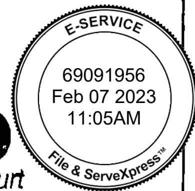

FILED
San Francisco County Superior Court
FEB 07 2023
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BY: [signature] Deputy Clerk

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Attorneys for Respondents
JOHN SHERWOOD and EDWARD M. TOPHAM,
as Co-Trustees of the ROBERT A. NAIFY
LIVING TRUST

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

In re the

FRANCESCA P. NAIFY LIVING TRUST
dated November 30, 1990

CHRISTINA CORTESE,

Petitioner,

v.

JOHN SHERWOOD and EDWARD M. TOPHAM, as CO-TRUSTEES of THE ROBERT A. NAIFY LIVING TRUST dated February 8, 1991, and DOES 1-20 inclusive,

Respondents.

Case No. PTR-16-300479

[PROPOSED] JUDGMENT

Judge: The Hon. Anne-Christine Massullo

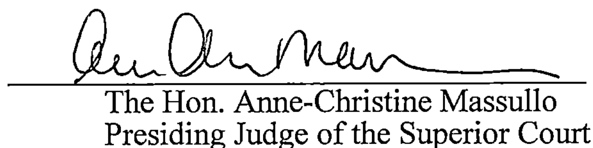
2563.000/1812006.1

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

JUDGMENT IS HEREBY ENTERED for the Respondents, John M. Sherwood and Edward M. Topham, as the Co-Trustees of the Robert A. Naify Living Trust dated February 8, 1991 ("Co-Trustees), and against Petitioner Christina Cortese, in conformity with the February 7, 2023 Statement Of Decision, attached hereto as Exhibit 1.

IT IS SO ORDERED.

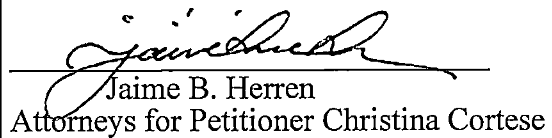
Dated: February 6, 2023



The Hon. Anne-Christine Massullo
Presiding Judge of the Superior Court

APPROVAL AS TO FORM;

HOLLAND & KNIGHT LLP



Jaime B. Herren
Attorneys for Petitioner Christina Cortese

Francesca P. Naify Living Trust	Case No: PTR-16-300479

CERTIFICATE OF ELECTRONIC SERVICE
(CCP §1010.6 & CRC §2.251)

I, R. Michael Diles, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am over the age of 18 years, employed in the City and County of San Francisco, California and am not a party to the within action.

On February 7, 2023, I electronically served the attached **Judgment** via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: February 7, 2023

Mark Culkins, Interim Clerk

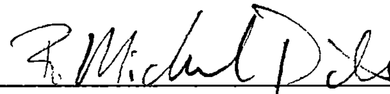
By: 
R. Michael Diles, Deputy Clerk

EXHIBIT A

FILED
San Francisco County Superior Court
FEB 07 2023
CLERK OF THE COURT
BY: [signature]
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

In Re: THE FRANCESCA P. NAIFY LIVING TRUST dated November 30, 1990 CHRISTINA CORTESE, as Successor In Interest to THE FRANCESCA P. NAIFY LIVING TRUST dated November 30, 1990 Petitioner, v. JOHN SHERWOOD, individually and as Co-Trustee of THE ROBERT A. NAIFY LIVING TRUST dated February 8, 1991, EDWARD M. TOPHAM as Co-Trustee of THE ROBERT A. NAIFY LIVING TRUST dated February 8, 1991, and DOES 1-20 inclusive, Respondents.	Case No. PTR-16-300479 **STATEMENT OF DECISION AFTER COURT TRIAL**

This case came on regularly for trial commencing on May 2, 2022 in Department 306 of the above-entitled Court before the Honorable Anne-Christine Massullo. Petitioner Christina Cortese ("Petitioner" or "Christina") was represented by Stacie P. Nelson, Yunnie Y. Son and Jaime B. Herren of Holland & Knight LLP. Respondents John Sherwood and Edward M. Topham, as Co-Trustees of the Robert A. Naify Living Trust dated February 8, 1991 (jointly,

"Respondents"), were represented by Benjamin K. Riley, Robert H. Bunzel, and Sony B. Barari of Bartko Zankel Bunzel Miller PC.

The trial took place over the course of several days in May, August and September 2022. On January 17, 2023, the Court issued a Proposed Statement of Decision. Pursuant to Code of Civil Procedure section 632 and California Rules of Court, rule 3.1590, the Co-Trustees filed Suggestions for Inclusion in the Final Statement of Decision on January 31, 2023. Having considered the suggestions filed herein, the Court issues this Statement of Decision.

SUMMARY OF DECISION

The issues in this case fall into two distinct categories. The first category is Respondents' three affirmative defenses and Petitioner's equitable estoppel claim. The second category is damages resulting from the alleged underfunding of the community share of the estate. With respect to the first category, much, if not most, of the findings by the Court depends on the credibility of the witnesses at trial coupled with documentary evidence that either supports or negates that testimony. The second category, damages, depends in large part on the testimony of one witness and several experts as well as what documentary evidence exists given the passage of almost 19 years between the death of Petitioner's mother in 1997 and her filing of this action in 2016.

For all the reasons set forth below and those in the record, this Court finds in favor of the Respondents' statute of limitations and laches defenses. There is no dispute that Petitioner was aware of the alleged underfunding in 1997. She asserts that Respondents are equitably estopped from asserting the defenses of statute of limitations and laches because of oral promises made to her by Robert Naify and John Sherwood, as his agent, in 1997 and thereafter. Those promises were, in essence, that Petitioner would be treated like Robert Naify's biological children and inherit, as an equal to them, part of his nearly $2 billion dollar estate. In addition, Petitioner claims that Robert Naify orally promised her that she would inherit a golf course and country club he owned in Marbella, Spain, to the exclusion of his other biological children. Petitioner claims that she did not file an action earlier because she relied on these oral promises to her detriment, and the first she learned that she was not an heir and would not inherit the golf course was after Robert Naify died in 2016.

The key witness to these oral promises is Petitioner, who this Court specifically finds not credible. In addition to the Court's observations of her during her testimony, the exhibits admitted during trial documented earlier statements Petitioner made that squarely contradict significant parts of her trial testimony. In addition, Petitioner knowingly and voluntarily released any claims against Respondents as part of a 2009 Assignment Agreement. Finally, in 2003, when Petitioner was the president of Equipoise, she received in error copies of Robert Naify's 1991 trust documents and amendments. She secretly made copies for herself despite being told by Equipoise counsel to return them.

Even assuming Petitioner's equitable estoppel claim survived, the underfunding of her mother's share of the community does not exceed $167,555. Based on the applicable legal standards and the record evidence, the Court denies any claim of interest or remaining relief.

I. FACTS AT TRIAL

A. PROCEDURAL HISTORY

On December 30, 2016, Petitioner Christina Cortese ("Christina")[1] filed her Petition for Relief for Breach of Fiduciary Duty, Third Party Liability for Participation in Breach of Trust, and Return of Trust Property. The Petition named Respondents John Sherwood and Edward C. Topham, as Co-Trustees of the Robert A. Naify Living Trust, with respect to the first and third causes of action, and named John Sherwood, individually, as respondent on the second cause of action for Third Party Liability. Christina would subsequently amend the petition four times.

Christina filed her Third Amended Petition on February 11, 2019, adding a fourth claim against John Sherwood individually for negligent misrepresentation. The Co-Trustees and John Sherwood filed answers thereto. In 2020, Respondent Edward M. Topham substituted in as Respondent Co-Trustee for his father, Edward C. Topham.

Generally, Christina claimed that: Robert Naify ("Bob") failed to fund the trust of his late wife, Francesca Naify ("Francesca"), with its full share of community property; that Bob failed to prudently invest and manage the Francesca Naify Trust assets; and that Bob imposed unfair

[1] First names are used herein for ease of reference and no disrespect is intended by the Court.

terms in a 2009 Assignment Agreement, by which he assigned his life income interest in the Francesca Naify Trust to Christina and her sister Acela, providing them with their residual trust share seven years before Bob died.

The week before trial in May 2022, Christina dismissed the second (Third-Party Liability for Participation in Breach of Trust) and fourth (Negligent Misrepresentation) causes of action against John Sherwood, individually, from the Third Amended Petition, with prejudice. The case proceeded on the first and third causes of action against the Co-Trustees.

A 20-day court trial was conducted from May 2 to May 5, May 10 to May 13, August 1 to August 5, August 8 to August 10, August 18, and August 22, 23, and 25, 2022. Twelve witnesses were called live at trial, comprising 87 hours of testimony. The parties also designated 16 witnesses by video deposition or deposition transcript, amounting to another 6 hours of testimony which the Court watched in camera per the parties' agreement. During trial, Christina dismissed her claim against the Co-Trustees for alleged imprudent investing. (Trial Transcript ("TR") at 1523-24.) Pursuant to the agreement and stipulation of the parties, which was approved and entered by the Court on August 4, 2022, and with leave of Court, Christina filed her Fourth Amended Petition confirming the striking of the individual claims against John Sherwood and the imprudent investment claim on October 19, 2022. The Fourth Amended Petition is the operative petition for purposes of the trial and this Statement of Decision.

In September 2022, the parties submitted post-trial briefs. The entire day of September 26, 2022 was devoted to counsels' Closing Arguments. On November 18, 2022, the parties submitted their proposed Statements of Decision. All parties agree that the Court has the full power to adjudicate this matter and come to a final conclusion. (TR at 3693, 3814-15.)

As fully discussed below, based on the testimony, witness credibility determinations, the admitted exhibits, and the arguments and other submissions of counsel, the Court finds that Christina's claims are barred by the Co-Trustees' affirmative defenses. Even if the affirmative defenses were inapplicable, the underfunding damages awarded to Christina are limited to $167,555 after taxes and appliable offsets.

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B. STATEMENT OF FACTS

1. Bob's Family

Bob was born on February 17, 1922. (Ex. 11-001.) Bob married Barbara Newton ("Barbara") in 1960, and adopted Barbara's son, Mark, several years later. Bob and Barbara had three children: Leslie, Christie, and Bobby. Bob and Barbara divorced in 1971. (Ex. 542.)

On May 25, 1974, Bob, then 52 years old, married Francesca ("Naify marriage"). At the time of the marriage, Francesca had two daughters from a previous marriage: Christina, age 14, and Acela, age 13. As of the date of marriage, Bob had a separate property net worth of approximately $3.9 million, comprised of United Artists ("UA") stock worth approximately $2.7 million, real property equity totaling $975,000, and $225,000 of other assets and liabilities. (Ex. 68.) Bob was also paid a salary and retirement benefits from his work with UA.

During their teenage years Christina and Acela lived in the Naify family home, but Bob never adopted either of them. In 1983, Bob formed a trust for Christina, among others, and started giving her inter vivos gifts. In that same year, Christina graduated from Harvard with a master's degree in regional planning and landscape architecture. She worked for the Yosemite National Park and the Department of Environmental Management in Boston, Massachusetts. Christina married Ted Dieker ("Ted") in 1984, and they moved to Cape Cod in 1986 where she worked for the Cape Cod Commission. In 1994, Bob asked Christina and Ted if they wanted to manage a development project on 5,000 acres of property he owned in Half Moon Bay, California. Christina and Ted moved to California temporarily at that time, intending to move back to Massachusetts. During this period, Christina attended several business seminars including bond investments, and investments and planning for wealth management. Christina worked at Bob's office from August 1994 until the birth of her youngest son, Teo.

In 1996 Ted and Christina purchased a home in San Francisco with a loan from Bob, paying less in their mortgage to him than they would have paid in rent. Shortly after this purchase, Bob approached Ted about going to Marbella, Spain for a month to oversee another real estate development project that was on the verge of bankruptcy. The project, Marbella Golf, was a 250-acre property with an 18-hole golf course and clubhouse. Ted had lived abroad and was excited about the project, so he and Christina moved to Marbella in 1996. Bob offered

Christina a percentage of the sales she would make for all the properties once the project was developed which was in addition to what he would pay Ted to manage Marbella Golf.

Francesca died unexpectedly on August 23, 1997. (Ex. 541.001.) Christina and Bob were both devastated by Francesca's death. Bob died 19 years later in April 2016. (Ex. 150.002.)

2. Bob's Assets

Beginning in the 1930s, Bob's parents, immigrants from Lebanon, co-founded and operated United California Theatre Circuit, Inc., a chain of movie theaters and related real estate. In or around 1963, United California Theatre Circuit merged with United Artists Theatre Circuit, Inc. ("UATC"), and in 1982, changed its name to United Artists Communications, Inc. ("UACI") (collectively, "United Artists"). (Ex. 595.088.) UA started investing in cable television companies in the 1950s, and in 1981 and 1985, led by Bob's older brother, Marshall Naify ("Marshall") (Ex. 607.003), the company completed major mergers/acquisitions of east coast cable systems. By 1986, UA owned over 1200 movie theaters and 23 different cable television systems. (Ex. 595.141.)

Beginning in the 1950s, Bob's parents began passing their UA stock ownership to Bob and his brother and sister. (Ex. 549.001-020.) At trial, the parties stipulated that the stock Bob held directly in UA was 100% his separate property. (Ex. 595.001.)

In December 1986, Bob sold approximately 10 million of these separate property shares of UA to Telecommunications, Inc. ("TCI"), receiving approximately $68 million in cash and $122 million in TCI Notes. (Ex. 595.001.) It is undisputed that Bob held the TCI Notes he received from the TCI transaction until after Francesca died in 1997. (Ex. 598.001.) At the time of the TCI Sale, UA was both a theater and cable business, and the sale agreement did not separately value the two.

Bob was president and co-chairman of the board of UA and his focus was on the theater operations. In a summary dated November 25, 1987, Bob described himself as being "aggressive in pursuing growth of multiple theaters in all areas." (Ex. 607.) Respondents testified that Bob's "focus was on the theater operations, primarily in a day-to-day format where he would be

reviewing, you know daily receipts, for example." The parties agreed that Bob had a strong work ethic and worked a lot in the relevant time period. John Sherwood, one of Bob's trusted attorneys who worked for him until his death, described Bob as follows: "Bob was the detail guy…Bob was very detail oriented, would check the box office numbers every morning when I was there… he was the hands-on manager of the theatre business." Bob had been in charge of "purchasing and construction" since 1948, when he began working in the back office with his father. (Ex. 607.003) It was Bob's vision and requirement to purchase the theater land that directly increased UA's value. Bob grew UA to the second largest theater chain in the United States by the time of the TCI Sale.

During the Naifys' marriage, but before the TCI Sale in 1986, Bob acquired 7,537 total shares of UA stock (before stock dividends) (Ex. 66.046) indirectly through a related company, Excelsior Amusement (Ex. 597.001), in three (3) transactions (by acquisitions in 1977, December 1978, and November 1984).

Bob purchased a minority interest in Excelsior Amusement in 1953 for $44,000, paid in cash and with a note to his parents. (Ex. 596A.001.) He made no further investments in Excelsior Amusement after 1953. Over the years, Excelsior Amusement redeemed the interests of the other owners, such that by 1982, Bob and Marshall each owned 50% of the company. (Ex. 596A.001.) During trial, the parties agreed that Bob's ownership interest in Excelsior Amusement was 100% his separate property.

As part of the 1986 TCI transaction, Excelsior Amusement sold its 1.9 million shares of UA stock to TCI, with Bob receiving $6.4 million in cash, and TCI Notes valued at $11.4 million. (Ex. 597.001.) As of December 1986, Bob also held 360,000 UA stock options, which he did not exercise in anticipation of the TCI Sale, although they were exercisable when Bob was searching for a buyer of UA. Christina contends that certain UA stock purchased by Excelsior Amusement should be treated as community property, but otherwise agrees that the UA stock held by Bob through Excelsior Amusement was his separate property. Christina also testified that gifts given to her through Excelsior Amusement were to be *gifts during Bob's life* and were not themselves a promise of an inheritance.

As of Francesca's death in August 1997, the TCI Notes (if then converted to stock) had a value of approximately $637 million (before tax).

Two other significant assets are in dispute: Bob's UA retirement and Marbella Golf. Bob's UA retirement plan was fully vested, and statements show significant contributions were made to the plan during the marriage, which resulted in earnings and appreciation. As of Francesca's death, the total value of the plan was $4,875,264.

As set forth above, Marbella Golf is a 250-acre property in Spain that includes a golf course and clubhouse. Bob first acquired an interest in Marbella Golf during the Naify's marriage and he made transfers to support the project during the marriage. Marbella Golf is owned in Bob's Trust, through the Pacific Golf Holding Company. (Ex. 66.037, Line 146.)

3. Bob's Delineation Between Separate and Community Funds

As set forth above, Francesca was Bob's second wife. Bob and his first wife, Barbara, had three children during their marriage. Bob also adopted Barbara's son, Mark. Bob and Barbara divorced after 11 years of marriage. As part of that proceeding, Barbara made a community interest claim in Bob's UA stock. The divorce court found that "All shares of United Artists Theater Circuit, Inc. presently standing in respondent's [Bob's] name, comprising a total of some 209,000 shares, are hereby confirmed as his sole and separate property, without any community interest of any kind." (Ex. 542-004.)

John Sherwood testified that during the Naify marriage, and perhaps because of his divorce with Barbara, Bob's staff was required to keep meticulous records, including separate General Ledger journals and bank accounts for Bob's separate property monies and other assets (which he termed "personal property") as well as for his community property monies and assets (which he referred to as "community property").

In addition to the careful recordkeeping made at his direction, multiple transactions demonstrate that Bob understood the difference between his separate property and the couple's community property, and sought to keep them separate and distinct. For example, in April 1981, only a few months after he became employed by Excelsior Amusement, John Sherwood wrote a memorandum explaining that, under an IRS Code section, if Bob used separate property assets to purchase a condominium for Christina, the cost could be deducted since she was a non-adopted step-child. (Ex. 799.002.) In July 1981, Bob used his separate property funds to buy a second home in Rancho Mirage for the community "[b]ecause the community property bank account did

not have enough money to pay for the full purchase price." (Ex. 791.001.) Next, in 1985, after Bob received an apartment building in San Francisco called the "Flaghouse" from his separate property Cal-Jones investment, Francesca asked to receive the Flaghouse as community property. Bob agreed and deeded the property to the community. (Ex. 564.) Finally, in 1996, Bob purchased another home in Rancho Mirage for Francesca, and deeded it to her as her separate property. (Ex. 792.)

4. Bob's Personal Property Funded the Marriage Expenses

Stuart Nakanishi, the forensic expert for the Co-Trustees, analyzed the available records for the period 1986 through Francesca's death in 1997. (Ex. 715.001.) Mr. Nakanishi's reports and his testimony provided evidence that:

- The $5.5 million earned by Bob in salary, bonus, consulting fees, and director fees from 1986 to 1997 was recorded in the *community property* cash receipts journal; none of these payments was recorded in the personal property cash receipts journal. (Ex. 699.003.)
- Between 1986 and 1997, there were: 154 transfers from Bob's personal property accounts to the community property account, totaling $3.5 million; and only 20 transfers from the community property account to the personal property accounts, totaling $444,000. (Ex. 702.007.)
- During this same period, the community expenses exceeded the community income by $4.5 million. (Ex. 700.003.)
- From 1986 to 1997, Bob paid $5.1 million from his separate property funds for taxes owed by the community. (Ex. 701.004.)
- In sum, for the period from 1986 to 1997, Bob's separate property accounts funded the community and its expenses by at least $5.4 million. (Ex. 702.003.)

The Court notes that other than raising questions comparing Bob's cash income from Exhibit 700 with his gross income from Exhibit 701 (including $10 million in stock options and other non-cash income) which Mr. Nakanishi adequately explained, Christina's forensic expert, Alexandra Peais, did not dispute Mr. Nakanishi's forensic work. Instead, Ms. Peais testified that Mr. Nakanishi's analysis should not be credited because of alleged commingling between community and personal accounts, and because Mr. Nakanishi did not perform a full "family law" tracing to rebut the community property presumptions at issue.

5. Francesca's Trust Assets and Estate at Death and Alleged Oral Promises

In the early 1990s, Bob and Francesca executed similar Living Trust instruments prepared by the same attorney, providing that the surviving spouse would obtain a life income interest in the trust assets of the first deceased spouse. (Exs. 639 and 746.) Francesca's Trust provided that her separate property would be distributed immediately upon her passing to her two biological children, Christina and Acela, and that her one-half share of the community assets would be held in trust for Bob during his lifetime, and then distributed to Christina and Acela. (Ex. 639.)

As executor and trustee after Francesca's death, Bob did not prepare any financial schedules regarding the community's or Francesca's assets upon Francesca's death. Based on Bob's knowledge about all of the Naifys' assets, and John Sherwood's knowledge of almost all of them, John Sherwood prepared a final inventory and appraisal for Francesca's probate estate. John Sherwood also prepared a first and final account and the federal estate tax returns for Francesca's estate. (Exs. 9 and 11.) John Sherwood admitted that some of the property that was allocated as community property was held in accounts titled in Bob's name only during marriage and as of Francesca's date of death.[2]

At her death in August 1997, Francesca's assets included approximately $1.2 million of separate property and another $11 million from her one-half interest in the community property, held in real property, stocks and other assets. (Ex. 541.004.) The most valuable community assets were four stocks derived from UA options Bob had earned prior to the TCI acquisition and converted into TCI stock. (Ex. 541.006-07.)

Christina testified that she was "visibly upset" and "trembling" when shortly after Francesca's death in 1997, John Sherwood told her about the size of her mother's estate "because none of this made sense to" her. Christina testified that thereafter she questioned Bob about the size of the estate, at which point, Bob is alleged to have made three oral inheritance promises to her: (1) he would leave her Marbella Golf & Country Club; (2) he would treat her as a biological

[2] Christina argues the fact that some community assets were in accounts titled in Bob's name only demonstrates co-mingling and unreliable record keeping. An equally plausible explanation, particularly given the record evidence, is that Bob and John Sherwood did not take advantage of the asset being in Bob's account but correctly allocated it as community property.

child in his estate plans; and (3) he would take care of her such that she would be a "wealthy woman." (Fourth Amended Petition, ¶¶ 29, 36, 65.) Christina states that Bob repeated the promises in 2006 and 2009. Shortly after Francesca's death, John Sherwood allegedly also told Christina that the value of Francesca's estate and Trust had been kept low for complicated tax reasons and told her not to worry because Bob would always look after her.

In September 1997, about one month after Francesca's death, Bob visited Christina in Spain. During the 1997 visit, Bob allegedly repeated that the value of Francesca's estate had been kept low for tax purposes and that Christina did not have to worry because Christina would inherit part of Bob's estate. Close to Francesca's death in August 1997, and again two to three times after that, Christina told her childhood friend, Melanie Lawrence ("Ms. Lawrence"), that "Bob and John [Sherwood] had deliberately underestimated her mother's estate for tax purposes" and that they "[promised] that she would get it back after [Bob's] death and, plus – plus some" so "she wasn't to worry." (TR at 1197:17 - 1198:2.) Still, Ms. Lawrence testified that "it was a source of worry… and anxiety" for Christina; "she was worried about it, but he always reassured her that everything would be fine." (*Id.*) While the Court finds Ms. Lawrence a credible and unbiased third-party witness, the source of Ms. Lawrence's understanding came from a purported conversation John Sherwood, not Bob, had with Christina.

> Q. Sure. Did you ever come to learn that after Francesca's death John Sherwood spoke to Christina about her mother's estate?
>
> A. Christina did discuss that with me, yes.
>
> Q. What did Christina tell you.
>
> A. Okay. Yeah. Christina -- Christina told me that she came to me one day. She was very upset and told me that she had been told that Bob and John [Sherwood] had deliberately underestimated her mother's estate for tax purposes, but a promise that she would get it back after his death and plus – plus some, and she wasn't to worry, but it was a source of worry for her and anxiety. She was – she was worried about it, but he always reassured her that everything would be fine.

(TR at 1197:4 – 1198:2.)

Upon Francesca's death, Bob became the executor of Francesca's estate and the trustee of the Francesca P. Naify Living Trust dated November 30, 1990 (the "Trust"), including all its sub trusts, such as the Marital Trusts. As the Trust's lifetime beneficiary, Bob was required to take distributions of the trust income. (Ex. 746.015.) He was also entitled to take principal

distributions from Francesca's Trust, but never did so. Because Christina was a residuary beneficiary of the Marital Trusts, and the sole beneficiary of a trust for her benefit, Bob owed Christina fiduciary duties as of Francesca's date of death, in his capacity as trustee. On or about 2012, Bob ceased serving as trustee of the escrow trust created under the 2009 Assignment Agreement. The escrow trust was then distributed upon expiration of the three-year statute of limitations on the gift, estate, and income tax returns associated with the Assignment Agreement and for which the escrow trust was holding reserve funds. (Ex. 525.002.)

6. The Francesca's Trust Accountings

Beginning in 2003, Bob and John Sherwood provided Christina and Acela with accountings of Francesca's Trust. (Ex. 502.) The accountings valued the trust assets as of December 31, 1997 at $15.8 million and did not identify any trust interest in Marbella Golf or the TCI Notes. (Ex. 502.007 et seq.) Accountings were provided to Christina from 2003-2009, accounting for the entire period following Francesca's death in 1997 through the Assignment Agreement in 2009. (Exs. 504, 56.) At the end of each accounting, Christina was advised of her rights to an accounting and of the three-year statute of limitations to file suit against the trustee (Bob) for breach of trust. Christina did not file suit on her breach of trust claim, among others, until after Bob's death in 2016.

7. The Assignment Agreement

By 2008, Christina had made it clear that she "would be happy to have [her] mother's trusts terminated" in order to receive the residual money "sooner rather than later." (Ex. 626.001, TR at 1743-44.) In June 2008, John Sherwood sent Christina and Acela a memorandum describing the terms of what became the Assignment Agreement: an agreement assigning Bob's life interest in Francesca's Trust to Christina and Acela, allowing them to receive their remainder shares immediately. (Ex. 508.) John Sherwood sent a second memo on August 8, 2008, calculating "the effect of an early termination of your mother's trust," and explaining that Christina and Acela would have to pay the additional tax Bob would incur from the early distribution. (Ex. 509.) Christina immediately wrote back, advising that she and Acela "would like to proceed" and that the offer to share in the income tax payment was "fair." (Ex.

149.) Christina was also informed at this time (and subsequently twice more) "that as part of the plan, you and [Acela] will be releasing Bob from any possible liability while he was trustee." (Ex. 511.002; see also Exs. 504.005, 523.001.)

Also in August 2008, Christina retained a tax lawyer from Geneva, David Hirsberg (Exs. 149, 511.001), who considered setting up a foreign trust to receive the anticipated distributed trust assets. In the process, Mr. Hirsberg reviewed the "termination discussions" and spoke directly with John Sherwood and with Bob's other attorney, Myron Sugarman. (Depo. of David Hirsberg, DH Tr. at 50-51, 66.) Mr. Hirsberg testified that "it's very common in the trust world when distributions are made for the trustee to ask for a release" and that the proposal to share payment of the income tax was "completely reasonable." (Id. at 123, 132.) Christina terminated Mr. Hirsberg's engagement by October 2008 due to the expense, even though he could have "provided advice" to her and "nailed down the [] issues" raised by the Assignment Agreement. (Depo. of D. Hirsberg at 68-69.)

By September 2008, it was clearly communicated to and understood by Christina that the Francesca Trust would not be terminated. Rather, Bob's life income interest in the trust would be assigned to Christina and Acela, with Christina and Acela becoming successor trustees for their remainder assets as the Francesca Trust contemplated upon Bob's death. (Ex. 513.) Myron Sugarman of Cooley drafted the Assignment Agreement (see Ex. 810, identifying 10 Cooley versions during the drafting process), and John Sherwood completed it and sent a draft of the agreement and its schedules to Christina and Acela in December 2008. (Exs. 630, 164.)

In January 2009, Christina spoke with another attorney, Joe Wolberg, and asked him about: the Assignment Agreement's release of Bob; the reasonableness of Bob's life income interest being worth up to 20% of the Francesca Trust value; the tax sharing issue; and Christina's and Acela's payment of capital gains on stock liquidated or distributed under the transaction. (Ex. 166.001.) Christina concluded her email to Mr. Wolberg with: "Joe, I recognize there is a lot to look at here, but I desperately need the advise [sic] of someone I can trust. I do not at all trust John [Sherwood], as you may know. *He is only looking out for Bob's interests*." (Ex. 166.002.) (Emphasis added.) Although Christina had the "full power and ability to hire an attorney" in addition to Messrs. Hirsberg and Wolberg to advise her, she chose not to.

(TR at 441, 481.) None of these communications mention Bob's alleged promises or Marbella Golf.

John Sherwood provided the next draft of the Assignment Agreement with all supporting exhibits and schedules to Christina on March 1, 2009, along with a memorandum explaining the release and advising that "You understand that I am Bob's attorney in this transaction, not yours, so it is important that your own counsel review it." (Ex. 523.003.) The final agreement confirmed Christina's and Acela's waiver of rights to further financial information or "judicial settlement of an accounting," and released Bob as both a beneficiary and trustee. (Ex. 56.005-06.) Christina testified that at the time in 2009 she found these terms "unfair and shocking" but never wrote to John Sherwood or Bob to tell them because "I had everything at stake and I wasn't going to be adverse to him [Bob]." (TR at 474-75.) Christina signed the final Assignment Agreement on March 16, 2009. (Ex. 56.008.)

After paying taxes and the actuarial value of Bob's life interest, Christina and Acela each received about $5 million. (Ex. 594.002.)

8. Bob, Christina, Marbella Golf and Equipoise

It is not disputed that Bob first acquired an interest in Marbella Golf during the Naify's marriage and he made transfers to Marbella Golf during the marriage, to support the project. Title in Marbella Golf was held by another company, Pacific Golf, and not Bob.

In 1996 after Ted and Christina moved to Spain, Ted became the General Manager of Marbella Golf and Christina worked on deed transfer issues with legal counsel in Spain.[3] Both Ted and Christina were paid a salary plus retirement benefits for their work. After they divorced in 2006, Christina took over as General Manager.

Christina testified that, during his visit to Spain in 1997 after Francesca's death, Bob allegedly told Christina that Francesca wanted Christina to have Marbella Golf and that Bob would leave Marbella Golf to her if she would be open to staying in Spain long term. Rebecca

[3] The background of the financial and deed transfer issues for Marbella Golf are not important to detail here. Suffice it to say that a substantial portion of the funds Bob invested were misappropriated and the deeds to the land, primarily because of local politics, were never properly transferred. Both of these issues impaired any development of the property.

Figone, a family friend of the Naifys who went on the 1997 trip to Spain with Bob, observed Bob and Christina together, and saw how proud Bob was of Christina and Christina's work at Marbella Golf. Bob also promised Ted and Christina a percentage of the sales of the property once it was developed – the anticipated development never happened.

Six months later, in 1998, Bob formed Equipoise, for which Christina served as secretary and treasurer from 1998 to 2000, and then president from 2000 to 2006. (Ex. 778.) Equipoise was created as an investment vehicle so that Bob could facilitate the transfer of a significant portion of his wealth to his children, grandchildren, and Christina. (Ex. 724.) For nearly seven years, from 2001 to 2006, Christina received a flat $100,000 annual salary for the part-time work she did for Equipoise. (*Id.*) In a letter to the California Franchise Tax Board ("FTB") dated April 18, 2002, as part of an FTB audit of Equipoise, Bob's attorneys from Morrison & Foerster described Christina as an "heir" regarding lifetime gifts of Equipoise stock. (Ex. 122.) A couple months later, on July 9, 2002, Bob wrote a letter to Christina indicating that she would receive Equipoise shares/notes. (Ex. 116.) Christina received more than $22 million in Equipoise shares from Bob during his lifetime.

Testimony was offered at trial through prior deposition designations concerning other people's perceptions of Bob's intentions regarding leaving Marbella Golf to Christina. In an affidavit signed by Ted on January 6, 2003, that was submitted to the FTB, Ted stated that Bob was grooming Christina so "he could pass the baton to the next generation" and that "Equipoise provided a vehicle through which [Bob] could make gifts to his heirs efficiently." (Ted Dieker Depo. Transcript ("TD Tr.), 223-225.) According to Damian Rodriguez, an employee of Marbella Golf from 1990 to 2010, on September 11, 2001, Ted told him that Christina would inherit Marbella Golf from Bob upon Bob's death. (Damian Rodriguez Depo. Transcript ("DR Tr."), 10-11, 21-22.) According to Jacqueline Van Den Hemel ("Ms. Van Den Hemel"), who worked in the Marbella Golf golf shop from 1997 to 2003, Bob always seemed proud of Christina and Ted for how they managed and ran Marbella Golf. (Jacqueline Van Den Hemel Depo. Transcript ("JV Tr."), 22, 23-24.) Ms. Van Den Hemel *believed* that Christina and Ted would inherit Marbella Golf because Bob had sent them to manage it on account of no one else in the family having an interest in doing so. (JV Tr.,19.) None of these witnesses testified that they heard Bob or John Sherwood, as Bob's agent, make any promise to Christina about an inheritance of Marbella Golf or any other asset.

In 2006, after she and Ted divorced, Christina became the General Manager of Marbella Golf. She testified when she visited Bob in San Francisco in 2006, he again told her she would receive Marbella Golf. In 2006 or 2007, Christina informed Damien Rodriguez that she would inherit Marbella Golf. Also in 2007, Alberto Diaz, a consultant with an architecture and city planning firm that contracted with Marbella Golf, understood Christina to be the representative in Spain for Pacific Golf (the entity that owned Marbella Golf). Neither of these individuals witnessed Bob or John Sherwood as Bob's agent, make any promises to Christina.

In the Fall of 2009, Christina was officially fired from her role as General Manager of Marabella Golf. John Sherwood testified that Bob viewed Christina as a poor manager who lost money by hiring additional employees and increasing expenses, missed scheduled telephone calls with him, and that she was not "forthright" and "truthful" in reporting to Bob. In September 2009, Christina "misstated" facts to Bob concerning a subtenant (Ex. 787), and, according to John Sherwood, Bob fired Christina because "he was tired of her lying." Three months later, Bob wrote Christina that she would not be "operating the golf course sometime in the near term or future." (Ex. 736.002.)

Christina signed a severance agreement with Marbella Golf on October 29, 2009. She did not work for Marbella Golf thereafter. On August 27, 2015, Christina wrote an email to John Sherwood regarding her 1999 Trust assets of Equipoise stock. She also informed him that her doctor told her that she would never be able to work full time again. (Ex. 784.) Christina never mentions Marbella Golf or any of the alleged oral promises that are part of the Fourth Amended Petition in this email. The email states the opposite of the Petition's allegations:

> I have attached to this email, a summary of my assets with notations as to liquidity. I presently only have access to $353,000 that is liquid. ... The fact that I no longer can earn income makes the situation dire. As much as I have been able to put all four of my children through college, they are not yet able to help me financially and as you know I do not have a partner. The only choice I have is to turn to the gift of Equipoise shares Bob gave me in 2002.
>
> You have said that Bob would like to treat my siblings and I equally. Each of us however has a unique situation that I think requires consideration. Mark and Leslie are both able to work and are being generously supported in their businesses or through their work in the family office. ... *Additionally, all three of my siblings have significant assets now and will inherit substantially more, apart from the 1999 Trust assets. None of my siblings will ever experience a shortage of funds. Their situations could not in any way be considered to be similar to mine.*

> Although I have received some assets from my mother's estate, the terms of distribution were extremely unfavorable to me *and I never would have accepted them had it not been for Acela's desperation and crisis in life.*
>
> *Considering now that my Equipoise assets are the only remaining assets I will have,* it is essential that I protect them from great risk. ... You [John Sherwood] are bound by the 1999 Trust to a "*Standard of Care*" which does not per se require diversification but does require that the "*Trustee shall act with the care, skill, prudence and diligence under the circumstances prevailing, including ... the circumstances of the beneficiary.*" Any "*reckless indifference to the interests of the beneficiary*" is considered a breach of your fiduciary responsibilities. (Italics excerpted from 1999 Trust language.)

(*Id.*) (Emphasis added except in last paragraph as referenced.)

9. Bob's Trusts and Bequests to Christina

The trial exhibits include more than 30 testamentary wills and trusts executed by Bob between 1978 and 2015. At no time was Christina ever a residuary beneficiary, a position given to Bob's biological children and at times his adopted son, Mark. Nor was there ever a bequest to Christina involving Marbella Golf. (See generally Ex. 817.) Trust documents dating from 1991 to 2006 identified a specific bequest to Christina, first at $2 million, later at $25 million, and then at $10 million. (Ex. 817.)

In June 2010, Bob removed the $10 million bequest to Christina in his trust. (Compare Ex. 758.032 with Ex. 761.002; see generally Ex. 817.) In 2014, Christina told Bob that she had heard that his long-time girlfriend, Jan Vandebos ("Jan") (who became Bob's third wife in April, 2015), would sue his estate after he died. Bob became very angry, told Christina to leave his house, and never spoke to her again. During his life and before this falling out in 2014, in addition to the $5 million she received under the Assignment Agreement, Bob had provided Christina, her husband, and children with gifts and compensation of $29.7 million (Ex. 796), including tuition payments for her children, loans and a gift of Equipoise stock worth more than $22 million when Christina redeemed it in 2016. (Ex. 790.004.). Christina herself described Bob as generous.

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10. Christina secured copies of Bob's trusts as written up to 2003

Sometime prior to December 2003, Christina accidentally received copies of Bob's 1991 trust and several amendments from Bob's lawyers when she was involved with the FTB audit of Equipoise. Christina testified that when she discovered she received the trust documents in error, she immediately called Bob's attorney at Morrison & Foerster, Tom Steele. She and her husband, Ted, decided to keep a copy but didn't tell anyone.

> Q. While you're thinking about that question, did you ever contract Morrison & Foerster and tell them that you got the trust by mistake?
>
> A. I did. Right away I called Tom Steele, and he was so embarrassed. He said, Oh, that shouldn't have gone to you. That was a mistake.
>
> And I said, Well what do you want me to do?
>
> And he said, Send it back. And he said, Please don't call Bob and John [Sherwood]. I would rather call them myself and explain what happened.
>
> Q. Okay. Did you tell him that you were keeping a copy?
>
> A. No.

(TR at 897.)

Christina admitted that when she reviewed the trust, she knew that Bob had changed it and removed his gift to Acela. She also knew that the gift to her was limited to $2 million and that the trust did not gift her Marbella Golf. At the time she made copies of the trust documents, she held the position as president of Equipoise. The first time Respondents learned Christina made a copy of the trust documents was in this action during her deposition.

II. LEGAL FINDINGS

The Co-Trustees assert that the statute of limitations and laches both bar Christina's claims. The Court agrees.

A. Statute of Limitations of Probate Code Section 16460 Bars Christina's Claims

Probate Code section 16460 states "[i]f a beneficiary has received an interim or final accounting in writing, or other written report, that adequately discloses the existence of a claim against the trustee for breach of trust, the claim is barred as to that beneficiary unless a

proceeding to assert the claim is commenced within three years after receipt of the account or report." Receipt of an accounting puts the beneficiary on notice and triggers the running of the statute. (*Noggle v. Bank of America* (1999) 70 Cal.App.4th 853, 861; *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1123.) Section 16460 bars the claim where the account or report "adequately discloses the existence of a claim." (*Noggle, supra,* 70 Cal.App.4th at 858.) *Noggle* found the beneficiaries' claims time-barred because they received annual accountings that "provided sufficient information to enable each [of them] to calculate the market value of the assets in the trusts, and were received over a sufficient number of years to permit each [beneficiary] to make comparisons and observe the absence of growth." (*Id.* at 861.)

Christina testified that she was "visibly upset" and "trembling" when shortly after Francesca's death in 1997, John Sherwood told her about the size of her mother's estate. Christina made no claim at this time.

Starting in 2003, Christina received annual accountings of Francesca's Trust, detailing all assets in the trust from Francesca's death until the Assignment Agreement. (Ex. 502.) With a cover letter dated March 14, 2003, Bob provided Christina with Trust accountings covering from the time Francesca passed away through December 31, 2002. (Ex. 504.001-002; Ex. 502.) With a cover letter dated April 20, 2007, Bob provided Christina with Trust accountings covering the calendar years 2003 through 2006. (Ex. 504.003-004; Ex. 502.) With an email dated December 26, 2008, Bob provided Christina with Trust accountings for 2007 and 2008. (Ex. 504.005; Ex. 502.) The cover letters enclosing each of the accountings advised of the three-year statute of limitations for bringing claims against Bob for breach of trust. (Ex. 504.001, .003.) The accountings identified the trust assets of $15.8 million as of December 31, 1997, with no mention of the TCI Notes, Marbella Golf, or the other assets claimed in this litigation. Still Christina made no claim.

Finally, Christina testified that at the time of the Assignment Agreement, 2008-2009, she found the amount of assets she would receive and the terms of the Agreement "unfair and shocking," but she proceeded with it because "I had everything at stake and I wasn't going to be adverse" to Bob. (TR at 474-75.) Thereafter, Christina was fired from Marbella Golf and in 2014, Bob told her to leave his home after her comment about Jan. Yet, she waited until 2016 *after Bob had died* and had not included her in his estate plan, to assert breach of trust claims.

The Court finds under Probate Code section 16460 that the accountings first provided to Christina in 2003 "adequately disclose[d] the existence of a claim against the trustee for breach of trust" requiring her to have filed suit within the statutory three-year period. Probate Code section 16460 bars Christina's claims.[4]

B. Laches Bars Christina's Claims

Laches requires: (1) an omission to assert a right; (2) a delay in the assertion of the right for some appreciable period; and (3) circumstances which would cause prejudice to an adverse party if assertion of the right is permitted. (*Stafford v. Ballinger* (1962) 199 Cal.App.2d 289, 296.) The delay in pursuing the case must be unreasonable and prejudice the defendant. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 68.) Also, "[d]eath of an important witness may constitute prejudice." (*Stafford, supra,* 199 Cal.App.2d at 296; *Getty v. Getty* (1986) 187 Cal.App.3d 1159, 1170.) In *Drake v. Pinkman* (2013) 217 Cal.App.4th 400, the court found that a daughter knew or should have known of the facts giving rise to her claim against her mother's trust more than four years before filing. (*Id.* at 407.) The Court of Appeal affirmed the summary judgment against the daughter, relying on the prejudice caused by the daughter waiting to bring the action until after her mother had passed. (*Id.* at 409; *see also Getty, supra*, 187 Cal.App.3d at 1170-71, long delay in asserting claims, coupled with death of important witnesses, supported laches defense.)

The same facts supporting the statute of limitations defense also establish unreasonable delay in bringing suit. Christina testified that soon after her mother's death in August 1997, she believed her mother's trust was substantially underfunded. According to Christina, John Sherwood told her that the value of Francesca's estate and Trust had been kept low for complicated tax reasons. The Trust accountings she received reflected which assets had been marshalled as Francesca's community property and which had not. Even with the 2009 Assignment Agreement — which she asserts the terms of were "unfair and shocking" —

[4] Code of Civil Procedure section 343, applying a four-year statute of limitations for general breach of fiduciary duty claims, also bars Christina's claims since by at least the 2003 receipt of accountings she was on full notice of the alleged failure to fully fund the trust with community assets. (*See e.g., Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807, the discovery rule only delays accrual of a cause of action "until the plaintiff discovers, or has reason to discover, the cause of action.... [W]e look to whether the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them.")

Christina delayed another seven years, after Bob's death, before filing suit.

Further, even if the Court were to take Christina's testimony at face value that she did not pursue a claim for the community property excluded from Francesca's underfunded trust because Bob told her she would inherit from him as an equal child after his death, and John Sherwood concurrently told her she would be "a wealthy woman," the record shows that in at least October 2014, Christina was aware of – or at the least, was concerned about – the possibility that Bob's long-time girlfriend, Jan, would make her own community property claim on the estate after his death. At that time, the value of Bob's estate was at its zenith – worth almost $2 billion. As of Bob's marriage to Jan in April 2015, Christina's interest in the Naify's community property share of the estate was in jeopardy not because of Bob, but Jan. There is nothing in this record to indicate that Christina had either the parent-child or fiduciary relationship with Jan that she testified she had with Bob. And yet, Christina still did not take action on the acknowledged underfunding of her mother's trust in either 2014 or 2015.

Instead, as discussed above, Christina wrote the August 27, 2015 email to John Sherwood regarding her 1999 Trust assets of Equipoise stock, which she refers to as "*the only remaining assets I will have*" to support her into the future, with no mention of her alleged expectations of inheritance asserted in the Petition. (Ex. 784.)

As to prejudice caused by the delay, Mr. Nakanishi and Ms. Peais agreed that if Bob were alive, he could have answered critical questions as to why certain payments were made from or to the various accounts, including disputed deposits to Merrill Lynch and Bear Stearns. John Sherwood summarized how Christina's delay in filing suit until after Bob died prejudiced the Co-Trustees and their ability to respond to all of her claims:

> [I]t's made it essentially impossible for us to provide -- find and provide information that we had at one time, including witnesses and including Bob.... Bob knew all of these facts. He was the trustee, and he could have testified with whatever information was required. Basically, we had lost or had discarded records that were -- that I believe if we had them, we could have explained to a gnat's eyelash, as it were, every dollar and penny. We once had virtually all the records. Some we didn't have, but virtually all the records.... I mean, we're just handcuffed. We just don't have all the records.

(TR at 1711-1712.)

According to John Sherwood, Bob was a meticulous record keeper, and that extended to his records of separate property and marital community property. Those ledgers were maintained by Bob's assistant, Dorothy Southern ("Ms. Southern"). Bob's general ledgers for

the first half of the marriage (1974-1985) are missing in their entirety because they were "purged" when his ledger "got too big." In addition, after Ms. Southern's death in Christmas 1995, the ledgers began to be replaced by a check registry instead. The bank retention policy of seven to ten years also denied the parties records for the first half of marriage, as Francesca died in 1997. Neither Christina nor Respondents have all of Bob and Francesca's income tax returns, complete bank account records, and complete brokerage account records for the marriage.

It is unknown what records from 1974 to 1985 would have been available had Christina filed suit at an earlier time after Francesca's death in August 1997. However, it is reasonable to conclude that Bob's testimony along with the records that were available could have assisted in re-creating the financial history for the marriage from 1974 to 1985. Indeed, beginning with the accountings in 2003 – and within the seven-to-ten-year bank retention policy – Christina was told she had the right to review the books and records associated with Francesca's Trust. In other words, bank records from 1993 to 1996 would have been available to Christina in March 2003 depending on bank retention policies.

The Court finds that Christina's delay in filing suit until 2016 — 13 years after she first received the Francesca Trust accountings and 7 years after the Assignment Agreement — constitutes prejudice sufficient to support the laches defense. The record demonstrates the detriment to the Co-Trustees in defending the case without the full records and most importantly without Bob — particularly given the strictures of Family Code section 760 community property presumptions and the burden to negate those presumptions.

For all these reasons, the Court finds that on this record, laches applies to Christina's claims.

C. Christina's Claim of Equitable Estoppel

Christina defends against the Co-Trustees' statute of limitations and laches defenses by asserting equitable estopped based on Bob's alleged oral inheritance promises. The Fourth Amended Petition alleges: "Relying on Robert's promises of the golf course, the 250-acres of land, and an inheritance as an equal child as well as John [Sherwood]'s representations that she would be a wealthy woman upon Robert's death, Christina did not challenge Robert's acts as

executor." (¶65.) The Petition also asserts that the alleged promises induced Christina to agree "to early termination and distribution of her remainder share." (¶13, see also ¶¶56, 92.)[5]

Equitable estoppel requires that: "(1) the party to be estopped must be apprised of the facts; (2) he [or she] must intend that his [or her] conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he [or she] must rely upon the conduct to his [or her] injury." (*Doe v. Marten* (2020) 49 Cal.App.5th 1022, 1028.)

Estoppel based on oral promises also requires the plaintiff to prove that the promises were expressly conditioned upon the plaintiff refraining from initiating litigation or taking action against the defendant. (*Kurokawa v. Blum* (1988) 199 Cal.App.3d 976, 990-91, plaintiff did not assert that "the alleged promises were conditioned upon her refraining from initiating litigation or taking any action;" as a result, the alleged promises "d[id] not equate with anything more than a series of gratuitous oral promises which reasonably could not, and did not, cause detrimental reliance.") Here, Christina never threatened Bob with suit over the community assets, and she introduced no evidence that Bob promised her an inheritance in return for not taking legal action regarding the Francesca Trust.

Oral promises to make a will, pled after the promisor's death, require proof, by clear and convincing evidence, of both the existence of the alleged promises and that they are enforceable in equity. (Probate Code section 21700(a)(4); *Di Salvo v. Bank of California, Nat. Ass'n* (1969) 274 Cal.App.2d 351, 356.) However, cases in the personal injury context adjudicating whether equitable estoppel bars a statute of limitations defense apply a preponderance of evidence standard. (*See e.g., DeYoung v. Del Mar Thoroughbred Club* (1984) 159 Cal.App.3d 858, 862.) The parties have not cited controlling law as to whether the Court should apply the clear and convincing standard from the Probate Code, or the general preponderance of evidence standard to this equitable estoppel claim by Christina based on a post-death oral inheritance claim.

[5] The Court notes that although Christina sued in a representative capacity on behalf of the Francesca Trust, at trial her estoppel claim relied only on alleged promises that she individually would inherit from Bob — not any alleged promise regarding the Francesca Trust.

Consequently, the Court applies the more permissive (and favorable) preponderance standard to Christina's estoppel claim.

1. Christina's Unilateral Hopes of Inheritance

Christina argues that it was not until Bob's death in 2016 that she learned Bob had disinherited her and she needed to act only then to protect her best interest, and that equitable estoppel applies because it was enough for her to have merely hoped that Bob would include her in his estate plans, so long as Bob led her to have those hopes and did not correct her.

The parties do not dispute that Bob and Christina had a falling out in the last years of Bob's life – in 2014 – after which Bob never spoke to Christina again. The parties do not dispute that Christina received and secretly kept a copy of Bob's 1991 trust and several amendments, sometime prior to December 2003. In reviewing these trust copies, Christina saw no mention of Marbella Golf and noted that she was only mentioned in connection with a $2 million bequest.

Evidence presented in support of this equitable estoppel argument indicates Christina had hopes, designs, anticipation, and optimism at inheriting Marbella Golf, until at least 2014. But this same evidence also shows that steps Christina took allegedly in reliance on her relationship with Bob, and Bob and John Sherwood's statements as Bob's agent, were taken unilaterally. Further, where the evidence shows the limited times that Bob was aware of these unilateral efforts, it also shows that he, or John Sherwood as his agent, acted to dispel Christina's implied expectation of inheritance. These examples include:

- On January 23, 2007, when Christina was still employed as Marbella Golf's General Manager, allegedly in anticipation of her inheritance of Marbella Golf, Christina engaged Irwin Mitchell to analyze tax efficient methods to transfer Marbella Golf from Bob to Christina; similar to how Bob was handling the transfer of Equipoise assets. On March 21, 2007, she retained Michael Josephs ("Mr. Josephs") of PricewaterhouseCoopers, LLP (PwC) for tax expertise regarding the same. (Ex. 137.) Mr. Josephs confirmed that he would have accurately tried to reflect what Christina had communicated to him when he wrote to her, such as: "[Y]ou have requested that PwC prepare a memorandum surveying options and discussing in very general terms possible strategies to effect a transfer of [MG] from your father to you..." (Michael Josephs Depo. Transcript ("MJ Tr."), 20:6-

21.) By at least April 27, 2007, John Sherwood and Bob were aware that Christina hired professionals to analyze the gift at life versus death. (Ex. 138, 129:8 - 134:9.) Within a week, there is evidence that Bob and John Sherwood questioned Christina about her actions, and she disclaimed any expectation of an inheritance. The notes handwritten by John Sherwood dated May 7, 2007 (Ex. 729), indicate that Christina knew she would not inherit from Bob. The handwritten notes contain the statement: "RAN, KF, JMS – re estate plan – re administrator no expectation that she will inherit anything. The atty's bill was misleading."

- On May 16, 2007, Christina was still engaged with Mr. Josephs, who sent Christina a "brief overview of US tax consequences" with respect to possible strategies to affect a transfer of Marbella Golf from Bob to Christina. (Ex. 139.) On June 12, 2007, Mr. Josephs sent an email to Christina informing her that the cost for an appraisal of Marbella Golf, required for any gifting, was approximately $70,000. (Ex. 140.002.) On July 3, 2007, John Sherwood sent a memorandum to a lawyer in Spain to discuss how to "minimize any death taxes in Spain, and to make any transfer of the ownership to [Bob's] successors as simple as possible." (Ex. 141.) The term used by John Sherwood was "[Bob's] successors" indicating at least more than one person, and not limited to Christina only. Again, Christina's unilateral acts in pursuing her anticipated or hoped for future interests and inheritance are not enough to establish a promise by Bob to gift her or leave her a bequest of Marbella Golf.
- Finally, Bob had fired Christina from her position as General Manager of Marbella Golf in the Fall of 2009. There is no indication on this record that she had been rehired or otherwise authorized to represent Marbella Golf after her termination. Regardless, Christina allegedly expended efforts to advance commercial development of Marbella Golf, particularly in 2013 to 2014 with Alberto Diaz. She paid for Mr. Diaz's work out of her own pocket. Throughout 2013 and 2014, and as late as February 2016, Mr. Diaz believed Christina to be a representative of Marbella Golf in Spain.

Christina argues Bob and John Sherwood knew, or should have known, of Christina's belief and expectation of inheritance as of mid-2007 -- whether that belief was correct or incorrect. Insofar as Christina's evidence may show that Bob and/or John Sherwood as Bob's agent knew of Christina's expectation of inheritance as of mid-2007, the Co-Trustee's evidence shows that this expectation was queried and dispelled by Bob and/or John Sherwood as Bob's agent, on or around May 7, 2007. The Court also does not find that either Bob or John Sherwood had a duty to know Christina's beliefs and expectations of inheritance, or that knowing would have put Bob under a legal obligation to meet or dispel those expectations.

2. The Trust Provisions and Testimony

The Court recognizes Christina's testimony, discussed above, about the alleged oral inheritance promises by Bob to leave her Marbella Golf, to treat her as a biological child, and to make her a wealthy woman.[6] But as observed by *Khoury v. Barham* (1948) 85 Cal.App.2d 202, 211, "[t]he only testimony of the alleged agreement was that of plaintiff in which he purported to give the statements or declarations of a deceased person. Such evidence is said 'to be in its nature the weakest and most unsatisfactory.' 'No weaker kind of testimony could be produced.'" (Citations omitted.) Courts are concerned about the "opportunity for the fabrication of testimony concerning the existence of the agreement" after the promisor dies. (*Juran v. Epstein* (1994) 23 Cal.App.4th 882, 894.) Accordingly, the cases look for testimony from independent third parties or documents confirming the alleged promises. (*See e.g., Horstmann v. Sheldon* (1962) 202 Cal.App.2d 184, 187, "several witnesses testified that from time to time the decedent had said she intended to leave the home to the plaintiff" and "[f]ive prior wills of the decedent were introduced in evidence and in each of them some provision was made for the plaintiff.".)

The Court first considers evidence of statements or actions by Bob – not John Sherwood or anyone else – to treat Christina differently than provided by his trusts. In more than 30 testamentary documents between 1978 and 2015, Bob never left Marbella Golf to Christina,

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[6] Christina admits she is not aware of any witness who heard Bob make the alleged inheritance promises to her. She also admits that she never told her husband — who was then the General Manager of Marbella Golf — of the alleged promises to leave her Marbella Golf. This is so despite her testimony that she *and* Ted kept a copy of the 1991 trust documents but never told anyone.

never treated her the same as his biological children, and never provided her with a residuary share of the trust. (Exs. 743-772; Ex. 817; *accord*, testimony of Bob's estate attorney, Myron Sugarman, TR at 3031, 3035-07.) With respect to Marbella Golf, the only promise Bob made to Christina was conditioned on the development and sales of real estate, a plan which never materialized. There is no evidence that is independent of Christina – no documents made at the time or after the alleged promise – to support Christina's claim that Bob promised she would inherit Marbella Golf. As to the treatment of her as a biological child, the letters Bob sent to his biological children were signed "Love Dad" but "Love Bob" to Christina; the trust documents she copied covertly listed her separately from his biological children. Christina's sole piece of evidence outside of her testimony supporting Bob's alleged oral promise that she would inherit from his estate upon death is a letter drafted by Bob's attorneys during the Equipoise audit that used the term *heir*. Again, this is not Bob's letter nor his words. Moreover, Christina agreed that the letter referred to gifts of Equipoise during Bob's life but said nothing about what would happen to his estate upon his death. Evidence supporting Christina's claim that Bob would provide her a residuary share of his trust is similarly lacking.

In contrast to Christina's oral promise claim is the following evidence refuting her testimony. First, after Bob fired Christina from her position at Marbella Golf in 2009, he deleted the one specific bequest to her in his trust. (Ex. 761.002.)[7] Second, in 2014, after an argument regarding Jan allegedly planning to claim an interest in Bob's estate, Bob never spoke to Christina again. There is no showing that the two ever reconciled, or that Bob thereafter welcomed Christina back into his life in any of her prior capacities as a stepchild or an employee.

There also is no admissible evidence from third parties that Bob wished to treat Christina differently than his Trust bequests or that substantiate the alleged inheritance promises. John Sherwood testified repeatedly that Bob never told him of the alleged oral promises. Nor did Bob tell Ted, Christina's husband and for 10 years the General Manager of Marbella Golf, that Christina would inherit Marbella Golf. (TD Depo. at 69, 84-85.) Jan Vandebos, Bob's third wife, testified that Bob was not the type of person to make oral promises:

[7] Christina agreed that "every one of us individuals in this country has the right to decide what we will leave people and what we won't." (TR at 523.)

Q. Did Bob ever tell you of a conversation he had with Christina while he was in Hawaii where he made – allegedly made certain promises to her about what he would give her?

A. Bob would never speak to someone like that. He was not – he wouldn't promise someone something.

Q. Why do you say that?

A. He just wasn't that type of person.

Q. Because why? He was private or what?

A. Well, he was private. But he was very – I mean – just the way he has handled everything, everything is done meticulously. He's not the kind of person that would come out and say, "I'm promising you this and that." Everything is organized and done through attorneys. And I mean that is the way Bob handled business.

Q. As opposed to oral promises, things would be put down in writing?

A. No. Everything went through John [Sherwood] or attorneys or assistants or – he just wasn't that type of person.

(JV Depo. at 234-35.)

Finally, Myron Sugarman testified that when he met with Bob in 2015, Bob was "sharp as a tack," and there was "no question" that the 2015 Trust expressed his wishes. (TR at 3237, 3051.)

3. The Trial Exhibits

Other exhibits also do not reflect statements by Bob supporting the inheritance promises alleged by Christina. Christina is aware of no writing from Bob or herself that confirms the alleged oral promises. A relevant exhibit from Bob — his note to Christina in January 2010 after she was fired from Marbella Golf — contradicts the oral promises of inheriting Marbella Golf by saying that Christina would not be "operating the golf course sometime in the near term or future." (Ex. 736.002.) It is undisputed that Christina knew as of 2003 that none of Bob's trusts to that point, beginning in 1991 when Christina would have been a young adult, had bequeathed her Marbella Golf or an inheritance more than $2 million.

Many other exhibits are inconsistent with the alleged promises, but two are most notable. First are John Sherwood's notes of a May 2007 conversation. Those notes reflect that Christina said that she had "no expectation that she will inherit anything" and that she later asked John

Sherwood "if Bob plans to avoid hav[ing] to sell the golf course upon his demise." (Exs. 729, 35.)[8] As reflected in her own notes, Christina even offered to put together a group, including herself, to "buy [Marbella Golf] from you" so as to "[a]void fire sale of golf course upon his death." (Ex. 788, TR at 590.) Christina contends that she was not present for the discussion in May 2007, but it is unreasonable to conclude that this statement came from anyone other than Christina herself.

Second are the words of Christina herself in the August 27, 2015, email to John Sherwood. This email came after she was fired from Marbella Golf and Bob had banished her because of her 2014 statement about Jan. In the email she wrote that "all three of my siblings have significant assets now *and will inherit substantially more*, apart from the [Equipoise] Trust assets. ... *Considering now that my Equipoise assets are the only remaining assets I will have*, it is essential that I protect them from great risk." (Ex. 784.001, .002.) (Emphasis added.) These documents indicate that Christina did not believe then, or at any time before, that Bob had made the oral promises to her. Christina's words are particularly enlightening because at the time she wrote the email, there was no reason to stay in Bob's good graces (she was out of his good graces, fired and banished) and she would have had every reason to document and check on Bob's alleged historical oral promises to protect her interests and future needs.

The court also notes that the Fourth Amended Petition alleges that Bob, as trustee of Francesca's Trust, made an oral promise to Christina, as a beneficiary of Francesca's Trust and estate, that she would inherit from his estate in exchange for not challenging Bob's acts as executor of Francesca's estate and agreeing to the terms of the Assignment Agreement. The alleged breach before the court is a breach of fiduciary duties owed to Francesca, her estate, her

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[8] Since John Sherwood had no present memory of his notes, the Court allowed the text of Exhibits 729, 35, 732 and 774 to be read into the record as Past Recollection Recorded. (TR at 1943 *et seq.*) The Court later admitted these exhibits as Business Records after finding them to be trustworthy based on John Sherwood's practice and testimony. Christina specifically objected to Exhibit 729 because part of the way down page 1 of the notes there is an indication of a conference between Bob, John, and Kevin Fritz, but not Christina. However, John Sherwood testified that he often filled in his notes after a call or conference. He also convincingly explained that the statements later in the notes about receiving the golf course title report, the status of a "convenio" from the City of Marbella, and "no expectation she will inherit anything, the attorney's bill was misleading" could only have come from Christina since the first two topics are reflected in Christina's own notes (Ex. 781.001), and she was the only person dealing with the Marbella title issues and Spanish counsel. (TR at 1950-54, 2055, Exs. 138, 797.001, .027.) The Court finds that testimony credible and accurate.

heirs, and her Trust beneficiaries. Christina has brought this Petition in her capacity as a beneficiary and successor in interest of her mother's Trust and her mother's estate, against Bob in his capacities as Trustee of the Francesca Trust and executor of Francesca's estate (Fourth Amnd. Pet. at ¶¶ 17, 18, 20). The Petition is brought pursuant to Probate Code sections 850, 859, 16240, and 17200. It does not bring a claim or cause of action against Bob's estate for breach of an alleged oral contract to make a will or devise of certain bequests to Christina. The Probate Code contemplates such contracts, and proceedings to construe them.[9] Case law exists that might have supported Christina waiting until Bob's death to bring that kind of claim, and might have further supported an equitable estoppel defense. (See, e.g. *Battuello v. Battuello* (1998) 64 Cal.App.4th 842, 847; *Estate of Watson* (1986) 177 Cal.App.3d 569, 573; *Redke v. Silvertrust* (1971) 6 Cal.3d 94; *Di Salvo v. Bank of California, Nat. Ass'n* (1969) 274 Cal.App.2d 351; *Estate of Housley* (1997) 56 Cal.App.4th 342, 347.) But that is not the legal action Petitioner brought. Petitioner's argument at trial that Bob's death was the start of Christina's statutory period of limitations misunderstands the legal posture of the case and the parties' capacities, and does not persuade the Court on Christina's equitable estoppel claim.

In conclusion, Christina has not met her burden — even by a preponderance of the evidence — to prove equitable estoppel. Thus, as held above, the Co-Trustees' statute of limitations and laches defenses bar Christina's claims.

4. Christina is Not a Credible Witness

Even without the abundance of documentary evidence squarely refuting Christina's equitable estoppel claims or claims of oral promises, this Court makes the specific finding that Christina is not a credible witness, for several reasons. First was Christina's demeanor and responses to questions during her testimony. On direct examination, Christina's answers appeared rehearsed and followed long leading questions from her attorney. On cross examination, Christina's responses were, at times, evasive or non-responsive. When confronted

[9] Cal. Prob. Code section 21700 (c) "A contract to make a will or devise or other instrument, or not to revoke a will or devise or other instrument, or to die intestate, if made prior to the effective date of this section [1/1/2001], shall be construed under the law applicable to the contract prior to the effective date of this section [1/1/2001]."

with evidence that did not support her version of events, Christina appeared agitated at counsel and dismissive of the question.

Second was the fact that Christina secretly made and kept a copy of Bob's 1991 trust documents. She did so despite her testimony that she didn't want to "cross Bob" and that he was a very private person. Christina testified that when she saw she got the copy by mistake she immediately contacted Tom Steele, at Morrison & Foerster. Mr. Steele specifically instructed her to send the trust documents back because they were sent to her in error. She sent the documents back to Mr. Steele but neither asked him for permission to make a copy nor did she tell him she intended to make a copy of it. It was not until this litigation that anyone, except Ted, knew she had a copy. Compounding her act was that, at the time she received the copy in error, she was the president of Equipoise. Christina's testimony and her actions underscore that she knew her act of making and keeping a copy of the trust was, in a word, deceptive.

Third, Christina never once sent Bob an email or letter confirming his alleged oral promise(s) to her, even though her lifelong friend, Melanie Lawrence, testified that shortly after her mother's death in 1997, Christina was very upset about the underfunding of her mother's estate. Even in her August 27, 2015 email to John Sherwood, *after* she was fired from Marbella Golf and banished by Bob because of her rumor about Jan, Christina made absolutely no mention of an inheritance, Marbella Golf or any oral promise.

Finally, the May 7, 2007, notes from the contemporaneous conversations Bob, John Sherwood, Kevin Fritz (John Sherwood's son), and Christina had are strong evidence that, in her own words, Christina did not expect to inherit anything from Bob. On April 27, 2007, Christina faxed John Sherwood a 24-page attorney term sheet and bills. The firm, Irwin Mitchell, provided a scope of work and attorney fees for work done on behalf of Marbella Golf. Bob needed to approve the fees because it was Pacific Golf, not Christina, who was responsible to pay the attorney's fees. The reference to inheriting Marbella Golf came in one sentence in 24-pages. John Sherwood's handwritten notes are on the bill with questions. (Ex. 138.) On May 6, 2007, he sent a memo to Bob and copied Christina *and Kevin Fritz* outlining topics for discussion. (Ex. 781.) Christina made notes on the May 6, 2007 memo from John Sherwood, and one concerned the future of the golf course upon Bob's death. John Sherwood's notes from May 7, 2007, track

the questions on the bill and came shortly after the April 27 fax and May 6 memorandum. The answers to those questions logically came from only one person: Christina. There is no other plausible person who could have made the statement that she didn't expect an inheritance *and* that the attorney's bill was a mistake. Christina denied at trial making any such statement, but it is unreasonable to conclude that someone else would have made or made-up the statement in John Sherwood's notes, given the timing of when it was made and the documents surrounding the notes.

For all these reasons, the Court finds that Christina is not a credible witness.

D. EVEN ASSUMING STATUTE OF LIMITATIONS AND LATCHES DID NOT BAR CHRISTINA'S CLAIMS, THE ASSIGNMENT AGREEMENT BARS CHRISTINA'S CLAIMS

a. The Assignment Agreement's Release

The Assignment Agreement contained a release by Christina and Acela in favor of Bob, in both his capacities as beneficiary and trustee:

> CHRISTINA and ACELA and each of them release and forever discharge ROBERT from all liability, responsibility or further accountability for any of his acts or omissions during the Account Period [starting with Francesca's death] and in making the distribution of assets related to his assignment as an individual **beneficiary** of the [Trust], without the entry of an order or judgment of a court of competent jurisdiction approving such acts.
>
> CHRISTINA and ACELA and each of them release and forever discharge ROBERT from all claims, demands, causes of actions, costs, expenses, attorney's fees, liabilities, claims for contribution and obligations or any nature whatsoever, whether in law or equity, whether or not now known, suspected or claimed, which they ever had, now have or hereafter can, shall or may have against ROBERT for, on, or by reason of, an matter, action, omission, cause or thing whatsoever with respect to his acts as **Trustee** during the Account Period and in making the distribution of assets. [Emphasis added.] (Ex. 56.005-06.)

John Sherwood advised Christina three times between September 2008 and March 2009 that, as a condition of the transaction, she would be required to provide Bob with a full release. (Exs. 511.002, 504.005, 523.001.) Christina agreed to do so under the Assignment Agreement.

Numerous memoranda, emails and telephone discussions were exchanged or occurred between John Sherwood and Christina regarding the terms and potential ramifications of the Assignment Agreement (*see, e.g.*, Exs. 508, 509, 149, 511, 513-520, 158, 164, 504.005, 522, and

523) all before Christina signed it. Christina testified that John Sherwood "was always responsive" to questions she posed about the transaction (TR at 458), and she told John Sherwood in writing at the time that the proposed terms were "fair." (Ex. 149, TR at 392.) She consulted with two attorneys about the terms of the Assignment Agreement (Exs. 149, 511, 166), and received two drafts before receiving the final version for signature. (TR at 423, 1771, Exs. 630, 522.) She understood she always could say no to the transaction or its terms, and not obtain her early distribution.

With this information, Christina decided to proceed:

> Q. You made the conscious decision to proceed with the assignment agreement, right?
>
> A. I decided to proceed, yes, against all my better judgment, but, yes, I did decide to proceed.
>
> Q. And that decision was informed by all the e-mails, memos, discussions we've talked about between June of 2008 and March 2009, right?
>
> A. It was informed. Yes, I was informed all along the way, I suppose I could say yes to that.

(TR at 486-87.)

Asked why did she not write Bob or John Sherwood that the terms of the Assignment Agreement were unfair, or threaten legal action, Christina responded that "I had everything at stake and I wasn't going to be adverse to him." (TR at 474-75.) The Court finds that Christina made a strategic, informed decision to proceed with the Assignment Agreement, release any claims against Bob as trustee related to the funding or administration of Francesca's Trust, and to wait until Bob died to seek an inheritance from his trust. Christina pursued this litigation strategy and failed.[10]

Christina's former attorney Mr. Hirsberg, and Mr. Roosevelt both testified that releases of trustees are common in connection with the distribution or assignment of trusts. (Hirsberg Depo. at 123, Ex. 712.003.) Such releases are enforceable under Probate Code section 16464(a):

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[10] The Court notes that a trial was held in 2021, before the Hon. Richard B. Ulmer, Jr., in *In Re Robert A. Naify*, Case Number PTR-16-299823 ("the *Robert* Case"), on Christina's claim for oral inheritance based on the three alleged promises. Christina requested that the Court not review the Statement of Decision and Judgment from the *Robert Case*, and the Court complied. The Court also granted Christina's Motion in Limine to Exclude Findings and Rulings from the *Robert Case*. Thus, the petition heard by this Court is Christina's second trial regarding assets she seeks to secure from the Robert Naify Trust and this decision is made completely independent of the *Robert Case*.

"Except as provided in subdivision (b), a beneficiary may be precluded from holding the trustee liable for a breach of trust by the beneficiary's release or contract effective to discharge the trustee's liability to the beneficiary for that breach." Christina argues under subsection (b) that she was not informed of certain material facts and that the transaction "involved a bargain with the trustee that was not fair and reasonable." It is her burden to so prove. (*Cohn v. Bugas* (1974) 42 Cal.App.3d 381, 391, "execution of the release established a prima facie case for the defendants," and the "burden of proof, in both the sense of producing evidence [] and in the sense of the burden of persuasion [] to prove fraud, either by reason of the alleged misrepresentations or unconscionable inadequacy of the consideration or both, was on the plaintiff.".)

The record does not support Christina's argument. The cited memoranda and emails disclose the material facts, and John Sherwood answered Christina's questions. She was repeatedly advised about the release and expressly waived her right to further financial information or to petition the court for approval of the accountings. After consulting two attorneys, at trial Christina admitted she could have but chose not to engage additional counsel regarding the Assignment Agreement. The bargain under the Assignment Agreement enabled Christina to receive her $5 million share of the trust residuary seven years before Bob died. As Mr. Roosevelt testified, "[t]he terms appropriately addressed and fairly satisfied the objectives of the transaction without favoring any one party over another" and Bob received "what he otherwise would have gotten had he lived his normal life expectancy." (Ex. 712.002, item 4, TR at 3602-03.) The Court finds that the bargain under Assignment Agreement was fair and reasonable as to Christina.[11]

Christina also makes two specific claims as to material facts not disclosed: first, related to capital gains under the Assignment Agreement; second, related to the loan program. She also contends that the Assignment Agreement should have been approved by a court.

i. Facts Regarding Capital Gains

Christina claimed that she was not adequately told of the capital gains tax liability she would be required to pay under the Assignment Agreement resulting from: the sale of stock to

[11] Christina's expert, Michael Muttart, did not analyze "the economic benefits to either side with respect to this bargain" of the Assignment Agreement. (TR at 2988-89; Probate Code section 16464(b)(4).)

reimburse for Bob's gift tax;[12] and the embedded capital gains in stock she received in kind. However, a memorandum from John Sherwood to Christina in October 2008, advises that "taxable gain" would be incurred "on all the property distributed to Bob." (Ex. 515.) Also, in her email to attorney Wolberg, Christina explained that Bob "wants us to pay the capital gains tax on the [stock] sales." (Ex. 166.001, at 3, TR at 437-38.) She continued at point 4 that "Bob wants to give stock in kind so that in order to diversify, we [Christina and Acela] would have to pay capital gains on that as well which is not even calculated in John's projected figures." (Ex. 166.001, TR at 438-39.) Christina testified that she learned this information from John Sherwood, and then asked Mr. Wolberg to provide "a ballpark figure on the capital gains tax we would pay." (TR at 438-39, Ex. 166.001.) Finally, in his final memorandum of March 1, 2009, John Sherwood highlighted Christina's agreement to pay "the capital gains taxes on the trust attributable to transfer of the [life estate] to you." (Ex. 523.001.)

The Court finds that Christina was adequately advised concerning the capital gains issues and sought independent legal advice on the topic.[13]

ii. The Risks of the Loan Program

Christina claims she was not sufficiently advised about the risks and potential penalties arising from the loan program from Francesca's Trust.

In 2005, Bob, with John Sherwood's advice, initiated a loan program through the Trust to provide Acela with financial support. (Ex. 548.) Bob gave equal loans from the Trust to both Christina and Acela for ease of bookkeeping, although Christina did not need or want the loans in the beginning.

These putative loans from Francesca's Trust were documented by interest-bearing promissory notes at the lowest permissible federal rate. (Ex. 546.) The loans were supported by

[12] As confirmed by Messrs. Muttart and Sugarman, IRS Code section 2207(a) provides a statutory right to reimbursement from the remainder beneficiaries for the payment of gift tax.

[13] Christina also raises an issue about the "Net-Net Gift" deduction. However, in order to benefit Christina and Acela, this deduction was authorized under the Assignment Agreement and taken on Bob's 2010 gift tax return, but when it was disallowed by the IRS Christina's attorney decided not to fight the issue. (Ex. 656.001, .025; TR at 513, 3198; Exs. 533, 534.)

promissory notes so the IRS would not characterize them as gifts. (Ex. 546.003.)[14] John Sherwood explained in a 2007 email to Christina that "there is no assurance that the loan program will hold up for gift tax purposes, and it is imperative that when the loans become due they be repaid." (Ex. 505.) And in January 2009, John Sherwood advised Christina that "[i]f the loans are continued, that increases the risk of [the IRS] treating loans as distributions." (Ex. 519.001, TR at 447-48.)

Christina relies on a privileged portion of a February 2009 memo from John Sherwood (kept "confidential" and sent only to Bob given "sensitive tax implications" (TR at 1255)) in which John Sherwood told Bob that if "additional loans ... continue to be made" they might "look more and more like distributions rather than true loans." (Ex. 55.005.)[15] The paragraph continued that if the IRS treated additional loans as distributions, there could be gift tax, interest, and penalties that "could add up to more than the trust is worth." (*Id.*) First, the Court notes the IRS never challenged the loan program and the loans were repaid by the Assignment Agreement. (Ex. 56.012, TR at 2963.) Second, the risks discussed by John Sherwood in his emails to Christina and his privileged paragraph to Bob expressly concern the making of "additional loans." (TR in 1784.) In fact, new loans were not made. (Ex. 56.012.)

Furthermore, Christina understood "the concern about an IRS audit and the IRS treating them as gifts, rather than loans." (TR at 460.) She testified that John Sherwood told her that "if the IRS comes in and audits us, that the penalties and fines could be tremendous. They will treat these as gifts, not loans, and I hate to think that we might – what the trust might have to pay out to the IRS." (TR at 464.)

In sum, the Court finds Christina was adequately informed about the material facts concerning the potential risks of an IRS audit of the loan program.

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[14] Christina expressly requested loans from the Francesca Trust. (Exs. 506, 507.)

[15] Christina was not within the attorney-client privilege as John Sherwood only represented Bob in the transaction. (Exs. 523.003, 166.002.) Given that the IRS did audit Bob's 2010 gift tax return (Exs. 533, 534), the Court finds it was reasonable for John Sherwood and Bob to not waive privilege regarding the first paragraph of the circled portion at Exhibit 55.005.

b. Christina Made an Informed Decision to Enter Into the Assignment Agreement

When the first round of loans became due in 2008, Acela was unable to pay the Trust back. If the loans were not repaid, Bob and John Sherwood feared that the IRS would audit the situation and treat the loans as gifts made at the time of the first loan, and tax them accordingly, with additional fees and penalties. In 2008, Bob, Christina, and Acela began discussing the termination of the Trust. Mr. Muttart, one of Christina's experts at trial, confirmed that Bob would have been personally liable for any tax consequences to the Trust as a result of the loans. (M. Muttart Tr., 2918:17 - 2919:13.)

In August 2008, Christina – still living in Spain and the General Manager of Marbella Golf – hired attorney David Hirsberg to look into establishing a foreign trust to receive proceeds upon the anticipated Trust termination. Mr. Hirsberg testified that he was an expert only on the "international piece" of the U.S. Tax Code and that he had never advised any client under California law, including regarding the early termination of a marital trust.

On August 21, 2008, Mr. Hirsberg sent a letter to Bob's attorney, Myron Sugarman, in which he stated, "Christina would like the parties involved to be aware that any trust established as part of the restructuring are certainly available to be used by [Bob] as a receptacle for Christina's inheritance from him." (Ex. 510.002; DH Tr., 164:10 - 165:24.) By September 2008, it was clearly communicated to Christina that the Francesca Trust would not be terminated. Rather, Bob's life income interest in the trust would be *assigned* to Christina and Acela, with Christina and Acela becoming successor trustees for their remainder assets as the Francesca Trust contemplated upon Bob's death. (Ex. 513.) Bob's attorney Myron Sugarman of Cooley drafted the Assignment Agreement (see Ex. 810, identifying 10 Cooley versions during the drafting process), and John Sherwood completed it and sent a draft of the agreement and its schedules to Christina and Acela in December 2008. (TR at 423, 1771, Exs. 630, 164.)

Mr. Hirsberg's work was done by the end of September 2008, and he no longer represented Christina by October 2008. He had by then determined that the amount of money Christina would receive from the Trust termination was too little to make it worthwhile or cost-effective to create a foreign trust. Christina testified that she was the one who terminated Mr. Hirsberg's engagement by October due to the expense, even though he could have "provided

advice" to her and "nailed down the[] issues" raised by the Assignment Agreement. (Depo. of D. Hirsberg at 68-69.)

From October 2, 2008 to March 1, 2009, John Sherwood communicated directly with Christina, without copying any other lawyer, in all communications related to the Assignment Agreement. Nonetheless, he specifically advised her and Acela that he was representing Bob in the transaction; that she and Acela should seek the advice of counsel; and he gave them time to secure the services of an attorney.

During this same timeframe, specifically in January 2009, Christina spoke with another attorney, Joe Wolberg, and asked him about: the Assignment Agreement's release of Bob; the reasonableness of Bob's life income interest being worth up to 20% of the Francesca Trust value; the tax sharing issue; and her and Acela's payment of capital gains on stock liquidated or distributed under the transaction. (Ex. 166.001.) Christina concluded her email to Mr. Wolberg with: "Joe, I recognize there is a lot to look at here, but I desperately need the advise [sic] of someone I can trust. I do not at all trust John, as you may know. He is only looking out for Bob's interests." (Ex. 166.002.) Although Christina had the "full power and ability to hire an attorney" in addition to Messrs. Hirsberg and Wolberg to advise her, she chose not to. (TR at 441, 481.)

John Sherwood provided the next draft of the Assignment Agreement with all supporting exhibits and schedules to Christina on March 1, 2009, along with a memorandum explaining the release and advising that "You understand that I am Bob's attorney in this transaction, not yours, so it is important that your own counsel review it." (Ex. 523.003.) The final agreement confirmed Christina's and Acela's waiver of rights to further financial information or "judicial settlement of an accounting," and released Bob as both a beneficiary and trustee. (Ex. 56.005-06.) Christina testified that at the time in 2009 she found these terms "unfair and shocking" but never wrote to John or Bob to tell them because "I had everything at stake and I wasn't going to be adverse to him." (TR at 474-75.) Christina signed the final Assignment Agreement on March 16, 2009. (Ex. 56.008.)

Christina testified that she did not seek to engage another attorney to discuss the Assignment Agreement, because she treasured the relationship she had with Bob, and because Bob was the patriarch of the family whose word was always the final word. While this may have

been true, it is also true that Christina consulted with two attorneys about the terms of the Assignment Agreement (Exs. 149, 511, 166), and received two drafts before receiving the final version for signature. (Exs. 630, 522.) She understood she always could say no to the transaction or its terms, and not obtain her early distribution.

With this information, Christina decided to proceed:

> Q. You made the conscious decision to proceed with the assignment agreement, right?
>
> A. I decided to proceed, yes, against all my better judgment, but, yes, I did decide to proceed.
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> Q. And that decision was informed by all the e-mails, memos, discussions we've talked about between June of 2008 and March 2009, right?
>
> A. It was informed. Yes, I was informed all along the way, I suppose I could say yes to that.

(TR at 486-87.)

Asked why did she not write Bob or John Sherwood that the terms of the Assignment Agreement were unfair, or threaten legal action, Christina responded that "I had everything at stake and I wasn't going to be adverse to him." (TR at 474-75.) The Court finds that Christina made a strategic, informed decision to proceed with the Assignment Agreement, and release any claims against Bob as trustee related to the funding or administration of Francesca's Trust.

At trial, Christina argued that at the time Bob presented the Assignment Agreement for her to execute she believed that she would inherit from him or that what was in the Naify family's best interest was in line with Christina's best interest. Christina alleged Bob said to her, "This is inconsequential, so please sign and let's move on." (TR at 292.) Christina testified that her interpretation of this statement was that the amount she would receive because of the Assignment Agreement was "inconsequential" relative to the inheritance she would receive from him at the time of his death.

Again, to credit this testimony, the Court would need to find Christina to be a credible witness. It does not. Moreover, Christina knew two things when she signed the Agreement: (1) that John Sherwood was representing Bob; and (2) that the Assignment Agreement contained a *complete release* of claims against Bob as trustee. Finally, in her August 27, 2015 email to John Sherwood, Christina's sole statement pertaining to the unfairness of the Assignment Agreement was that she chose to sign it *because of Acela* and not because of any promises or statements Bob or John Sherwood made to her.

c. Court Approval of the Assignment Agreement

Finally, Christina claims that the release in the Assignment Agreement should not be enforced because the parties did not obtain court approval under section 15403(a) of the Probate Code.

As chronicled above, after months of detailed explanations and questions, all parties elected to proceed with the Assignment Agreement. Christina understood "we have decided not to terminate the trust in order to avoid going to court" (Ex. 628.001), and never challenged or complained about that decision. (TR at 409.) Both the March 1, 2009 memorandum from John Sherwood and the Assignment Agreement reiterated Christina's agreement "to waive any court approval of the accounting of the trusts and to avoid having to go to court you will waive any claims against Bob as trustee." (Exs. 523.001, 56.005-06.) Mr. Sugarman, the drafter of the Assignment Agreement and an experienced probate lawyer, agreed that no court approval was required. (TR at 3250.)

Moreover, Probate Code section 15403 authorizing court approval is permissive, not mandatory: beneficiaries "may" petition the court on termination of trusts. (*See* Roosevelt Report and testimony: Ex. 713.008-09, TR at 3611.) Mr. Roosevelt opined that section 15403 "did not require a Court order to approve or implement the Assignment Agreement" (Ex. 713.009):

> The Naify family had ample reasons to avoid and not risk the potential public exposure of its intra-family affairs in a public judicial proceeding. ... [A]ll of the requirements of Section 15403 had been met. All beneficiaries of Francesca's trust consented to the transaction, including not only Acela and Christina, but Bob, the holder of the life estates interest being assigned. In addition, in my opinion, the material purposes of the trust had been accomplished. The material purposes were that Francesca's estate had obtained a marital deduction at the time of her death and Bob, due to his enormous wealth, did not need the financial protection of the income or discretionary right to principal of the trust. (Ex. 713.008-09.)

In addition, since the entire trust was not being terminated, section 15403(a) "would not have guided the conduct of Bob as trustee of the Trust." (Ex. 713.008, TR at 3610-11.)

Under these circumstances with the informed consent of all parties — including Christina — the Court declines to invalidate the release based on the absence of court approval.[16]

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[16] Mr. Muttart testified that the Assignment Agreement also violated the spendthrift clause of Francesca's Trust. However, the Court credits Mr. Sugarman's testimony that this clause contained a scrivener's error.

The Court finds that Christina failed to meet her burden of proving the unenforceability of the release in the Assignment Agreement, and that the release bars Christina's claims.

E. FIGURES AND DAMAGES ASSUMING NEITHER STATUTE OF LIMITTIONS, LACHES NOR THE ASSIGNMENT AGREEMENT BARRED CHRISTINA'S CLAIMS

a. Legal Presumptions

Assuming arguendo that Christina's claims were not barred by statute of limitations, laches or the release of the Assignment Agreement, the Court will analyze the two remaining causes of action in the Fourth Amended Petition: Breach of Fiduciary Duty, citing Family Code section 721 and Probate Code section 16000 *et seq.*; and Return of Trust Property under Probate Code section 850. Both claims assert the same alleged elements of underfunding of Francesca's Trust's share of community property. In making its analysis, the Court notes that this case presents a panoply of competing legal presumptions and statutory provisions. It also presents novel questions concerning the extent of appellate precedent for which there is little guidance.

Christina asserts that her community underfunding claim is governed by Family Code section 760, which provides that "all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property." The community property presumption of Family Code section 760 may be overcome by, among other methods, direct tracing of the purchased asset to separate property funds, or by the Family Expense method which demonstrates that the community income was expended on expenses of the marital community, leaving only separate property funds with which to invest or acquire other assets. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 611; *In Re Marriage of Marsden* (1982) 130 Cal.App.3d 426, 442.)

The Co-Trustees argue that this Court should not apply the divorce law of Family Code section 760 in part because this action was filed 19 years after Francesca died and six months after Bob died, and because the passage of time has resulted in many important records being

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Compare the last sentence of Section 8.1 of Francesca's Trust (Ex. 639.037) to Section 8.1 of Bob's Trust executed two months later (Ex. 746.041) — changing the words from "surviving grantor" to the intended words of "grantor's spouse." According to Mr. Sugarman as drafter, the spendthrift language was intended "to make it absolutely clear that the [surviving] spouse is not precluded from assigning/transferring/disclaiming that interest for the purposes of creating gift tax rather than an estate tax." (TR at 3204; *see also* Mr. Roosevelt's testimony, TR at 3614-15.)

unavailable, as well as Bob being unavailable to testify. They also cite the probate case of *Estate of Wall* (2021) 68 Cal.App.5th 168 (Supreme Court *review denied* December 15, 2021), which held based on Evidence Code section 662 that "the form of title controls at death." (*See also In Re Brace* (2020) 9 Cal.5th 903, 917, favorably citing "the well-established default rule that form of title controls at death".) Under the facts of that case, *Estate of Wall* found that "the probate court erred in determining Family Code section 760 prevailed over Evidence Code section 662 in this probate action." (*Id.* at 175.)

This Court declines the Co-Trustees' invitation to broadly apply Evidence Code section 662 and *Estate of Wall*, because the Court views the holding in *Estate of Wall* as limited to real property assets for which the decedent held title. (TR at 3676.) Except as noted, the assets to which Christina asserts a community interest are not parcels of real property for which Bob held legal title. As to the assets involving real property, including Marbella Golf, title to most of this property was held by limited liability companies, limited partnerships and other investments in which Bob invested along with others.[17] Thus, the Court applies Family Code section 760 to assets Bob acquired during marriage other than real estate as to which he was an owner of record. Family Code section 770 is applicable to Bob's pre-marriage separate property and the income and profits derived therefrom: "Separate property of a married person includes all of the following: (1) All property owned by the person before marriage. (2) All property acquired by the person after marriage by gift, bequest, devise, or descent. (3) The rents, issues, and profits of the property described in this section."

As discussed below, the Court finds that Family Code section 760 is inapplicable to three of the four bases for damages asserted by Christina. With regard to those damage claims, the Court applies the civil preponderance of evidence standard under Evidence Code section 115. With regard to the fourth basis for damages, the Court finds that the Co-Trustees have rebutted the community property presumption.

Finally, Christina asserts that the undue influence presumption of Family Code section

[17] The real property assets owned 100% by Bob and claimed as community property on the Peais balance sheets are: Marbella Golf & Country Club, owned by Pacific Golf which is owned by Bob's trust (Ex. 66.037, Line 146); the investment apartments of Landmark 40 and 2 Fallon Place; and the house in Manchester, California. (Ex. 66.066, Lines 110, 111, and 119 to Balance Sheet 2.2B.) Nonetheless, as discussed below, the Court finds that even under section 760, the Co-Trustees have rebutted any community presumption as to Marbella Golf, Landmark 40 and 2 Fallon Place.

721 applies to the assets Bob acquired during marriage. The Court disagrees. The words and application of Family Code section 721 make clear that the section only applies to "transactions between" the two spouses during their lifetimes. The introductory language of section 721 specifically excludes Family Code section 21385 which provides that "[a]n at-death transfer, as defined in Section 21104, between spouses by will, revocable trust, beneficiary form, or other instrument is not subject to Section 721 of the Family Code or any presumptions of undue influence created by that section." (*See also Estate of Gagnier* (1993) 21 Cal.App.4th 124, applying section 721 to a premarital agreement.) The items cited in the Peais report concern Bob's alleged failure to marshal or transfer what Christina claims is community property at death. Christina does not challenge any lifetime transfers between Bob and Francesca, for example the Flaghouse property that Bob transferred to Francesca or the other homes he purchased for her with separate property assets. (*See, e.g.*, Ex. 791.001.) Accordingly, the undue influence presumption of Family Code section 721 does not apply to these assets.

b. Law Governing Disposition of Assets at Death

Probate Code section 100, subdivision (a) states: "Upon the death of a person who is married or in a registered domestic partnership, one-half of the community property belongs to the surviving spouse and the other one-half belongs to the decedent." This is true for the death of any spouse after January 1, 1985. (Prob. Code, § 105.) Accordingly, when the first spouse dies, one half of such property is subject to decedent's testamentary disposition. (Prob. Code, § 100.)

The "character of property as separate or community is determined at the time of its acquisition." (*See v. See* (1966) 64 Cal.2d 778, 783.) This presumption "is fundamental to the community property system" and "has greater force in cases where the marriage has been a long-continued relation than in cases where the marriage was entered into shortly before the acquisition of the property." (*In re Duncan's Estate* (1937) 9 Cal.2d 207, 217.) During their lifetimes, spouses share equal ownership interests in community property that vest immediately when the property is acquired unless changed by transmutation. (Fam. Code, §§ 1102, 751).

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c. The Community Property Presumption Applies at Death

Pursuant to both the Family Code and Probate Code, all property acquired by a spouse during marriage is community property, except as provided by statute. (Fam. Code, § 760 [the "community property presumption"]; Prob. Code, § 28.) Similar to Family Code section 760, the Probate Code defines "community property" in part as property acquired during marriage by a married person while domiciled in California. (Prob. Code, § 28, subd. (a).) There is nothing in the text of Family Code section 760 that expresses a limitation of the community property presumption to the context of marital dissolution.[18] (*In re Brace* ["*Brace*"] (2020) 9 Cal.5th 903, 927-928.)

The community property presumption applies in probate. (*In re Ney's Estate* (1963) 212 Cal.App.2d 891, 895; *Duncan, supra*, 9 Cal.2d at p. 217; *In re Estate of Caswell* (1930) 105 Cal.App. 475, 481.) In the probate context: "The presumption is that all property acquired by either spouse after marriage, otherwise than by gift, bequest, devise or descent, is community property. And while this presumption is not conclusive, the burden rests upon the party affirming the fact to the contrary. . ." (*In re Estate of Caswell, supra*, 105 Cal.App. at p. 481.)

As discussed above, Bob's record keeping clearly and consistently delineated separate and community property, during his marriage to Francesa. Based on the record evidence, John Sherwood's testimony, which the Court finds credible[19], and the expert testimony presented at trial, the following is the Court's determination as to the underfunding of the community at the time of Francesca's death.

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[18] The applicability of the community property presumption at death is bolstered by Family Code section 802 ("Section 802"), which states that the community property presumption "does not apply to any property to which legal or equitable title is held by a person at the time of the person's death if the marriage during which the property was acquired was terminated by dissolution of marriage more than four years before the death." The exception of Section 802 confirms the Legislature's intent that the community property presumption applies at death except in the specified situation, which did not occur in the instant case.

[19] John Sherwood's demeanor while testifying was appropriate, balanced and he directly answered questions to the best of his memory. Christina argued that his testimony regarding the May 7, 2007 note was contradicted by earlier testimony. Given the extent of his testimony and the fact that this proceeding has been pending for five years, the Court still finds overall that John Sherwood was a credible witness despite some inconsistencies.

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d. The Meaning of "Title on Death"

The Court recognizes that a tension exists between the community property presumption and the legal title presumption under Evidence Code section 662, which states, "[t]he owner of the legal title to property is presumed to be the owner of the full beneficial title" unless rebutted by clear and convincing proof. (*Id.*) The community property presumption characterizes property according to the date of acquisition, while the legal title presumption characterizes property according to the way legal title is held. Legal title is "one cognizable or enforceable in a court of law, or one which is complete and perfect so far as regards the apparent right of ownership and possession," synonymous with the term "record title." (*Solomon v. Walton* (1952) 109 Cal.App.2d 381, 386-387.)

The Court finds that *Brace* and *Estate of Wall* ("*Wall*") (2021) 68 Cal.App.5th 168 are solely limited to real property. These cases provide little direct guidance on this issue, but the language in both opinions appears to be limited to real property. *Brace* states: "In community property states, ownership turns on the method and timing of acquisition, while the traditional view in common-law states is that ownership depends on title" (*Brace, supra,* 9 Cal.5th at p. 916) and its holding is an exception for real property held by spouses in joint tenancy,[20] which is not applicable here. Both cases address only real property, not interests in LLCs, partnerships, and brokerage/bank accounts, at issue here.[21]

e. Christina's Alleged Damages

Christina's underfunding claims, premised on Probate Code section 1101, seek to restore "impairment to the claimant spouse's present undivided one-half interest in the community estate." The report and testimony by her expert, Alexandra Peais, asserted four bases for damages:

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[20] In *Brace*, one spouse died holding property in joint tenancy with the other spouse. The Court held that the surviving spouse inherits the property by gift, as the form of title is evidence that the deceased spouse intended that result. "To not honor the joint tenancy nature of the title in that limited situation would defeat the intention of the deceased spouse to give his/her own share of the community property to the surviving spouse." (*In re Marriage of Valli* (2014) 58 Cal.4th 1396, 1405-1406.)

[21] In *Brace*, the issue was "which presumption governs the characterization of joint tenancy property in a dispute between a couple and the bankruptcy trustee of one of the spouses." The Court finds that it is not controlling or even instructive in the instant case because no joint tenancy is at issue.

- Alleged breach of fiduciary duty by Bob in not exercising his United Artists options prior to the TCI transaction and exchanging them for TCI Notes: **$2.9 million**;

- Damages under a *Pereira* calculation for the community's share of the increase in value of United Artists during the marriage: **$76.7 million**;

- 1.514% of the value of the TCI Notes based on the purchase by Excelsior Amusement of certain shares of United Artists in 1977, 1978 and 1984: **$18.4 million**; and

- Balance Sheet 2.2B calculations, consisting of 188 line items, to which Christina asserts a percentage community interest: **$14.3 million.**

(*See* Peais Report, Ex. 66, and Summary of Underfunding Elements, Ex. 822; *see also* TR at 2601-03 (Ms. Peais affirming accuracy of Ex. 822).)[22]

The four bases of damages asserted by Christina total **$112.3 million.** (Ex. 822.) Ms. Peais asserted no damages for any alleged commingling or margin trading and she did not assert any damages under or flowing from the Assignment Agreement. With the damages limited to the four categories set out above, the Court discusses each in turn.

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[22] Post-trial, Christina has asserted damages beyond those contained in her expert's report or testified to by Ms. Peais, explaining "it's just math." As ruled at trial, those additional damage claims are untimely and therefore excluded. Christina's counsel agreed that expert opinions at trial would be limited to those expressed in expert reports and depositions, with the exception that experts could comment on a subject first raised at the opposing experts' deposition. (*See* Co-Trustees' Objections to Updated Peais Report (provided to Court and served on August 4, 2022; filed November 10, 2022.) On July 31, 2022 — the night before the resumption of the trial — Christina served an updated expert report for Ms. Peais which acknowledged an error in her original expert report, thereby reducing the balance sheet damages, but then sought to add additional deductions that increased the damages numbers. The Co-Trustees objected that the numbers sought to be deducted were available in discovery and included in Mr. Nakanishi's March 2022 reports (Ex. 697.014, .028 and Ex. 698.038), and thus the new damages numbers were too late. The Court agreed, and Christina withdrew her offer of the amended expert report. Accordingly, Ms. Peais did not testify concerning the alleged deductions or increased damages number.

Christina then attempted to have Mr. Nakanishi deduct the numbers on the stand. Although he was able to do the math, Mr. Nakanishi repeatedly testified that "I have no basis to know that" the numbers were correct or should be deducted, and that he did not agree with the numbers. In addition, on the stand Mr. Nakanishi was not able to apply the new community percentage of 7.92% posited by counsel's questions to the full 188-line Balance Sheet. In sum, there is no admissible evidence supporting any damages beyond those contained in Ms. Peais' expert report, Exhibit 66, and Christina's claims are limited to those numbers.

1 i. The *Pereira* Claim

2 The largest component of Ms. Peais' underfunding model — $76,669,602 — derives from her *Pereira* calculation. (Ex. 66.183-85.) Even though the parties agree that nearly all of
3 Bob's UA stock was separate property, under the *Pereira* line of cases Ms. Peais calculated the
4 increase in value of Bob's UA's stock between 1974 and the TCI acquisition in 1986. She set
5 that appreciation at $205 million, subtracted for Bob's separate property investment and
6 income tax, and identified the remaining $153 million as community property.

7 Christina bears the burden of proof, by the preponderance of the evidence, to establish
8 the applicability of *Pereira*. The community property presumption of section 760 does not
9 apply since the *Pereira* theory involves separate property Bob held prior to marriage, not property acquired during marriage. As Ms. Peais put it, Christina must prove what proportion
10 of the increase in the value of UA is "primarily or significantly attributable" to Bob's skill and
11 ability as opposed to other factors and enhancements. (*See Cozzi v. Cozzi* (1947) 81
12 Cal.App.2d 229, 232-33, burden on proponent.)

13 There are two lines of cases for measuring apportionment of the increase in value of a
14 separate property business during marriage: *Pereira v. Pereira* (1909) 156 Cal. 1, 7, community
15 receives the increase in value during the marriage that is above the reasonable rate of return; and *In re Marriage of Van Camp* (1921) 53 Cal.App. 17, 27-28, community receives reasonable
16 compensation for the value of the community property services provided to the business during
17 the marriage with the remaining increase separate property. The *Pereira* method applies where
18 the business appreciation is primarily due to the spouse's efforts, for example in increasing the
19 value of a professional services or retail business. (*See Millington v. Millington* (1968) 259
20 Cal.App.2d 896, 908.) The *Van Camp* approach controls when there is more than minimal
21 community effort in the business, but the accrued profits are mainly due to the nature of the business or outside forces, for example stock or other capital or real property investments, *or*
22 *efforts by others*. (*See In re Marriage of Brooks* (2019) 33 Cal.App.5th 576, 590, 592, even
23 though husband made more than minimal contribution to the growth of his separate-property
24 tech company, *Van Camp* method still appropriate since husband's efforts were not the "chief
25 contributing factor" in growth).

26 Under either test, the community is entitled only to the portion of the profits fairly
27 attributable to the time, talent, and personal effort of the spouse, as opposed to appreciation due

to capital markets, distinct investments, or work of others. (*Beam v. Bank of America* (1971) 6 Cal.3d 12, 17-19.) The burden is on the spouse asserting the community property interest to prove what proportion of an increase in value of a separate property business is attributable to the separate property spouse's skill and ability as opposed to other factors and enhancements. (*See Cozzi, supra,* 81 Cal.App.2d at 232-33, wife failed to prove how much of business' increase in value resulted from husband's skill and ability; any portion attributable to his skill was spent on family expenses.)

The Court finds that Christina has failed to meet her *Pereira* burden. While she performed the *Pereira* calculation, Ms. Peais had "no opinion" on whether it applied. Christina's other experts also did not opine on *Pereira*. The Court finds that based on the uncontroverted evidence at trial, a *Pereira* analysis is not applicable here.

John Sherwood and Co-Trustee's expert, Neil Beaton, testified that the dramatic growth in the value of UA in the 1980s came from its acquisition of 23 different cable television businesses. In a summary of company history, Bob wrote: "Marshall encouraged the growth in cable particularly with the support of the executives. Bob was aggressive in pursuing growth of multiple theaters in all areas with full support from Marshall and the other executives." (Ex. 607.003.) John Sherwood testified that starting in 1981, led by Marshall, UA made major acquisitions of cable companies, and, based on Marshall's insistence, successfully outbid Dow Jones and Knight-Ridder to retain one of the cable companies. Moreover, the cable companies were under the direct purview of Salah Hassanein in New York and operated in Connecticut, not in San Francisco where Bob and Marshall lived and worked. The 1982 UA Annual Report reflects "a special bonus of $100,000, which was paid to Marshall Naify in recognition of his contributions to the company during 1981, including his leadership in the company's successful effort to retain its cable television interests." (Ex. 595.093, note 5.) As John Sherwood testified, "TCI wanted the cable business. It did not want the movie theater business," and so to obtain the cable business, "TCI bought the Naifys' stock." (TR at 1557.)

Mr. Beaton's expert report (Ex. 709) corroborates both John Sherwood's testimony and the documents in evidence. Mr. Beaton's report established how during the 1970s and 1980s UAs' theater revenues and profits were relatively flat. Starting in the 1980s, however, the profit from the newly-acquired cable companies rose dramatically, and by 1986 cable earned double the profit of the theaters, on much smaller revenues. (EBITDA Chart, Ex. 709.007.)

Mr. Beaton explained:

> [I]f you look at the growth, Your Honor, going from approximately 32 million [1984] to about 62 million [1985], that's almost 100% growth, That's huge in the cash flow world. Then between 1985 and '86, it went from 62 to just about 79 million, about, again, another 25, 30% jump. That's what drives value. ... So this is the basis upon which I say cable was the reason -- the primary reason for the increase in value between '74 and '86.

(TR at 3091.)

In summary, Mr. Beaton testified that TCI was "acquiring [UA] for the cable business, and they were getting rid of the theater business for the very reason that cable was ... the driver of value." (TR at 3094.) Marshall, not Bob, led UAs' efforts to buy and retain the cable companies that drove the value of the company, while Bob focused on the theater side of the business. (Ex. 607.003.) Weighing the evidence, Christina failed to prove that Bob's efforts "primarily or significantly" caused the increase in the value of UA during the marriage.

Responding to the *Van Camp* line of cases, Mr. Beaton further testified that Bob was more than adequately compensated for the value of his services to UA. Mr. Beaton's report offered uncontradicted evidence that aggregating his salary, board compensation and options during the marriage, Bob was paid $7.7 million more than average market compensation for CEOs/directors in similarly-sized companies at the time. (Ex. 709.031.) Accordingly, the evidence showed that the community was, if anything, overcompensated for Bob's work for UA.

Based on all of the uncontradicted testimony, analysis and record evidence, Christina's $76.7 million *Pereira* damage claim is rejected.

ii. Interest in UA Stock Owned by Excelsior Amusement

Christina asserts a community property interest in about 5500 shares of UA stock acquired by Excelsior Amusement in 1977 and 1978, and another 2000 UA shares acquired by Excelsior in 1984. (Ex. 66.046, Ex. 597.001.) Based on these new 7500 shares, Ms. Peais calculated a 1.514% community interest in the UA stock Bob sold to TCI. Balance Sheet 2.2A (Ex. 66.027, Line 68) then applied this percentage against the TCI Notes (valued as of November 1999 – over two years after Francesca's death in August 1997), resulting in an additional $35.4 million community interest or $17.7 million added to Francesca's alleged

equalizing payment.[23] The Court rejects Christina's claim for this UA stock because it is unsupported by the evidence adduced at trial.

Christina was unable to establish that Bob provided community property funds to Excelsior Amusement to fund the purchase of the UA shares or to reimburse Excelsior in whole or part for such purchases. In lieu of such evidence, Christina asserts under Family Code section 760 that the Co-Trustees must prove that Bob did not reimburse Excelsior from the community account for his percentage of these UA stock purchases.

To assess this claim, the Court initially must determine if the community property presumption of Family Code section 760 — pertaining to "property ... acquired by a married person during the marriage" — applies to this theory for damages. There are two points in this regard. First, it is undisputed that the 7500 UA shares were acquired by Excelsior Amusement, not Bob. At the time, Excelsior Amusement was a decades-old independent company, with two theaters, investment real estate, and its own cash flow. As discussed above, Bob purchased his interest in Excelsior Amusement in 1953 (Ex. 596A), and made no further investments in it thereafter. Moreover, the parties agreed that Bob's 50% interest in Excelsior was his separate property. Finally, as discussed below, Ms. Peais confirmed that there is no "evidence of any direct purchase by Robert" of any of the stock acquired by Excelsior. Thus, the Court finds that based on this evidence, the community property presumption does not apply to this 1.514% component of Ms. Peais' damages model since Excelsior Amusement, not Bob, acquired the new shares.

Secondly, Christina failed to provide evidence to pierce the corporate veil and apply section 760 to Excelsior Amusement's purchase as though Excelsior were Bob's alter ego. Further, even if the Court were to apply the community property presumption, the evidence rebuts Christina's premise that Excelsior Amusement funded its purchase of the new UA shares with a payment by Bob from community property sources. Examining the 5500 UA shares acquired by Excelsior in 1977 and 1978, Ms. Peais conceded there is no evidence that Bob made "any payment to Excelsior Amusement in connection with" either purchase. Nor is there evidence of any payment from community funds in 1977 or 1978, or any loans from Bob at this time.

[23] The only difference between Ms. Peais' Balance Sheet 2.2A and 2.2B is the application on Lines 68 and 86 of 2.2A of the 1.514% interest to the TCI Notes and certain Todd-AO stock.

Additionally, in 1978 and 1979, Excelsior Amusement made loans to Marshall of $75,000 and $40,000 — indicating Excelsior had at least this much liquidity. (Ex. 804.) Thus, as to the 5500 United Artists stock purchased by Excelsior Amusement in 1977 and 1978, the Court finds that community funds were not used for these purchases and that any presumption to the contrary has been rebutted.

Ms. Peais also had "no information that Robert paid any money to Excelsior Amusement for purposes of the 1984 purchase of UA stock." (TR at 2640.) Instead, she pointed to loans made to Excelsior by Bob and others. However, she acknowledged that a loan is not the same as a payment. (TR at 2656 (Peais: "a loan is not a capital contribution … [i]f it's paid back").) Also, the loans, which started in 1980, were either *de minimus* or were funded from Bob's personal property account. Exhibit 599 shows that in 1981 Bob made a $2,000 loan to Excelsior Amusement, while larger loans were obtained from the Ahwanee property and Marshall. (Ex. 599.047.) By 1984, Bob's loan to Excelsior amounted to only $3,300 (Ex. 599.001) — an amount Ms. Peais agreed "wasn't enough to buy back the 1984 stock." (TR at 2652.)

Ms. Peais also relied on a $150,000 loan made by Bob to Excelsior Amusement, documented as of December 31, 1984. (Ex. 599.068.) The Court notes that since Bob is deceased, the Co-Trustees were unable to present evidence on why he made this loan. But John Sherwood explained that the Cash Disbursement notation ("CD229") in the General Ledger Posting Reference means that this loan was made from Bob's personal property account. (Ex. 599.068.) Ms. Peais agreed that the $150,000 loan "came from the account that is labeled in the general ledger [] as the separate property checking account." (TR at 2656.)[24] While Ms. Peais is correct that an account label alone does not explain the source of funds, based on John Sherwood's testimony, the evidence of how the records were maintained and the evidence of other transactions involving Excelsior Amusement, the Court finds that this loan was made from Bob's separate property, rebutting any presumption to the contrary.

Finally, Ms. Peais cited four payments, totaling $39,000, made from Bob to Excelsior Amusement in 1986, identified as service charges and management fees. (Ex. 807.002-04.) John Sherwood explained that these payments reimbursed Excelsior Amusement for

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[24] John Sherwood testified that the loan would have been paid off as part of the TCI transaction when Excelsior Amusement was liquidated.

compensation of employees, including him, and had nothing to do with redemption of UA stock by Excelsior Amusement. The Court credits John Sherwood's testimony on this point. Despite the passage of time, John Sherwood had a good recollection of events and the workings of Excelsior Amusement. In any event, Ms. Peais testified, and the Court finds, that "the four payments in 1986 could not have been used for stock redemptions in 1977, 1978, or 1984." (TR at 2659.)

Accordingly, as to the 2000 shares of UA stock purchased by Excelsior Amusement in 1984, the Court finds that no community funds were used for this purchase, again rebutting any presumption that might apply.

Finally, and even if the Court were to consider awarding these damages, the Court notes that Ms. Peais' opinion inflated the value of the TCI Notes. Ms. Peais valued every item on her 188-line Balance Sheet as of the date of Francesca's death in August 1997 — *with the exception of the TCI Notes*. Ms. Peais calculated the value of the TCI Notes more than two years later in November 1999 based on the underlying stocks' share price (TR at 2625), thereby recording the Notes' value at $2.3 billion (Ex. 66.027, Line 68) rather than the $637 million value at the date of death. This later valuation date increased the amount of alleged community property on Balance Sheet 2.2A, Line 68, from $9.6 million to $35 million.

Ms. Peais explained that in family law post-death valuations are used "where there are assets that are very difficult to value." (TR at 2219, 2236.) Nonetheless, Ms. Peais appropriately conceded that "it would have been very easy for [her] to find out what these three stocks were selling for in August 1997 as opposed to November 1999." (TR at 2629.) The Court therefore finds that there was no difficulty in valuing these stocks as of Francesca's death in August 1997; their value should be determined at that time, thereby decreasing this damages claim fourfold.

In sum, whether applying a preponderance of evidence standard, as the Court believes is appropriate, or concluding that the community property presumption has been rebutted, the Court finds that Bob did not contribute community funds towards any of these three UA stock purchases by Excelsior Amusement. Thus, the $18.4 million of alleged underfunding of Balance Sheet 2.2A, derived from the 1.514% calculation, is rejected as a basis for a damages award.[25]

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[25] Since the two Balance Sheets are identical other than the 1.514% calculation discussed above, the Court notes that Balance Sheet 2.2A suffers from the same infirmities discussed below as to Balance Sheet

iii. Alleged Breach of Duty Re the UA Options

Ms. Peais asserts $2,987,998 in damages for breach of fiduciary duty based on Bob not converting 360,000 options into UA stock and selling the shares to TCI. (Ex. 66.053-56.) The Court disagrees. First, as indicated at oral argument, the Court agrees with the Co-Trustees that the community property presumption of Family Code section 760 does not apply to this basis for damages. This claim does not raise any question about the character of property acquired during marriage. The UA options were always community property and treated as such on Francesca's estate tax return (IRS Form 706). (Ex. 541.006-07.) The issue is whether Bob breached his duty by not exercising the community options earlier. Accordingly, the Court applies the preponderance of evidence standard to these damages claim.

Second, the documents and testimony establish that TCI purchased only the Naify family stock. Although aware of the community options, there is no evidence that TCI wanted to purchase them. The Sales Agreement confirms purchase of only the Naify family's 50.1% ownership interest (Ex. 785.073, ¶12.18), despite identifying the community options held by Bob and Marshall. (Ex. 785.092.) John Sherwood testified that TCI "did not need [Bob's option shares] to acquire 50.1%, and did not want to buy them." (TR at 1560.) John Sherwood's testimony is uncontradicted on this point. In addition, Marshall also did not exercise his options, which further corroborates John Sherwood's testimony that TCI did not need to acquire more shares than it did in the transaction. (*Id.*) Ms. Peais also testified that she was "not aware of any facts that TCI was actually interested in buying these additional option shares" and she agreed that "TCI did not need these option shares to obtain control of United Artists." (TR at 2607, 2610.)

For all these reasons, the Court finds that there is no evidence in the record to support any obligation by Bob to exercise the options prior to the TCI transaction, or for TCI to purchase them. Someone may decline to exercise an option or sell stock for many reasons, and the Court will not speculate on Bob's reasons. At the same time, the Sales Agreement and the testimony by John Sherwood sufficiently establish that TCI did not need or want to buy the option shares. The Court rejects Christina's claim for breach of fiduciary duty in connection with the UA stock options.

2.2B. Hence its community percentage and line-item values are overstated, and it would need to be adjusted for the same line items and assumption arguments referenced in section iv. below.

iv. Underfunding Asserted from Balance Sheet 2.2B

The final component of Christina's alleged damages is taken from Ms. Peais' Balance Sheet 2.2B, and culminates in a claimed "equalizing payment" to the Francesca Trust of $14,281,784. (Ex. 66.039.) Balance Sheet 2.2B consists of 188 line items of assets held by Bob as of Francesca's death.

As noted above, the Court will apply a Family Code section 760 analysis since these items were acquired during marriage. The Court acknowledges the Co-Trustees' argument that section 760 does not apply as well as their concern that it would be inequitable to apply section 760 here given Christina's delay in filing this case until 19 years after Francesca's death, the loss of important records and, most significantly, the death of Bob Naify. Bob would have been the most important witness on the issues raised by Christina in this proceeding. Indeed, the parties have cited no California probate case where Family Code section 760 has been applied with a similarly long delay in filing and where both spouses are deceased. Nonetheless, in the Court's view, if it were to find damages, the law regarding the Co-Trustees' affirmative defenses — particularly statute of limitations and laches — and denial of prejudgment interest provides the Court with sufficient tools to reach an equitable result.

The cross-examination of Ms. Peais revealed several erroneous or unsupported items in Balance Sheet 2.2B, Exhibit 66. The Court first addresses those items since they must be subtracted from the asserted $14.3 million in underfunding.

1. Adjustments to Balance Sheet 2.2B

Community Percentage Calculation. Except for those assets she specifically investigated and addressed in her report, based on certain stocks and other assets owned by Bob at the end of 1986, Ms. Peais opined that 11.042% of his assets acquired from 1987 to 1997 were community property. (Ex. 94.) She then applied that percentage to the majority of post-1986 items on Balance Sheet 2.2B to obtain a community interest.

Exhibit 94 and the 11.042% were based in part on Ms. Peais' assumption that Bob held only 37,031 pre-marriage shares of Homestead. After reviewing Mr. Nakanishi's Rebuttal Report 2 (Ex. 708.003), Ms. Peais agreed that due to stock splits the actual number of Bob's pre-marriage, separate property Homestead shares was 228,620. This change reduced Ms. Peais' post-1986 community property percentage from 11.042% to 5.821%. (Ex. 823.) Mr. Nakanishi then testified based on Exhibit 824 that the lowered percentage reduced the

Francesca Trust equalizing payment from $14.3 million to $11.7 million. (Ex. 824.) The Court finds that this 5.821% post-1986 community allocation applies to Balance Sheet 2.2B.

Bob's Retirement Account. Line 96 of the Balance Sheet claimed a $2.6 million community interest in Bob's UA retirement account (Ex. 66.036), half of which is applied to the community equalizing payment. Based on the testimony of John Sherwood and expert Michael Roosevelt, and consistent with *Boggs v. Boggs* (1997) 520 U.S. 833, this Court finds that John Sherwood correctly concluded that "when Francesca died, any community interest in the retirement plan ceased." (Ex. 600.001, TR at 2619-20.) As Mr. Roosevelt explained, after *Boggs* "to have included an interest in Bob's retirement plan in Francesca P. Naify's estate would have been a violation of federal law." (Ex. 712.004.)

Accordingly, the Court will eliminate the $2,596,108 community value in Line 96.

$2.3 Million Double-Counting. On cross-examination, Ms. Peais agreed that five of her specific Balance Sheets items — for which she attributed a total of $2.6 million in community value based on the K-1 values — were duplicated on Line 83 as to Other Equities where she assigned $2.3 million of community value. Accordingly, the Court will eliminate all values in Line 83, including the community property value of $2,337,729.

Marbella Golf. Applying her community percentage, on Line 146, Ms. Peais assigned a $2.47 million community property value to Marbella Golf. (Ex. 66.037.) The Court rejects any community property interest in Marbella Golf, for two reasons. First, it is undisputed that Marbella Golf was owned by Bob's Trust, through the Pacific Golf holding company. (*Id.*, Line 146.) Accordingly, in the Court's view, this real property asset is subject to the title presumption of Evidence Code section 662 and the *Estate of Wall* case, and Christina has not adduced the "clear and convincing evidence" required to rebut Bob's separate property title. In any event, as discussed next, the Co-Trustees have rebutted any community property presumption based on Probate Code section 760.

Mr. Nakanishi's Exhibit 704, page 3, traced $20.7 million investments in Marbella Golf to four of Bob's separate property accounts, showing only $2,326 going to Marbella Golf from the community account, apparently by mistake. (Ex. 800.) Further, in his application for credit for Marbella Golf, Bob applied for only "individual credit" and did not submit Francesca's signature for "joint credit with spouse" (Ex. 794.001-.004), another indicia of separate property.

As to this item and many of the items that follow, Ms. Peais testified that Mr. Nakanishi's tracing analysis should not be adopted because some of the accounts from which Bob's separate property payments were made received community funds. As described above, the Court declines to ignore the separate property sources for Bob's investments where, based on the testimony of John Sherwood and Mr. Nakanishi, the Co-Trustees attempted to identify and provide credit for every transfer of funds from and to the community located in the documentary record. (*See, e.g.* TR at 3534 (John Sherwood directing Mr. Nakanishi to provide credit for $2.4 million of community stock sold from Bear Stearns.) While a traditional divorce case may feature a detailed, transaction-by-transaction tracing, the experts agree such a tracing was not possible here due to the passage of time.

The record also shows Bob's intent and meticulous efforts to keep community and personal funds separate. (Exs. 791.001, 799.002, 800.001.) Thus, based on this record as to Marbella Golf and the items that follow, the Court finds that the Co-Trustees have "adequately traced" any commingling to their separate and community property sources, thereby: (a) demonstrating that the net transfers were in favor of the community; and (b) rebutting the community property presumption. (*Marriage of Ciprari, supra,* 32 Cal.App.5th at 91; *In Re Marriage of Braud* (1996) 45 Cal.App.4th 797, 822-23.)[26]

The Court also notes the *de minimus* community funds directed to Marbella Golf or Bob's other investments and similarly finds that the overall net transfers between separate property and community resulted in a net benefit to the community.[27]

Accordingly, based on either Evidence Code section 662 or the rebuttal of the community property presumption of Probate Code section 760, the Court rejects any community property interest in Marbella Golf, and will eliminate the $2,466,775 community value in Line 146 from the Balance Sheet.

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[26] As described below, Mr. Nakanishi's Family Expense analysis (Ex. 700) also supports a finding that Bob's investments after 1986 were made with his separate property funds.

[27] Ms. Peais cited a $200,000 transfer of funds from a Bear Stearns account in 1993 (which received $606,000 of community property money) to Bob's personal property account, and then a subsequent payment to Marbella Golf of $185,000 from the personal property account. But she did not consider Mr. Nakanishi's testimony that at the time of the transfer from Bear Stearns to the personal property account, the Bear Stearns account had at least $580,000 of other money — more than enough to fund the $200,000 transfer. The Court credits Mr. Nakanishi's testimony and finds that the $200,000 transfer represented separate property in the Bear Stearns account.

Exhibit 815. In Exhibit 815, John Sherwood traced various investments into 23 Balance Sheet items, showing 223 payments totaling $15,993,897.41 from Bob's separate property accounts, and only one mistaken payment of $1,014 from the community property account. (TR at 1666-67.) Nonetheless, Ms. Peais allocated "a community property value of $4.5 million on the balance sheet deriving from these entities." (TR at 2684-85.) Because of her position on commingling, Ms. Peais "did not try to identify the funding source or funding account for the real property and other business assets listed on [her] balance sheet" (TR at 2599), and did not consider that all but a *de minimus* amount ($1,014) of the investment payments were made from Bob's separate accounts.

Under the facts of this case, the Court finds that the Co-Trustees have adequately traced the separate funding for these 23 entities and rebutted the community property presumption. The Court finds that these 23 items were Bob's separate property and therefore will eliminate the community value from line items 110, 119, 124-127, 129-132, 136-139, 143, 148-152, 155, 156 and 158.[28]

Todd AO. As to the Todd AO stock on Lines 39 and 84 (Ex. 66.034-35), Ms. Peais identified community value of $7,781,936. But John Sherwood testified with documentary support and no contradiction that all but $48,126 of that value derived from Bob's purchase on March 23, 1988 of 444,000 Todd AO shares, with a payment of $2,471,700 from his separate property Merrill Lynch account. (Ex. 808.003-04.) The Court credits that evidence and as a result Line 39 of the Balance Sheet will be reduced to $0, and line 84 will be reduced to $48,126.

BART GO Bonds. The Balance Sheet assigns these bonds on Line 55 a community value of $648,258. (Ex. 66.034.) Again, however, John Sherwood testified, and the records established that the bonds were purchased on December 23, 1986 and held at Goldman Sachs (Ex. 545.011), right after the Goldman account received $18 million of Bob's separate property money from the TCI transaction. (Ex. 698.005, note 2.) The Court finds that the BART GO

[28] Several of these Balance Sheet items must be disregarded for independent reasons. For Landmark 40, 2 Fallon Place, and the Manchester house (Ex. 66.066, Lines 110, 111 and 119), the Court finds that Christina has not rebutted the title presumption of Evidence Code section 662 for these real property parcels owned by Bob. Also, as to Landmark 40 the Court struck the hearsay source for the asserted community value. The Court also finds that Northwest Nevada Industrial Park, Line 156 (Ex. 66.038), must be reduced to $0 since Francesca executed two Quit Claim deeds, one for the property and one for the holding company. (Ex. 587.012, .020.)

Bonds are Bob's separate property and therefore this line item will be reduced to $0.

Dover Shares. On Lines 34 and 35, Ms. Peais identified $182,756 and $137,064 in community value for Dover stock. However, she further testified that there needed to be "some reduction to these two line items based on the separate property pre-marriage shares" of Homestead (the predecessor to Dover), which she agreed needed to be increased from 37,031 to 228,620. (TR at 2711-12.) Ms. Peais did not calculate the value of that reduction, but Mr. Nakanishi did. He testified that these two lines items should be reduced by $199,000. The Court so finds.

E-Trade Account. Line 29, which totals Lines 26-28 (Ex. 66.033), asserts a community value of $22,424. However, the trial exhibits show that the account was funded in 1997 with a $300,000 deposit from Bob's personal account. (Ex. 814.010.) Accordingly, the remaining balance in this account is Bob's separate property, and these line items will be reduced to $0.

2. Adjusted Balance Sheet

Adjusting the amounts in evidence with the revised community percentage of 5.821% from Exhibit 824, and then reducing the community property value for the adjustments discussed above renders an overall community property value of $29,350,268, with Bob having received $17,945,846 and Francesca's Trust having received $11,404,422. (Line 186.) As a result, Bob received $6,541,424 more community property than Francesca's Trust, and Francesca's Trust's equalizing payment (one-half of that amount) is $3,270,712. (Line 187.)

3. Other Balance Sheets Considerations

The Court next considers two other factors affecting the validity of the remaining Adjusted Balance Sheet underfunding numbers: first, the "No Liquidity" assumption; second, Mr. Nakanishi's Family Expense analysis.

After the Court's adjustments, the remaining line items on the Adjusted Balance Sheet rely on Ms. Peais' assumption that Bob "did not have significant separate property liquidity." (Ex. 66.013, item 2.) To form this opinion, Ms. Peais examined Bob's 1974 financial statements, noting there "weren't a lot of liquid assets." (TR at 2663-64.) Ms. Peais therefore treated all of Bob's investments from 1974 through 1986 as community regardless of funding source; in other words, due to her view that Bob lacked liquidity, she assumed that all of Bob's investments during that time were made using community assets. (*See, e.g.,* Adjusted Balance

Sheet, Line 32, claiming $4.2 million of "Equity acquired during marriage (1974-1986)" as community property.) She then used the 1974-86 assets she characterized through her no-liquidity assumption to calculate her community property percentage (ultimately, after adjustment at trial, 5.821% (Ex. 823), applied against the majority of assets Bob acquired after 1986. This results in another purported $637,495 of "Equity acquired during marriage (1987-1997)" claimed on Line 33 of the Balance Sheet (Ex. 66) as community property.

In response, Mr. Nakanishi produced his Rebuttal Report 1 (Ex. 707.004), establishing that even prior to the TCI transaction Bob had liquidity of at least $4.6 million (42% of cash flow). Ms. Peais took exception with Mr. Nakanishi not subtracting income tax, but even applying an assumed 50% tax rate, her Exhibit 239 still identified $2.3 million of separate property cash flow for Bob. She also agreed that Bob had "more than sufficient" separate property cash to pay for the $438,000 worth of separate property stocks he actually purchased between 1974 and 1986. (Ex. 703.003.) Thus, the Court finds that Bob had more than sufficient "separate property liquidity" to pay for investments between 1974 and 1986.

Moreover, the Court finds that Mr. Nakanishi's Family Expense analysis independently proves that Bob's investments after 1986 were made from his separate property assets. The Family Expense method, or recapitulation, can be used "to establish the character of the property" and rebut the community property presumption of Family Code section 760. (*See v. See* (1966) 64 Cal.2d 778, 783; *In re Ades' Estate* (1947) 81 Cal.App.2d 334, 339, "[e]vidence that there was no excess of community income over living expenses is as effective to prove that all assets of the estate are separate property as a specific showing from which separate source each asset flowed.") The law presumes that community income and assets are first used on community family expenses, as opposed to investments. (*See Huber v. Huber* (1946) 27 Cal.2d 784, 792.)

Mr. Nakanishi analyzed the community's income and expenses between January 1986 and Francesca's death in 1997. During those 12 years the community ran a "deficit" of over $4.5 million, with the shortfall paid by Bob's separate property cash. (Ex. 700.003.)[29] (*See, e.g., In re Arstein's Estate* (1961) 56 Cal.2d 239, 240-42, husband's estate found to be entirely separate

[29] As an example, Bob had to use his separate property funds to buy a second community property home in Rancho Mirage "[b]ecause the community property bank account did not have enough money to pay for the full purchase price." (Ex. 791.001, TR at 1412-13.) This document shows both separate property liquidity prior to 1986 and insufficient community assets to meet community expenses.

property even though funds were commingled, where community income during marriage was maximum of $71,931.25 and family living expenses were at least $108,868.40.) Ms. Peais did not perform a Family Expense analysis. The Court finds that Mr. Nakanishi's Family Expense analysis is correct and rebuts the community property presumption to the extent that presumption is applicable for several reasons.

First, both experts agreed that under the facts of this case — particularly given the passage of time and the absence of critical records — a full, "family law" tracing was not possible. Second, the Court declines to consider only one side of the financial equation with respect to monies flowing from the community account to Bob's personal accounts. Transfers in the other direction must be considered as well. Mr. Nakanishi appropriately gave credit to all identified transfers between and among Bob's personal accounts and the community account. On balance the record shows that Bob's separate funds supported the community and paid its taxes to the extent of millions of dollars.

Third, "mere commingling of separate property and community property funds does not alter the status of the respective property interests, provided that the components of the commingled mass can be adequately traced to their separate property and community property sources." (*In re Marriage of Ciprari* (2019) 32 Cal.App.5th 83, 91. *See also* 32 Cal.Jur.3d Family Law § 476: "'Commingling' is generally a word of art used to connote the mixture of separate property or funds with community property or funds, in such a manner as to make segregation impossible, thus requiring the application of the presumption that it is community property.") Here, given the available records, Mr. Nakanishi adequately traced the deposits of community funds into separate accounts, and provided credit for those transfers. The Court finds Mr. Nakanishi's analysis to be credible and correct. This is so even though Ms. Peais did not ascribe any damages from the alleged commingling.

In conclusion, the Court accepts and credits the analysis by Mr. Nakanishi and the overall conclusion that, for the period 1986 to 1997, the community benefited from Bob's separate property in the amount of $5.4 million.

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4. **Summary of Alleged Underfunding Based on Balance Sheet 2.2B**

In sum, based on the analysis above as to separate property sources for many of the items on the Balance Sheet, Bob's demonstrated cash liquidity between 1974 and 1986, and the deficit of community income compared with expenses between 1986 and 1997, the Court finds that the Co-Trustees have rebutted the community property presumption of Family Code section 760. Thus, as to the $3,270,712 of alleged underfunding to Francesca's Trust indicated by the Adjusted Balance Sheet, there was no underfunding and Christina is not entitled to recover damages.

f. **Damages Calculation Is Limited, Even Assuming a Community Underfunding**

As stated above, Court finds no underfunding damages on Christina's allegations re breach of fiduciary duty concerning the UA stock options, the *Pereira* calculation, or the alleged community interest in the UA stock purchased by Excelsior Amusement. It also does not find underfunding based on payments by Bob from his separate property for community debts. Even assuming, however, that this Court is incorrect as to the last finding, applying Family Code section 760 and the Adjusted Balance Sheet, the Court finds, in the alternative, that Bob received $6,541,424 more community property than Francesca's Trust.

To this amount, however, the Court must make several adjustments. First, Mr. Nakanishi's Exhibit 702 demonstrated that for the period from 1986 to 1997, Bob's personal property accounts funded the community and its expenses by at least $5.4 million. (Ex. 702.003.) Given that the essence of this case is to determine how much, if any, community assets Bob received in excess of Francesca's Trust, it is equitable to consider the separate property assets Bob contributed for community taxes and other community expenditures during the marriage. The Court therefore subtracts this $5,424,392 of separate property funding from the $6,541,424 difference under the Adjusted Balance Sheet, yielding a net excess of community assets received by Bob of $1,117,032.

From this net excess amount, it is undisputed that Bob and Francesca shared a 50% interest, making Francesca's share of the net excess $558,516.

Two more adjustments must be made to Francesca's share of excess community funds

received by Bob to determine the amount awarded to Christina. First, it is undisputed that during his life Bob was entitled to all income earned from the Francesca Trust assets. Putting aside the Assignment Agreement, Christina's and Acela's entitlement to the residuary of the Francesca Trust assets arose only on Bob's death. When Bob died, his trust paid 40% estate tax on his assets, including the assets (or assets derived from them) on the Adjusted Balance Sheet. (*See* Ex. 150.002: total estate tax in Item 6 ($932,977,949) divided by total estate value in item 5 ($2,332,580,373).)[30] Thus, Francesca's share of the excess community funds received by Bob must be reduced by 40% since this amount has already been paid by the Robert Naify Trust in estate taxes. The $558,516 reduced by this 40% tax allocation equals $335,110.

Finally, in 2021, Christina's sister Acela settled her claims against the Co-Trustees. (Exs. 616, 617.) In that settlement, Acela assigned all her claims relating to this case, Christina's claims, and any claimed underfunding of Francesca's estate to the Co-Trustees. (Exs. 616.035-36, 617.003.) To account for Acela's share, the Court reduces the amount of the Francesca Trust's underfunding after the tax adjustment by 50% to arrive at the monies owed to Christina in this matter.

In sum, the Court finds that Christina's individual share of the Francesca Trust underfunding, after allocating for the taxes paid by the Robert Naify Trust and for Acela's 50% share, equals $167,555.

F. INTEREST, ENHANCED DAMAGES, AND ATTORNEYS' FEES

a. Prejudgment Interest Is Denied

In her largest scenario, Ms. Peais' Report seeks $261 million of interest as damages, accruing from Francesca's death in 1997. (Ex. 66.006, Scenario A ($373 million total damages subtract actual maximum damages of $112 million.) There are several problems with this claim.

First, Bob was entitled to all interest on Francesca's Trust through the time of his death in April 2016. (Ex. 746.015, section 5.4.3.1: "[t]he trustee shall pay or apply for the benefit of the grantor's spouse during the grantor's spouse's life, the entire net income of the Marital Trust and the Family Trust.") In addition to this mandatory trust clause, payment to Bob of the trust income was required to uphold the marital deduction. In sum, the residuary beneficiaries of the

[30] Ms. Peais' damages model made no deductions for taxes on any underfunded assets or for Acela's share of the Francesca Trust residuary. However, Ms. Peais agreed that Christina was not entitled to receive any alleged underfunded amount without allocations for taxes and Acela's share. This Court has an obligation to see that taxes paid are properly credited in any award.

Francesca Trust — Christina and Acela — had no right to income from Francesca's Trust until after Bob died. Thus, the Court finds that interest on any alleged underfunding could only begin to accrue with Bob's death in 2016.

Normally, interest prior to judgment is not awardable where, as here, the amount of damages are not a "sum certain." Civil Code section 3287(a). Christina relies on Probate Code section 16440(a) which provides three measures of damages with interest, for a breach of fiduciary duty resulting in: "loss or depreciation in value of the trust estate;" "profit made by the trustee;" or "profit that would have accrued to the trust estate." First, the Court notes that Christina's Petition has not pleaded section 16440. Further, section 16440 expressly concerns mismanagement or lack of prudent investing in the management of the trust, after it has been funded. By contrast, Probate Code section 1101 concerns the measure of damages for failure to fund the trust, as alleged here. The parties have not cited any case applying section 16440 to a failure to fund case, and the Court concludes section 16440 does not apply to this matter.

But even if section 16440 applies here, part (b) of the statute provides an exception: "If the trustee has acted reasonably and in good faith under the circumstances as known to the trustee, the court, in its discretion, may excuse the trustee in whole or in part from liability under subdivision (a) if it would be equitable to do so." The Court finds no evidence that Bob Naify was other than a man of integrity and doing his best in a given situation. Christina testified repeatedly that Bob was "kind and generous" to her. (TR at 358.) The Court finds that Bob acted reasonably and in good faith under the circumstances as known to him, and therefore finds it equitable to deny Christina's claim for interest.

Finally, based on the case law and the Court's finding of laches above, the Court also denies the interest claim due to Christina's unreasonable delay in bringing her claims. (*Estate of Kampen* (2011) 201 Cal.App.4th 971, 1000, 1002, "affirmative defense of laches barred any claim for interest.")

b. Enhanced Damages Are Also Rejected

Christina has pled two bases for enhanced damages: 100% of the community property under Family Code section 1101(h); and "double damages" under Probate Code section 859. These enhancements require proof of actual fraud under Civil Code section 3294 or at least a finding of "bad faith." The Court declines to make either finding. As discussed, the record established that Bob was a man of integrity who was kind and generous to his family and friends,

including Christina. There is no evidence that Bob (or John Sherwood on Bob's behalf) acted fraudulently or in bad faith. In addition, given this Court's determination that Christina was not a credible witness, the Court would at a minimum need to believe her testimony regarding oral promises to even begin to find actual fraud or bad faith in this record. Christina's request for enhanced damages is denied.

c. Attorney's Fees Are Denied

Christina testified that she has incurred "attorney's fees and costs" of approximately $8.9 million for this *Francesca Trust* matter (although she did not testify she has actually paid these fees). Christina cites two bases for recovery of fees: Family Code section 1101(g) and the common fund doctrine. The Court declines to award attorney's fees for several reasons.

First, since Christina has not established recoverable damages, her request for fees is inapplicable. Although the Court made a finding in the alternative in Christina's favor of $167,555 – applicable only in the event that the Court is incorrect in its findings that the Co-Trustees' affirmative and other defenses completely bar all of Christina's claims – this would be a result far short of her litigation goals, at a fraction of the $112.3 million in total claimed damages. (*See Santisas v. Goodin* (1998) 17 Cal.4th 599, 622, "a court may base its attorney fees decision on a pragmatic definition of the extent to which each party has realized its litigation objectives, whether by judgment, settlement, or otherwise"; *Hsu v. Abbara* (1995) 9 Cal.4th 863, 877, "in determining litigation success, courts should respect substance rather than form, and to this extent should be guided by equitable considerations".)[31]

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[31] Assuming arguendo, that the alternative underfunding of $167,555 permitted an award of attorney's fees, Christina would need to file a separate motion, with full and authenticated documentary support, to be adjudicated at a separate hearing at which the Court would "determine the amount of reasonable attorney fees awardable ..., apportioning fees incurred for the separate causes of action as appropriate." (*Aleman v. AirTouch Cellular* (2012) 209 Cal.App.4th 556, 584. *See also, Akins v. Enter. Rent-A-Car Co. of San Francisco* (2000) 79 Cal.App.4th 1127, 1134, "The trial court is the best judge of the value of professional services rendered in its court, and while its judgment is subject to our review, we will not disturb that determination unless we are convinced that it is clearly wrong.")

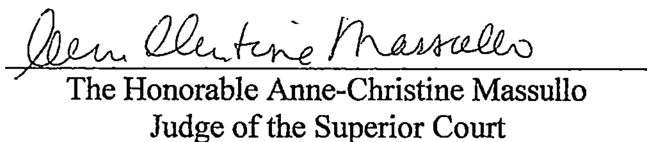
Moreover, Family Code section 1101(d)(3) provides that the "defense of laches may be raised in any action brought under this section." Based on the facts and equities discussed above concerning Christina's long delay in filing suit and the resulting prejudice to the Co-Trustees, the Court finds that laches precludes an award of attorney's fees.

Third, Christina relies on the common fund doctrine by which "a fund for the benefit of others in addition to himself" is recovered, citing *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105, 110, and *Copley v. Copley* (1981) 126 Cal.App.3rd 248, 293. In fact, the *Sweet* case rejects application of the common fund doctrine where a plaintiff sued a third party and a county asserted a hospital lien. *Id.* at 118. Moreover, in *Copley*, the attorneys for the two co-trustees successfully obtained a fund of $12 million to benefit themselves plus six other unrepresented beneficiaries. *Id.* at 292-94. Here, any monetary award entered by this Court benefits only Christina since Acela settled her case and assigned her claims to the Co-Trustees long before trial. (Ex. 617.003) Also, "the rationale for the rule allowing fees from the common fund disappears when different beneficiaries are represented by different counsel." (*Estate of Korthe* (1970) 9 Cal.App.3d 572, 575-76.) Acela's case and claims were handled by her own counsel who were paid $600,000 in connection with the settlement. (Ex. 617.003.) The common fund doctrine does not apply here.

III. CONCLUSION

Based on the foregoing, the Court rejects Christina's claims and rules for the Co-Trustees on all claims. Judgment will be entered for the Co-Trustees.

Dated: February 6, 2023



The Honorable Anne-Christine Massullo
Judge of the Superior Court

Francesca P. Naify Living Trust	Case No: PTR-16-300479

CERTIFICATE OF ELECTRONIC SERVICE
(CCP §1010.6 & CRC §2.251)

I, R. Michael Diles, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am over the age of 18 years, employed in the City and County of San Francisco, California and am not a party to the within action.

On February 7, 2023, I electronically served the attached **Statement of Decision After Court Trial** via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: February 7, 2023

Mark Culkins, Interim Clerk

By:

R. Michael Diles, Deputy Clerk