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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 ROBERT A. NAIFY LIVING TRUST dated February 8, 1991	Case No. PTR-16-299823 **[~~PROPOSED~~] AMENDED JUDGMENT**
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.	Judge: The Hon. Richard B. Ulmer Jr.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

THIS AMENDED 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 June 28, 2021 Statement Of Decision, attached hereto as Exhibit 1.

The Co-Trustees are the prevailing parties and, pursuant to this Court's Order Granting Co-Trustees' Motion For Costs Award entered on December 13, 2021, costs are awarded in favor of the Co-Trustees and against Christina Cortese in the amount of $99,239.89.

IT IS SO ORDERED.

Dated: 12/15/21, 2021

Richard B. Ulmer Jr.
Judge of the Superior Court

APPROVAL AS TO FORM;

HOLLAND & KNIGHT LLP

Stacie P. Nelson
Attorneys for Petitioner Christina Cortese

EXHIBIT 1

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

In re: ROBERT A. NAIFY LIVING TRUST dated February 8, 1991

Case No. PTR-16-299823

CHRISTINA CORTESE,

Petitioner,

v.

JOHN SHERWOOD, et al.,

Respondents.

STATEMENT OF DECISION

Christina Cortese sued the co-trustees of her step-father Robert (Bob) Naify's trust for "breach of oral agreement – promise of an inheritance." The claim requires proof by clear and convincing evidence that the promises were made – proof Christina did not adduce at trial.[1]

Findings of Fact

The Naify family became wealthy from movie theaters and cable television. In the second generation, Bob managed family businesses. He died a billionaire at age 94 in 2016.

Bob married Barbara Newton. She already had a son, Mark, whom Bob adopted and who took the Naify name. Bob and Barbara had three children: Leslie, Christie and Bobby Naify. Divorced from Barbara, Bob married Francesca Cortese. Francesca already had two children:

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[1] Like the parties, this statement of decision often uses first names for clarity; no disrespect is intended. The co-trustees are John Sherwood and Edward Topham. Christina's operative petition is her first-amended (Pet.). Internal legal citations and quote marks are omitted.

Acela and Christina Cortese. Bob adopted neither and both kept the Cortese name. Years after Francesca died, Bob married a third wife, Jan Vandebos.

The family proved the adage that money can't buy happiness. Drug addiction, divorce and strife were endemic. Bobby died of a heroin overdose. Acela was addicted to heroin and served prison time for fraud. Francesca was dependent on pain pills. Christina divorced her husband, Ted Dierker, alleging abuse. Christina and Jan despised one another.

Bob was an avid golfer. In 1987, he invested in a Robert Trent Jones Sr. course in Spain – the Marbella Golf & Country Club – later gaining 100% ownership. In 1995, Bob invited Ted and Christina to move to San Francisco to work with him. In 1996, Bob offered to make Ted general manager of Marbella Golf. Having lived abroad before, Ted accepted and Christina agreed to the move. Plans were to develop housing on Marbella Golf property. Ted and Christina were to receive commissions on the development. Marbella's government was corrupt and the development never occurred.

While Ted was Marbella Golf general manager, Christina worked part-time managing the pro shop and cared for the couple's four children when they were not at a Swiss boarding school paid for by Bob. From 2001 to mid-2006, Marbella Golf turned a profit.

To avoid taxes, Spanish residents Ted and Christina were officers of Naify entities, notably Equipoise, Inc. They helped address a California tax audit of Equipoise and Bob in 2003. Commitments to Equipoise were otherwise minimal – 2% of his time Ted testified.

From 1996 until his death in 2016, Bob signed dozens of testamentary documents – wills, trusts and amendments. Under none of them was Christina to inherit Marbella Golf. Nor was Christina ever treated equally with Bob's biological children.

Christina divorced Ted in 2006. Christina became Marbella Golf general manager at her request. In the next three years, the venture made a profit once. Bob and his in-house lawyer Sherwood believed Christina hired too many employees, bloating expenses.

Bob took a hands-on approach to Marbella Golf. Christina missed scheduled telephone calls and did not follow Bob's instructions. In mid-2009, Bob learned Christina had lied to him about when a vendor moved into the clubhouse – "the straw that broke the camel's back," Sherwood testified. Bob fired Christina. Sherwood investigated whether Christina had embezzled, finding she had not. After 2009, Christina appeared infrequently at Marbella Golf. She was never again a manager or employee at the club.

Meanwhile, in 2002 Bob had gifted Equipoise stock to his three biological children Leslie, Christie and Bobby and to step-daughter Christina. Gift letters to the three are signed by Bob "Love, Dad;" Christina's letter is signed "Love, Bob." Equipoise stock that Bob gifted to Christina was to be worth $22 million.

Under Francesca's trust, Acela and Christina were to inherit, but not until Bob died. Acela wanted money, so in 2008 she proposed early termination of the Francesca trust. Urged to seek counsel, Christina consulted two lawyers, but involved neither extensively. Christina received $4.8 million from Francesca's trust.

While in California in 2014, Christina heard a rumor that Jan planned to sue Bob's estate after he died. Christina repeated the rumor to Bob. Angered, Bob ordered Christina out of his home and never spoke to her again. After Bob died in 2016, Sherwood told Christina that Bob's estate included no bequest for her. During life, Bob had made gifts to Christina valued at more than $25 million. Christina also received the $4.8 million from Francesca's trust.

The Purported Promises and the Evidence

This case involves three oral inheritance promises that Christina purports Bob made to her: to (1) inherit Marbella Golf Course & Country Club, (2) be "equally treated" in Bob's estate and (3) be made "a very wealthy woman."

Marbella Golf. Christina's verified petition pleads that in 1996 Bob promised her "a significant participation in future real estate sales" at Marbella Golf for moving to Spain. (Pet. 5:27-6:1.) The petition also pleads that "several times in the following years" Bob promised Christina "she would inherit the golf course upon his death." (Id. at 6:1-2.) At trial, Christina said a 2007 version of the purported promise was conditional: "I needed to continue to work hard, to do a good job" as general manager.

Beyond her own testimony, Christina's evidence of a promise to inherit Marbella Golf is sparse. She briefly had lawyers consider how the club could be transferred to her, but they were not told whether the transfer was Christina's wish or Bob's promise. An ex-Marbella Golf employee said she heard the club "would be theirs" (Ted's and Christina's), but Christina does not say she was to share with Ted. A second ex-employee testified to hearsay – including from a third employee who rebutted his claim – that Christina was to inherit Marbella Golf. Christina also says her failure to dispute how the Francesca trust was terminated shows she expected to inherit the golf course, but concedes she told no one so at the time. Christina says she was the only family member but Bob to take interest in Marbella Golf, though her involvement was limited after Bob fired her in 2009.

In contrast, the trustees' evidence about Marbella Golf is substantial. Bob signed dozens of testamentary documents from 1996 – when Christina says he first made any promise about the

golf course – until he died in 2016. Marbella Golf is mentioned in none of those documents, much less that Christina was to inherit it.

Christina concedes that no one else was ever present when Bob made a promise that she would inherit Marbella Golf. Christina made no contemporaneous writing reflecting any such promise. No such promise was ever memorialized in any way by Bob, Sherwood, Christina or anyone else. Christina never told her husband Ted or Sherwood about any promise to inherit Marbella Golf.

In a 2007 telephone call, Christina told Bob and Sherwood she knew she was not to inherit Marbella Golf. During termination of Equipoise trusts in 2015, Christina indicated she knew she would not inherit from Bob at his death. Sale of Marbella Golf – including an investment by Christina – was considered over the years, but Christina never protested that the course should not be sold because she was promised to inherit it.

As to the purported 2007 promise, Bob's view was that Christina did not "do a good job" as general manager. Marbella Golf lost money under her leadership and Bob fired her.

Equal Treatment. Christina's claims of Bob's promises of equal inheritance treatment present a moving target. She first pleads that in 1997 Bob promised "he would divide his estate equally among his biological children and Christina when he died." (Pet. 2:6.) The petition later pleads that Bob promised "he would equally divide his estate among his four biological children and Christina" (id. at 11:16-17), though Bob had three biological children, not four. On another page, the petition says Bob "promised Christina that she would be treated equally with his other children upon his death," not indicating who the "other children" were. (Id. at 9:10-11.) At trial, Christina claimed Bob promised "he would treat her equally to his other daughters, Christie and

Leslie" if she remained "a loyal daughter." Later, the equal treatment was said to apply to "Bobby, Christie, Leslie and me."

Beyond her own testimony, Christina cites times in lawyer-drafted documents when she was grouped among Bob's "children" or termed his "daughter." More telling are the 2002 gift letters with actual words from Bob – his handwritten salutations to his three biological children ("Love, Dad") and to Christina ("Love, Bob"). Christina concedes that her gift letter is her "only direct evidence in this case." She claims the letter states "she is an equal heir," but it does not.

The trustees' evidence on Christina's equal treatment claim is much the same as that already discussed. Bob's dozens of testamentary documents over 20 years that never treated step-daughter Christina equally with his biological children. No claim by Christina that she ever told anyone about this promise. No writing reflecting such a promise.

The trustees also note that though Mark was adopted by Bob and took the Naify name (whereas Christina was not adopted and kept the Cortese name), Mark was not treated equally in Bob's estate plan with Bob's biological children. Sherwood testified to Bob's spoken preference for his three offspring – "that's just the way I feel."

Moreover, Bob did not view Christina as a "loyal daughter." He fired her in 2009 as Marbella Golf general manager for lying to him. In 2014 he ordered Christina out of his home and never spoke to her again, after she repeated the rumor that Jan would sue his estate.

Very **Wealthy Woman.** Christina pled that Bob and Sherwood told her she "would receive a substantial inheritance after Robert's death and become a 'very wealthy woman'." (Pet. 10:13-14.) Sherwood denied this promise. In any event, Bob did make Christina a very wealthy woman: his lifetime gifts to her exceeded $25 million in value.

Legal Analysis

Christina's one-count petition pleads "breach of oral agreement – promise of an inheritance" under Probate Code §21700.[2] Thus, Christina had to prove by "clear and convincing evidence" "an agreement between the decedent and the claimant or a promise by the decedent to the claimant that is enforceable in equity." (Id.) She did not.

As to §21700's second alternative, "clear and convincing evidence" of "a promise by the decedent" is required before enforceability is reached. As detailed above, none of the purported promises was proved by clear and convincing evidence.

Section 21700's first alternative is even harder to prove – it requires an actual agreement with proof of contract elements.. Among them: proof that "the parties agreed to give each other something of value" – here, "a promise to do something." (California Civil Jury Instruction 302.) Again, as detailed above, Christina had no clear and convincing evidence of the purported promises.

The lion's share of Christina's evidence was her own testimony about conversations she allegedly had alone with Bob – allegations he can no longer refute. Where an oral inheritance promise "is alleged after promisor is deceased and unable to testify, there is an opportunity for the fabrication of testimony concerning the existence of the agreement." (*Juran v. Epstein* (1994) 23 Cal.App.4th 882, 893-94.) Hence, a petitioner's testimony about an oral inheritance promise is "the weakest and most unsatisfactory" evidence. (*Khoury v. Barham* (1948) 85 Cal.App.2d 202, 211.) "No weaker kind of evidence could be produced." (Id.)

Christina's "weakest and most unsatisfactory" evidence (see id.) is moreover uncorroborated by evidence that would be expected had the purported promises been made.

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[2] Probate Code §21700 applied after 2000; Probate Code §150 applied before then. Several purported promises post-date 2000, but which code section applies does not matter, as it was not proven that the promises occurred.

Husband Ted, who lived and worked closely with Christina, testified that she never mentioned any of the purported promises. Sherwood, Bob's long-trusted lawyer and confidant, never heard of any such promise from Bob, from Christina (until she sued) or from anyone else. No writing or other memorialization reflects any of the purported promises.

This is the opposite of cases in which oral inheritance promises are credited. (*Redke v. Silvertrust* (1971) 6 Cal.3d 94, 101 (decedent's oral inheritance promises heard by multiple witnesses); *Byrne v. Laura* (1997) 52 Cal.App.4th 1054, 1060 (same); *Lake v. Jackson* (1961) 191 Cal.App.2d 372, 376 (same); *Riganti v. McElhinney* (1967) 248 Cal.App.2d 116, 118 n.1 (decedent told friend about inheritance promise); *Horstman v. Sheldon* (1962) 202 Cal.App.2d 184, 187 (witnesses testified to decedent stating intent to leave house to plaintiff; five prior wills provided for her).) No one but Christina testified to hearing Bob make any of the purported promises[3] and the limited evidence Christina adduced was unavailing hearsay.

Christina says "situational changes" she made to live in Spain evidence the purported promises. The actual evidence is to the contrary. Ted favored the move and Christina agreed. It is undisputed that Bob promised Ted and Christina commissions if residential development was allowed at Marbella Golf, but not that Christina would inherit the course and club. Further, if living in Spain was a negative, Christina could have returned to America after Bob fired her as general manager in 2009. Instead she remains in Spain today, 12 years on.

[3] The one exception Christina claims is: "Ms. Figone testified that Bob said he intended to treat Christina financially equally." The actual testimony: "Q: Did you ever hear Bob Naify say anything about financially treating his children equally? A: There was some reference – I remember once. There was some reference that they were all treated the same. Nothing specific or – you know, but Francesca had said the same thing, which is why I remember." This is not clear and convincing evidence.

In sum, Christina's case failed at its initial step – the requirement to prove by clear and convincing evidence that Bob made any of the three purported promises. Other elements of her claim and affirmative defenses thus need not be reached. (See *Khoury*, 85 Cal.App.2d at 213.)

Disposition

Judgment on Christina Cortese's Probate Code §21700 petition is for co-trustees John Sherwood and Edward Topham. The trustees are the prevailing parties.

Dated: June 28, 2021

Richard B. Ulmer Jr.
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

In Re the Matter of ROBERT A. NAIFY LIVING TRUST Dated February 8, 1991	Case No.: PTR-16-299823 **CERTIFICATE OF MAILING** **[CCP 1013a(4)]**

I, Melinka Jones, a deputy clerk of the Superior Court of California, County of San Francisco, certify that I am not a party to the within action.

On June 28, 2021, I served the attached **STATEMENT OF DECISION** by placing a copy thereof in a sealed envelope, addressed as follows:

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I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: June 28, 2021

T. MICHAEL YUEN, Clerk

by: _____
Melinka Jones, Deputy Clerk

Robert A. Naify Living Trust	Case No: PTR-16-299823

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

I, Kimberly M. Septien, 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 December 16, 2021, I electronically served the attached **Amended Judgment** via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

I declare under penalty of perjury under the laws of the State of California that the foregoing statements are true and correct.

Dated: December 16, 2021

T. Michael Yuen, Clerk

By: _____
Kimberly M. Septien, Deputy Clerk