case at 227 N.Y.S. 96.

And in that case, Your Honor, the executor in that case like the executor here challenged distribution to a charitable company. In that case the bequest was named -- named a beneficiary corporation in the will which was named after the decedent's brother. She wanted to honor her brother, his name, in perpetuity. But after the decedent died the beneficiary corporation changed its name. And like the executor does here, the executor in *Walsh* claimed that the corporation ceased to exist and that the name changes violate the condition of the

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will because it was the intention of the decedent to honor her brother.

The court disagreed and then took a look at the language of the will in that case which was similar to our case, at will condition. In that case the will simply read I give and bequeath $10,000 to the Henry McCadden [phonetic] Junior Fund for the Education of Candidates for the Roman Catholic Priesthood. The court said there's no condition in there and it rejected the argument without hesitation. It determined that the name change did not cause the request to lapse. It cited an adoptive rule from other -- you know, other statements of rule that says we have found nothing on the record to support this monstrous doctrine that a religious society before us has lost title to its property by a change of its corporate name.

The -- the court also rejected the executor's claim that the will somehow imposed a name rights condition. The court recognized that the executor -- and here you have Milton Schwartz as an astute businessman with a legal acumen. But in that case the court recognized that if it had been decedent's intention to give only on the condition that the name remain the same, it would have been a simple matter for the decedent to have inserted the express condition in the will, the same thing as in this case and it's not expressed. There is no lapse in the legal change.

THE COURT: Okay. All right. Anything else?

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MR. COUVILLIER: No, Your Honor.

THE COURT: Okay. So then just so it's clear before Mr. Freer gets up here, exactly what you're looking for is partial summary judgment. You're just looking to have the funds that have been sequestered released, and then the issue continues with respect to the counterclaims and that is was there a violation of some sort of an agreement.

MR. COUVILLIER: That is correct, Your Honor.

THE COURT: Got it. Okay. Thanks.

MR. COUVILLIER: Thank you, Your Honor.

THE COURT: Mr. Freer.

MR. FREER: Good morning, Your Honor.

THE COURT: Good morning.

MR. FREER: To start, this isn't a partial summary judgment issue with respect to -- the releasing the funds is the main issue that's set forth in our motion for declaratory relief. We have six claims. Claims 2 through 6 include offsets, etcetera, and I'll get into that a little bit later. But I just want to make it clear, just releasing the money here today completely obviates all of our other claims that we've raised and we haven't had a chance to do discovery.

THE COURT: Okay. That's why I wanted to make very clear exactly the relief that Mr. Couvillier is looking for.

MR. FREER: Right.

THE COURT: Okay.

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MR. FREER: So what we have here, Your Honor, is in Section 2.3 of the will, Milton I. Schwartz -- Milton I. Schwartz made a request to the Milton I. Schwartz Hebrew Academy. There's no entity that exists by that name and that leaves us to two possibilities, neither of which are appropriate for summary judgment. Either this Court confines its inquiry to the four corners of the will without resorting to any extrinsic evidence, in which case it's required under Nevada law that the bequest is lapsed. In which case, the Adelson Campus is not entitled to judgment as a matter of law. I'll get into that in a second.

The second option is that the Court does allow extrinsic evidence in to be introduced to resolve the late ambiguity of what Milton Schwartz intended when he directed a bequest to the Milton I. Schwartz Hebrew Academy. That is a question of fact for the jury to determine at trial because we have requested a jury trial in this matter.

First, with respect to the four corners issue, I think the briefing on it is a little bit strange in terms of passing the night and I'm a little baffled by the Adelson Campus's insistence on the application of the four corners because it favors us. Confined to the four corners under Section 2.3 without resort to any evidence, the gift lapses because there is no Milton I. Schwartz Hebrew Academy.

Under Nevada law, absent any latent ambiguity, a gift

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to an unascertainable or a non-existent beneficiary lapses absent an anti-lapse statute or language in the will itself. That's recognized in the *Gianoli* case that we cited. There the Nevada Supreme Court recognized the concept of common law lapse and that its application would cause the bequest to fail. The only statutory exception or anti-lapse statute that's found in this case, in Nevada law, is NRS 133.200. That only applies to the descendents of a decedent. It does not apply to non-relatives, entities, or charities.

Thus, if you're constrained to look at the four corners of this document or Section 2.3, the only other means in which an anti -- or means in which a lapse can be presented without resorting to extrinsic evidence is for the testator to include specific language in the will itself. That's the consensus of the common law that we cite in our brief. It can be found in Am. Jur. 2d Wills, Section 1412. Should a testator desire to present a lapse -- prevent a lapse, the testator must express an intent that the gift not lapse or must provide for the substitution of another devisee to receive the gift.

We explain in our brief that that's typically done with successor clauses or successor language, as such in ABC charity or its successors or to ABC charity or its successors in interest. Milton Schwartz did not do that in Section 2.3. So here we've got Section 2.3 without any containment of or successor clause. There's no Nevada anti-lapse statute because

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Milton I. Schwartz Hebrew Academy is not a descendent. So if the Court's limited to the four corners of the will without extrinsic evidence, the only permissible ruling is let it lapse.

THE COURT: Okay. Now, how -- with respect to successor clauses Mr. Couvillier's point is that it's not really a successor. It wasn't as if they transferred their assets to somebody else, that they -- you know, the Hebrew Academy of San Diego moved in and took them over. It's the same entity, it's the same location, it's the same board, they just changed their name.

MR. FREER: Right. And how do --

THE COURT: So --

MR. FREER: And how do we know that? They have to provide extrinsic evidence of the name change and that's where we get into the question of fact. The only means by which they can even proceed is by resorting the introduction of that extrinsic evidence. That -- that is where the latent ambiguity lies.

So if this Court finds the latent ambiguity and allows -- or allows that extrinsic evidence in, then it must also determine what Milt was intending by his gift to the Milton I. Schwartz Hebrew Academy. All extrinsic evidence at that point comes in concerning Milt's understanding and intent. This is the application of the common law, and it's quite straightforward.

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Adelson Campus can't have it both ways. It can't introduce extrinsic evidence and then at the same time say, oh, no other extrinsic evidence with respect to what Milton wanted or intended with respect to his gift to the Milton I. Schwartz Hebrew Academy is admissible. Courts are quite clear. It says where a bequest is made to an entity and that entity does not exist by a particular name specified in the will and a beneficiary comes forward claiming the right to that interest, such a claim creates a latent ambiguity requiring the introduction of extrinsic evidence for two reasons. One, to clarify not only the name and existence of the beneficiary, but also the testator's intent as to whether that gift should lapse.

Those concepts are found in Restatement of Third of Property Section 11.1, 80 Am. Jur. 2d Wills Section 1412, and C.J.S. Wills Section 1091. All of this recognizes two prominent approaches, that when you have a name change you must also couple that with an analysis of the intent of the decedent and whether that would somehow thwart the intent.

Nevada law allows all evidence concerning the testator's intent to be admissible when resolving an ambiguity. We cite that in the Jones -- *In Re Jones Estate* case, 72 Nev. 121. The concept with respect to the scope of evidence that's admissible is probably most eloquently stated by a Connecticut Court of Appeals. It says since the object is to discover the intention of the testator, the rule is well settled that any

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testimony is admissible for that purpose, which is relevant under the general principles of evidence. Any fact or circumstance from which experience or observation may be fairly presumed to have had an influence on his mind and inducing him to make the bequest or legacy is admissible to prove his intention.

Further, their instance with respect to the *Frei* case doesn't bar the Estate's introduction with extrinsic evidence. There are two huge distinctions in *Frei* that make that case not applicable and not a bar in this situation. First, it was conceded in that case that the estate plan contained no ambiguities. Clearly, here if Adelson Campus is bringing in extrinsic evidence, there is a latent ambiguity and that ambiguity allows the introduction of extrinsic evidence.

Second, the *Frei* case only stands for the proposition that the testator could not testify to contradict the plain meaning of the will's contents. The Estate is making no attempt here to introduce evidence that is inconsistent with the plain language of the will. All evidence produced is consistent with the wording of the will without resort to the insertion of additional language. If anything, *Frei* would really only bar their intention if the Court is going to apply it because they're asking the Court to insert the Adelson Campus in exchange for the Milton I. Schwartz Hebrew Academy.

In essence, once the Adelson Campus introduces

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evidence to claim their status as a purported beneficiary, the door opens to all extrinsic evidence in order to determine Milton's intent as to the use of the term Milton I. Schwartz Hebrew Academy. And here is where the Estate has gathered a mountain of evidence that leads to the only conclusion that Milton intended the gift only to go to the Milton I. Schwartz Hebrew Academy, an entity which bore his name. Since bifurcating this first phase of the proceeding, the evidence of Milton's intent more than creates a genuine issue of fact. It's overwhelmingly been one way.

Milton's intent and understanding, I think, is probably best stated in a statement he made two months prior to his will as to what his understanding was with respect to the Milton I. Schwartz Hebrew Academy and his name being attached. He states, quote, I raised a half a million and I gave half a million and they agreed to name the school the Milton I. Schwartz Hebrew Academy in perpetuity.

MR. SCHWARTZ: His death.

MR. FREER: I'm sorry?

MR. SCHWARTZ: His death. Not before the will, before his death.

MR. FREER: Oh, I'm sorry. Before his death. Thank you for correcting me.

So two months prior to his death he issues that statement. His clear understanding and his clear intent was

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that the name was to be in perpetuity in consideration for the donations provided, that he provided and continued to provide during his lifetime. We introduced evidence that this understanding was first formulated in 1989 when the school promised and agreed to be named the Milton I. Schwartz Hebrew Academy.

We produced evidence and Your Honor said you read it that the promise and agreement was -- was recognized by the board of trustees in the depositions of Roberta Sabbath, Neville Pokroy, and Lenny Schwartzer. This evidence was also established in the bylaws and articles where it states the name of the corporation is the Milton I. Schwartz Hebrew Academy and shall remain so in perpetuity.

In fact, Mr. Schwartzer testified that the name of the school was changed to the Milton I. Schwartz Hebrew Academy in light of Mr. Schwartz's financial fundraising contributions stating, quote, in consideration of that it was our understanding and I believe it was our agreement that the school would be named the Milton I. Schwartz Hebrew Academy as long as -- as long as it remained the Hebrew Day School.

We also introduced evidence that having Milton's name on the school was more than just a gratuitous recognition to him. It was vitally important to him for personal and religious reasons. We provided the testimony of Rabbi Wyne who was Milton's rabbi and administered the Jewish equivalent of the

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last rights to Milton before his death. Rabbi Wyne testified that Milt held religious beliefs that rendered it vitally important for him to have his charitable giving associated with his name to enable his soul to progress.

In essence, it was Milton's belief that when a charitable institution bore his name it was credit to his soul and enabled him to further develop by doing good works in his name post death. That same testimony is accurate by his children, and Dr. Sabbath also testified that the name was very important to him as expressed to her. She said --

THE COURT: But she just only -- she said the building.

MR. FREER: Well, and -- and --

THE COURT: She specifically said we agreed to name the building after him.

MR. FREER: And that gets into the 2007. What we have here, though, is everything has been removed. That she states that the importance to Milton is it was very important to Milton. I do remember that. He expressed it and I remember him saying make sure that it stays in perpetuity. So what we have here is a situation where it's not just somebody's name and he's happy because he donated some money and it's on there. These were personal important items to him not only for the personal reasons, but also for religious reasons.

THE COURT: That's my -- but that's my question is is

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it important that the school be named after him or that the building be named after him or that the scholarship be named after him? Don't they all have essentially the same effect?

MR. FREER: No.

THE COURT: Okay.

MR. FREER: It doesn't. Milton understood in the bylaws, etcetera, it said that the entity would be named after him in perpetuity, so the Milton I. Schwartz Hebrew Academy in perpetuity. So that is his understanding. In 2007, after the execution of the will, the understanding is that when the Adelson High School comes in, and this was testified to by Schiffman, that it would still be the Milton I. Schwartz Hebrew Academy, and that name would specifically tie to the grades K through 8 and there would be an associated high school. That was what Mr. Schiffman testified to.

That's what all of the children testified to what Milt's understanding was as conveyed to them, and that is actually what is shown by the records that the school produced or, you know, documents from the school at the time. It's recognizing that there's an Adelson school, specifically an Adelson high school, and the Milton I. Schwartz Hebrew Academy. There -- right now there is nothing. It's the Adelson Campus, the lower campus, upper campus. That is not what Milton would have intended and that evidence is overwhelming in terms of how important it was to him.

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I mean, we've got examples that we provided that over the 20-year period when he did not have names associated with his giving he wouldn't contribute. And we've provided that by way of testimony from his personal secretary and provided two specific instances in '94 and in 2004 when the will was introduced. We also provided evidence that when his name was temporarily removed in 1994 he ceased affiliation with the school and he ceased making distributions. That prompted Roberta Sabbath to come back in 1996 and make amends, basically, through that 1996 letter that we attached.

Actually, it's basically a 1996 agreement. In there it states that the Milton I. Schwartz Hebrew Academy would be restored in that name in perpetuity. The school would restore the marker with the name of the school in front of it. It would change its stationary and its references to the school MISHA. The board ratified that in '96 and changed the bylaws to state that the name of the corporation is the Milton I. Schwartz Hebrew Academy and will remain so in perpetuity.

THE COURT: Well, this kind of gets us to my question with Mr. Couvillier which is if we're talking about the will in 2004, what is the historical relevance of what happened historically before and after? I mean, like I said, I read all of this stuff. So it's all very interesting, but it's -- how does that aid in interpretation of what he meant in 2004?

MR. FREER: It is -- it is vitally important from the

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standpoint that his understanding of the Milton I. Schwartz Hebrew Academy when he used it in Section 2.3 was that it was the Milton I. Schwartz Hebrew Academy in perpetuity. That is all the representations that was made to amend, all the statements that is made, that was what was important to him. And that understanding, those representations made to him formulated his intent when he executed Section 2.3.

And that's right on point with the prior statement -- or quote that I read that says any fact or circumstance from experience or observation may be fairly presumed to have an influence on the mind of the testator is admissible to prove intention.

THE COURT: Well, if we could talk, then, about the will itself because what struck me about the will is you start with paragraph 2.3 where he talks about the Milton I. Schwartz Hebrew Academy. And if there is a mortgage, pay off the mortgage, if there is no mortgage -- because he had guaranteed the mortgage and he wanted a release. Very clearly the idea was give this $500,000 to get me and my -- and my heirs off this guarantee with this $500,000. They didn't have to worry about that because by that time the mortgage has been paid off. But if the mortgage is paid off, then give it to scholarships for Jewish children.

And this corresponds to, you know, even the supplement that was provided where he talks to Dr. Adelson about I just

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love going to the school and the little children come up to me and I feel that they're my children because I'm helping to educate them. So, I mean, that was -- that's what he intended.

But -- and he goes on in the next paragraph in 2.4 and he talks about I'm going to give specific dollar amounts, $45,000 each to his grandchildren who had done such a good job at their brother's Bar Mitzvah with their Torah portions and how proud he was of how well they had done at that Bar Mitzvah. And he gave them each $45,000 for that. Again, just reiterating this pride that he feels in -- in children with a good Jewish education.

And then he, on a different topic, he talks about the house that was to go to his then wife, if she survives me, provided she is married to and living with me. I mean, very clear. These are the requirements. She's got to survive me, she's got to be married to me, she's got to be living with me at the time of my death. She isn't, and so he comes in with a codicil and he makes -- immediately he fixes that because he wants to make it really clear that's not going to be dealing -- we're not going to be dealing with that anymore.

He fixes it because, as his son testified, that's how he was. If there was a change, he took care of it, he acknowledged it, he dealt with it. Paragraph 2.7 he talks about terminating gifts because he had talked at one point in time in helping the Jewish Federation maybe starting an alternate

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school. He wanted to make it really clear, if I offered them anything, if I made any pledges to them, I'm revoking them. And if they challenge it, they get a dollar. I mean, a very clear provision. So this just gets me back up here to 3. I mean --

MR. FREER: All right. And why didn't he include any type of condition in the will?

THE COURT: Right.

MR. FREER: It's because it already existed at the time he did the 2004 will. It was already promised to him. He had already secured that promise twice that it would be there in perpetuity. And this is where we got basically, you know, every shred of evidence points to that's what Milton understood, that the school would bear his name in perpetuity. It's basically reverse logic imposing a burden upon Milton to make sure that the Hebrew Academy doesn't breach its obligations that were owing to him, its promises and representations to him. It basically flips kind of the law and logic on its head.

What was he supposed to say? That, you know, basically I leave my money to the Milton I. Schwartz Academy so long as they don't breach their agreement and promises to me to keep my name on it in perpetuity? It was already there in the existence of the '89 -- you know, '89 agreement, in the existence of the '96 agreement, in the existence of the testimony of the other board of directors. It was already in existence. And so his reference to Milton I. Schwartz Hebrew

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Academy encapsulated his understanding that it was his baby. It was his. It was not going to change.

Similarly, when he made the 2007 agreement to allow Adelson to put his name on the high school, it still had perpetuity in the bylaws. It was still named the Milton I. Schwartz Hebrew Academy in perpetuity. And that was with respect to the name being on the lower school. So now for no reason to change the will, you know, there is no reason to change the will because everything was as it was at the time he executed it in 2004. There were no facts coming to light in which it would cause him to become upset and to change it because he had already settled those issues.

You know, the other evidence with respect to -- you know, we pointed out why the earlier evidence was relevant with respect to formulating Milton's intent. We also provided evidence by way of testimony of Jonathan Schwartz with respect to the drafting of the 2004 will. Obviously the Court recognizes that Milton drafted the will for himself. Jonathan was the scrivener for that. Jonathan testifies that Milton intentionally omitted any successors from receiving the Section 2.3 bequest.

He says, quote, Milton made it clear that there was no successor clause to be added to Section 2.3. He was adamant that there was to be no successor in 2.3 because the bequest was supposed to go only to Milton I. Schwartz Hebrew Academy to be

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used for the benefit of children who attended the Milton I. Schwartz Hebrew Academy.

So we have evidence right there that coupled with his understanding that Milton I. Schwartz Hebrew Academy was going to be there in perpetuity, also coupled with lack of the successor clause Milton thought that he had adequately provided for. That's the only inference that the evidence can present, and that inference is for the jury to decide because there's a question of fact as to what Milton intended.

THE COURT: Okay. So then it's your position that summary judgment is inappropriate at this time and -- and/or that even if the Court were to find that, you know, the doctrine of cy pres or whatever that it's reasonable to assume that what Mr. Schwartz wanted was just to educate Jewish children in one of the following two fashions, pay off the mortgage first, then pay for scholarships, that even if the Court finds that it's not appropriate to grant the relief that Mr. Couvillier wanted, which was to distribute the funds, because the counterclaims are for -- would prevent that, that the jury still has to make a determination as to whether, in fact --

MR. FREER: Correct.

THE COURT: -- they're entitled to some offsets.

MR. FREER: You're absolutely right, Your Honor. And with respect to the whole issue with respect to the purpose of the funds being used, you know, what the Adelson Campus tries to

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do when they -- when they get into their thing is they try to just gloss over to whom the money is supposed to be given to.

Obviously, the purpose is for the education of Jewish children, but that is -- it's a limitation on what the Milton I. Schwartz Hebrew Academy could use that money for. Just because there's a statement in there that it can be used for Jewish education doesn't mean that we completely ignore Milton's intent with respect to whom he wanted the distribution being made.

There was a peculiar affection here for Mr. Schwartz wanting the name of the school to be named the Milton I. Schwartz Hebrew Academy, and that gets right into why the case law cited by the Adelson Campus is inapplicable. You know, this isn't just a name change case. This is basically an affront to what Milton's intent was. During his lifetime he had twice going through the issue of getting it changed.

The cases they cite, most of them, don't even deal with name change in the context of estate proceedings. They're more licensing issues with respect to estate. It has nothing to do with what was intended by the inclusion of the name. Further, the one -- they cite two cases that do deal with it. One of them, *Hagen's* [phonetic] will, is misleading because it states, and they omit this from there, but *Hagen* states the mere change of a name, unless some peculiar affection for the name is indicated by the donor, means nothing. And that is the question of fact for us to determine, what was his intent with respect to

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that?

I've spoken quite a bit of time. Did I answer all the Court's questions at this point?

THE COURT: Yes, I guess, except for a couple of procedural questions. And as we indicated, the -- the -- if summary judgment is -- is -- even if summary judgment is granted at this time there would still be these other issues to be determined at trial. Two things the clerk has pointed out to me. One, we don't have a trial. And, two, we don't have a jury demand. So --

MR. FREER: Actually, we submitted the jury demand and I believe I've got one right here. We submitted that November 23, 2013.

THE COURT: Okay. Well, the clerk's office didn't pick it up. I don't know if it's because it's submitted to the clerk's office in Family Court and we just don't have any such thing as a jury demand in Family Court. I don't know.

MR. FREER: If I may approach I'll provide the Court with what we've got, the file stamped copy.

THE COURT: And we'll see if we can get it flagged for a jury trial because right now it's not -- you know, we do have to deal with the Family Court people. So that's the other -- the point of the question is that, you know, what, then, is your understanding would be left for trial? It's this whole issue of -- your position is the whole thing should be heard by a jury?

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MR. FREER: Exactly. If this Court --

THE COURT: If it isn't a question of law.

MR. FREER: If this Court allows extrinsic evidence --

THE COURT: Uh-huh.

MR. FREER: -- in to determine to allow the Adelson Campus to show that they are a successor entity and to allow the Estate to show that name change has everything to do with Milton's intent, that is a question of fact for a jury.

Actually, I anticipated that question. I've got a couple of cases I can provide the Court where courts basically say a will construction to determine a testator's intent as a question of fact and appropriate for a jury trial. One exemplar case of that is found in *Raft versus United States*, 780 F Supp. 572. That's a District of Illinois case 1991. It states where the terms of a will are unclear and ambiguous, the testator's intent becomes a question of fact for the jury.

The same type of holding is in *Mercantile National Bank*, that's a 488 S.W.2d 605. That's a Texas Appellate Court decision. It holds to the same thing. So our position is, yes, once the Court allows extrinsic evidence in, those become issues of fact. That's appropriate for the jury to decide. We've raised all of these issues with respect to intent. The jury is one that gets to weigh those issues. The remaining claims we have are offsets against the amounts due and owing under the bequest in our prior briefing.

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Obviously we didn't brief this much because it's not the issue right now, but there are courts and there is case law that says where we have claims, the Estate has claims against third parties who are also beneficiaries, it's appropriate for the Court -- for the Estate to seek an offset against those amounts. So basically this whole ball of wax needs to be tried together and it needs to be tried by a jury.

THE COURT: Thank you.

Mr. Couvillier.

MR. COUVILLIER: Thank you, Your Honor. I'll start with the basic principle here under NRS 137.030. If we were to even look at extrinsic evidence --

THE COURT: Uh-huh.

MR. COUVILLIER: -- it's only contemporaneous evidence. That's what I -- you know, to address some of the points about Milton Schwartz's understanding and so forth, I had to harken back, Your Honor, again, to the 2004 minutes that were done at the same time that he executed his will in which the school said we're contemplating naming rights changes. And Mr. Schwartz did not change his will in 2004 or when he revisited it in 2006.

And I just want to belie one claim that was raised earlier that, you know, Mr. Schwartz was so sure of these things. But I'll go to Exhibit 5 of our motion, which is the Executor's deposition, and at page 27, starting at line 13, the

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Executor talks about why Mr. Schwartz executed the second codicil. And the -- and his testimony is, well, he was republishing his intent that his premarital agreement and various agreements were to remain effective.

So Mr. Schwartz already had various agreements. He had a premarital agreement, but yet he found it necessary to, for the third time, restate his intent clearly and unequivocally in a codicil. Now we go back to 2004. He's sitting in a board meeting where he is being told we should consider name changes to the school as a way to raise capital. Yet he never went back and revisited his will.

Your Honor, and I -- and I'll cite to the Executor. The Executor pointed out in one of his cases, which is *Tennessee Division of United Daughters to the Confederacy versus Vanderbilt*, which is a Tennessee case. And that case expressly recognized that when donors impose conditions on gifts, the conditions are generally contained in the terms of the donor's will. And then I go back to the case that we cited, which is the *Wright* case out of New York, which said if there was a naming right condition he simply would have stated it. Very simple words, on the condition that it remained "X" in perpetuity. It's not named here.

THE COURT: So the argument that the Executor makes that he thought that was all done because he -- he had gone through this previously, he was promised this originally, and

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then when he had the falling out he came back because he was promised it again so it didn't need to be stated because it was known to everybody. I mean, I don't know. I just don't know how you bind people in perpetuity unless you --

MR. COUVILLIER: Put it in writing.

THE COURT: -- put it in writing.

MR. COUVILLIER: Put it in writing. And, Your Honor, we're not -- we're not talking about extrinsic evidence from the school on Mr. Schwartz's intent. We're saying his intent is clearly manifested in the words of the will. We're not talking about what he intended or what he didn't intend, Your Honor. We're saying we're the Hebrew Academy. There's no ambiguity about that. We all know who we are. We changed our name.

And the law says that that doesn't change who the identity of the corporation is. It doesn't change it. There is -- so we're not talking about an ambiguity. And the -- you know, even the Executor recognizes that we're talking about a lapse. A lapse only occurs when the beneficiary has died, which is not the case here, when a corporation ceases to exist, which is not the case here, or the corporate beneficiary has abandoned its corporate purpose. We're still educating Jewish children, Your Honor. And so we're here on the limited purpose for the Court to rule summary judgment that the school is entitled to the bequest under Section 2.3 and that the -- and that the funds be released.

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Now, I do want to address the issue of the blocked funds remaining blocked. Your Honor, essentially what they're asking for is a pre-judgment lien of attachment which is not before the Court and which is something that we did not agree to. The Executor agreed to deposit the funds for our purpose and our purpose only.

And in his motion he said, on his motion of December 12th, page 3, the deposit is for the purpose of the Adelson Campus. It's the proposal would save the Adelson Campus time and money by guaranteeing the funds would be available to satisfy any bequest ordered by the Court. There is nothing mentioned of, well, if we lose at summary judgment, the funds should remain there because we have an offset claim. The offset claim is not before the Court.

We did not agree to keep the funds remaining there. This is -- this is extraneous fugitive request of a judgment lien of attachment. We're asking the Court to have those funds released or summary judgment in our behalf. And after that Mr. Freer and I can sit down and talk about the next steps in discovery to address their counterclaims and propose a plan to the Court.

THE COURT: Okay. Well, I think that -- I guess the issue is that essentially what we're -- you're talking about here is the application under essentially the cy pres doctrine or just the admission of evidence under 134. But we have this

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-- this paragraph that as the Executor points out doesn't have a successor clause, doesn't say the Milton I. Schwartz Hebrew Academy or any successors. It just says the Milton I. Schwartz Hebrew Academy, and the argument being, well, it is still the -- it's the same Hebrew Academy. The name changed. You know, is that -- so I guess the question is -- your position is that is not a question of fact for a jury, but it is a question for the Court.

MR. COUVILLIER: Yes, Your Honor. It's not a question of fact for the jury. In the *Wright* case in New York there was no problem with the court saying, no, your argument about this corporation ceasing to exist merely because it changed its name is wrong as a matter of law, as a matter of established law that a corporate name change does not change the identity of the beneficiary. We're not asking here of any issue of fact.

THE COURT: So that -- so the -- unless the will specifically said that the name is important, that there's -- that you can determine that as a matter of law?

MR. COUVILLIER: Yes, Your Honor.

THE COURT: Got it. Thanks.

Mr. Freer is standing, so --

MR. FREER: Yeah.

THE COURT: -- if he's got something else to say, we'll let him say something.

MR. FREER: I've got to clear up --

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THE COURT: You'll have the last word, Mr. Couvillier.

MR. FREER: -- a couple things, Your Honor. First, this wasn't addressed in any of the briefings. The application of the cy pre doctrine, which they have not raised --

THE COURT: Uh-huh.

MR. FREER: -- if I understand the Court is -- I would even probably agree that it probably is something that should be looked at. That application of cy pres doctrine is a question of fact. There are tons of cases out there that say the cy pres doctrine because you allow in evidence of intent because the whole purpose is to find who the testator wanted the property to go to. And so there are tons of cases. We can provide the Court supplemental briefing if you want that, but that does -- it, too, presents an issue of fact.

Let's get to the *Wright* case first. And I -- I omitted this during my argument, but their application of the -- or, I'm sorry, the -- that case doesn't stand for what it says. Basically that that case dealt with a name change that wasn't a total abandonment. It changed the fund from McGavin Fund [phonetic] to the McGuirk Foundation [phonetic]. There was no evidence, unlike here, there was no evidence introduced that the testator would have wanted the gift to lapse in light of the name change. And further, the Court specifically found that there were no representations, promises, or contractual arrangements associated for the gift.

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That's the only way that case, which was a trial court case, could distinguish prior New York Supreme Court authority issued by Cardozo that basically said that a gift where there is found to be some type of agreement is invalidated. So the court in the *Wright* case says the only way it was able to distinguish that it said there was absence of any evidence of any contract or representation. That's obviously different than what we've got here. That's why that case isn't applicable with respect to that.

A couple other issues to clear up as soon as I can find the right page. You'll note when he's talking about the *Tennessee* case we cited it says conditions are generally contained in the will. It's not it must be contained, it's just noted that as a general matter they are contained in the will. It's not in this case because we already went through, we have the prior agreements.

So with respect to the lapse issue, simply I think Your Court is right. They're -- they're trying to pigeonhole us into three situations in which the lapse applies. We cite to additional law that says a lapse applies any time the intent of the testator is thwarted by events or circumstances that occur after the execution of the will. So for them to say that our three positions on lapse are only death, dissolution, or change of the purpose, that is not the case. We also cite to cases for the general proposition any time the matter is thwarted or the

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testator's intent is thwarted, a lapse can occur.

The last thing I want to clear up is this evidence they keep talking about in 2004 with respect to the naming rights. First and foremost, these are scant inferences. There was never any -- there was never any action taken. We still have the in perpetuity clause language. Milt wasn't worried about that. It was promised to him it was in perpetuity. Further, even if he were to accept what they said, all that does is create an issue of fact and that's for the jury to decide.

Their sole basis for hitting this trumpet is the one clause that it's -- and it's contained in the meeting minutes, it doesn't refute any of the evidence that we point out and there's nothing to indicate that it wasn't the scope of what we already talked about in our evidence. There were situations where they were talking about naming classrooms. There wasn't discussion about naming buildings or naming schools until 2007 with respect to the Adelson High School.

THE COURT: Thank you.

Mr. Couvillier, anything further?

MR. COUVILLIER: Unless Your Honor has any doubts or any questions, Your Honor, I think as a matter of law we've demonstrated the Court can and should make the -- the entry of order. The dispositive facts here are not in dispute. The will is clear. And we're asking the Court for the Hebrew Academy enter a summary judgment order. Thank you.

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THE COURT: All right. Well, I think actually, unfortunately, Mr. Couvillier, I disagree. I think that what this is is a question of fact because we have this problem here of what does the Milton Schwartz Hebrew Academy mean? I know when I read this, to me, it appears that what he was talking about was he was really focused on education of Jewish children. His pride in his grandchildren who could cite the Torah portions so well. His revoking any other affiliation with any other school is all really clear.

He doesn't put in anything that says in exchange for the Hebrew Academy being named after me in perpetuity I'm giving them $500,000. He doesn't say that. He says I want to deal with their -- with their mortgage. And in the alternative, if the mortgage is paid off then we're going to educate children. But that's interpreting it as a question -- it's a question of fact. And so I can't say that it's a matter of law. To me, I believe that it's -- it's a question -- ultimately it's a question of fact for the finder of fact.

So I'm going to deny the motion and I guess we have to come in and discuss how much time you think you need. We will send you an order scheduling this for a jury trial since we now have the jury demand here so that we can flag it and get it on the stack. What's -- how much time do you think you need?

MR. FREER: Could I defer and talk to my --

MR. COUVILLIER: Yeah.

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THE COURT: Yeah, I mean --
MR. FREER: I think we --
THE COURT: -- are you going to --
MR. FREER: -- need to go through and kind of look at the evidence and get together.
THE COURT: What is your plan for -- are you going to do a report, are you going to give us some sort of -- because you don't usually -- normally the discovery commissioner would give us the scheduling order and she would tell us how long you're going to take for your discovery. Probate works a little differently. So I don't know if you want to do your own or if you want to be referred there to --
MR. COUVILLIER: Your Honor, if I may propose -- and Alan -- if we may set this matter over for a status check in a month, and in the meantime Alan and I can get together and -- and reach an agreement and submit a proposal to the Court.
THE COURT: Okay. All right. And I also, I should say that I do think that this is a cy pres issue. And I think that is a question of fact, as well. So, anyway, in the end it's just questions of fact which somebody is going to have to decide. So you need to let us know so we can get you on a schedule because we're already sitting out pretty far and we'll see if we can find some place to put you in. So it's a month for a status check.
THE CLERK: Okay. So a month would be probably August

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13th.

MR. COUVILLIER: Okay.

THE CLERK: August 13th at 9:00.

MR. COUVILLIER: Thank you.

THE COURT: Okay.

MR. FREER: That's great.

THE COURT: And we will see you back here.

MR. COUVILLIER: Great. Thank you, Your Honor.

MR. FREER: Thank you, Your Honor.

(Proceedings adjourned at 10:52 a.m.)

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ATTEST: I HEREBY CERTIFY THAT I HAVE TRULY AND CORRECTLY TRANSCRIBED HE AUDIO/VIDEO PROCEEDINGS IN THE ABOVE-ENTITLED CASE TO THE BEST OF MY ABILITY.

JULIE POTTER
TRANSCRIBER

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EXHIBIT 3

THE MILTON I. SCHWARTZ HEBREW ACADEMY

RESOLUTIONS OF THE BOARD OF TRUSTEES

December 13, 2007

At a meeting duly called and noticed, the Board of Trustees of The Milton I. Schwartz Hebrew Academy (the "Board"), a Nevada non-profit corporation (the "Corporation"), represented by a quorum and acting by majority vote, approved and adopted the following resolutions. The Secretary is hereby directed to file these resolutions with the minutes of the meetings of the Board of Trustees of the Corporation.

The following votes are hereby adopted:

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RESOLVED: That the Articles of Incorporation of the Corporation (the "Corporate Articles") be and hereby are amended in the following manner: (i) Article I of the Corporate Articles be and hereby is amended and restated in its entirety to state that: "This corporation shall be known in perpetuity as "The Dr. Miriam and Sheldon G. Adelson Educational Institute"; (ii) a new paragraph be and hereby is added to the end of Article II of the Corporate Articles to state the following specific language "The schools conducted by the corporation shall not be orthodox Judaic. Students in the schools shall not be required to pray and shall not be required to wear a kippa, except in holy studies or similar classes.", and (iii) Article IV of the Corporate Articles be and hereby is amended and restated in its entirety to state the following specific language: "The governing board of the corporation shall be known as the Board of Trustees and the Board of Trustees shall constitute the corporation. The term of office of each Trustee shall be three years. The number of Trustees may from time to time be increased or decreased by the Board of Trustees but in no event shall the number of Trustees be fewer than seven (7) or more than twenty (20). If for any reason a Trustee shall not be elected in the time and manner provided for herein, or in the Bylaws, such Trustee shall continue to serve as Trustee until his or her successor has been elected."

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RESOLVED: That the Corporation's elementary school shall be named in honor of Milton I. Schwartz in perpetuity.

THE MILTON I. SCHWARTZ HEBREW ACADEMY - RESOLUTIONS OF THE BOARD OF TRUSTEES Dated December 13, 2007

RESOLVED: That the Bylaws of the Corporation be and hereby are amended in the following manner: (i) Section 1.01 of the Bylaws be and hereby is deleted in its entirety and replaced with the following: "The corporation shall be known in perpetuity as "The Dr. Miriam and Sheldon G. Adelson Educational Institute"; and (ii) Article IX of the Bylaws be and hereby is deleted in its entirety and replaced with the following: "These Bylaws may be altered, amended or repealed and new Bylaws may be adopted by vote of two-thirds (2/3) of the Board of Trustees."

RESOLVED: Having adopted the foregoing resolutions, the Board resolves that the number of Trustees on the Board be and hereby is increased to sixteen (16) and that Tom Speigel be and hereby is appointed a Trustee of the Board of Trustees.

RESOLVED: That the Corporation borrow (the "Borrowing") the sum of $1,810,000 from the Bank of Nevada (the "Bank"), in accordance with the terms and conditions set out in the Business Loan Agreement (the "Agreement") dated December ___, 2007, and that in connection with the Borrowing, the Corporation grant a mortgage (the "Mortgage") to the Bank on the elementary school and the portion of the land on which the elementary school is situated, including the access road.

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RESOLVED: That, any and all actions (i) previously taken by Victor Chaltiel and/or any other officer or Trustee of the Corporation in connection with the Borrowing are hereby ratified, and (ii) necessary, convenient or desirable on the part of any officer or Trustee of the Corporation in connection with the Borrowing are hereby authorized. Victor Chaltiel and each officer of the Corporation is authorized on behalf of the Corporation to execute and deliver to the Bank any and all documents related to the Borrowing, including, but not limited to, the Agreement, the Mortgage, and the promissory note in respect thereof.

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RESOLVED: That the Corporation is authorized to open a line of credit with the Bank, that the Corporation may secure such line of credit with the Mortgage, and that Victor Chaltiel and each officer of the Corporation is authorized on behalf of the Corporation to execute and deliver to the Bank any and all documents related to the line of credit, including, but not limited to, the line of credit agreement, the Mortgage, and the promissory note in respect thereof.

THE MILTON I. SCHWARTZ HEBREW ACADEMY - RESOLUTIONS OF THE BOARD OF TRUSTEES Dated December 13, 2007

RESOLVED: That Victor Chaltiel is authorized on behalf of the Corporation to execute and deliver that Grant Agreement letter dated December 13, 2007 by and between the Corporation and the Adelson Family Charitable Foundation, and that Victor Chaltiel and each officer of the Corporation are authorized, in the name and on behalf of the Corporation, to do any and all such further acts and things and to execute and deliver any and all such other documents, forms, instruments and certificates as may, in the opinion of said officers, be necessary, convenient or desirable to carry out the terms of the Grant Agreement and effectuate the purposes thereof, including, but not limited to, actions regarding the naming of the campus and the schools.

RESOLVED: That Victor Chaltiel and each of the officers of the Corporation be and hereby are authorized, in the name and on behalf of the Corporation, to do any and all such further acts and things and to execute and deliver any and all such other documents, forms, instruments and certificates as may, in the opinion of said officers, be necessary, convenient or desirable to effectuate the purposes of the foregoing resolutions and to carry out the actions hereinabove approved.

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By their execution below, each of the Trustees consents to each of the foregoing board resolutions.

Victor Chaltiel

Sheldon G. Adelson

Jill Hanlon

Ercy Rosen

Roni Amid

Dr. Suzanne Green

Yasmin Lukatz

Sam Ventura

Dr. Larry Cohler

Philip Kantor

AC404208

CONFIDENTIAL

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THE MILTON I. SCHWARTZ HEBREW ACADEMY - RESOLUTIONS OF THE BOARD OF TRUSTEES Dated December 13, 2007

Dorit Schwartz

Rachel Schwartz

Irv Steinberg

Leah Stromberg

Benjamin Yerushalmi

By his execution below, Tom Speigel hereby acknowledges his acceptance of his appointment as Trustee and his approval and ratification of the foregoing resolutions.

Tom Speigel

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Alan D. Freer (#7706)
Alexander G. LeVeque (#11183)
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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.: P-07-061300-E Dept.: 26/Probate Hearing Date: January 10, 2019 Hearing Time: 9:30 a.m.

REPLY IN SUPPORT OF MOTION TO RETAX COSTS PURSUANT TO NRS 18.110(4) AND TO DEFER AWARD OF COSTS UNTIL ALL CLAIMS ARE FULLY ADJUDICATED

A. Jonathan Schwartz ("Executor" or "Jonathan"), Executor of the Estate of Milton I. Schwartz (the "Estate"), 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 his Reply in support of his Motion to Retax Costs Pursuant to NRS 18.110(4) and to Defer Award of Costs Until All Claims are Fully Adjudicated (the "Reply").

Dated this 4th day of January, 2019.

SOLOMON DWIGGINS & FREER, LTD.

Alan D. Freer, Esq., Bar No. 7706
Alexander G. LeVeque, Esq., Bar No. 11183
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129

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

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

There are two primary issues before the Court by way of the Estate's Motion: (1) whether the Court should defer making any ruling on costs until all of the claims in this matter have been fully adjudicated; and (2) if the Court is not inclined to defer ruling, whether all of the costs submitted by the School should be awarded.

II.

THE SCHOOL SURPRISINGLY CHALLENGES THE UNRIPENESS OF ITS REQUEST FOR COSTS WHERE IT IS UNDISPUTED THAT A FINAL ADJUDICATION OF ALL CLAIMS HAS NOT YET OCCURRED

In its Opposition, the School unpersuasively argues that the Court should not defer ruling because it prevailed on what it self-servingly considers the "primary" claim in the case and the Court should therefore ignore of the other claims yet to be adjudicated by the Court. To get where it needs to go, the School mispresents the status of the proceedings. Indeed, the School states that "all claims presented at trial were fully resolved and a judgment was entered in favor of the Adelson Campus."[1] What the School ignores or perhaps does not understand is that all of the competing claims went to trial. There are, however, two decision-makers. For the Estate's contract claim, the jury was the decision-maker. For all of the other claims (including the School's claim), the Honorable Gloria Sturman is the factfinder and decision-maker. It is patently absurd for the School to argue that a "prevailing party" for purposes of assessing costs should be determined for each and every claim in piecemeal fashion and is indeed defeated by well-established law that the School is undoubtedly aware of.

As fully briefed in its Motion, the Estate still has claims against the School which seek a money judgment in excess of $2.8 million that the Court has yet to adjudicate. Moreover, the School's claim against the Estate – the petition to compel distribution of the $500,000 bequest –

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[1] *See* Opposition, at 4:5-6, on file with the Court.

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has also not been adjudicated. The Estate submits that it is very likely that it will prevail on both. If the Court does afford relief to the Estate and/or denies the School's petition, the Estate would be the "prevailing party" after collectively assessing all claims as it would receive the benefit of the litigation. Indeed, the Estate could be awarded $1.00 on its claim for rescission of inter vivos gifts and would be the "prevailing party" under Nevada law.

The bottom line is that the Estate need only prevail on one of its claims to be the "prevailing party." The fact that it did not prevail on one of its claims – the contract claim – is irrelevant if will ultimately prevail on others. *See e.g. Close v. Isbell Constr. Co.*, 86 Nev. 525, 531, 471 P.2d 258, 262 (1970) (holding that a party prevailed when it won on its mechanic's lien claim but had its damages reduced significantly by the adverse party's counterclaim); and *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608 ("To be a prevailing party, a party need not succeed on every issue.") (citing *Hensley v. Eckhart*, 461 424, 434 (1983) (observing that "a plaintiff [can be] deemed 'prevailing' even though he succeeded on only some of his claims for relief.")).

The fact that the Estate's remaining claims and the School's claim have still not been decided only underscores the unripeness of the School's motion. *See e.g. Parodi v. Budetti*, 984 P.2d 172, 115 Nev. 236 (1999) (holding that in cases where separate suits and been consolidated into one action, the trial court must offset all awards of monetary damages to determine which side is the prevailing party). Indeed, the School made no effort to apportion or otherwise delineate its costs which relate to the legal claims from those which relate to the equitable claims.

For these reasons, the Court should defer ruling until (1) all claims are reduced to judgment and; (2) the Court makes a determination as to who the prevailing party is; and (3) after the Estate submits its own memorandum of costs if warranted.

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III.

THE SCHOOL HAS FAILED TO MEET ITS BURDEN TO ESTABLISH A LEGAL BASIS FOR ALL COSTS OBJECTED TO BY THE ESTATE

A. THE SCHOOL CANNOT RENEGE ON ITS AGREEMENT TO SPLIT CERTAIN TRIAL COSTS WITH THE ESTATE.

The School presents no cognizable legal argument as to why its agreement to split certain costs with the Estate is somehow invalidated because the Estate did not succeed on its contract claim. The School misleads the Court by citing to *Foster v. Dingwall*, 126 Nev. 56 (2010) for its assertion that Nevada permits a prevailing party to recover costs which were previously split by the parties. The Supreme Court of Nevada offers no such holding in its *Foster* opinion. In *Foster*, the issue on appeal was review of the trial court's decision to assess special-master fees previously split between the parties 50/50 against the non-prevailing parties. What the School neglected to inform this Court of in its Opposition is the fact that "after the parties agreed to split the fees 50/50, **the district court clearly communicated that the special-master fees would be recoverable at the end of the case by the prevailing party** [and that] **neither party objected to the court's conclusion that special-master fees were recoverable by the prevailing party.**" *Foster*, at 126 Nev. 72-73 (emphasis added). In this case, there was no such order of the Court. *Foster*, therefore, is inapposite. Accordingly, the School's request for payment of costs associated with "Transcript of Court Proceedings" in the amount of $9,120.00 should be denied.

B. EMPLOYEE OVERTIME IS NOT A RECOVERABLE COST

The School cites no authority other than the "catchall" provision of NRS 18.005 for its assertion that a law firm's staff overtime payroll expenses are a recoverable cost. In *Bergmann v. Boyce*, 109 Nev. 670, 680 (1993), the Supreme Court of Nevada acknowledged that there are certain costs that "are better considered part of the attorney's fee or non-recoverable overhead rather than an allowable cost."[2] Employee payroll costs are the part of a law firm's non-recoverable

[2] In *Bergmann*, which was decided in 1993, the Supreme Court of Nevada determined that a law firm's charges for computer research were better considered part of the attorney's fee or non-recoverable overhead. *Bergmann*, however, was decided before the 1995 amendments to NRS 18.005, which expressly included a provision for "reasonable and necessary expenses for

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overhead. *See e.g. Apple Corps. Ltd. v. Int'l. Collectors Soc.*, 25 Supp.2d 480, 499-500 (D.N.J. 1998); and *Perfect 10, Inc. v. Giganews, Inc.*, 2015 WL 1746484 (C.D.Cal. 2015) ("[G]eneral costs of doing business that should be subsumed in a firm's overhead, such as staff overtime, are generally disallowed [in copyright infringement cases]."). Accordingly, the School's claim for staff overtime should be denied.

C. MEDIATION FEES WERE JOINTLY SPLIT BETWEEN THE PARTIES BY AGREEMENT.

During pretrial litigation, the Estate moved the Court for a mandatory settlement conference through the Eighth Judicial District Court.[3] Judicial settlement conferences do not cost anything. At the voluntary election of both the Estate and the School, the parties opted to participate in a private mediation instead.[4] The parties further agreed to split the costs of the private mediation.[5] For the reasons set forth above, the School's share of the voluntary and private mediation cost is its responsibility and is not recoverable under NRS 18.005. Accordingly, the School's claim for $4,278.75 should be denied.

D. THE SCHOOL HAS NOT APPORTIONED ITS "PROFESSIONAL SERVICES".

Ignoring for a moment the fact that a "prevailing party" cannot yet be determined as all claims have not yet been fully adjudicated, even if the Court were to buy the School's argument that it is a piecemeal prevailing party on the contract claim, the School has wholly failed to apportion or otherwise delineate which professional services were related to that claim. Indeed, the

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computerized services for legal research." So, although the 1995 amendments superseded *Bergmann* on the specific issue of Westlaw research, *Bergmann* is still good law with respect to whether certain "costs" are really the costs of doing business rather than an expense of litigation and trial. *See Matter of DISH Network Derivative Litigation*, 401 P.3d 1081, at n. 6 (2017) ("we note that NRS 18.005(17) was amended in 1995, after *Bergmann*, and now includes "reasonable and necessary expenses for computerized services for legal research" as costs, but the analytical framework used in *Bergmann* to decide whether an expense falls within the "catchall" definition in NRS 18.005(17) remains good law.").

[3] *See* Court Minutes, September 28, 2016, a true and correct copy being attached hereto as **Exhibit 1**.

[4] *See* Order Setting Settlement Conference, filed on October 17, 2016, a true and correct copy being attached hereto as **Exhibit 2**.

[5] *See* Email Chain, a true and correct copy being attached hereto as **Exhibit 3**.

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School had to prosecute its own claim in this case (to compel the distribution of the $500,000 bequest) which the "professional services" were undoubtedly utilized for. In support of its claim, the School cites *Brochu v. Foote Enterprises, Inc.*, 2012 WL 5991571 (2012), an unpublished decision. *Brochu*, however, is inapposite as all claims had been fully adjudicated in that case and the defendant/contractor was unquestionably the prevailing party as the plaintiff/homeowners did not prevail on any of their claims. As such, even if this Court were inclined to award costs at this juncture for legal claims, it would be impossible to do so because the School as not segregated between the legal and equitable claims.

E. THE SCHOOL HAS NOT APPORTIONED ITS "LEGAL RESEARCH."

In its opposition, the School argues that costs should be awarded for legal research because it accurately kept track of research time associated with the client matter number maintained by its attorneys. The School has failed, however, to separate the legal research between the legal and equitable claims. It is the School's burden to prove that recoverable costs were incurred and have failed to do so with any sort of accuracy concerning the Estate's contract claim against the School. Accordingly, costs should be denied for legal research. *See Trustees of Southern California IBEW-NECA Pension Plan v. Gartel Corp.*, 2013 WL 1703060 (C.D.Cal. 2013) (reducing a claim for legal research costs because prevailing party failed to apportion such costs between two matters).

CONCLUSION

Based upon the foregoing, the Executor respectfully requests that this Court enter its Orders and Decrees as follows:

1. That this Court defer an award of any costs to either party until a determination is made by this Court as to which party is defined as the "prevailing party" entitled to such costs;

2. That the Court deny costs on the basis that the School failed to apportion any of its costs as to the legal claims;

2. That this Court reduce the School's costs in the amount of $63,034.06 as set forth above in the event it is determined to be the "prevailing party"; and

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3. For such other and further relief as it deems just and appropriate.

Dated this 4th day of January, 2019.

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9060 West Cheyenne Avenue
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Attorneys for A. Jonathan Schwartz,
Executor of the Estate of Milton I. Schwartz

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January, a true and correct copy of the foregoing REPLY IN SUPPORT OF MOTION TO RETAX PURSUANT TO NRS 18.110(4) AND TO STAY AWARD OF COSTS UNTIL ALL CLAIMS ARE FULLY ADJUDICATED was served on all parties through the Court's e-filing system.

An employee of Solomon Dwiggins & Freer, Ltd.

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EXHIBIT 1

07P061300

DISTRICT COURT
CLARK COUNTY, NEVADA

Probate - General Administration	**COURT MINUTES**	September 28, 2016

07P061300	In the Matter of the Estate of Milton Schwartz

September 28, 2016 **9:30 AM** **Status Check**

HEARD BY: Sturman, Gloria **COURTROOM:** RJC Courtroom 03H

COURT CLERK: Phyllis Irby

PARTIES:

Abigail Schwartz, Beneficiary, not present — Pro Se
Jonathan Schwartz, Other, Petitioner, not present — Mark Solomon, Attorney, not present
Milton Schwartz, Decedent, not present — Steven Oshins, Attorney, not present
Parties Receiving Notice, Other, not present
The Dr Miriam and Sheldon G Adelson Educational Institute, Other, not present — Jon Jones, Attorney, present

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JOURNAL ENTRIES

- Mr. Jones advised he has had an agreement to continue the deposition for Mr. Adelson in March. His client believes this case is appropriate for a settlement conference before Mr. Adelson's deposition. We would like an Order from the Court under 2.51 for a judicial settlement conference with the ability to do a private mediation if the parties agree.
Mr. Jones advised he has taken a neutral position on this issue.
COURT ORDERED, PARTIES ARE REFERRED TO PRIVATE MEDIATION. Mr. Leveque will prepare the Order. STATUS CHECK SET.

1-25-17 9:30 AM STATUS CHECK: MEDIATION (DEPT. XXIV)

Notice: Journal entries are prepared by the courtroom clerk and are not the official record of the Court.

07P061300

INTERIM CONDITIONS:

FUTURE HEARINGS:

June 08, 2017 9:00 AM Calendar Call
Denman, Linda
Sturman, Gloria
RJC Courtroom 03H
Esparza, Kerry

July 03, 2017 9:00 AM Jury Trial
Sturman, Gloria
Denman, Linda
Esparza, Kerry
RJC Courtroom 03H

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EXHIBIT 2

Electronically Filed
10/17/2016 04:54:29 PM

CLERK OF THE COURT

Mark A. Solomon, Esq., Bar No. 418
msolomon@sdfnvlaw.com
Alan D. Freer, Esq., Bar No. 7706
afreer@sdfnvlaw.com
Alexander G. LeVeque, Esq., Bar No. 11183
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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.: P-13-061300-E Dept. No.: XXVI/Probate

ORDER SETTING SETTLEMENT CONFERENCE

PLEASE READ AND COMPLY WITH ALL REQUIREMENTS OF THIS ORDER

This case has been selected for inclusion in the Senior Judge Settlement Program before a member of Senior District Court Judges pursuant to E.D.C.R. 2.51. All parties are ordered to schedule a settlement conference for a date in December of 2016 or January of 2017. **Please contact Ileen Spoor at (702) 671-4607 by October 21, 2016, to arrange for a mutually agreed upon date and time.** Once set, the date may not be changed or cancelled for any reason without the approval, upon good cause shown, of Judge Gloria Sturman. The parties may elect, however, to participate in a voluntary private mediation in lieu of a judicial settlement conference without seeking leave of Court provided that all parties agree to do so.

The parties in this case are the *Estate of Milton I. Schwartz* (the "Estate") and the *Dr. Miriam & Sheldon G. Adelson Educational Institute* (the "School"). With regard to the Estate, the Estate's Executor must be physically present with trial counsel. With regard to the School, a member of the School's Board of Trustees and/or Executive Board with authority to fully settle the case and the School's trial counsel must also be physically present.

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Confidential settlement briefs must be submitted at least five (5) business days before the settlement conference. The briefs should be no more than ten (10) pages in length and must address each of the following issues, if applicable:

1. A brief factual statement regarding the matter;
2. The procedural posture of the case including any scheduled trial dates;
3. The strengths and weaknesses of each parties' claims;
4. The settlement negotiations that have transpired and whether the parties have engaged in any prior mediations or settlement conferences and the identity of the mediator or prior settlement judge;
5. The dates and amounts of any demands and offers and their expiration date(s);
6. Any requirements of a settlement agreement other than a release of all claims for the matter and a dismissal of all claims;
7. Any unusual legal issues in the matter;
8. The identity of the individual with full settlement authority who will be attending the settlement conference on behalf of the party; and
9. Any insurance coverage issues that might affect the resolution of the matter.

The Confidential Settlement Brief must be submitted to:

Ileen Spoor
Senior Judge Department, Phoenix Building
330 South Third Street, 11th Floor
Las Vegas, Nevada 89101
(702) 671-4607

DATED this 17th day of October, 2016.

DISTRICT COURT JUDGE

Respectfully Submitted By:

SOLOMON DWIGGINS & FREER, LTD.

Alexander G. LeVeque, Bar No. 11183
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Telephone (702) 853-5483

Attorneys for the Estate

Approved as to Form and Content By:

KEMP, JONES & COULTHARD, LLP.

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3800 Howard Hughes Parkway, 17th Floor
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Telephone (702) 385-6000

Attorneys for the School

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EXHIBIT 3

Alexander LeVeque

From: Randall Jones <r.jones@kempjones.com>
Sent: Monday, October 17, 2016 5:30 PM
To: Alexander LeVeque; Alan Freer
Cc: Dave Blake
Subject: RE: Adelson School

Great, and agreed.

J. Randall Jones

From: Alexander LeVeque [mailto:aleveque@sdfnvlaw.com]
Sent: Monday, October 17, 2016 5:27 PM
To: Randall Jones <r.jones@kempjones.com>; Alan Freer <afreer@sdfnvlaw.com>
Cc: Dave Blake <d.blake@kempjones.com>
Subject: RE: Adelson School

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Ok, I will reach out to Stu's assistant tomorrow with those dates. Is it a fair assumption that both sides would split the costs of mediation?

Thanks,

Alexander G. LeVeque
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www.linkedin.com/company/solomon-dwiggins-&-freer-ltd-

SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

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From: Randall Jones [mailto:r.jones@kempjones.com]
Sent: Monday, October 17, 2016 5:24 PM
To: Alan Freer; Alexander LeVeque
Cc: Dave Blake
Subject: RE: Adelson School

Guys,

I have been given the following dates that Mr. Adelson is currently available: November 15, 16, 17, 18 or 22 and December 15 and 16.
As you might expect, his calendar fills up quickly so the faster we can lock in one of the dates the better. I will leave it to you to talk to Stu Bell if that's okay. I would also ask that you all agree to accommodate Mr. Adelson's daily schedule for the start time. Due to business dealings in the far east Mr. Adelson stays up late into the night working. We would like to start the settlement conference no earlier than 11:00. If that schedule can be accommodate I believe it would help facilitate the process. If you want to get started earlier with Stu to better use the day I also have no problem with that, but I am fine if both parties arrive at 11:00 as well.

I look forward to hearing from you.

Regards,

J. Randall Jones

From: Alan Freer [mailto:afreer@sdfnvlaw.com]
Sent: Monday, October 17, 2016 4:10 PM
To: Randall Jones <r.jones@kempjones.com>; Alexander LeVeque <aleveque@sdfnvlaw.com>
Cc: Dave Blake <d.blake@kempjones.com>
Subject: RE: Adelson School

Sounds good. Thanks Randall.

Alan D. Freer
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(702) 853-5483
(702) 589-3555 (direct)
(702) 853-5485 (fax)

SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

From: Randall Jones [mailto:r.jones@kempjones.com]
Sent: Monday, October 17, 2016 4:03 PM
To: Alexander LeVeque; Alan Freer
Cc: Dave Blake
Subject: Adelson School

Alex and Alan,

I was finally able to reach Mr. Adelson today. He is willing to personally participate in the settlement conference. He is also agreeable to use Stu Bell as the mediator. As you might expect, his schedule is quite full. He told me he thought he may be able to do the settlement conference in mid-November. I have a call into his secretary now to get as many dates in November and even December as possible to provide to you and Stu Bell. I have no idea what Stu's calendar looks like, and hope that Mr. Schwartz's calendar is flexible so we can get an agreed upon date. I will be in touch as soon as I get dates from Mr. Adelson's office.

Regards,

J. Randall Jones

Kemp, Jones & Coulthard, LLP
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
E-Mail: r.jones@kempjones.com

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of MILTON I. SCHWARTZ, Deceased.	Case No.: 07-P061300 Dept. No.: 26/Probate

REPORTER'S TRANSCRIPTION OF PROCEEDINGS

BEFORE THE HONORABLE JUDGE GLORIA J. STURMAN

DEPARTMENT XXVI

LAS VEGAS, NEVADA

THURSDAY, JANUARY 10, 2019

9:50 A.M.

RECORDED BY: KERRY ESPARZA, COURT RECORDER

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LAS VEGAS, NEVADA; THURSDAY, JANUARY 10, 2019;

9:50 A.M.

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P R O C E E D I N G S

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MR. FREER: Good morning, Your Honor. Alan Freer, Alex LeVeque, and Dan Polsenberg on behalf of Milton -- or the estate of Milton I. Schwartz and Jonathan Schwartz.

MR. JONES: Randall Jones and Josh Carlson on behalf of the school.

THE COURT: Okay. We have three different issues going on, and I think we have to take them in a specific order. The first one is the equitable issues, the second one is the motion to retax, and the third one the motion for relief (indiscernible).

So starting with equitable issues, and I think we have to take them separately because they are such discreet issues. So equity.

MR. FREER: All right. So with respect with the equity, Your Honor, I did have an issue just to avoid ping ponging back and forth. The school's the petitioner with respect to compelling the distribution of the bequest. We're obviously a counter-claimant, and so I'm just trying to figure

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out in terms of rebuttal and reply, who's movement -- who's the movement, who gets the last word, and I'll look to you for some direction on that.

THE COURT: Right. Because the -- the estate filed the briefs on the equitable claims -- because as we kept saying through this whole thing, the jury has to make these findings of fact, but that's not the end of this -- of the analysis. And so now that we have the jury's findings of fact, now we go to what does that mean?

MR. FREER: What do we do?

THE COURT: Yes. So the jury made very specific findings of fact, which was the -- which we now have to use to interpret this will.

MR. FREER: So I guess with that all, I'll just jump in and proceed on behalf of the estate.

THE COURT: Right. So the issue with respect to -- there's those two things -- two different parts of what you're asking for. The first is what happens to the $500,000?

MR. FREER: Correct.

THE COURT: Their assumption seems to be they get it. Your assumption seems to be, you know --

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MR. FREER: It's lapsed or rescinded.

THE COURT: -- it's lapsed. The second one is this other equitable argument. The other equitable claim, which was to refund the gifts. Was that --

MR. FREER: Lifetime gifts, yes. So --

THE COURT: I'm going to assume that was always in here.

MR. FREER: Yes. It was --

THE COURT: I only remembered the thing about the will.

MR. FREER: It was claim six on the --

THE COURT: Okay. Right.

MR. FREER: So --

THE COURT: I trust you guys. That the issue of -- that this was a mistaken belief that all these gifts were made on the same mistaken belief.

MR. FREER: Yes.

THE COURT: Okay.

MR. FREER: All right. With respect to the bequest, Your Honor, ample law and evidence, the jury verdict, the findings therein support the denial of the school's petition to compel distribution. Your Honor already stated that that main reason was to determine what Milton's intent

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was and whether he intended that bequest to be made only to an entity bearing the name Milton I. Schwartz Hebrew Academy.

The jury came back with responses to questions eight and questions nine. Basically question eight was that the -- made a determination that Milton intended the bequest only to be made to a school known as the Milton I. Schwartz Hebrew Academy and not the Adelson Educational Institute. And with respect to question number nine, the school -- or the jury found that the reasoning for that bequest was based on the belief that he had a naming rights agreement.

The jury findings on both of these are supported by the overwhelming and uncontroverted evidence with respect to Milton's belief that he had such an agreement. Start with Milton's words directly in Trial Exhibit 134 where he states, "Affiant donated $500,000 to Hebrew Academy with the understanding that the school would be renamed Milton I. Schwartz Hebrew Academy in perpetuity." You also have Milton's statements in Trial Exhibit 116A where he said, "I raised a million dollars, the half a million I gave, and they agreed to name the school Milton I. Schwartz Hebrew Academy in

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perpetuity."

Everybody involved in the transaction testified that Milton understood that this was to be Milton I. Schwartz Hebrew Academy in perpetuity. We have testimony from the board members we cited, including Lenny Schwartz and Roberta Sabbath, even Tamar Lubin admits that there was an agreement between to school and Milton. This belief that Milton had was reinforced by the various documents --

THE COURT: I -- we don't need to hear all of this --

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MR. FREER: That was introduced at trial. So now we get to the issue of with respect to the findings that the jury made, and the outset is that we requested two remedies with respect to them. The first remedy being that -- well, the overall issue and import when the Court does this remedy is what did Milton intend. We know that now from the jury's findings, and the two remedies that we requested is construction and lapse or mistake and rescission with respect to this bequest.

And as to the construction remedy, we've cited numerous cases over the years in all these trial briefs, pretrial and post-trial briefs, that

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the Court has the ability to construe a bequest and declare a lapse where the testator's intent has been frustrated, and under the consensus of common law, we've shown those. And we've shown examples of where the bequest has lapsed with examples such as, not only dying, but corporation ceasing to exist or the donor's intent been thwarted by an act of total abandonment. So as a general matter with respect to this, where the event or conditions occurred or not occurred, that thwarts the intent, and as the jury found, the intent is the school be named Milton I. Schwartz Hebrew Academy in perpetuity, the jury finding would support the remedy for this Court to construe paragraph 3.2 and declare the bequest as lapsed.

With respect to -- additionally as a counter or an alternative is our third claim for relief is that the Court can declare that the bequest is void or rescinded due to mistake. And we've been citing for years now the Monzo case that Your Honor heard for the proposition that with respect to unilateral gift or with a donative gift, a unilateral mistake can be rescinded. Again, there is ample evidence that Your Honor is well aware of after sitting through the trial that jury -- and

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jury findings number nine would support the remedy that the bequest is void or rescinded by reason of unilateral mistake because Milton believed that the Milton I. Schwartz Hebrew Academy would be named after him in perpetuity, and they had an agreement as such. The fact that he didn't have an enforceable agreement based on the jury's finding constitutes the ground for the unilateral mistake.

Now with respect to the lifetime gifts --

THE COURT: I don't want to go -- I don't want to go on yet. Okay. So --

MR. FREER: All right.

THE COURT: -- we have the take the factual findings as the jury made them and interpret the language of the will. So let's talk about the language of the will. So paragraph 2.3, "The Milton I. Schwartz Hebrew Academy I hearby give, device, and bequeath the sum of $500,000 to the Milton I. Schwartz Hebrew Academy (The Hebrew Academy)."

And the conclusion of that paragraph -- and it talks about how this was supposed to first go to reduce the mortgage. "In the event the lender will not release my estate" -- blah blah blah -- "the gift shall be given -- no gift shall be given to the Hebrew Academy. In the event that no mortgage

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exists" -- and this is the -- the situation because at the time of his death, I believe there was no mortgage.

MR. JONES: That is correct, Your Honor.

THE COURT: It had been paid off by the Adelsons. "In the event that no mortgage exist at the time of my death" -- which is the situation we have here -- "the entire $500,000 amount shall go to the Hebrew Academy for the purpose of funding scholarships to educate Jewish children only."

So the findings as the jury made them -- we know as a matter of fact there was no mortgage at the time of his death, so we have to look at that last clause, which is that "in the event that no mortgage exists at the time of my death, the entire $500,000 amount shall go to the Hebrew Academy for the purpose of funding scholarships to educate Jewish children only." If you read that paragraph in connection with jury answers eight and nine that Milton intended the bequest he made only to a school known as the Milton I. Schwartz Hebrew Academy for purposes set forth in the bequest, that's what they chose, that he intended it only to go to a school known as a Milton I. Schwartz Hebrew Academy. And question nine -- and their point being well, there

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was at the time of his death, his name was on the lower school building, but if you read question nine, "Do you find that the reason Milton Schwartz made the bequest was based on his belief that he had a naming rights agreement with the school which was in perpetuity? Yes." And that is significant because their first answer is he didn't have a naming rights agreement.

MR. FREER: Right. But he believed he did.

THE COURT: He was in error about that. He -- that's why he did it. He believed he had a naming rights agreement, and so that is why he did what he did.

MR. FREER: Correct.

THE COURT: And so the net of that as a matter of law is that where your testator makes a gift that is based on a false understanding, a false impression, or a false belief of -- then it would be void because he never intended this to go to anything other than a school named after him in perpetuity.

MR. FREER: Correct. That is -- that is the basis and our recommendation that this Court find based on those findings.

THE COURT: Okay. So now we can go on to

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the inter vivos gifts because I don't understand how those two things interrelate.

MR. FREER: So the inter vivos gifts constitute a separate claim.

THE COURT: I know but I'm -- I'm trying to -- I just don't understand how the jury findings relate to the inter vivos gifts because they weren't asked about anything about what he did during his life.

MR. FREER: They weren't, but we're still left with that claim because it was an equitable claim for Your Honor to determine, so we brought --

THE COURT: Right.

MR. FREER: -- this -- this is a post -- this is basically a request for this Court to determine the equitable claims in front. So Your Honor is the one that makes the findings and the conclusions based on those inter vivos gifts.

So with respect to those inter vivos gifts, we outline -- hang on one second. Let me turn to my outline here. We raised those -- the claim for the rescission of those inter vivos gifts in our sixth claim for relief and in the underlying petition, and the basis for that is the same issue of unilateral mistake. Because at the time Milton made the

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$500,000 donation, at the time he made those donations during his life, he made those donations under the belief, mistaken now that the jury has come in with its finding, that he had a naming rights agreement. And as all the evidence pointed out at trial, he made that with the understanding that that would be made -- that the school would be named after him in perpetuity, and for those situations where for those years where there was not any kind of naming right, he didn't make any gifts, and that was presented in the testimony of Susan Pacheco, and it was also in Trial Exhibit 62 and Exhibit Number 9. So our request as part of this is to refund those bequests or those lifetime gifts that he made because those also operate under the mistaken -- the unilateral mistake that he did when he had the donative -- when he made those donative transfers.

THE COURT: Okay. So that's the time period -- if you look at your chart, 1989 he made the $500,000 gift, 1990 he made $9,000, nominal amounts $150.69 in '91, '92, then he has the break with the board.

MR. FREER: Right.

THE COURT: '93, '94, '95, '96.

MR. FREER: '96 we get in with the Roberta Sabbath letter inviting him back.

THE COURT: So '96 is the Sabbath letter, and he comes back and the next year he gives 2,100.

MR. FREER: Correct.

THE COURT: 2,500, 2,600 -- I'm -- beg your pardon -- then 22,000, 26,000 and various other dollar figures --

MR. FREER: Until it starts ramping up significantly in 2003, '04, '06, and '07.

THE COURT: That's right. Okay.

MR. FREER: And so our request under the same Monzo case is that it's a unilateral mistake. But for his mistaken belief that he had a naming rights agreement, he wouldn't have made those donative gifts, and it's an especially true with respect to the $500,000. I mean, you heard for several days at trial everybody that was involved in that transaction, he thought and he made that money -- he made that gift on condition that it be named after him. Roberta Sabbath testified that was extremely important to him, the fact that the school be named after him in perpetuity and formed a basis for the transaction. So if that understanding and that mistaken belief, that he had enforceable naming

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rights agreement, permeated every single donation he made throughout the entire thing, there isn't any evidence that was presented that he never varied from that donative intent.

THE COURT: But, I mean, so he makes the initial gift. He thinks he's got this naming rights agreement. He has the falling out. He's already made those gifts, the three -- 1994, '95 gifts. He's already made those gifts. Then he has this break and comes back and gets the letter from Roberta Sabbath. So relying on Roberta Sabbath's letter, he --

MR. FREER: He becomes re-involved and starts making gifts again.

THE COURT: Starts making new gifts. So I'm just trying to understand how we can go all the way back to his initial $500,000 and say that was a mistake. I mean, he made that gift and --

MR. FREER: Because it was conditioned on the belief that was school would be named after him in perpetuity. That's the -- that's the unilateral mistake.

THE COURT: But --

MR. FREER: He didn't --

THE COURT: -- he never pursued getting it

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back. I mean that was 1989, and he leaves the school, and he doesn't say anything to anybody about I'm leaving, and I want my money back because you're not going to keep this place named after me in perpetuity.

MR. FREER: There is testimony from Susan Pacheco that they were going to go to war, but before any of the statute of limitations ran, the school came back, offered him to rename the -- to basically reconcile, put the name back on the school and resume the relationship.

THE COURT: Right. So -- but that was 20 -- almost -- that was 30 years ago.

MR. FREER: Right.

THE COURT: How can we go back 30 years ago?

MR. FREER: It's the law of donative transfers, Your Honor. There's cases out there where you've got people making donations years in advance and name changes, and the courts basically say rescission is the appropriate remedy for those cases.

THE COURT: Okay.

MR. FREER: The fact that it occurred in 1989 doesn't matter because we didn't have until

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2018 a determination that there was no naming rights agreement, and so for him to operate all those years with the understanding that he had an enforceable naming rights agreement, only to determine after his death that that was a mistake, a mistaken belief, that's what constitutes it. And we're talking about something in equity here. So --

THE COURT: Okay. Well, but where is there anything that tells us -- the will tells us, I device and bequeath to Milton I. Schwartz Hebrew Academy this amount. Okay. Fine. Where is there anything in writing that tells us I only made this gift of $500,000, $100,000, $69.99 because I believe that this school is named after me in perpetuity? I mean, I'm just not understanding of --

MR. FREER: Where --

THE COURT: I'm not understanding how his pattern of gifting is --

MR. FREER: Okay. So where we have in writing is his affidavit.

THE COURT: Uh-huh.

MR. FREER: Where he says, "Affiant donated $500,000 to the Hebrew Academy with the understanding that the school would be named Milton I. Schwartz Hebrew Academy in perpetuity," and

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that's in Trial Exhibit 134. And then also the video clip, which is Trial Exhibit 116A, "I raised a half million dollars. The half million I gave, and half a million -- and I -- the half a million, and I gave half a million, and they agreed to name the school MISHA in perpetuity." He was operating under that belief at the time he handed them the $500,000. That's also what Roberta Sabbath testified to, that there was a gentleman's agreement that the school be named after him in perpetuity, and that in perpetuity language for the naming of the school was very important to him.

I think that evidence constitutes clear and convincing evidence that but for the mistake, he would not have made that donation.

THE COURT: Any of them? Any of them? The $1,110,606.66 that he made over a period of twenty years?

MR. FREER: Yes. Because what we have is we have data points. We don't have -- you know, and this feeds into the straw man argument that the Adelson school raises is their position is in order to satisfy the clear and convincing evidence burden, you would need basically akin to a sworn affidavit every time you made a donation that he was doing

this only because of the mistaken -- of his belief that he -- it was named after him in perpetuity. Obviously, that's an improbable standard. But if you do look at some of the cases cited by Monzo in the supreme court, there are two cases where those cases cited with approval the Court talks about or those courts talk about instances where a clear and convincing evidence standard was met.

And the first one where that standard is met -- hang on one second. The first case cited by Monzo is that *Gereraux versus Dobyns* case and there the Court found clear and convincing evidence based on evidence that the purpose and the understanding of setting up that trust was not met, which was tax -- was for tax effect --

THE COURT: Okay.

MR. FREER: -- and it was based on evidence of testimony of the donor, that after-the-fact, that was her understanding, that's why she set it up, and so based on that testimony only, the Court ended up saying that was clear and convincing evidence.

The second case was *Twyford versus Huffaker*, and there the Court said clear and convincing evidence of mistake also was by the way of the grantor's testimony, and so here what we've

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got is --

THE COURT: Our grantor is dead.

MR. FREER: Exactly. But the difference is we've got an affidavit after-the-fact saying, "That was my understanding when I did it." We have a video of him a year before he died saying, "That was my understanding when I did it."

THE COURT: Okay.

MR. FREER: You also have data points along the way that we showed during trial. The fact that he made the bequest in his will showed that he was operating under the same mistaken belief. So in the same year that he's making the bequest in the will in 2004, he's also donating $135,000. We also showed that same intent when he did the codicils to that in 2006. He donated a hundred thousand dollars with respect to that. So that's where our data -- that's where the evidence comes in. We feel that that's clear and convincing evidence with respect to those.

MR. JONES: I guess you've heard this both in jury trial, you've heard argument before trial. I'm going to start at the most basic level, procedural law. And I think you pointed this out. They did not raise these issues in Rule 50 motion,

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and they can't raise them under Rule 52(c). They did not raise these issues at trial. They did not raise these issues at trial. They cannot -- in the supreme court -- you want to talk about being clear -- the supreme court has told us without equivocation that if you don't raise an issue at -- a Rule 50 motion or an issue during trial, you cannot then try to get a do-over after-the-fact. So that's the procedural status that we're in right now.

The next issue, clear and convincing evidence. The burden is on them. Period. End of story. You could talk about data points. You can talk about well, we think this is what it means, but there is no evidence -- bless you. Well, I'll split it into two, Your Honor. I don't know if you -- if this makes sense to you, but you raised the issues, so I want to address it. There's the -- the pre-1993 time period, and then there's the post-1993 time period.

In the post -- I'm going to talk about the post-1993 time period first. So -- bless you. After-the-fact -- after he get booted out of the place, his name comes off the corporation, his name comes -- is never on the building because we know

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that Dr. Lubin's name was on the building. That original building. So -- so he knew at that point his name is not there. And so from that point forward he gets a letter, and the letter in 1996 -- I believe you're right, it was -- it says, hey, we're going to do this stuff. It doesn't say anything about in perpetuity.

We know he's a meticulous guy from his son and his -- his former secretary. He documents everything. He's a smart -- he's smarter than his own lawyers. And he goes forward, he makes these gifts. As you point out, some of them are as small as $50, and they have the burden of proving each and every single one of those gifts not by some presumed data point you can infer something.

They have a high -- the second highest burden of proof that we have in our system. Clear and convincing evidence. They have utterly failed to abide by that burden assuming they can get over the hurdle of the procedural flaw in their position. Utterly fail. They have never shown this Court that -- Mr. Schwartz never did it in a video, he never did it -- his -- in fact, I'd point out Ms. Pacheco acknowledged that initially she said in her deposition she destroyed all the back up

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information, so we have on top of it a spoliation issue. As you know during the trial, they tried to bring it in and say, well, here it is, and you're refusing to look at it. Well, of course, I was refusing to look at it because I had a right to because it prejudice me to not have been able to investigate that information.

So they have utterly failed at every step of the way as a matter of law and as a matter of fact of testimony and evidence to prove that there was a specific testator intent that every single bequest, each one, needs its own support by clear and convincing evidence that it was intended. In other words, the only reason he gave $50, Your Honor, is because he thought his name was there in perpetuity. No. So for procedural reasons they lose; for factual reasons they lose; for the burden of proof they lose.

Now I want to talk about pre-1993 time period. We have the testimony from Mr. Schwartz in the video where he said, I gave that $500,000. That's the only amount that he says that he gave for naming rights. And we also know it's incredibly ambiguous as to whether that was in perpetuity or not because different documents that the supposed

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man who was meticulous about his documentation as it relates to in perpetuity -- whether it was in perpetuity or not, but let's assume for argument's sake, which I believe is improper for a clear and convincing evidence standard to do, and let's just ignore the burden of proof for a moment and go to the point you made.

Here's a man who is a litigious person by his own testimony and by his son's testimony is a litigious person. And as you point out, and I'm glad you did because I was going to bring it up, in 1993 he's booted out of the place. He's given his $500,000. His name comes off of the building or excuse me -- off of the corporation. It's gone. He's excised from or exercised from the -- the school and anything to do with it, and his name was never on the building that point. And he sued over control for the board, but he never raised the issue of rescission of his gift. Never said, I want my money back because you breached a contract with me, and there's nothing in the record that suggests that he was ever intending to do that.

Ms. Pacheco's hearsay testimony to that effect is well, they were going to sue. What were they going to sue for? She couldn't tell you what

exactly they were going to sue for. She couldn't tell you. She couldn't tell the jury. She couldn't tell anybody. And there's no evidence of what, if anything, he ever intended to do about that. What we do know -- the facts we do have is what he did, and we know he was aggravated enough to file a lawsuit, but he didn't include that.

So how in the world could you say -- can -- can the estate say, we have met our burden by a clear and convincing evidence that he was only going to -- had only made that gift as long as his name remained on the corporation or the school or something. Because when it was put to the test, he didn't do it. That is evidence, direct unchallengeable evidence of a contrary intent, of an intent that he still wanted to give to the school.

And I would just raise this one other point, Your Honor, that there was testimony from multiple witnesses, including his own son and Ms. Pacheco, about his love for the school and how much he wanted to take care of that school, how much he was for supporting education of Jewish kids. So there was evidence in the record of an ulterior motive for his gifts, and no evidence when given the opportunity for three-plus years to sue to get his

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$500,000 back. The evidence shows he chose not to do that when he was still -- was motivated enough to do something by suing for other reasons.

So the burden of proof is on them. They have utterly failed in it. They have failed the procedural test here as well under Rule 50 and Rule 52(c). So, Your Honor, and I would actually suggest the Court based upon the actual testimony we have from Mr. Schwartz, his son, and Ms. Pacheco that would be a travesty to now after 30 years, 30 years -- now we're 2019, 30 years to take a half a million dollars or a million -- over a million dollars is what they really want, but even a half a million dollars. It would be a travesty of justice to then come back 30 years later and say, oh, we're going to take $500,000 away from this school that is serving the purpose that Milton Schwartz said he was interested in, which was promoting Jewish education.

And I know it sometimes get overlooked because we -- the school has an unbelievable benefactor as we all know. So I think part of their strategy is well, look, they got this super rich benefactor and what is that to him? He'll just make it up. That is -- if -- if that's the -- so underlying or undercurrent of -- of argument here,

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that is disturbing to think that it's not a big deal for the school because they also have right now a very wealthy benefactor, and we would implore this Court not to listen to this argument and take away any amount of the money including the half a million dollars that Mr. Schwartz gave without them satisfying their obligations under the law.

THE COURT: With respect to the gift, the inter vivos gifts and how the jury's findings effect that, you know, I understand that part now, but the interpretation of the will, I think we always talked about the fact that the jury had to make its finding, but the Court still had to interpret the will. I thought we always understood there was going to be post-trial motion on the will.

MR. JONES: We -- we had some disagreements about that, Your Honor, legal arguments, but you made a ruling and that's what we have to live with and both sides have to live with your ruling, and so that is my understanding of what your ruling was, and so with respect to that argument and so alluding to the $500,000 bequest --

THE COURT: Right.

MR. JONES: -- I'm not going to belabor it. You've heard these arguments more times than you

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probably care to hear. The argument is pretty simple and straightforward, so I'll just make it quickly.

Here's the -- the -- the point and you are the person who makes the call. As to the $500,000, at the time that Mr. Schwartz died, Milton Schwartz died, the school was named -- the building was named the Milton I. Schwartz Hebrew Academy. There's no dispute about that. At the time he died, the corporation was named the Milton I. Schwartz Hebrew Academy. There's no dispute about that. It changed about three, I think, or four months later. Actually about four months later as I recall. So I -- I understand their argument. Well, it did change, and so when they -- you changed it even though he had died at the time back, you know, in August or whenever it was, it still was changed later, and you can't do this sort of bait-and-switch on us assuming that's what the intent was, which we just don't believe that, but that's sort of their argument.

So here's the other side or the other point of that argument, one of the things that Mr. Freer said is that the gift has lapsed. That's actually contrary to Jonathan Schwartz's sworn testimony.

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Cause I cross-examined him on this point. The gift has not lapsed. He said -- cause remember the IRS, they got the deduction, they cannot have lapsed, and so I said, so what are you going to do. You going to give it -- you're going to create a school called the Milton I. Schwartz Hebrew Academy and give it to them? Well, no, but we'll figure out something to do with it.

So here is the question, this is really what it gets right down to it, the estate got a tax write-off for the $500,000. The trustee of the estate -- the executor of the estate has admitted in open court before you that they have an -- an absolute obligation to give that money to somebody because they got the tax write-off and it's all -- all a done deal, and that they're going to give it to someone, somewhere. So then question becomes -- and by the way, I could talk to you about the law, about interpretation of charitable gifts and the liberal nature of that and the intent and -- and I would just point out, Mr. Schwartz himself testified in video how much he loved Jewish education for Jewish kids. His son testified that was a driving force in his life. So this doesn't go to the school inevitably. This goes to scholarships for Jewish

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kids at that school.

So the question then this Court has to grapple with is -- so should the Court take away that gift that's going to go -- theoretically, it's going to go somewhere. There's no school that's named the Milton I. Schwartz Hebrew Academy, and Mr. Schwartz, Jonathan Schwartz, could not tell this Court where he was going to give it, but he promised the Court under oath that he's going to give it to somebody because he had to. What is the most appropriate equitable resolution to that conundrum. To give it in trust to the school for strictly for the purpose of scholarships to Jewish kids for Jewish education. In light of his clearly expressed intent to promote Jewish education.

And I would submit to the Court that the equities, because that's what they're asking for here, the equities unquestionably favor putting it in trust for education of Jewish kids as Mr. Schwartz intended especially based upon all of the ambiguities that have arisen here that were a result of Mr. Schwartz and -- and how he wrote out the will. We all know he thought he was a lawyer -- he actually thought he was smarter than lawyers, and he may have been, but he has to live -- and I don't

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say this disrespectfully -- and died by the terms that he chose to put in his will.

So you get to make that call, Your Honor, but I think that that's the most appropriate equitable thing to do, doesn't go to the school, not going to go to operations, it's going to go to some kids somewhere, theoretically or actually -- actually for Jewish -- to promote Jewish education.

THE COURT: Thank you.

MR. JONES: Thank you, Your Honor.

THE COURT: Briefly.

MR. FREER: Briefly, Your Honor. With respect to the argument that there's some type of procedural flaw, this is all the -- what we're dealing with right now is the equitable proceedings. This isn't any kind of post-trial motion based on what the jury findings were. That's the other motion that we're going to hear in a moment. This is all the Court's equitable considerations the Court has to make, and so there aren't any 52, 50, 49 proceedings here. This -- this is the proceeding. Your Honor heard -- heard the -- heard the evidence and now you're making your decisions.

With respect to their argument that he didn't raise the issue of the naming right in the

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litigation that occurred in '92, '93, the issue was they were trying to determine who was going to control the board. If he won that case and controlled the board, he could buy -- he could rectify the problem that he had. And if Your Honor would recall, that litigation ended up terminating shortly thereafter and which then followed with the '96 letter. And now the '96 letter, if you recall, Roberta Sabbath testified that her use of the language in that letter of -- having a testament and being -- and always being something to remember, it essentially equated with the words perpetuity and the idea that it would be in perpetuity. And you saw after that letter that the school did go back, and amend the bylaws to, again, be in perpetuity. So the fact that that occurred, the lawsuit occurred, and had we had the resolution is of no import with respect to that.

With respect to the lifetime gifts, if Your Honor recalls, Ms. Pacheco did find the documentation. It's not a spoliation issue. It's just that the Court said that it could not be admitted.

However, there are other evidences of the gifts. If you look at Trial Exhibit 112 and 113,

those show direct evidence of the gift of $500,000. And then you also have admissions by the school that they received the money from Milton Schwartz. If you look at Trial Exhibit 536A, it's a gala brochure recognizing a gift of $50,000 -- at least $50,000 by Milton Schwartz. You also look at Trial Exhibit 149, the school acknowledges his generous support. So the school has all these records of charitable donations. No point during this litigation even though that table was included at the very beginning of the petition filed in 2013, at no point has the school ever came back and challenged the numbers set forth. They have the records. They've never said that there is any differing amount from what was said with Ms. -- by Ms. Pacheco.

Now --

THE COURT: Anything else?

MR. FREER: Yes. When we're talking about fairness. What's more disturbing than the assumption that we're just after money because there's a deep pocket is you remember everybody involved in this transaction thought there was a deal. It wasn't until after he died that they did the bait-and-switch, they changed the name, and

that's were the equities lie, and this Court needs to rectify that equitable prong. And it can do so by holding that that gift lapsed or that the unilateral mistake occurred with respect to the will and by refunding the gifts.

THE COURT: Thank you. Okay. I'm going to grant this motion in part and deny it in part. We have always discussed that eventually we were going to have evaluate the will. I do think that the jury's findings on the will -- because the jury's findings were very specific to the will, indicate that Milton only intended the money to go to a school named after him in perpetuity. This one wasn't. The jury found that. And there was never an enforceable agreement. He never had an enforceable agreement. He believed he did. He didn't.

So his gift to the school -- and you have to read the second -- the last sentence of this paragraph -- of this -- paragraph 2.3 of his will, "In the event that no mortgage exists at the time of my death" -- and none did -- "the entire $500,000 amount shall go to the Hebrew Academy for the purpose of funding scholarships to educate Jewish children only." There is no Hebrew Academy.

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Therefore, the gift -- well, at the time of his death, technically, the Milton I. Schwartz Hebrew Academy did exist; however, it no longer exists and that's the problem. He never had an enforceable agreement that it would be that way in perpetuity. That's the only reason he made this gift. So whether or not there was an entity at the time of his death that still had his name and later changed, isn't the point. The point is he wouldn't have made this gift if he didn't -- if he knew that his name -- if he didn't have an enforceable naming rights agreement, and he didn't. He just clearly didn't.

However, I have I agree with Mr. Jones in part and that is that very clearly this gift is intended to fund scholarships to educate Jewish children, and I think Mr. Schwartz acknowledged that on the stand. It was claimed that way on the IRS return. It has to go to that. So it begs the question, where does it go? It has to go somewhere to fund scholarships for Jewish children.

MR. FREER: And as we represented in court when Mr. Schwartz testified, they're -- the family's all in agreement that this was going to go towards such scholarships and also with the caveat that

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those honor Milton Schwartz's legacy. That's what the whole purpose of probate administration is. We'll be back in once they identify who the benefactor is --

THE COURT: Okay. But --

MR. FREER: -- or who the beneficiary is.

THE COURT: I do not see that the same agreement goes to these inter vivos gifts at all. The jury -- I was not asked to consider whether that same naming rights belief applied to his inter vivos gifts, and I have to agree with Mr. Jones, I think that the evidence is to the contrary. He had a chance to sue to get the money back, the original founding $500,000, and he didn't do it. He never did it. He never sought to get that money back. Whether he came back in some sort of alliance that the school was going to have his name on it, he never again stated, I'm doing this because it's named after me in perpetuity. I don't recall the evidence that way. He continued to give money. Yes, his name was on the school. He may have believe he had an enforceable naming rights agreement, but he never conditioned any gift. He never conditioned a gift on that incorrect belief ever. So I just -- I don't see that the inter vivos

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gifts can be interpreted the same way at all.

The will is very specific and the will states the intent of, and it was -- he was wrong about his belief, but the will says it's intended to be because it's named after me. None of these other gifts ever said, I'm giving this because I believe this is named after me. It just isn't in the record.

So for that reason, I'm going to grant the motion in part and deny it in part. I'm granting the equitable claim as to the $500,000. The -- it does not go to the school. I -- the -- for -- I think the point Mr. Jones was making, it doesn't go to the school as a gift to the school. It is clearly intended to be a scholarship fund, and it has to be a scholarship fund in the amount of $500,000. Where they set that up, you know, I don't know that that can be interpreted as only being at this particular school. It's a school. It's intended to benefit the education of Jewish children, and that's all he said.

So moving on then to the other issue, which is the post-trial motion on the -- basically the --

MR. JONES: Well, Your Honor, you said you might want to talk about retax and cost before we

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get to the final motion. Whatever -- I don't care. I just thought that that's what you said the order you wanted to do it. Motion to retax before we did the final motion on there. It doesn't matter to me.

THE COURT: Okay. Well, we can do retax if you want. I -- I -- but I think that if we talk about the motion to retax, then I guess that just kind of -- the first question is: Who won?

MR. JONES: And if you want to take the other motion first, I just thought -- what I thought I heard you say but --

THE COURT: Yeah. Well, that's the order they were filed in. So the issue on the motion to retax cost, and I will say because having dealt with Mr. Jones's firm a number of times, we've had this discussion go around and around. If anybody documents their files in a way that *Cadle versus Woods Erickson* could never dispute, it's Mr. Jones's firm. They exhaustively document their costs. So, I mean, there may be some issues that we can address, but my first question is: Who won? I --

MR. FREER: And I think that needs to be briefed, Your Honor, now that you've made the ruling with respect to --

THE COURT: I mean, they timely filed it,

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that's -- after the jury's verdict, they had to do it, they timely filed.

MR. FREER: They timely filed, and we had to timely file our motion to retax after they did that, and the whole point of our motion was the Court should delay its ruling on this until determining the equitable relief, and then we can come back, especially after we file our memorandum of costs with respect to the equitable relief section, and the Court can determine who the prevailing party was and the amounts.

THE COURT: Because each side won on something.

MR. FREER: Yes.

THE COURT: So that was my -- when I read this, I was -- I was just like -- seems premature.

MR. FREER: Right. And I admit -- they were preserving their rights. We were preserving our rights --

THE COURT: Exactly.

MR. FREER: -- but I don't think the Court needs to hear that today.

THE COURT: So, Mr. Jones, on the motion to retax costs --

MR. JONES: Well, I guess I would only say

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assuming it was premature -- it's -- I don't think it is now.

THE COURT: Right. I mean, your client won on that issue, so I guess that's my question. This is maybe a Polsenberg question, who won?

MR. JONES: Well, Your Honor, I would suggest that having had that situation before --

THE COURT: Yeah.

MR. JONES: -- where I've been in cases and probably Dan has as well where both sides won one claim or a claim or two claims or whatever.

THE COURT: Right.

MR. JONES: In other words, there's a split between claim and a counterclaim as we have here, and the case law as I understand it in those situations, the Court looks at who essentially won the majority of the case if you will. The -- the -- the party that is prevailed on the most claims. And it's looked at different ways but, and maybe it's premature, you want to get briefing on it, but I guess the point I would say is here most of the claims in this case, most of the discussion and the argument and the dispute in this case was whether or not Mr. Schwartz had a naming rights contract. The equitable claim of whether or not we had the -- we

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got the $500,000 in the scholarship money was a minor -- I would restate that. I wouldn't say it was a minor claim. It was not the major issue before the Court, and it was not the issue as we --

THE COURT: Right.

MR. JONES: -- just discussed. It was tried before the jury. The vast majority of our costs are related to the jury trial. Almost no -- none of our costs are related to the equitable claim that this Court just ruled upon. And that is my understanding -- and Dan may have a different perspective on that, but that is my understanding essentially of how the Court is tasked to analyze that question when we have this situation where you have two arguably prevailing parties.

THE COURT: Right. That issue isn't brief. That's my question.

MR. JONES: Exactly.

THE COURT: I mean, it's not so much that I'm not prepared the rule these -- this memorandum of costs in the context of this jury trial. I mean, I have -- I've looked through it, and as I said, nobody does a better job at documenting their costs than Mr. Jones's firm.

MR. FREER: But the main issue is who's the

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prevailing party. We'd like the opportunity to brief that, Your Honor, and argue --

THE COURT: Because this is -- this is Mr. Jones's point is that with respect to the jury trial and the costs that were incurred in going to the jury trial, very clearly, you know, the trial support, all those kinds of things, that are all jury -- jury trial issues.

The question is then what, if any, costs are recoverable on the equitable issues and his point being only those that would be attributable to the equitable issues and this is something that, you know, I think --

MR. FREER: Well, obviously, this is the first --

THE COURT: Mr. Polsenberg may have some thoughts about --

MR. FREER: This is the first instance for us.

THE COURT: -- and so that's why I'm kind of indicating -- I don't know if we -- if we should go forward now because I do think we'd know. They --

MR. JONES: Your Honor, I'll make this simple. If that's what the Court is inclined to do,

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we don't need to belabor it. If the Court wants briefing on that, we'll -- that's fine.

THE COURT: Yeah, 'cause it's kind of, like, how much would be -- and that's what got me thinking is, like, who won, and if both sides win, what do you -- what do you get to recover? So I don't know if Mr. Polsenberg wants to be heard on that, but I -- I do think --

MR. POLSENBERG: No.

THE COURT: -- it probably needs to be briefed. I do think it probably needs to be briefed.

MR. POLSENBERG: I agree.

THE COURT: That was kind of what I thought when I looked at it is --

MR. FREER: I guess the only response I'd have is if you look at questions eight and nine, those were the direct issues that the jury determined, the Court prior in its order denying judgment said that the ultimate issue of fact to be heard by the jury with respect to this is what Milton intended at the time he executed the will. So that was part and parcel of the jury --

THE COURT: Right. Okay.

MR. FREER: -- and so we can brief that,

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Your Honor.

THE COURT: Okay. So I -- I do think that -- that's the issue is --

MR. JONES: That -- that's fine, Your Honor. The only point I would have is that Mr. Polsenberg just proved his own point by saying that he's the only one that argues longer than me when he only stood up and said no, and so I would just make the record --

THE COURT: But the --

MR. POLSENBERG: He's right.

THE COURT: But the point is that there is case law out there that says a -- and in this case the -- technically would be the defendant -- doesn't have to recover money damages in order to recover costs. I mean, that's not a factor.

MR. FREER: Right. But I --

THE COURT: The defendant is entitled to recover their costs and they -- they defended having to name a school after Milton Schwartz.

MR. FREER: Right.

THE COURT: So and they didn't.

MR. FREER: We'll brief it, Your Honor.

THE COURT: So that's not the problem. The problem is, there's -- each side kind of recovers on

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something.

The post-trial motion?

MR. FREER: The post-trial motion, Your Honor, to save everybody time, I will just briefly go through this. These are all arguments we've raised before trial, during trial, now we're raising them again after trial. Basically we assigned, you know, arguments that a new trial is warranted on the judgment, on the breach of oral contract. We outlined the prejudice that occurred, that we believe occurred because of that -- because we weren't able to emphasize the existence of an oral contract. We cite all that information.

We also request a new trial on the basis of the jury instruction with respect to modification of the contract and outline as stated in our briefs, and I'll just mention it here real briefly. The prejudice that occurred from that is it prevented us in closing argument from being able to explain to the jury how course of conduct and modification over time and the fact that in light of events that occurred after the initial formation --

THE COURT: Yeah, I'm with you up to there, but I'm not following this final part four of -- that the jury disregarded jury instructions 5, 6,

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21, 22, 23, and 28.

MR. FREER: Right. And that's our third claim so final part four of what -- I'm sorry.

THE COURT: The -- yeah, the final part of the brief, section four of the brief, page 11. And it -- it's -- and 12. It specifically relates to specific jury instructions 5, 6, 21, 22, 23, and 28.

MR. FREER: Right. Those -- so in that whole section what we did was we were requesting either the Court amend the judgment on jury verdict or a brand new trial on the basis that the jury did not follow those instructions. Our argument is that the evidence presented at trial was so overwhelming that had the jury followed those instructions, it would have been compelled to find that there was an enforceable agreement. That is what is outlined in our brief --

THE COURT: Oh, okay.

MR. FREE: -- and that's what -- we go through each one of the elements of contract because obviously the jury just came back and said there was no contract, and so we just analyzed that, and that's the basis of our motion for relief there.

We assert additional grounds for relief in the brief -- I'm going to rest on the briefness of

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those. Just make the record that I'm not abandoning those claims --

THE COURT: Understood.

MR. FREER: -- but in the interest of time.

MR. JONES: Your Honor, I definitely would ask the Court if the Court needs to hear argument -- and the reason I say that is you've heard as Mr. Freer candidly admitted, and I appreciate that, you've heard really these arguments, most of those arguments before, and I would point out, by the way, I disagree that what Mr. Freer said about Rule 52(c) does apply even to the equitable claims you have to raise those issues during trial even if it's a bench trial with the Court, and that was one of our arguments. And that -- here's -- Rule 50 clearly applies that you cannot bring up new issues on post -- post-trial that you did not argue during trial, and we point that out in -- in our brief that they are raising new issues here. The issue they raise in the Rule 50 motion was only for a directed verdict against their first claim for relief, construction of will. So and I --

THE COURT: That wasn't for the jury.

MR. JONES: That's right. That's right. And so, you know, I can go through this chapter and

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verse if you want me to. It's -- I think it's well briefed --

THE COURT: It's really well briefed --

MR. JONES: -- by both sides.

THE COURT: -- by both sides. As I said, the one that I didn't quite follow was where they had disregarded the jury instructions, and in looking at that issue on a motion, I mean, you may disagree with the conclusion they came to, but you have -- it has to be something that shows that, like, they just didn't follow an instruction, and I don't -- I mean, I don't see anything that was inconsistent in what the jury verdict came out with, I mean.

MR. JONES: And just as further support of that provision, Your Honor --

THE COURT: They just -- they initially started out, there is no naming rights contract.

MR. JONES: And if -- and they said no, which included a no written naming rights contract. We know, as Mr. Freer said in opening statement, if we had a written contract, we wouldn't be here today. That's almost a verbatim quote.

THE COURT: Right.

MR. JONES: And Mr. Jonathan Schwartz

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testified it was an oral contract.

THE COURT: Because they were specifically asked, is there a contract, they said no. So they didn't have to answer the rest of the questions. Where was there an oral contract in -- or was it founded on writing? They didn't have to answer that. They didn't have to answer whether it was a contract in perpetuity. They -- what was the consideration? They didn't have to answer any of those because they just found there was no contract.

MR. JONES: And if there is no -- and here's the point about alteration, modification under Nevada law, and I believe this is pretty consistent across the country, you can't find a modification or alteration of an oral contract. It has to be a written contract to have a modification or alteration because the parties have to -- both parties have to agree to the express terms of the modification, alteration. It makes perfect sense. And how do you do that when you talk about an oral contract? That's why you need it in writing if you're going to argue modification, alteration. So it doesn't even apply to the facts of this case --

THE COURT: And the implied covenant of good faith and fair dealing if I'm not instructing

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on a contract, then there is no implied covenant of good faith and fair dealing. The jury didn't -- the jury didn't find a contract.

MR. JONES: That's -- I would agree with the Court on that point.

THE COURT: Okay. All right. Anything else?

MR. FREER: Disagree on the alteration, modification. We put it forth in our brief instances where course of conduct and alteration of oral contracts can occur.

THE COURT: As indicated, really well briefed by both sides, but starting from the oral contract, the statute has run on that, and so from that point on then I just -- the rest of this sequentially falls into place, and so I'm going to deny the motion for relief from judgment on the verdict. I think the jury followed the instructions very well and was well presented by both sides. So denying that motion.

MR. JONES: And the only other thing that I guess if they want further briefing on the --

THE COURT: Yeah. How do you want to do that?

MR. JONES: Prepare or --

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THE COURT: Do you want a schedule for that and a date?

MR. FREER: Yeah.

THE COURT: Because they've got five days now to file a --

MR. FREER: Should we just do a -- yeah, obviously we still need to do our memorandum of costs --

THE COURT: Right.

MR. FREER: -- and so I think --

THE COURT: And they have to do their motion to retax and whatever.

MR. FREER: So we work well together, why don't we just put a stipulation and order together --

THE COURT: Okay. Yeah.

MR. FREER: -- as to the briefing schedule.

MR. JONES: That's fine, Your Honor. We're happy to do that.

THE COURT: Okay. Thanks.

MR. FREER: Thanks you, Your Honor.

MR. JONES: We'll prepare the order for brief one and we'll (indiscernible) before we --

MR. FREER: Right.

MR. JONES: -- submit it.

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MR. FREER: And -- yeah, so we'll do the -- if you do granting party --

MR. JONES: Partial -- we'll do the order granting partial --

MR. FREER: -- and you'll do the other one.

MR. JONES: Okay. I think we can do that.

(Overlapping dialogue.)

MR. FREER: Thank you, Your Honor.

MR. JONES: Have a good day, Your Honor.

(Proceedings adjourned.)

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ATTEST: FULL, TRUE, AND ACCURATE TRANSCRIPT OF PROCEEDINGS.

Carre Lewis

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/S/ Carre Lewis, CCR No. 497

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of: MILTON I. SCHWARTZ, Deceased.	Case No.: P-07-061300-E Dept.: 26/Probate

JUDGMENT ON A. JONATHAN SCHWARTZ'S PETITION FOR DECLARATORY RELIEF

A. Jonathan Schwartz's Petition for Declaratory Relief (the "Petition"), brought on behalf of the Estate of Milton I. Schwartz, came on for trial before the Court, Honorable Gloria Sturman, District Judge, presiding. After considering all evidence admitted at trial and the jury's verdict, the Court hereby

FINDS AND DECLARES that Milton I. Schwartz would have never made the $500,000 bequest to the Milton I. Schwartz Hebrew Academy pursuant to Section 2.3 of his Last Will and Testament had Milton I. Schwartz known that he did not have a legally enforceable naming rights agreement with the school; the Court further

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FINDS AND DECLARES that Milton I. Schwartz intended that the bequest go to a school that bore his name in perpetuity; the Court further

FINDS AND DECLARES that absent an enforceable naming rights agreement that applies to each of the inter vivos gifts, this Court cannot rescind Milton I. Schwartz's lifetime gifts; it is therefore

ORDERED, ADJUDGED AND DECREED that A. Jonathan Schwartz's Petition is **GRANTED** in part and **DENIED** in part. The Petition is granted with respect the First Claim for Relief (construction of will) and the Third Claim for Relief (bequest void for mistake). ~~The Petition is denied with respect to the Fourth Claim for Relief (offset of bequest under will)~~ as moot and with ~~respect to the Sixth Claim for Relief (revocation of gift and constructive trust) and this denied~~ claim ~~is dismissed on the merits with~~ prejudice; it is further

ORDERED, ADJUDGED AND DECREED that the FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) deposited with the Court, and all interest accrued thereon if any, shall be distributed to A. Jonathan Schwartz, Executor of the Estate of Milton I. Schwartz; it is further

ORDERED, ADJUDGED AND DECREED that the Executor shall hold the FIVE HUNDRED THOUSAND DOLLARS ($500,000.00) until further order of this Court.

Dated this 10th day of February, 2019.

DISTRICT COURT JUDGE

Submitted by:

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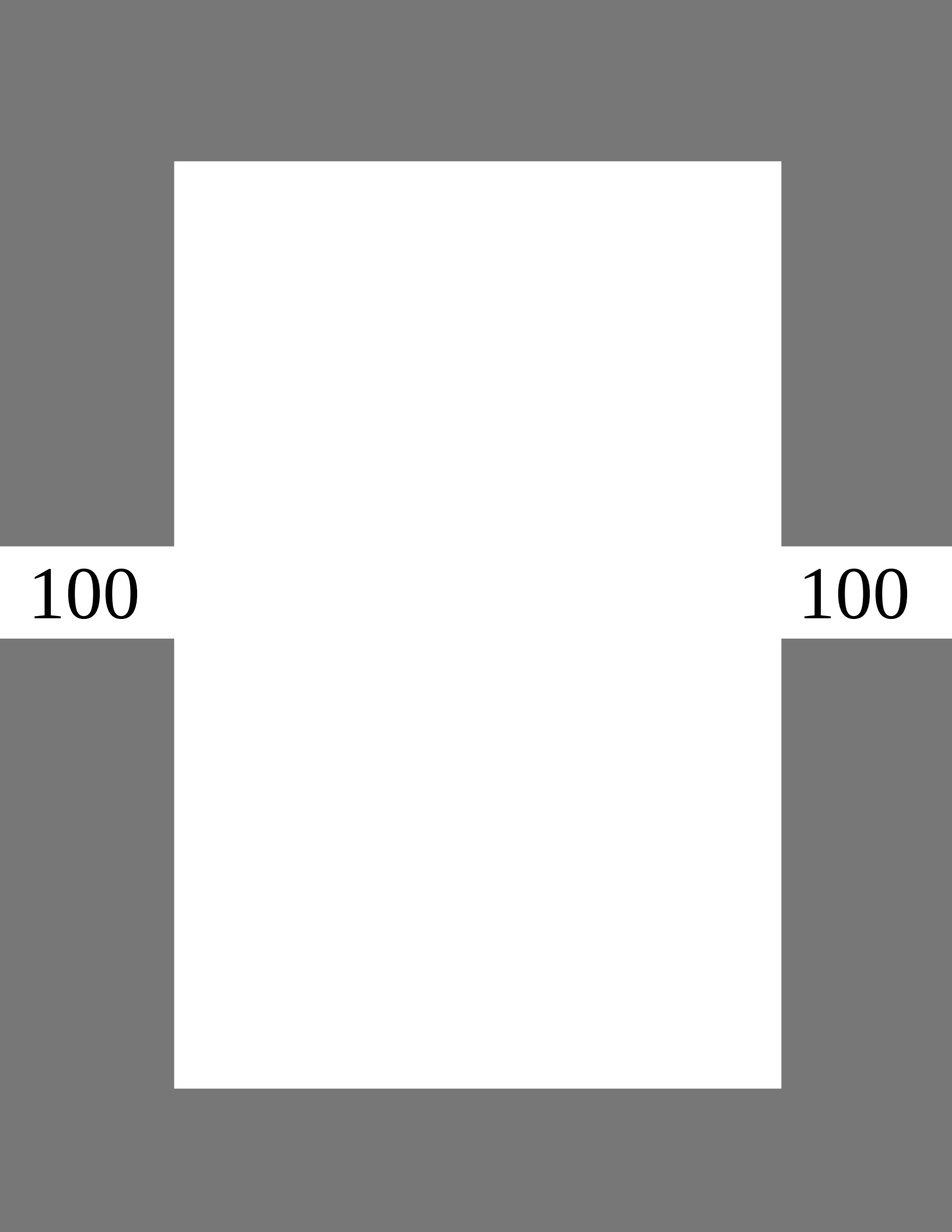
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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of: MILTON I. SCHWARTZ, Deceased.	Case No.: P-07-061300-E Dept.: 26/Probate

JUDGMENT ON THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE'S PETITION TO COMPEL DISTIBUTION, FOR ACCOUNTING, AND FOR ATTORNEYS' FEES

The Dr. Miriam and Sheldon G. Adelson Educational Institute's Petition to Compel Distribution, for Accounting, and for Attorneys' Fees (the "Petition") came on for trial before the Court, Honorable Gloria Sturman, District Judge, presiding.

After considering all evidence admitted at trial and the jury's verdict, it is hereby

ORDERED, ADJUDGED AND DECREED that The Dr. Miriam and Sheldon G. Adelson Educational Institute's Petition is **DENIED** in its entirety; it is further

ORDERED, ADJUDGED AND DECREED that The Dr. Miriam and Sheldon G. Adelson Educational Institute takes nothing by way of its Petition; it is further

ORDERED, ADJUDGED AND DECREED that the Petition, and the claims made therein, are **DISMISSED** on the merits with prejudice.

Dated this 18th day of February, 2019.

DISTRICT COURT JUDGE

Submitted by:

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of

MILTON I. SCHWARTZ,

Deceased.

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

NOTICE OF ENTRY OF ORDER DENYING THE ESTATE'S MOTION FOR POST-TRIAL RELIEF FROM JUDGMENT ON JURY VERDICT ENTERED ON OCTOBER 4, 2018

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an ORDER DENYING THE ESTATE'S MOTION FOR POST-TRIAL RELIEF FROM JUDGMENT ON JURY VERDICT ENTERED ON OCTOBER 4, 2018 was entered in the above-captioned case on February 20, 2019. A copy of said Order is attached hereto.

KEMP, JONES & COULTHARD, LLP

/s Joshua D. Carlson
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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of February, 2019, the foregoing **NOTICE OF ENTRY OF ORDER DENYING THE ESTATE'S MOTION FOR POST-TRIAL RELIEF FROM JUDGMENT ON JURY VERDICT ENTERED ON OCTOBER 4, 2018** was served on the person(s) listed on the E-Service list via the court's Electronic Service.

/s/ Pamela Montgomery
An employee of Kemp, Jones & Coulthard, LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of

MILTON I. SCHWARTZ,

Deceased.

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

ORDER DENYING THE ESTATE'S MOTION FOR POST-TRIAL RELIEF FROM JUDGMENT ON JURY VERDICT ENTERED ON OCTOBER 4, 2018

Date of Hearing: January 10, 2019
Time of Hearing: 9:30 a.m.

THIS MATTER having come before the Court on January 10, 2019, the DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE ("Adelson Campus") having appeared by and through its counsel of record, KEMP, JONES & COULTHARD, LLP, and A. JONATHAN SCHWARTZ, EXECUTOR OF THE ESTATE OF MILTON I. SCHWARTZ (the "Estate"), having appeared by and through his counsel of record, SOLOMON DWIGGINS & FREER, LTD., on the Estate's Motion for Post-Trial Relief from Judgment on Jury Verdict Entered on October 4, 2018. The Court having reviewed and considered the papers and pleadings on file herein, and having heard the arguments of counsel, with good cause appearing and there being no just cause for delay,

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Case Number: 07P061300