Case Nos. 78341 and 79464

In the Supreme Court of Nevada

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

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

PETITION FOR REHEARING

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NRAP 26.1 DISCLOSURE

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

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

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

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

Dated this 17th day of June, 2022.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ M. Dale Kotchka-Alanes*

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PETITION FOR REHEARING

In its Order entered on March 30, 2022 ("Order"), this Court overlooked or misapprehended the following material points of law and fact. Appellant respectfully requests that the Court correct these deficiencies.

ARGUMENT

I.

THIS COURT ERRONEOUSLY RULED THAT "THE SCHOOL'S BYLAWS COULD NOT QUALIFY AS AN ENFORCEABLE CONTRACT WITH A THIRD PARTY" – MILTON SCHWARTZ WAS NOT A THIRD PARTY

This Court affirmed the district court's grant of summary judgment on the Estate's oral contract claim first by ruling that a four-year statute of limitations applied. The Court reasoned, "The evidence in the record supports the district court's conclusion that Milton's naming rights agreement was an oral contract because … the School's bylaws could not qualify as an enforceable contract with a third party, and the only written document reflecting the agreement was unsigned by the School." (Order at 2-3.)

However, the 1990 bylaws were signed by the School – in fact, they were signed by every board member. (27 App. 6612–6620.) And

they contained the clear agreement that the "name of this corporation is The Milton I. Schwartz Hebrew Academy … and shall remain so in perpetuity." (27 App. 6612.)

This Court reasoned that "the School's bylaws could not qualify as an enforceable contract with a third party," (Order at 2-3), but Milton Schwartz was not a third party. He was a member of the corporation, a board member, and he himself signed the bylaws. (27 App. 6620.) The bylaws specified that the "governing board of the corporation shall be known as the Board of Trustees and the membership of the Board of Trustee shall constitute the corporation." (27 App. 6612.) Milton Schwartz was on the Board of Trustees and thus was a member of the corporation – and he also had voting power to elect board members (27 App. 6612), making him a member of the corporation statutorily. *See* NRS 82.031 ("Unless otherwise provided in the articles or bylaws, the word 'member' means … any person who on more than one occasion has the right pursuant to the articles or bylaws to vote for the election of a director or directors.").[1]

As the Estate pointed out in its opening and reply briefs, bylaws

[1] "'Directors' and 'trustees' are synonymous terms." NRS 82.026.

are a contract among the members of a corporation, and corporations are prohibited from amending their bylaws to so as to impair a member's contractual rights. (*See* 1/29/20 AOB at 55-58; 2/26/21 ARB at 5-6, 16-17); *see also, e.g.*, *WSB Investments, LLC v. Pronghorn Dev. Co., LLC*, 344 P.3d 548, 557–58 (Or. App. 2015) ("the bylaws of a corporation are a contract between the members of the corporation, and between the *corporation* and its members") (quotations and citation omitted); *Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343, 361 (D.C. 2005) ("It is well established that the formal bylaws of an organization are to be construed as a contractual agreement between the organization and its members"); 8 Fletcher Cyc. Corp. § 4198 (updated Sept. 2021) ("The bylaws become an integral part of the contract [between the members of a corporation] as a matter of law"); *First Fla. Bank, N.A. v. Fin. Transaction Sys., Inc.*, 522 So. 2d 891, 892 (Fla. Dist. Ct. App. 1988) ("It is firmly established that a corporation is prohibited from amending its bylaws so as to impair a member's contractual right.").

Indeed, "[a]ny contract or conveyance, otherwise lawful, made in the name of a corporation, which is authorized or ratified by the directors" – such as the 1990 bylaws conveying perpetual naming rights to

Milton Schwartz – "binds the corporation." NRS 82.216(3); *see also Hickman v. Kline*, 71 Nev. 55, 69, 279 P.2d 662, 669 (1955) (union's "constitution amounts to a binding agreement between the union and its members").

Milton Schwartz was not a third party[2] to the 1990 bylaws stating that the school would be named after him forever – he was a member, and his contractual right could not be divested by future amendments to the bylaws. Thus, the school's obligation to be perpetually named after Milton Schwartz was "founded upon an instrument in writing" – the bylaws – and the six-year statute of limitations applied to the Estate's oral contract claim. NRS 11.190(1)(b).

[2] Even if Milton Schwartz were a third party, the bylaws were communicated to him to induce his reliance on them, meaning he was an intended third-party beneficiary and the School cannot contend the bylaws do not apply. (*See* AOB at 56 n.27); *Williams v. Univ. Med. Ctr. of S. Nevada*, 688 F. Supp. 2d 1134, 1144 (D. Nev. 2010) ("a reasonable jury could find that [doctor] was an intended third party beneficiary of" hospital bylaws establishing "contract for privileges between [chief of staff] and the hospital"). This Court never explained why the bylaws could not qualify as an enforceable contract with Mr. Schwartz even if he were a third party.

II.

JONATHAN SCHWARTZ DID NOT SEE ANY ADELSON MIDDLE SCHOOL SIGN WHEN HE TOURED THE SCHOOL IN 2008

Even if the four-year statute of limitations applied to the Estate's oral contract claim, there was no "uncontroverted evidence irrefutably demonstrat[ing] plaintiff discovered or should have discovered the facts giving rise to the cause of action" within the limitations period. *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025, 967 P.2d 437, 440 (1998). Summary judgment on the Estate's oral contract claim was improper.

In affirming the district court's erroneous grant of summary judgment, this Court inappropriately relied on Jonathan Schwartz's visit to the school in 2008 (which was not even part of the evidence before the district court on summary judgment) and mistakenly concluded that Jonathan Schwartz knew the middle school had been renamed as a result of the tour. (Order at 3.)[3] Not so.

Jonathan Schwartz testified that he did not see the middle school

[3] "The executor of the Estate, Milton's son, A. Jonathan Schwartz, testified that he took a tour of the School in 2008 when the entrance to the campus and the middle school bore the Adelson name, and he acknowledged that the renaming of the middle school was a breach of Milton's naming rights agreement. Despite this inquiry notice, the Estate did not file its action until 2013." (Order at 3 (footnote omitted).)

sign until a March 2010 tour of the hallways of the school. (14 App. 3445, 3452.)[4] Even the School did not contend that Jonathan Schwartz saw any middle school sign in 2008. Rather, the School contended there was an Adelson Campus sign at the entrance to the School. (7/27/20 RAB at 72.) Not only did Jonathan Schwartz testify he did not recall seeing the sign until 2010, but regardless of when he saw it, Mr. Schiffman told him the sign referred only to the high school and that the sign with his father's name had been taken down *temporarily* due to construction. (17 App. 4008–10, 4028, 4055–56.)

The School argued that the School's website referred to the middle school "as 'The Dr. Miriam and Sheldon G. Adelson Middle School' … by at least September 7, 2008." (7/27/20 RAB at 74.) But Jonathan's 2008 tour of the school was in August, not September (16 App. 3774) – and the School produced no evidence whatsoever that Jonathan ever looked

[4] "When I took the tour in March [2010] … in walking through the halls of the school, I saw a sign that said Adelson Middle School.… I was right next to Chaltiel and I turned to him and said, What's this? Pointing to the sign that said Adelson Middle School. And he said, Well, the middle school is now named after the Adelsons. And I turned to him and I said, That's a violation of my dad's agreement with the school. I said, What are you doing? And he turned to me, and he said, Sheldon gave $65 million he can do whatever he wants." (14 App. 3452.)

at the School's website or that he had any reason to.

In short, nothing in the record supports this Court's erroneous conclusion that Jonathan should have known from his 2008 tour of the School that the middle school bore the Adelson name. Even Mr. Schiffman testified that in "2008 they were operating as the two separate institutions" and the Milton I. Schwartz Hebrew Academy encompassed "pre-K, 18 months, to 8th grade." (16 App. 3774.) And Jonathan Schwartz stated under oath that he did not know of the School's middle school name change until March 2010. (1 App. 235; *see also* 2/26/21 ARB at 19-20 & n.12.) Neither the district court nor this Court was entitled to ignore this evidence or make credibility determinations at the summary judgment stage. *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 714, 57 P.3d 82, 87 (2002) ("all of the non-movant's statements must be accepted as true, all reasonable inferences that can be drawn from the evidence must be admitted, and neither the trial court nor this court may decide issues of credibility based upon the evidence submitted in the motion or the opposition").

Moreover, this Court overlooked the legal point made in the Estate's briefing that testimony regarding the 2008 tour of the school did

not emerge until trial and that this Court cannot consider evidence not before the district court at the time it made its summary judgment ruling. (2/26/21 ARB at 22-25.) This Court should not have even considered trial testimony concerning the 2008 tour in ruling on the propriety of the district court's grant of summary judgment – and it surely was not entitled to draw inferences in the *School's* favor, as the School was the summary judgment movant.

III.

THIS COURT FAILED TO RULE ON THE ESTATE'S SEPARATE-BREACHES THEORY

Despite extensive briefing by the Estate (1/29/20 AOB at 45-46; 2/26/21 ARB at 33-37), this Court did not make any ruling on the Estate's separate-breaches argument. It is undisputed that the Estate executor did not know about the School's corporate name change until after this lawsuit was filed and that the School's removal of Mr. Schwartz's name from the elementary school did not even occur until after this lawsuit was filed. (14 App. 3427-29; 16 App. 3787; 17 App. 4008.) At a minimum, allegations concerning those breaches were timely under the Estate's oral contract claim, and the Estate should

have been permitted to present evidence of its damages caused by those breaches.

IV.

THE COURT OVERLOOKED EVIDENCE OF CONSIDERATION FOR THE 1996 MODIFICATION

This Court affirmed the district court's erroneous refusal to give the Estate's proposed jury instruction regarding contract modification, reasoning:

> The Estate failed to present evidence of a modification, as there was no evidence of consideration Milton provided to the School in 1996 when his name was placed back on the School, and even Jonathan referred to the 1996 restoration of Milton's name as a cure of a previous breach of the naming rights agreement, not as a modification.

(Order at 4.) Jonathan Schwartz's characterization of the 1996 restoration of Milton's name is immaterial. Parties are permitted to argue alternative theories to the jury. *Peck v. Woomack*, 65 Nev. 184, 207, 192 P.2d 874, 885 (1948); *Waite Hill Servs., Inc. v. World Class Metal Works, Inc.*, 959 S.W.2d 182, 184 (Tex. 1998) ("A party is generally entitled to sue and to seek damages on alternative theories"); *North v. Owens-Corning Fiberglas Corp.*, 704 A.2d 835, 838-39 (Del. 1997) (trial court's

failure to give jury instructions on alternative theories was not harmless).

Thus, the Estate should have been permitted to argue both (1) that the 1996 Sabbath Letter was a memorialization of the earlier oral contract – in which case no additional consideration was needed[5] – and (2) that the 1996 Sabbath Letter and restoration of Milton's name was a modification of the earlier contract (especially because the School argued that the initial agreement lacked clear terms or was simply an agreement to name the school corporation after Milton in perpetuity).

The Court's conclusion that "there was no evidence of consideration Milton provided to the School in 1996 when his name was placed back on the School" is contradicted by the record. As the Estate pointed out, the School agreed to the terms of the Sabbath letter "in exchange for Mr. Schwartz (a) resuming donations to the School and (b) being involved with the school and lending his name to it, which in turn would enhance the School's reputation in the community and potentially attract other donors." (2/26/21 ARB at 48.) Mr. Schwartz provided such consideration to the School. (AOB at 16; 14 App. 3299-3308 (evidence

[5] (*See* 2/26/21 ARB at 46-47 & n.25.)

that Mr. Schwartz did resume donations to the School, became involved again, and enhanced the School's reputation).)

Before the reconciliation with Mr. Schwartz, "the school's very existence was under threat," and it was important to rebuild bridges with Mr. Schwartz because he "had credibility in the community." (14 App. 3300.) That is, the School got something in return for agreeing to the terms of the Sabbath letter – that is all that is required for consideration. *Sw. Gas Corp. v. Ahmad*, 99 Nev. 594, 594–95, 668 P.2d 261, 261–62 (1983); *Oscar v. Simeonidis*, 800 A.2d 271, 276 (N.J. App. 2002) ("Any consideration for a modification, however insignificant, satisfies the requirement of new and independent consideration.").[6]

There was sufficient evidence of consideration to support a jury instruction on contract modification.

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[6] *See also Oh v. Wilson*, 112 Nev. 38, 41, 910 P.2d 276, 279 (1996) ("courts do not generally inquire into the adequacy of consideration"); *Renk v. Renk*, 188 A.D.3d 502, 504, (N.Y. App. Div. 2020) ("[T]he slightest consideration is sufficient to support the most onerous obligation, and it is not for the court to determine whether the consideration was in fact adequate") (quotations and citation omitted).

V.

BREACH OF THE IMPLIED COVENANT WAS PART OF THE ESTATE'S CONTRACT CLAIM

This Court also affirmed the district court's erroneous refusal to give the Estate's proposed jury instruction regarding the implied covenant of good faith and fair dealing, reasoning, "the Estate did not plead a breach of the covenant of good faith and fair dealing claim and the Estate does not assert that the parties tried that issue by consent." (Order at 4.) The Court appears to have misapprehended the Estate's legal point that it did plead a breach of the implied covenant and that the parties did try the issue by consent because breach of the implied covenant was part of the Estate's contract claim. (1/29/20 AOB at 63-66; 2/26/21 ARB at 50-55.)

In some jurisdictions, parties are not even allowed to "bring separate claims for breach of contract and breach of the duty of good faith, because the latter is premised on the former." *Younglove Const., LLC v. PSD Dev., LLC*, No. 3:08CV1447, 2010 WL 3515603, at *3 (N.D. Ohio Sept. 3, 2010). This Court appears to have overlooked the Estate's legal point that Nevada is a notice pleading jurisdiction and that the Estate "undoubtedly put the School on notice of the facts comprising its breach

of good faith claim." (2/26/21 ARB at 52 (citing pleadings and briefing where the Estate laid out the facts comprising its implied covenant claim).)

This Court has never held that breach of contract and breach of good faith claims must be pled separately where both stem from the same contract and seek the same contractual damages. Rather, this Court has consistently rejected that plaintiffs must specify the precise "legal theory" on which they seek recovery. (2/26/21 ARB at 52-53 (citing several Nevada cases)); *see also, e.g.*, *Chavez v. Robberson Steel Co.*, 94 Nev. 597, 600, 584 P.2d 159, 160 (1978) (explaining that a "single count may allege alternative theories of recovery," that allegations in a negligence claim adequately "set forth a cause of action for both strict products liability and negligence, and that the court's refusal to instruct the jury regarding strict liability was prejudicial error").

Here, the Estate's breach of contract claim alleged facts adequate to set forth both a breach of contract and a breach of the implied covenant, and the district court's refusal to instruct the jury regarding breach of the implied covenant was prejudicial error.

VI.

AT A MINIMUM, MILTON SCHWARTZ WOULD NOT HAVE MADE HIS INITIAL $500,000 DONATION BUT FOR HIS BELIEF THAT THE SCHOOL BE NAMED AFTER HIM IN PERPETUITY

Finally, this Court affirmed the district court's denial of the Estate's claim for rescission of Milton's lifetime gifts, reasoning there "was no evidence that Milton conditioned each of his lifetime gifts on the School being named after him" and that "the Estate failed to show by clear and convincing evidence that each of the lifetime gifts were based on Milton's mistaken belief that the school would bear his name in perpetuity." (Order at 4.)

The Estate believes there was sufficient evidence to show that all of Milton's lifetime gifts were conditioned on the School being named after him, given that he stopped making lifetime gifts during the years when the School was not named after him. (1/29/20 AOB at 16 (setting forth chart of donations).) But at a minimum, the Estate provided clear and convincing evidence that Milton's initial $500,000 was based on his mistaken belief that the School would bear his name in perpetuity. (2/26/2021 ARB at 59-63; (1 App. 177 (Milton testifying in 1993 "[t]hat on or about August of 1989, Affiant donated $500,000 to the Hebrew

Academy in return for which it would guarantee that its name would change in perpetuity to the MILTON I. SCHWARTZ HEBREW ACADEMY"); 28 App. 6881 (Milton testifying in 1993 "[t]hat 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"); 29 App. 7008 (stating in a 2007 video interview "I gave a half a million, and they agreed to make the name of the School the Milton I. Schwartz Hebrew Academy in perpetuity").)

As the donor of the gift, Mr. Schwartz's intent is controlling. *In re Irrevocable Tr. Agreement of 1979*, 130 Nev. 597, 605-607, 331 P.3d 881, 887-88 (2014). The School did not present any evidence that Mr. Schwartz would have made the initial $500,000 gift but for his belief that the School would be named after him in perpetuity. That is because the School could not contradict Mr. Schwartz's own statements of his intent.

Both Mr. Schwartz's own uncontroverted statements and those of other witnesses[7] confirm that he would not have made his initial

[7] (*See* citations in 2/26/2021 ARB at 59-63.)

$500,000[8] donation but for his mistaken belief that the School would be named after him in perpetuity. At a minimum, this $500,000 gift must be returned to the Estate at present-day value.

CONCLUSION

This Court should grant this petition and reverse the district court's grant of summary judgment on the Estate's oral contract claim, vacate the judgment on the Estate's contract claims, and remand for a new trial.

[8] Even this Court acknowledged that "[w]hile there was evidence that Milton would not have given large donations to charities without naming rights associated with those gifts, many of the subject lifetime gifts were significantly smaller and there is no evidence he would not have made those gifts if the School was not named after him in perpetuity." (Order at 5.) Regardless of the size of his other lifetime gifts, Mr. Schwartz's donation of $500,000 was large – especially given that it was made in 1989 – and was as large as the $500,000 will bequest which the jury correctly found that Milton provided only "because he believed the School was named after him in perpetuity." (Order at 5.)

DATED this 17th day of June, 2022.

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CERTIFICATE OF COMPLIANCE

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

2. I certify that this brief complies with the type-volume limitations of NRAP 40(b)(3), because it contains 3,262 words.

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

DATED this 17th day of June, 2022.

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CERTIFICATE OF SERVICE

I certify that on June 17, 2022, I submitted the foregoing "Petition for Rehearing" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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