IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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

Appellant/Cross-Respondent,

vs.

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

Respondent/Cross-Appellant.

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

Appellant,

vs.

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

Respondent.

No. 78341

No. 79464

APPENDIX OF EXHIBITS TO RESPONDENT/CROSS-APPELLANT'S COMBINED:

REPLY BRIEF ON CROSS-APPEAL (NO. 78341)
&
REPLY BRIEF ON APPEAL (NO. 79464)

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

CHRONOLOGICAL TABLE OF CONTENTS

ALPHABETICAL TABLE OF CONTENTS

J. Randall Jones, Esq. (#1927)
Joshua D. Carlson, Esq. (#11781)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
Attorneys for The Dr. Miriam and Sheldon G. Adelson Educational Institute

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of MILTON I. SCHWARTZ, Deceased.	Case No.: P061300 Dept. No.: 26/Probate **MOTION IN LIMINE NO. 3 TO PRECLUDE JONATHAN SCHWARTZ FROM TESTIFYING AT TRIAL ABOUT STATEMENTS ALLEGEDLY MADE TO HIM BY MILTON I. SCHWARTZ**

The Dr. Miriam Adelson and Sheldon G. Adelson Educational Institute (the "Adelson Campus" or the "School") by and through its counsel, hereby submit its Motion in Limine No. 3 to Preclude Jonathan Schwartz from Testifying at Trial about Statements Allegedly Made to Him by Milton I. Schwartz.

/ / /

/ / /

/ / /

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

This Motion is made and based upon the following Points and Authorities, the exhibits attached hereto, the pleadings and papers on file herein, the oral argument of counsel and such other or further information as this Honorable Court may request. [1]

DATED this 2nd day of July, 2018.

KEMP, JONES & COULTHARD, LLP

J. Randall Jones, Esq. (#1927)
Joshua D. Carlson, Esq. (#11781)
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Attorneys for The Dr. Miriam and Sheldon G. Adelson Educational Institute

NOTICE OF MOTION

TO: All Interested Parties; and

TO: All Counsel of Record

PLEASE TAKE NOTICE that Dr. Miriam and Sheldon G. Adelson, will bring the foregoing **MOTION IN LIMINE NO. 3 TO PRECLUDE JONATHAN SCHWARTZ FROM TESTIFYING AT TRIAL ABOUT STATEMENTS ALLEGEDLY MADE TO HIM BY MILTON I. SCHWARTZ** on for decision on the ____ day of August 23, 2018 at 1:00 a.m./p.m. in front of the above-entitled Court.

DATED this 2nd day of July, 2018.

KEMP, JONES & COULTHARD, LLP

J. Randall Jones, Esq. (#1927)
Joshua D. Carlson, Esq. (#11781)
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Attorneys for The Dr. Miriam and Sheldon G. Adelson Educational Institute

[1] In an effort to save valuable time and resources, the Adelson Campus incorporates by reference the declaration provided in compliance with EDCR 2.47 contained in its Motion in Limine No. 1.

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Jonathan Schwartz repeatedly testified at both of his depositions about statements his father, Milton I. Schwartz, allegedly made regarding various issues raised in this case. The Adelson Campus anticipates that the Estate or its counsel will attempt to introduce Milton Schwartz's alleged statements as evidence through Jonathan Schwartz's testimony. However, there is no question that any statements Milton allegedly made to Jonathan offered by the Estate to prove the truth of the matter being asserted are inadmissible hearsay and must be excluded from trial pursuant to NRS 51.065. Therefore, the Adelson Campus seeks an order from this Court specifically precluding all hearsay evidence from Jonathan Schwartz regarding Milton Schwartz's statements to promote efficiency in the proceedings and avoid prejudice to the Adelson Campus.

II.

RELEVANT FACTS

The Adelson Campus was first known as the Albert Einstein Hebrew Day School and began as a private school offering education for elementary school children. In 1980, the School name was changed to the Hebrew Academy. In 1989, the School name was changed to the Milton I. Schwartz Hebrew Academy. In 1993, during a dispute between Board members, the School name was changed back to the Hebrew Academy. In 1996, after the dispute resolved, the School name was changed again to the Milton I. Schwartz Hebrew Academy.

On April 9, 2005, Dr. Miriam Adelson and Sheldon Adelson pledged $25,000,000 to the School's Operating Entity, through the Adelson Family Charitable Foundation. These funds were used to construct a new high school, refurbish the existing school edifice, and renovate the entire campus. The completion of the new high school and other improvements transformed the new campus, which opened in August of 2008. Almost overnight, the School transformed from a well-regarded but underfunded private Jewish elementary school and preschool into a world class private campus, offering education from grades Pre-K through high school. The middle school grades, which were housed in the elementary school, moved to the new high school building. The original School building,

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

which houses children pre-K through 4th grade, remained known as the Milton I. Schwartz Hebrew Academy until 2013.

In his February 5, 2004 executed Will ("Will"), Milton Schwartz bequeathed $500,000 to the Milton I. Schwartz Hebrew Academy (the "Bequest"). After Milton Schwartz's passing in 2007, the Adelson Campus entered into discussions with Milton Schwartz's son and administrator of the Estate, Jonathan Schwartz, to receive the Bequest. Jonathan Schwartz, as Executor of Milton Schwartz's estate, later refused to honor the Bequest on the basis that the change of the school name breached what he claimed was an enforceable naming rights agreement between the School and Milton Schwartz. While no such agreement has ever been produced, and the Estate's details of the terms of the alleged agreement and the consideration paid for it are vague, ambiguous and even contradictory, the Estate contends that an enforceable agreement exists between the School and Milton I. Schwartz that his name would remain on the School forever.

At his depositions on March 5, 2014 (Phase 1), and July 28, 2016 (Phase 2), Jonathan Schwartz offered testimony as to numerous statements allegedly made by Milton Schwartz regarding various topics at issue in this litigation. *See* Jonathan Schwartz Hearsay Testimony Table, *infra*.

III.

LEGAL ARGUMENT

A. Motions in Limine are Favored and Promote Judicial Economy and Efficiency.

Motions in limine are designed to seek the Court's ruling on the admissibility of arguments, assertions and evidence in advance of trial. The Nevada Supreme Court has approved of the use of motions in limine in a number of cases by recognizing the legitimacy of such pre-trial motion practice and the Court's authority to rule on these motions. *See e.g., State ex rel. Dep't of Highways v. Nevada Aggregates & Asphalt Co.,* 92 Nev. 370, 551 P.2d 1095, 1098 (1976).

NRCP 16(c)(3) provides the Court's authority to rule on motions in limine by allowing for "advance rulings . . . on the admissibility of evidence." This permits, as the California Courts have held, "more careful consideration of evidentiary issues than would take place in the heat of battle during trial;" and motions in limine also promote judicial economy by minimizing "side-bar conferences and

disruptions at trial." *Kelly v. New West Fed. Sav.*, 56 Cal.Rptr.2d 803, 808 (1996). By resolving "potentially critical issues at the outset, [motions in limine] enhance the efficiency of trial and promote settlements." *Id.*

The prophylactic motion-in-lime is authorized by NRS 47.080, which states as follows:

> In jury cases, hearings on preliminary questions of admissibility, offers of proof in narrative or question and answer form, and statements of the judge showing the character of the evidence shall to the extent practicable, unless further restricted by NRS 47.090, be conducted out of the hearing of the jury, to prevent the suggestion of inadmissible evidence.

The Adelson Campus' Motion in Limine seeks a ruling precluding the Estate from offering or attempting to offer Milton Schwartz's hearsay statements through Jonathan Schwartz. This Court has the authority to grant the Adelson Campus' Motion to avoid unnecessary delays during trial arguing the subject of this Motion and to avoid prejudice to the Adelson Campus.

B. The Court must exclude all hearsay testimony from Jonathan Schwartz regarding statements allegedly made by Milton Schwartz.

It is well-settled that "[a]n out-of-court statement offered at trial to prove the truth of the matter asserted in the statement is hearsay, and is inadmissible unless it falls within one of the recognized exceptions to the hearsay exclusionary rule." *Franco v. State*, 109 Nev. 1229, 1236, 866 P.2d 247, 252 (1993) (citing NRS §§ 51.035, 51.065).

The Adelson School anticipates that the Estate or its counsel will improperly attempt to introduce Milton Schwartz's hearsay statements as evidence through Jonathan Schwartz in support of the Estate's claims or defenses to establish various facts in the Estate's favor. For instance, the Adelson School anticipates Jonathan Schwartz will attempt to offer testimony regarding Milton Schwartz's alleged statements on two of the central issues in this case: (1) whether an ambiguity exists regarding the Bequest (a legal question), and if so, then whether the Estate must honor the Bequest; and (2) whether Milton Schwartz and the School had an enforceable agreement that the School would be named after Milton Schwartz "in perpetuity." The following are just some of the examples of such hearsay testimony offered by Jonathan Schwartz on these issues at his depositions:

///

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

Jonathan Schwartz Hearsay Testimony Summary

Testimony	Cite
Milton and Jonathan discussed the language of provision 2.3 in Milton's February 5, 2004 Will ("MISHA Gift"); Milton told Jonathan he did not want a successor clause added to the language in that provision.	Phase 1, 9:25-10:24 20:18-24. *See* **Exhibit 1**, March 5, 2014, Dep. Jonathan Schwartz.
Milton and Jonathan had numerous conversations over the course of many years regarding the MISHA gift.	*See id* at 10:25-11:17
Milton told Jonathan that he "might need [the Sabbath Letter], if the naming rights to the school ever become an issue."	*See id* at 11:7-11
Milton told Jonathan: "Here is a copy of the Bylaws to the school that says it's the Milton I. Schwartz Hebrew Academy in perpetuity. You may need this one day, if it ever becomes an issue."	*See id* at 11:12-17
Milton and Jonathan discussed Milton's estate often; Milton told Jonathan and other members of the family that the school was supposed to be named the Milton I. Schwartz Hebrew Academy in perpetuity. "He used to love to say – whenever he would say the Milton I. Schwartz Hebrew Academy, he would say the Milton I. Schwartz Hebrew Academy in perpetuity with emphasis added."	*See id* at 12:1-25
Milton discussed the fact that the school was supposed to be named the Milton I. Schwartz Hebrew Academy in perpetuity with Jonathan's siblings, Robin Landsburg, Eileen Zarin, and Samuel Schwartz.	*See id* at 13:1-6
Milton told Jonathan Milton had a conversation with Marc Gordon about Milton's will.	*See id* at 17:12-18:5
Jonathan had numerous discussions with Milton about the fact that Milton donated $500,000 to the school in return for which the school guaranteed it would change its name to the "MISHA" in perpetuity	Phase 2, 8:23-9:16. *See* **Exhibit 2**, July 28, 2016, Dep. Jonathan Schwartz.
"When he referred to the school, he would always say 'The Milton I. Schwartz Hebrew Academy in perpetuity.' And he would enunciate the term 'in perpetuity.' And he would say it with a little smirk on his face. And that's just the -- how it was referred to in our office."	*See id* at 10:1-7
Jonathan remembers Milton telling him that the school agreed to change its name to the MISHA in perpetuity.	*See id* at 10:8-16
Milton told Jonathan he discussed the naming of the school with Tamar Lubin and some of the then-members of the Board in 1989, and they agreed to name the school after Milton Schwartz in perpetuity.	*See id* at 10:17-23
Milton told Jonathan that Milton had a meeting at his home where the Board agreed to the name change.	*See id* at 12:7-14 and 14:7-10

Milton told Jonathan that an issue related to the letterhead and how Milton's named was to be memorialized was discussed with the School.	*See id* at 18:19-19:2
Milton told Jonathan in 2006/2007, when the Adelson's pledged $25M to build a high school, that the high school would be known as the Adelson High School and the rest of the school would continue to be known as the Milton I. Schwartz Hebrew Academy and there was never a discussion regarding the naming rights for the campus.	*See id* at 22:12-23:2
Milton told Jonathan that Milton had suggested to Sheldon Adelson that they both donate a portion of their net worth to the school. Milton told Jonathan sometime in 2007 that Milton and Sheldon Adelson reached an agreement about the naming of the high school – the high school would be known as the Adelson High School and the rest of the school would continue to be known as the Milton I. Schwartz Hebrew Academy	*See id* at 41:11-42:9
Milton said that he was only going to leave a gift [to the school] in his will, and that was it.	*See id* at 64:10-65:8

Any such testimony is clearly inadmissible under NRS 51.065 where the Estate seeks to offer Milton's statements to prove the truth of the matter asserted. In particular, such statements are inadmissible hearsay where the Estate seeks to use this testimony to show that (a) an ambiguity exists regarding the Bequest; (b) Milton Schwartz intended only that the Bequest was to be made to a school bearing the name the "Milton I. Schwartz Hebrew Academy;" and (c) there was an enforceable agreement between the school and Milton Schwartz that the school would be named after him in perpetuity. Because the Estate cannot show that any hearsay exception would apply to Milton Schwartz's hearsay statements, this testimony is inadmissible.

Therefore, the Court should grant the Motion and expressly preclude Jonathan Schwartz from offering or attempting to offer Milton Schwartz's hearsay statements into evidence.

///

///

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

IV.

CONCLUSION

For all the reasons indicated above, the Adelson School respectfully requests that this Court grant the instant motion and preclude Jonathan Schwartz from offering or attempting to offer Milton Schwartz's hearsay statements into evidence.

DATED this 2nd day of July, 2018.

Respectfully Submitted,

KEMP, JONES & COULTHARD, LLP

J. Randall Jones, Esq. (#1927)
Joshua D. Carlson, Esq. (#11781)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
Attorneys for The Dr. Miriam and Sheldon G. Adelson Educational Institute

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of July, 2018, I served a true and correct copy of Dr. Miriam and Sheldon G. Adelson Educational Institute's **MOTION IN LIMINE NO. 3 TO PRECLUDE JONATHAN SCHWARTZ FROM TESTIFYING AT TRIAL ABOUT STATEMENTS ALLEGEDLY MADE TO HIM BY MILTON I. SCHWARTZ** via the Eighth Judicial District Court's CM/ECF electronic filing system, addressed to all parties on the e-service list.

An employee of Kemp, Jones & Coulthard, LLP

EXHIBIT 1

DISTRICT COURT

COUNTY OF CLARK, NEVADA

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

DEPOSITION OF A. JONATHAN SCHWARTZ

Taken on Wednesday, March 5, 2014

At 12:33 p.m.

At 9060 West Cheyenne Avenue

Las Vegas, Nevada

Reported by: Carla N. Bywaters, CCR 866

Job No. 9107

attorneys that he employed. My father was a member of MENSA. He was a member of Intertel. He was literally a genius, and he often did things like this, so that's why.

Q. Now, at the time that you took dictation, you had already received your law degree, correct?

A. Correct.

Q. Did you have any experience in estate planning?

A. I had worked alongside my father my entire life with Dick Oshins, with Marc Gordon. I sat in on and was a part of witnessing my father create his estate plan for my entire life in addition to all the classes I took in law school.

Q. So suffice it to say you were pretty knowledgeable about your father's estate --

A. Yes.

Q. -- and that process?

A. Yes.

Q. Did you give your father any advice regarding the preparation of the will?

A. We discussed it. I don't know if I would say I ever gave my father advice.

Q. What did you discuss?

A. We discussed numerous things.

Q. Like what?

A. Well, when it has to do with what's relevant, which is the Milton I. Schwartz Hebrew Academy, we certainly discussed the language as to that gift.

Q. Did you discuss anything else with regards to any of the other provisions?

A. I don't recall specifically.

Q. Okay. And what do you recall discussing about this provision, 2.3, of the will?

A. I specifically recall him saying that he did not want a successor clause added to the language where it says -- may I read?

Q. Yes, please.

A. Let me find it. I hereby give, devise, and bequeath the sum of $500,000 to the Milton I. Schwartz Hebrew Academy. We discussed whether or not the language should say to the Milton I. Schwartz Hebrew Academy and its successors in interest or its successors in interest, and he specifically said it shouldn't because there would be no successor in interest, that the gift was only to go to the Milton I. Schwartz Hebrew Academy.

Q. Okay. And what was your response to that?

A. Yes, sir.

Q. Okay. Did you conduct any research in regards

to preparing this specific section?

A. I didn't conduct research, but over the course of many, many years, I had numerous conversations with my father where he would walk into my office -- we shared an office in the same building. He had an office; I had a separate office.

And he would walk into my office, and he would bring out the Roberta Sabbath letter that was the subject of a prior deposition today and say, "You may need this one day, if the naming rights to the school ever become an issue."

A couple months later he would come in, and he would say, "Here is a copy of the Bylaws to the school that say it's the Milton I. Schwartz Hebrew Academy in perpetuity. You may need this one day, if it ever becomes an issue." We had more conversations like that than I can count.

Q. Okay. Why did he ever think that the naming rights would become an issue?

A. Because it was a subject of the litigation, I believe -- and I may be slightly wrong on the year -- I think '92 was the year.

Q. Okay. And did you have these sorts of discussions in 2004?

A. I don't recall.

Q. Would there be anything to help refresh your recollection, maybe notes or --

A. I didn't take any --

Q. -- conversations?

A. I didn't take any notes. I just recall numerous times where we had that discussion. I do recall in 2004 we had a family meeting. My father was very, very open about his will and his estate plan with our entire family. We had periodic meetings, and we discussed these issues; what was in his will, what he intended, why he wanted it.

And the fact that the school was supposed to be named the Milton I. Schwartz Hebrew Academy in perpetuity was a discussion he had with me and my siblings and members of my family. He used to love to say -- whenever he would say the Milton I. Schwartz Hebrew Academy, he would say the Milton I. Schwartz Hebrew Academy in perpetuity with emphasis added.

Q. Did you have any of these conversations at the time that he dictated the will to you?

A. Yes.

Q. Okay. And how did that come up?

A. It was just -- it was understood. It was known. Like I said, he would always say that. It was an oft-made statement, often-made statement.

Q. Okay. Did he discuss this provision, Section 2.3, of the will with anybody else from your immediate family, your mom or your siblings?

A. I know he had discussions about the fact that it was supposed to be named the Milton I. Schwartz Hebrew Academy in perpetuity with my siblings.

Q. And for the record, Jonathan, who are your siblings?

A. Robin Sue Landsburg, Eileen Joanna Zarin, and Samuel Schwartz are my father's other children.

MR. FREER: Would you mind spelling that for the court reporter, please?

THE WITNESS: Which names do you want me to spell? Do you want me to spell all of them from beginning to end?

BY MR. COUVILLIER:

Q. And if you could add their addresses while we're at it, too, please.

A. Well, I'm going to have to give you those later.

Q. How about whether they live in Las Vegas or what city?

A. Some live in -- I'll go one by one --

Q. Thank you, Jonathan.

A. -- to make it simple for you. It's Samuel

Q. Now, what did you do after you finished the dictation, and your father reviewed it; what happened after that?

A. It was sent to Marc Gordon.

Q. How was it sent to Marc?

A. I don't recall.

Q. Did you have an e-mail account at that time?

A. Probably.

Q. Could you have sent it to him via e-mail?

A. I don't specifically recall. You're talking ten years ago.

Q. I understand. I'm just asking for your best testimony here today, Jonathan. And after you sent it to Marc, what happened after that?

A. I know they had a conversation on the phone, and I know that Marc conducted a signing ceremony at his office.

Q. And how do you know that they had a conversation on the phone?

A. Because my father told me about it.

Q. And when you say they had a conversation, you mean your father and Marc Gordon?

A. Correct.

Q. Okay. Was anybody else a part of that conversation?

A. I don't remember.
Q. What did your father say to you about that conversation?
A. That he sent it to Marc to review and to -- that was it. That's all I can remember.
Q. Okay. Did you have any conversations with Marc Gordon about the will?
A. When?
Q. After you sent him the copy that you had taken the dictation?
A. Well, again, that's a ten-year period.
Q. Asking for your best testimony.
A. I've told Marc that he's going to be called for a deposition, so yes.
Q. More immediate to the 2004, let's say within a month of you sending that over to Marc, did you have any conversations with him?
A. I don't remember.
Q. Okay. What was your most recent conversation that you've had with Marc?
MR. FREER: And I'll object to the extent that I was present and -- on the attorney-client privilege -- you can answer absent any meetings in which I was present with Marc. And I guess, also, let's post an objection from the standpoint that --

Q. Okay. Were your discussions with Marc just in general about the will?

A. I don't recall that I ever had a conversation with Marc about it.

Q. Okay. Did you have any conversations with anybody at Marc's office?

A. Not that I remember.

Q. Okay. So would it be fair to say that after you sent him the dictation, you didn't have any conversations with Marc thereafter regarding Section 2.3?

A. I didn't say I sent him the dictation.

Q. Okay. Let me rephrase that question. After the dictation that you had taken from your father was sent to Marc, you didn't have any conversations with Marc regarding Section 2.3 of the will?

A. I don't recall.

Q. Did you give your father any advice regarding Section 2.3 of the will?

A. I think I testified previously I don't -- I didn't give him advice. I recall specifically us discussing whether or not there should be a successor clause and him saying he didn't want one because there wouldn't be a successor.

Q. Okay. Anything else beyond that?

EXHIBIT 2

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * * *

In the Matter of the Estate of,

MILTON I. SCHWARTZ,

Deceased.

Case No. P061300
Dept. No. 26/Probate

VIDEOTAPED DEPOSITION OF

JONATHAN SCHWARTZ

Volume I

Las Vegas, Nevada

July 28, 2016

9:40 a.m.

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

Q Are you licensed in Nevada at the present time?

A No.

Q Okay. And you're currently licensed in Arkansas; right?

A Yes.

Q Have you ever practiced as an attorney?

A It's debatable. I've never practiced on behalf of a client outside of my family, so I would say no.

Q Okay. Pretty much just the family lawyer on various things and --

A Correct.

Q All right. Now, let me mark the petition, first of all -- let's mark everything while we're at it.

(Exhibit Nos. 1, 2 & 3 were marked.)

(Discussion off the record.)

BY MR. KEMP:

Q Okay. Why don't we start with Exhibit 1. Could you take a look at that, please.

Okay. Now, if you take a look at page 2, lines 13 through 15, there's an allegation there or a statement that says, quote, "In

August 1989, Milton Schwartz donated 500,000 to the academy in return for which the academy would guarantee that its name would change in perpetuity to the, quote, Milton I. Schwartz Hebrew Academy," end quote.

Do you understand that allegation?

A Yes.

Q Okay. And what personal knowledge do you have, if any, about the August 1989 events?

A I had numerous discussions with my father about it. I've had discussions with board members of the school about it. I've had discussions with my family about it.

It was an off -- often-discussed item in my office, in my home, in my father's home. The school was a big part of his -- his life.

Q Okay. Why don't we try to break it down in time frame, because we have your letter marked as Exhibit 2.

In 1989, did you have any knowledge of it?

A I remember him making the donation to the school, and I recall the school agreeing to be named the Milton I. Schwartz Hebrew Academy in perpetuity.

And, like I said, my father had this practice. When he referred to the school, he would always say "The Milton I. Schwartz Hebrew Academy in perpetuity." And he would enunciate the term "in perpetuity." And he would say it with a little smirk on his face. And that's just the -- how it was referred to in our office.

Q Okay. All right. Well, let's get back to 1989.

You said you remember the school agreeing to it?

A Correct.

Q Okay.

A I remember my father telling me the school agreed to it.

Q Okay. Great.

And did your father tell you who he dealt with in 1989?

A Tamar Lubin and some of the members of the board at that time.

Q Okay. And you said the school agreed to it?

A Correct.

Q All right. Now, Dr. Lubin has testified in this case.

purposes of the --

A Yes.

Q Okay. And the agreement was between your father and Dr. Lubin.

Is that your understanding?

A The school. The board.

Q Okay. It's your understanding the board was part of the agreement, too?

A Correct.

Q Okay. What do you base that on?

A I was told by my father that he had a meeting at our home and that the board agreed to do it, and there were a series of documents memorializing the agreement. There were corporate documents from the school, the --

Q Okay. Let's stick with 1989.

A Uh-huh.

Q You're talking about the bylaws from 1996 or whatever; right? I assume that's what you're talking about when you say "a series of corporate documents."

A I don't remember the dates.

Q Okay. We have -- we have -- your letter here is probably the -- okay.

Back in 1989, your understanding is that

the board of the school came to your father's house and made this agreement with him?

A Correct.

Q Okay. When did that occur?

A I don't remember specifically.

Q At some time in 1989?

A I believe that's correct. Late '80s. I think '89 is the correct date.

Q Okay. And --

A Correct year.

Q And the board at that time, do you know who that would have been?

If you need to look at something in this package, do --

A I don't have anything to look at. I don't remember off the top of my head.

Q Okay. Do you remember any of the board members at that time?

A Some of them. I think Lennie Schwartzer was a board member.

Q Sam Ventura?

A I don't know if Sam was a board member at that time or not. My understanding is Sam was on and off the board at different periods of time, so I don't know if he was a board member at that

time.

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

A Correct.

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

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

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

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

Q Okay.

A -- for today's times, you know. In -- in 1996, I don't think people had websites.

Q Or '89?

A Or '89.

Q So you'll agree with me that websites were not specifically discussed in either '89 or -- or 1996?

A May not have been.

Q Okay.

A May not have been.

Q And there's an extensive provision here about letterhead and promotional material in bold letters and the size of type and things of that nature.

Is it your understanding that that was discussed back in 1989?

A I don't know.

Q Okay. Same question for '96, do you think that was discussed at that point in time?

A I believe it was. I believe I -- I reviewed a letter from -- I know that the letterhead and how the name would be memorialized was discussed. I had heard this before from my father. It's not something I was making up anew.

This was all based on discussions I had with my dad.

Q I'm not suggesting in any way you're making anything up. Okay? I'm not suggesting that. And I -- and I apologize if -- if you -- you understood it that way.

Okay. Why -- why don't we break it down a little better.

In '89, the school consisted of K through 8, yes?

A Don't know.

Q Okay. At some point in time, there was a high school added on?

A Correct.

Q Okay. And you're aware of the fact that that was named the Adelson High School?

A Correct.

Q Do we have any dispute about that being --

A No.

Q Okay. All right.

A Never did.

Q Okay. All right.

Now, with regards to the lower school, okay, we refer to that -- do you understand that

you've seen his affidavit -- in his affidavit -- and I can show it to you again if you -- if you need to look at it. In his affidavit he said that he had discussions with your father that the lower school and the academy will be named after your father. And then when we took his deposition, he said, no, I didn't -- there weren't any discussions about the campus. It was just the lower school.

A Uh-huh.

Q So he clarified that point.

I'm asking you if you had discussions about the lower school and the academy, separate entities, or if there was just the lower school.

A I had discussions with my father in 2006 and 2007 when the Adelsons announced what was originally a pledge of $25 million to build a high school. And my father said the high school is going to be known as the Adelson High School, and the rest of the school will continue to be known as the Milton I. Schwartz Hebrew Academy.

There was never any discussion with my father about naming rights for the Adelsons attached to the campus. I've said this before: The whole notion of Adelson Educational Campus was

something that someone made up after my father died. It was never something my father agreed to.

Q Okay. And by the same token, there was never an agreement that it would be called the Milton I. Schwartz Educational Campus either; correct?

A No, that's what it was.

Q Okay. Well, let -- let me back up.

So your contention is that in 1989 there was an agreement that both the lower school and the campus be named after your father; is that correct?

A Any school that was on that piece of land was the Milton I. Schwartz Hebrew Academy.

Q Okay. But your contention was that would include both the lower school and any -- any name of the campus?

A Your client, I believe, is differentiating between the lower school, the high school, and the campus. And what I'm telling you is there was no -- any school that appeared on that land was the Milton I. Schwartz Hebrew Academy.

This whole notion of separate naming rights as to the campus, again, was something that

A My father was agreeable to the high school being known as the Adelson High School.

Q Okay. Great.

Now, what about the campus?

A There was no discussion about the campus receiving a different name.

Q No discussion at any time?

A No agreement. There may have been discussion; there was no agreement.

Q That you know of?

A That my father told me. I mean, I specifically remember my father walking in -- I'll tell you a couple of things, because my father was enjoying this process.

At one point, he told me that he had suggested to Sheldon that they both donate an equal percentage of their net worth. And Sheldon, being worth much, much more than my father, would have resulted in the school getting a lot more money. And my father was always trying to raise money for the school.

So he would come into my office, and he would relay these discussions. And at one point, he walked into my office in either the -- the winter of 2007 or the spring and said, "I'm so

happy. I've reached an agreement with Sheldon regarding the naming of the high school."

And I said, "Okay. What's the agreement?"

And he said, "The high school is going to be known as the Adelson High School, and the rest of the school is going to continue to be known as the Milton I. Schwartz Hebrew Academy." And that was it.

Q Those were his words, "the rest of the school"?

A Yes.

Q And you understood that to include both the K through 8 and the campus?

A Again, your -- the rest of the school. I mean, that's the way it was relayed to me, "the rest of the school." My father never differentiated or told me that there were any discussions or any agreement regarding changing the name of the campus.

Q Okay. I mean, you're suggesting that we're differentiating between school and campus. Actually, Rabbi Wyne was the one who says -- differentiates between the three in his affidavit.

A Well --

Q Is it -- okay. Let's slow down.

A Uh-huh.

Q Their claim or discussion was that -- does this have anything to do with what we're here to talk about, a separate agreement for the high school?

A It has -- yeah, it's relevant with regard to some of the allegations that Mr. Adelson has made and then the threat that he made to me.

Q Okay. All right. So Mr. Schiffman and Mr. Chaltiel claim that there was some sort of agreement to give money to the high school? Yes or no?

A I know that in and around the time that the high school was contemplated, that there were discussions amongst several large donors, "What are you going to donate?"

Q Uh-huh.

A And this was sort of a -- almost like a -- a little bit of one-upmanship or goading of one another. It was a little bit of a competition. "I'm going to donate this. You're going to donate that. I'm going to do this. You're going to do that," these types of things.

And I remember specifically my father

said, "I'm going to leave a gift in my will, and that's it."

And I've had this confirmed by a couple of people that my father never said what he was going to give. He simply said, "I'm going to make a gift in my will." Because his presence at the school predated all of these people, and he had given a lot of money over the years.

Q So your understanding is, the reason he made the bequest in the will of 500,000 was for the high school?

A It was just a gift to the school. It was a gift to the Milton I. Schwartz Hebrew Academy. The building of the school -- of the high school was an event around which they were raising donations for the overall school.

Q Okay. I thought you --

A His gift was specifically to the Milton I. Schwartz Hebrew Academy.

Q Okay. We'll get to that.

I thought --

A He wouldn't have given to anything else.

Q I thought you told me at one point that there was a discussion with Mr. Schiffman and Mr. Chaltiel at this lunch about whether or not

J. Randall Jones, Esq. (#1927)
Joshua D. Carlson, Esq. (#11781)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
Attorneys for The Dr. Miriam and Sheldon G. Adelson Educational Institute

DISTRICT COURT
CLARK COUNTY, NEVADA

In the Matter of the Estate of MILTON I. SCHWARTZ, Deceased.	Case No.: P061300 Dept. No.: 26/Probate **MOTION IN LIMINE NO. 5 TO PRECLUDE RESPONDENT WITNESSES FROM TESTIFYING ABOUT STATEMENTS ALLEGEDLY MADE BY MILTON I. SCHWARTZ**

The Dr. Miriam Adelson and Sheldon G. Adelson Educational Institute (the "Adelson Campus" or the "School") by and through its counsel, hereby submit its Motion in Limine No. 5 to Preclude Respondent Witnesses from Testifying about Statements Allegedly Made by Milton I. Schwartz.

This Motion is made and based upon the following Points and Authorities, the Declaration of J. Randall Jones, the exhibits attached hereto, the pleadings and papers on file herein, the oral argument of counsel and such other or further information as this Honorable Court may request.[1]

DATED this 2nd day of July, 2018.

KEMP, JONES & COULTHARD, LLP

J. Randall Jones, Esq. (#1927)
Joshua D. Carlson, Esq. (#11781)
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Attorneys for The Dr. Miriam and Sheldon G. Adelson Educational Institute

[1] In an effort to save valuable time and resources, the Adelson Campus incorporates by reference the declaration provided in compliance with EDCR 2.47 contained in its Motion in Limine No. 1.

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

NOTICE OF MOTION

TO: All Interested Parties; and

TO: All Counsel of Record

PLEASE TAKE NOTICE that Dr. Miriam and Sheldon G. Adelson, will bring the foregoing **MOTION IN LIMINE 5 TO PRECLUDE RESPONDENT WITNESSES FROM TESTIFYING ABOUT STATEMENTS ALLEGEDLY MADE BY MILTON I. SCHWARTZ** on for decision on the 23rd day of August, 2018 at 9:30 a.m./~~p.m.~~ in front of the above-entitled Court.

DATED this 2nd day of July, 2018.

KEMP, JONES & COULTHARD, LLP

J. Randall Jones, Esq. (#1927)
Joshua D. Carlson, Esq. (#11781)
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Attorneys for The Dr. Miriam and Sheldon G. Adelson Educational Institute

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Several witnesses testified at their depositions about statements Milton I. Schwartz allegedly made regarding various issues raised in this case. The Adelson Campus anticipates that Jonathan Schwartz, Executor of the Estate of Milton I. Schwartz (the "Estate"), or their counsel will attempt to introduce Milton Schwartz's alleged statements as evidence through the testimony of their witnesses. However, there is no question that any statements Milton allegedly made to these witnesses that are offered by the Estate to prove the truth of the matter being asserted are inadmissible hearsay and must be excluded under NRS 51.065. Therefore, the Adelson Campus seeks an order from this Court specifically precluding all hearsay evidence from the Estate regarding Milton Schwartz's statements at trial to promote efficiency in the proceedings and avoid prejudice to the Adelson Campus.

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

II.

RELEVANT FACTS

The Adelson Campus was first known as the Albert Einstein Hebrew Day School and began as a private school offering education for elementary school children. In 1980, the School name was changed to the Hebrew Academy. In 1989, the School name was changed to the Milton I. Schwartz Hebrew Academy. In 1993, during a dispute between Board members, the School name was changed back to the Hebrew Academy. In 1996, after the dispute resolved, the School name was changed again to the Milton I. Schwartz Hebrew Academy.

On April 9, 2005, Dr. Miriam Adelson and Sheldon Adelson pledged $25,000,000 to the School's Operating Entity, through the Adelson Family Charitable Foundation. These funds were used to construct a new high school, refurbish the existing school edifice, and renovate the entire campus. The completion of the new high school and other improvements transformed the new campus, which opened in August of 2008. Almost overnight, the School transformed from a well-regarded but underfunded private Jewish elementary school and preschool into a world class private campus, offering education from grades Pre-K through high school. The middle school grades, which were housed in the elementary school, moved to the new high school building. The original School building, which houses children pre-K through 4th grade, remained known as the Milton I. Schwartz Hebrew Academy until 2013.

In his February 5, 2004 executed will ("Will"), Milton Schwartz bequeathed $500,000 to the Milton I. Schwartz Hebrew Academy (the "Bequest"). After Milton Schwartz's passing in 2007, the Adelson Campus entered into discussions with Milton Schwartz's son and administrator of the Estate, Jonathan Schwartz, to receive the Bequest. Jonathan Schwartz, as Executor of Milton Schwartz's estate, later refused to honor the Bequest on the basis that the change of the school name breached what he claimed was an enforceable naming rights agreement between the School and Milton Schwartz. While no such agreement has ever been produced and the Estate's details of the terms of the agreement and the consideration are fuzzy at best, the Estate contends that an enforceable agreement exists between the School and Milton I. Schwartz that his name would remain on the School forever.

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

III.

LEGAL ARGUMENT

A. Motions in Limine are Favored and Promote Judicial Economy and Efficiency.

Motions in limine are designed to seek the Court's ruling on the admissibility of arguments, assertions and evidence in advance of trial. The Nevada Supreme Court has approved of the use of motions in limine in a number of cases by recognizing the legitimacy of such pre-trial motion practice and the Court's authority to rule on these motions. *See e.g., State ex rel. Dep't of Highways v. Nevada Aggregates & Asphalt Co.,* 92 Nev. 370, 551 P.2d 1095, 1098 (1976).

NRCP 16(c)(3) provides the Court's authority to rule on motions in limine by allowing for "advance rulings . . . on the admissibility of evidence." This permits, as the California Courts have held, "more careful consideration of evidentiary issues than would take place in the heat of battle during trial;" and motions in limine also promote judicial economy by minimizing "side-bar conferences and disruptions at trial." *Kelly v. New West Fed. Sav.,* 56 Cal.Rptr.2d 803, 808 (1996). By resolving "potentially critical issues at the outset, [motions in limine] enhance the efficiency of trial and promote settlements." *Id.*

The prophylactic motion-in-lime is authorized by NRS 47.080, which states as follows:

> In jury cases, hearings on preliminary questions of admissibility, offers of proof in narrative or question and answer form, and statements of the judge showing the character of the evidence shall to the extent practicable, unless further restricted by NRS 47.090, be conducted out of the hearing of the jury, to prevent the suggestion of inadmissible evidence.

The Adelson Campus' Motion in Limine seeks a ruling precluding Respondent and/or the Estate from offering or attempting to offer Milton Schwartz's hearsay statements through witness testimony. This Court has the authority to grant the Adelson Campus' Motion to avoid unnecessary delays during trial arguing the subject of this Motion and to avoid prejudice to the Adelson Campus.

B. The Court Must Exclude All Hearsay Testimony from Witnesses Regarding Statements Allegedly Made by Milton Schwartz.

It is well-settled that "[a]n out-of-court statement offered at trial to prove the truth of the matter asserted in the statement is hearsay, and is inadmissible unless it falls within one of the recognized

exceptions to the hearsay exclusionary rule." *Franco v. State*, 109 Nev. 1229, 1236, 866 P.2d 247, 252 (1993) (citing NRS §§ 51.035, 51.065).

The Adelson School anticipates that the Estate or their counsel will improperly attempt to introduce Milton Schwartz's hearsay statements as evidence through witness testimony to establish various facts in the Estate's favor. The following are just some of the examples of the hearsay testimony involving alleged statements made by Milton Schwartz offered by witnesses at their depositions:

Witness	**Testimony**	**Cite**
Susan Pacheco	"[Milton] said the school was going to be in his name and he was preparing the letter for them to sign so it would be easier for them."	*See* **Exhibit 1**, Pacheco Dep. at 17:24-18:2.
Susan Pacheco	"The idea of the school and the fact that the school was named after him as a result of this initial gift of $500,000 was discussed many times with many people."	*See id* at 19:19-20
Susan Pacheco	Milton told her that he considered the removal of his name as a breach or violation of some agreement he had with the school; he said "This is my school. It was in my name in perpetuity. We have the papers. We've got the agreements. We've got the court--"	*See id* at 39:4-15
Susan Pacheco	"That when they removed his name, he was very upset about it because he has several agreements and he – he held that he had several agreements and, of course, he taught me that if it's signed, it's an agreement; that this – the school was in his name in perpetuity. It was in the bylaws. It was in the articles of incorporation. It was on the deed. It was on the letterhead. He had his name on everything because that was – it was really important to him."	*See id* at 39:16-40:1
Neville Pokroy	Recalls discussions with Milton that the school was going to be named after Milton.	*See* **Exhibit 2**, Pokroy Depo. at 13:25-14:3
Roberta Sabbath	Milton told her having the school named after him was important and she remembers him saying to make sure that ot was "in perpetuity."	*See* **Exhibit 3**, Sabbath Depo. at 20:12-16
Roberta Sabbath	In her last conversation with Milton asked her whether she had anything related to the "in perpetuity" naming issue.	*See id* at 21:4-22:5
Lenard Schwartzer	Had discussions with Milton and the board about the school being named after Milton "in perpetuity."	*See* **Exhibit 4**, Schwarter Dep. at 9:22-10:10

Any such testimony is clearly inadmissible under NRS 51.065 where the Estate seeks to offer Milton's statements to prove the truth of the matter asserted. In particular, such statements are

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

inadmissible hearsay where the Estate seeks to use this testimony to show that (a) an ambiguity exists regarding the Bequest; (b) Milton Schwartz intended only that the Bequest was to be made to a school bearing the name the "Milton I. Schwartz Hebrew Academy;" and (c) there was an enforceable agreement between the school and Milton Schwartz that the school would be named after him in perpetuity. Because the Estate cannot show that any hearsay exception would apply to Milton Schwartz's hearsay statements, this testimony is inadmissible. Therefore, the Court should grant the Motion and expressly preclude the Estate's witnesses from offering or attempting to offer Milton Schwartz's hearsay statements into evidence.

IV.

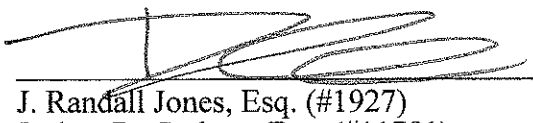
CONCLUSION

For all the reasons indicated above, the Adelson School respectfully requests that this Court grant the instant motion and preclude the Estate's witnesses from offering or attempting to offer Milton Schwartz's hearsay statements into evidence.

DATED this 2nd day of July, 2018.

Respectfully Submitted,

KEMP, JONES & COULTHARD, LLP

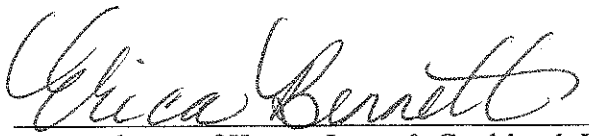


J. Randall Jones, Esq. (#1927)
Joshua D. Carlson, Esq. (#11781)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
Attorneys for The Dr. Miriam and Sheldon G. Adelson Educational Institute

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of July, 2018, I served a true and correct copy of Dr. Miriam and Sheldon G. Adelson Educational Institute's **MOTION IN LIMINE NO. 5 TO PRECLUDE RESPONDENT WITNESSES FROM TESTIFYING ABOUT STATEMENTS ALLEGEDLY MADE BY MILTON I. SCHWARTZ** via the Eighth Judicial District Court's CM/ECF electronic filing system, addressed to all parties on the e-service list.



An employee of Kemp, Jones & Coulthard, LLP

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

EXHIBIT 1

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of MILTON I. SCHWARTZ, Deceased	CASE NO.: PO61300

DEPOSITION OF SUSAN PACHECO

LAS VEGAS, NEVADA

FRIDAY, MARCH 6, 2015

REPORTED BY: KAREN L. JONES, CCR NO. 694, CSR 9464

JOB NO.: 239421

A. Yes.

Q. Do you recall what you did with those copies?

A. I kept one and I don't recall the rest.

Q. How many copies of the letter do you recall making?

A. I don't recall.

Q. Do you recall how many copies that you gave Mr. Schwartz of the letter?

A. I don't recall.

Q. But you at least gave him one copy of the letter?

A. Yes.

Q. And you don't recall what he did with the letter?

A. Not specifically, no.

Q. Generally, do you?

A. No. I know that was a bad answer. No. I don't recall.

Q. Did he discuss this letter with you other than dictating it?

A. Yes.

Q. What did he say?

A. He said that -- I don't want to say it the wrong way, but he said the school was going to

be in his name and he was preparing the letter for them to sign so it would be easier for them.

He often, when things -- he often put things in writing -- as soon as he said something, he put it in writing. So that's what he did here.

Q. Do you know if he obtained a signature from the school on this letter?

A. No.

Q. Did he ever tell you whether he obtained a signature from anybody at the school on this letter?

A. I don't recall.

Q. Have you ever seen a copy of this letter that's been signed?

A. I don't recall.

Q. Would there be anything in your files that you could look at or that maybe I could show you or Jeff could show you to help refresh your recollection?

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

Q. When did you pull a copy of this letter from your files?

A. Today.

Q. And besides today, when was the last time you recall seeing this letter?

A. I don't recall.

Q. Do you recall ever receiving a call from anybody at the school regarding this letter, Exhibit Number 2?

A. No.

Q. Do you recall any conversations -- and I apologize if I ask it again, but do you recall any conversations with Mr. Schwartz, Milton Schwartz, regarding this letter besides the time that he dictated it to you?

A. This, I don't know how to say this. This letter was a result of the gift, the original gift, the $500,000 that he gave to the school, and his -- the school was going to be named after him as a result of this gift.

So this particular letter, I don't recall it being discussed. The idea of the school and the fact that the school was named after him as a result of this initial gift of $500,000 was discussed many times with many people.

Q. But the specifics of this letter, with respect to this letter, Exhibit No. 2, other than the day that he dictated it to you, you don't recall any other conversations with Milton regarding the letter, this Exhibit No. 2?

you, "We are going to war to get my name back on the Hebrew Academy." Do you recall that?

A. Oh, yes.

Q. Did he tell you that he considered the removal of his name as a breach or violation of some agreement that he had with the school?

A. Yes.

Q. What did he say?

A. Well, I don't know the exact words, but it was, "This is my school. It was in my name in perpetuity. We have the papers. We've got the agreements. We've got the court --" No, hold on. Let me see if that's the right time. We went to court on this at one time. I don't remember the date.

But when they removed his -- that was when. That when they removed his name, he was very upset about it because he has several agreements and he -- he felt that he had several agreements and, of course, he taught me that if it's signed, it's an agreement; that his -- the school was in his name in perpetuity. It was in the bylaws. It was in the articles of incorporation. It was on the deed. It was on the letterhead.

He had his name on everything because

that was -- it was really important to him.

Q. And when you said you went to court, did you go to court here in Las Vegas?

A. Yes. And he went to court; I didn't.

Q. He went to court. Okay.

Do you recall what the name of the case was?

A. Do you want exact words?

Q. The best of your recollection.

A. The Hebrew Academy versus the Milton I. Schwartz Hebrew Academy.

Q. Do you recall the case number by any chance?

A. No.

Q. Do you recall whether Mr. Schwartz had an attorney assisting him?

A. Yes.

Q. What was the name of the attorney?

A. I believe -- I don't know for sure, there was a Mark and there was also, I believe, Fred Berkley. I don't know if Fred Berkley was involved in this. That's all I got.

Q. And you said Mark. Would the name -- if I told you Mark Solomon, does that refresh any recollection?

EXHIBIT 2

Deposition of:

Neville Pokroy, M.D.

Case:

In the Matter of the Estate of Milton I. Schwartz
P061300

Date:

02/25/2014

OASIS
REPORTING SERVICES
400 South Seventh Street • Suite 400, Box 7 • Las Vegas, NV 89101
702-476-4500 | www.oasisreporting.com | info@oasisreporting.com
COURT REPORTING | NATIONAL SCHEDULING | VIDEOCONFERENCING | VIDEOGRAPHY

present at this meeting and that this line of questioning is relevant as to ascertaining what Milton I. Schwartz's knowledge and understanding was concerning the naming of the school at or about the time he executed the same, and this line of questioning establishes a historical baseline for what Mr. Schwartz understood.

MR. COUVILLIER: I think the Court was clear on it, and I'm not going to get into a debate with Mr. Freer. But I do object to it, and I hope we don't spend a lot of line of questioning on the historical aspects, Alan, just, you know, to stick with the will that happened in 2005 and Mr. Schwartz's intentions at the time that he executed the will, which I think is what the Court is looking for.

BY MR. FREER:

Q. That being said, Mr. Pokroy, at the meeting, was there any discussion about naming the Hebrew Academy after Milton I. Schwartz?

A. My recollection, that there was a discussion at that particular moment in time, I don't remember details. But certainly the discussion took place, and indeed, we followed it up by naming the school after Milton I. Schwartz.

Q. Do you recall having any discussions with

Milton at or about that time that the school was going to be named after him?

A. Yes.

Q. And what is your recollection of those discussions?

A. We had a hand in soliciting Mr. Schwartz to help us, because we were given an eviction notice from our previous housing at Beth Sholom. I think they gave us about a year because they needed the space, so we had to find another location. We needed funds. The land in Summerlin had been negotiated by the principal and others, and so we were looking for financial help. And my wife and I spoke to Milton to encourage him to be involved, and he said yes.

Q. Did Milton ask at that -- did Milton ask about naming the school after him?

A. When we solicited him, no, but it clearly was discussed at subsequent meetings, and his name was on the school thereafter.

MR. FREER: We'll mark that as Exhibit No. 3.

(Exhibit No. 3 was marked for identification.)

BY MR. FREER:

Q. Now, before we move to Exhibit No. 3, I'm going to draw your attention down to the third

EXHIBIT 3

Deposition of:

Roberta Sabbath, Ph.D.

Case:

In the Matter of the Estate of Milton I. Schwartz
P061300

Date:

03/05/2014

OASIS
REPORTING SERVICES
400 South Seventh Street • Suite 400, Box 7 • Las Vegas, NV 89101
702-476-4500 | www.oasisreporting.com | info@oasisreporting.com
COURT REPORTING | NATIONAL SCHEDULING | VIDEOCONFERENCING | VIDEOGRAPHY

BY MR. LUSZECK:

Q. Okay. Was it your understanding that the Hebrew Academy was going to retain the name of the Milton I. Schwartz Hebrew Academy in perpetuity?

MR. COUVILLIER: Same objection. Asked and answered.

THE WITNESS: Should I go ahead and answer.

MR. KRAMETBAUER: You can answer the question.

THE WITNESS: It was, very strongly. It was very important to Milton. I do remember that.

BY MR. LUSZECK:

Q. Okay. How do you know that it was important to Milton?

A. He expressed it, and I remember him saying make sure that it says in perpetuity, and it -- so that is how I know it was important to him.

Q. Okay. Do you recall how many times -- sorry. Will you repeat her response back?

(Record read.)

Q. Do you know approx -- how many times did he express that to you?

A. I do not recall how many times.

Q. Okay. How would you describe your relationship with Milton? Did you consider him a friend? Was he kind of a business associate?

A. Just give me a moment.

Milton was an important community leader, and I was a member of the community.

Q. Okay. When was the last time that you spoke with him?

A. He called me a few years ago, five years ago maybe, not -- I'm not sure of the exact, called the school and a memo was put on my door at school, and there were -- and sometime passed before I got that note for whatever reason -- it was a Spring Break -- I do not remember.

And I did call him back and he said, "Roberta, do you have anything that's related to the in perpetuity issue, the naming of the school?" I do not remember the exact words, but I understood that to be his request. And I said, "No, Milton, I don't, and I remember him specifically saying, "Oh, that -- I -- I have it or I'm on top of it or -- or it doesn't matter" -- the fact that I didn't have anything -- "goodbye." So it was a very short conversation.

Q. Okay. Did he indicate to you why he was looking for documentation with that language on it?

A. No, he did not.

Q. Okay.

A. No, he did not.

Q. Did you have a discussion with him at that time with respect to the naming rights of the school and whether the school was going to retain the name of Milton I. Schwartz Hebrew Academy in perpetuity?

A. No, I did not.

MR. COUVILLIER: Same objection. It violates the Court's order. And, Jeff, if I may interpose. What was the time that we're talking about, maybe in terms of years, that this discussion took place; what year was it?

THE WITNESS: I had said about five years ago, give or take a couple of years.

MR. COUVILLIER: Thank you.

THE WITNESS: I don't know when he -- when did he pass away?

MR. SCHWARTZ: '7 -- '07.

THE WITNESS: '7, so it was longer than five, obviously.

MR. KRAMETBAUER: That's okay.

THE WITNESS: Okay.

BY MR. LUSZECK:

Q. Were you still employed by the Hebrew Academy at that time?

A. No.

Q. Okay. Were you on the board or serving in any

EXHIBIT 4

Deposition of:

Lenard E. Schwartzer, Esq.

Case:

In the Matter of the Estate of Milton I. Schwartz
P061300

Date:

02/25/2014

OASIS
REPORTING SERVICES

400 South Seventh Street • Suite 400, Box 7 • Las Vegas, NV 89101
702-476-4500 | www.oasisreporting.com | info@oasisreporting.com

COURT REPORTING | NATIONAL SCHEDULING | VIDEOCONFERENCING | VIDEOGRAPHY

a letter that was written that said I was -- by me that said I was no longer on the board in '92.

Q. Okay. All right. Do you recall being on the board at or about the time the Hebrew Academy switched its name to the Milton I. Schwartz Hebrew Academy?

A. Yes.

Q. What do you recall with respect to the name change?

A. I don't have any specific recollection of a board meeting where that was done. I do have a specific recollection that the name of the school was changed to the Milton I. Schwartz Hebrew Academy at the time the school was moving to the new location on Hillpointe because Mr. Schwartz donated a very large sum and arranged for the balance of the financing for the construction of the new school building.

And it was -- was then and today -- my understanding that the school would be named the Milton I. Schwartz Hebrew Academy in perpetuity in light of that financial donation and his -- you know, I got the impression he guaranteed the loans with the bank.

Q. Okay. You used the phrase "in perpetuity." What is your understanding as to why that term "in perpetuity" came about?

A. Well, it came about because in the discussions

that was had with Milton when he was discussing with board members, and I don't remember at a board meeting. I just remember it was part of the discussions, and we had non-board meetings where there would be several board members meet with Milton.

There were times when I would discuss things with Milton, because I think at some point in time, I did legal work for the school on a pro bono basis, and I was considered the attorney (indicating) for the board.

We used the term "in perpetuity," because since it was by far the largest amount of money anybody had ever donated to the school at the time, and it made it possible to build the new school on Hillpointe. Without that donation, there wouldn't be -- there wouldn't have been a school built.

Q. Okay.

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

Q. Okay. Do you ever recall Milton using the term "in perpetuity"?

A. I don't have any recollection of specific conversations from that period of time.

J. Randall Jones, Esq. (#1927)
Joshua D. Carlson, Esq. (#11781)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
Attorneys for The Dr. Miriam and Sheldon G. Adelson Educational Institute

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of MILTON I. SCHWARTZ, Deceased.	Case No.: P061300 Dept. No.: 26/Probate **MOTION IN LIMINE NO. 6 TO PRECLUDE RESPONDENT FROM INTRODUCING OR RELYING ON THE AFFIDAVIT OF MILTON I. SCHWARTZ**

The Dr. Miriam Adelson and Sheldon G. Adelson Educational Institute by and through its counsel, hereby submit its Motion in Limine No. 6 to Preclude Respondent from Introducing or Relying on the Affidavit of Milton I. Schwartz.

This Motion is made and based upon the following Points and Authorities, the exhibits attached hereto, the pleadings and papers on file herein, the oral argument of counsel and such other or further information as this Honorable Court may request.[1]

DATED this 2nd day of July, 2018.

KEMP, JONES & COULTHARD, LLP

J. Randall Jones, Esq. (#1927)
Joshua D. Carlson, Esq. (#11781)
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Attorneys for The Dr. Miriam and Sheldon G. Adelson Educational Institute

[1] In an effort to save valuable time and resources, the Adelson Campus incorporates by reference the declaration provided in compliance with EDCR 2.47 contained in its Motion in Limine No. 1.

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

NOTICE OF MOTION

TO: All Interested Parties; and

TO: All Counsel of Record

PLEASE TAKE NOTICE that Dr. Miriam and Sheldon G. Adelson, will bring the foregoing **MOTION IN LIMINE 6 TO PRECLUDE RESPONDENT FROM INTRODUCING OR RELYING ON THE AFFIDAVIT OF MILTON I. SCHWARTZ** on for decision on the 23rd day of August, 2018 at 9:30 a.m./p.m. in front of the above-entitled Court.

DATED this 2nd day of July, 2018.

KEMP, JONES & COULTHARD, LLP

J. Randall Jones, Esq. (#1927)
Joshua D. Carlson, Esq. (#11781)
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Attorneys for The Dr. Miriam and Sheldon G. Adelson Educational Institute

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel: (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The Estate previously produced a document entitled "Second Supplemental Affidavit of Milton I. Schwartz," dated March 31, 1993 ("Milton Schwartz Affidavit"). *See* **Exhibit 1**, EST-00311-312. Milton Schwartz apparently prepared this affidavit in conjunction with prior, unrelated litigation. The Adelson Campus anticipates that Respondent Jonathan Schwartz, Executor of the Estate of Milton I. Schwartz (the "Estate"), or their counsel will attempt to introduce or rely on the Milton Schwartz Affidavit in support of their claims or defenses. However, there is no question that the Milton Schwartz Affidavit is inadmissible hearsay if offered by the Estate and that no hearsay exception applies. Therefore, the Adelson Campus seeks an order from this Court specifically precluding the Estate from offering or relying on the Milton Schwartz Affidavit at trial to promote efficiency in the proceedings and avoid prejudice to the Adelson Campus.

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

II.

LEGAL ARGUMENT

A. Motions in Limine are Favored and Promote Judicial Economy and Efficiency.

Motions in limine are designed to seek the Court's ruling on the admissibility of arguments, assertions and evidence in advance of trial. The Nevada Supreme Court has approved of the use of motions in limine in a number of cases by recognizing the legitimacy of such pre-trial motion practice and the Court's authority to rule on these motions. *See e.g., State ex rel. Dep't of Highways v. Nevada Aggregates & Asphalt Co.,* 92 Nev. 370, 551 P.2d 1095, 1098 (1976).

NRCP 16(c)(3) provides the Court's authority to rule on motions in limine by allowing for "advance rulings . . . on the admissibility of evidence." This permits, as the California Courts have held, "more careful consideration of evidentiary issues than would take place in the heat of battle during trial;" and motions in limine also promote judicial economy by minimizing "side-bar conferences and disruptions at trial." *Kelly v. New West Fed. Sav.,* 56 Cal.Rptr.2d 803, 808 (1996). By resolving "potentially critical issues at the outset, [motions in limine] enhance the efficiency of trial and promote settlements." *Id.*

The prophylactic motion-in-lime is authorized by NRS 47.080, which states as follows:

> In jury cases, hearings on preliminary questions of admissibility, offers of proof in narrative or question and answer form, and statements of the judge showing the character of the evidence shall to the extent practicable, unless further restricted by NRS 47.090, be conducted out of the hearing of the jury, to prevent the suggestion of inadmissible evidence.

The Adelson Campus' Motion in Limine seeks a ruling precluding Respondent and/or the Estate from offering or attempting to rely on the Milton Schwartz Affidavit at trial. This Court has the authority to grant the Adelson Campus' Motion to avoid unnecessary delays during trial arguing the subject of this Motion and to avoid prejudice to the Adelson Campus.

B. The Court Must Preclude the Estate from Offering or Relying on the Milton Schwartz Affidavit at Trial Under NRS 51.065.

It is well-settled that "[a]n out-of-court statement offered at trial to prove the truth of the matter asserted in the statement is hearsay, and is inadmissible unless it falls within one of the recognized

exceptions to the hearsay exclusionary rule." *Franco v. State*, 109 Nev. 1229, 1236, 866 P.2d 247, 252 (1993) (citing NRS §§ 51.035, 51.065). An affidavit is generally inadmissible hearsay. *Cramer v. State*, DMV, 126 Nev. 388, 392, 240 P.3d 8, 11 (2010); *see also Sheriff v. Witzenburg*, 122 Nev. 1056, 1064, 145 P.3d 1002, 1007 (2006) ("Affidavits are considered testimonial hearsay.")(citing *Crawford v. Washington*, 541 U.S. 36, 51-52, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)).

The Adelson School anticipates that the Estate or their counsel will improperly attempt to introduce the Milton Schwartz Affidavit to establish various facts to support the Estate's claims and/or defenses. However, the Milton Schwartz Affidavit would clearly constitute inadmissible hearsay under NRS 51.065 where the Estate seeks to offer Milton's statements to prove the truth of the matter asserted, and no hearsay exception would apply. Therefore, the Court should grant the Motion and preclude the Estate from offering into evidence or attempting to rely on the Milton Schwartz Affidavit at trial.

III.

CONCLUSION

For all the reasons indicated above, the Adelson School respectfully requests that this Court grant the instant motion and preclude the Estate from offering or attempting to rely on the Milton Schwartz Affidavit at trial.

DATED this 2nd day of July, 2018.

Respectfully Submitted,

KEMP, JONES & COULTHARD, LLP

J. Randall Jones, Esq. (#1927)
Joshua D. Carlson, Esq. (#11781)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
Attorneys for The Dr. Miriam and Sheldon G. Adelson Educational Institute

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of July, 2018, I served a true and correct copy of Dr. Miriam and Sheldon G. Adelson Educational Institute's **MOTION IN LIMINE NO. 6 TO PRECLUDE RESPONDENT FROM INTRODUCING OR RELYING ON THE AFFIDAVIT OF MILTON I. SCHWARTZ** via the Eighth Judicial District Court's CM/ECF electronic filing system, addressed to all parties on the e-service list.

An employee of Kemp, Jones & Coulthard, LLP

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

EXHIBIT 1

SECOND SUPPLEMENTAL AFFIDAVIT OF MILTON I. SCHWARTZ

STATE OF NEVADA)
: SS
COUNTY OF CLARK)

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

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

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

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

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

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

///

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

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

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

FURTHER AFFIANT SAYETH NAUGHT.

MILTON I. SCHWARTZ

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

Notary Public

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

Alan D. Freer (#7706)
Alexander G. LeVeque (#11183)
SOLOMON DWIGGINS & FREER, LTD.
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: (702) 853-5483
Facsimile: (702) 853-5485
afreer@sdfnvlaw.com
aleveque@sdfnvlaw.com

Attorneys for A. Jonathan Schwartz

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of MILTON I. SCHWARTZ, Deceased.	Case No.: P-07-061300-E Dept. No.: XXVI/Probate Hearing Date: August 9, 2018 Hearing Time: 1:30 p.m.

THE ESTATE'S OMNIBUS OPPOSITION TO:

MOTION IN LIMINE NO. 3, TO PRECLUDE JONATHAN SCHWARTZ FROM TESTIFYING AT TRIAL ABOUT STATEMENTS MADE BY MILTION SCHWARTZ; OPPOSITION TO MOTION IN LIMINE NO. 5, TO PRECLUDE WITNESSES FROM TESTIFYING ABOUT STATEMENTS MADE BY MILTION SCHWARTZ; AND OPPOSITION TO MOTION IN LIMINE NO. 6, TO PRECLUDE THE AFFIDAVIT OF MILTION SCHWARTZ

A. Jonathan Schwartz ("Executor"), Executor of the Estate of Milton I. Schwartz (the "Estate"), by and through his counsel, Alan D. Freer, Esq. and Alexander G. LeVeque, Esq., of the law firm of Solomon Dwiggins & Freer, Ltd., hereby submits his Opposition to Motion to Motion in Limine No. 3, To Preclude Jonathan Schwartz From Testifying At Trial About Statements Made By Miltion Schwarts ("MIL No. 3"); Opposition To Motion In Limine No. 5, To Preclude Witnesses From Testifying About Statements Made By Miltion Schwartz ("MIL No. 5"); and Opposition To Motion In Limine No. 6, To Preclude The Affidavit Of Miltion Schwartz "MIL No. 6") (the "Opposition").

///

///

///

This Opposition is made and based upon the pleadings and papers on file in this action, the attached Memorandum of Points and Authorities, all attached exhibits, and any oral argument that this Honorable Court may entertain at the time of hearing.

DATED this 23rd day of July, 2018.

SOLOMON DWIGGINS & FREER, LTD.

/s/ Alexander G. LeVeque

ALAN D. FREER (#7706)
ALEXANDER G. LEVEQUE (#11183)
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone No: (702) 853-5483
Facsimile No: (702) 853-5485
Attorneys for the Executor

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENTS AT ISSUE

MIL Nos. 3, 5, and 6, concern the School's sole contention that certain statements made by Milton Schwartz while living must be precluded from being received into evidence by the jury as the School asserts that the proffered statements constitute inadmissible hearsay. Specifically, within MIL No. 3, the School identifies the following 16 statements of Milton Schwartz, as testified to by Jonathan Schwartz, as inadmissible hearsay:

No.	Testimony	Cite
1.	Milton and Jonathan discussed the language of provision 2.3 in Milton's February 5, 2004 Will ("MISHA Gift"); Milton told Jonathan he did not want a successor clause added to the language in that provision.	Phase 1, 9:25-10:24 20:18-24. *See* **Exhibit 1**, March 5, 2014, Dep. Jonathan Schwartz.
2.	Milton and Jonathan had numerous conversations over the course of many years regarding the MISHA gift.	*See id* at 10:25-11:17
3.	Milton told Jonathan that he "might need [the Sabbath Letter], if the naming rights to the school ever become an issue."	*See id* at 11:7-11
4.	Milton told Jonathan: "Here is a copy of the Bylaws to the school that says it's the Milton I. Schwartz Hebrew Academy in perpetuity. You may need this one day, if it ever becomes an issue."	*See id* at 11:12-17

5.	Milton and Jonathan discussed Milton's estate often; Milton told Jonathan and other members of the family that the school was supposed to be named the Milton I. Schwartz Hebrew Academy in perpetuity. "He used to love to say — whenever he would say the Milton I. Schwartz Hebrew Academy, he would say the Milton 1. Schwartz Hebrew Academy in perpetuity with emphasis added."	*See id* at 12:1-25
6.	Milton discussed the fact that the school was supposed to be named the Milton I. Schwartz Hebrew Academy in perpetuity with Jonathan's siblings, Robin Landsburg, Eileen Zarin, and Samuel Schwartz.	*See id* at 13:1-6
7.	Milton told Jonathan Milton had a conversation with Marc Gordon about Milton's will.	*See id* at 17:12-18:5
8.	Jonathan had numerous discussions with Milton about the fact that Milton donated $500,000 to the school in return for which the school guaranteed it would change its name to the "MISHA" in perpetuity	Phase 2, 8:23-9:16. *See* **Exhibit 2**, July 28, 2016, Dep. Jonathan Schwartz.
9.	"When he referred to the school, he would always say The Milton L Schwartz Hebrew Academy in perpetuity.' And he would enunciate the term in perpetuity.' And he would say it with a little smirk on his face. And that's just the -- how it was referred to in our office."	*See id* at 10:1-7
10.	Jonathan remembers Milton telling him that the school agreed to change its name to the MISHA in perpetuity.	*See id* at 10:8-16
11.	Milton told Jonathan he discussed the naming of the school with Tamar Lubin and some of the then-members of the Board in 1989, and they agreed to name the school after Milton Schwartz in perpetuity.	*See id* at 10:17-23
12.	Milton told Jonathan that Milton had a meeting at his home where the Board agreed to the name change.	*See id* at 12:7-14 and 14:7-10
13.	Milton told Jonathan that an issue related to the letterhead and how Milton's named was to be memorialized was discussed with the School.	*See id* at 18:19-19:2
14.	Milton told Jonathan in 2006/2007, when the Adelson's pledged $25M to build a high school, that the high school would be known as the Adelson High School and the rest of the school would continue to be known as the Milton L Schwartz Hebrew Academy and there was never a discussion regarding the naming rights for the campus.	*See id* at 22:12-23:2
15.	Milton told Jonathan that Milton had suggested to Sheldon Adelson that they both donate a portion of their net worth to the school. Milton told Jonathan sometime in 2007 that Milton and Sheldon Adelson reached an agreement about the naming of the high school — the high school would be known as the Adelson High School and the rest of the school would continue to be known as the Milton I. Schwartz Hebrew Academy	*See id* at 41:11-42:9
16.	Milton said that he was only going to leave a gift [to the school] in his will, and that was it.	*See id* at 64:10-65:8

See, MIL No. 3, at pp. 6-7. (Numbers added for reference).

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

Likewise with respect to MIL No. 5, the School seeks to preclude the Estate from introducing testimony of certain witnesses as to statements made to them by Milton Schwartz in support of the Estate's claims, as the School contends that such statements are inadmissible hearsay. Specifically, within MIL #5, the School identifies the following 8 statements as inadmissible hearsay:

No.	Witness	Testimony	Cite
17.	Susan Pacheco	"[Milton] said the school was going to be in his name and he was preparing the letter for them to sign so it would be easier for them."	*See* **Exhibit 1**, Pacheco Dep. at 17:24-18:2.
18.	Susan Pacheco	"The idea of the school and the fact that the school was named after him as a result of this initial gift of $500,000 was discussed many times with many people."	*See id* at 19:19-20
19.	Susan Pacheco	Milton told her that he considered the removal of his name as a breach or violation of some agreement he had with the school; he said "This is my school. It was in my name in perpetuity. We have the papers. We've got the agreements. We've got the court--"	*See id* at 39:4-15
20.	Susan Pacheco	"That when they removed his name, he was very upset about it because he has several agreements and he — he held that he had several agreements and, of course, he taught me that if it's signed, it's an agreement; that this — the school was in his name in perpetuity. It was in the bylaws. It was in the articles of incorporation. It was on the deed. It was on the letterhead. He had his name on everything because that was — it was really important to him."	*See id* at 39:16-40:1
21.	Neville Pokroy	Recalls discussions with Milton that the school was going to be named after Milton.	*See* **Exhibit 2**, Pokroy Depo. at 13:25-14:3
22.	Roberta Sabbath	Milton told her having the school named after him was important and she remembers him saying to make sure that of was "in perpetuity."	*See* **Exhibit 3**, Sabbath Depo. at 20:12-16
23.	Roberta Sabbath	In her last conversation with Milton asked her whether she had anything related to the "in perpetuity" naming issue.	*See id* at 21:4-22:5

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

24.	Lenard Schwartzer	Had discussions with Milton and the board about the school being named after Milton "in perpetuity."	*See* **Exhibit 4**, Schwartzer Dep. at 9:2210:10

See, MIL No. 5, at p. 5. (Numbers added for reference).

In regards to MIL No. 6, the School seeks to preclude the Estate from introducing an affidavit of Milton Schwartz in support of the Estate's claims, as the School contends that the statements set forth in the affidavit constitute inadmissible hearsay. While the School identified the entire affidavit in its MIL No. 6, the relevant statements included in the affidavit are as follows:

> 5. That Affiant donated $500,000 to the Hebrew Academy with the understanding that the school would be renamed the MILTON I. SCHWARTZ HEBREW ACADEMY in perpetuity. That subsequent to the donation being made the By-Laws were changed to specifically reflect that fact and that as a result of the change, Article I, Paragraph 1 of the By-Laws read "The name of this corporation is the Milton I. Schwartz Hebrew Academy (hereinafter referred to as The Academy) and shall remain so in perpetuity.
>
> 6. That Affiant solicited contributions from Paul Sogg and Robert Cohen. That as a result of Affiant's efforts, Paul Sogg pledged to donate $300,000, and that as a result of Affiant's efforts Robert Cohen pledged to donate $100,000.
>
> 7. That Summerlin only donated 17 acres for the Hebrew Academy after Affiant donated $500,000, and Paul Sogg pledged and donated $300,000 and Robert Cohen pledged and donated $100,000.
>
> 8. That the donation of $500,000 by Affiant was condition precedent to the donation of the land by Summerlin; that Affiant believes that the donation of $400,000 by Mr. Sogg and Mr. Cohen was also a condition precedent to the donation of the Land in Summerlin.

See, MIL No. 6, at **Exhibit 1**, thereto.

II. ARGUMENT

A. Legal Standard in Determining a Motion in Limine.

"A motion in limine is a procedural device to obtain an early and preliminary ruling on the admissibility of evidence. Black's Law Dictionary defines it as '[a] pretrial request that certain inadmissible evidence not be referred to or offered at trial. Typically, a party makes this motion when it believes that mere mention of the evidence during trial would be highly prejudicial and could not be remedied by an instruction to disregard.'" *Goodman v. Las Vegas Metro. Police*

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

Dep't, 963 F. Supp. 2d 1036, 1046 (D. Nev. 2013) (citing Black's Law Dictionary 1109 (9th ed.2009)). "The decision on a motion in limine is consigned to the district court's discretion—including the decision of whether to rule before trial at all. Motions in limine should not be used to resolve factual disputes or to weigh evidence, and evidence should not be excluded prior to trial unless the evidence is inadmissible on **all** potential grounds. Even then, rulings on these motions are not binding on the trial judge, and they may be changed in response to developments at trial." *United States v. Whittemore*, 944 F. Supp. 2d 1003, 1006 (D. Nev. 2013) aff'd, 776 F.3d 1074 (9th Cir. 2015).

"If a motion in limine is granted the court in its ruling should provide and advise counsel such ruling is without prejudice to the right to offer proof during the course of the trial, in the jury's absence, of those matters covered in the motion and if it then appears in the light of the trial record that the evidence is relevant, material and competent it may then be introduced, subject to opposing counsel's objections, as part of the record of evidence for the jury's consideration." *Deveroux v. State*, 96 Nev. 388, 391, 610 P.2d 722, 724 (1980).

B. The Proffered Statements Are Not Inadmissible Hearsay.

As a preliminary matter, it is extremely burdensome to address numerous bits and pieces of testimony in a vacuum before trial has even begun. Evidentiary objections are best considered and decided during the trial itself. *See Twyford v. Weber*, 220 N.W.2d 919 (Iowa 1974) ("[A motion in limine] serves the useful purpose of raising and pointing out before trial certain evidentiary rulings the court may be called upon to make during the course of the trial... It is not a ruling on evidence and should not, except on a clear showing, be used to reject evidence.")

Under Nevada law, all relevant evidence is generally admissible unless otherwise provided by law. NRS 48.025. Despite being relevant, hearsay is inadmissible unless an exception applies. NRS 51.065. Certain statements are not hearsay despite being out of court statements offered to prove the truth of the matter asserted such as (1) a statement of a party opponent (NRS 51.035(3)); and (2) statements which may themselves affect the legal rights of the parties.[1]

[1] *See Creaghe v. Iowa Mut. Cas. Co.*, 323 F.2d 981 (10th Cir. 1963) (holding that the hearsay rule does not exclude relevant testimony as to what contracting parties said with respect to making or

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON | DWIGGINS & FREER | TRUST AND ESTATE ATTORNEYS

Certain statements, although made out of court, are also not excluded by the hearsay rule if their nature and the special circumstances under which they were made offer assurances of accuracy. NRS 51.075 & NRS 51.315. NRS 51.085-305 provides an illustrative and non-restrictive list certain types of statements that would be exempted from the general rule to exclude hearsay.

Nevada law expressly confirms that "[a] statement of the declarant's then existing state of mind, emotion, sensation or physical condition, such as **intent, plan, motive, design**, mental feeling, pain and bodily health, is not inadmissible under the hearsay rule," and further that "[a] statement of memory or belief to prove the fact remembered or believed is inadmissible under the hearsay rule unless it relates to the execution, revocation, identification or terms of declarant's will." *See*, NRS 51.105(1) and (2). (Emphasis added). *See also, Howard Hughes Med. Inst. v. Gavin*, 96 Nev. 905, 908, 621 P.2d 489, 490 (1980) (holding that NRS 51.105(2) makes hearsay evidence admissible relative to the execution, revocation, **identification or terms of the declarant's will**.)

Nevada law also expressly confirms that "[a] statement describing an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, is not inadmissible under the hearsay rule." NRS 51.085. "The policy for admitting statements under [NRS 51.085] is that the statement is more trustworthy if made contemporaneously with the event described." *Browne v. State*, 113 Nev. 305, 313 (1997).

It is also widely accepted that statements that would otherwise constitute inadmissible hearsay may be admitted if they are offered to prove something other than the truth of the matter asserted. *See e.g. Wallach v. State*, 106 Nev. 470 (1990) ("[T]he hearsay rule does not apply if the statement is not offered to prove the trust of the matter asserted. A statement merely offered to show that the statement was made and the listener was affected by the statement, and which is not offered to show the truth of the matter asserted, is admissible as non-hearsay.") (citations and quotations omitted).

---

terms of an oral agreement); and *West Coast Truck Lines, Inc. v. Arcata Comm. Recycling Center, Inc.*, 846 F.2d 1239 (9th Cir. 1988) (holding that evidence of an oral agreement, not offered to prove the trust of the matter stated but simply to show that the statement was made, was not hearsay).

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON | DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

1. Statements concerning the terms of the Will are admissible.

Statements 1, 7, and 16, having to do with the terms of Milton's Will, are not inadmissible hearsay under NRS 51.105(2). Moreover, these statements do not attempt to vary the express terms of Milton's Will, but simply to establish his testamentary and donative intent in effectuating and later enforcing the conditional bequest to the Milton I. Schwartz Hebrew Academy. Each of Milton's statements to Jonathan, and the statements recounted by the other witnesses, evidence that it was Milton's intent that his bequest be made only to the Milton I. Schwartz Hebrew Academy and that it was Milton's intent not to designate a successor because he intended to enforce the condition that the name of the school be maintained in perpetuity. These statements are not hearsay, because they fall under NRS 51.105(2), as they evidence Milton's testamentary intent concerning the terms of his Will, and they also fall under NRS 51.105(1) as they evidence his then testamentary and donative intent to create the conditional bequest and to strictly construe and enforce the same.

2. Statements of Milton's then existing state of mind and emotion, such as intent, plan, motive, design and mental feeling are admissible.

Courts have generally held that past statements of a person's then present state of mind, intent, plan, design and motive, are not inadmissible hearsay, and evidence that the declarant intended to and did act consistent with his expressed intent. *See, e.g.*, *Goodale v. Murray*, 289 NW 450, 457 (Iowa, 1940) (stating "[o]ne of the well established exceptions to the hearsay rule is the admission of statements of the declarant showing his existing state of mind respecting design, intent, motive, feeling, etc. ...It has already been seen that the existence of a design or plan to do a specific act is relevant to show that the act was probably done as planned. The design or plan ... may be evidenced circumstantially by the person's conduct... the plan or design may also, it is clear, be evidenced under the present exception by the person's own statement as to its existence."). Indeed, in the *Goodale* matter, the Iowa Supreme Court held that testimony constituting declarations of the testator, made prior to and subsequent to the execution of the will, that the decedent executed it and that the decedent had wanted to will his property to a certain

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

person were admissible, within the exception to the hearsay rule by which declarations of a deceased person are admissible as evidence not as showing the truth of the fact declared, but as proving the then state of mind and belief of the declarant. *Id.* The Iowa Supreme Court confirmed that "[w]here a state of mind, intention, or plan is in issue, or is relevant to an issue, the manifestations thereof by conduct or speech are always admissible." *Id.* at 457-58. *See also, Linahan v. Linahan*, 39 A.2d 895, 904–05 (Conn. 1944) (holding that a letter written by the decedent during the course of the administration of property under a trust agreement was admissible as tending to show that the decedent did intend a bona fide trust; it was a verbal act evidencing intention, not a hearsay statement offered to prove the truth of any fact stated in it).

Each of the statements 1-24, and as set forth in Milton's Affidavit corroborate the conditional nature of the gift made by Milton to the School, as well as the bequest included in Milton's Will, and should be admissible under NRS 51.105(2). Each of these statements additionally plainly evidence Milton's express intention to create and enforce the strict condition that the School maintain the name Milton I. Schwartz Hebrew Academy in perpetuity. For instance, statements 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 19, 20, 22, 23, and 24 each evidence Milton's intent that the condition of maintaining the name "in perpetuity" was of the utmost importance to Milton and that he intended to strictly enforce such condition. These statements plainly demonstrate Milton's then present intent, plan, design, and motive to effectuate and strictly enforce the naming right in perpetuity. Further, Milton's statements to Jonathan, who was designated as the personal representative of Milton's Estate, by which Milton handed Jonathan "the Sabbath Letter," and a copy of the Bylaws to the school, stating he "may need this one day if it ever becomes an issue," demonstrate his then present intent that the bequest was accompanied with the condition that the naming rights would be strictly enforced. Further, Milton's statements whereby he made specific references to, and his emphasized pronunciation of the term "in perpetuity" likewise demonstrate verbal acts, which are admissible as non-hearsay to demonstrate Milton's intent. For example:

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

Statement #3: Milton told Jonathan that he "might need [the Sabbath Letter], if the naming rights to the school ever becomes an issue" is evidence that Milton felt and believed that the naming rights could become an issue and that the Sabbath Letter would address the issue.

Statement #5: Milton telling Jonathan and other members of the family that the school was supposed to be named MISHA in perpetuity and emphasized the word "perpetuity" is evidence of Milton's state of mind regarding his belief that his agreement with the School was in perpetuity.

Statement #9: When referring to the school, Milton would always say The Milton I. Schwartz Hebrew Academy in perpetuity and would enunciate the term in perpetuity and he would say it with a little smirk on his face. This statement also speaks to Milton's then existing state of mind with respect to his intent and design to make his gift conditioned on perpetual naming rights.

Statement #15: Milton telling Jonathan in 2006/2007, when the Adelson's pledged $25 million to build a high school that the high school would be known as the Adelson High School and the rest of the school would continue to be known as the Milton I. Schwartz Hebrew Academy is evidence of Milton state of mind concerning his understanding of the intent and plan of the Adelson's contribution to the school. Moreover, it is also a statement evidencing Milton's present sense impression which is also discussed *infra*.

Statement #20: When the school removed his name, Milton was very upset about it because he had an agreement with the school that the name would remain in perpetuity which was in the bylaws and the articles of incorporation and that it was really important to him. Such statements are also evidence of Milton's state of mind when learning that the school removed his name and why he was upset. This is also a statement evidencing Milton's present sense impression as well.

Statement #22: Milton told Roberta Sabbath that having the school named after him was important and she remembers him saying to make sure that was "in perpetuity." Not only does this clearly speak to Milton's state of mind concerning his intent and plan to make a charitable contribution to the school with conditions and that the same was important to him, it also

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON | DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

constitutes a statement of a party opponent under NRS 51.035(3) as Dr. Sabbath was a board member of the school who negotiated the naming rights agreement. The statement also has independent legal significance has it contains terms of the agreement itself.

Thus, this Court should find that each of the statements 1-24, and the statements in Milton's Affidavit, demonstrate (1) his testamentary and donative intent in effectuating a conditional gift, via a bequest in his Will, that the School would receive the gift by satisfying and maintaining the condition that the School be perpetually named the Milton I. Schwartz Hebrew Academy; and (2) his belief and understanding that he gave the school money as consideration for a perpetual naming rights agreement. These statements are plainly admissible as evidence of the declarant's intent, plan, motive and design in negotiating the naming rights agreement with the school, making the conditional bequest in the Will, and strictly enforcing the same against the School.

3. Statements of Milton's present sense impression are admissible.

In addition to the foregoing, certain statements identified by the School are admissible under NRS 51.085 as they describe an event or condition made while Mr. Schwartz was perceiving the event or condition, or immediately thereafter. For example, during the 90s Litigation when the school temporarily removed Milton's name, Susan Pacheco recalled that Milton was very upset about it because he felt they breached an enforceable agreement and that it was really important to him. See, Statement No. 20.

C. <u>To the Extent the School Seeks to Preclude Testimony by Any Former Board Member, as to Such Board Member's Prior Statements, the Court Should Determine that Any Such Statements are Admissible by the Former Board Members against the School.</u>

NRS 51.035(3) provides that a statement is hearsay if offered in evidence to prove the truth of the matter asserted unless the statement is offered against a party and is: (d) A statement by the party's agent or servant concerning a matter within the scope of the party's agency or employment, made before the termination of the relationship." Here, any statements by board members to Milton, as later recounted by those board members, constitute statements by the School's agents or representatives offered against the School. Numerous courts have held that

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

such statements made by school-board members and administrators acting as agents for school districts are not hearsay and are admissible as statements by party opponents. *See, e.g., Wilkerson v. Columbus Separate Sch. Dist.*, 985 F.2d 815, 818 (5th Cir.1993) (considering statements by school-board members as evidence against the defendant school district because the board members were the school district's agents); *Kitzmiller v. Dover Area Sch. Dist.*, 2005 WL 4147867, at *2 (M.D. Pa. Sept. 22, 2005) (holding that "...to the extent that statements were made by members of the Board and administration while acting within the scope of the agency relationship and made during the existence of the relationship, such statements are party-opponent admissions and therefore admissible evidence").

Here, the Estate anticipates that several former board members will testify as to what they told Milton, or others, while acting in their official capacities as board members for the School. Plainly, such testimony is admissible as statements against interest offered against a party opponent, as the statements were made by the School's board members during the course of their agency for the School. *See, e.g.*, NRS 51.035(3). While the School has not filed a motion in limine that focuses on the statement of former board members, the Court should be mindful of the fact that various witnesses which the Estate intends to call once served on the board for the School. It is anticipated that these former board members will not only acknowledge the fact that the School name was to be maintained in perpetuity, but that they made statements consistent with the Estate's case that when Milton made gifts to the School, he did so under the express condition that the School agreed that Milton would be granted the naming rights in perpetuity. Such acts and statements by the former board members constitute admissions by the School, which the School cannot avoid by a mere hearsay objection.

MIL #5, however, does touch upon a few of such statements. Specifically, Statement Nos. 21-24 are statements made by Neville Pokroy, Roberta Sabbath and Leonard Schwartzer. All of these witnesses were former board members of the school and were testifying as to conversations they had with Milton when they are actively serving on the board. These statements (and all

SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

others made by board members concerning their understanding of the Schwartz Agreement) are admissible under NRS 51.035(3).

D. Milton's Affidavit Is Admissible as Non-Hearsay.

The School seeks to preclude the introduction of Milton's affidavit on the sole basis that it introduces hearsay offered for the truths of the matters asserted. Here, however, Milton's affidavit is admissible for several reasons. First, the affidavit is admissible under NRS 51.105(1) and (2) as previously asserted, to evidence Milton's donative and testamentary intent to make gifts to the School conditioned upon the perpetual naming of the School at that time. Further, Milton's recounting of facts set forth in the affidavit demonstrate his beliefs at the time which ultimately reflected upon his testamentary intent when he thereafter executed his Will. NRS 51.105(2) plainly provides that hearsay statements by the Decedent of his memory or belief are not inadmissible to demonstrate his testamentary intent as it relates to the execution or identification or terms of the Declarant's Will. The statements recounted by Milton in his affidavit each demonstrate that at all relevant times he acted consistent with his intent to make conditional gifts to the School and that he intended to strictly enforce the expressed condition that the naming rights be maintained in perpetuity. Accordingly, Milton's affidavit is admissible as evidence of his intent.

Further, however, the Affidavit should be admitted under the general exception that "a statement is not excluded by the hearsay rule if (a) its nature and the special circumstances under which it was made offer strong assurances of accuracy; and (b) the declarant is unavailable as a witness." *See*, NRS 51.315. Here, Milton's affidavit should additionally be admitted under the general exception as the circumstances under which it was made offer strong assurances of accuracy. Milton executed the affidavit under penalty of perjury. Moreover, Milton served on the board of the School at the time he made the affidavit which lends additional credence to its credibility.

In addition, Milton's affidavit may be admitted under the ancient documents exception. *See*, NRS 51.235, providing that "[s]tatements in documents more than 20 years old whose

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

authenticity is established are not inadmissible under the hearsay rule." Indeed, the authenticity of Milton's affidavit is established as his signature is notarized, and not challenged by the School. Further, the affidavit is plainly more than 20 years old, and the facts recounted therein, pre-date the instant controversy. Thus, Milton's affidavit is plainly admissible as an exception to the hearsay rule provided by NRS 51.235.

Accordingly, this Court should deny the School's Motion as to Milton's affidavit.

E. To The Extent the School Contends that the Gift Made by Milton and the Bequest In Milton's Will Was Not Conditional, or that the Bequest May Be Paid to the School's Successor in Interest, the Proffered Statements Are Admissible to Demonstrate Unilateral Mistake by Milton Schwartz.

With respect to conditional gifts, the Restatement identifies two types of unilateral mistakes that may occur: invalidating mistakes and mistakes in the content of a document. Restatement (Third) of Restitution & Unjust Enrichment § 5 (2011); Restatement (Third) of Prop.: Wills & Other Donative Transfers § 12.1 (2003). An invalidating mistake occurs when "but for the mistake the transaction in question would not have taken place." Restatement (Third) of Restitution & Unjust Enrichment § 5(2)(a) (2011). "The donor's mistake must have induced the gift; it is not sufficient that the donor was mistaken about the relevant circumstances." *Id.* § 11 cmt. c. A mistake in the content of a document arises through either a mistake of expression or a mistake of inducement. Restatement (Third) of Prop.: Wills & Other Donative Transfers § 12.1 & cmt. i (2003). A mistake of expression occurs when a document misstates the donor's intention, fails to include a specific term that the donor intended to be included, or includes a term that was not intended. *Id.* A mistake of inducement occurs when a donor intentionally includes or omits a term, but the intent to include or omit the term was a product of mistake. *Id.* Whether a donor's mistake is characterized as a mistake of fact or law is irrelevant. Restatement (Third) of Restitution & Unjust Enrichment § 11 cmt. c (2011).

Here, the proffered evidence demonstrates Milton's intent to make conditional gifts, specifically, that Milton intended that his gifts to the School and the bequest contained in his Will would be conditioned upon the School maintaining its name as the Milton I. Schwartz Hebrew

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

Academy in perpetuity. Milton's statements expressed to Jonathan and others demonstrate that he intended for his Will not to contain a successor clause, as he intended that there would not be a successor to the bequest he intended to leave in his Will as an effectuation of the conditional gift to the School. The proffered statements are admissible to demonstrate that Milton acted consistent with his intention as expressed in his statements to others, when he made gifts to the School and solicited donations from others, and when he formed his Will. Milton's statements to Jonathan to hold onto certain documents which Milton believed evidenced his conditional gifts and ratification of the same by the School further demonstrate his intention to make conditional gifts to the School and specifically, that the expressed condition would be strictly enforced by Milton and his Estate. To the extent the School contends that such a condition was not made by Milton, or not agreed to by the School, the proffered statements by Milton directly evidence Milton's intent and verbal acts in creating the condition, as well as his intent to strictly enforce the same.

The evidence is admissible to afford the Estate the argument that if Milton made a unilateral mistake, either in the expression of the conditional gift, or in the inducement by the School to make the conditional gift, the Estate should be afforded the remedy to address the mistake either by reformation or rescission. *See, e.g.*, Restatement (Third) of Restitution & Unjust Enrichment § 5(1) (2011), providing the donor different remedies depending on the type of mistake, and stating that rescission is an appropriate remedy to address an invalidating mistake, while, in contrast, reformation is an appropriate remedy to address mistakes in the content of the document, where the donative transfer was intended but mistakes affected the expression of the transfer. *See, e.g.*, Restatement (Third) of Prop.: Wills & Other Donative Transfers § 12.1 cmts. a, g & h (2003). The Restatements' discussion of when rescission or reformation may be appropriate is consistent with Nevada contractual law addressing remedies. *See, Home Savers v. United Sec. Co.*, 103 Nev. 357, 358–59, 741 P.2d 1355, 1356 (1987) (permitting rescission for a mistake "as to a basic assumption on which" the contract was made (internal citations omitted)); *25 Corp. v. Eisenman Chem. Co.*, 101 Nev. 664, 672, 709 P.2d 164, 170 (1985) (stating that reformation is available to correct drafting mistakes in a contract to reflect the parties' true intentions). *See also,*

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

In re Irrevocable Tr. Agreement of 1979, 130 Nev. Adv. Op. 63, 331 P.3d 881, 887–88 (2014) (stating that "[b]ased on our review of the relevant Restatement sections and extrajurisdictional decisions evaluating the Restatement approach to unilateral mistake in the donative transfer context, we conclude that the Restatement's position corresponds with Nevada's overall treatment of mistake and our application of the remedies of rescission and reformation in the contract realm. Accordingly, we join the majority of jurisdictions in recognizing that a donor's unilateral mistake in executing a donative transfer may allow a donor to obtain relief from that transfer if the mistake and the donor's intent are proven by clear and convincing evidence. And depending on whether the unilateral mistake constitutes an invalidating mistake or a mistake in the content of the document, the donor may be entitled to rescission or reformation of the transfer.").

The Nevada Supreme Court has further stated that:

> [D]emonstrating unilateral mistakes in the execution or transfer of a gift depends on the donor's intent at the time of the donative transfer. Thus, unilateral mistakes cannot be said to have been made without first determining the donor's intent at the time when delivery and all other elements necessary to complete a donative transfer were completed. If the donor's intent is not in accord with the facts, then a mistake may have occurred warranting relief. Determining a donor's donative intent and beliefs is a question for the fact-finder, and the presence of ambiguity in a donor's intent in making a gift creates genuine issues of material fact that preclude summary judgment.

In re Irrevocable Tr. Agreement of 1979, 130 Nev. Adv. Op. 63, 331 P.3d 881, 888 (2014); citing *Anvui, L.L.C. v. G.L. Dragon, L.L.C.*, 123 Nev. 212, 215–16, 163 P.3d 405, 407 (2007), and *Mullis v. Nev. Nat'l Bank*, 98 Nev. 510, 513, 654 P.2d 533, 535–36 (1982).

Here, this Court should deny MIL Nos. 3, 5, and 6, as the statements proffered by the school are critical to determining Milton's then present testamentary and donative intent, including as to whether in effectuating his intent to create a conditional gift to the School, Milton made a mistake in either the inducement to make the conditional gift to the School or a mistake in the expression of the conditional gift in his Will.

/ / /

/ / /

SOLOMON | DWIGGINS & FREER | TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

III. CONCLUSION

Based upon the foregoing, the Estate respectfully requests that the School's Motion in Limine Nos. 3, 5, and 6 be denied in their entirety.

DATED this 23rd day of July, 2018.

SOLOMON DWIGGINS & FREER, LTD.

/s/ Alexander G. LeVeque

ALAN D. FREER (#7706)
ALEXANDER G. LEVEQUE (#11183)
9060 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone No: (702) 853-5483
Facsimile No: (702) 853-5485
Attorneys for the Executor

9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM
SOLOMON DWIGGINS & FREER
TRUST AND ESTATE ATTORNEYS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 23, 2018, pursuant to NRCP 5(b)(2)(B), I placed a true and correct copy of the foregoing **THE ESTATE'S OMNIBUS OPPOSITION TO: MOTION IN LIMINE NO. 3, TO PRECLUDE JONATHAN SCHWARTZ FROM TESTIFYING AT TRIAL ABOUT STATEMENTS MADE BY MILTION SCHWARTS; OPPOSITION TO MOTION IN LIMINE NO. 5, TO PRECLUDE WITNESSES FROM TESTIFYING ABOUT STATEMENTS MADE BY MILTION SCHWARTZ; AND OPPOSITION TO MOTION IN LIMINE NO. 6, TO PRECLUDE THE AFFIDAVIT OF MILTION SCHWARTZ** in the United States Mail, with first-class postage prepaid, addressed to the following, at their last known address, and, pursuant to EDCR 8.05 (a) and 8.05 (f) and Rule 9 of N.E.F.C.R., caused an electronic copy to be served via Odyssey, to the e-mail addresses noted below:

KEMP JONES & COULTHARD, LLP
J. Randall Jones, Esq.
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, NV 89169
j.jones@kempjones.com
j.carlson@kempjones.com

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

/s/ -- Sherry Curtin-Keast
An Employee of Solomon Dwiggins & Freer, LTD.

SOLOMON DWIGGINS & FREER TRUST AND ESTATE ATTORNEYS
9060 WEST CHEYENNE AVENUE
LAS VEGAS, NEVADA 89129
TELEPHONE (702) 853-5483
FACSIMILE (702) 853-5485
WWW.SDFNVLAW.COM

J. Randall Jones, Esq. (#1927)
Joshua D. Carlson, Esq. (#11781)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
Attorneys for The Dr. Miriam and Sheldon G. Adelson Educational Institute

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of MILTON I. SCHWARTZ, Deceased.	Case No.: P061300 Dept. No.: 26/Probate **REPLY IN SUPPORT OF MOTION IN LIMINE NO. 3 TO PRECLUDE JONATHAN SCHWARTZ FROM TESTIFYING AT TRIAL ABOUT STATEMENTS ALLEGEDLY MADE TO HIM BY MILTON I. SCHWARTZ**

MEMORANDUM OF POINTS AND AUTHORITIES

I.

ARGUMENT

The Adelson Campus seeks to preclude at trial Milton Schwartz's alleged hearsay statements presented through Jonathan Schwartz's testimony. While the Estate proffers several reasons why the identified testimony by Jonathan Schwartz set forth in Motion in Limine No. 3 is not hearsay, these arguments are unpersuasive.

The threshold issue remains that the referenced extrinsic testimony cannot be introduced at the time of trial due to its nature as inadmissible parol evidence to contradict the express and unambiguous terms of Milton Schwartz's Will. As the Supreme Court of Nevada stated:

> **A court may not vary the terms of a will to conform to the court's views as to the true testamentary intent.** The question before us is not what the testatrix actually intended or what she meant to write. Rather it is confined to a determination of the meaning of the words used by her. As stated by Wigram, (Extrinsic Evidence in Aid of The Determination of Wills, Second American

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

> Edition, pages 53 and 54), '* * * any evidence is admissible which, in its nature and effect, simply explains what the testator has written; **but no evidence can be admissible which, in its nature or effect, is applicable to the purpose of showing merely what he intended to have written**. In other words, the question in expounding a will is not—What the testator meant? as distinguished from—What his words express? but simply—What is the meaning of his words? And extrinsic evidence, in aid of the exposition of his will, must be admissible or inadmissible with reference to its bearing upon the issue which this question raises.'

In re Jones' Estate, 72 Nev. 121, 123–24, 296 P.2d 295, 296 (1956). The Estate will likely seek to introduce testimony by Jonathan Schwartz at the time of trial to show what Milton intended to have written in his Will, but this extrinsic evidence is inadmissible. The Estate has neither sought, nor has the Court made any legal determination that the subject bequest in Milton Schwartz's Will is ambiguous. Consequently, no testimony can be introduced at trial in an attempt to contradict or imply meaning into the unambiguous Will bequest.

Nevertheless, the Estate argues that the testimony referenced in Motion in Limine No. 3 (statements nos. 1-16 as numbered by the Estate) is admissible as it demonstrates Milton's then-present state of mind, intent, plan, design, and motive to *effectuate and strictly enforce the naming right* in perpetuity. *See* Opp. at 9:18-19. In other words, the Estate wants to introduce statements allegedly made by Milton Schwartz substantially after he allegedly entered into a naming rights agreement with the school to prove both that an agreement existed and that it was Milton's plan and intent to seek to enforce it. However, the state-of-mind exception only applies if the declarant's then-existing state of mind is a relevant issue in the case. *See Shults v. State*, 96 Nev. 742, 751, 616 P.2d 388, 394 (1980). Whether Milton Schwartz would "strictly enforce" a purported naming rights agreement is irrelevant to whether an enforceable naming agreement legally exists and whether the Estate should be compelled to pay the $500,000 bequest contained in Milton Schwartz's Will to the School.

The Estate's argument also fails because later statements by Milton Schwartz regarding an earlier alleged plan, intent or motive are inadmissible. Under Nevada law, a **later declaration or statement of a prior mental state—a recollection of a state of mind—is not admissible** under the then-existing state-of-mind exception to the hearsay rule. *See Cureton v. State*, 66422, 2015 WL 4411120, at *1 (Nev. July 17, 2015); *citing Shepard v. United States*, 290 U.S. 96, 105-06 (1933). Thus, statements made by Milton Schwartz years later recalling his state of mind, plan, or intent at the time

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax. (702) 385-6001
kjc@kempjones.com

he allegedly entered in a naming rights agreement is inadmissible hearsay. For example, statement nos. 5, 6, and 9[1] concern statements by Milton Schwartz in the years following the naming agreement allegedly being entered into by the parties, wherein Milton stated to Jonathan and the Schwartz family that the school **was** named after him in perpetuity. *See* Mot. at p. 6. Similarly, statement nos. 2-4, also concern statements by Milton Schwartz to Jonathan in the years following the alleged naming rights agreement about the existence of certain documents which Milton believed supported his past recollection of and intent regarding the existence of a perpetual naming right of the school. It is undisputed that all of these statements by Milton Schwartz to Jonathan are a statement of a **prior** mental state of mind, intent or plan that are not admissible under the limited state of mind expectation to the hearsay rule and should be precluded at trial.

II.

CONCLUSION

For all the reasons indicated above, the Adelson Campus respectfully requests that this Court grant the instant Motion and preclude the Jonathan Schwartz from offering or attempting to offer Milton Schwartz's hearsay statements into evidence.

DATED this 2nd day of August, 2018.

Respectfully Submitted,

KEMP, JONES & COULTHARD, LLP

J. Randall Jones, Esq. (#1927)
Joshua D. Carlson, Esq. (#11781)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Attorneys for The Dr. Miriam and Sheldon G. Adelson Educational Institute

[1] These statements are also inadmissible because "self-serving testimony of the parties as to their subjective intentions or understandings is not probative evidence of whether the parties entered into a contract." *James Hardie Gypsum (Nevada) Inc. v. Inquipco,* 112 Nev. 1397, 1402, 929 P.2d 903, 906 (1996) (quoting *Mullen v. Christiansen*, 642 P.2d 1345, 1350 (Alaska 1982)).

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of August, 2018, I served a true and correct copy of the **REPLY IN SUPPORT OF MOTION IN LIMINE NO. 3 TO PRECLUDE JONATHAN SCHWARTZ FROM TESTIFYING AT TRIAL ABOUT STATEMENTS ALLEGEDLY MADE TO HIM BY MILTON I. SCHWARTZ** via the Eighth Judicial District Court's CM/ECF electronic filing system, addressed to all parties on the e-service list.

/s/ Joshua Carlson

An employee of Kemp, Jones & Coulthard, LLP

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

J. Randall Jones, Esq. (#1927)
Joshua D. Carlson, Esq. (#11781)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
Attorneys for The Dr. Miriam and Sheldon G. Adelson Educational Institute

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of MILTON I. SCHWARTZ, Deceased.	Case No.: P061300 Dept. No.: 26/Probate **REPLY IN SUPPORT OF MOTION IN LIMINE NO. 5 TO PRECLUDE RESPONDENT WITNESSES FROM TESTIFYING ABOUT STATEMENTS ALLEGEDLY MADE BY MILTON I. SCHWARTZ**

MEMORANDUM OF POINTS AND AUTHORITIES

I.

ARGUMENT

The Adelson Campus seeks to preclude witnesses at trial from testifying about alleged out of court statements made by Milton Schwartz offered for the truth of the matter asserted, specifically that Milton Schwartz had a perpetual naming right of the school because he told everyone he did and the perpetual naming right was a condition to his $500,000 Will bequest. While the Estate proffers several reasons why the exemplar testimony set forth in Motion in Limine No. 5 is not hearsay, these arguments are all unpersuasive.

The threshold issue remains that the referenced extrinsic testimony cannot be introduced at the time of trial due to its nature as inadmissible parol evidence to contradict the express and unambiguous terms of Milton Schwartz's Will. As the Supreme Court of Nevada stated:

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

> **A court may not vary the terms of a will to conform to the court's views as to the true testamentary intent**. The question before us is not what the testatrix actually intended or what she meant to write. Rather it is confined to a determination of the meaning of the words used by her. As stated by Wigram, (Extrinsic Evidence in Aid of The Determination of Wills, Second American Edition, pages 53 and 54), '* * * any evidence is admissible which, in its nature and effect, simply explains what the testator has written; **but no evidence can be admissible which, in its nature or effect, is applicable to the purpose of showing merely what he intended to have written**. In other words, the question in expounding a will is not—What the testator meant? as distinguished from—What his words express? but simply—What is the meaning of his words? And extrinsic evidence, in aid of the exposition of his will, must be admissible or inadmissible with reference to its bearing upon the issue which this question raises.'

In re Jones' Estate, 72 Nev. 121, 123–24, 296 P.2d 295, 296 (1956). The Estate will likely seek to introduce testimony at the time of trial to show what Milton intended to have written in his Will, but this evidence is inadmissible. The Estate has neither sought, nor has the Court made any legal determination that the subject bequest in Milton Schwartz's Will is ambiguous. Consequently, no testimony can be introduced at trial in an attempt to contradict or imply meaning into the unambiguous Will bequest.

Nevertheless, the Estate argues that the testimony referenced in Motion in Limine No. 5 (statements nos. 17-24 as numbered by the Estate) is admissible as it demonstrates Milton's then-present state of mind, intent, plan, design, and motive to *effectuate and strictly enforce the naming right* in perpetuity. *See* Opp. at 9:18-19. In other words, the Estate wants to introduce statements allegedly made by Milton Schwartz substantially after he allegedly entered into a naming rights agreement with the school to prove both that an agreement existed and that it was Milton's plan and intent to seek to enforce it. However, the state-of-mind exception only applies if the declarant's then-existing state of mind is a relevant issue in the case. *See Shults v. State*, 96 Nev. 742, 751, 616 P.2d 388, 394 (1980). Whether Milton Schwartz would "strictly enforce" a purported naming rights agreement is irrelevant to whether an enforceable naming agreement legally exists and whether the Estate should be compelled to pay the $500,000 bequest contained in Milton Schwartz's Will to the school.

The Estate's argument also fails because later statements by Milton Schwartz regarding an earlier alleged plan, intent or motive are inadmissible. Under Nevada law, a **later declaration or statement of a prior mental state—a recollection of a state of mind—is not admissible** under the

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

then-existing state-of-mind exception to the hearsay rule. *See Cureton v. State*, 66422, 2015 WL 4411120, at *1 (Nev. July 17, 2015); *citing Shepard v. United States*, 290 U.S. 96, 105-06 (1933). Thus, statements made by Milton Schwartz years later recalling his state of mind, plan, or intent at the time he allegedly entered in a naming rights agreement is inadmissible hearsay.

The Estate next conclusively argues that pursuant to NRS 51.105(2) all of the statements the Adelson Campus seeks to preclude are admissible. NRS 51.105(2) narrowly provides that hearsay evidence is admissible relative to the execution, revocation, identification or terms of the declarant's will. Yet, the fact is that none of the testimony referenced in Motion in Limine No. 5 (statements nos. 17-24) relate to the execution, revocation, or terms of Milton Schwartz's Will. *See* Mot. at 5. Therefore, the hearsay exception under NRS 51.105(2) is not applicable.

Finally, the Estate contends that the testimony by former board members Neville Pokroy, Roberta Sabbath and Leonard Schwartzer (statements nos. 21-24) about what Milton Schwartz told them is admissible as a statement against the interest of the Adelson Campus. This argument also fails because at the time Neville Pokroy, Roberta Sabbath and Leonard Schwartzer testified at their deposition, they were all no longer board members at the Adelson Campus. Pursuant to NRS 51.035(3), an out of court statement offered for the truth of the matter asserted is hearsay unless: (d) "A statement by the party's agent or servant concerning a matter within the scope of the party's agency or employment, **made before the termination of the relationship**". NRS 51.035(3)(d)(emphasis added). The statute is unequivocal that for a statement to qualify under the statement against interest exception it must have been made **before the termination of the relationship** between the school and the board member. As all three of these witnesses were former board members at the time of their depositions, the statement against interest hearsay exception does not apply.

///

///

///

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

II.

CONCLUSION

For all the reasons indicated above, the Adelson Campus respectfully requests that this Court grant the instant Motion and preclude the Estate's witnesses from offering or attempting to offer Milton Schwartz's hearsay statements into evidence.

DATED this 2nd day of August, 2018.

Respectfully Submitted,

KEMP, JONES & COULTHARD, LLP

J. Randall Jones, Esq. (#1927)
Joshua D. Carlson, Esq. (#11781)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Attorneys for The Dr. Miriam and Sheldon G. Adelson Educational Institute

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of August, 2018, I served a true and correct copy of the **REPLY IN SUPPORT OF MOTION IN LIMINE NO. 5 TO PRECLUDE RESPONDENT WITNESSES FROM TESTIFYING ABOUT STATEMENTS ALLEGEDLY MADE BY MILTON I. SCHWARTZ** via the Eighth Judicial District Court's CM/ECF electronic filing system, addressed to all parties on the e-service list.

An employee of Kemp, Jones & Coulthard, LLP

J. Randall Jones, Esq. (#1927)
Joshua D. Carlson, Esq. (#11781)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
Facsimile: (702) 385-6001
Attorneys for The Dr. Miriam and Sheldon G. Adelson Educational Institute

DISTRICT COURT

CLARK COUNTY, NEVADA

In the Matter of the Estate of MILTON I. SCHWARTZ, Deceased.	Case No.: P061300 Dept. No.: 26/Probate **REPLY IN SUPPORT OF MOTION IN LIMINE NO. 6 TO PRECLUDE RESPONDENT FROM INTRODUCING OR RELYING ON THE AFFIDAVIT OF MILTON I. SCHWARTZ**

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

MEMORANDUM OF POINTS AND AUTHORITIES

I.

LEGAL ARGUMENT

The Estate offers three explanations as to why the "Second Supplemental Affidavit of Milton I. Schwartz," dated March 31, 1993 ("Milton Schwartz Affidavit") is admissible non-hearsay: because it demonstrates his beliefs at the time which reflected upon his testamentary intent; because it bears strong assurances of accuracy; and because it is an ancient document. However, as demonstrated below, none of these exceptions apply to the Milton Schwartz Affidavit.

While the Milton Schwartz Affidavit may have been executed under penalty of perjury and is over twenty (20) years old, there are also several factors weighing against its admissibility. "[A] self-serving declaration ought not be admitted as an ancient statement without confirmatory circumstances merely because of [its age]." *See Slattery v. Adams*, 279 S.W.2d 445, 451 (Tex. Civ. App.—Beaumont 1954), aff'd on other grounds, 295 S.W.2d 859 (Tex. 1956). Despite the age of the Milton Schwartz Affidavit, "courts typically should not admit documents made in anticipation of litigation as they lack sufficient guarantees of trustworthiness to be excepted from the hearsay rule." *Stolarczyk ex rel. Estate*

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel.: (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

of Stolarczyk v. Senator Int'l. Freight Forwarding, LLC, 376 F.Supp.2d 834, 841 (N.D.Ill. Feb. 15, 2007) (internal citations omitted).

> "It is a general rule that self-serving declarations-that is, statements favorable to the interest of the declarant-are not admissible in evidence as proof of the facts asserted, regardless of whether they were implied by acts or conduct, were made orally, or were reduced to writing. The rule which renders self-serving statements inadmissible is the same in criminal prosecutions as in civil actions. The vital objection to the admission of this kind of evidence is its hearsay character; the phrase 'self-serving' does not describe an independent ground of objection. Such declarations are untrustworthy; their introduction in evidence would open the door to frauds and perjuries, and the manufacturing of evidence. The fact that the declarant has since died does not alter the general exclusionary rule."

Chrysler Motors Corp. v. Davis, 226 Ga 221, 173 S.E.2d 691 (1970). "The party wishing to introduce hearsay evidence must rebut the presumption of unreliability by appropriate proof of trustworthiness. A witness's death is not enough to justify discarding the trustworthiness requirement of the residual hearsay exception." *Stolarczyk v. Senator Int'l Freight Forwarding, LLC*, 376 F. Supp. 2d 834, 841 (N.D. Ill. 2005).

As in *Stolarczyk*, the statements contained in the Milton Schwartz Affidavit are clearly favorable to Milton Schwartz alone, and there is nothing inherently trustworthy about the statements [because] they were made in anticipation of...litigation, [thus] the presumption is in favor of untrustworthiness." *Id.* at 841–42. The Milton Schwartz Affidavit was created in conjunction with a prior, unrelated litigation. The statements contained in the Milton Schwartz Affidavit are favorable to Milton Schwartz and to him alone, and he had substantial motivation, with all respect, to embellish, as he clearly appreciated that he was laying out his litigation position. Furthermore, the mere fact that Milton Schwartz is unavailable to be cross-examined about the contents of the Milton Schwartz Affidavit is insufficient to overcome the requirement that the statements themselves must bear marks of being trustworthy. *See Stolarczyk,* at 842 ("a witness's death is not enough to justify discarding the trustworthiness requirement of the residual hearsay exception.").

The Estate also argues the Milton Schwartz Affidavit is admissible as it demonstrates his beliefs at the time which reflect upon his testamentary intent, however this argument is a red herring. NRS 51.105(2) makes hearsay evidence admissible relative to the execution, revocation, identification or

terms of the declarant's will. Contrary to the Estate's contention, the statements made by Milton Schwartz in the Affidavit have nothing to do with the bequest in his Will that is at issue in this matter. All that Milton Schwartz states in his Affidavit is that he donated $500,000 with the understanding that school would be renamed after him in perpetuity and that he solicited contributions from Paul Sogg and Robert Cohen. *See* Ex. 1 to Mot. at ¶¶ 5-6. While the Estate argues that the statements also demonstrate that he intended to enforce the express condition that the naming rights be enforced in perpetuity, the only conditions actually mentioned in the Affidavit concern Milton's alleged belief that his donation and the donations from Mr. Sogg and Mr. Cohen were conditions precedent to Summerlin donating land for the school. *See id* at ¶ 8. It should also be noted that the Affidavit was prepared 11 years prior to Milton Schwartz preparing and executing his Will. Clearly, the narrow hearsay exception relative to the execution, revocation, identification or terms of the declarant's will pursuant to NRS 51.105(2) is inapplicable and the Affidavit should be precluded at the time of trial.

II.

CONCLUSION

For all the reasons indicated above, the Adelson School respectfully requests that this Court grant the instant motion and preclude the Estate from offering or attempting to rely on the Milton Schwartz Affidavit at trial.

DATED this 2nd day of August, 2018.

Respectfully Submitted,

KEMP, JONES & COULTHARD, LLP

J. Randall Jones, Esq. (#1927)
Joshua D. Carlson, Esq. (#11781)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Attorneys for The Dr. Miriam and Sheldon G. Adelson Educational Institute

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel: (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of August, 2018, I served a true and correct copy of Dr. Miriam and Sheldon G. Adelson Educational Institute's **REPLY IN SUPPORT OF MOTION IN LIMINE NO. 6 TO PRECLUDE RESPONDENT FROM INTRODUCING OR RELYING ON THE AFFIDAVIT OF MILTON I. SCHWARTZ** via the Eighth Judicial District Court's CM/ECF electronic filing system, addressed to all parties on the e-service list.

Pamela Montgomery

An employee of Kemp, Jones & Coulthard, LLP

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com