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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

FREDERIC G. MARKS, FRANKLIN MOORE, JACK HURWITZ, JOSEPH HENTZ, STEWART SMITH, JEAN MOLLENHAUER, ROGAN COOMBS, JOSEPH DROLL, GREG ROOTEN, THOMAS R. WOOD, MARILYN WOOD, GREG STAININGER,

Plaintiffs,

v.

WAYNE JOYNER and CHARLES W. HAYES, individually and as Trustees of THE UNIVERSAL SCIENTIFIC PUBLICATIONS COMPANY TRUST and THE UNIVERSAL SCIENTIFIC PUBLICATIONS COMPANY, INC., and DOES 1 through 50, Inclusive,

Defendants.

CASE NO. BC 352639

[Honorable Kenneth R. Freeman, Department 64]

PLAINTIFFS' REBUTTAL TO DEFENDANTS' CLOSING ARGUMENT

DATE: JULY 27, 2007
TIME: 10:00 A.M.
DEPT.: 64

TABLE OF AUTHORITIES

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1. Defendants assert that the time for their performance has not arrived so they have not breached the PPSA.

Response: "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed." *Civil Code* §1657.

If a contract does not specify the time for performance, and the act constituting performance can not be done instantly, performance is due within a reasonable time. *Stockton v. Stockton Plaza Corp.* (1968) 261 C.A.2d 639. In *Stockton*, a lessee claimed it had an indefinite time to obtain

financing to construct improvements on real property because the lease had no provision allowing lessor to terminate for delay. Held, a reasonable time having passed without performance by lessee, lessor was entitled to terminate.

After Galambos died in 1997, defendants stated in 1998 and 1999:

"We are absolutely committed to publish Book One . . . and we are taking action to achieve this goal as expeditiously as possible. Funding is in place to publish Book One." Ex. 17.

"Book One shall consist of four or, perhaps, five volumes . . . Volume I contains the V-50 lectures. . . . Volumes 2 through 4 (or 5) consist of the V-201 lectures . . . and are being compiled by a separate group of editors. Each volume shall be delivered as it comes off the press.". Ex. 18.

On March 12, 1999 defendants offered to sell additional copies of Book One for prices ranging from $2,000 upwards. Ex. 20.

On April 17, 1999 defendants, at a celebratory open house, delivered Volume I of Book I. At that time defendants invited and took orders for purchase of additional copies of Book Ex. 24; Testimony of Stuart Smith.

From 2000 until after the filing of the complaint in 2006 defendants' website announced the publication of Volume 1, and stated: "The remaining three or four volumes of Sic Itur Ad Astra are in progress and will consist of the edited transcripts of Galambos' most important course, V-201, the nature and protection of Primary Property." Ex. 22.

After Galambos died in 1997, defendants assumed the responsibility for fulfillment of the PPSA. It took defendants two years after Galambos' death to publish Volume 1. At that rate, two years per volume, it would have taken another six to eight years (until 2005 to 2007) to publish the remaining three or four volumes. That would have constituted a reasonable time to publish, but defendants have published nothing since 1999.

A reasonable time for performance has arrived and long since passed. Defendants are in default and in breach of the PPSA.

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2. Defendants argue that the PPSA was a unilateral contract for which there can be no anticipatory breach.

In support of this position defendants cite *Cobb v. Pacific Mutual Life Ins. Co.*, 4 C.2d 565 (1935); and *Diamond v. University of Southern California*, 11 C.A.3d 49 (1970). Neither case is a valid precedent for defendants' position.

Cobb involved wrongful refusal of defendant insurance company to pay monthly disability income benefits to plaintiff. Plaintiff sued to recover not only accrued and unpaid benefits, but also a lump sum award of the present value of all *future* benefits payable over his 15-year life expectancy. The court held that in such cases the insured is entitled to all payments due as of time of trial, but that "recovery can not be had for any installments falling due in the future." It would be unfair, the court held, to require the insurer "to pay a large gross amount although the insured [in this case] . . . will not probably live the period of expectancy that a person in normal health would live."

In *Diamond*, U.S.C. repudiated a promise to sell tickets to the Rose Bowl football game to a class of "economy" season ticket holders. Plaintiff [an attorney] immediately filed a class action suit on behalf of 600 holders of the economy season tickets. U.S.C. then reversed itself and sent timely applications for purchase of Rose Bowl tickets to the economy season ticket holders. That fulfilled defendant's obligation and rendered the lawsuit moot. Defendant U.S.C. filed a motion for summary judgment, which was granted.

The appellate court affirmed summary judgment, noting that the sole purpose of the appeal was to vindicate plaintiff's right to attorney's fees, which, under the circumstances, the court declined to do.

> "The rationale for the rule [that anticipatory breach is not applicable to unilateral contracts] is that the aggrieved party has already performed and *would not be harmed* by awaiting counter-performance *at the time promised*." *Harris v. Time, Inc.* (1987) 191 C.A.3d 449. 457 (Emphasis supplied).; *Diamond v. University of So. California, supra,* 11 C.A.3d 49 , 55; 1 *Witkin Summary of California Law*, 10th ed., Contracts, §867, pp. 954-955.

The reason for the rule vanishes if the contract does not specify a date certain for performance.

The instant case is analogous to a hypothetical contract wherein a painter ("painter") proposes to paint four separate buildings on the real property of owner ("owner"), in the color

"Desert Sand", for a total price of $40,000. The contract, originally bi-lateral, becomes "unilateral" by complete performance of owner upon pre-payment of the entire price. If, after painting the first building, in the color "Desert Sand", the painter refuses to continue, but announces that he will paint the remaining buildings in a different color, and will not commit to a completion date, thus committing anticipatory repudiation, the owner would be prejudiced. So long as the painter never committed to a completion date, he would, under Defendants' theory, be *immune* from suit. Obviously, the owner is allowed to sue immediately for breach of the entire contract.

Similarly, in the present case defendants have for over three years refused, and still refuse, to publish Book 1 in the form the parties agreed upon, or to commit to any future time for performance by delivery of the remaining volumes of Book 1. Therefore, in the absence of the rationale for the decisions in *Cobb* and *Diamond* (no prejudice to plaintiff in waiting for default in performance before suing) those cases are inapposite.

Moreover, and importantly, Defendants' argument falsely assumes that the PPSA grants them the unilateral right to postpone, indefinitely, publication of Book 1, so that as long as they don't commit to a date certain, subscribers have no remedy for breach. As will be hereinafter shown in Part 6 of this Brief, ¶6.7 of the PPSA gives the option to extend the delivery date of Book 1 , ***to the subscribers, not TUSPCO.*** TUSPCO may only *propose* such extension, with *additional compensation* to subscribers for delay, and subscribers are free to accept the extension, or obtain a refund.

After concealing their true intentions for several years, Defendants now propose an indefinite extension which Plaintiffs may, at their option, reject. Plaintiffs reject the proposed extension. That means Defendants are in breach.

3. Defendants contend that the specific performance demanded by plaintiffs has no connection to the PPSA, and is an attempt to rewrite the PPSA.

> "A decree of specific performance seldom brings about performance within the time that the contract requires. In this respect, such a decree is nearly always for *less than exact and complete performance.* For the partial breach involved in delay or in other existing non-performance *money damages will be awarded along with the decree for specific performance.*" Vol. 12 *Corbin on Contracts*, Interim Ed., Specific Performance, §1160, pp. 254-255. [Emphasis supplied].

Defendants claim that Plaintiffs are seeking a "windfall" in requesting 30 CDs of V-201 and a refund for the balance of Books they paid for. This is no windfall. Plaintiffs are entitled to 277 Books. A CD is far from a book in terms of the value to the recipient. Therefore it is appropriate to grant refunds as to 247 Books. That is entirely in accordance with the principle stated above by *Corbin*. When performance is "less than exact and complete", "damages will be awarded along with the decree of specific performance."

The PPSA calls for publication and delivery of a book. Plaintiffs are requesting copies of the transcripts of the V-201 lectures in digital form, on compact disc. Defendants' argue that this request does not comply with the legal requirement of substantial similarity of the requested performance to the contractual terms.

The PPSA states that Book 1 was to contain "the theories taught by Andrew J. Galambos in . . . courses V-50 and V-201;" and that if Galambos failed to write his book, it "may be supplied . . . in the alternate form of edited selections from the tape recorded lectures of AJG [Galambos] . . . it being understood that this alternate form would be second best, but vastly superior to not having Book 1 exist at all." Ex. 1, Sec. 1.3.

During his lifetime Galambos recorded his V-50 and V-201 lectures. The recordings were transcribed into typewritten form. Defendants transferred the transcripts to digital compact discs, as confirmed by Joyner's testimony. [RT June 25, pg. 42 lls 13-28]

In 1999 defendants published the V-50 lectures in essentially verbatim form, as Volume 1 of Book 1, while promising similar imminent publication of the V-201 lectures serially, as each volume was printed. At the time defendants believed publishing the virtually verbatim transcripts was fulfilling the PPSA.

Mr. Joyner testified:

> Q. "At the open house, when volume 1 was distributed, did you intend to publish the remaining volumes in the same format as volume 1 sitting in front of you?"
>
> A. "At that time, yes." [RT June 25, pg. 39 lls. 11-14]

Defendants now refuse to publish the V-201 lectures in the same format as the V-50 lectures. Plaintiffs are willing to accept, as a substitute for the remaining volumes of Book 1, the

digitized V-201 lecture transcripts in defendants' possession. Their similarity to the V-50 publication (Ex. 24) is more than substantial. It is closer to identical.

Indeed, not only is the performance requested by Plaintiffs *substantially similar* to performance of the contractual terms per *Blackburn v. Charnley* (2004) 117 C.A.4th 758, 766 as cited by Defendants, it is *far less burdensome and expensive* than requiring them to print the lectures in book form. Would Defendants rather be ordered to edit and print the V-201 lectures in the same format as Volume 1, as they had consistently and publicly promised to do right up until this lawsuit was filed?

Stated another way, on what ground can Defendants complain if Plaintiffs are willing to accept a less burdensome and expensive form of specific performance, with which they can *easily* comply? They ought to be *relieved* that Plaintiffs are being so reasonable.

There is no question at all about the unique quality, character and value of the property Galambos, through TUSPCO, promised to provide to Plaintiffs. And California has adopted a liberal approach to granting specific performance when the property is unique. *Commercial Code* §2716 (1). See Plaintiffs' Trial Brief, pp. 13-14.

It is defendants, not plaintiffs, who are seeking to "rewrite" the PPSA, by their stated intent to create an "authoritative, definitive, and concise" version of both V-50 and V-201 according to Mr. Giansante. That is what Galambos could have done but failed to do in his lifetime. Subscribers did not bargain for an "authoritative, definitive, and concise" work not of Galambos' writing. The PPSA makes no mention of such a thing happening in the event of Galambos' death. Rather, the PPSA specifies publication of "edited selections from the tape recorded lectures of AJG [Galambos]."

Defendants refuse to edit the V-201 lectures as the V-50 lectures were edited, in which editing was limited to correcting grammatical errors and false starts, as acknowledged by Joyner. [RT June 25, p. 37 lls. 13-19] Therefore, plaintiffs prefer having the unedited V-201 lectures to having no book at all. And without aid of this court, plaintiffs will receive no book at all, given defendants' long, unexcused delays and unwillingness to specify a publication date other than "not more than ten years" from now.

The court can take judicial notice that digital compact discs are exceedingly easy and inexpensive to duplicate. *Evidence Code* §452(h). Inexpensive equipment to do this is readily available in any consumer electronics store, and people duplicate CDs in their homes on such equipment all the time. Accordingly, it would be no meaningful burden on defendants to produce the requested 30 copies of V-201 on compact disc.

4. Defendants assert that transferring the transcripts of Course V-201 to plaintiffs in any form would condone the theft of Galambos' intellectual property.

The PPSA was a contract to transfer the content of AJG's intellectual property by means of a book setting forth his theories. A public lecture is a form of publication. AJG published his intellectual property to thousands of people by live presentation of his V-50 and V-201 lectures. Galambos *promised* to publish his intellectual property to plaintiffs in book form in return for advance payment. Plaintiffs have bought and paid for the intellectual property content of these lectures.

Defendants obviously did not consider it to be a theft of intellectual property when they published the V-50 lectures in book form to plaintiffs in 1999. They considered it partial performance of the PPSA. Delivery of the V-201 lecture transcripts to plaintiffs would also be in performance of the contract, rather than constituting a theft of intellectual property.

Defendants perceive no irony in telling the Court that: (1) giving Plaintiffs what they paid for would amount to "theft", but that (2) sanctioning Defendants' refusal to refund subscription money is "justice."

5. Defendants contend that plaintiffs are not entitled to a favorable declaration of their rights under the PPSA because defendants have the exclusive authority to determine the appropriate form and content of Book 1.

Defendants Joyner and Hayes are trustees under the Andrew and Suzanne Galambos Natural Estate Trust dated April 16, 1992 (TNET).

Throughout this litigation defendants Joyner and Hayes have attempted to justify their failure to publish anything for the past eight years by pointing to the word "protect" in the phrase

of the TNET Trust that charges the successor trustee with the duty to publish, protect and perpetuate the work of Galambos. That is, according to Joyner and Hayes *not publishing Galambos is somehow protecting his ideas.*

Schedule B of the Trust document states that with respect to management of Trustors' manuscripts the order of preference shall be ***publication of the edited transcripts*** of Andrew J. Galambos' courses. Ex. 116, Schedule B, ¶¶4 and 5. [Emphasis added.]

The PPSA states that posthumous publication of Galambos' theory of volition shall be via edited selections from the ***tape recorded lectures*** of Courses V-50 and V-201. Ex. 1, sec. 1.3. [Emphasis added.]

That is the only evidence in this case regarding defendants' authority. Their authority is clearly circumscribed.

- As trustees of TNET defendants Joyner and Hayes are instructed to publish Galambos' works with the order of preference being publication of the edited transcripts of his courses.
- Defendants Joyner and Hayes control TUSPCO, which has a contractual obligation to subscribers to publish edited selections from the tape recorded lectures of V-50 and V-201.

Accordingly, defendants do not have the exclusive authority they claim to determine the form and content of Book 1. The declaration of rights requested by plaintiffs is consistent with the terms of TNET and the PPSA. The contentions of defendants are not.

6. Defendants assert that plaintiffs' refund claims are barred by the statute of limitations, laches and waiver.

After arguing unsuccessfully throughout the pre-trial proceedings that plaintiffs' claims are too late to be legally enforceable, at trial defendants assert plaintiffs' action is premature in that TUSPCO has not breached the PPSA and defendants continue to work on producing Book 1. Nevertheless, to avoid refund liability, defendants assert that refunds are barred by the statute of limitations and laches. Defendants' position is that denial of refunds is not a breach of the PPSA, but is rather consistent with the terms of the PPSA.

Defendants are mistaken. In the first place, the defense of laches can only be asserted to an equitable claim and is not available in an action at law. *Pratali v. Gates* (1992) 4 C.A.4th 632,

645. The refund claim arises from an action at law. Second, the party invoking the equitable defense must show prejudice from the delay, which Defendants have not shown at all. *Newport v. Hatton* (1924) 195 Cal. 132, 148.

The PPSA provides that subscribers' payments shall be paid into a special trust fund [the TUSPCO Trust] held separate and apart from the assets of TUSPCO; that the Trustees of the TUSPCO Trust shall not make withdrawals from the trust fund except to pay TUSPCO for production of Book 1 or to pay the balance of the trust fund to TUSPCO on delivery of Book 1 or to pay a refund to subscribers. Ex. 1, §§4 through 4.3

Plaintiff Frederic G. Marks, then attorney for AJG and TUSPCO, recommended that AJG and TUSPCO appoint a corporate trustee for the TUSPCO Trust. To that end Marks obtained the agreement of two banks, Ahmanson Trust Company and United California Bank, to serve as trustee of the TUSPCO Trust. However, AJG appointed as trustees Mitchell J. Lange ("Lange") and another individual because they had taken his courses, saw him frequently, and therefore he preferred them as trustees to an independent trustee. [Declaration of Frederic G. Marks, p. 12, ¶¶. 52-54]

Sections 6.4 and 6.7 of the PPSA provide that if Book 1 is not delivered when promised, upon subscribers' request a full refund will be made of the amount paid for Book 1 plus interest at the rate of 6% per annum.

Section 6.5(5) provides that the obligation to pay a refund shall cease and be null and void "if the assets of the [TUSPCO] trust fund are seized or made unavailable for the purposes of this agreement by any state, or by any coercive force."

It is undisputed that Lange embezzled the entire TUSPCO Trust fund between 1978 and 1984.

TUSPCO, by letter of Suzanne Galambos, wrote to all subscribers stating that pursuant to section 6.5(5) of the PPSA refunds would not be paid, attributing this to the "coercion" of Lange's embezzlement (the "no refund" policy). Ex. 25.

That statement of TUSPCO was legally inappropriate. Plaintiffs presented detailed evidence that Lange was the agent of AJG and TUSPCO. [Declaration of Frederic G. Marks p. 9,

¶¶ 38-41]. Defendants presented no evidence to the contrary.

Under the doctrine of respondeat superior, the acts of the agent Lange are in legal effect the acts of his principals, AJG and AJG's controlled companies including TUSPCO. Accordingly, Lange's embezzlement is attributed to the principals; that is, even though AJG and TUSPCO were also victims of Lange's embezzlement, the legal consequence of Lange's embezzlement is the same as if TUSPCO and AJG had misappropriated and lost the TUSPCO Trust funds.

Therefore, TUSPCO had no legal basis for asserting its no refund policy; that policy was legally improper and of no force or effect. *Civil Code* §1668. TUSPCO's attempt to invoke PPSA sec. 6.5(5) in justification of the no refund policy was not only ineffective, it was misleading to subscribers.

In three letters between March 1988 and June 1992 TUSPCO and Suzanne Galambos told subscribers that notwithstanding the loss of the TUSPCO Trust monies Book I would be published and delivered. Ex. 25 through 27.

When plaintiffs Mollenhauer and Rooten inquired about a refund after 1987, defendant Joyner, then acting as attorney for TUSPCO, invoked the no refund policy, but also asked Mollenhauer and Rooten to be patient because TUSPCO would complete and deliver Book 1 to them. Exs. 112 and 119.

Section 6.7 of the PPSA gives an option to extend the time for delivery of Book 1 ***to the subscribers, not TUSPCO.*** It states in relevant part ***"at the option of subscriber,*** the delivery date of Books 1 and 2 may be extended . . . to such later time as TUSPCO may propose. . . . Any subscriber who does not accept the proposed extension of delivery date shall receive a full refund of all subscription payments made. . . with interest at the rate of 6% per annum accrued from the time such funds were in the possession of the trustee [of the TUSPCO Trust.]. [Emphasis added.]

The foregoing effectively gives the subscriber the option to request a refund ***at any time*** after December 31, 1987.

Continuously from March 1988 right up until the filing of this lawsuit in May 2006, defendants induced subscribers to wait patiently for delivery of Book 1. This was done by a series of letters to subscribers sent out between 1988 and 1999, by statements of defendants Joyner and

Hayes at the celebratory Open House marking delivery of Volume 1 in April 1999, and thereafter by the TUSPCO website. Exs. 17 through 22, and 25 through 29.

Therefore, defendants are estopped from asserting a statute of limitations defense. *Langdon v. Langdon* (1941) 47 C.A.2d 28, 31 [defendant liable to pay bonus repeatedly requested plaintiff to be patient and not press him until his business was well established.]

Even though plaintiffs Mollenhauer and Joyner requested, and were denied, a refund, in 1988 and 1992 respectively, their refund claims are not barred by the statute of limitations. That is because TUSPCO's attorney, defendant Joyner, told them not that TUSPCO was repudiating the refund obligation, but wrongfully advised Mollenhauer and Rooten that the no refund policy was provided for by the PPSA due to the "coercion" of Lange. Exs. 112 and 119. They believed what Joyner told them. See Declarations of Mollenhauer and Rooten, Exs. 171 and 172. Are they now to be punished for accepting his word?

If one were to accept Defendants' bizarre assertion that they are immune from suit because the have not committed to a date certain for delivery of their "new, improved" version of Book 1, the announcement of such date would constitute a *proposed extension* of the delivery date under PPSA section 6.7, giving plaintiffs and all other subscribers the right to immediate refunds of amounts paid, plus 6% interest since the time subscription funds were paid to the TUSPCO Trust. So it is obvious Defendants will *never* make such a commitment.

7. Defendants argue that plaintiffs are not entitled to a refund because they received Volume 1 of Book 1, the V-50 lectures.

Posthumous publication of Galambos' Book 1 was to consist of not only the first volume containing the V-50 lectures but also ***"the remaining three or four volumes*** of *Sic Itur Ad Astra* . . . which will consist of the ***edited transcripts of Galambos' most important course, V-201***, The Nature and Protection of Primary Property." [Ex. 22, last page, last paragraph. Emphasis added.]

Defendants are in default of the PPSA by reason of their failure to make good on the contractual obligation to deliver the entirety of Book 1. Defendants have done more than default. They have absolutely repudiated any obligation to do what they said they would do in the PPSA and in all defendants' communications with subscribers from March 1988 through May 2006. That

is they have repudiated any obligation to deliver three or four volumes containing the edited transcripts of Galambos' most important course, V-201.

Defendants cite no legal authority for their argument that their refund obligation was discharged by delivery of the first volume while refusing to deliver the other three or four volumes that defendants admit were the most important.

8. Defendants argue that if they breached the agreement it was only with respect to the obligation to deliver four books.

Since Marks subscribed to only four books, Defendants urge the court to deny relief to all other plaintiffs and, by implication, to erect a legal impediment against assertion of the rights of all other subscribers who in aggregate bought and paid for five times as many books as plaintiffs. The argument rests on the assertion that the Defendants' repudiation of their obligations to Mr. Marks, did not amount to a repudiation of their obligations to any other subscriber to the PPSA.

What are they saying? If Marks had told them he was speaking for all plaintiffs and assignors, they would *not* have repudiated? Or must all the other Plaintiffs go through the idle exercise of demanding assurances personally from Defendants and be rebuffed before their claims have "matured"? No, the repudiation to Marks was repudiation to all Plaintiffs and assignors.

Defendants' illogical and narrow view focuses only on the communications between Marks and defendants Joyner and Hayes in 2004 and 2005. It disregards all of the following, which entitle all plaintiffs to the relief sought in the complaint and further would entitle all other subscribers to the same relief should they sue.

- The defendants continuing failure to deliver the balance of Book 1 after 1999.
- Defendants' attempt to *conceal* from all subscribers their post-1999 decision not to publish the V-201 lectures, as evidenced by their failure to communicate that intention to subscribers; leaving the website unchanged until the lawsuit; and demanding of Marks that he enter into an agreement not to disclose to other subscribers any status report defendants might provide Marks.
- Defendants' extensive communications with all subscribers between 1988 and 2006 having the effect of inducing all subscribers to wait patiently for performance, and not to bring legal action to enforce their PPSA rights.
- The continued repudiation of the PPSA by defendants by their conduct since Marks' first request for a status report in mid-2004 right up to and *through trial.*

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9. Defendant TNET denies responsibility for breach of the PPSA.

Defendants argue that there has been no showing sufficient to hold TNET liable for the obligations of TUSPCO under the PPSA. To the contrary, the trial record includes evidence sufficient to support a finding and judgment that TNET is responsible for the obligations of TUSPCO under the PPSA.

Section 4.3 of the PPSA provides that "Subscribers shall . . . receive refunds . . . from the TUSPCO Trust. . . . [and] TUSPCO guarantees in full (100%) any payment required to be made from the [TUSPCO Trust] to subscriber[s]."

Andrew Galambos carried on his lecturing and publishing business through two wholly-owned corporations, The Universal Corporation through which Galambos conducted the business aspects of his lectures; and TUSPCO whose business was to publish and market books which Galambos intended to write. Galambos owned all (100%) of the shares of both corporations. [Trial Decl. of Frederic G. Marks, pp. 3-4, ¶¶ 10-12; p. 13, ¶63.]

After the death of Mr. and Mrs. Galambos, the trustees of TNET acquired legal title to the assets the Galambos' estate, including The Universal Corporation and TUSPCO. Ex. 116, the TNET document, Schedule A.

Accordingly, TNET acquired the Galambos' residence, free and clear of mortgage, sold for $975,000 in 2005, as well as an office building in Los Angeles and other assets. Ex. 116, Schedule A.

Lange, the agent of Galambos and his companies, embezzled all of the monies in the TUSPCO Trust between 1978 and 1984.

In a letter to subscribers on letterhead of TUSPCO, dated March 15, 1998, Suzanne Galambos stated that "Lange's techniques for stealing included (but were not limited to) falsifying financial records so his thefts could remain undetected for a long period of time and juggling moneys from one account to another until they were ultimately siphoned into his own pocket." Ex. 25, p. 2, ¶5.

Suzanne Galambos said that notwithstanding Lange's embezzlement, "we are . . . funding the publication of Galambos' books . . . out of our own pocket . . . This is a moral decision which

Professor Galambos has made. . . . Since we are continuing to deliver the products, none of our subscribers is being injured by Lange's theft." Ex. 25, p. 2, ¶7 and p. 3, ¶2.

Lange embezzled over $1,500,000 from various accounts of entities controlled by Andrew Galambos, including The Universal Corporation, TUSPCO, and the TUSPCO Trust. Over $850,000 of the embezzlement was from the TUSPCO Trust. Ex. 145.

Defendants Joyner and Hayes testified that neither the TUSPCO Trust nor TUSPCO have sufficient assets to fulfill the PPSA. [RT June 26, pg. 2-4; pg. 29 lls. 11-18]. However, taking into account the assets of TNET, all three entities have sufficient assets to fulfill the PPSA, and defendants intend to use the assets of all three entities, including TNET to fulfill the PPSA.

The hallmarks of alter ego are (1) such unity of interest and ownership that separate personalities of a corporation and its controlling shareholder no longer exist, and (2) an inequitable result from allowing the controlling shareholder immunity from liability for the acts of the corporation.

In our following analysis, the two "entities" mean TUSPCO and TNET.

In *Associated Vendors, Inc. v. Oakland Meat Co.*, 210 C.A.2d 825 (1962), the court lists a number of factors that have been found when the doctrine of *alter ego* has been used by a court to impose liability on shareholders for acts of their controlled corporation. It is not necessary to have all these factors in any one case. Just a few key factors will do.

Among those listed in *Associated Vendors* that appear in the present case are the following (the complete list being set forth in Defendants' brief at page 19).

Use of a corporation as an instrumentality for the business of an individual (here found in Galambos' use of his two corporations to handle the financial aspects of his lectures and publishing venture).

Unauthorized diversion of corporate funds or assets (here the embezzlement of Lange attributable to TUSPCO and to Galambos himself under agency principles).

Holding out by an individual that he is personally liable for the debts of the corporation (here found in the assumption of personal liability by the Galambos' in Mrs. Galambos' letter on TUSPCO letterhead, Ex. 25).

Identical equitable ownership in the two entities (here TNET which owns 100% of TUSPCO shares).

Identification of the equitable owners with the domination and control of the two entities (here found in the control of both TNET and TUSPCO by the trustees of TNET).

Identification of the directors and officer of the two entities in the responsible supervision and management (here found in the control of both TNET and TUSPCO by Joyner and Hayes as directors, officers and trustees).

Undercapitalization (here found in the inadequacy of TUSPCO to fulfill its PPSA obligations, including the refund).

Diversion of assets from a corporation by a stockholder to the detriment of creditors (here found in Galambos' and TUSPCO's vicarious responsibility for Lange's embezzlement under the doctrine of *respondeat superior*).

Concentration of assets and liabilities between entities so as to concentrate the assets in one (here in TNET) and the liabilities in another (here in TUSPCO).

All of this provides ample basis for a finding that TUSPCO is the alter ego of TNET and vice versa. The assets of TNET are all concentrated in that Trust. All the liabilities are in TUSPCO, Inc. It would be inequitable to exempt TNET from liability to pay the refunds which TUSPCO clearly owes and cannot, itself, pay, because of the embezzlement by Lange, which is directly attributable to Galambos himself and his companies.

Course V-201 was the most important course Galambos ever gave. Its publication in Book 1 was to be the capstone of Galambos' life. The alter ego issue arises if the court declares that Plaintiffs are entitled to relief. If Plaintiffs are entitled to relief, it would be inequitable to allow Defendants, who have done *nothing* to publish V-201 to the students who paid for it almost 30 years ago, to "sit on" the still considerable assets of Galambos' estate while avoiding their responsibilities by hiding behind the existence of a corporate entity, a corporate entity which has no separate existence.

10. Defendants contend that there is no evidence that Plaintiffs and their assignors have been "disqualified" from receiving the benefits of the contract because they have sued to enforce

it.

Response: Defendants' trial testimony demonstrates that Plaintiffs are disqualified, as far as Defendants are concerned. Mr. Joyner testified as follows:

"Q. Assuming that you do turn out with Book 1 at sometime in the definite future, do you intend to deliver it to the Plaintiffs in this case?

"A. Possibly.

"Q. Well, at your deposition, didn't you tell me they were disqualified?

"A. I said – you asked me my opinion and I told you that as far as I was concerned, personally, they were not qualified to receive Book 1 because they were in violation of the PPSA in a section regarding termination of Subscribers but I also said that they could cure that in accordance with Galambos' teachings by making an apology and financial restitution for the property that was dislocated.

"Q. What you told me was that they had violated the contract by bringing the lawsuit; isn't that right?

"A. I did.

"Q. And you believed (*sic*) that, don't you?

"A. I do.

"Q. So this action to enforce the contract disqualified my clients from receiving the book, right?

"A. That would be one factor in it, yes.

"Q. But they can become re-qualified if they make restitution to the Trust, correct?

"A. That was my opinion then and now.

"Q. And did (*sic*) they also have to give you a written apology for suing the Trust, right?

"A. Yes.

"Q. And we're talking about restitution. We're talking about reimbursement of the litigation costs associated with this lawsuit, aren't we?

"A. That would be according to what Galambos thought, it would be all expenses which would include litigation costs, someone's time, any associated costs." [RT June 26, 21:17-27, 22:1-22.]

Defendant Hayes agreed with Joyner:

"Q. And, once again, do you consider the Plaintiffs today qualified to receive Book 1 whenever you decide to publish it?

"A. In my opinion as of today, no." [RT June 26, 30:7-10.]

Plaintiffs and the Court need not *speculate* about whether Defendants will, in the future, deliver Book 1 to Plaintiffs. They won't.

11. Defendants contend there is no evidence that they are seeking to impose additional burdens on Plaintiffs by reserving the right to require all Subscribers to sign a Non-disclosure Agreement as a condition of receiving Book 1.

Response: Defendants' trial testimony confirmed that if, as and when Defendants publish Book 1, they intend to impose limitations upon its use, disclosure of its contents, and transfer of the Book itself.

First, the evidence showed that Defendant Joyner refused even to discuss with Plaintiff Marks what the Trustees of the Natural Estate Trust were doing to publish Book 1 unless Marks first signed a written Non-disclosure Agreement. This alone is highly indicative of Defendants' mind set.

Second, Joyner insisted that Marks sign such an agreement because he [Joyner] had signed a Confidentiality Agreement with Peter Giansante (his co-Trustee). He further testified as follows:

> "Q. Mr. Joyner, do you intend to impose contractual terms of (*sic*) the usage of Book 1 on the Subscribers?
>
> "A. There will – well, there may be. That decision has not really been made. It would be consistent with what the professor taught in V-201 to have contractual terms of usage of his ideas. It's consistent with what he had in the supplementary proprietary notice that all students sign before they took V-201." [RT June 26, 62:11-18.]

Joyner also testified that the publication of Volume I of *Sic Itur Ad Astra* was a "mistake" in that it didn't protect Galambos' work:

> "'Question: How did it, it didn't protect his work?'
>
> 'Answer: No.'
>
> 'Question: How did it – why did it not protect his work? How did it leave his work unprotected?'
>
> 'Answer: 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.'
>
> "So, you're opposed to just giving the book, Book 1 to just anyone, right?'

"A. Yes."

"Q. So, if a Subscriber were to get the book from you, would there be restrictions on, for example, selling the book?"

Mr. Godsill: "Calls for speculation."

The Witness: "It hasn't been decided."

By Mr. Golden: "Q. 'There might be, though.'"

A. "There might be."

Q. "And there might be restrictions on use of the ideas in the book, correct?"

A. "As I said, those decisions have yet to be made."

Q. "If – but you reserve the right to make those decisions, don't you?"

A. "It's certainly something that will need to be considered in order to be consistent with the ideas taught by Galambos." [RT June 26, 64:23-28, 65:1-28.]

Mr. Giansante further confirmed that whatever the Trust publishes as Book 1 will come with a Confidentiality Agreement.

Q. "And when this Book 1 gets published by the Trustees, is it going to have a Confidentiality Agreement that goes with it?"

A. "Well, any contractual terms that accompany the disclosure of the book will be consistent with the principles of Galambos' theory and, in general, and, in particular, with the terms of the V-201 proprietary notice which every book subscriber also has signed."

Q. "There's going to be a non-disclosure agreement with your book, isn't there?"

A. "There has been no determination as to what the terms of disclosure will be." * * *

Q. "Is it your intention to publish Book 1 without any restrictions on the disclosure of its contents?"

A. "No." * * *

Q. "Do you reserve the right to require recipients to sign a non-disclosure agreement, before they get the book?"

A. "The Trust reserves the right to determine the disposition of the intellectual property of Andrew J. Galambos because that was the purpose of the trust and that's the fiduciary obligation of the trustees."

Q. "So you do retain that right, don't you?"

A. "The trust has that right." * * *

Q. "I'm asking you do you reserve the right to impose limitations on what subscribers can do with the book?"

A. "Oh. Thank you. I understand that question very well, yes." [RT June 26, 81:27-83:23.]

Plainly, Defendants have placed additional burdens upon the Plaintiffs as a condition precedent to Plaintiffs' receiving Book 1; conditions which are *not* contained in the PPSA, which Defendants insist they have not yet breached. Such conduct not only constitutes a separate breach of the PPSA, it also undermines completely Defendants' argument that the contract is unilateral, because Plaintiffs cannot receive the benefit of the contract without further consideration in the form of a non-disclosure agreement.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully submit that they should be awarded partial specific performance in the form requested and damages for Defendants' refusal to do that which they are admittedly capable of doing, *i.e.*, publishing the balance of *Sic Itur Ad Astra* in the same format as they published Volume 1.

DATED: July 19, 2007

Respectfully submitted,

Jonathan K. Golden

JONATHAN K. GOLDEN
Attorney for Plaintiffs

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 19 2007, I served the foregoing document described as **PLAINTIFFS' REBUTTAL TO DEFENDANTS' 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
Freeman, Freeman & Smiley
3415 Sepulveda Boulevard
Suite 1200
Los Angeles, CA 90034

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 19, 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

Jonathan K. Golden