Case Nos. 78341 and 79464

**In the Supreme Court of Nevada**

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| In the Matter of the Estate of MILTON I. SCHWARTZ, deceased. | No. 78341 |
| A. JONATHAN SCHWARTZ, Executor of the Estate of MILTON I. SCHWARTZ,<br>Appellant/Cross-Respondent,<br>*vs.*<br>THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE,<br>Respondent/Cross-Appellant. | |
| In the Matter of the ESTATE OF MILTON I. SCHWARTZ, deceased. | No. 79464 |
| THE DR. MIRIAM AND SHELDON G. ADELSON EDUCATIONAL INSTITUTE,<br>Appellant,<br>*vs.*<br>A. JONATHAN SCHWARTZ, Executor of the Estate of MILTON I. SCHWARTZ ,<br>Respondent. | |



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

# APPELLANT'S REPLY BRIEF AND ANSWERING BRIEF ON CROSS-APPEAL

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## NRAP 26.1 DISCLOSURE

The undersigned counsel of record certify that the following are persons as described in NRAP 26.1(a) and must be disclosed:

1. A. Jonathan Schwartz is an individual and the executor of the Estate of Milton I. Schwartz.

2. Alan D. Freer and Alexander G. LeVeque of Solomon Dwiggins & Freer, Ltd. and Daniel F. Polsenberg, Joel D. Henriod, Abraham G. Smith, and M. Dale Kotchka-Alanes of Lewis Roca Rothgerber Christie LLP represent Schwartz in the district court and in this Court.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Dated this 26th day of February, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*

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## ROUTING STATEMENT

The Estate agrees that the School's cross-appeal concerning Mr. Schwartz's will bequest (Case No. 78341) is not presumptively assigned to either the Supreme Court or the Court of Appeals, and that the School's appeal on costs (Case No. 79464) is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(7). However, given that the Estate's appeal regarding the enforceability of perpetual naming rights raises issues of first impression and statewide public importance, NRAP 17(a)(11)–(12), the Estate submits it would be most efficient for the Supreme Court to decide all issues raised by the parties.

## ISSUES PRESENTED

### I.

### ISSUES PRESENTED BY THE SCHOOL'S CROSS-APPEAL ON MR. SCHWARTZ'S WILL BEQUEST

1. Whether the will bequest to the "Milton I. Schwartz Hebrew Academy" lapsed because the School ceased to be named that.

2. Whether the district court properly admitted extrinsic evidence to determine the meaning of the words Mr. Schwartz used in his

will when he left the bequest to the "Milton I. Schwartz Hebrew Academy."

3. Whether the district court acted within its discretion in admitting evidence of Mr. Schwartz's state of mind and intent in leaving the bequest to the "Milton I. Schwartz Hebrew Academy."

4. Whether the bequest was conditional on the School being named the "Milton I. Schwartz Hebrew Academy."

5. Whether the bequest was based on an invalidating mistake, given that Mr. Schwartz believed he had an enforceable agreement for the School to be named after him in perpetuity.

## II.

## ISSUES PRESENTED BY THE SCHOOL'S APPEAL ON COSTS

1. Whether the district court acted within its discretion in determining that the Estate was the prevailing party where the Estate successfully avoided paying the will bequest to the School and where the School achieved none of the relief it sought in bringing suit.

2. Whether the district court acted within its discretion in awarding costs for certain deposition transcripts, processor fees, and Westlaw research.

## STATEMENT OF THE CASE

The Dr. Miriam and Sheldon G. Adelson Educational Institute (the "School") filed suit in 2013 to compel Mr. Schwartz's Estate to pay the School a $500,000 bequest left in Mr. Schwartz's will to the "Milton I. Schwartz Hebrew Academy." But the School was no longer named that, having changed its name shortly after Mr. Schwartz's death in 2007. After an eight-day trial, the jury found that Mr. Schwartz intended the bequest to "be made only to a school known as the 'Milton I. Schwartz Hebrew Academy'" and not to the "school presently known as the Adelson Educational Institute" and 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." (19 App. 4515.) Although the jury found Mr. Schwartz did not have an enforceable naming rights contract (19 App. 4513), the Estate had been precluded from presenting its oral contract claim to the jury based on the district court's summary adjudication based on the statute of limitation (the subject of the Estate's appeal).

The district court found that Mr. Schwartz "would have never

made the $500,000 bequest to the Milton I. Schwartz Hebrew Academy … had [he] known that he did not have a legally enforceable naming rights agreement with the school" and that he "intended that the bequest go to a school that bore his name in perpetuity." (24 App. 5994–95.)

The district court accordingly granted the Estate's claims regarding will construction and declaring the bequest void for mistake. (24 App. 5995.) And the court denied the School's petition to compel distribution of the will bequest in its entirety, with the School to take nothing. (24 App. 5996–97.) The district court found the Estate was the prevailing party and awarded the Estate $59,517.67 in costs (after deducting $7,259.67 in costs the court found not sufficiently documented or unwarranted). (27 App. 6588–6595.)

## SUMMARY OF THE ARGUMENT[1]

**The Estate's Appeal**: The oral naming rights agreement between Mr. Schwartz and the School was evidenced by writings and thus was subject to the six-year statute of limitations. Even if the four-year

[1] The Estate disputes the School's statement of facts and refers the reader to the Estate's statement of facts (1/29/2020 Appellant's Opening Brief ("AOB") at 2–27) and the evidence discussed herein.

statute of limitations applied, disputed issues of material fact precluded summary judgment on the Estate's oral contract claim. The Estate was prejudiced because it was prevented from presenting its strongest theory to the jury. The district court also erred in refusing to instruct the jury on contract modification and breach of the implied covenant. The Estate should be granted a new trial on its oral contract claim.

The district court also erred in failing to rescind Mr. Schwartz's lifetime gifts, which were conditioned on the School perpetually bearing his name and/or based on the invalidating mistake that Mr. Schwartz believed he had a perpetual naming rights agreement. If a new trial is not granted on the Estate's oral contract claim, at a minimum, Mr. Schwartz's lifetime gifts must be rescinded.

**The School's Appeal on the Will Bequest**: Mr. Schwartz left a $500,000 bequest to the "Milton I. Schwartz Hebrew Academy." There is no Milton I. Schwartz Hebrew Academy, so the bequest fails. The same result obtains whether one looks at the clear language of the will alone (Mr. Schwartz chose not to use a successor clause in the bequest, though he did elsewhere in the will) – or whether one considers extrinsic evidence as to what Mr. Schwartz meant when he used the words

"Milton I. Schwartz Hebrew Academy" in his will. The uncontradicted evidence establishes he referred only to the entity he believed was named after him forever.

The School's protests about hearsay are unfounded. The School waived many of its objections by failing to make them at trial. Moreover, the evidence admitted was not hearsay. In addition to falling within the exceptions for state of mind and statements of memory or belief related to the execution or terms of the declarant's will, NRS 51.105, the testimony was not hearsay to begin with because it was not offered to prove the truth of the matter asserted. Mr. Schwartz's references to the Milton I. Schwartz Hebrew Academy "in perpetuity" or statements that he had a naming rights agreement with the School were not offered to prove the truth of the statements (that the School was actually named after him in perpetuity), but that he *thought* it was. There was no prejudicial admission of hearsay.

**The School's Appeal on Costs**: The district court properly exercised its discretion to find that the Estate was the prevailing party, as the Estate successfully avoided paying the will bequest to the School whereas the School achieved none of the benefit it sought in bringing

suit. The district court properly awarded only those costs authorized by statute and sufficiently documented.

## ARGUMENT

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## PART ONE

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### I.

### THE DISTRICT COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT ON THE ESTATE'S ORAL CONTRACT CLAIM

#### A. The Six-Year Statute of Limitations Applies Because the Estate's Oral Contract Claim Was to Enforce an Obligation "Founded Upon an Instrument in Writing"

The six-year statute of limitations in NRS 11.190(1)(b) "is not limited to actions upon 'contracts in writing,' but relates to any obligation or liability founded upon an instrument of writing." *El Ranco, Inc. v. New York Meat & Provision Co.*, 88 Nev. 111, 113, 493 P.2d 1318, 1320 (1972), *overruled on other grounds by State v. Am. Bankers Ins. Co.*, 105 Nev. 692, 696, 782 P.2d 1316, 1318 n.2 (1989). The School argues that the Estate's oral contract claim does not fall within the rule of *El Ranco* because "no writing exists immediately and directly evidencing the School's obligations." (RAB at 67.) There could be no more immediate

or direct statement of the School's obligations: "The name of this corporation is The Milton I. Schwartz Hebrew Academy … and shall remain so in perpetuity." (27 App. 6612.)

The School suggests *all* the terms of the contract had to be contained in a single writing passed by a single board with the precise amount of consideration expressly stated. (RAB at 62–64.) Not so. It is the obligation being sued on that must be documented in writing – not what the other party exchanged in return or the details of the contract. *See El Ranco*, 88 Nev. at 114-15, 493 P.2d at 1321; *Matherly v. Hanson*, 359 N.W.2d 450, 456 (Iowa 1984) (the shorter limitations period applies only where parol evidence "must be used to show the obligation itself, as distinguished from the details of, the obligation to be enforced"); *Bracklein v. Realty Ins. Co.*, 80 P.2d 471, 476 (Utah 1938) (plaintiff's claim was based on instruments in writing where defendant later assumed note and deed even though defendant "did not sign these instruments, … gave no writing to plaintiff, and made no promises directly to her"); *O'Brien v. King*, 164 P. 631, 632 (Cal. 1917) (where receipt merely stated amount of money received from the other party with the words "at 5 per cent interest," longer limitations period applied as "a promise

to repay is implied by necessary inference").

This case is not like *Kaufman*,[2] where certain documents merely evidenced the parties' "relationship with each other," but did not show any "obligation." *Restroom Facilities, Ltd. v. Kaufman*, 128 Nev. 929, 381 P.3d 655, 2012 WL 6013432, at *1 (Case No. 55765, Nov. 30, 2012) (unpublished). Rather, here, the School's obligation to name itself the Milton I. Schwartz Hebrew Academy in perpetuity was reflected in writing multiple times:

| **Table A** | | |
|---|---|---|
| **Language** | **Document** | **Cite** |
| "A letter should be written to Milton Schwartz stating the Academy will be named after him." | August 14, 1989 Board Minutes | 28 App. 6870 |
| Thanking Mr. Schwartz for his "generous gift of $500,000" and stating, "the Board of Trustees of The Hebrew Academy has decided to name the new campus the 'Milton I. Schwartz Hebrew Academy,' in perpetuity for so long as The Hebrew Academy exists and for so long as may be permitted by law, your name to be appropriately commemorated and memorialized at the academy campus." | August 14, 1989 draft letter | 28 App. 6872 |
| "The Board corrected the draft of the revised By-Laws by eliminating paragraph | November 29, 1990 Board minutes | 29 App. 7006 |

[2] The School cited this unpublished 2012 decision in contravention of NRAP 36(c)(3). (RAB at 61, 64.)

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| 6 of Article II and naming the corporation after Milton I. Schwartz in perpetuity." | | |
| "The name of this corporation is The Milton Schwartz Hebrew Academy (hereinafter referred to as The Academy) and shall remain so in perpetuity." | December 1990 bylaws | 27 App. 6612 |
| "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." | May 19, 1996 Board meeting minutes | 27 App. 6626 |
| Board promising to "(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 fill name on future brochures. (5) Where practicable, display the full name of the Hebrew Academy."<br><br>"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." | May 23, 1996 Sabbath letter written on behalf of "the entire Board of Directors" | 28 App. 6883–84 |
| "The name of the Corporation is The Milton Schwartz Hebrew Academy and will | April 1999 Bylaws | 27 App. |

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| remain so in perpetuity." | | 6629 |
| "That the Corporation's elementary school shall be named in honor of Milton I. Schwartz in perpetuity." | December 13, 2007 Board Resolutions (signed by Sheldon Adelson) | 27 App. 6676[3] |

Though the original promise to Mr. Schwartz was oral, the longer statute of limitations applies to the Estate's oral contract claim because the School's obligation to bear Mr. Schwartz's name is in writing. *See El Ranco*, 88 Nev. at 114, 493 P.2d at 1321 ("if the fact of liability arises or is assumed or imposed from the instrument itself, or its recitals, the liability is founded upon an instrument in writing") (quotations omitted); *Hotchkiss v. Int'l Profit Assocs., Inc.*, 854 N.W.2d 73, 2014 WL 3511786, at *6 (Iowa Ct. App. 2014) (unpublished) (liability "established by a writing" where a written assurance "establishe[d] 'an obligation or liability to do ... something.'") (citation omitted).

### *1. The Six-Year Statute of Limitations Applies Even if the Contract is Part Oral, Part Written*

The School cites a treatise relying on Washington and Illinois case

[3] If the School truly believed there was no contract with Mr. Schwartz and no obligation on its part, it is strange (to say the least) that it nevertheless resolved to name the elementary school after Mr. Schwartz with the same "in perpetuity" language the parties had referenced for decades – and that it did so even after promising naming rights to the Adelsons.

law for the proposition that "'[i]f resort to parol evidence is necessary to establish any material or essential element of a written contract, the contract is partly oral,[4] and the statute of limitations for oral contracts applies.'" (1/27/2020 Respondent/Cross-Appellant's Answering Brief & Opening Brief ("RAB") at 68 (quoting 51 AM. JUR. 2D, *Limitation of Actions* § 117, which in turn cites *Armstrong v. Guigler*, 673 N.E.2d 290, 294 (Ill. 1996) and *Bogle & Gates, P.L.L.C. v. Zapel*, 90 P.3d 703, 705

[4] The School's attack on the Estate's reliance on *Ringle* (RAB at 67 n.14) is misguided. To the extent the State is seriously contending that contracts cannot be part oral and part written, that flies in the face of *Ringle* and well-established contract law. *Ringle v. Bruton*, 120 Nev. 82, 91, 86 P.3d 1032, 1037 & n.10 (2004) (jury instruction did not violate the parol evidence rule where it indicated a contract may be "partly oral and partly written"); *Kuchta v. Sheltie Opco, LLC*, 466 P.3d 543 (Nev. App. 2020) (unpublished) (considering "oral agreement concerning the speed of or difficulty of the ride that does not contradict the express terms of the waiver"); *In re Cay Clubs*, 130 Nev. 920, 936, 340 P.3d 563, 574 (2014) (parol evidence rule "does *not* bar extrinsic evidence that is offered to explain matters on which the [written] contract is *silent*"); *Glenn v. Univ. of S. California*, No. B151776, 2002 WL 31022068, at *3–4 (Cal. Ct. App. Sept. 10, 2002) (donor had viable contract claim based on a "partly-oral, partly-written contract with" university where only some terms were confirmed in writing); *PYA Int'l Ltd. v. White, Zuckerman, Warsavsky, Luna, Wolf & Hunt*, No. B214232, 2011 WL 2446574, at *11 (Cal. App. June 20, 2011) ("It is well established that a contract can be either written or oral, or a combination of the both."); *Schwartz v. Shapiro*, 40 Cal. Rptr. 189, 197 (Cal. App. 1964) (a contract "may be partly written and partly oral … parol evidence is admissible to prove that part of the contract not reduced to writing").

(Wash. App. 2004)).) However, contrary to Nevada, both the Illinois and Washington limitation statutes refer to "written contracts."[5] Where limitation statutes refer to "obligations founded upon a 'writing'" (like Nevada's) "a strict construction should not be applied," but "the result is otherwise" where a limitation "statute specifically provides for a 'contract,' absent 'founded.'" *El Ranco*, 88 Nev. at 115, 493 P.2d at 1321.

Indeed, "Illinois courts give a strict interpretation to the meaning of a written contract within the statute of limitations." *Brown v. Goodman*, 498 N.E.2d 854, 856 (Ill. App. 1986); *Herkert v. MRC Receivables Corp.*, 655 F. Supp. 2d 870, 878 (N.D. Ill. 2009) (speaking of "the significant body of Illinois law addressing the stringent writing requirements necessary to trigger the [longer] limitations period").

In contrast, this Court has ruled "that a strict construction should not be applied … in determining what does and what does not constitute" obligations founded upon a writing. *El Ranco*, 88 Nev. at 115, 493

[5] 735 Ill. Comp. Stat. 5/13-206; Wash. Rev. Code § 4.16.040 (referring to actions "upon a contract in writing, or liability express or implied arising out of a written agreement").

P.2d at 1321. In Nevada "the statute is not limited to actions upon 'contracts in writing.'" *Id.*, 88 Nev. at 113, 493 P.2d at 1320.[6]

Even in stricter states like Washington, if terms are originally agreed upon orally, "a memorandum that memorializes an oral agreement between the parties satisfies the writing requirement." *Urban Dev., Inc. v. Evergreen Bldg. Prod., LLC*, 59 P.3d 112, 119 (Wash. App. 2003); *Kloss v. Honeywell, Inc.*, 890 P.2d 480, 483–85 & n.1 (Wash. App. 1995) (memorandum confirming oral agreement sufficient to bring contract within longer statute of limitations).

Here, both the bylaws and the Sabbath letter confirm the School's obligation to be named after Milton I. Schwartz "in perpetuity" – meaning "always" and "forever." (27 App. 6612, 6629; 28 App. 6883–84; 13 App. 3013; 14 App. 3306.) Thus, the longer limitations period applies and the Estate should have been given the opportunity to try its oral contract claim to the jury.

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[6] "Nevada adopted the California statute with its judicial gloss," *id.*, under which "a promise or agreement … can be inferred from the terms employed." *O'Brien*, 164 P. at 633 (quotations omitted).

### *2. The Terms of the School's Obligation Were Sufficiently Documented in Writing*

The School protests that the "Bylaws are missing numerous material terms of the alleged naming rights contract, including most critically consideration" and that the Sabbath letter also fails to state the consideration given. (RAB at 64.) ***First,*** it is only the School's naming obligation that must be apparent from the writing, as that is the obligation the Estate sued on. (*See supra* Part One, §§ I.A & I.A.1.) Even if the details of the agreement had to be documented, the Sabbath letter contained the precise contours of the School's obligations. (28 App. 6883–84.) The requirement of an instrument in writing can "be satisfied by two documents." *Steward Mach. Co. v. White Oak Corp.*, 462 F. Supp. 2d 251, 277 (D. Conn. 2006); (*see also* AOB at 48 n.21 (collecting Nevada case law on how separate writings can together satisfy the statute of frauds).)[7]

[7] Any dispute over whether the bylaws or Sabbath letter control – or if the Sabbath letter modified the parties' earlier agreement – is "a disputed issue of material fact that should be decided by the fact-finder, not pretermitted at the summary judgment stage." *Counter Wraps Int'l, Inc. v. Diageo N. Am., Inc.*, 819 F. App'x 494, 496 (9th Cir. 2020) ("while the parties dispute *which* emails and documents controlled their agreement" – including whether "the parties' contract was modified by subsequent correspondence" – the longer statute of limitations applied under

***Second,*** "courts do not generally inquire into the adequacy of consideration," *Oh v. Wilson*, 112 Nev. 38, 41, 910 P.2d 276, 279 (1996), and the price Mr. Schwartz paid for the naming rights was not a term that had to be documented in writing. *See Kloss*, 890 P.2d at 483–85 & n.1 (memorandum sufficient to bring oral agreement within longer statute of limitations even where missing compensation term, as "the amount of compensation need not be specified for a contract to be enforceable"); *Sloan v. Taylor Mach. Co.*, 501 So. 2d 409, 411 (Miss. 1987) (longer statute of limitations still applies if "parol evidence merely establishes the exact amount of money to be paid or physical specifications of work to be performed"); *Matherly*, 359 N.W.2d at 456 (longer statute of limitations applies were "parol evidence … [is] used to establish such details as the exact amount of money to be paid … rather than the basic existence of an obligation"); *Steward Mach. Co.*, 462 F. Supp. 2d at 270-78 (longer statute of limitations applied "[d]espite the absence of a formalized writing … that contained a term regarding price").

***Third,*** even if the consideration Mr. Schwartz paid had to be documented in writing, it was. It is undisputed that the checks Mr.

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Nevada law as the parties' agreement was evidenced by writings).

Schwartz wrote to the school in August 1989 totaled $500,000 (28 App. 6871) and that the list of pledges attached to the 1990 board minutes reflected that Mr. Schwartz pledged and paid $500,000 with "none" unpaid. (28 App. 6876.)[8] Multiple writings together can satisfy the writing requirement. *Steward Mach. Co.*, 462 F. Supp. 2d at 277; *Ray Motor Lodge, Inc. v. Shatz*, 80 Nev. 114, 118–19, 390 P.2d 42, 44 (1964)

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[8] The pledge list accurately reflected the amounts of money promised and paid as of January–February 1990. (14 App. 3259.) Thus, if Mr. Schwartz had truly promised $1 million in August 1989 and had failed to pay it, the School would have known that in January–February 1990 and could have removed his name from the school then. Instead, the pledge list and subsequent bylaws naming the School after Mr. Schwartz "in perpetuity" show an objective meeting of the minds (regardless of what former School officials may subjectively claim 30 years after the fact). *See James Hardie Gypsum (Nevada) Inc. v. Inquipco*, 112 Nev. 1397, 1402, 929 P.2d 903, 906 (1996) ("The fact finder should look to objective manifestations of intent to enter into a contract."), *disapproved of on other grounds by Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 35 P.3d 964 (2001); *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 401, 632 P.2d 1155, 1157 (1981); *Roth v. Malson*, 79 Cal. Rptr. 2d 226, 229 (Cal. Ap. 1998) ("Contract formation is governed by objective manifestations…. The test is what the outward manifestations of consent would lead a reasonable person to believe.") (quotations and citations omitted). The parties' course of conduct also supports that Mr. Schwartz paid all he agreed to. The School opportunistically removed Mr. Schwartz's name only twice – once in 1992–94, when Mr. Schwartz and the then-current board had a falling out (28 App. 6878; R.A. 3), and then in late 2007–early 2008, just months after Mr. Schwartz died and another donor was available. (27 App. 6680–83.)

(concluding "two letters, considered together" were a sufficient "memorandum of an oral contract" to satisfy the statute of frauds).[9]

***Finally,*** the School suggests that the bylaws cannot constitute a writing upon which the School's naming obligation is founded because bylaws can be amended. (RAB at 63 (arguing "the Board can amend the Bylaws with a simple majority vote").) But any writing can be amended – that does not make it any less of a "writing." Moreover, the use of the words "in perpetuity" signifies that the Board intended (as the drafter

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[9] The School attempts to distinguish case law cited by the Estate by claiming "in those cases the court determined that the entire agreement was actually contained in the corporate documents." (RAB at 63 n.13.) First, the agreement here *is* contained in corporate documents, including corporate minutes and a Board letter reflecting where Mr. Schwartz's name appropriately needs to be placed. (*See supra* Part One, § I.A, Table A.) Even the consideration Mr. Schwartz paid is reflected in corporate minutes. (28 App. 6876.) Second, the cases also considered various documents together in ruling that the longer statute of limitations applied. *See Elec. Contractors' Ass'n of City of Chicago v. A. S. Schulman Elec. Co.*, 63 N.E.2d 392, 397 (Ill. 1945) (longer statute of limitations applied where controlling agreement was defendant's name change request "and plaintiff's constitution and bylaws. These are all written"); *Gray v. Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers, Local No. 51*, 447 F.2d 1118, 1121 (6th Cir. 1971) (application "together with the union constitution and bylaws, constitute a written contract."). The cases support that the longer statute of limitations applies here because the School's obligation was "recognized in writing." *Bankers' Tr. Co. v. Rood*, 233 N.W. 794, 801 (Iowa 1930).

testified) that the School would remain named after Mr. Schwartz forever[10] – even if other provisions of the bylaws could be changed. (13 App. 3012-13, 3115-16.) Indeed, the term "in perpetuity" would be rendered meaningless if the obligation to which it is attached is amendable or subject to cancellation. That interpretation should be avoided. *See Phillips v. Mercer*, 94 Nev. 279, 282, 579 P.2d 174, 176 (1978) ("A court should not interpret a contract so as to make meaningless its provisions."); *Royal Indem. Co. v. Special Serv. Supply Co.*, 82 Nev. 148, 150, 413 P.2d 500, 502 (1966) ("Every word must be given effect if at all possible."); (*see also* AOB at 56–57 (collecting case law establishing that bylaws are contracts and cannot be amended to impair a member's contractual rights).)

The Estate's oral contract claim was based on an instrument in writing and was therefore subject to the six-year statute of limitations; the district court erred in ruling the claim was barred by the four-year statute of limitations.

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[10] *Tompkins v. Buttrum Const. Co. of Nevada*, 99 Nev. 142, 144, 659 P.2d 865, 866 (1983) ("words must be given their plain, ordinary and popular meaning").

### B. Even if the Four-Year Statute of Limitations Applied, Disputed Issues of Fact Precluded Summary Judgment

The School points to four pieces of evidence to argue that the executor knew or should have known of facts giving rise to his contract claim on or before May 28, 2009. (RAB at 70–75.) All of this evidence is subject to varying interpretations and does not support the School's position – and only 2 pieces of evidence were actually before the district court at the time it ruled on the School's summary judgment motion. Evidence adduced at trial cannot possibly justify the district court's pretrial ruling (and does not support the School's claims in any event).

***First***,[11] the School points to the executor's May 10, 2010 letter to argue that the executor knew of the School's breaches 2½ years prior to that (i.e. since 2007). But all the letter says is that the School has been breaching the naming rights agreement for 2½ years – measured from

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[11] The School apparently concedes on appeal that the School's amended articles of incorporation filed on March 21, 2008 were not sufficient to put the executor on notice of the School's name change, even if they were a public record. (*Contrast* 7 App. 1526, 9 App. 2181 (relying on Articles of Incorporation in arguments to district court), *with* RAB (omitting any argument regarding Articles of Incorporation)); *see also Bemis v. Estate of Bemis*, 114 Nev. 1021, 1026, 967 P.2d 437, 441 (1998) (reversing dismissal on statute-of-limitations grounds, as "it cannot be said as a matter of law that Kevin and Scott should have known of their parents' divorce agreement simply because it was public record").

Mr. Schwartz's August 2007 death – and the executor now knows about it, in 2010. (27 App. 6689 ("some of what the school has done in the last 2 and ½ years breaches the Agreements").) The executor's declaration that he now knows the School's wrongdoing has been going on for 2½ years does not equate to a declaration that he has known of the School's wrongdoing for 2½ years. That may be an inference the School wanted the district court to draw, but on "summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party" – here, the Estate. *Wood v. Safeway*, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

The executor testified that he did not know of any of the School's breaches until March 2010 – and he did not know of certain breaches, such as changing the name of the corporation and removing Mr. Schwartz's name from the elementary school, until after this litigation commenced. (1 App. 235; 14 App. 3428–29, 3462–63; 16 App. 3787.) The executor's verified petition stating he did not know of the School's breaches until March 2010 at the earliest (1 App. 235) was evidence[12] –

[12] *Hunter v. Gang*, 132 Nev. 249, 262, 377 P.3d 448, 457 (Nev. App. 2016) (verified complaint is evidence); *Munz v. Michael*, 28 F.3d 795,

and even if the district court disbelieved the executor, she was not free to make credibility determinations at the summary judgment stage. *Borgerson v. Scanlon*, 117 Nev. 216, 220, 19 P.3d 236, 238 (2001) ("a district court cannot make findings concerning the credibility of witnesses or weight of evidence in order to resolve a motion for summary judgment"); *Sawyer v. Sugarless Shops, Inc.*, 106 Nev. 265, 267–68, 792 P.2d 14, 15–16 (1990) ("All of the non-movant's statements must be accepted as true and a district court may not pass on the credibility of affidavits."). The district court erred in drawing inferences or resolving conflicts in the School's favor.

***Second***, the School points to the executor's deposition testimony where he stated that he would hear "statements from board members, statements from, you know, people who sent their kids there, you, know, 'They're – they're not respecting your dad's legacy,' all of this kind of stuff." (7 App. 1540; RAB at 71–72.) But hearing that his fa-

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798–99 (8th Cir. 1994) ("For summary judgment purposes, we must believe the allegations in [claimant's] verified complaint as they are evidence to the same extent as statements in a sworn affidavit."); *McElyea v. Babbitt*, 833 F.2d 196, 197–98 (9th Cir. 1987).

ther's legacy was not being respected or that Sheldon Adelson was taking over is a far cry from knowing that the School had officially changed its name and was violating his father's naming rights agreement as of a particular date. The executor stated he "would hear things from members of the community," parents, and "board members" from 2007–2014, but the School never established what things the executor heard or when. (7 App. 1541.)[13] The only concrete example the executor testified to was a conversation he had with board member Sam Ventura, which did not occur until 2010, well within the statute of limitations. (*See* AOB at 35–36.) Far from showing that his claims were untimely, the executor's deposition testimony confirmed that he first knew of the School's December 2007 name change "when [he] read that document" (7 App. 1540), which was not until after this litigation commenced. (14 App. 3428.) The School's reliance on vague statements in the executor's

[13] It was the School's burden to show when the executor discovered or should have discovered the facts comprising his claim and that there were no disputed issues of fact. *Oak Grove Inv'rs v. Bell & Gossett Co.*, 99 Nev. 616, 623, 668 P.2d 1075, 1079 (1983), *disapproved of on other grounds by Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000).

deposition is misplaced, as this is far from "uncontroverted evidence irrefutably demonstrat[ing]" that the executor was on notice of his claims prior to 2010. *Bemis*, 114 Nev. at 1025, 967 P.2d at 440 ("Dismissal on statute of limitations grounds is only appropriate when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the facts giving rise to the cause of action.") (quotations omitted).

***Third***, the School points to trial testimony regarding the executor taking a tour of the school in 2008, arguing that he should have seen a sign referring only to the Adelson Campus and this should have put him on notice of the School's breach of the naming rights agreement. (RAB at 72–73.) As an initial matter, this trial testimony was not part of the record before the district court at the time it granted summary judgment – indeed, the School did not even mention the executor's 2008 tour of the school in its summary judgment briefing. (7 App. 1524–1541, 9 App. 2178–2209.) Thus, this court cannot consider trial testimony concerning the 2008 tour of the school in reviewing the district court's summary judgment ruling. *See Blankinship v. Brown*, 399 S.W.3d 303, 309

(Tex. App. 2013) (refusing to consider trial testimony that "was not before the trial court at the time it considered summary judgment"); *Owens v. Nat'l Bank of Commerce*, 608 So. 2d 390, 391 (Ala. 1992) ("this Court is limited to a consideration of the factors that were before the trial court when it ruled on the summary judgment motion"); *GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 795 P.2d 827, 830–31 (Ariz. App. 1990) (refusing to consider deposition transcripts that were not "part of the record before the trial court at the time it considered the motion for partial summary judgment"); *Pickering v. State*, 557 P.2d 125, 128 (Haw. 1976) (refusing to consider letters that were later filed with the trial court but "were not presented to the trial court in its determination of the State's motion for summary judgment"); *see also Wood*, 121 Nev. At 729, 121 P.3d at 1029 (summary judgment is appropriate only where the "evidence on file" demonstrates no dispute of material fact).

Moreover, even if this Court could consider trial testimony concerning the Adelson Campus sign, the executor testified that he did not recall seeing the sign until 2010[14] and that, regardless of when he saw

[14] The School attempts to argue that the executor had to go through the front entrance when he toured the school in 2008 and that he therefore must have seen the Adelson Campus sign then. (RAB at 72.) But the

it, Mr. Schiffman told him (a) the sign referred to the high school and (b) the removed sign with his father's name had been taken down temporarily due to construction. (17 App. 4008–10, 4028, 4055–56.) With school representatives expressly assuring the executor that the Adelson Campus sign was *not* a breach of his father's naming rights agreement, the sign was far from irrefutable evidence that the executor was or should have been on notice of his claims prior to 2010. *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 253, 277 P.3d 458, 463 (2012) (reversing summary judgment where it "is unclear as to what respondents specifically conveyed to [appellant]" and factual issues remained as to whether limitations period should have been tolled due to hospital's alleged concealment of information). "The intent with which [Mr. Schiffman's] statements were made is an issue of fact for the jury to resolve." *Harrison v. Rodriguez*, 101 Nev. 297, 299, 701 P.2d 1015, 1016–17 (1985) (where insurance company "made certain statements to [claimant], to the effect that Farmers would pay 'all medical bills,'" summary

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executor could have been looking in another direction, been distracted, or not have noticed the sign for a variety of reasons. This is precisely the type of factual issue that should not have been resolved on summary judgment.

judgment was improper as the jury could find the "statements were made with the intent to mislead …, or to cause [claimant] to refrain from filing suit").

***Fourth***, the School cites trial testimony to argue that the executor suspected that the School was breaching the naming rights agreement prior to 2010 and that this constituted inquiry notice. (RAB at 73–75.) Again, subsequent trial testimony was not before the district court at the time it made its summary judgment ruling and thus cannot justify the grant of summary judgment. Courts "consider only evidence that was before the trial court at the time it ruled on the particular summary judgment motions being challenged." *Saad v. Valdez*, No. 14-15-00845-CV, 2017 WL 1181241, at *7 (Tex. App. Mar. 30, 2017) ("we do not consider additional evidence adduced at the bench trial in our review and analysis of [appellant's] issues challenging the trial court's grant of summary judgment").

Moreover, the testimony cited by the School establishes the executor did not know of the School's breaches until 2010 – he suspected *in 2010* that the breaches had been occurring for some time, "but I didn't know about it until 2010." (17 App. 4027.) The School argues that an

investigation would have revealed the School's contractual breaches since the School's website referred to the "Dr. Miriam and Sheldon G. Adelson Middle School." (RAB at 74.) But the School submits no undisputed evidence establishing the threshold step – that something should have put the executor on notice that he needed to investigate the School's behavior.

Even if something should have put the executor on notice that he needed to inquire further, he did inquire. There is no perfect investigation or fixed steps the executor *had* to take (such as checking the School's website or digging through Secretary of State filings to find the School's revised articles of incorporation). Rather, the executor went to the school and spoke with school officials and was assured repeatedly that the School was honoring his father's name and legacy. (17 App. 4008–10, 4028, 4056–57; 14 App. 3434.) Whether the executor "exercised reasonable diligence in discovering [his] causes of action 'is a question of fact to be determined by the jury or trial court after a full hearing.'" *Bemis*, 114 Nev. at 1025, 967 P.2d at 440 (quoting *Millspaugh v. Millspaugh*, 96 Nev. 446, 448, 611 P.2d 201, 203 (1980)); *Diamond v.*

*Davis*, 680 A.2d 364, 372 (D.C. 1996) (whether an investigation "is 'reasonable under the circumstances' is a highly factual analysis" – "whether an exhaustive investigation would have uncovered the claim is not necessarily relevant," as "the relevant facts may be such that it may be reasonable to conduct no investigation at all").

The district court's summary judgment on the Estate's oral contract claim was unwarranted due to material factual disputes. This Court has repeatedly reversed grants of summary judgment based on statute of limitations grounds because "[w]hen the plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of his cause of action is a question of fact for the trier of fact." *Nev. State Bank v. Jamison Family P'ship*, 106 Nev. 792, 800, 801 P.2d 1377, 1382 (1990) (quotations omitted) (reversing summary judgment as "a viable issue of fact exists regarding when the Bank knew, or reasonably should have known, of the facts surrounding" its claim); *see also, e.g.*, *Torrealba v. Kesmetis*, 124 Nev. 95, 104, 178 P.3d 716, 723 (2008) (reversing summary judgment "[b]ecause, according to [appellants'] account of when they discovered the alleged misconduct, they brought their claim within" the time limit); *Massey v. Litton*,

99 Nev. 723, 728, 669 P.2d 248, 252 (1983) (fact issues as to when appellant "was, or should have been, aware of her cause of action" precluded summary judgment). Reversal is likewise warranted here.

### C. The Jury Should Have Decided Whether the School Misled the Executor, Resulting in Estoppel

The School acknowledges that "estoppel is generally a question of fact" and can only be a question of law "if the facts are undisputed." (RAB at 75–76.) Here, the facts and the inferences to be drawn from those facts are *not* undisputed. Indeed, the district court acknowledged there were questions of fact as to whether the School misled the executor into not suing earlier:

- "[M]y problem is they did continue to use letterhead. … Okay, for what period of time? When did they stop using that letterhead?" (10 App. 2458)
- "[M]y question that remains there, is was he told something differently when he made that inquiry" (10 App. 2459)
- "You're out there in 2009, and if they misrepresent to you oh, that's how we're leaving it, that's fraud on him" (10 App. 2463)

The district court conflated estoppel/tolling with inquiry notice, reasoning that estoppel and tolling could not apply once the executor

was on inquiry notice. (10 App. 2464 ("They may have done something to reassure him or to cause him to delay in taking action, but that's not – he's on the inquiry notice"); *id.* ("And they may have lured him into a false sense of relief by saying look, your dad's name is still on the wall in 2009, but he had notice").) This misses the point. Estoppel and tolling come into play *after* one's duty to inquire is triggered. *See Diamond*, 680 A.2d at 372 (distinguishing between "(i) the quantum of knowledge required to trigger the duty to investigate, and (ii) the amount of diligence that must be exercised in conducting the investigation once it is triggered" and explaining "plaintiff's reliance on the defendant's conduct and misrepresentations" is part of the second inquiry). Thus, even where inquiry notice starts the statute of limitations, equitable tolling stops (i.e. tolls) the running of the limitations period precisely because the defendant lures the plaintiff into a false sense of relief.[15]

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[15] The School wrongly contends that the "Estate's reliance on equitable tolling is wholly misplaced" because the "Estate does not contend that any procedural technicality precluded the Estate from timely bringing its oral contract claim." (RAB at 80-81 (citing *State Dep't of Taxation v. Masco Builder Cabinet Grp.*, 127 Nev. 730, 738, 265 P.3d 666, 671 (2011)).) Fraudulent concealment tolls the statute of limitations. *See Winn*, 128 Nev. at 258, 277 P.3d at 466 ("'[T]he rationale of the tolling doctrine is estoppel.'" (quoting *Brown v. Bleiberg*, 651 P.2d 815, 821 (Cal. 1982))); *Smith v. Boyett*, 908 P.2d 508, 512 (Colo. 1995) ("we have

The School protests that the letters to the executor could not have misled the executor because they all "contain some reference to the Adelson Educational Campus." (RAB at 77.) Merely referencing the Adelson Educational Campus along with The Milton I. Schwartz Hebrew Academy did not put the executor on notice of the School's breach because this was consistent with Mr. Schwartz's understanding that the high school would be named after the Adelsons. (14 App. 3420–22.)[16]

The School argues that the Estate "failed to identify any evidence that a School employee's use of the old Hebrew Academy letterhead was

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consistently recognized fraudulent concealment as a basis for tolling statutes of limitation") (cited favorably in *Winn*). While one situation in which equitable tolling applies is "when the only bar to a timely filed claim is a procedural technicality," *Masco*, 127 Nev. at 738, 265 P.3d at 671, that is not the only circumstance in which equitable tolling applies. *See Winn*, 128 Nev. at 258, 277 P.3d at 466; *Copeland v. Desert Inn Hotel*, 99 Nev. 823, 826, 673 P.2d 490, 492 (1983) (reversing summary judgment where issues of material fact remained concerning equitable tolling and noting factors to consider "[w]ithout limiting or restricting the application of the doctrine of equitable tolling").

[16] The School points to small, hardly noticeable print on the bottom of one letter stating that the "Adelson Educational Campus is a 501(c)(3) nonprofit corporation." (29 App. 7002; RAB at 78.) But this letter still appears on letterhead referring "The Milton I. Schwartz Hebrew Academy in Summerlin" and gives no indication that the School has changed its corporate name. Indeed, if the executor even noticed the fine print, he likely would have thought a separate corporation had been established in connection with the high school.

intentional." (RAB at 78.) Not so. The fact that letters were consistently sent to the executor on such letterhead (including after the School had already discontinued that letterhead) suggests the act was intentional. And Mr. Schiffman, school head, testified that "this letterhead should not have been used" and he was "embarrassed" the letterhead was apparently only used to communicate with, and solicit donations from, the executor. (16 App. 3776–3780.) In fact, Mr. Schiffman agreed that, based on the correspondence sent to the executor, it was "reasonable for [the executor] to assume and conclude that the Milton I. Schwartz Hebrew Academy was still the name of the school." (16 App. 3780.) The intent with which the letters were sent was "an issue of fact for the jury to resolve." *Harrison*, 101 Nev. at 299, 701 P.2d at 1016. Moreover, for fraudulent concealment to result in tolling or estoppel, "[i]t is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. It is sufficient that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings." *Mills v. Forestex Co.*, 134 Cal. Rptr. 2d 273, 296 (Cal. App. 2003) (quotations and citations omitted); *Fine v. Checcio*, 870 A.2d 850, 860 (Pa. 2005) (fraudulent concealment "does not require fraud in the strictest

sense encompassing an intent to deceive, but rather, fraud in the broadest sense, which includes an unintentional deception").

The letters alone created an issue of fact as to whether the statute of limitations should have been tolled due to the School's fraudulent concealment.[17] But in addition to the deceptive letterhead, Mr. Schiffman misled the executor by telling him the Adelson Campus sign referred to the high school and that the removed sign with Mr. Schwartz's name had been taken down only temporarily due to construction. (17 App. 4008–10, 4028, 4055–56.) When Mr. Schiffman gave the executor a tour of the school in 2008, he pointed out a painting and statute of Mr. Schwarz and highlighted Mr. Schwartz's name about the entry doors to the school (14 App. 3433–34), but he declined to tell the executor that the Milton I. Schwarz Hebrew Academy was no longer the corporate

[17] The School protests that the Estate cannot argue fraudulent concealment since "the Estate withdrew its fraud claims." (RAB at 76 n.18.) But "the doctrine of fraudulent concealment serves to toll the running of the statute of limitations," *Fine*, 870 A.2d at 860, and is distinct from the Estate's withdrawn fraud claim alleging that the School fraudulently induced Mr. Schwartz to make donations when it, in fact, had no intent to honor the naming rights agreement with Mr. Schwartz. (1 App. 237; *see also* 10 App. 2463–2464.)

name of the school, that the School had entered a naming rights agreement with the Adelsons, or that the middle school was now named after the Adelsons. (16 App. 3876, 3879.) Quite simply, summary judgment is inappropriate where, as here, "issues of fact on estoppel and perhaps fraud remain." *Harrison*, 101 Nev. at 300, 701 P.2d at 1017; *see also Winn*, 128 Nev. at 253, 277 P.3d at 463.

### D. The Estate's Oral Contract Claim Was Timely Because the Ultimate Breach of Removing Mr. Schwartz's Name Altogether Did Not Occur Until After the Estate Filed Suit

The School cites *Wallace v. Smith* (another pre-2016 unpublished case) to argue that "[o]nly contracts that are either (1) installment or (2) divisible, can accrue separate and independent breaches, thereby invoking multiple statute of limitations periods under the same contract." (RAB at 81 (citing *Wallace v. Smith*, No. 60456, 2014 WL 4810304, at *2 (Nev. Sept. 26, 2014)).) That proposition is nowhere to be found in *Wallace*. *Wallace* pointed out that just because an agreement is "indivisible" does not mean in cannot be an installment contract. 2014 WL 4810304, at *2. But the case does not limit separate limitations accruals to only divisible or installment contracts. Any contract imposing a

continuing obligation can give rise to separate breaches triggering separate limitations periods. *Aryeh v. Canon Bus. Sols., Inc.*, 292 P.3d 871, 880 (Cal. 2013).

The School argues that "there can be no 'partial' or 'multiple' breaches … because the Estate's alleged damages are the same regardless of whether multiple breaches occurred." (RAB at 82.) But that is untrue. An injunction (the Estate's preferred remedy) to restore the name of the elementary school is distinct from an injunction to change the School's corporate name, to ensure appropriate signage and letterhead, or to call the middle school after Mr. Schwartz. It would be illogical to contend that failure to sue the School for changing its letterhead (for example) would preclude a later action for removing Mr. Schwartz's name from all School buildings.[18] If "the expiration of the limitations period following a first breach of duty or instance of misconduct were treated as sufficient to bar suit for any subsequent breach or miscon-

[18] The School seeks to distinguish certain case law as "concern[ing] waiver principles not at issue here." (RAB at 83 & n.23.) But waiver is precisely what the School is arguing – that the executor's purported failure to sue for allegedly known breaches precludes him from suing for later breaches.

duct … parties engaged in long-standing misfeasance would thereby obtain immunity in perpetuity from suit even for recent and ongoing misfeasance." *Aryeh*, 292 P.3d at 880. This is why courts "have long settled that separate, recurring invasions of the same right can each trigger their own statute of limitations." *Id.*

Indeed, "whenever there is a continuing … obligation" – such as to name the School after Mr. Schwartz *in perpetuity* – continuous accrual applies such that "a cause of action accrues each time a wrongful act occurs, triggering a new limitations period." *Id.* (quotations and citations omitted); *see also, e.g.*, *Henry v. Bank of Am.*, 147 A.D.3d 599, 601 (N.Y. Sup. Ct. App. Div. 2017) (the continuous wrong "doctrine is applied to extend the statute of limitations when the contract imposes a continuing duty on the breaching party" and there is "a series of independent, distinct wrongs") (quotations and citations omitted); *Dave & Buster's, Inc. v. White Flint Mall, LLLP*, 616 F. App'x 552, 557–58 (4th Cir. 2015) (action not time-barred where breaching party "was subject to an ongoing obligation" because for each breach, "accrual of the statute of limitations began anew").

The School attempts to distinguish the case law cited by the Estate as "entirely unrelated to the alleged contract at issue here." (RAB at 82–83.) But just because other cases do not involve naming rights does not make them inapposite. Recurring payments may be a common type of continuing obligation,[19] but the premise that separate breaches are separately actionable is equally applicable to the School's multiple distinct breaches of its continuing obligation to name the School after Mr. Schwartz. *See Carroll v. City & Cty. of San Francisco*, 254 Cal. Rptr. 3d 519, 524 (Cal. App. 2019) (because the duty to refrain from discrimination is ongoing, "an unlawful event occurred each time plaintiff received a discriminatory payment, such that a new limitations period applies to each allegedly discriminatory check"); *Dave & Buster's*, 616 F. App'x at 556–58 (because obligation not to operate competing facilities within radius restriction was "a continuing obligation," "[e]very day"

[19] *Merrill v. DeMott*, 113 Nev. 1390, 1400, 951 P.2d 1040, 1046 (1997) (lease payments); *Pritchard v. Regence Bluecross Blueshield of Oregon*, 201 P.3d 290, 292 (Or. 2009) (each wrongful denial of insurance claim "constitutes a discrete breach of the obligation to pay benefits under the policy"); *Alderson v. State*, 806 P.2d 142, 145 (Or. 1991) ("each deduction [from salaries] was a separate breach, … and the statute began to run separately as to each alleged breach").

party did so "constituted a breach of the ongoing contract … such that accrual of the statute of limitations began anew"). Here, the School's multiple distinct breaches resulted in different harms requiring different remedies (i.e. restoration of Mr. Schwartz's name to different buildings, amending the School's corporate filings, restoring the letterhead, etc.) and were separately actionable. *See Orange Cty. Water Dist. v. Sabic Innovative Plastics US, LLC*, 222 Cal. Rptr. 3d 83, 130 (Cal. App. 2017) (rejecting that contamination of groundwater was a single harm accruing only once, as "[s]eparate negligent acts could reasonably lead to more or different contamination, contamination with different effects, or contamination requiring different remediation efforts").

The Estate timely sued for all of the School's breaches, but at a minimum, it did so for the School's corporate change of name (which the executor indisputably did not know about until after this lawsuit was filed)[20] and for the School's removal of Mr. Schwartz's name from the elementary school (which did not even occur until after this lawsuit was filed).[21]

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[20] (14 App. 3428.)

[21] (16 App. 3787.)

### E. The Estate Was Prejudiced by the District Court's Erroneous Grant of Summary Judgment on its Oral Contract Claim

The School incorrectly argues that the Estate cannot show prejudice from the district court's erroneous grant of summary judgment because "the district court permitted the Estate to present evidence on and submit the issue of the existence of a naming rights contract, oral and written, to the jury." (RAB at 84–86.) The district court allowed evidence about the contract because it was relevant to the Estate's written contract claim[22] and to Mr. Schwartz's state of mind in making his bequest. (18 App. 4350–51.) But make no mistake: the Estate was never going be able to succeed on its oral contract claim. While the jury verdict form asked (1) did Mr. Schwartz have a naming rights contract and (2) was "the contract oral or founded upon a writing or writings," the verdict form instructed the jury to skip the question "Did the School breach the Contract?" if "you found the contract was an oral agreement." (19 App. 4513-15.) Thus, the Estate was not going to argue an

[22] In reality, "a contract or agreement in legal contemplation is neither written nor oral, but oral or written evidence may be received to establish the terms of the contract or agreement between the parties." *Lande v. S. Cal. Freight Lines*, 193 P.2d 144, 147 (Cal. App. 1948).

oral contract to the jury – that would be arguing itself into an already forgone conclusion of losing.

The Estate was prejudiced by the district court's grant of summary judgment on its oral contract claim. But for that ruling, the Estate would have requested the jury instruction that a "contract may be oral, written, or partly oral and partly written. An oral, or partly oral and partly written contract is as valid and enforceable as a written contract." Nevada Jury Instructions: Civil, Nevada Jury Instruction 13.3 (2018). The Estate would have emphasized to the jury that not all of a contract's terms need to be in writing to be enforceable and that the parties' performance of the agreement for many years was "persuasive, if not conclusive" evidence of the terms of the agreement. *Moore v. Prindle,* 80 Nev. 369, 372, 394 P.2d 352, 354 (Nev. 1964); *Wiley v. Cook*, 94 Nev. 558, 562, 583 P.2d 1076, 1078 (1978); *Flyge v. Flynn*, 63 Nev. 201, 239, 166 P.2d 539, 556 (Nev. 1946); Restatement (Second) of Contracts § 4 (1981) ("A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.").

The School acts as if the Estate could have requested its desired

jury instructions, made arguments to the jury, and otherwise acted directly contrary the district court's summary judgment ruling. But the Estate was duty-bound to follow the court's order even though the Estate disagreed with it. *Maness v. Meyers*, 419 U.S. 449, 458–60 (1975) ("We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. … once the court has ruled, counsel and others involved in the action must abide by the ruling"); *Weddell v. Stewart*, 127 Nev. 645, 652, 261 P.3d 1080, 1085 (2011). And let's not kid ourselves: if the Estate had requested a jury instruction explaining that oral contracts are just as valid as written contracts, the School would have been the first to object given that the court had already granted summary judgment on the oral contract claim.

The Estate was thus prejudiced by being precluded from presenting one of the strongest theories of its case. *Cf. Cobb v. Pozzi*, 363 F.3d 89, 116 (2d Cir. 2004) (finding prejudice where "the district court effectively precluded the jury from weighing any evidence that the defendants submitted in support of their theory"). There is more than a chance "a different result might reasonably have been reached" had the

district court not erroneously granted summary judgment on the Estate's oral contract claim. *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (defining prejudicial error). The evidence of an oral contract was overwhelming. (AOB at 52–53.) Even the School's counsel told the jury there was an oral contract (but that this was not good enough for the Estate to succeed on its contract claim). (18 App. 4423 (School's closing referring to the executor's testimony "it was an oral contract… Ladies and gentleman, it doesn't get any better for my client than that. The person who brought this lawsuit alleging a contract told you under oath there is no written contract. It was oral. It doesn't get any better than that").) If the court had not granted summary judgment on the oral contract claim, the Estate certainly would have objected each time the School falsely conveyed to the jury that the contract had to be in writing.[23] *Mountain Shadows of Incline v. Kopsho*, 92

[23] (*E.g.*, 12 App. 2956 (School's counsel arguing during opening statement "that these kind of agreements need to be … clear and in writing and signed by the parties"); 12 App. 2958 ("they don't have a written contract"); 12 App. 2958 ("there is no evidence of a written contract"); 12 App. 2968; 12 App. 2977 (referring to written contract with the Adelsons and stating this "is what Milton I. Schwartz was required to have an actual forceable naming rights agreement"); 12 App. 2980 ("Milton I. Schwartz did not have any kind of written contract for perpetual naming rights of any kind"); 18 App. 4420 (School's closing arguing "this

Nev. 599, 600, 555 P.2d 841, 842 (1976) ("We reject appellant's contention that it cannot be bound by its employment contract because the contract was not reduced to a written agreement and signed by the parties."). But there was no point in objecting when the court had already foreclosed the Estate's oral contract claim.

But for the erroneous grant of summary judgment on statute of limitations grounds, the jury almost certainly would have found there was an oral contract and that the School breached the same.

### F. The Issue is Not Before This Court, but the Naming Rights Agreement Satisfies the Statute of Frauds

The School argues that the naming rights agreement with Mr. Schwartz violates the statute of frauds, but that issue is not before this

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was a very smart, very sophisticated, very meticulous businessman who knew how to write a contract… He knows what a contract is and yet he didn't have a contract? … So Milton Schwartz never had a written contract."); 18 App. 4420 ("They have the burden of proof on the written contract, not us. No written contract."); 18 App. 4421 ("They don't have a written agreement."); 18 App. 4423; 18 App. 4424 ("Gentlemen's agreement. No written agreement."); 18 App. 4436 ("he … never had a contract, never had an enforceable contract"); 18 App. 4438 ("That's why you do what the Adelson's do. You have a written contract that is clear, and everybody can understand it 30 years later, so you don't end up in a courtroom like this."); 18 App. 4440 ("No written contract."); 18 App. 4456 ("he could have had a written agreement. He knew how to make written agreements.").)

Court. While the School argued to the district court that the statute of frauds barred the Estate's contract claim (7 App. 1563-64), the district court denied the School's motion (10 App. 2497-98) and the written contract claim went to trial – a ruling neither side has appealed. The School has no grounds to argue an alternative theory for a claim it already won.

To the extent the School is arguing the statute of frauds is an alternative basis to affirm the district court's erroneous grant of summary judgment on the Estate's oral contract claim, that was not the issue on which summary judgment was requested or granted. In any event, the statute of frauds was satisfied in this case. (AOB at 48–49 n.21.) The statute of frauds provides that an agreement "not to be performed within 1 year" "is void, unless the agreement, or some note or memorandum thereof expressing the consideration, is in writing, and subscribed by the person charged therewith." NRS 111.220(1).

Here, the pledge list was attached to signed board minutes (i.e. it was "subscribed by the person charged" – the School) and reflected that Mr. Schwartz pledged and paid $500,000 ("the consideration"). (27 App.

6874–76.)[24] The School's promise to name the school after Mr. Schwartz in perpetuity was reflected in numerous writings signed by School representatives (*see* Table A), including but not limited to (i) the 1990 bylaws signed by all board members (27 App. 6612–6620), (ii) the 1999 bylaws signed by the president and secretary (27 App. 6629–6638), and (iii) the Sabbath letter, signed by school head Dr. Sabbath and written "[o]n behalf of myself, President, Geri Rentchler and the entire Board of Directors." (28 App. 6883–84.)

The School argues "the absence of a document signed by the School automatically violates the statute of frauds" (RAB at 89) – but all the cited documents were signed or subscribed to by the School. The School claims that besides naming the corporation after Mr. Schwartz in perpetuity, the School's other obligations are "absent from these documents." (RAB at 89–90.) But the School overlooks the Sabbath letter detailing where Mr. Schwartz's name needed to be placed. And the School reveals the weakness of its position when it claims that "you can-

[24] Presumably the School signed Mr. Schwartz's checks made out to the School when it cashed them. These, too, reflected the consideration in writing and were subscribed to by the School. (28 App. 6871.)

not have a meeting of the minds, especially one creating perpetual obligations on the obligor, when the obligor – in this case, the obligator is made up of the various Board members at any given time – changed over time." (RAB at 91.) Any entity will operate through board members that change over time. The School apparently contends that the School can thus never enter into a binding contract – but that is not the law. Nothing in the statute of frauds requires that the various documents constituting the "note or memorandum" of the agreement be executed at the same time. *See Shatz*, 80 Nev. at 119, 390 P.2d at 44 ("missing description" in one letter was "supplied by the letter" written over a month earlier, and together, the letters satisfied the statute of frauds). And even if the Court were to consider only the 1990 bylaws, at a minimum, there was written evidence of the agreement to name the corporation after Mr. Schwartz in perpetuity – and the School breached that promise.

Finally, the statute of frauds does not even apply here because Mr. Schwartz fully performed his end of the bargain. *Edwards Indus., Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1032, 923 P.2d 569, 574 (1996) ("Full performance by one party may also remove a contract from the statute

of frauds.").

## II.

## THE DISTRICT COURT ERRED IN REFUSING JURY INSTRUCTIONS ON CONTRACT MODIFICATION AND BREACH OF THE IMPLIED COVENANT

### A. The District Court Erred in Refusing to Instruct the Jury on Contract Modification

The School offers no response to the fact that it erroneously argued to the district court that "you can't find a modification or alteration of an oral contract. It has to be a written contract to have a modification." (24 App. 5990; *contrast* AOB at 60–62 (citing case law showing this is incorrect), *with* RAB at 92–97 (offering no response).) Nor does the School contest that the district court denied the Estate's post-trial motion on the refused jury instruction because summary judgment had already been granted on the oral contract claim (24 App. 5991) – making the erroneous grant of summary judgment doubly prejudicial.

Instead, the School argues there was no evidence of Mr. Schwartz's "consideration to support the modification." (RAB at 93.)[25]

[25] As an initial matter, where parties "simply clarify the terms of the original contract" in a subsequent writing, courts "will enforce the clarification even if there is no additional consideration to support it." *Ro-*

Not so. The original agreement may have been simply to name the School or the corporation after Mr. Schwartz, but the jury could have found that the Sabbath letter modified the original agreement by specifying in writing precisely where Mr. Schwartz's name needed to be used (i.e. the corporation, the marker in front of the school, the School's stationary, and advertising). (28 App. 6883.)[26] Dr. Sabbath testified that in sending the letter to Mr. Schwartz, the School board was "trying to rebuild bridges and goodwill, as well as credibility in not only the Jew-

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*din Properties-Shore Mall, N.V. v. Cushman & Wakefield of Pennsylvania, Inc.*, 49 F. Supp. 2d 709, 724 (D.N.J. 1999). This is because "[w]hen the subsequent writing is intended to merely clarify or explain the terms of the original contract, neither party acquires any additional benefit or burden; rather, the parties are merely acknowledging what they had already intended. Accordingly, no new consideration is required." *Farmers All. Mut. Ins. Co. v. Hulstrand Const., Inc.*, 632 N.W.2d 473, 476 (N.D. 2001). Here, the jury could have found the Sabbath letter constituted a memorialization/explanation of the terms of the original oral agreement. (14 App. 3340 (Dr. Sabbath testifying the letter "was a memorialization of what we had agreed on, that for the donation, his name would be on the school").)

[26] The School argues that there must be clear and convincing evidence of modification and that no reasonable juror could have found a modification. (RAB at 96–97.) But the jury was instructed on clear and convincing evidence (18 App. 4487), and it was still for the jury to determine if there was a modification.

ish community but the community at large, and one of the first important steps was by reaching back out to our biggest donor." (14 App. 3307.) That is, the School was promising the modified terms in the Sabbath letter in exchange for Mr. Schwartz (a) resuming donations to the School and (b) being involved with the school and lending his name to it, which in turn would enhance the School's reputation in the community and potentially attract other donors.

Mr. Schwartz provided the agreed-upon consideration. He resumed making substantial donations to the School (*see* Chart at AOB at 16), and he became involved in the School again. (14 App. 3307 ("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.").) And the School's condition and reputation improved. (14 App. 3308.)

Mr. Schwartz's actions were more than sufficient consideration for the modified terms. "Any consideration for a modification, however insignificant, satisfies the requirement of new and independent consideration." *Oscar v. Simeonidis*, 800 A.2d 271, 276 (N.J. App. 2002) ("For example, payment of an existing rent obligation one day in advance of the due date would suffice, slight as that consideration would be."); *see also*

*M/V Am. Queen v. San Diego Marine Const. Corp.*, 708 F.2d 1483, 1489 (9th Cir. 1983) ("Any performance in addition to that already bargained for serves as consideration for a modification"). This Court held that an employee handbook could modify an "oral employment contract" and that "since the employee was free to leave her employment, her continued employment after receiving the handbook provided sufficient consideration for the modifications." *Sw. Gas Corp. v. Ahmad*, 99 Nev. 594, 594–95, 668 P.2d 261, 261–62 (1983). If continued employment is adequate consideration for a contract modification, surely Mr. Schwartz's resumption of donations and continuing involvement with the School is sufficient consideration for the modified terms evidenced by the Sabbath letter and the parties' course of conduct complying with the Sabbath letter for over a decade.

The School argues that the Estate was not prejudiced by the district court's refusal to give the contract modification instruction because the jury determined no contract ever existed. (RAB at 95–96.) But that argument is based on the false premise that the jury could have found an oral contract existed. The court had already granted summary judg-

ment on the oral contract claim, so the Estate did not advocate that theory to the jury. If parties were required to present evidence of, and argue, already dismissed claims to the jury merely to show the dismissal was prejudicial, this would (a) unduly prolong trials, (b) defeat the purpose of summary judgment, which is meant to streamline claims for trial, and (c) put counsel in the untenable position of irking the trial judge who has already adjudicated the claim and is not inclined to hear evidence on it. The Estate was prejudiced by both the district court's erroneous grant of summary judgment and its refusal to give a modification instruction.

### B. The District Court Erred in Refusing to Instruct the Jury on Breach of the Implied Covenant

The School argues the Estate was not entitled to a jury instruction on the implied covenant of good faith and fair dealing because the Estate did not plead the implied covenant as an independent claim. (RAB at 98–99.) But properly analyzed, breach of the implied covenant is not "a free-standing cause of action, as good faith is part of a contract claim and does not stand alone." *Avis Rent A Car Sys., LLC v. City of Dayton*, No. 3:12-CV-399, 2015 WL 5636897, at *7 (S.D. Ohio Sept. 25, 2015) (quotations omitted); *see also, e.g.*, *Younglove Const., LLC v. PSD Dev.*,

*LLC*, No. 3:08CV1447, 2010 WL 3515603, at *3 (N.D. Ohio Sept. 3, 2010) ("parties may not bring separate claims for breach of contract and breach of the duty of good faith, because the latter is premised on the former"); *Krukrubo v. Fifth Third Bank*, 2007 WL 4532689, at *5 (Ohio App. 2007) ("a claim for breach of contract subsumes the accompanying claim for breach of the duty of good faith and fair dealing").[27] Indeed, a "determination by the jury that the implied covenant was breached will give rise to an award of contract damages," *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 109 Nev. 1043, 1047, 862 P.2d 1207, 1209 (1993) – the same damages the Estate alleged in its contract claim, which subsumed and included a breach of the implied covenant. (28 App. 6808.)

By pleading that the School "failed to comply with the agreement and conditions" on which Mr. Schwartz's donations were made and that

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[27] The School cites *Richardson* in arguing that the "Estate failed to properly raise this independent claim and was not entitled to the jury instruction." (RAB at 99.) But that case merely indicated that breach of the covenant of good faith and fair dealing should be pleaded affirmatively when it is asserted as an affirmative defense. *Clark Cty. Sch. Dist. v. Richardson Const., Inc.*, 123 Nev. 382, 394, 168 P.3d 87, 95 (2007); *see also* NRCP 8(c)(1) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense"). The Estate asked for an instruction on the implied covenant as part of its contract claim against the School, not as an affirmative defense to claims brought by the School.

the School "has breached its agreement and promises" (28 App. 6808), the Estate *did* plead breach of the covenant of good faith and fair dealing implied in every contract. The Estate undoubtedly put the School on notice of the facts comprising its breach of good faith claim. (28 App. 6801–05 (Estate's petition describing how the School surreptitiously changed its corporate name shortly after Mr. Schwartz's death, changed the name of the middle school, and changed its letterhead); 9 App. 2247–48 (Estate's pre-trial memorandum describing how "just four months after Milton's death," the School changes its name and reduced "Milton's namesake from K-8 to K-4," only to later "completely remove[] Milton's namesake").) "Nevada is a notice-pleading state,"[28] and as long as the Estate put the School on notice of the facts comprising its claim, it is immaterial whether the Estate identified the precise legal theory of "breach of the implied covenant of good faith and fair dealing." "'Notice pleading' requires plaintiffs to set forth the facts which support a legal theory, but does not require the legal theory relied upon to be correctly

[28] *W. States Const., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992) ("thus, our courts liberally construe pleadings to 'place into issue matters which are fairly noticed to the adverse party'" (quoting *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984))).

identified." *Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578–79, 908 P.2d 720, 722–23 (1995) (footnote omitted) (while plaintiff "did not specifically use the term 'constructive discharge,'" he "repeatedly set forth facts which supported such a legal theory"); *Michoff*, 108 Nev. at 936–37, 840 P.2d at 1223 (rejecting argument that respondent "did not plead any contractual claims" where her pretrial pleadings and trial statement put appellant on notice that she was claiming "an ownership interest … based on an implied" or express agreement "to acquire and hold property as though the parties were married"); *Droge v. AAAA Two Star Towing, Inc.*, 136 Nev. Adv. Op. 33, 468 P.3d 862, 878 (Nev. App. 2020) ("'A plaintiff who fails to use the precise legalese in describing his grievance but who sets forth the facts which support his complaint thus satisfies the requisites of notice pleading.'" (quoting *Liston*, 111 Nev. at 1578, 908 P.2d at 723 )).

An instruction on the implied covenant was essential because even if the jury found the original agreement was simply a promise to name the School after Mr. Schwartz in perpetuity (without specifying what precisely that entailed) or a promise to name the corporation after Mr. Schwartz, the jury could still have found it contravened "the intention

and spirit of the contract"[29] and denied Mr. Schwartz "the benefits of the contract"[30] for the School to remove Mr. Schwartz's name from signage, the middle school, letterhead, and ultimately from all public indicators of the School's name. Surely the School was not allowed to promise it would be named after Mr. Schwartz forever and then relegate his name to a small sign on a single building (only to subsequently remove the name altogether). The jury should have been instructed on the implied covenant, and the Estate was prejudiced by the district court's refusal to do so.

The School again contends that the Estate was not prejudiced because the jury found there was no contract. (RAB at 99–100.) But this again ignores the reality that the question of whether there was an oral contract was not truly before the jury. The court had already granted summary judgment on that claim, so the Estate did not argue it to the jury. The Estate was prejudiced by both the erroneous grant of summary judgment on the oral contract claim and the subsequent failure to

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[29] *Morris v. Bank of Am. Nevada*, 110 Nev. 1274, 1278, 886 P.2d 454, 457 (1994) (quotations omitted).

[30] *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 234, 808 P.2d 919, 924 (1991).

give relevant jury instructions on contract modification and the implied covenant.

## III.

## THE DISTRICT COURT ERRED IN REFUSING TO RESCIND MR. SCHWARTZ'S LIFETIME GIFTS

### A. The District Court Committed Reversible Error in Refusing to Rescind Mr. Schwartz's Lifetime Gifts

The district court stated in a signed order 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." (24 App. 5995.) The School now contends this was not really the reason the court refused to rescind Mr. Schwartz's lifetime gifts because the court dealt with the claim for rescission in a separate order. (RAB at 104 n.27.) But the separate order was drafted by the School's counsel and merely stated that the Estate was to "take nothing by way of its remaining claims for Promissory Estoppel and Revocation of Gift and Constructive Trust" and that these claims were dismissed with prejudice. (25 App. 6005.)

Since the rescission of Mr. Schwartz's lifetime gifts was an equita-

ble issue being decided by the district court (with the jury's findings being advisory), the court was required to "find the facts specially and state its conclusions of law separately." Nev. R. Civ. P. 52(a)(1). The only conclusion of law the district court included in its orders was that it could not rescind Mr. Schwartz's lifetime gifts "absent an enforceable naming rights agreement" applicable to each gift. (24 App. 5995.)[31] This was legal error, as one need not have an enforceable contract to make a gift conditional or rescindable based on an invalidating mistake (AOB at 66–72) – a point the School does not contest. Instead, the School argues the district court did not really mean what it said and that the Estate's assertion of error is "moot." (RAB at 104 n.27.) Written orders exist for a reason, and the School cannot now revise history by asking this Court to ignore the district court's signed order and trust the School as to what the district court really meant.

Because the district court's refusal to rescind Mr. Schwartz's lifetime gifts was based on an erroneous conclusion of law, the district court's decision must be reversed for that reason alone. *See Bopp v.*

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[31] The district court crossed out other portions of the order, but left this portion intact – confirming the district court's endorsement of the reasoning. (24 App. 5995.)

*Lino*, 110 Nev. 1246, 1249-53, 885 P.2d 559, 561-63 (1994) (conclusions of law "are reviewed de novo" and require reversal when in error); *Hannam v. Brown*, 114 Nev. 350, 361-64, 956 P.2d 794, 801-03 (1998) (same).

### B. Estoppel Does Not Preclude the Estate's Rescission Claims

The School erroneously contends that the Estate flip-flopped between whether the court or jury should decide its rescission claims and that it reverted back to the court only when it lost before the jury. (RAB at 102–103.) Not so. In its sixth claim for relief, the Estate sought to revoke Mr. Schwartz's lifetime gifts based on their "conditional natures" and on Mr. Schwartz's belief "that the [School] had agreed to bear his name in perpetuity" even "if the [School] denies that it made such promise or contends that such promises are not enforceable." (1 App. 239–240 (emphasis added).) Thus, the Estate raised three different theories to obtain the same relief: (1) the gifts were conditional, (2) the gifts were based on an invalidating mistake, and (3) the gifts should be returned to the Estate under the doctrine of promissory estoppel even if the School's promises were "not enforceable." (1 App.

240); *see generally Dynalectric Co. of Nev. v. Clark & Sullivan Constructors, Inc.*, 127 Nev. 480, 483–84, 255 P.3d 286, 288 (2011) (describing promissory estoppel as a promise that induces reliance where injustice can be avoided only by enforcement of the promise). All three theories are equitable in nature and thus the claim for rescission was always meant to be decided by the court. *See Dynalectric*, 127 Nev. at 485, 255 P.3d at 289 n.8 ("promissory estoppel is rooted in equity" (citing *Toscano v. Greene Music*, 21 Cal. Rptr. 3d 732, 737 (Cal. App. 2004))); *C & K Eng'g Contractors v. Amber Steel Co.*, 587 P.2d 1136, 1141 (Cal. 1978) (claim for promissory estoppel was "equitable in nature, to be tried by the court with or without an advisory jury").

Here, the facts underlying promissory estoppel were permissibly submitted to the jury in an advisory capacity (19 App. 4516), but the claim remained one for the court to decide – as the Estate always argued. (23 App. 5572–73.)

The School's claim of judicial estoppel fails because the Estate took no inconsistent actions, let alone two "totally inconsistent" positions. *Delgado v. Am. Family Ins. Grp.*, 125 Nev. 564, 570, 217 P.3d 563, 567 (2009) (describing necessary elements of judicial estoppel test).

And the Estate did not win on its promissory estoppel claim (19 App. 4516), which is an independent and additional reason judicial estoppel does not apply. *Id.* (for judicial estoppel to apply, the party must have been "successful in asserting the first position").[32]

### C. Mr. Schwartz's Lifetime Gifts – and Especially His Initial $500,000 Donation – Were Conditioned on the School Being Named After Him in Perpetuity; at a Minimum, This Was an Invalidating Mistake

#### *1. Mr. Schwartz's Initial Donation Must Be Returned, as It Was Induced by the Belief That the School Would Perpetually Bear His Name in Exchange*

Mr. Schwartz made it clear that his initial $500,000 donation was based solely on the belief that in return, the School would be named after him in perpetuity. (1 App. 177 (testifying in 1993 "[t]hat on or about August of 1989, Affiant donated $500,000 to the Hebrew Academy in return for which it would guarantee that its name would change in perpetuity to the MILTON I. SCHWARTZ HEBREW ACADEMY"); 28 App. 6881 (testifying in 1993 "[t]hat Affiant donated $500,000 to the Hebrew

[32] Moreover, while the School contends that the promissory estoppel claim was submitted to jury over its "objection" (RAB at 102–103), it cites to no place in the record where it made its purported objection, violating NRAP 28(e)(1).

Academy with the understanding that the school would be renamed the MILTON I. SCHWARTZ HEBREW ACADEMY in perpetuity"); 29 App. 7008 (stating in a 2007 video interview "I gave a half a million, and they agreed to make the name of the School the Milton I. Schwartz Hebrew Academy in perpetuity").)

These affidavits and statements were uncontradicted as to Mr. Schwartz's state of mind in making his initial donation – indeed, he was the only person who knew firsthand his intent when donating to the School.[33] Mr. Schwartz's uncontroverted sworn statements alone constitute clear and convincing evidence. *Vu v. Second Jud. Dist. Ct.*, 132 Nev. 237, 244–45, 371 P.3d 1015, 1020 (2016) ("uncontroverted evidence" and reasonable inferences therefrom satisfied "clear and convincing evidentiary standard").[34] Besides Mr. Schwartz's own authoritative

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[33] The School may contest the terms of the parties' agreement, but it did not (and could not) submit any evidence contradicting that Mr. Schwartz made his initial $500,000 donation based on the *belief* that the School would thereby be named after him in perpetuity.

[34] *See also Best v. Bender*, No. CV-2001-7786, 2004 WL 1080153, at *5 (Idaho Dist. Jan. 15, 2004) ("Sparling's uncontradicted affidavit is clear and convincing evidence and provides proof far beyond a preponderance of the evidence."); *Brandner v. Delaware State Hous. Auth.*, No. C.A. 1132-K, 1993 WL 548831, at *4 (Del. Ch. Dec. 9, 1993) ("Based on these uncontradicted affidavits, plaintiff has shown by clear and convincing evidence" entity's promise made to her); *Surgical Laser Techs.,*

statements as to his intent, other evidence supported that his initial contribution was conditioned on the School being named after him forever. (13 App. 3165 (Mr. Schwartz's long-time secretary Ms. Pacheco testifying, "In your opinion, would Mr. Schwartz have ever given the school a half million dollars if it was not going to be named after him in perpetuity? … THE WITNESS: No."); 2 App. 288 (former board member Michael Novick testifying in 1993 that after the temporary falling out between the School and Mr. Schwartz, "Tamar Lubin instructed Affiant to offer to return $500,000 to Milton I. Schwartz" – showing the gift was conditional).) Having his name on the School "is what [Mr. Schwartz] intended originally when he gave … his initial $500,000 … in exchange for the naming of the school to be the Milton I. Schwartz Hebrew Academy." (13 App. 3180 (emphasis added).) As the donor of the gift, Mr. Schwartz's intent is controlling. *In re Irrevocable Tr. Agreement of 1979*, 130 Nev. 597, 605, 331 P.3d 881, 887 (2014).

The Estate proved by clear and convincing evidence that Mr.

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*Inc. v. Heraeus Lasersonics, Inc.*, No. CIV. A. 90-7965, 1995 WL 20444, at *8 (E.D. Pa. Jan. 12, 1995) ("the uncontradicted declarations provided by plaintiff are sufficient evidence … even applying a clear and convincing evidentiary standard").

Schwartz's belief that the School would be named after him in perpetuity induced his initial $500,000 donation, even if that belief was mistaken. *In re Irrevocable Tr. Agreement of 1979*, 130 Nev. at 605–06, 331 P.3d at 887 (an invalidating mistake occurs when the donor's mistake "induced the gift"). But for his belief that the School would perpetually bear his name in return for his donation, Mr. Schwartz would not have made the donation. (1 App. 177; 28 App. 6881; 13 App. 3165.) *In re Irrevocable Tr. Agreement of 1979*, 130 Nev. at 605, 331 P.3d at 887 ("An invalidating mistake occurs when 'but for the mistake the transaction in question would not have taken place.'" (quoting Restatement (Third) of Restitution & Unjust Enrichment § 5(2)(a) (2011))).

Thus, at a minimum, the August 1989 $500,000 donation must be returned to the Estate at present-day value. *In re Irrevocable Tr. Agreement of 1979*, 130 Nev. 597, 606, 331 P.3d 881, 887 (2014) ("Rescission is an appropriate remedy to address an invalidating mistake."); *Tennessee Div. of United Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98, 119 (Tenn. App. 2005) (determining consumer price index should be used as "it would be inequitable to allow [school] to 'return' the gift at issue here simply by paying the [donor] the same sum of

money the [donor] donated in 1933 because the value of a dollar today is very different").[35]

### *2. Mr. Schwartz's Other Lifetime Donations Were Based on the Condition and/or Invalidating Mistake That the School Was Named After Him in Perpetuity*

Besides his initial $500,000 donation, Mr. Schwartz donated $610,606.66 to the School over the years from 1989 to 2007 – but importantly, he made no donations between 1993–1996. (AOB at 16; 13 App. 3169, 3184–88; 28 App. 6860.)[36] The uncontroverted testimony was that Mr. Schwartz stopped making donations during those years "[b]ecause his name was taken off the school." (13 App. 3169.) Thus, Mr. Schwartz only donated when his name was on the School – powerful evidence that his lifetime donations were conditioned on the School bearing his name.

The School essentially argues that to prove a conditional gift, there must be a signed statement at the time of each donation expressly

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[35] Using the calculator on the U.S. Bureau of Labor Statistics webpage (https://www.bls.gov/data/inflation_calculator.htm), the value of $500,000 in August 1989 equates to $1,045,240.77 as of December 2020.

[36] The School does not contest the amounts or timing of Mr. Schwartz's donations. (*See generally* RAB at 100–116.)

stating it is conditional. But that is not the standard. The condition can be expressly stated or "inferred from the circumstances." Restatement (First) of Restitution § 58 cmt. b (1937); *see also, e.g.*, *Cooper v. Smith*, 800 N.E.2d 372, 380 (Ohio App. 2003) ("Whether a gift is conditional … is a question of the donor's intent, to be determined from any express declaration … or from the circumstances.") (quotations omitted); *Estate of Pepper v. Whitehead*, 780 F.3d 856, 862 (8th Cir. 2015) (factfinder "could find that [donor] implied a condition that the [gift] be returned upon his request"); *Grossman v. Greenstein*, 155 A. 190, 191 (Md. 1931) ("the gift may yet fail because it has expressly or by implication been made upon a condition"). Contrary to the School's suggestion (RAB at 109), there is no requirement that the condition be in writing. *Ver Brycke v. Ver Brycke*, 843 A.2d 758, 770 (Md. 2004); *Ewing v. Hladky Const., Inc.*, 48 P.3d 1086, 1087–90 (Wyo. 2002) (determining that gift of stock was conditional on continued employment even where "no such written agreement was ever prepared").

Here, Mr. Schwartz's intent was abundantly clear. Each donation was to the Milton I. Schwartz Hebrew Academy – expressly indicating he wanted to donate to the entity bearing that name. And at the time

he made his donations, there were writings in place indicating that the School was not just currently named that, but would always bear his name. (28 App. 6870, 6872; 29 App. 7006; 27 App. 6612, 6626; 28 App. 6883–84; 27 App. 6629.)[37] Thus, at the time of Mr. Schwartz's donations, the School was named the Milton I. Schwartz Hebrew Academy, and Mr. Schwartz expected it would always be so. "A donor may limit a gift and render it so conditioned and dependent on an expected state of facts that when the state of facts fails, the gift fails with it." *Wilkin v. Wilkin*, 688 N.E.2d 27, 29–30 (Ohio App. 1996) (daughter had to return father's conditional gift of $4,000 since she failed to use the money to take a French course).

It was not a secret or an "undisclosed intention"[38] that Mr. Schwartz intended for the School to be named after him in perpetuity –

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[37] Mr. Schwartz was instrumental in securing the bylaws and other documents expressing the condition that the School always bear his name. (*E.g.*, 27 App. 6612–20 (Mr. Schwartz signing the December 1990 bylaws as a board member); 28 App. 6883–84 (Sabbath letter referencing Mr. Schwartz's efforts to "resolve differences" with the School).) That is, he expressed the condition.

[38] *Courts v. Annie Penn Mem'l Hosp., Inc.*, 431 S.E.2d 864, 866–67 (N.C. App. 1993) (explaining the "intent of the donor to condition the gift must be measured at the time the gifts is made, as any undisclosed intention is immaterial") (quotations omitted).

the condition was manifest. Everyone associated with the School knew it was incredibly important to Mr. Schwartz that the School bear his name in perpetuity. (AOB at 7–9; 14 App. 3253–54; 13 App. 3163–67; 14 App. 3383–86; 13 App. 3012–13; 13 App. 3115–16.) Indeed, Dr. Sabbath and the board agreed to restore Mr. Schwartz's name precisely so that he would resume donating again. (14 App. 3307 (the intent of the board in sending the Sabbath letter was to reach "back out to our biggest donor").) The School understood the condition and once the School compiled with the condition, Mr. Schwartz resumed donating again. (14 App. 3394.)

Here, Mr. Schwartz's first $500,000 donation was conditioned on the School bearing his name forever (*see supra* Part One, § III.C.1), as was his last donation (the bequest in his will). (27 App. 6640, § 2.3; 14 App. 3400–06, 3410, 3420; 19 App. 4515 (jury finding "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").) It only makes sense that his interim donations were based on the same condition – especially given (1) that Mr. Schwartz stopped making those donations when his name was removed from the School; and (2)

some of his lifetime donations were made at the very times he was reiterating the condition. For example, in the same year (2004) that Mr. Schwartz dictated his will bequest to the Milton I. Schwartz Hebrew Academy with no successor clause (27 App. 6640; 14 App. 3402–06, 3410), he also donated $135,277 to the School. (13 App. 3186.) The only logical conclusion is that Mr. Schwartz would have made neither gift but for his belief that the School would be named after him in perpetuity.

The School argues that Mr. Schwartz's lifetime gifts were not based on an invalidating mistake by pointing to testimony that Mr. Schwartz loved the School and wanted to ensure "that kids in Las Vegas could obtain a quality Jewish education." (RAB at 112–13 (quoting 27 App. 6688).) But Mr. Schwartz loved the School because it bore his name,[39] and he had enough connections that he could – and would – have formed another school with his name to give Las Vegas children a quality Jewish education had the School manifested its intent to remove

[39] (13 App. 3180 ("The school was his love, and so this was really important to him, that his name be on there for his legacy. And he just -- he wanted his name on that school in perpetuity for the legacy for his kids and his grandkids and their kids.").)

his name during his lifetime. (13 App. 3391, 16 App. 3922–26 (when the School did temporarily remove Mr. Schwartz's name, he helped form another school and "was pursuing naming rights" with that school).)

The School again argues that Mr. Schwartz's lifetime donations were not conditional because "while alive, [Mr. Schwartz] never demanded the return of his Lifetime Gifts from the School when his name was taken off." (RAB at 108.) First, the School offers no response to the case law cited by the Estate (AOB at 70) that it is "irrelevant that [the donor] did not undertake to undo the gifts during his lifetime. None of the legal principles applied in this area of the law requires that the person take an affirmative action while alive before a gift will be considered conditional." *Estate of Sacchetti v. Sacchetti*, 128 A.3d 273, 288 (Pa. Super. Ct. 2015). Second, the School ignores that Mr. Schwartz sued to get back on the board, a position from which he could demand compliance with the naming condition. The School resumed compliance with the naming condition within the statute of limitations for the School's initial breach of the condition, thereby obviating the need to sue for the return of the gifts. Because the issue was rectified during Mr. Schwartz's lifetime and the School remained compliant with the

naming condition until after Mr. Schwartz's death (14 App. 3421, 3427–28), there was no need to sue for the return of the gifts.

### D. The Estate's Rescission Claim is Timely Since It Did Not Accrue until the Jury Rendered Its Verdict

The School fallaciously argues that the Estate's rescission claim based on invalidating mistake is barred by the statute of limitations because it is based on "the same facts giving rise to the Estate's claims for breach of contract." (RAB at 110–11.) Untrue. The Estate's claim for invalidating mistake accrued not when the Estate breached the contract, but when the jury ruled there was no contract – that's what rendered Mr. Schwartz's belief "mistaken." "An action for relief on the grounds of mistake" accrues "'upon the discovery by the aggrieved party of the facts constituting the ... mistake.'" *State Dep't of Transportation v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 133 Nev. 549, 556, 402 P.3d 677, 683 (2017) (quoting NRS 11.190(3)(d)). The Estate did not discover the mistake until the jury rendered its verdict. Thus, the claim is undoubtedly timely. *Cf. Saylor v. Arcotta*, 126 Nev. 92, 96, 225 P.3d 1276, 1279 (2010) ("district court erred in concluding that appellants' contribution claim was time-barred" where there was no final underlying judgment yet, as the "statute of limitations period has not yet

begun to run in this case").

### E. Rescission is Necessary to Avoid the Unintended Enrichment of the School

"A donor whose gift is induced by invalidating mistake has a claim in restitution as necessary to prevent the unintended enrichment of the recipient." Restatement (Third) of Restitution and Unjust Enrichment § 11(2) (2011). The School acknowledges this, but claims that equity would not be served by "[f]orcing the School to now return Milton Schwartz's Lifetime Gifts, despite naming the School after him for decades." (RAB at 114–15.)

The School's own argument highlights the inequity of its position. According to the School, it is good enough that the School was named after Mr. Schwartz for decades and now it should be able to cater to the wealthiest donor.[40] But the School is not free to ignore the condition attached to Mr. Schwartz's gifts merely because that condition is now in-

[40] (*E.g.*, 18 App. 4417, 4427 (the School arguing in closing that the Adelsons "put three times, five times . . . the amount of money that Milton Schwartz put into that building and yet—Jonathan Schwartz says my father's name goes on everything. And it is infinitesimally small.").)

convenient for the School. The School accepted Mr. Schwartz's conditional donations and would not be here but for those donations.[41]

The only inequitable result would be to allow the School to retain the gifts conditioned on the School being named after Mr. Schwartz in perpetuity – a condition the School repeatedly acknowledged in writing (*see supra* Part One, § 1.A, Table A) – yet dispense with the condition as soon as Mr. Schwartz passed away. Failure to comply with the condition results in forfeiture of the gift. *E.g.*, *Zirngibl v. Zirngibl*, 477 N.W.2d 637, 640 (Wis. App. 1991) ("if the condition is not fulfilled, the donor may recover the gift"); John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. Davis L. Rev. 375, 406 (2005) ("The remedy for noncompliance with a donor's conditions in the case of a conditional gift is the charity's forfeiture of the gift.").

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[41] (*E.g.*, 13 App. 3072 ("I think all of us [board members] understood that because Milton Schwartz was coming to the rescue, remember the school was not going to exist if he didn't— if this didn't happen, he came to the rescue, said I'm giving a half a million dollars and I will help you raise the remainder of the money you need. And in exchange for that, we agreed to name the school the Milton I. Schwartz Hebrew Academy.").)

Mr. Schwartz's lifetime donations must be returned either at present-day value[42] or with pre-judgment interest in accord with NRS 99.040.[43]

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## PART TWO

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## IV.

### THE DISTRICT COURT CORRECTLY DENIED THE SCHOOL'S EFFORTS TO COMPEL THE BEQUEST

Mr. Schwartz left a $500,000 bequest to the "Milton I. Schwartz Hebrew Academy." (27 App. 6640.) The School sought to compel payment of this bequest to the Dr. Miriam and Sheldon G. Adelson Educational Institute over five years after the School had changed its name. (1 App. 74.) There was no longer any Milton I. Schwartz Hebrew Academy the bequest could be distributed to, so the bequest failed.

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[42] *Tennessee Div. of United Daughters of the Confederacy*, 174 S.W.3d at 119.

[43] Since the School failed to comply with Mr. Schwartz's condition, his lifetime donations constituted "money received to the use and benefit of another and detained without his … consent." NRS 99.040(1)(c). (*See* 23 App. 5571–72, 5671–73 for pre-judgment interest calculations.)

The School argues the district court erroneously admitted extrinsic evidence because the bequest was unambiguous. To the extent the bequest is unambiguous, this only favors the Estate. The clear language dictates that the bequest be paid only to the "Milton I. Schwartz Hebrew Academy." Without extrinsic evidence, there is no evidence linking the Adelson Educational Institute with the Milton I. Schwartz Hebrew Academy at all. Moreover, any evidence is admissible to explain the meaning of the testator's words. *In re Jones' Estate*, 72 Nev. 121, 123–24, 296 P.2d 295, 296 (1956). The district court properly admitted evidence confirming that when Mr. Schwartz left the bequest to the "Milton I. Schwartz Hebrew Academy," he intended that the bequest be paid only to the school bearing his name in perpetuity.

### A. The Will Unambiguously Dictated that the Bequest Go Only to the "Milton I. Schwartz Hebrew Academy"

The School argues that Mr. Schwartz's $500,000 bequest was unambiguous and that the district court erred in admitting parol evidence in construing the will. (RAB at 118–19.) To the extent the will was unambiguous, the bequest was clearly "to the Milton I. Schwartz Hebrew Academy" – not to the Adelson Educational Institute or any successor of the Milton I. Schwartz Hebrew Academy. (27 App. 6640.) Even if the

district court should have construed the bequest from only the four corners of the will, the error was harmless, as the result still would have been in the Estate's favor.

The School's insistence that the bequest was unambiguous is curious since the lack of ambiguity points only in the Estate's favor.[44] Indeed, without extrinsic evidence, there would have been no evidence to show that the Adelson Educational Campus was related to the Milton I. Schwartz Hebrew Academy at all. Since the will leaves the bequest to only the Milton I. Schwartz Hebrew Academy and there is no longer any Milton I. Schwartz Hebrew Academy, the gift fails. *In re Estate of Beck*, 649 N.E.2d 1011, 1015–16 (Ill. App. 1995) (gift to named orphanage lapsed where "the orphanage ceased to exist," notwithstanding other charity acquired its assets and claimed to be its successor); *In re Aker's Estate*, 21 A.D.2d 935, 936 (N.Y. App. 1964) ("the legatee was no longer in existence and the gift failed"); *Ward v. Worthington*, 162 N.E. 714, 717 (Ohio App. 1928) ("the specific devise to the Westminster Church is

[44] The School argues the executor "admits that the Bequest i[s] unambiguous." (RAB at 118 n.29.) The executor testified not to a legal conclusion, but made the factually accurate statement that the bequest was "clear to [him] and clear to [his father, Mr. Schwartz]." (14 App. 3475.)

void, because that church was not in existence at the time the gift was to take effect"); *Brooks v. City of Belfast*, 38 A. 222, 225 (Me. 1897) ("when a gift was made by will to a charity which has expired it was as much a lapse as a gift to an individual who had expired") (quotations omitted).

The School asserts at the time Mr. Schwartz died in August 2007, the Milton I. Schwartz Hebrew Academy was still in existence. (RAB at 26.) That may be, but the School voluntarily changed the name of the corporation, the campus, and all school buildings before the bequest could be distributed.[45] The bequest thus lapsed because the School ceased to occupy the position on which the bequest depended – being an entity named the Milton I. Schwartz Hebrew Academy. 97 C.J.S. Wills § 2070 (updated Feb. 2021) ("A legacy may lapse … if the beneficiary no longer occupies the position on which the testator's bounty depends.");

[45] The executor filed his petition for probate of will in October 2007 and listed the Milton I. Schwartz Hebrew Academy as a beneficiary. (1 App. 1–4.) Notwithstanding this, the School proceeded to name the school after the Adelsons in December 2007 (27 App. 6676–82) and officially changed the name of the corporation in March 2008 (27 App. 6683). Eventually Mr. Schwartz's name was removed from the elementary school as well (14 App. 3462–63, 16 App. 3787), so now there is no building or entity by the name of Milton I. Schwartz Hebrew Academy.

*see also Gilman v. Burnett*, 102 A. 108, 109–10 (Me. 1917) ("if the charitable purpose is limited to a … particular institution, and … if … the institution ceases to exist before the gift has taken effect, and possibly in some cases after it has taken effect, … the legacy lapses"); *Brooks*, 38 A. at 225 (gift fails where donor's specified "object cannot be carried out, or the charity provided for ceases to exist") (quotations omitted); *Teele v. Bishop of Derry*, 47 N.E. 422, 423 (Mass. 1897).[46]

Moreover, Mr. Schwartz's will demonstrates that he knew how to use successor clauses, but purposefully did not include one in his bequest to the Milton I. Schwartz Hebrew Academy because he wanted the bequest to be effective only if the entity bore his name. (*Contrast* 27 App. 6640 § 2.3 (no successor clause in bequest to the Milton I.

[46] Case law relied on by the School below that a mere name change ordinarily does not impact a corporation's existence is of course inapposite here. The point is not whether the School ceased to exist for purposes of corporate law, but whether the entity named in Mr. Schwartz's will ceased to exist for purposes of his bequest. Even the case law relied on by the School acknowledged that a name change is usually insignificant "unless some peculiar affection for the name is indicated by the donor." *In re Hagan's Will*, 14 N.W.2d 638, 642 (1944) (quotations omitted). At the risk of stating the obvious, the man Milton I. Schwartz had a peculiar affection for the name "Milton I. Schwartz Hebrew Academy;" that the institution be named after him was supremely important to him. (13 App. 3163; 14 App. 3383–86.)

Schwartz Hebrew Academy), *with* 27 App. 6640–43 §§ 2.7, 4.10(b), (c), (f), (g) (referring to the "Las Vegas Jewish Federation or any successor thereto," the "Las Vegas Jewish Federation Day School in Formation or any successor thereto," and various companies "and any successor companies thereto").) The intention of the grantor "may be derived from the entire instrument as a whole" and "by necessary implication." *In re Walters' Estate*, 75 Nev. 355, 360, 343 P.2d 572, 574 (1959) (quotations omitted). That Mr. Schwartz did not include a successor clause in his bequest to the Milton I. Schwartz Hebrew Academy demonstrates that he did not want the bequest to go to a successor entity or any entity no longer named the Milton I. Schwartz Hebrew Academy. *See id.*, 75 Nev. at 361, 343 P.2d at 575 (determining "through a consideration of the entire trust instrument" the trustor's intent in the event of a contingency "not specifically provided"); *Succession of Provost*, So. 802, 805 (La. 1938) (to ascertain testator's intention, "clauses [of will] are to be brought in juxtaposition" and "construed with reference to each other").

Mr. Schwartz did not speak in ambiguous terms, nor was he propounding riddles.[47] He stated plainly that the bequest was left to the

[47] "[T]he first and natural impression conveyed to the mind on reading

"Milton I. Schwartz Hebrew Academy." *Tsirikos v. Hatton*, 61 Nev. 78, 116 P.2d 189, 191 (1941) (where testator identified beneficiary by name, "his intent as to who should be the recipients of his bounty is clearly expressed"). Mr. Schwartz clearly left the bequest to the Milton I. Schwartz Hebrew Academy and did not include a successor clause. There is no longer any institution by that name, and thus the bequest fails. *Am. Nat. Bank & Tr. Co. v. Auman*, 746 S.W.2d 464, 467 (Tenn. Ct. App. 1987) (bequest lapsed where there was "no ambiguity in the will" and "'[i]t cannot be seriously disputed that 'the institution' [settlor] knew and identified as the Bonny Oaks School was not in existence at the time the trust terminated"); *Brooks*, 38 A. at 224–25 (gift to school district lapsed where the named school district "ceased to exist").[48]

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the will as a whole is entitled to great weight. The testator is not supposed to be propounding riddles, but rather to be conveying his ideas to the best of his ability[.]" *In re Succession of White*, 961 So. 2d 439, 441 (La. App. 2007) (quotations omitted); 96 C.J.S. Wills § 878.

[48] Nor can the bequest be given to the Adelson Educational Campus under the doctrine of cy-près, as Mr. Schwartz clearly expressed his desire to contribute only to the school bearing his name. *E.g.*, *In re Koons' Will*, 135 N.Y.S.2d 733, 736 (N.Y. Sur. 1954) (cy pres doctrine could not apply to give bequest to other charity where will settlor was "fundamentally interested in a certain school" and desired "to help this particular educational institution" rather than to generally promote education); *Crisp Area YMCA v. NationsBank, N.A.*, 526 S.E.2d 63, 66 (Ga. 2000) (cy pres cannot become "a means by which to effectuate a testamentary

### B. Extrinsic Evidence Was Admissible to Show the Meaning of Mr. Schwartz's Words "Milton I. Schwartz Hebrew Academy"

The School misleadingly argues the district court "found a latent ambiguity regarding whether Milton Schwartz intended that the money go to scholarships for every grade (Pre-K through 12) or just the lower school (grades Pre-K through 4)." (RAB at 122.) The question was always what did Mr. Schwartz mean by the words "Milton I. Schwartz Hebrew Academy."[49] The district court was right to bring up grade levels in the context of what was meant by the words "Milton I. Schwartz Hebrew Academy" (12 App. 2811–15) because by the time of Mr. Schwartz's death, he knew there was going to be a high school called the Adelson School. (14 App. 3420–22; 28 App. 6889–90.) But that was

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intent that the decedent himself specifically and clearly rejected"); *Brooks*, 38 A. at 225 (where gift is for a particular purpose and "cannot vest in the first instance in the donees, for the reason that no such donees can be found, or because a corporation is dissolved, the court cannot appoint other donees cy pres") (quotations omitted).

[49] (24 App. 5915 (denying the School's earlier motion for summary judgment because "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?"); 12 App. 2813 ("when he then says the Hebrew Academy, I don't know what that is"); 19 App. 5474 (submitting to the jury the question whether Mr. Schwartz "intended that the Bequest be made only to a school known as the 'Milton I. Schwartz Hebrew Academy'" or "to the school presently known as the Adelson Educational Institute").)

*not* the entity he left the bequest to. When Milton Schwartz used the words "Milton I. Schwartz Hebrew Academy" in his will, he intended to leave the bequest only to the then-existing entity comprised of grades K–8 that had borne his name for over a decade. (14 App. 3402, 3410; 19 App. 5474.)

### *1. Extrinsic Evidence Was Admissible to Explain the Meaning of Mr. Schwartz's Words*

This was not a case where the executor wrote one thing (i.e. a bequest to McDonald's) and the court admitted evidence showing the executor meant to write something different (i.e. he meant to leave his bequest to Burger King). Rather, the district court appropriately admitted evidence explaining the meaning of the words Mr. Schwartz actually used (the meaning of "Milton I. Schwartz Hebrew Academy"). "[A]ny evidence is admissible which, in its nature and effect, simply explains what the testator *has* written" as opposed to what the testator "*intended* to have written. … In other words, the question in expounding a will is … simply—What is the meaning of his words?" *In re Jones' Estate*, 72 Nev. at 123–24, 296 P.2d at 296 (quotations omitted). ***Any*** extrinsic evidence is admissible to answer that question. *Id.*

The question here was who is the intended beneficiary of Mr.

Schwartz's bequest – only the school bearing his name, or the Adelson Educational Campus that took over the former Milton I. Schwartz Hebrew Academy and changed the name of the campus, the corporate entity, and all buildings? "[T]he cardinal rule of interpretation of wills is to ascertain the intention of the testator,"[50] including in "[d]etermining the intended beneficiary." 96 C.J.S. Wills § 1018. "[T]he will must be construed so as to carry out that intention," and "[e]xtrinsic or parol evidence is admissible for that purpose." *Id.* "Where a latent ambiguity arises from the fact that there is no claimant whose name or description exactly corresponds with that given in the will, as where there is no such … corporation or association, …extrinsic evidence is admissible to enable the court to determine who was intended[.]" 96 C.J.S. Wills § 1015 (footnotes omitted).[51]

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[50] *In re Walters' Estate*, 75 Nev. at 361, 343 P.2d at 575 (quotations omitted); *see also Matter of Estate of Scheide*, 136 Nev. Adv. Op. 84, 478 P.3d 851 (2020); 96 C.J.S. Wills § 902.

[51] *See also Methodist Orphanage of Waco v. Buckner's Orphans' Home of Dallas*, 261 S.W. 203, 205 (Tex. App. 1924) ("parol evidence is always admissible to identify a devisee or legatee, when under the terms of the will there is ambiguity on this point") (quotations omitted).

Especially important are the testator's own declarations,[52] the executor's construction of the will,[53] and the scrivener's testimony.[54] Here, Jonathan Schwartz was the executor, scrivener,[55] and son of Mr. Schwartz, with whom he enjoyed an especially close relationship.[56] His testimony was admissible, as were Mr. Schwartz's own statements reflecting his state of mind and the testimony of his secretary (Ms. Pacheco) who worked for him for over 20 years.[57]

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[52] *Howard Hughes Med. Inst. v. Gavin*, 96 Nev. 905, 908, 621 P.2d 489, 490–91 (1980) ("a testator's declarations may be useful in interpreting ambiguous terms of an established will").

[53] 96 C.J.S. Wills § 900 ("the construction placed on a will by the executors … may not be ignored, particularly where they enjoyed an intimate relationship with the testator").

[54] "Where a latent ambiguity exists, the court may resort to parol evidence (such as testimony of the scrivener) to determine the decedent's true intent." *In re Estate of Schultheis*, 747 A.2d 918, 923 (Pa. Super. 2000).

[55] (14 App. 3401, 3412.)

[56] (14 App. 3378–80, 3390–93, 3397.)

[57] (13 App. 3141.)

### *2. The Evidence Did Not Contradict the Language of the Bequest, but Supported the Already Clear Indication that the Bequest Was to Go Only to the Entity Bearing Mr. Schwartz's Name*

The School argues the district court erred in admitting parol evidence that "contradicted the language of the Bequest." (RAB at 124.) Non-sense. Mr. Schwartz used the words "Milton I. Schwartz Hebrew Academy" in his bequest, and the testimony at trial only elucidated what he meant when he used those words.[58]

While the testator's intent "must be ascertained from the meaning of the words in the instrument, … the law admits extrinsic evidence of those facts and circumstances to enable the court to discover the meaning attached by the testators to the words used in the will." *Methodist Orphanage of Waco*, 261 S.W. at 205 (quotations omitted); *see also* 96 C.J.S. Wills § 1015 ("Extrinsic evidence of 'personal usage' is permitted to construe a will where the testator habitually referred to someone in an idiosyncratic manner during the testator's lifetime, and then used

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[58] While "the appellate court undertakes an independent appraisal of the will … to the extent that the construction turns on the assessments of credibility or of conflicts in the evidence," the appellate court must uphold the district court's determination if supported by "substantial evidence." *Matter of Estate of Meredith*, 105 Nev. 689, 691, 782 P.2d 1313, 1315 (1989).

that idiosyncratic terminology in a will.").

Here, Mr. Schwartz consistently referred to the school as the Milton I. Schwartz Hebrew Academy "in perpetuity." (13 App. 3167 (Ms. Pacheco testifying, "He would often refer to the school as the Milton I. Schwartz Hebrew Academy in perpetuity throughout the office. He would add that at the end.");[59] 14 App. 3387 (the executor testifying, "He would say, Milton I. Schwartz Hebrew Academy in perpetuity with emphasis added to in perpetuity.").) When Mr. Schwartz used the words "Milton I. Schwartz Hebrew Academy" in his will, he meant the entity he thought was named after him forever.

Mr. Schwartz specifically instructed his son *not* to include a successor clause in the bequest to the Milton I. Schwartz Hebrew Academy. (14 App. 3402–3406 ("he told me don't put it in").)[60] That is because Mr. Schwartz "wanted $500,000 to go to the Milton I. Schwartz Hebrew Academy, and that he didn't want it to go anywhere else." (14 App.

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[59] The School did not raise any hearsay objection to Ms. Pacheco's testimony. (13 App. 3167.)

[60] The School did not object to the executor's testimony as to what Mr. Schwartz told him to put in the will as scrivener. (14 App. 3406 (School's counsel, "I guess there is an exception to the rule so on that one, I will withdraw my objection.").)

3402.)[61] "If the Milton I. Schwartz Hebrew Academy didn't exist as the Milton I. Schwartz Hebrew Academy, he didn't want it going to any other school on that land. It was only supposed to go to a school named the Milton I. Schwartz Hebrew Academy." (14 App. 3410.)[62]

The undisputed evidence was that Mr. Schwartz *believed* "the school was going to publicly be known as the Milton I. Schwartz Hebrew Academy forever." (14 App. 3384–85;[63] *see also* 29 App. 7008 (Mr. Schwartz recounting in a 2007 video interview his belief that the school would be named the "Milton I. Schwartz Hebrew Academy in perpetuity").[64]) That belief informed his will bequest. He intended that his bequest go only to the school bearing his name. (19 App. 4515.)[65]

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[61] The School raised no objection to the re-phrased question eliciting this response.

[62] The School raised no objection to this testimony.

[63] The School raised no objection to this testimony.

[64] The School itself showed this video in its closing. (18 App. 4429.)

[65] The School relies heavily on *Frei* (RAB at 124–25), but that case was a malpractice action in which the client was precluded from arguing that documents drafted by the attorney he was suing did not capture his true intent even though he signed them and admitted they were unambiguous. *Frei ex rel. Litem v. Goodsell*, 129 Nev. 403, 409, 305 P.3d 70, 73-74 (2013). That is a far cry from the situation here, in which the Estate argues *not* that the will says something totally different than

### C. The School's Protests Based on Alleged Hearsay Are Unfounded

The School argues that the district court erred in admitting inadmissible hearsay and that the error was prejudicial because the "inadmissible hearsay was the ***only*** evidence supposedly connecting the … Bequest to Milton Schwartz's alleged mistaken belief he had an enforceable naming rights contract." (RAB at 129–32.) The School's argument fails for several reasons.

***First***, "[t]he trial court is vested with broad discretion in determining the admissibility of evidence. The exercise of such discretion will not be interfered with on appeal in the absence of a showing of palpable abuse." *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 492, 117 P.3d 219, 226 (2005) (quotations omitted). There was no palpable abuse here. To the contrary, the district court was fair in its rulings, sometimes sustaining the School's hearsay objections (14 App. 3386), but more frequently overruling them since – as the district court repeatedly explained – the Estate's questioning went to Mr. Schwartz's state of mind when drafting his will and subsequently reaffirming it. (*E.g.*,

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what Mr. Schwartz intended, but that extrinsic evidence may be considered to show the meaning of the words Mr. Schwartz actually used.

12 App. 2842; 14 App. 3413, 3415–18.)

***Second***, the testimony admitted is not inadmissible hearsay. For purposes of the will bequest, testimony that Mr. Schwartz referred to the school as the Milton I. Schwartz Hebrew Academy "in perpetuity" was not "to prove the truth of the matter asserted," NRS 51.035 (i.e. that the School actually was named after him in perpetuity), but rather to show he *believed* the School was named after him in perpetuity. The testimony is not hearsay to begin with since it is not to prove the truth of what Mr. Schwartz asserted, *see* NRS 51.035,[66] but even if it were, it would fall within the state of mind exception. NRS 51.105.

Likewise, testimony, declarations, or videos of statements by Mr. Schwartz that the School agreed to bear his name forever were offered in connection with the will bequest not to show the School actually agreed to the naming rights, but that Mr. Schwartz thought the School

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[66] *See also Cunningham v. State*, 113 Nev. 897, 904–05, 944 P.2d 261, 265–66 (1997) ("the statements were non-hearsay because they were not offered to prove the truth of the matter asserted (whether Suzette was, in fact, at the house of Cunningham's brother); rather, they went toward Tom's state of mind as to what Tom thought about Suzette's whereabouts"); *Sollars v. State*, 73 Nev. 248, 261, 316 P.2d 917, 923 (1957) ("The letters clearly were not hearsay. They were offered not to establish the truth of the statements they contained but as evidence of the mental state of the writer at the time they were written.").

did. The evidence (1) is not hearsay, (2) qualifies as a statement of Mr. Schwartz's "state of mind" or "emotion[67] … such as intent, plan, motive, design, [and] mental feeling," NRS 51.105(1), and/or (3) qualifies as a "statement of memory or belief to prove the fact remembered or believed" as it "relates to the execution, … identification or terms of declarant's will." NRS 51.105(2). Mr. Schwartz's recollection or belief that the School agreed to bear his name in perpetuity (even if erroneous) shows what he meant when he used the term "Milton I. Schwartz Hebrew Academy" in his will. His intent was to leave a bequest to the school he thought was named after him forever.

***Third***, the School did not object to the majority of the testimony it now claims was hearsay. (*See supra* nn. 59–64; 13 App. 3155–56, 3167,

[67] For example, the State objects to Ms. Pacheco's testimony that when Mr. Schwartz's name previously was taken off the School letterhead and building, he "was extremely unhappy, … furious … extremely upset." (13 App. 3171.) These are all emotions and show Mr. Schwartz's state of mind that he believed the School had to be named after him forever – a state of mind he acted in conformity with when he dictated his will. *In re Estate of Shepherd*, 823 N.W.2d 523, 531 (Wis. App. 2012) (explaining that state-of-mind hearsay exception "can be used to prove that the declarant later acted in conformity with a certain mental state").

3179–80,[68] 3210–11,[69] 3230, 3238,[70] 14 App. 3384–85 (no objection to rephrased question to the executor as to his understanding of what his "father believed the terms of his arrangement with the school were"); 3392–93;[71] 3410.[72]) It is well established that "error may not be predicated upon a ruling which admits … evidence unless a substantial right

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[68] The School objected to Ms. Pacheco's testimony on how happy Mr. Schwartz was to receive the Sabbath Letter based on speculation and lack of foundation (which were rightly overruled) – but not on hearsay.

[69] The School cites this testimony as an example of hearsay, but the School did not object; the School was the one questioning Ms. Pacheco.

[70] The School objected on speculation, not hearsay. Based on over 20 years of working with Mr. Schwartz, it was permissible for Ms. Pacheco to testify to her own knowledge that Mr. Schwartz thought he had a binding agreement for the School to be named after him forever.

[71] The School objected on relevance (which was rightly overruled), not hearsay.

[72] The executor testified about why his father chose not to include alternative instructions in his will if the Milton I. Schwartz Hebrew Academy ceased to object and how Mr. Schwartz "didn't want [the bequest] going to any other school on that land. It was only supposed to go to a school named the Milton I. Schwartz Hebrew Academy." (14 App. 3410.) The School raised no objection to this testimony and rightly so. *In re Estate of Sherry*, 240 P.3d 1182, 1189 (Wash. App. 2010) ("testimony of the drafter, including as to the testator's intent, is one piece of evidence admissible to explain the language"); *Matter of Smith's Estate*, 580 P.2d 754, 757 (Ariz. App. 1978) ("statement of the attorney who drew up the will" was admissible to show what testator intended by the use of the word "money"); *see also Wilkin v. Nelson*, 258 Cal. Rptr. 3d 803, 810 (Cal. App. 2020) ("The [drafting] attorney's testimony, although not conclusive, is entitled to much weight.") (quotations omitted).

of the party is affected, and … a timely objection or motion to strike appears of record, stating the specific ground of objection." NRS 47.040(1)(a).

The School's failure to raise specific hearsay objections in the district court precludes it from doing so now. *City of Elko v. Zillich*, 100 Nev. 366, 370, 683 P.2d 5, 7–8 (1984) ("appellant's failure to raise any objection to the presentation of this evidence during trial prevents our review of this issue"); *Whalen v. State*, 100 Nev. 192, 195, 679 P.2d 248, 250 (1984) ("A rule of evidence not invoked is waived.") (quotations omitted).

***Fourth***, while the School claims that "inadmissible hearsay was the ***only*** evidence" connecting the bequest to Mr. Schwartz's belief the School would be named after him forever (RAB at 131–32), that simply is untrue. The School specifically did not object to the executor's testimony about how Mr. Schwartz instructed him not to include a successor clause in the bequest to the Milton I. Schwartz Hebrew Academy. (14 App. 3406 ("I guess there is an exception to the rule so on that one, I will withdraw my objection.").) Mr. Schwartz instructed his attorney son, the scrivener, not to include a successor clause because he thought

the School would be named after him forever. "[T]he testimony of a drafting attorney as to the statements made to him or her by the testator is admissible on the question of intent" and is not "inadmissible hearsay." *In re Estate of Shepherd*, 823 N.W.2d at 531.

In addition, certain evidence the School objected to (such as that Mr. Schwartz referred to the school as the Milton I. Schwartz Hebrew Academy "in perpetuity") was already in the record and the School had not previously objected. (*Contrast* 14 App. 3386–87 (objecting to the executor's testimony on this point), *with* 13 App. 1367 (Ms. Pacheco's testimony on this same point with no objection).) Other witnesses also testified that "the perpetuity piece … was very important to him." (14 App. 3253 (Dr. Sabbath).) Thus, any alleged hearsay was cumulative and harmless. *Felder v. State*, 107 Nev. 237, 242, 810 P.2d 755, 758 (1991) (admission of hearsay was harmless because other admissible evidence established the same point, meaning the "hearsay evidence was only cumulative").

The School's hearsay arguments fail.

### D. The Contract Rule Construing Ambiguity Against the Drafter Does Not Apply

The School cites a contract case[73] and argues that "[i]f an ambiguity exists in the Bequest, then the ambiguity must be construed against the drafter." (RAB at 127.) But a "will is not a contract. There is no offer and acceptance of privileges and responsibilities." *In re Langenbach's Estate*, 232 N.E.2d 831, 834 (Oh. Prob. 1967) (actions of "testamentary trustee are not governed by rules of law relating to contract").[74]

The rule that ambiguities are to be construed against the drafter does not apply to wills because there is no unequal bargaining[75] – there is no bargaining at all:

> A will is not a contract; it is a unilateral act, and the intention of the testator … must stand supreme as the ultimate criterion of interpretation. The testamentary power may be

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[73] *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015).

[74] *See also, e.g.*, *Kunz v. Sylvain*, 159 Conn. App. 730, 741, 123 A.3d 1267, 1274 (Conn. App. 2015) ("A will is not a contract."); *In re Calomiris*, 894 A.2d 408, 410 (D.C. 2006) (same); 95 C.J.S. Wills § 7 (same).

[75] *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1417 (2019) ("*contra proferentem* resolves the ambiguity against the drafter based on public policy factors, primarily equitable considerations about the parties' relative bargaining strength" and is "triggered only after a court determines that it *cannot* discern the intent of the parties").

> exercised arbitrarily and without accounting to persons expecting to participate in the bounty of the testator; and a testator is not serving himself any more by one disposition of his property than by any other disposition thereof.

R.T. Kinbrough, "Admissibility of extrinsic evidence to aid interpretation of will," 94 A.L.R. 26 (Originally published in 1935, updated weekly).

The School claims entitlement to the bequest, as if it were a contracting party with the right to demand return performance. But in truth, the Milton I. Schwartz Hebrew Academy was simply the recipient of Mr. Schwartz's generosity, entitled to nothing. "It is an elementary principle that a person can dispose of his or her property by will as he or she pleases[.]" *McKean v. Warburton*, 919 So. 2d 341, 344 (Fla. 2005). In wills, far from construing ambiguities against the testator, the will should be "construed liberally to effectuate the testator's intent." *Id.*; *see also* 96 C.J.S. Wills § 902. Mr. Schwartz's intent was clear – he left the bequest only to the school bearing his name.

### E. The Bequest Was Based on an Invalidating Mistake and/or Was Conditional on the School Being Named the "Milton I. Schwartz Hebrew Academy"

The district court's orders construing the will and denying the

School's petition to compel distribution of the bequest (24 App. 5594–97) should be affirmed based on the clear language of the will (and, if necessary, the additional extrinsic evidence showing what Mr. Schwartz meant when he used the term "Milton I. Schwartz Hebrew Academy"). In the alternative, the district court's orders must be affirmed for the independent reason that the will bequest was conditional and/or based on an invalidating mistake.

As the district court correctly found, "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." (24 App. 5994.) The jury also found "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." (19 App. 4515.) The evidence was clear and convincing – indeed uncontroverted – that Mr. Schwartz would not have made the bequest but for his belief that the School would be named after him forever. (14 App. 3400–06, 3410, 3420-22.) Accordingly, the district court properly ruled that the bequest need not

be paid to the School. *In re Irrevocable Tr. Agreement of 1979*, 130 Nev. at 607, 331 P.3d at 888; Restatement (Third) of Property (Wills & Don. Trans.) § 12.1 (2003).

Alternatively, he bequest was conditional on the School bearing Mr. Schwartz's name forever. A will may contain a condition precedent "which must occur before an interest can vest" or "a condition subsequent defeats an interest that has already vested." *Matter of Estate of Zimbleman*, 539 N.W.2d 67, 71 (N.D. 1995). "The fact that a condition … requires … continuous action for its performance" or where "the time for performance is indefinite" indicates "a condition subsequent." 97 C.J.S. Wills § 1577. By using the name "Milton I. Schwartz Hebrew Academy" without a successor clause (particularly given the parties' history regarding the naming of the institution), Mr. Schwartz manifested his condition that if the School ever ceased to be named that, the bequest would fail.

The School refused to comply with Mr. Schwartz's condition when it voluntarily changed its name, both renouncing the bequest through its own actions and causing the bequest to fail. 97 C.J.S. Wills §§ 2071, 1980 ("A testamentary gift may lapse if a condition is not performed,"

and "a refusal to comply with the conditions under which a gift was made may amount to a renunciation.").

### F. The School Cannot Blame the Estate for Its Own Actions

In a telling display of character, the School attempts to blame the executor for its own actions in removing Mr. Schwartz's name from the elementary school. (RAB at 127–28.) No one forced the School to remove Mr. Schwartz's name – and certainly not the executor, who wanted his father's legacy to be honored. The School (and Mr. Adelson himself) resolved to, at a minimum, name the elementary school after Mr. Schwartz "in perpetuity" (27 App. 6676) – and then proceeded to remove Mr. Schwartz's name out of spite for the executor refusing to cave to the School's unwarranted demands to pay the bequest. The School itself caused the bequest to lapse by choosing to ignore its obligations to Mr. Schwartz to cater to a new and bigger donor. It cannot now escape the consequences of its own decisions.

The School's appeal to equity is particularly astounding. There is nothing just about promising Mr. Schwartz the School would be named after him forever to secure generous donations throughout his lifetime – and then changing the name of the School four months after his death

to cater to a new donor, only to then greedily demand that Mr. Schwartz's Estate still pay the $500,000 will bequest. In any event, regardless of what the School (or anyone else) thinks is fair, beneficiaries "have no right to testamentary bequests except subject to the testator's conditions, and it generally is not the role of a court to rearrange those bequests or conditions in keeping with the court's sense of justice." *Tunstall v. Wells*, 50 Cal. Rptr. 3d 468, 474 (Cal. App. 2006). "[I]n the minds of others than the testator, the question whether a will is just or unjust is a matter of opinion, and the policy of the law is to make the disposition under a will in accordance with the desires of the testator." *Id.* at 474–75 (quotations omitted).

Mr. Schwartz intended to leave $500,000 to the School only if it was named after him in perpetuity (as he thought it was). When the School changed its name, the bequest lapsed.

## PART THREE

## V.

## THE DISTRICT COURT CORRECTLY AWARDED COSTS TO THE ESTATE

### A. The Estate Was the Prevailing Party

The School was the one who commenced this litigation – and it did so by filing a petition in probate court to compel distribution of the will bequest. (1 App. 74–86.) Despite the fact that the district court "DENIED [the School's petition] in its entirety" and ordered that the School "take[] nothing" (24 App. 5996), the School argues incredibly that *it* was the prevailing party entitled to costs. That is not the law in Nevada. "A party prevails 'if it succeeds on *any significant issue* in litigation which achieves some of the benefit it sought in bringing suit.'" *LVMPD v. Blackjack Bonding*, 131 Nev. 80, 90, 343 P.3d 608, 615 (2015) (quoting *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005)) (underlining added); *see also Golightly & Vannah, PLLC v. TJ Allen, LLC*, 132 Nev. 416, 422, 373 P.3d 103, 107 (2016) ("A prevailing party must win on at least one of its claims."). Here, the School achieved none of the benefit it sought in bringing suit; it did not prevail

on its sole claim to compel the will bequest. Accordingly, the district court correctly determined that the Estate – not the School – was the prevailing party. *Golightly*, 132 Nev. at 422, 373 P.3d at 107 (where party "did not prevail on its sole claim … it did not prevail").

### *1. The District Court's Determination That the Estate Was the Prevailing Party is Entitled to Deference*

"[T]he decision to award costs is … 'within the sound discretion of the [district] court.'" *Capanna v. Orth*, 134 Nev. 888, 895, 432 P.3d 726, 734 (2018) (quoting *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998)); *see also* 20 C.J.S. Costs § 9 ("Ordinarily, the determination of prevailing party status rests in the court's sound discretion").

The district court's wide discretion in determining the prevailing party is especially important "in cases involving multiple claims and parties" and "the granting of non-monetary relief to one or more parties." *Mountain States Broad. Co. v. Neale*, 783 P.2d 551, 556 n.7 (Utah Ct. App. 1989) (such "cases demonstrate the need for a flexible and reasoned approach to deciding in particular cases who actually is *the* 'prevailing party'"). "A district court's decision regarding an award of costs

will not be overturned absent a finding that the district court abused its discretion." *Vill. Builders 96, L.P. v. U.S. Labs., Inc.*, 121 Nev. 261, 276, 112 P.3d 1082, 1092 (2005). Here, the district court appropriately found the Estate was the prevailing party. (27 App. 6591.)

### *2. The Estate Prevailed on Part of the Relief It Sought, Whereas the School Did Not*

The School attempts to self-servingly recast the entire lawsuit into what it characterizes as two distinct issues: (1) the will bequest and (2) the Estate's claim for breach of the naming rights agreement. The School then claims that more money was at stake in the breach of contract claim and because the School prevailed on that claim, it should be considered the prevailing party. The School's analysis is flawed for several reasons.

#### a. THE ESTATE ACHIEVED SOME OF THE BENEFIT IT SOUGHT IN ITS AFFIRMATIVE CLAIMS, WHEREAS THE SCHOOL DID NOT

The School ignores controlling law that a party prevails only if it "achieves some of the benefit it sought in bringing suit." *Blackjack Bonding*, 131 Nev. at 90, 343 P.3d at 615 (quotations omitted). While a prevailing party can of course "encompass plaintiffs, counterclaimants,

and defendants,"[76] the School was not simply a defendant in this case defending against the Estate's breach of contract claim. Rather, the School initiated this lawsuit and sought to compel payment of the $500,000 will bequest (along with an accounting and attorneys' fees). (1 App. 74–86.) The School obtained *none* of the relief it sought.[77]

In contrast, the Estate brought claims for (1) construction of the will bequest, (2) fraud in the inducement, (3) bequest void for mistake, (4) offset of bequest, (5) breach of contract, and (6) revocation of gift and constructive trust. (1 App. 231–243.) The Estate succeeded on claims 1 and 3 – and actually on part of claims 5 and 6, which alleged that the bequest was "conditioned on the Academy bearing [Mr. Schwartz's] name perpetually." (1 App. 239; 24 App. 5994–95 (granting claims 1 and 3 and finding that Mr. Schwartz "would have never made the

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[76] *Valley Elec.*, 121 Nev. at 10, 106 P.3d at 1200.

[77] Because the School sought "to recover more than $2,500," costs were mandatory in this case and had to "be allowed of course to the prevailing party." NRS 18.020(3); *Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 565 (1993) (prevailing party "was entitled to recover all of his costs as a matter of right" under NRS 18.020(3)); *Campbell v. Campbell*, 101 Nev. 380, 383, 705 P.2d 154, 156 (1985) ("Costs are awarded as a matter of course to the prevailing party in all actions listed in NRS 18.020."). In addition, the district court always has discretion to award costs. NRS 18.050.

$500,000 bequest" had he "known that he did not have a legally enforceable naming rights agreement with the school").) Thus, the Estate achieved "some of the benefit it sought"[78] and won "on at least one of its claims." *Golightly*, 132 Nev. at 422, 373 P.3d at 107.

The School protests that the Estate's "'claims' for construction of will and bequest void for mistake … are not claims at all," but "simply affirmative defenses, or at most, counterclaims." (RAB at 139–140.) Counterclaims are claims – so the School's argument is nonsensical. Even if the School had not filed its petition to compel the bequest, the Estate still could have petitioned for will construction and a declaration that the bequest was void for mistake. *See* NRS 30.040(2) ("A maker or legal representative of a maker of a will … may have determined any question of construction or validity arising under the instrument and obtain a declaration of rights, status or other legal relations thereunder."). Thus, the Estate's claims were for affirmative relief. Regardless of the nomenclature applied to the Estate's claims, part of what it sought in this lawsuit was to avoid paying the bequest to the School –

[78] *Blackjack Bonding*, 131 Nev. at 90, 343 P.3d at 615.

and it achieved that. (1 App. 240–241 (requesting that the court "declare that the Executor … was and is authorized to abstain from distributing the bequest"); 24 App. 5994–95.) The district court correctly determined that the Estate was the prevailing party entitled to costs. (27 App. 6591); *Blackjack Bonding*, 131 Nev. at 90, 343 P.3d at 615; *Canepa v. Durham*, 62 Nev. 417, 431, 155 P.2d 788, 788 (1945) ("the party receiving … affirmative relief is entitled" to costs); 20 C.J.S. Costs § 12 ("where each party succeeds on one or more of the causes of action, claims, or issues, a plaintiff[79] who has obtained a judgment for a part of the relief requested is regarded as the 'prevailing party' entitled to costs").[80]

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[79] Here, the Estate was the plaintiff with regard to its counterclaims for will construction and bequest void for mistake.

[80] The School cites a federal court decision discussing requirements for a civil rights plaintiff to be a prevailing party for purposes of attorneys' fees and suggests that the Estate failed to achieve "actual relief on the merits … materially alter[ing] the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *McMillen v. Clark Cty.*, No. 214CV00780APGPAL, 2016 WL 8735673, at *3 (D. Nev. Sept. 23, 2016) (quotations omitted); (RAB at 137, 139.) Besides the fact that this Court has never articulated such a standard for entitlement to costs under NRS 18.020, the School's argument fails because the ruling that the Estate need not pay the School the $500,000 bequest does materially alter the parties' legal relationship. $500,000 is a significant amount of money that the Estate

### b. THE CONTRACT AND BEQUEST CLAIMS WERE INTERTWINED, AND THE BEQUEST WAS JUST AS IMPORTANT

Despite now claiming that the naming rights contract "was unquestionably the most significant issue in the litigation" (RAB at 140), the School previously argued that "Milton I. Schwartz's intent of his bequest" was "the ultimate issue of the case." (11 App. 2522.)[81] The School now acts as if the naming rights contract and the will bequest were entirely distinct issues, but they were not. They were always intimately related, as Mr. Schwartz made the will bequest only because he believed he had an enforceable naming rights contract with the School.

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is not required to give to the School and can now give to a different educational entity. The School argues that there is no "financial impact on the Estate" as the Estate must still give the money to charity (RAB at 139) – but that ignores the very real benefit the Estate sought and obtained: to not have to give the money to the School, an entity which removed Mr. Schwartz's name and dishonored his legacy. To whom the money is paid (not whether it is paid) is of utmost importance to the Estate.

[81] The district court also indicated that whether "the decedent's will was intended to gift the Hebrew -- Milton I. Schwartz Hebrew Academy only if the schools bore his name. … this is the ultimate question that we started -- that we first were here talking about in 2013. This is the very first question we had. That's the whole issue in the case." (11 App. 2526.)

(1 App. 234–241; 19 App. 4515; 24 App. 5994–95.) That is why the district court correctly determined it was "impossible to determine which costs either party claimed are related to issues presented to the jury versus the equitable issues decided by the Court… the Jury found that the bequest was based on Mr. Schwartz'[s] mistaken belief he had naming rights, so the bequest failed." (27 App. 6591.) That is, the entire trial and the costs associated with it (including pre-trial discovery) were based both on whether there was an enforceable naming rights agreement *and* on whether Mr. Schwartz believed there was. Even if the Estate was not successful in convincing the jury of breach of contract,[82] the evidence the Estate put on regarding the naming rights agreement was still important because it helped convince the jury that Mr. Schwartz *believed* he had a perpetual naming rights agreement with the School and that his bequest was based on that belief. (19 App. 4515.)

Neither the contract and bequest-related claims themselves nor the costs associated with them were distinctly separable. *Cf. Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1098, 901 P.2d 684, 689

[82] The Estate maintains the jury would have likely found in its favor if the Estate had been allowed to present its oral contract theory to the jury. (*See supra* Part One, § I.E.)

(1995) (it was unnecessary "to apportion the fees" expended on unsuccessful claims against company president "as opposed to those against [company] because the efforts made to expose [president's] negligence individually were intertwined with efforts to prove that [company] … was negligent"). Since the Estate prevailed in showing that, at a minimum, Mr. Schwartz believed he had an enforceable naming rights agreement with the School, the Estate was the prevailing party.

c. THERE ARE NO DAMAGES AWARDS TO COMPARE

The School emphasizes that the Estate requested repayment of Mr. Schwartz's $1,055,903.75 in lifetime gifts (plus interest) and argues that since the Estate was requesting more money than the School, the School is somehow the prevailing party. (RAB at 136–140.) The School's argument is fundamentally flawed for several reasons.

***First***, the claim for rescission of Mr. Schwartz's lifetime gifts was an equitable alternative remedy. The Estate's preferred remedy was specific performance of the naming rights agreement, in which the School would change "its name back to the Milton I. Schwartz Hebrew Academy" in perpetuity. (5 App. 1163.) If this remedy had been granted, there would have been no need for return of the lifetime gifts

or any monetary compensation at all.[83]

***Second***, the prevailing party "determination is based upon success upon the merits, not upon damages." 20 C.J.S. Costs § 9. One need not obtain monetary relief to be the prevailing party. *Blackjack Bonding*, 131 Nev. at 90, 343 P.3d at 615 (where agency was ordered to produce requested records in redacted form, requester "achieved at least some of the benefit that it sought" and was the prevailing party). Because the Estate won on the merits on the will bequest, the district court appropriately exercised its discretion to declare the Estate the prevailing party.

***Third***, under Nevada case law, only competing damages awards

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[83] The School claims that it retained "the incredibly valuable right and ability to continue to be named The Dr. Miriam and Sheldon G. Adelson Educational Institute, which it would have lost had the Estate prevailed on the naming rights claim." (RAB at 139.) But this is irrelevant to the calculus of who the prevailing party is. The Estate was the one claiming breach of contract, and it is well established that damages are "based on the rule that the breaching party must place the nonbreaching party in as good a position as if the contract were performed." *Lagrange Const., Inc. v. Kent Corp.*, 88 Nev. 271, 275, 496 P.2d 766, 768 (1972). That the School would have experienced inconvenience or found itself in trouble with the Adelsons has no bearing on what it was required to restore to Mr. Schwartz's Estate. The School created its own predicament by selling the same naming rights to different donors.

are offset – not the potential amounts parties might have recovered under different theories. *See Parodi v. Budetti*, 115 Nev. 236, 241, 984 P.2d 172, 175 (1999) (whether there are "multiple claims in a single action" or "multiple lawsuits which have been consolidated into one action… the trial court must offset all awards of monetary damages to determine which side is the prevailing party") (emphasis added); *N. Nevada Homes, LLC v. GL Constr., Inc.*, 134 Nev. 498, 501, 422 P.3d 1234, 1237 (2018) ("*Parodi* only requires the district court to consider judgments for monetary damages when determining the prevailing party") (emphasis added).

While there is a preference to consider multiple claims together to determine one prevailing party, *see Parodi*, 115 Nev. at 241, 984 P.2d at 175, Nevada courts do not compare the monetary amounts each party sought – only the damages actually awarded. *Id.*; *see also N. Nevada Homes*, 134 Nev. at 502, 422 P.3d at 1238 (holding that district courts should not "compare a monetary settlement of one party's claim against a judgment for damages on another party's counterclaim" to determine the prevailing party).

Here, neither side was awarded damages, and the damages the

Estate sought for its contract and rescission claims were really in the alternative to its demand for specific performance. It is unfair for the School to pick the highest amount of damages the Estate claimed on an alternative theory and then argue the School was successful simply because it sought less damages (which it was not awarded). The School also demanded attorneys' fees, which would put its claim for relief well beyond the $500,000 will bequest. (1 App. 74–75, 84.) It is precisely because the amounts each side demands are speculative until actually realized that only monetary judgments are compared. While neither side was awarded a monetary judgment, the Estate was successful in avoiding paying the $500,000 will bequest to the School and in convincing the jury and the district court that Mr. Schwartz believed he had an enforceable naming rights contract with the School. Meanwhile, the School achieved none of what it sought in its initial petition, confirming that the Estate was the prevailing party. *See Strickland v. Becks*, 157 Cal. Rptr. 656, 657 (Cal. App. Dep't Super Ct. 1979) ("[n]ot having competing money claims to use as a basis for determining who is the prevailing party for the purpose of assessing costs," determining that the defendant was the prevailing party where plaintiff "chose the action to

be brought" and did not achieve "the primary purpose of the action which he instituted").

### B. The Costs Awarded Were Actually, Reasonably, and Necessarily Incurred

The School argues that even if the Estate was the prevailing party, the district court erred in awarding $11,747.68 for certain deposition transcripts, certain processor fees, and Westlaw legal research costs. (RAB at 141–45.) Not so. The district court's award of these costs was appropriate.

#### *1. Deposition Transcripts*

The School argues the district court erroneously awarded $586.75 for the deposition transcripts of two individuals it had designated as experts but who were not permitted to testify at trial as experts. (RAB at 141–142.) However, Rabbi Wyne testified as a fact witness at trial (on many of the same areas covered by his deposition). (16 App. 3920–3963.) In any event, "calling the witnesses at trial [i]s not a prerequisite to an award of witness fees as costs." *Bergmann*, 109 Nev. at 679–80, 856 P.2d at 566 (affirming award of witness fees and expert witness fees for witnesses not called at trial). Moreover, "[u]nder NRS

18.005(5), an expert witness who does not testify may recover costs equal to or under $1,500[.]" *Pub. Employees' Ret. Sys. of Nevada v. Gitter*, 133 Nev. 126, 134, 393 P.3d 673, 681 (2017) (affirming costs for expert consultant never disclosed and who never testified).

Really, the costs at issue here were not fees paid to the experts, but were simply the reporting fees for the individuals' depositions – depositions that the School took (not the Estate). (26 App. 6399, 6406–6408.) Deposition transcription costs are expressly allowed under NRS 18.005(2), and "the statute does not require that the deposition be utilized at trial to be a taxable cost." *Jones v. Viking Freight Sys., Inc.*, 101 Nev. 275, 277, 701 P.2d 745, 747 (1985). It was reasonable and necessary for the Estate to have transcripts of the depositions for trial preparation (and to respond to the School's motion to exclude the expert witness testimony). The district court rightly awarded these costs. (27 App. 6593.)

### *2. Processor Fees*

The School contends the district court should not have awarded $1,920 in expedited service fees (RAB at 142–143), but the School does not contest that these expedited service fees were actually incurred and

well documented. (*E.g.*, 26 App. 6264–6265, 6288–6289.) The School cites no authority for the proposition that expedited service fees are not recoverable. Because of deadlines and the time-sensitive nature of litigation, the expedited service fees were reasonably and necessarily incurred.

The School next contends that the district court erred in awarding $235 for serving a trial subpoena on Dr. Pokroy, whom the School ended up calling as a trial witness. (RAB at 143.) But there was no guarantee the School would actually call him, and it was reasonable and necessary for the Estate to have him under subpoena. In fact, the Estate kept Dr. Pokroy under subpoena as a courtesy to the School (27 App. 6528-29) – a point the School concedes.[84] The School erroneously relies on NRS 18.110(2), which merely indicates that service of a subpoena is not necessary to entitle a prevailing party to witness fees and mileage for testi-

[84] (27 App. 6581 (School's counsel arguing to the district court, "At the end of the day, we did live up to our obligation. Now, I certainly agree with Mr. LeVeque, you can't trust opposing counsel, their strategy may change. We may not have ended up called Dr. Pokroy," "but the fact is we did. And so they didn't have to have that subpoena out there. So I leave that to your discretion.").)

fying witnesses. But here, the Estate did serve a subpoena and is entitled to recover that cost.

Finally, the School contends the district court erred in awarding $510 for serving Dr. Miriam Adelson with deposition subpoenas when she was not ultimately deposed. (RAB at 143.) But process server fees are expressly allowed (NRS 18.005(7)), and the Estate did not depose Dr. Adelson because the district court issued a protective order and would not allow it to. (27 App. 6529; Supreme Court Case No. 73066 (the Estate filed a writ petition to challenge the district court's protective order).) The Estate should not be penalized for attempting to obtain information from a potential witness and actually serving her.

### *3. Westlaw Research*

The School challenges the Estate's Westlaw legal research costs of $8,730.93 simply because the School does not like the Estate's billing method. (RAB at 144–145.) But NRS 18.005(17) expressly allows costs for "computerized services for legal research," and nothing prohibits billing clients on a pro-rata share of the firm's total monthly Westlaw charges. (27 App. 6529–30.) These costs should be allowed.

## CONCLUSION

This Court should reverse the grant of summary judgment on the Estate's oral contract claim and allow the claim to proceed to trial. This Court should affirm the district court's decision that the Estate need not pay the will bequest to the School. This Court should affirm the district court's decision awarding the Estate costs as the prevailing party.

DATED this 26th day of February, 2021.

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## CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of the Court's July 31, 2020 "Order Granting Motion" (Doc. No. 20-28068), because, except as exempted by NRAP 32(a)(7)(C), it contains 25,454 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED this 26th day of February, 2021.

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## CERTIFICATE OF SERVICE

I certify that on February 26, 2020, I submitted the foregoing APPELLANT'S REPLY BRIEF AND ANSWERING BRIEF ON CROSS-APPEAL for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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