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FILED
LOS ANGELES SUPERIOR COURT

APR 23 2007

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

11 FREDERIC G. MARKS, JOSEPH HENTZ,
12 STUART SMITH, JEAN MOLLENHAUER,
13 ROGAN COOMBS, JOSEPH DROLL, GREGG
WOOD, THOMAS R. WOOD, MARILYN
WOOD, and GREG STAININGER,
Plaintiffs,

14 v.

15 WAYNE JOYNER and CHARLES W. HAYES,
16 individually and as Trustees of THE UNIVERSAL
17 SCIENTIFIC PUBLICATIONS COMPANY
18 TRUST, THE UNIVERSAL SCIENTIFIC
19 PUBLICATIONS COMPANY, INC., THE
NATURAL ESTATE TRUST and DOES 1
through 50, Inclusive,
Defendants.

CASE NO. BC352639

(Honorable Kenneth R. Freeman,
Department 64)

**PLAINTIFFS' OPPOSITION TO
DEFENDANT CHARLES W. HAYES'
MOTION FOR SUMMARY
JUDGMENT/SUMMARY
ADJUDICATION OF ISSUES;
MEMORANDUM OF POINTS AND
AUTHORITIES**

**DATE: May 7, 2007
TIME: 8:30 A.M.
DEPT: 64**

21 TO ALL PARTIES AND TO THEIR RESPECTIVE ATTORNEYS OF RECORD:

22 Plaintiffs hereby oppose the Motion of Defendant Charles W. Hayes, individually, for
23 summary judgment or, in the alternative, summary adjudication as follows:

24 **AS TO ISSUE NO. 1**, which asserts the bar of the statute of limitations (*Code of Civil*
25 *Procedure* §337(3)): The verified Complaint *anticipated that affirmative defense*, alleging facts
26 to refute it and Defendant's failure to address those allegations or refute them, requires that the
27 Motion for Summary Judgment/Adjudication on the First, Second and Third Causes of Action be
28 denied. *Westlye v. Look Sports, Inc.* (1993) 17 C.A. 4th 1715, 1739-1740.

1 As further grounds of Opposition respecting **ISSUE NO. 1:**

2 (a) A triable issue of material fact exists as to whether or not Defendants are estopped
3 to assert the statute of limitations on account of Defendants' continuing promises of performance
4 and Plaintiffs' reliance thereon.

5 (b) A triable issue of material fact exists as to the date upon which Defendants breached
6 the contract, and whether it was an *anticipatory breach*.

7 (c) A triable issue of material fact exists as to whether the breach, if any, occurred more
8 than four (4) years before the date of the filing of the Complaint and, if it did, whether it was a
9 material breach of the contract.

10 (d) A triable issue of material fact exists as to whether all, or any, of the Plaintiffs
11 deemed the contract to have been breached in a material way more than four (4) years before the
12 filing of the action.

13 (e) A triable issue of material fact exists as to whether the parties extended the time for
14 TUSPCO's performance.

15 (f) The evidence submitted by Defendant Charles W. Hayes in support of the Motion
16 is insufficient to show he is entitled to summary adjudication as a matter of law in that it fails to
17 establish that time for TUSPCO's performance of the agreement was not extended by the parties.

18 **AS TO ISSUE NO. 2**, whether the Fourth Cause of Action for breach of fiduciary duty
19 fails for alleged lack of a causal link between Defendant's breach and Plaintiffs' damages:

20 (a) A triable controversy exists with respect to the following material facts: Whether
21 Defendant Hayes wasted the assets of the TUSPCO Trust, TUSPCO, Inc. or the Natural Estate
22 Trust by disbursing funds to unauthorized recipients.

23 (b) A triable controversy exists with respect to the following material facts: Whether
24 Hayes' conduct as a trustee has caused TUSPCO, Inc. to be unable to publish and deliver the
25 remaining volumes of Book 1 or to refund money paid by Plaintiffs in advance for their
26 subscriptions.

27 **AS TO ISSUE NO. 3**, whether the Fourth Cause of Action for breach of fiduciary duty
28 fails because Plaintiffs cannot establish a breach:

1 (a) A triable controversy exists with respect to the following material facts: Whether
2 Defendant Hayes wasted the assets of the TUSPCO Trust, TUSPCO, Inc. or the Natural Estate
3 Trust by disbursing funds to unauthorized recipients.

4 (b) A triable controversy exists with respect to the following material facts: Whether
5 Hayes' conduct as a trustee has caused TUSPCO, Inc. to be unable to publish and deliver the
6 remaining volumes of Book 1 or to refund money paid by Plaintiffs in advance for their
7 subscriptions.

8 **AS TO ISSUE NO. 4**, whether the Second Cause of Action for specific performance fails
9 "because the contract is not amenable to specific performance":

10 (a) The allegations of the Complaint affirmatively establish that Book 1 constitutes
11 unique personal property subject to a decree of specific performance under *California Commercial*
12 *Code* §2716(1). Defendant Hayes has neglected to refute, or even address those allegations and,
13 on that basis alone, summary adjudication should be denied. *Westlye v. Look Sports, Inc.* (1993)
14 17 C.A. 4th 1715, 1739-1740.

15 (b) A triable controversy exists with respect to the following material fact: Whether
16 the remaining volumes of Book 1, consisting of course V-201, constitute unique personal property;

17 (c) Whether Defendants have, in their possession, edited selections from the tape
18 recorded lectures of Andrew J. Galambos in course V-201.

19 (d) The Pre-Publication Subscription Agreement does not limit the Plaintiffs to seeking
20 a refund of amounts paid in advance for Book 1.

21 **AS TO ISSUE NO. 4**, and the contention that the Second Cause of Action for specific
22 performance fails because it implicates the federal Copyright Act:

23 (a) Contrary to the assertions of Defendant Hayes, Plaintiffs do not seek to duplicate,
24 publish or distribute AJG's lectures in course V-201 to anyone in violation of copyright laws.
25 Plaintiffs request equitable relief in the form of an order that Plaintiffs fulfill their obligations under
26 the contract by delivering that which the contract called for, *i.e.*, "edited selections from the tape
27 recorded lectures of AJG", as they did with regard to Volume I of Book 1 and as specified in the
28 contract itself.

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In the event that Defendants claim they are unable to fulfill their contractual commitments to Plaintiffs, then Plaintiffs have, *as an alternative*, offered to duplicate and distribute the edited transcripts of course V-201, at no cost to Defendants, to any other fully paid original Subscriber to the Subscription Agreement who so requests.

Federal copyright law has not been "implicated". Plaintiffs have not sought to wrest any copyrights from Defendants or to publish in violation of federal law.

The evidence submitted by Defendant Hayes in support of the Motion is insufficient to show that he is entitled to summary adjudication in that the supporting declarations and exhibits fail to establish that Plaintiffs seek to duplicate, publish or distribute transcripts of course V-201, contrary to federal copyright law.

The motion should be denied in its entirety.

DATED: April 20, 2007



JONATHAN K. GOLDEN
Attorney for Plaintiffs FREDERIC G. MARKS,
JOSEPH HENTZ, STUART SMITH, JEAN
MOLLENHAUER, ROGAN COOMBS, JOSEPH
DROLL, GREGG ROOTEN, THOMAS R.
WOOD, MARILYN WOOD, GREG
STAININGER, and JOHN FOUNTAIN

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3 Witkin, *California Procedure*, 4th Ed., §619, "Delayed Accrual
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"Equity", §30, "Contract Concerning Personal Property", p. 322 13

1 MEMORANDUM OF POINTS AND AUTHORITIES

2
3 I.

4 FACTS

5 For approximately 20 years, between the late 1960's and late 1980's, Plaintiff Frederic G.
6 Marks was the personal attorney and a confidante of Andrew J. Galambos ("AJG"). In 1978, under
7 the close direction of AJG, Marks drafted the Subscription Agreement which underlies this action.
8 (Marks Decl., ¶9)

9 AJG was an astrophysicist and the innovator of the Science of Volition. During the 1960's,
10 70's and 80's, AJG gave numerous lecture courses, for profit, presenting classes to students at
11 various locations in Southern California and through contractors who presented the same courses
12 to interested students via audiotapes of his lectures. ((Marks Decl., ¶3)

13 The Plaintiffs are all former students of AJG who contracted with AJG, through his
14 company, the Universal Scientific Publications Company Trust, Inc. and its Trust, The Universal
15 Scientific Publications Company Trust, to purchase a book to be written by AJG based upon his
16 lectures in his two principal courses, V-50 (the introductory course) and V-201 (the advanced
17 course).

18 Defendants Wayne Joyner, an attorney, and Charles W. Hayes, an accountant, are the senior
19 officers of TUSPCO, as well as Trustees of the Natural Estate Trust which holds all of the assets
20 of AJG's estate, including all shares of TUSPCO, Inc. Hayes is also trustee of the TUSPCO Trust.
21 (Hayes Decl., ¶1; Hayes Answer, ¶¶2-4)

22 In or about 1978, each of the Plaintiffs signed a Subscription Agreement with TUSPCO and
23 paid, in advance, for the publication of certain books, including courses V-50 and V-201. The
24 books were to be written by AJG. (Marks Decl., ¶7)

25 It was always AJG's desire and intent to publish his teachings in book form in order to
26 assure the permanence, durability and accuracy of the ideas disclosed, as well as to protect the
27 integrity of his unique intellectual property and secure credit for innovation to the proper
28 individuals. Many students of AJG wished to encourage him to publish his ideas in book form,

1 thereby making them more readily accessible to the world. To accomplish this, AJG founded
2 TUSPCO, The Universal Scientific Publications Company, Inc., as the entity through which he
3 would publish his courses in book form. (Marks Decl., ¶3-8)

4 In or about 1978, each of the Plaintiffs executed written contracts with TUSPCO,
5 subscribing to and paying in advance for the as yet unwritten book identified in the Subscription
6 Agreement as "Book 1" containing the theories taught by AJG in the volitional science courses
7 known as V-50 and V-201. (Marks Decl., ¶7-8)

8 TUSPCO, for its part, stated in the contract its written intention to publish Book 1 on or
9 before December 31, 1987, that is, approximately nine (9) years after the execution of the
10 Subscription Agreement. Collectively, Plaintiffs own subscription rights to almost 300 copies of
11 Book 1. This represents approximately 21% of all subscriptions, because Plaintiffs understand that
12 1,309 first edition copies of Book 1 were sold under the Agreement. (Hayes' Decl. ¶5)

13 The Subscription Agreement further provided that the time for publication of Book 1 could
14 be extended beyond December 31, 1987 by agreement between TUSPCO and the subscribers to
15 *any date TUSPCO might propose*. It further provided that any subscriber who did not wish to
16 extend the time for delivery of Book 1 could demand, and receive, a full refund of all subscription
17 payments, together with six percent (6%) interest on amounts paid. (Def's Exhibit "A".)

18 In order to receive, hold and safeguard funds paid by subscribers for the as yet unwritten
19 Book 1, AJG and TUSPCO created The Universal Scientific Publications Company Trust.
20 Defendant Charles W. Hayes is successor trustee of the TUSPCO Trust. (Def's Exhibit "A".)

21 Paragraph 4.2 of the Subscription Agreement provided, *inter alia*, that: "The trustee shall
22 receive the subscription payment, in trust, and shall hold such subscription payments in a trust fund
23 separate and apart from all assets of TUSPCO or Subscriber. The trustee shall not withdraw funds
24 from the trust fund except (1) to pay over to TUSPCO the subscription payments of Subscribers
25 at the time specified herein, or (2) to refund to Subscribers their subscription payments at the time
26 specified herein for any such refund. The trustee shall pay subscription payments from the trust
27 fund to TUSPCO at such time as TUSPCO has Subscriber's Book(s) ready for delivery to
28 Subscriber. The trustee shall also pay to TUSPCO from the trust fund such portion of the

1 accumulated trust funds as are necessary for the production expenses of book[s] 1 . . . including,
2 by way of example but not limitation, typesetting, paper, printing, publishing, binding, editorial and
3 administrative expenses incurred after completion of the author's manuscript." (Def's Exhibit "A".)

4 Paragraph 4.3 of the Subscription Agreement provides, in relevant part: "The special trust
5 fund created hereby shall be known as 'The Universal Scientific Publications Company, Inc. Book
6 Subscription Trust' which may be abbreviated to 'TUSPCO Trust' and Subscribers shall make their
7 payments hereunder to the TUSPCO Trust and shall receive refunds, if any, from the TUSPCO
8 Trust. Notwithstanding the foregoing, TUSPCO guarantees in full (100%) any payment required
9 to be made from the trust to Subscriber, except under certain circumstances described in paragraph
10 6.5 below." (Def's Exhibit "A".)

11 AJG did not write and TUSPCO did not publish Book 1 before December 31, 1987.
12 Plaintiffs were more than willing to extend the time for delivery of Book 1 because Plaintiffs
13 believed, then and now, that the value of the intellectual property contained in courses taught by
14 AJG and expected in Book 1 vastly exceeded the value of the money Plaintiffs had deposited with
15 the TUSPCO Trust. (Marks Decl., ¶31)

16 In the late 1980's and during the 1990's, AJG's health steadily deteriorated. He was unable
17 to write Book 1 before his death in 1997. However, after December 31, 1987, representatives of
18 TUSPCO, Inc, Joyner and Hayes continually represented orally, and in writing, that they were
19 working on the publication, assured Plaintiffs that Book 1 would be published and encouraged
20 Plaintiffs to wait for its delivery. (Marks Decl., ¶14-31)

21 The Subscription Agreement provides: "In the event of the inability of AJG to write Book
22 1 due to his death or incapacity, Book 1 may be supplied by TUSCPO in the alternate form of
23 edited selections from the tape recorded lecturers of AJG edited to the best of the ability of the
24 authorized representative(s) of FEI and the proprietary heir(s) of AJG who would be performing
25 such editing, it being understood that this alternate form would be second best, but vastly superior,
26 to not having Book 1 exist at all. Book 1 is scheduled for publication during the year 1987, it being
27 the firm intention, but not the promise or guarantee of TUSPCO, that Book 1 will be published in
28 the year 1987." (Def's Exhibit "A".)

1 In or about 1999, Defendants Joyner and Hayes, on behalf of TUSPCO and the TUSPCO
2 Trust, published and distributed Volume 1 of Book 1 (Course V-50) to Plaintiffs and other
3 subscribers in partial performance of the contract. The title of Book 1 is "*Sic Itur Ad Astra*". The
4 first edition of Volume 1 was, and is, a hard cover book containing more than 900 pages and
5 consists of verbatim, edited transcripts from AJG's audiotaped lectures of course V-50, the
6 introduction to volitional science. (Marks Decl., ¶49-50)

7 At the time Volume 1 was published, and at all times thereafter, Defendants Joyner and
8 Hayes represented, and continue to represent, publicly that the remaining volumes of Book 1,
9 consisting of the edited transcripts of AJG's tape recorded lectures of course V-201 were being
10 prepared for publication and will be delivered to all Subscribers at a future, unspecified date.
11 (Marks Decl., ¶25-27; Hayes Decl., ¶4)

12 In reliance of such representations, Plaintiffs did not, until now, press Defendants for
13 immediate publication of the remaining volumes of a Book 1, which all parties considered to be
14 a very important, unique and valuable book. (Marks Decl., ¶32; Rooten Decl. ¶5-8; Mollenhauer
15 Decl. ¶5-8)

16 TUSPCO maintains an internet website at <http://tuspc.com> where, until this suit was filed,
17 it represented to the public that: "The remaining three or four volumes of *Sic Itur Ad Astra* are in
18 progress and will consist of the edited transcript of Galambos' most important course, V-201, The
19 Nature and Protection of Primary Property." TUSPCO further offers, at its website, to sell a first
20 edition, hard cover copy of all volumes of *Sic Itur Ad Astra* for the price of \$2,500.00. This would
21 include the three or four volumes of *Sic Itur Ad Astra* (V-201) which have yet to be published or
22 delivered to Plaintiffs. (Marks Decl., ¶31, Exh. "9")

23 Continuously, since Plaintiff Marks first made inquiry about the publication of the Book
24 in 2004, Defendants Joyner and Hayes refused to communicate to Plaintiff Marks, or to any other
25 Subscriber, what efforts they had taken to publish the remaining volumes of Book 1 or to account
26 for the expenditure of trust funds. In June, 2005, at a gathering of former students of AJG,
27 defendant Joyner announced that he would not answer any questions about the status of publication
28 of the Book. Also, in 2005, Defendants Joyner and Hayes denied to Marks that they had any duty

1 or obligation to publish the remaining volumes of Book 1 or distribute them to Subscribers or to
2 advise Subscribers such as these Plaintiffs of what, if any, steps have been, or will be taken to
3 fulfill the balance of the contract. Defendants Joyner and Hayes also denied that they had any duty
4 to account to Plaintiffs for the assets of the TUSPCO trust or TUSPCO and therefore refused to do
5 so. (Marks Decl., ¶33-36)

6 The lectures of course V-201 as delivered by AJG have been completely transcribed, are
7 in possession of Defendants and their agents, and are capable of being published in the same format
8 as course V-50, previously distributed as Volume 1 of Book 1 to the Subscribers. The transcripts
9 of course V-201 have been digitized and transferred to compact disc. (Marks Decl., ¶49-50)

10 Plaintiffs allege that Defendants have dissipated the assets of TUSPCO and the TUSPCO
11 Trust instead of safeguarding them, and no longer have the financial ability to publish the
12 remaining volumes of Book 1. Plaintiffs further allege that Defendants Joyner, Hayes and DOES
13 1 through 50 have wrongfully paid themselves and others substantial sums from TUSPCO and the
14 TUSPCO Trust, depleting the assets of TUSPCO and the TUSPCO Trust so that these entities are
15 no longer able to perform their contractual obligations. (Marks Decl., ¶39-46)

16 Defendants Joyner and Hayes have, commencing in 2005, refused repeated requests by
17 Marks and other Subscribers to account for the assets of the TUSPCO Trust, or TUSPCO, to
18 inform Subscribers of the progress, if any, they have made toward publishing the final volumes of
19 Book 1, to advise Subscribers of the form those volumes will take or commit to any anticipated
20 delivery date. (Marks Decl., ¶33-37)

21 Based upon the foregoing facts, Plaintiffs have sought (1) declaratory relief; (2) specific
22 performance; (3) damages for breach of contract; and (4) damages for breach of fiduciary duty.

23 II.

24 THE CLAIMS FOR BREACH OF CONTRACT, DECLARATORY
25 RELIEF AND FOR SPECIFIC PERFORMANCE ARE NOT
26 BARRED BY THE FOUR YEAR STATUTE OF LIMITATIONS.

27 **A. The Complaint Anticipated the Affirmative Defense of the Statute of Limitations and**
28 **Alleged Facts Refuting the Defense.**

1 Defendants demurred to the Complaint based upon the four year statute of limitations. The
2 demurrer was overruled because, among other things, the allegations of the verified Complaint
3 showed that Defendants were estopped to assert it by continued promises of performance upon
4 which Plaintiffs relied. Defendant Hayes has done nothing to address the facts supporting an
5 estoppel.

6 It is well settled that if, in anticipation of an affirmative defense, the Complaint alleges facts
7 to refute it, the pleadings themselves create "a material issue which Defendant would have to refute
8 in order to obtain summary judgment." *Bacon v. Southern Cal. Edison Co.* (1997) 53 C.A.4th 854,
9 858.

10 "If, . . . the plaintiff pleads several theories or anticipates
11 affirmative defenses by a show of excusing events or conditions, the
12 challenge to the opponent is made by the complaint, requiring the
13 moving defendant to affirmatively react to each theory *and* excusing
14 or justifying event, or condition which supports a theory, if the
15 motion [for summary judgment] is to be successful." *Westlye v.*
16 *Look Sports, Inc.* (1993) 17 C.A. 4th 1715, 1740, quoting *Conn v.*
17 *National Can Corp.* (1981) 124 C.A.3d 630 at p. 639 (italics
18 original).

15 Paragraphs 19, 22 and 23 of the verified Complaint alleged Defendants' continuous
16 representations that they were working on and would publish Book 1, consisting of edited
17 transcripts of AJG's tape recorded lectures of V-50 and V-201, and that Plaintiffs, who were deeply
18 committed to the publication of AJG's work, relied upon those representations.

19 Defendant Hayes has not challenged those facts. That failure, by itself, warrants denial of
20 the Motion to the extent that it is based on the statute of limitations.

21 **B. A Triable Issue of Fact Exists as to Whether the Time for Delivery of Book 1 Was**
22 **Extended by Agreement of the Parties.**

23 First, to correct a misunderstanding by Defendant Hayes' counsel, this action is not one for
24 rescission of a contract and is not, therefore governed by *CCP* §337(3). It is, instead, an action
25 founded on a written contract which is governed by *CCP* §337(1) and which must, barring certain
26 exceptions, be brought within four (4) years of a material breach.

27 The contract provided, *inter alia*, that: "Book 1 is scheduled for publication during the year
28 1987, it being the firm intention, but not the promise or guarantee of TUSPCO that Book 1 will be

1 published in the year 1987." (Def's Exhibit "A", ¶1.3.) The contract further provided that
2 "publication . . . could be extended by agreement . . . to any date TUSPCO might propose." (Def's
3 Exhibit "A", ¶6.7) Subsequent to December 31, 1987, TUSPCO and the remaining Defendants
4 continuously represented that they were diligently working on publication of the book and that
5 subscribers could confidently expect it to be forthcoming. Plaintiffs, who were committed to
6 publication and did not want or demand a refund of the purchase price, relied upon the good faith
7 of Defendants who professed to share that goal. Such reliance was rewarded in 1999, when
8 Defendants published Volume I of Book 1 (Course V-50). Defendants did not breach or repudiate
9 any of their contractual obligations until 2005. Until then, they treated the contract as valid and
10 binding.

11 Defendant Hayes has produced no evidence that any Plaintiff other than Frederic G. Marks,
12 Jean Mollenhauer and Greg Rooten ever received notice that TUSPCO, Inc. would invoke the "no
13 refund policy" that TUSPCO was *permitted to invoke*, pursuant to the Defendant's understanding
14 of paragraph 6.5, subd. (5). That paragraph states:

15 "Notwithstanding anything to the contrary herein, if the
16 assets of the trust fund cease or made unavailable for the purpose of
17 this agreement by any state, or by any coercive force, the obligation
of TUSPCO to make or guarantee any refund to Subscribers shall
cease, and shall be null and void."

18 Putting aside the fact that Defendant has not proven that the "no refund" policy was
19 communicated to anyone beyond the three (3) above-named Plaintiffs, the evidence submitted by
20 both sides proves that the parties did not view Mrs. Galambos' invocation of ¶6.5, subd. (5) as a
21 breach of the agreement. On the contrary, Mr. Joyner, TUSPCO's lawyer, informed both Mrs.
22 Mollenhauer and Mr. Rooten that TUSPCO was *contractually entitled* to invoke the "no refund"
23 policy in light of Lange's theft of trust funds. (Def's Exhibit "T", p. 2; Exhibit "V", p. 2.)

24 To quote Mr. Joyner: "Due to the above situation [Lange's embezzlement], paragraph
25 6.5(5) of the agreement is being invoked. This paragraph provides that when the trust assets are
26 seized by any coercive force, the refund obligation is null and void. You were required by
27 Professor Galambos to read all of the trust agreement (including this paragraph) before you signed
28 it. Since the assets of the Trust were seized, there is no obligation to make refunds." (Def's Exhibit

1 "V", p.2.)

2 Rooten and Mollenhauer accepted TUSPCO's attorney's construction of the contract and
3 assumed that the exculpatory clause was valid. (Rooten Decl. ¶7; Mollenhauer Decl ¶6)

4 Defendants are in no position now to contend the announcement of the "no refund" policy
5 constituted a material breach. If Mrs. Galambos and Mr. Joyner believed, in good faith, that
6 Lange's theft voided TUSPCO's guarantee to refund Subscribers' money, then they could not have
7 viewed its invocation as a breach.

8 If, on the contrary, they now contend that invocation of the "no refunds" clause was a
9 breach, then Mr. Joyner and TUSPCO are guilty of fraud because they willfully misled the
10 Plaintiffs as to the effect of the agreement and continued with promises of performance. Hayes
11 cannot benefit by either position.

12 Defendant Hayes asserts that "An agreement to extend the date for performance in a written
13 contract must also be in writing", citing *Civil Code* §1698. Defendant fails to consider subsections
14 (b) or (d) of §1698 which provide that a contract in writing may be modified by an oral agreement
15 to the extent that it is executed by the parties and that "Nothing in this section precludes . . . the
16 application of rules of law concerning estoppel . . . waiver of a provision of a written contract, or
17 oral independent collateral contracts."

18 In sum, Defendant Hayes has not produced any evidence that any Plaintiffs, or even
19 Defendants themselves, viewed the announcement of a "no refund" policy as a breach of the
20 contract, must less a material breach, or that more than three of the Plaintiffs received notice of it.
21 Whether the breach occurred before 2005, whether if it did, it was material and whether all of the
22 Plaintiffs had notice of it constitute triable issues of material fact.

23 Plaintiffs contend that Defendant's breach was anticipatory, and occurred in 2005 when
24 they refused to provide Marks with further assurances of their intentions. Commercial Code
25 §2609.

26 **C. Assuming, *Arguendo*, That Defendants Breached the Contract in 1988, They Are**
27 **Estopped to Assert the Statute of Limitations by Virtue of Their Promises to Perform.**

28 It is well settled that the statute of limitations will be tolled where the Defendant makes

1 representations that he will perform his contractual obligation, and the Plaintiff, in reliance thereon,
2 forbears to sue in time. Vol. 3, Witkin, *California Procedure*, 4th Ed., "Actions", §686, pp. 873-
3 874.

4 "A defendant may be estopped to assert the statute of
5 limitations as a defense where he has improperly induced the
6 plaintiff to delay filing a lawsuit. (Citation omitted) Such
7 inducements may include promises of performance of a contract . .
8 . or promise that by relying upon the defendant the plaintiff will
9 suffer no harm." *Snyder v. Boy Scouts of America, Inc.*, 205 C.A.3d
10 1318, 1324.

11 Furthermore, whether an estoppel to assert the statute of limitations exists is a question of
12 fact, not of law. *In re Piepers's Estate* (1964) 224 C.A.2d 670, 690-691.

13 "[W]hether an estoppel exists -- whether the acts,
14 representations or conduct lulled a party into a sense of security
15 preventing him from instituting proceedings before the running of
16 the statute, and whether the party relied to his prejudice is a *question*
17 *of fact* and not of law. [Citations]" *Id.*, at pp. 690-691 (Emphasis
18 supplied); *County of Santa Clara v. Vargas* (1977) 71 C.A.3d 510,
19 524.

20 Plaintiffs have alleged and proven facts supporting a claim that Defendants are estopped
21 from asserting the statute of limitations by virtue of their continuous promises of performance;
22 promises that they made on their website as late as May 2006, and promises that they have made
23 to this Court *in their moving papers*. Defendants cannot deny their own words.

24 Mr. Hayes states: "The trustees of the Natural Estate Trust have every intention of
25 publishing the entirety of Book 1 based on the express desire and intent of Professor Galambos."
26 (Hayes Decl., ¶4.) What is that if not a judicial admission of promised performance? Until they
27 were sued, they promised performance on their website, offering to sell to the public all volumes
28 of Book 1 for \$2,500.00, books that did not exist because they had not printed them and for which
they will not commit to a date certain for publication.

Defendants stand before the court acknowledging that they have happily taken thousands
of dollars from new subscribers for books that they don't have, but they deny the legal obligation
to publish those books to the people who already paid for them! The question of whether or not
Defendants are estopped to assert the statute of limitations represents multiple triable issues of fact
concerning Defendants' representations and Plaintiffs' reliance thereon.

1 **D. Plaintiffs' Cause of Action Did Not Accrue Until 2005 When Defendants Gave Notice**
2 **That They Would Not Honor Their Obligations.**

3 Defendant Hayes is the Trustee of the TUSPCO Trust, the entity created by AJG to hold
4 advance subscription payments in trust for the benefit of the subscribers and to disburse those funds
5 to TUSPCO upon TUSPCO's delivery of Book 1 to the subscribers. As holder of those trust funds,
6 Hayes is plainly a fiduciary.

7 Hayes also claims to be a trustee of the Natural Estate Trust, a charitable, educational trust
8 which has, as its central and paramount directive: "The trustee is directed to concentrate the
9 distributions from the trust on activities that will further publication, perpetuation, and protection
10 of the innovations of Andrew J. Galambos." (Complaint, ¶4.) The Plaintiffs, as well as all the
11 other Subscribers to the PPSA, are beneficiaries of that trust, because it is through publication of
12 Book 1 to Galambos' former students who subscribed to it that Mr. Hayes fulfills his core duty as
13 a trustee.

14 Clearly, a beneficiary of a trust is entitled to rely on the trustee's fidelity, and the statute
15 does not begin to run until he has knowledge of repudiation of the trust or of the act constituting
16 the breach of the trustee's fidelity. *United States Liability Ins. Co. v. Haidinger-Hayes, Inc.*, (1970)
17 1 C.3d 586, 596; 3 Witkin, *California Procedure*, 4th Ed., §619, "Delayed Accrual Inaction
18 Against Fiduciary" p. 795.

19 "Where a fiduciary obligation is present, the courts have
20 recognized a postponement of the cause of action until the
21 beneficiary has knowledge or notice of the act constituting a breach
22 of fidelity. [Citations omitted] The existence of a trust relationship
23 limits the duty of inquiry. 'Thus, when a potential plaintiff is in a
24 fiduciary relationship with another, that plaintiff's burden of
discovery is reduced and *he is entitled to rely on the statements and
advice provided by the fiduciary.*' (*Sherman v. Lloyd, supra*, 181
C.A.3d at p. 698, 226 Cal.Rptr. 495)" *Eisenbaum v. Western
Energy Resources, Inc.* (1990) 218 C.A.3d 314, 324 (Emphasis
supplied)

25 At all times after December 31, 1987, the Defendants represented to the public and privately
26 reassured Plaintiffs that they were diligently working on publication of Book 1 and that their
27 obligations under the Subscription Agreement would be fulfilled. Only two Plaintiffs expressed
28 interest in getting their money back. All Plaintiffs are far more interested in acquiring a unique,

1 invaluable and important book. They were entitled to rely upon the Defendants' fidelity until the
2 Defendants announced that they had no obligation to publish. That repudiation did not occur until
3 the latter part of 2005. (Marks Decl., ¶¶32-36) This action was filed on May 19, 2006.

4 Plaintiffs contend that their cause of action did not arise until 2005, when Defendants
5 rejected Marks' request for further assurances of performance. That refusal constituted an
6 anticipatory breach. *Commercial Code* §2610. The date upon which Plaintiffs' cause of action
7 accrued presents one more triable issue of fact.

8 III.

9 TRIALE ISSUES OF FACT EXIST AS TO WHETHER
10 HAYES' BREACH OF FIDUCIARY DUTY PROXIMATELY
11 CAUSED DAMAGE TO PLAINTIFFS.

12 The Fourth Cause of Action is against Mr. Hayes, individually, and alleges, in general, that
13 his misconduct in the management of the assets of TUSPCO, the TUSPCO Trust and the Natural
14 Estate Trust left those entities incapable of performing their obligations under the PPSA or
15 responding in damages.

16 Mr. Marks has outlined the areas of misconduct in his declaration. (¶¶39-46) Mr. Hayes
17 contends that he cannot be held accountable since the TUSPCO Trust at the time he first became
18 its trustee, has never contained any of Plaintiffs' money. The argument mistakenly assumes that
19 Plaintiffs are seeking to hold Mr. Hayes, the successor trustee, liable for the misconduct by his
20 predecessor, Mr. Lange. They are not.

21 Plaintiffs contend that Hayes' *de facto* and *de jure* control as an officer and trustee of
22 TUSPCO, Inc., the TUSPCO Trust and The Natural Estate Trust gives rise to a fiduciary duty in
23 him not only to safeguard assets subject to his control, but also to report to the beneficiaries what
24 he is doing with those assets, and to fulfil the contracts made by AJG and TUSPCO.

25 The "damages" Plaintiffs have suffered in this action are not reflected in the loss of the
26 funds stolen by Lange, as mistakenly assumed by Defendant. The "damages" consist in the loss
27 of the remaining volumes of Book 1, which have incalculable value to the Plaintiffs, on account
28 of Defendants' unwillingness or inability to provide them and the anticipated claim that neither the

1 TUSPCO Trust nor TUSPCO, Inc. nor TNET any longer have sufficient funds to compensate the
2 Plaintiffs or honor the contracts.

3 Finally, Defendant Hayes seems oblivious to the effect of *Civil Code* §1668 which states
4 that "All contracts which have for their object, directly or indirectly, to exempt anyone from
5 responsibility from his own fraud . . . are against the policy of the law." Thus, TUSPCO and TNET
6 cannot exculpate themselves from the fraud committed by their hand-picked agent, Lange. (Marks
7 Decl. ¶¶ 4,5,6 and 10). It is as if the seller of Blackacre insisted that the buyer deposit the
8 purchase price to the seller's brother-in-law as escrow agent. If the brother-in-law absconds with
9 the funds, the theft does not provide a defense to the seller of Blackacre in an action for specific
10 performance and/or damages, even if the contract were to so provide.

11 Triable issues of fact remain as to whether Defendant Hayes, as Trustee, has breached his
12 fiduciary duty to Plaintiffs and to what extent Plaintiffs have suffered a loss as a consequence.

13 **A. Plaintiffs' Discovery Responses Establish That There Is A Triable Issue of Fact as to**
14 **Hayes' Breach of Fiduciary Duties.**

15 Defendant Hayes places great stock in the fact that only Mr. Marks claims to have
16 knowledge respecting Mr. Hayes' intermingling and dissipating of the assets of TUSPCO, the
17 TUSPCO Trust and the Natural Estate Trust to benefit himself, Mr. Joyner and others and to the
18 detriment of the beneficiaries, including the Subscribers, the PPSA who are owed the Book.

19 The short answer to the contention Plaintiffs cannot establish that Mr. Hayes has breached
20 a fiduciary duty is to point out that Defendant intentionally omitted from his Statement of
21 Undisputed Facts and Evidence the full text of Mr. Marks' discovery responses. When the full text
22 of the answers are considered, especially Introductory Paragraph 12, it is plain that multiple issues
23 of fact exist as to the propriety of Hayes' stewardship.

24 With respect to the cavil that the remaining Plaintiffs have no personal knowledge of
25 misconduct by Hayes, and so stated in their answers to interrogatories, their lack of personal
26 knowledge is of no consequence because a plaintiff is entitled to rely upon the knowledge of a co-
27 Plaintiff and refer to it in responding to interrogatories.

28 "If the information which is sought [by an interrogatory] is
not in possession of the party served or of its agent, then it is

1 sufficient answer to indicate that the information is unavailable or
2 to refer to the person or entity which can provide the information."
Pantzas v. Superior Court (1969) 272 C.A.2d 499, 503.

3 IV.

4 THE SECOND CAUSE OF ACTION FOR SPECIFIC
5 PERFORMANCE IS ENTIRELY APPROPRIATE
6 WHEN A CONTRACT IS FOR THE SALE OF
7 UNIQUE PERSONAL PROPERTY.

8 As an alternative grounds for dismissal of the Second Cause of Action for Specific
9 Performance (in addition to the statute of limitations defense), Defendants contend that specific
10 performance is not available because "the contract is not amenable to specific performance".
11 ((Def's Sep. Stmt., Issue 4, p. 13.) The thrust of the argument seems to be that the PPSA, in Hayes'
12 view, limits the remedies Plaintiffs may seek to a refund of their subscription payment and
13 somehow rules out specific performance as a remedy. There is no support at all for that contention
14 in the contract. On the contrary, the agreement expressly provides that "Book 1 may be supplied
15 by TUSPCO in the alternate form of edited selections from the tape recorded lectures of AJG".
16 Defendants have the transcripts and the text thereof has been digitized and transferred to compact
17 disc. There is no reason the contract could not be fulfilled by providing Plaintiffs with the text of
18 the lectures.

19 The breach of a contract to convey unique personal property gives rise to a claim for
20 specific performance. See Vol. 13, Witkin, *Summary of California Law*, 10th Ed., "Equity", §30,
21 "Contract Concerning Personal Property", p. 322; *Gilfallan v. Gilfallan* (1914) 168 C.23, 25.

22 Indeed, the California Legislature has declared that: "Specific performance may be decreed
23 where the goods are unique or in other proper circumstances." *California Commercial Code*
24 §2716(1).

25 V.

26 THE FACTS OF THIS CASE DO NOT IMPLICATE THE
27 FEDERAL COPYRIGHT ACT.

28 Defendant Hayes again mistakenly contends that Plaintiffs seek in this action the right to

1 duplicate, publish and distribute course V-201 lecture and that the Court may not grant such relief
2 because to do so would violate federal copyright laws.

3 The argument completely ignores fact that the prayer of the Complaint explicitly dispels
4 any notion that Plaintiffs are seeking to reproduce, publish or distribute course V-201 to anyone
5 who TUSPCO hasn't already sold it to. The only people who would be eligible for such
6 distribution would be fully paid subscribers, who are contractually entitled to the Book anyway.


7 The real remedy requested by Plaintiffs in the Second Cause of Action for specific
8 performance is that Defendants be ordered to "publish and distribute to Plaintiffs, by a date certain,
9 the remaining volumes of Book 1 in the form of edited, verbatim transcripts of the lectures by AJG
10 in course V-201, or, *in the alternative*, if Defendants are unwilling or unable to comply with the
11 aforesaid order, that they be ordered to deliver . . . to Plaintiffs, the verbatim transcripts and/or
12 compact discs of course V-201 so that Plaintiffs may, *at their own expense* and at no cost to
13 Defendants, publish and distribute course V-201 to themselves and to any other fully paid original
14 Subscriber to the Subscription Agreement who so requests." (Complaint, p. 12, ll. 9-16.)

15 The Defendants have the transcripts, on paper and compact disc. Specific performance of
16 the contract to deliver them is not only what justice requires, Defendants owe it to Professor
17 Galambos, to preserve and protect his work by publishing it *exactly* as he presented it *before*
18 others falsely claim credit for his innovations or publicly misstate (and therefore damage) his ideas
19 and reputation.

20 The Motion for summary judgment/adjudication should be denied.

21 DATED: April 20, 2007

22 Respectfully submitted,

23
24 
25 JONATHAN K. GOLDEN
26 Attorney for Plaintiffs FREDERIC G. MARKS,
27 JOSEPH HENTZ, STUART SMITH, JEAN
28 MOLLENHAUER, ROGAN COOMBS, JOSEPH
DROLL, GREGG ROOTEN, THOMAS R.
WOOD, MARILYN WOOD, GREG
STAININGER, and JOHN FOUNTAIN

PROOF OF SERVICE

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STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California; I am over the age of 18 and not a party to the within action; my business address is 1900 Avenue of the Stars, Suite 1900, Los Angeles, California 90067.

On April 20, 2007, I served the foregoing document described as **PLAINTIFFS' OPPOSITION TO DEFENDANT CHARLES W. HAYES' MOTION FOR SUMMARY JUDGMENT/SUMMARY ADJUDICATION OF ISSUES; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action

X by placing the original a true copy thereof in sealed envelopes addressed as follows:

Catherine L. Sekely, Esq. Lacey, Dunn & Do 315 W. Arden Avenue Suite 11 Glendale, CA 91203	John P. Godsil, Esq. Freeman, Freeman & Smiley 3415 Sepulveda Boulevard Suite 1200 Los Angeles, CA 90034-6060
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X **By mail** I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on April 20 2007, at Los Angeles, California.

X STATE I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

 FEDERAL I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.


Jonathan K. Golden