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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

FREDERIC G. MARKS, et al.,

Plaintiffs,

v.

WAYNE JOYNER and CHARLES W. HAYES, etc., et al.,

Defendants.

CASE NO. BC352639

(Honorable Kenneth R. Freeman, Department 64)

PLAINTIFFS' CLOSING ARGUMENT

I.

OVERVIEW AND SUMMARY

In their Trial Brief, Defendants apparently abandoned their former main line of defense, *i.e.*, the Statute of Limitations, earlier asserted on Demurrer and Motion for Summary Judgment.

They now contend that the action is "premature". There has been "no breach" of the contract, because they haven't promised to deliver anything to Plaintiffs by a date certain. They intend, but cannot promise, to perform sometime in the next 10 years.

The evidence showed that Andrew J. Galambos wanted subscribers to the PPSA to receive Book 1 in the form of lightly edited transcripts of his lectures as "Book 1" if he did not write the book in his lifetime. Paragraph 1.3 of Exhibit 1, the PPSA, states: "In the event of the inability of

AJG to write Book 1 due to his death or incapacity, Book 1 may be supplied by TUSPCO in the alternate form of edited selections from the tape recorded lectures of AJG, edited to the best of the ability of the authorized representative(s) of FEI and the proprietary heir(s) of AJG who would be performing such editing, it being understood that this alternate form would be second best, *but vastly superior, to not having Book 1 exist at all.*" [Emphasis supplied].

The Natural Estate Trust document, signed by Mr. and Mrs. Galambos, provides: "The Trustee is directed to concentrate the distributions from the trust on activities that will further the publication, perpetuation and protection of the innovations of ANDREW J. GALAMBOS," [Exhibit 116, Sched. "B" pg. 1] and further establishes an order of preference in publishing, "the order of preference being the publication of the edited transcripts of ANDREW J. GALAMBOS' courses." [Exhibit 116, Sched. "B" pg. 2].

Defendants clearly understood the contract and their duties because on April 17, 1999, they partially performed by publishing Volume 1 of Book 1 *"Sic Itur Ad Astra"* to subscribers in the form of lightly edited verbatim transcripts of course V-50. Everybody celebrated. Sometime later, Joyner and Hayes decided *not* to publish the remaining volumes, but told no one, instead, representing publicly at TUSPCO'S internet website that they would.

Having been summoned into court, Defendants now assert that Plaintiffs are entitled to *nothing*; that the action is *premature* because Defendants have not promised to deliver their new concept of "Book 1" by a date certain. Defendants *will not* perform the contract according to the instructions of Galambos and the understanding of the parties. They *deny* any legal obligation to do so, but insist they have not yet breached.

Defendants have breached the PPSA at least 4 different ways: (1) They have repudiated their obligations by refusing to provide reasonable assurances of performance upon request. (2) They have sought to change the contract's terms unilaterally, announcing that they will not deliver the Book to any subscriber in the form contemplated by the parties when the contract was signed. (3) They contend that Plaintiffs and their assignors are "disqualified" from receiving the benefits of the contract because they have sued to enforce it. (4) Seeking to impose additional burdens on Plaintiffs and devalue that which they are entitled to receive, Defendants reserve the

right to require all subscribers to the PPSA to sign, as a pre-condition to receiving their "new version" of Book 1, a non-disclosure agreement limiting their use and transfer of whatever ill-defined materials they ultimately publish.

II

THE PARTIES SHARED A COMMON UNDERSTANDING OF HOW BOOK 1 WAS SUPPOSED TO BE PUBLISHED UNDER THE PPSA. HOWEVER, AFTER VOLUME 1 WAS DELIVERED, DEFENDANTS CHANGED THEIR MINDS BUT CONCEALED THEIR INTENTIONS FROM PLAINTIFFS.

Defendants place great store in the definition of Book 1 set forth in Paragraph 1.3 of the PPSA as well as the provision stating that Book 1 may be provided in the form of "edited selections from the tape recorded lectures of [Galambos] edited to the best of the ability" of his authorized representatives and proprietary heirs.

Obviously, these words are subject to interpretation, and in this case all parties shared a ***common understanding*** of what those words meant until and after April 1999 when Volume 1 was delivered to subscribers. What was that common understanding? Defendants described it themselves in their trial brief: "In 1999 a portion of Book 1 (primarily involving course V-50) was delivered to subscribers. The 1999 publication consisted of *virtually verbatim transcripts of course V-50 lectures.*" [Defendants' Trial Brief, p. 5 ll. 5-7] (Emphasis Supplied). These were exactly the verbatim transcripts Plaintiffs were expecting. They were the same verbatim transcripts that Joyner and Hayes had said they were preparing in pre-April 1999 letters to "FEI customers," [Exhibits 17-21] and that Mrs. Galambos and James Gafford had referred to in earlier letters to subscribers. [Exhibits 26-29].

Civil Code §1636 states that: "A contract must be so interpreted as to give effect to the mutual intention of the parties *as it existed at the time of contracting,* so far as is ascertainable and lawful." (Emphasis Supplied).

Furthermore, *Witkin* explains the familiar principle that: "Acts of the parties, subsequent

to the execution of the contract and before any controversy has arisen as to its effect, may be looked at to determine the meaning. * * * 'When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent.'" *Vol. 1 Witkin, Summary of California Law,* 10th Ed. Contracts §749 p. 838; *Crestview Cemetery Assn. v. Dieden* (1960) 54 C. 2nd 744, 754.

For over 20 years, between 1978 and April 1999, the Galambos', their companies and representatives, including Joyner and Hayes, interpreted the contract in the same way. Everybody wanted and expected to receive verbatim transcripts of the lectures if Galambos did not publish in his lifetime. That is what Defendants delivered in April, 1999.

Only later did Defendants ***change their minds*** about what the contract called for. They admit this in their trial brief and testimony. But they ***never told anyone***. In fact, they ***refused to tell subscribers*** : (1) that they had decided not to publish the remaining volumes of Book 1 as verbatim transcripts or (2) what they planned to publish instead (3) when the subscribers could expect to receive what they had paid for, or (4) who would be the author/editor of such work. Their trial testimony confirmed that they still have no concrete plans.

When Plaintiff Marks asked Defendant Joyner for information in 2004, Joyner demanded that Marks first sign a "Disclosure Agreement" promising to keep their talks secret. Marks declined because the other subscribers had equal rights to know. When Marks later demanded explanations via inquiry letters, he was ignored.

The letters documenting Mark's requests for assurances of performance by Joyner and Hayes (received in Evidence as Plaintiffs' Exhibit Nos. 11 through 16 and largely duplicated as Defendants' Exhibit Nos. 133 through 144) prove the "stone-walling". Defendants' refusal to provide adequate assurances that they were going to fulfil the contract amounted to repudiation of it. Commercial Code §2609 (1) and (4).

Why did Defendants change their minds? Because, they say, Volume 1 was a financial flop. Their testimony confirmed their assertion that (1): "publication of course V-50 in that format [verbatim transcripts] was an utter commercial failure as the number of books sold did not even cover the printing costs," and (2) "because it did little, if anything, to further penetrate the market."

[Defendants' Trial Brief, Pg 5 ll. 7-10]

The first rationale perversely assumes that performance of a contract will be excused when it is not financially advantageous. It is also demonstrably false. The cost of printing Volume 1, according to Mr. Hayes, was about $35.00 per copy. The costs of printing had been prepaid by the subscribers at an average cost of $361.25 per book. (See. Ex. 31). Assuming the remaining volumes had been produced at a similar cost per volume, the total cost for Book 1 in its entirety would have been between $140 and $175 for the complete set of 4 or 5 volumes.

That Volume 1 "did little, if anything, to further penetrate the market," is *irrelevant.* The PPSA itself created a "market" of several hundred individual purchasers of around 1300 books. Defendants' obligation to provide Book 1 to the existing market of subscribers does not depend on whether they can successfully sell the same Book to a larger market. Nothing in the PPSA remotely suggests that the First Edition of Book 1 must be published in a form that will have wide appeal and generate sales beyond the initial subscribers.

Furthermore, if these were true reasons, why would Defendants want to keep them secret from subscribers? Why would they refuse to disclose what they were doing instead? Why not explain their intentions openly and honestly to the people who had been waiting so patiently for so many years? Why have they waited until *trial* to put forth a palpably bogus justification for what they now characterize as a mere delay in the performance of their duties?

And why would they force the Plaintiffs to trial on a verified complaint wherein *Plaintiffs offered to perform Defendants' contractual obligations without further cost or liability to Defendants*? The prayer included an alternative request for relief as follows: "[I]f Defendants are unwilling or unable to comply with [an Order to publish verbatim transcripts of course V-201] that they be ordered to deliver, forthwith, to Plaintiffs, the .....compact discs of course V-201 so that Plaintiffs may, at their own expense, and at no cost to Defendants, publish and distribute course V-201 to themselves and to any other fully paid original Subscriber...who so requests." [Ex. No. 145, Complaint, p. 12, ll. 11-16].

The evidence and common sense reveal that the "financial flop" and "market penetration" excuses are spurious. Defendants possess sufficient funds and the ability to publish lightly edited

verbatim transcripts of course V-201. They just don't want to spend the money, including money solicited from subscribers, since 1984, after Lange's theft.

The other reason Defendants have not published anything further is this: Sometime after the publication of Volume 1, Mr. Joyner and Mr. Hayes took it into their heads that both they, and ***Galambos himself*** had made a major blunder in the application of the Science of Volition by failing to include, within the PPSA, language prohibiting the *disclosure* or use of the ideas within Book 1, or *alienation* of the Book itself, without their prior, express, written consent as Trustees of The Natural Estate Trust.

Thus, Defendants believe that it was a "mistake" to publish Volume 1 without requiring subscribers to first execute non-disclosure agreements and that it would be an even bigger "mistake" to publish the remaining volumes, containing course V-201, unless the recipients first sign such agreements. Therefore, as a pre-condition to receipt of whatever Defendants plan to publish at some future, unspecified date, subscribers will have to promise, in writing, not to disclose the contents of Book 1 to anyone, employ the technological innovations explained therein, or transfer the Book to anyone without first executing a separate agreement with Defendants which will govern the terms of all future disclosure and use of Galambos' intellectual property.

The PPSA, authored by ***Galambos himself***, contains no such restraints and frankly, Plaintiffs think Galambos knew what he was doing, since he *invented* the Science of Volition.

The "bottom line" is that Defendants have not and will not voluntarily publish anything further, in any form, to Plaintiffs unless the Plaintiffs first make "restitution" to Defendants for their time and expense, including attorney fees, for the defense of this action and sign a written apology. Remember, Defendants contend that Plaintiffs *violated* the PPSA by suing to enforce it. Both Joyner and Hayes confirmed that Plaintiffs are not "qualified" subscribers unless and until they do these things. Thus, they have repudiated their contractual obligations.

Second, Plaintiffs and their assignors must sign an new agreement restricting disclosure and use of the materials. In trial, Defendants were evasive. They would only acknowledge this as a *potential* requirement, which is yet to be determined. But they insisted that they have the *right* to require Plaintiffs to agree to limitations on disclosure as a pre-condition to receiving whatever

Defendants ultimately offer as "Book 1".

So not only have they changed, unilaterally, the mutually agreed format of Book (no more verbatim transcripts) but they have added new, burdensome terms to the PPSA by claiming the right to require a new non-disclosure agreement that Galambos himself did not believe was necessary or desirable. These declarations that Defendants will not perform the contract, as written, constitute ***breaches***.

III.

THE COMPLAINT IS NOT BARRED BY THE STATUTE OF LIMITATIONS

The original anticipated, but not promised, delivery date for Book I was by December 31, 1987. In a March 15, 1988 letter TUSPCO, by Suzanne J. Galambos [SJG], stated there would be no refund of the subscribers' pre-payments that had been embezzled, but that the Galambos' would pay for the publication of Galambos' books "out of our own pocket". [Ex. 25, page 2, ¶ 8 and page 3, ¶ 5.]

In March 1998 and November, 1991, TUSPCO, by SJG, stated that they had elected to publish Book 1 serially, in several volumes. [Ex. 25, page 4, third full ¶; and . Ex. 26, ¶ 4], a method authorized in section 7.6 of the PPSA, [Ex. 1, page 17.]

The November 1991 communication states: "The first volume [of Book I] is . . . projected for publication during the second quarter of 1993. The second and third volumes are projected for publication at approximately 20-month intervals thereafter." [Ex. 26, ¶5]

By letter dated 1992, June 16, on her personal letterhead, SJG stated: "I expect to bring out the first the first volume of this multi-volume opus either by the end of 1993 or early in 1994. The other volumes of BOOK I should follow at approximately 20-month intervals thereafter." [Ex. 27, page 1, ¶ 6, and page 2, ¶ 1]. Since SJG had stated earlier there would be three volumes, this statement indicated publication of the third volume 40 months after early 1994, or around mid-1997.

AJG was diagnosed with Alzheimer's disease in or before 1992; SJG died in February 1996, and AJG died in April 1997. [Ex. 27, page 1, ¶ 1; Trial Stipulations of Fact].

TUSPCO, by James Gafford, President, in March 1996 advised that publication and delivery of Volume One of Book I would occur in October 1996. [Ex. 28, ¶ 3.] In September 1996, TUSPCO, by Gafford, announced that Volume One was not yet ready, but said "progress has been, and continues to be, steady." Gafford then assured that "until the task is completed, TUSPCO's single priority is to finish publishing Book I." [Ex. 29, ¶ 2.]

In 1998 and 1999 Defendants, Joyner and Hayes, acting as Trustees of TNET and officers of TUSPCO, sent a series of letters to FEI customers, including subscribers, assuring prompt completion and serial delivery of the four of five volumes to comprise Book One. [Ex. 17, ¶ 5;. Ex. 18, ¶¶ 1 – 5; Ex. 19, ¶¶ 1 and 2;. Ex. 20, ¶ 1; Ex. 21, ¶ 1.]

Beginning on April 17, 1999, defendants delivered Volume One of Book 1, consisting of the printed verbatim transcripts of AJG's V-50 lectures.

Thereafter, defendants offered all of Book One for sale for $2500 on the TUSPCO website beginning in or about 2000 and continuing until after the filing of the complaint in May 2006.

Some time between 2000 and 2004 defendants decided they would not publish the transcripts of the V-201 lectures in fulfillment of the PPSA. But that decision was never communicated by defendants to the PPSA subscribers. Defendants' refusal to publish the V-201 transcript became apparent gradually, from mid-2004 through the end of 2005, when defendants refused even to respond to Marks' repeated requests for a status report to all subscribers. [Decl. of Marks; Exhibits 11 through 16.]

It was Defendants' "failure to provide within a reasonable time not exceeding thirty (30) days such assurance of due performance as is adequate under the circumstances" which amounted to a repudiation of the contract. Commercial Code §2609 subd. (1) and (4).

Although Defendants have apparently abandoned the contentions that a breach occurred before 2004 or 2005, they would be estopped to assert the statute of limitations by virtue of their continued promises of performance, upon which Plaintiffs relied. See, *Langdon v. Langdon* (1941) 47 C.A.2d 28, 31. The estoppel issue was adequately covered in Plaintiffs' Trial Brief [Part IV, p. 10, ll. 28 to p. 11, ll. 1-22] and will not be revisited here.

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IV.

DEFENDANTS HAVE COMMITTED MULTIPLE BREACHES OF THE PPSA.

A. Defendants' Proposed Delay Amounts to Refusal to Publish Within a Reasonable Time.

Defendants contend they are working to produce a version of Book One which, in the opinion of their recently appointed co-trustee, Mr. Peter Giansante, will be authoritative, definitive and concise. However, defendants are unwilling to commit to a delivery date any sooner than *"not more than ten years from now"* [that is by the year 2017]. [Testimony of Joyner, Hayes, and Giansante.]

Further, Defendants are vague about their activities to accomplish publication in the manner they intend. The most defendants would say at trial was that they were considering whom to use as editors but that nothing had been accomplished since 1999 other than planning to formulate a production contract with editors.

The PPSA promises performance via publication of edited selections from AJG's lectures if AJG failed to write Book One, stating "this alternate form would be second best, but vastly superior to not having Book 1 exist at all." [Ex. 1, section 1.3.]

Defendants by their conduct are virtually dooming many, if not all, of the subscribers to having no publication of Book One at all. The subscribers fully paid for Book One anywhere from 29 to 35 years ago. Defendants' only commitment is to publish at some future date which could be 40 or more years after full payment. At least ten subscribers have already died. Many more are likely to die before receiving Book One from defendants. [Testimony of Marks.]

Defendants now have the ability to publish the transcripts of the V-201 lectures. Defendants' proposal to publish something else at an indefinite time in the future cannot, and will not, amount to due performance of the contract.

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. Restatement 2d, "Contracts", §205. This is the implied covenant of good faith and fair dealing which is a part of every contract.

> "There is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract

> .... This covenant not only imposes upon each contracting party the duty to refrain from doing anything which would render performance of the contract impossible by any act of his own, but also the duty to do everything that the contract presupposes that he will do to accomplish his purpose." Vol. I, Witkin, *Summary of California Law*, 10th Ed., "Contracts", §798, p. 892; *Harm v. Frasher* (1960) 181 C.A.2d 405, 417.

The covenant can be breached by objectively unreasonable conduct, regardless of the actor's motive. *Badie v. Bank of America* (1998) 67 C.A.4th 779, 796.

> "Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: Bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty." Vol. I, Witkin, *Summary, supra*, §799 at pp. 893-894, citing Restatement 2d, "Contracts", §205, Comment d.

B. The "Publish, Protect and Perpetuate" Instruction in The TNET Trust Does Not Authorize Defendants to Re-write the PPSA.

Defendants point to the words "protect and perpetuate" in the TNET trust instrument as justification for their conduct, namely withholding publication of the V-201 transcripts, and reserving the right to impose on subscribers various restrictions on use and transfer.

Defendants' policies are in violation of the terms of the PPSA. The contract requires publication of edited selections from the V-50 and V-201 lectures themselves. By publishing Volume One as an essentially verbatim printing of AJG's V-50 lectures, defendants showed they knew what AGJ wanted and subscribers expected to receive.

People who knew AJG and attended Course V-201 heard AJG say that if he didn't write his book he wanted the lectures printed as an alternate form of Book 1. [Testimony of Frederic Marks, Franklin Moore and Stuart Smith.] AJG didn't want anyone else to write his book if he didn't. That is why he stated in the PPSA that publishing the lectures would be "second best, but vastly superior to not having Book 1 exist at all." [Ex. 1, section 1.3 on page 1.]

Defendants' employed Stuart Smith and James Turner to catalog the thousands of tape recordings of AJG lectures. Smith and Turner found tape recordings of AJG lectures in which he said in substance and effect: "My work won't be safe until I am published;" and "If I don't write my book I want the transcripts of my lectures to be published."

Smith and Turner asked Joyner to meet with them at the Galambos' residence so Joyner

could listen to these tape recorded statements. Joyner did meet with them and listened to the tape recorded statements. [Testimony of Stuart Smith.]

Defendants' are attempting to change the terms of the PPSA. One of the current trustees of TNET represents that it is the intent of the trustees to cause writing and publication of a "definitive, authoritative, and concise" exposition of Galambos' theories. [Testimony of Peter Giansante.]

But that is not what Galambos wanted. He wanted his *own* words published via publication of his lectures in printed form. Once that is done, anyone in the world would be free to write their own book, *at their own expense*, explaining, criticizing, praising, or further developing AJG's theories. However, the information available for writing such a derivative book would be second hand and sorely deficient if there were no access to the actual words of AJG himself presenting his ideas in his lectures.

C. Defendants' Reservation of The Right to Impose Restrictions on Subscribers Is Another Breach of Contract.

In his deposition testimony, inserted into the trial record, defendant Joyner asserted the right to impose restrictions on subscribers, saying it was a mistake to publish Volume One without restrictions because: "it was available to anyone who wanted to buy a copy. No restrictions on use. No inquiry into the qualifications of the person that may want to use the ideas expressed there. Generally just giving it to anyone." [Joyner deposition, volume 1, p. 99, line 13 to p. 101, line 2.]

There are no use restrictions of any kind in the PPSA and there are no provisions for limiting delivery of Book One to subscribers in any way suggested by Joyner's testimony. Joyner, Hayes as well as Giansante insisted on the right to impose such restrictions in their sole discretion. It is an independent breach for defendants' to impose any of the use restrictions or "qualification" requirements as they suggest.

V

THE EMBEZZLEMENT BY TUSPCO'S AGENT DOES NOT ABSOLVE TUSPCO, AS PRINCIPAL, FROM LEGAL RESPONSIBILITY.

Defendants contend that Lange's embezzlement nullified the subscribers' right to a refund pursuant to section 6.5 (5) of the PPSA. However, in law the embezzlement of Lange had the same legal consequences as though defendants themselves had misappropriated or lost the funds. PPSA section 6.5(5) does not nullify subscribers' right to a refund.

Neither TUSPCO nor any other Defendant may, by contract, exempt itself from liability for its agent's fraud or embezzlement. *Civil Code* §1668. When Mr. Joyner, as TUSPCO'S lawyer, invoked §6.5(5) of the PPSA in letters denying refunds to Plaintiffs Jean Mollenhauer and Gregg Rooten, he did so in violation of public policy because the clause was void. But in any case, Joyner promised both Mrs. Mollenhauer and Mr. Rooten that they would nevertheless receive their books, which is what they really wanted. [See Exs. 112 and 119] Mrs. Mollenhauer and Mr. Rooten were lay persons, who accepted TUSPCO's lawyer's interpretation of the contract, and were thus induced to wait for their books. [See Declarations of Mollenhauer and Rooten, Exs. 171 and 172.] No other Plaintiff, until now, has ever requested a refund.

FGM had advised AJG in 1978 to appoint a bank as trustee of the TUSPCO Trust, and FGM had found two banks willing to serve as Trustee of the TUSPCO Trust. AJG preferred to appoint Lange since he did business regularly with Lange who also attended AJG's lectures.

It was defendants, namely AJG and the companies he owned and controlled, who put Lange in a position to embezzle. Defendants had employed Lange since the 1970s to keep financial records, collect monies owing to the Galambos companies (and the TUSPCO Trust), and transact banking including deposits and withdrawals. [Decl. of FGM and Testimony of Hayes] It was Hayes who uncovered the means by which Lange embezzled.

Thus, according to Ms. Galambos:

> "Lange's techniques for stealing included (but were not limited to) falsifying financial records [to conceal] his thefts and juggling moneys from one account to another until they were ultimately siphoned into his own pocket." [Ex. 25, page 2, ¶ 5.]

In the declaration of Marks, Plaintiffs set forth evidence of the agency relationship between AJG and his companies as principal and Lange as agent. No contradictory evidence was produced by defendants at trial.

When Plaintiffs refer to "defendants" in this discussion of agency they mean all named

defendants. Mr. Joyner and Mr. Hayes, as the Trustees of TNET and the directors and officers controlling TUSPCO stand in the shoes of AJG and his companies. Under the doctrine of *respondeat superior* defendants are legally responsible for the wrongdoing of Lange, even though Joyner and Hayes did not participate personally in that wrongdoing.

VI

ALTER EGO

Plaintiffs submit that the evidence justifies imposing joint and several liability to perform the contract and to pay refunds on the TUSPCO Trust, TUSPCO and TNET.

The alter ego doctrine is an equitable remedy to prevent injustice where failure to disregard the separate existence of a corporate entity would produce an inequitable result. *Mesler v. Bragg Management Co.*, 39 C. 3d 290 (1985).

In this case subscribers to the PPSA were required to pay their book subscription payments into the TUSPCO Trust. [Ex. 1, section 4.1, page 9.] The obligations of the TUSPCO Trust were guaranteed by TUSPCO under section 4.3 of the PPSA, which states in pertinent part: "subscribers shall make their payments hereunder to the TUSPCO Trust and shall receive refunds, if any, from the TUSPCO Trust. . . . *TUSPCO guarantees in full (100%) any payment required to be made from the trust to Subscriber.*" [Emphasis supplied] [Ex. 1, page 10.]

AJG and his wife SJG owned all (100%) of the shares of TUSPCO, which shares were transferred to TNET. [Exhibit 116, Schedule A, item 4.]

TUSPCO was established by AJG to publish books of his own writing as well as books of other authors relevant to AJG's theories. [Decl. of Marks, page 11, ll. 23-28.]

Subscribers' funds in the TUSPCO Trust were embezzled by Mitchell J. Lange. The evidence shows without contradiction that Lange was the agent of AJG and AJG's companies. [Decl.of Marks, page 9, ll. 6-24, Testimony of Joyner and Hayes.]

TUSPCO and the TUSPCO Trust do not have adequate assets to fulfill their obligations under the PPSA. The amount embezzled from the TUSPCO Trust was over $850,000. [Ex. 108, civil complaint against Lange, page 16, ll. 21-22]. The TUSPCO Trust now has only around $200,000 in funds. The assets of TUSPCO and the TUSPCO Trust are not adequate to their

liabilities under the PPSA. Defendants Joyner and Hayes intend to publish a new version of Book 1 by using the assets of all three entities, namely the TUSPCO Trust, TUSPCO, and TNET. [Defendants' Trial Brief, page 8, fn. 10. Testimony of Charles Hayes and Wayne Joyner.]

The alter ego doctrine in California has evolved in a series of judicial decisions having two principal elements in common:

1. There is evidence of such a *unity of interest and ownership* between a corporation and its owners that a separate personality of the corporation and its shareholders does not truly exist.

2. Failure to hold the owners of a corporation responsible legally for the liabilities of the corporation would produce an *inequitable result*. *Robbins v. Blecher*, 52 C.A. 4th 886 (1997).

One of the principal elements which justifies disregard of the corporate entity is inadequate capitalization of a corporation in relation to its liabilities and the active participation of the shareholders in the conduct of the affairs of the corporation. *Automotriz De California v. Resnick*, 47 C. 2d 702, 796 (1957); *Mirabito v. San Francisco Dairy Co.*, 1 C.2d 400, 406 (1935); *Minifie v. Rowley*, 187 C. 481, 487 (1921)

Other relevant factors found in the instant case that justify disregard of the corporate entity are the following, which are among those identified in *Associated Vendors, Inc. v. Oakland Meat Co.*, 210 C.A.2d 825 (1962).

Identity of equitable ownership; common officers and directors. AJG and his wife SJG owned all the shares of the two corporate entities, The Universal Corporation and TUSPCO. The Galambos' transferred all the assets of these two corporations to TNET in 1992. [Ex. 116, page 1 and Schedule A.] Defendants Joyner and Hayes are Trustees of TNET and directors and officers of TUSPCO.

Use of a corporation for conduct of a personal business. AJG was in the business of giving lectures and publishing books setting forth his theories and other books relevant to his theories. The Universal Corporation and TUSPCO were established by AJG to carry on the financial affairs of these activities. [Decl. of Frederic G. Marks, page 3, ll. 13-28; p. 4, ll. 1-13.]

Diversion of assets from a corporation by controlling shareholders. The assets of the

TUSPCO Trust were to become assets of TUSPCO upon fulfillment of its obligations under the PPSA. Lange embezzled all the assets of the TUSPCO Trust. Although Mr. and Mrs. Galambos, as well as PPSA subscribers, were among the victims of Lange's embezzlement, the embezzlement of Lange is for legal purposes the act of his principal under the doctrine of *respondeat superior*. AJG was the principal in that AJG and the companies he owned and controlled employed Lange in the financial aspects of their business and appointed Lange as Trustee of the TUSPCO Trust. Under the rule of *respondeat superior*, Lange's embezzlement is treated as though TUSPCO, and AJG himself, had misappropriated the money paid by subscribers into the TUSPCO Trust.

Concentration of assets in one entity and liabilities in another entity. The Galambos' transferred to TNET their residence in Orange County, an office building in Los Angeles, and their 100% interest in The Universal Corporation, TUSPCO, and the CCI Bookshelf, as well as various securities and various mutual fund accounts. [Ex. 116, Schedule A.]

The Galambos residence sold for $975,000 two years ago. It was owned by TNET free and clear of mortgage debt. TNET now holds all the assets of the estates of Mr. and Mrs. Galambos, while the sizable liability to PPSA subscribers is nominally in the TUSPCO Trust and in TUSPCO. There are inadequate assets in TUSPCO and the TUSPCO Trust to fulfill the obligations of those entities under the PPSA. [Testimony of Charles Hayes and Wayne Joyner.]

The evidence summarized above amounts to a prototypical example of a situation where a trial court has authority to apply the doctrine of alter ego. It would be inequitable to allow TNET to avoid liability for TUSPCO's guarantee and TUSPCO Trust's default.

VII

REMEDIES

AJG invited his students to subscribe to multiple copies of Book One, on the premise it would be a good speculation, because of the possibility of resale for a price higher than the acquisition cost. [Testimony of Marks and Stuart Smith.]

TUSPCO itself, until the complaint was filed in May 2006, was offering on its website to sell hard copy first edition versions of Book One. The price established by TUSPCO in 1999 was $2,500, far greater than average of $361.75 per book paid by plaintiffs and assignors. [Exhibits

19, 20, 22, and 31.]

Volume One of *Sic Itur Ad Astra* is presently available on Amazon.com, a readily ascertainable fact which is subject to judicial notice. Evidence Code §452(h). Had AJG or TNET completed and published all of Book One, it is certainly reasonable to believe that eventually subscribers to multiple First Edition copies of Book One might be able to resell them at a profit.

Among the sixteen plaintiffs and assignors, fifteen subscribed to more than one copy, with some subscribing to so many copies the implication is they believed AJG was right and intended to profit by resale. Names and numbers of copies appear in Ex. 31, and include Deming, 150 copies; Curtin, 25 copies; Staininger, 21 copies; Hentz 16 copies; Coombs, 11 copies; Mollenhauer, 10 copies; Sattro, 10 copies; etc.

Plaintiffs submit that a printed version of the V-201 lectures would have far more resale value than a DVD, or a several-thousand-page typescript of AJG's V-201. Plaintiffs paid $100,066.48 for 277 copies of Book 1 *before* 1984. [Ex. 31].

While plaintiffs seek the text of AJG's V-201 lectures in whatever format is available, it would be inequitable to award, for example, only 25 or 150 copies of a DVD or typed manuscript of V-201 to someone who paid for 25 or 150 handsomely bound *books*. Rather, for purchasers of multiple copies of Book One it would be fair, just and equitable to receive a cash refund for any number of books they purchased over and above those they intended to hold for their permanent library.

Accordingly, having discussed this issue with all plaintiffs and assignors, Plaintiff Frederic G. Marks, through counsel, represents to the court that the plaintiffs and assignors as a group wish to receive thirty copies of V-201 in the available format, with cash refunds for 247 copies.

Specifically, Plaintiffs request a judgment: (1) requiring Defendants to provide Plaintiffs with thirty copies of the V-201T (1973-74) lectures in digital, printable Microsoft Word format on one or more DVDs sufficient to accommodate the content of V-201 and (2) awarding, as damages for breach of contract, the principal sum of $89,228.75 [$361.25 per book x 247 books], together with interest thereon at the rate of 6% per annum from and after January 1, 1984 in the sum of $125,812.53, for a total of $215,041.28.

DATED: July 5, 2007

Respectfully submitted,

JONATHAN K. GOLDEN
Attorney for Plaintiffs
FREDERIC G. MARKS, et al.

PROOF OF SERVICE

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 July 5, 2007, I served the foregoing document described as **PLAINTIFFS' CLOSING ARGUMENT** on the interested parties in this action

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

John P. Godsil, Esq.
Freeman, Freeman & Smiley
3415 Sepulveda Boulevard
Suite 1200
Los Angeles, CA 90034-6060

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 July 5, 2007, at Los Angeles, California.

___ (BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee. Executed on _____, 2007, at _____, 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