John P. Godsil (State Bar No. 174356)
Nicholas A. Rozansky (State Bar No. 219855)
FREEMAN, FREEMAN & SMILEY, LLP
3415 Sepulveda Boulevard, Suite 1200
Los Angeles, California 90034-6060
Telephone: (310) 255-6100
Facsimile: (310) 391-4042

Attorneys for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

FREDERIC G. MARKS, et. al., Plaintiffs, vs. WAYNE JOYNER, et. al., Defendants.	CASE NO. BC 352639 (Hon. Kenneth R. Freemen – Dept 64) **DEFENDANTS' BRIEF RE: CLOSING ARGUMENT** Hearing Date Re: Decision: July 27, 2007 Time: 10:00 a.m. Department: 64 Trial: June 21-26, 2007

FREEMAN, FREEMAN & SMILEY, LLP
PENTHOUSE, SUITE 1200
3415 SEPULVEDA BOULEVARD
LOS ANGELES, CALIFORNIA 90034-6060
(310) 255-6100

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PENTHOUSE, SUITE 1200
3415 SEPULVEDA BOULEVARD
LOS ANGELES, CALIFORNIA 90034-6060
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I. PRELIMINARY STATEMENT

When boiled down to its core, ***plaintiffs' case is premised upon a series of demonstrably false contentions***, including the following two wholly unsupportable arguments:

- Because TUSPCO published *Sic Itur Ad Astra*, Volume 1 ("*SIAA*"), in a particular format in April 1999, the PPSA "requires" defendants to replicate that identical format as to the future publication of Book 1.
- The lawsuit is not premature because defendants anticipatorily repudiated the PPSA by "ignoring" Frederic G. Marks' ("Marks") requests in 2004 and 2005 for a status report regarding the publication of Book 1.

Plaintiffs are only able to make these misguided arguments by disregarding the PPSA, and flatly ignoring both the evidence presented at trial and governing law. As elaborated upon below, the Court should summarily reject plaintiffs' case, and enter judgment in favor of defendants.

As to the breach of contract claim, because the time for defendants' performance under the PPSA has not arrived, that agreement has not been breached. Further, as a matter of law, the concept of anticipatory repudiation is not applicable to unilateral contracts such as the PPSA. Consequently, judgment must be entered in favor of defendants as to the breach of contract cause of action.

As to the specific performance claim, given the absence of any breach of the PPSA, plaintiffs are not entitled to specific performance of that agreement. Further, the so-called "performance" demanded in plaintiffs' Closing Brief has no nexus whatsoever to the provisions of the PPSA. Rather, by way of their Closing Brief, plaintiffs attempt to rewrite the PPSA and obtain an order that would result in the outright theft of Galambos' intellectual property.

As to the declaratory relief claim, judgment in favor of defendants is mandated because the trustees of The Natural Estate Trust ("TNET") have the exclusive authority to determine the appropriate content and format of Book 1, and the evidence shows that they are working on a publication that is expressly described in, and contemplated by, the PPSA.

Additionally, judgment should be entered in favor of defendants as to the following issues:

- *Plaintiffs are not entitled to a refund.* The evidence demonstrates that plaintiffs sat on their rights for nearly 20 years after TUSPCO informed plaintiffs that a refund would not be

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paid. Therefore the refund claim is barred by the statute of limitations, as well as under the doctrines of waiver and laches. Moreover, even under plaintiffs' theory of this case, the refund demanded is inappropriate because plaintiffs acknowledge receiving enormous value when *SIAA*, was delivered.

- *Assuming arguendo that the PPSA can be anticipatorily repudiated (which it cannot) judgment should nevertheless be entered in favor of defendants as to all claims made in connection with any PPSA other than the one executed by Marks.* The only evidence before the Court regarding a purported anticipatory repudiation of a PPSA relates to the communications between Marks and defendants in 2004 and 2005. At that time, Marks only possessed the rights to four copies of Book 1 pursuant to the PPSA he personally executed. The assignments were obtained between March 2006 and November 2006, and were only disclosed to defendants after November 21, 2006. (See, Trial Ex. 170) There has been no evidence that defendants repudiated any obligation after the assignments were obtained, and there has never been any contractual privity between Marks and the other plaintiffs.

- *Judgment should be entered in favor of defendant TNET as to all causes of action.* There has been no showing that TNET is the alter ego of TUSPCO.

II. DEFENDANTS DID NOT BREACH THE PPSA

A. There Has Been No Actual Breach Of The PPSA

The PPSA has not been breached because the time for TUSPCO's performance has not arrived. The PPSA provides, in part:

> "The scheduled delivery date for Books 1 and 2 under this agreement is on or before 1987, December 31. At the option of Subscriber, the delivery date of Books 1 and 2 under this agreement ***may be extended to such later time as TUSPCO may propose***." [Trial Ex. 1, p. 15 at § 6.7] (Emphasis added)

The evidence at trial showed that Book 1 was not delivered by December 1, 1987. Moreover, the parties stipulated that:

> "It is not contested that at least since *Sic Itur Ad Astra*, Volume 1, was

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LOS ANGELES, CALIFORNIA 90034-6060
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delivered in April 1999, a firm delivery date, (*i.e.*, date certain) for Book 1 has never been proposed by TUSPCO or any other defendant." [Reporter's Transcript ("RT"), June 21, 2007 at 19:2-6][1]

Of course, a necessary element of any breach of contract claim is an **actual breach**, which is commonly described as follows: "The *wrongful,* i.e., the unjustified or unexcused, failure to perform a contract is a *breach.*" 1 Witkin, Summary of California Laws, *Contracts*, at § 847. The evidence confirmed that the time for TUPSCO's performance under the PPSA has not arrived. Therefore, there was no breach of the PPSA.

B. Plaintiffs Concede That An Actual Breach Has Not Occurred, And Instead Argue That Defendants Anticipatorily Breached The PPSA

In their Trial Brief and Closing Brief, plaintiffs tacitly acknowledge that the time for defendants' performance under the PPSA has not arrived. Rather, plaintiffs argue as follows: "Defendants' breach was anticipatory, and occurred in 2005 when they refused to provide Marks with further assurances of their intentions." [Plaintiffs' Trial Brief at 10:8-9] This position is repeated in plaintiffs' Closing Brief: "It was Defendants' 'failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances' which amounted to a repudiation of the contract." [Plaintiffs' Closing Brief at 8:20-21]

Given the absence of an actual breach, plaintiffs' case hinges entirely upon the averment that the PPSA was anticipatorily breached by the failure to provide Marks with adequate assurances of performance. As a threshold matter, however, plaintiffs' argument in this regard lacks merit because there can be no anticipatory repudiation of a unilateral contract such as the PPSA.[2]

---

[1] The witnesses at trial further confirmed (in trial testimony, or deposition testimony read into the record) that a new delivery date was never proposed by any defendant. For example, Marks so testified. [See, RT, June 21, 2007 at 48:2-48:8]

[2] In addition to the stark legal inadequacy with plaintiffs' position, even if a unilateral contract could be anticipatorily repudiated, and even if Marks' request for a status report can be construed as a demand for further assurances under the Commercial Code, *Marks was in fact provided with such assurances*. Marks was consistently told that TNET was working on the publication of Book 1. Further, defendants have never denied an obligation to publish Book 1.

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C. There Can Be No Anticipatory Repudiation Of A Unilateral Contract

1. The PPSA Is A Unilateral Contract

"[A] bilateral contract becomes unilateral when the promisee has fully performed." Cobb v. Pacific Mut. Life Ins. Co., 4 Cal. 2d 565, 573 (1935). The evidence presented at trial shows that the plaintiffs fully performed their obligations under the PPSA by paying for their copies of Book 1. In particular, Special Interrogatory Number 40 asked Marks to identify all of the facts that supported the plaintiffs' contention that they had fully performed under the PPSA. Marks replied:

> "Plaintiff fully paid, in advance, for all Volumes of Book 1." [See, Trial Ex. Number 159][3]

Marks explained this interrogatory response during his cross-examination at trial:

> Q AND YOUR RESPONSE, YOU BASICALLY SAY THAT YOU PERFORMED WHAT YOU NEEDED TO PERFORM UNDER THE AGREEMENT BY FULLY PAYING IN ADVANCE FOR ALL VOLUMES OF BOOK 1, CORRECT?
>
> A WHAT I SAY IS ABOUT EIGHT WORDS: "PLAINTIFFS FULLY PAID IN ADVANCE FOR ALL VOLUMES OF BOOK 1."
>
> Q AND THAT'S YOUR UNDERSTANDING OF WHAT YOU'RE REQUIRED TO DO UNDER THE PRE-PUBLICATION SUBSCRIPTION AGREEMENT, CORRECT?
>
> A CORRECT.
>
> Q FROM YOUR PERSPECTIVE, YOU BOUGHT FOUR COPIES OF A BOOK, RIGHT?
>
> A RIGHT.
>
> **Q AND YOUR END OF THE DEAL WAS TO PAY FOR THEM, CORRECT?**
>
> **A THAT'S RIGHT.**
>
> Q AND YOU DID THAT IN 1978 OR THEREABOUTS, RIGHT?
>
> A WELL, ACTUALLY I DID IT PROBABLY AS EARLY AS '72.

[3] The identical response was made by all other plaintiffs in response to the same special interrogatory. They all indicated: "Plaintiffs fully paid in advance for all volumes of Book One." [See, Trial Ex. 169 at page 12: 10-11.]

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Q BUT AS SET FORTH IN YOUR DIRECT EXAM, THE DECLARATION, THOSE MONIES PAID IN 1972 WERE REFUNDED TO YOU IN 1978?

A CORRECT.

Q AND AT THAT POINT IN TIME, YOU REAPPLIED THOSE MONIES FOR THE BOOKS WHICH YOU DESCRIBED IN EXHIBIT 107, YOUR PRE-PUBLICATION SUBSCRIPTION AGREEMENT, CORRECT?

A I DID.

Q AND THAT WAS YOUR END OF THE DEAL TO PAY FOR THE BOOKS, CORRECT?

A CORRECT.

Q AND WAIT FOR THEIR PUBLICATION, RIGHT?

A CORRECT. [RT, June 21, 2007 at 54:22-55:26]

Due to the foregoing evidence, plaintiffs cannot dispute that the PPSA is a unilateral contract.

2. Unilateral Contracts Cannot Be Anticipatorily Breached

Of tremendous import, the California Supreme Court has determined that, "there can be no anticipatory breach of a unilateral contract." Cobb, *supra*, 4 Cal. 2d at 573. Therefore, as a matter of law, defendants did not anticipatorily breach the PPSA.

In Cobb, the plaintiff policyholder sued the defendant insurance company, in connection with a disability policy. The policy obligated the defendant to pay monthly benefits if the plaintiff became disabled. After entering the policy, the plaintiff became disabled, and gave notice to the defendant. The defendant responded with a notice of rescission, claiming that the plaintiff made fraudulent representations on his insurance application. The plaintiff, in turn, sued for recovery of all past and future monthly benefits due under the policy. As to the monthly benefit installments, the plaintiff's theory was that the defendant had anticipatorily repudiated the policy.

The trial court found the policy repudiated, and awarded the plaintiff a sum equal to the present value of 15 years worth of future benefits installments owing under the policy (based upon plaintiff's life expectancy). The Court of Appeal reversed the portion of the judgment that applied the doctrine of anticipatory breach, and the plaintiff was remitted the amount of the accrued installments only. The plaintiff appealed to the California Supreme Court.

The Supreme Court observed that "a bilateral contract becomes unilateral when the promisee

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has fully performed." Cobb, 4 Cal. 2d 565, 573. The plaintiff had fully performed "as he was exempt from future performance as far as dues or assessments were concerned." Cobb, 4 Cal. 2d 565, 573. The court also noted that simply because the plaintiff was required to submit to reasonable future medical examinations, or furnish occasional health reports, those requirements were too inconsequential and trivial to be regarded as an unperformed obligation. Cobb, 4 Cal. 2d 565, 573

Ultimately, as noted above, the California Supreme Court found:

> "***There can be no anticipatory breach of a unilateral contract.***" Id. at 573. (Emphasis added)

Thus, that portion of the judgment allowing plaintiff damages for breach of contract for the present worth of the sum of monthly installments for plaintiff's life expectancy was reversed.

Another case recognizing the rule articulated in Cobb arises in a factual scenario substantially similar to that which is before the Court in the instant matter. See, Diamond v. University of Southern California, 11 Cal. App. 3d 49 (1970).

In Diamond, the parties entered into a contract whereby the defendant agreed that any purchaser of an economy regular season football ticket (such as the plaintiff) would receive the right to purchase a Rose Bowl ticket if the defendant's team was selected to play in the Rose Bowl. After the defendant's team was selected to play in the Rose Bowl, the defendant announced that it would not perform its promise, and an application for a Rose Bowl ticket would not be provided to the plaintiff.

Prior to the Rose Bowl game (*i.e.*, ***before the time of the defendant's performance was due***) the plaintiff sued on a theory that the agreement had been anticipatorily breached. Relying upon the rule announced by the California Supreme Court in Cobb, supra, the Court of Appeal affirmed the trial court's finding that the plaintiff's claim was ***premature***. The Court determined that after the plaintiff paid for its regular season ticket, the contract became unilateral, as the plaintiff had fully performed. At that time nothing remained except for defendant's performance. Id. at 53. The Court stated:

> "It is quite evident that when defendant repudiated its obligation on December 4, the contract had become unilateral. **Plaintiff and the members of his class had done all that they had ever been obligated to do, that is to pay the price of a season ticket. Nothing was left**

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but for defendant to furnish the applications for the Rose Bowl tickets. This action, therefore, was premature." Diamond, 11 Cal. App. 3d at 54.

In the matter at bar, plaintiffs fully performed under the PPSA when they rendered payment, and as a result the PPSA is a unilateral contract. As Cobb and Diamond make clear, the doctrine of anticipatory repudiation does not apply to unilateral contracts, and therefore, plaintiffs' claims must be rejected by the Court because they are premature.[4]

D. Plaintiffs' Remaining Claims of "Breach" Are Not Supported by the Record, And Are Instead Based Upon Mere Speculation

Seemingly recognizing the fatal flaws with their "anticipatory repudiation" argument, plaintiffs contend (*for the first time*) that defendants breached the PPSA in two additional ways:[5]

- "[Defendants] contend that Plaintiffs and their assignors are 'disqualified' from receiving the benefits of the contract because they have sued to enforce it."
- "Seeking to impose additional burdens on Plaintiffs . . .by. . .reserv[ing] the right to require all subscribers to . . .sign . . .a non-disclosure agreement." [Plaintiffs' Closing Brief at 2:26-3:3]

These two arguments are based upon pure speculation – not evidence. Indeed, the evidence

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[4] In Diamond, even though the defendant had explicitly repudiated its obligation before the time to perform, the Court still ruled that the doctrine of anticipatory repudiation did not apply because plaintiff's claim was premature. However, in the instant case, defendants have ***never*** repudiated their obligation. Hence, plaintiffs' claim of anticipatory repudiation has no factual basis in the first place.

[5] Plaintiffs also allege defendants breached the PPSA by "announcing that they will not deliver the Book to any subscriber in the form contemplated by the parties when the contract was signed." [Plaintiff's Closing Brief at 2:24 –2:26] This is just another way of arguing that the PPSA has been anticipatorily repudiated. As noted above, such an announcement cannot support a breach of contract claim because the PPSA is a unilateral contract. See, Cobb and Diamond, *supra*. In any event, the evidence established that defendants intend to publish Book 1 in the precise manner contemplated by the PPSA, *to wit*, a book consisting of edited selections from Galambos' lectures, which selections are edited to the best of the ability of the trustees of TNET.

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at trial was to the contrary.[6]

As to the issue of so-called "disqualification" of subscribers, Joyner testified that such a decision had not been made. Even though Joyner has a particular personal opinion on that issue, it is merely that – a personal opinion, which "is not a policy that has been adopted by the Trust of anyone else or TUSPCO." [RT, June 26, 2007 at 22:27-23:2.]

Moreover, the evidence also established that no decision has been made as to whether Book 1 will contain a confidentiality agreement. Joyner testified as follows:

> Q NOW, WHENEVER TO GET AROUND TO PUBLISHING BOOK 1, YOU'RE GOING TO OFFER IT TO QUALIFIED SUBSCRIBES TO THE PPSA, AREN'T YOU?
>
> A YES.
>
> Q BUT YOU'RE GOING TO REQUIRE THOSE SUBSCRIBERS TO SIGN A CONFIDENTIALITY AGREEMENT, AREN'T YOU?
>
> A THAT HASN'T BEEN DETERMINED, NO.
>
> Q IS IT POSSIBLE THAT YOU'RE GOING TO REQUIRE THEM TO SIGN A CONFIDENTIALITY AGREEMENT?
>
> MR. GODSIL: CALLS FOR SPECULATION.
>
> THE COURT: SUSTAINED. [RT, June 26, 2007 at 61:9–61:19]

Additionally, the plaintiffs' fears that any future contractual disclosure provisions might somehow deprive them of Book 1 are unfounded. Peter Giansante testified as follows:

> 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, IN GENERAL, AND, IN PARTICULAR, WITH THE TERMS OF THE V-201 PROPRIETARY NOTICE, WHICH EVERY BOOK SUBSCRIBER ALSO HAS SIGNED. [RT, June 26, 2007 at 81:27–82:6][7]

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[6] These newly crafted arguments further establish that plaintiffs' lawsuit is premature. The claims are based upon *possible* conduct that *might* occur in the *future* – not something that has already transpired.

[7] Joyner similarly testified that any usage restrictions implemented in the future would be (continued...)

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Plaintiffs have not offered any evidence to contradict this testimony. Thus, plaintiffs' claims – which are clearly based upon unsubstantiated speculation – are without merit.

III. PLAINTIFFS ARE NOT ENTITLED TO SPECIFIC PERFORMANCE

A. Given The Absence Of A Breach, Specific Performance Is Improper

As plaintiffs failed to show any breach of the PPSA by defendants, they are not entitled to specific performance. See, Golden West Baseball Co. v. City of Anaheim, 25 Cal. App. 4th 11 (1994). Golden West is fully briefed at page 9 of defendants' Trial Brief. Given the absence of any breach by defendants in this case, the specific performance claim must fail.

B. In Any Event, The "Performance" Demanded In Plaintiffs' Closing Brief Has No Connection To The Terms Of The PPSA, And Is Not Supported By The Law

Plaintiffs request a judgment "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." [Plaintiffs' Closing Brief at 16:23-25] The PPSA contains no such requirement, and therefore the Court cannot grant plaintiffs' demand.

The plaintiffs contracted to purchase Book 1, which is defined in the PPSA as follows:

> "[T]he book containing the theories taught by Andrew J. Galambos in the volitional science courses (principally courses V-50 and V-201) of [the Free Enterprise Institute]." [Trial Ex. 1 at § 1.3]

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[7](...continued)
consistent with Galambos' teachings as set forth in the Supplemental Proprietary Notice For Course V-201. [See, Trial Ex. 147, pg. 2] As set forth in Trial Ex. 147, every subscriber who enrolled in Course V-201 (including each of the plaintiffs and assignors) agreed to the following in writing: "I recognize that ideas are property and agree not to disclosure to any outside party (not an enrollee in or graduate of V-201 or V-201T) the material in the course, and I also agree to respect the authorship rights of Galambos in the material. I understand that this agreement not to disclosure or publish will be in effect until Galambos' book ***on this material*** and on material in V-50 (and other related courses) will be published by him. ***After the publication of these courses in a book by Galambos, publication of the material by others is permitted according to the restrictions in the book itself.***" [See, Trial Ex. 147 (2nd page, ¶5; and, the sign-in sheets for Course V-201 which begin at 4th page of Trial Ex. 147); see, also, RT, June 26, 2007 at 62:11-18 and 66:13-67:6] Therefore, to the extent Book 1 contains usage restrictions, the plaintiffs have already expressly agreed to them. However, this is a moot point since the evidence established that a decision regarding usage restrictions has not been made.

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All of the trial witnesses acknowledged that this was and remains the only definition of Book 1. Therefore, it is clear that plaintiffs are attempting to rewrite the PPSA to suit their own desires, fears and prejudices.[8]

"Specific performance of a contract may be decreed whenever: (1) its terms are sufficiently definite; (2) consideration is adequate; (3) **there is substantial similarity of the requested performance to the contractual terms**; (4) there is mutuality of remedies; and (5) plaintiff's legal remedy is inadequate." Blackburn v. Charnley, 117 Cal. App. 4th 758, 766 (2004) (Emphasis added) ***Here, there is absolutely no similarity – let alone the requisite "substantial similarity" – between the requested performance and the terms of the PPSA.*** The PPSA is absolutely clear as to what the plaintiffs purchased: Book 1, as defined above. Neither TUSPCO nor the plaintiffs contracted for the copies of the V-201 lectures in "digital, printable Microsoft Word format on one or more DVDs." Thus, plaintiffs are demanding performance which is well beyond what is set forth in the PPSA (which contains all of the terms of the agreement between the parties). [RT, June 21, 2007 at 14:26–16:8]

Indeed, transferring the transcripts of course V-201 to plaintiffs in any form – and particularly in an editable form as demanded in plaintiffs' closing brief – would do nothing less than condone the theft of Galambos' intellectual property. Plaintiffs purchased a to-be-written book – nothing more, and nothing less. Book 1 – the product which plaintiffs contracted for by way of the PPSA – *has not been prepared.* As a result, there is nothing available to transfer to plaintiffs. Having entered into the PPSA, plaintiffs must simply wait for the publication of Book 1 as contemplated by that agreement.[9]

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[8] Notably, because plaintiffs demand a "digital. . . Microsoft Word format" of V-201, they are obviously seeking the ability to edit the transcripts, so as to improperly distribute them to the market and thereby unfairly compete with TNET. Marks explicitly asserted his intention to do so in his September 15, 2005 letter to Joyner [Trial Ex. 143 at page 2, ¶ 5], and repeated that intention in the Complaint filed in this litigation [Trial Ex. 145 at pages 9-10, ¶ 41].

[9] An order of specific performance is also improper because if TUSPCO ever breaches the PPSA in the future, plaintiffs will have the ability to seek an adequate legal remedy in the form of monetary damages. See, Blackburn, *supra.*

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LOS ANGELES, CALIFORNIA 90034-6060
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IV. JUDGMENT AS TO THE DECLARATORY RELIEF CLAIM SHOULD BE ENTERED IN FAVOR OF DEFENDANTS

A. Defendants Will Publish Book 1 As Expressly Contemplated By The PPSA

The evidence presented shows that the authority to edit Book 1 lies exclusively with the trustees of TNET – not the plaintiffs. The plaintiffs cannot prescribe the format or content of Book 1. Based upon the agreement they voluntarily entered into with TUSPCO, the plaintiffs are required to wait for publication of Book 1.

As set forth in the PPSA and the Declaration of Trust, the development and implementation of editorial specifications regarding Book 1 lies squarely within the sole discretion of the trustees of TNET. The trustees are obligated to proceed in a fashion that will result in the publication, perpetuation *and* protection of Galambos' innovations. Under the PPSA, they are required to take "edited selections" from the course lectures, and edit those materials to "***to the best of their ability***."[10]

"Edit" is defined by *The American Heritage Dictionary of The English Language* (4th Ed.) as follows: "1.a. To prepare (written material) for publication or presentation, as by correcting, revising, or adapting. b. To prepare an edition of for publication: *edit a collection of short stories.* c. To modify or adapt so as to make suitable or acceptable: *edited her remarks for presentation to a younger audience*. 2. To supervise the publication of (a newspaper or magazine, for example). 3. To assemble the components of (a film or soundtrack, for example), as by cutting and splicing. 4. To eliminate; delete: *edited the best scene out.*"

Book 1 is being prepared in a manner consistent with the foregoing commonly used definition of "edit," and as a result, plaintiffs' entire case must fail. This is particularly true since "[i]nterpretation of a contract consists in ascertaining the meaning to be given to the expression of the parties. . .Where the language of a contract is clear and not absurd, it will be followed." 1 Witkin, Summary of California Laws, *Contracts*, at § 741. The undisputed evidence shows that even though Book 1 will be published in a different format that *SIAA* (to more effectively communicate Galambos'

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[10] The evidence established that the trustees of TNET are Galambos' proprietary heirs. Indeed, in session 30 of Course V-201 Galambos himself defined "proprietary heir" to mean the trustee of The Natural Estate. [RT, June 26, 2007 at 72:26–73:12]

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ideas in a book format, and to avoid repetition and redundancy) Book 1 will indeed consist of edited selections from the tape recorded lectures of Galambos. As Peter Giansante testified:

> "THE TRUSTEES INTEND TO PUBLISH EXACTLY WHAT IS SPECIFIED IN PPSA SECTION 1.3. IT'S A BOOK THAT IS CREATED FROM EDITED SELECTIONS FROM THE TAPED COURSES OF ANDREW J. GALAMBOS EDITED TO THE BEST OF THE ABILITY OF THE TRUSTEES." [RT, June 26, 2007 at 74:21-24]

Joyner also noted at trial:

> "BASED IN PART UPON TRUST EXPERIENCE GAINED FROM THE PUBLICATION OF VOLUME 1 AND FROM THE ADDITIONAL INFORMATION GAINED ABOUT EFFECTIVE COMMUNICATION, THE TRUST DEVELOPED AN EDITORIAL SPECIFICATION FOR BOOK 1 SUCH AS IT HAD TO BE AUTHORITATIVE, DEFINITIVE, CONCISE. THE TRUST DEVELOPED A PRODUCTION PLAN TO ACCOMMODATE ALL CONCERNS THAT WERE EXPRESSED IN THE NATURAL ESTATE TRUST AND THE PPSA AND OUR OWN PERSONAL CONCERNS THAT THE BOOK WOULD CONTAIN ALL OF THE IDEAS THAT THE PROFESSOR EXPRESSED AS HE EXPRESSED THEM BUT PRESENTED WITHOUT REPETITION, PRESENTED WITHOUT - - PRESENTED IN A FORMAT FOR A BOOK SO THAT THE READER WOULD UNDERSTAND IT MORE EASILY THAN PLOWING THROUGH 4,000 PAGES OF TRANSCRIPTS." [RT, June 26, 2007 at 18:21–19:5]

Of particular import, the evidence demonstrated that the TNET trustees have ***never*** "changed their minds" regarding their understanding or interpretation of the PPSA. Book 1 has always been understood to mean that which is expressly set forth in section 1.3 of that agreement. As Joyner and Giansante explained at trial, the trustees simply learned from the experience gained in connection with the market following the delivery of *SIAA*. The trustees also examined ways to effectively communicate a live lecture course in book form, as well as issues relating to avoiding the repetition and redundancy that inherently exists in an extended live lecture. As a result, the TNET trustees possess a greatly enhanced ability to edit Galambos' lectures – and in doing so, have remained absolutely true to both the letter and the spirit of the PPSA. ***In the final analysis, as expressly contemplated by the PPSA, Book 1 will indeed consist of edited selections from Galambos' tape recorded lectures, which selections will be edited to the best of the ability of the trustees of TNET.***[11]

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[11] Even though the project is an enormous undertaking, absent the problems previously encountered (*e.g.*, the 6 year legal battle with William Martin which concluded in March 2004, the succession of editors, and the current litigation) Book 1 would likely be near completion. Once this lawsuit is concluded, TNET will be able to return to editing Book 1 for publication.

FREEMAN, FREEMAN & SMILEY, LLP
PENTHOUSE, SUITE 1200
3415 SEPULVEDA BOULEVARD
LOS ANGELES, CALIFORNIA 90034-6060
(310) 255-6100

B. The Court Should Reject Plaintiffs' Demand To Rewrite The PPSA

In their Closing Brief, Plaintiffs point to the format of *SIAA*, and contend that the TNET trustees are forever restrained from editing Book 1 in any format other than the April 1999 publication. Nothing in the PPSA mandates such a constraint. Rather, the PPSA places the editorial discretion exclusively with the TNET trustees, who are required to edit Book 1 to the best of their ability.

As underscored in defendants' Trial Brief, the PPSA should be construed based upon its plain meaning – terms should not be added, deleted or distorted. See, Livingston Rock and Gravel Co., Inc. v. De Salvo, 136 Cal. App. 2d 156 (1955). There, the Court noted:

> "The cannon of construction which teaches that the function of the court in construing a written instrument is to ascertain – neither to add nor to subtract, neither to delete nor distort – applies. No more need be said than that to vary the terms of the instrument so as to make it mean what [the party contends] . . .would be to make a contract the parties did not enter into. That the courts cannot do." Id at 164.

In short, ***the Court should reject plaintiffs' attempt to delete terms from the PPSA*** (*e.g.*, Section 1.3's instruction that the TNET trustees edit Book 1 "to the best of [their] ability"), ***and refuse plaintiffs' request to augment the PPSA with new and different provisions***.[12]

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[12] Such new and different provisions include the revisions to the PPSA suggested in the trial testimony of plaintiffs' witnesses, including Stuart Smith and Franklin Moore. Their testimony is independently suspect for several reasons. For instance, Smith acknowledged his dislike of Joyner, as well as his disappointment when Joyner refused to permit Smith to publish the transcripts of course V-201. Further, Moore acknowledged the existence of a monetary dispute with TNET, as well as his frustration over the fact that TUSPCO published *SIAA*, without taking into account Moore's suggested changes. In any event, these witnesses claimed that Galambos expressed certain things regarding how to publish Book 1. Those purported expressions are not contained in the PPSA. Moreover, in the case of Smith, it should be noted that at his April 9, 2007 deposition, he had no recollection whatsoever of the content of the "second tape" which he presented at a meeting with Joyner. [RT, June 25, 2007 at 25:4-19] Then, without explanation for his improved memory, Smith was able to recall the substance of the tape at trial; yet, plaintiffs provided no such documentation in response to defendants' discovery requests for production of documents. The Court should disregard this entirely unreliable and unsupported testimony.

FREEMAN, FREEMAN & SMILEY, LLP
PENTHOUSE, SUITE 1200
3415 SEPULVEDA BOULEVARD
LOS ANGELES, CALIFORNIA 90034-6060
(310) 255-6100

Moreover, the Court cannot ignore the stated intention of Galambos set forth in the Declaration of Trust – that the trustees publish, perpetuate *and* protect Galambos' work. The trustees have a duty to administer TNET according to the terms of the trust instrument. See, Probate Code § 16000. Doing so here is perfectly consistent with the PPSA, which allows the trustees to edit the lectures of Galambos to the best of their ability. Moreover, "[it] is well settled that the courts will not attempt to exercise discretion which has been confided to a trustee unless it is clear that the trustee has abused his discretion in some manner." In re Marre's Estate, 18 Cal. 2d 184, 190 (1941). Because there has been absolutely no abuse of the discretion provided to the trustees, the Court should decline to interject itself into the affairs of TNET.

V. PLAINTIFFS ARE NOT ENTITLED TO A REFUND

A. Plaintiffs' Refund Claims Cannot Be Enforced Due To Laches

Section 3527 of the Civil Code provides: "The law helps the vigilant, before those who sleep on their rights." As one court has explained, "[l]aches is neglect or failure on the part of a plaintiff in the assertion of a right that, when taken in conjunction with a more or less lengthy period of time, and also in connection with other circumstances prejudicial to the defendant, will operate as a bar in equity to the successful maintenance of the plaintiff's cause of action." Columbia Engineering Co. v. Joiner, 231 Cal. App. 2d 837, 857 (1965); accord, Howard v. Societa Di Unione E Beneficenza Italiana, 62 Cal. App. 2d 842, 851-852 (1944) ("Equity will not come to the aid of one who, through his own delay and own fault, has lost the remedy which the law has provided.")

Laches requires unreasonable delay in bringing the action as well as either acquiescence in the defendant's conduct or prejudice to the defendant. Johnson v. City of Loma Linda, 24 Cal. 4th 61, 68 (2000). "Courts of equity will refuse relief even where the statutory time of limitations has not run, if in addition to mere passive neglect there is a showing of facts amounting to ***acquiescence in the acts complained of***, or other circumstances which, coupled with the delay, render the granting of relief inequitable." Smith v. Sheffey, 113 Cal. App. 2d 741, 744 (1952).

The evidence shows that in 1988 – *at a time when Marks was the attorney for Galambos and TUSPCO* – the plaintiffs (and all subscribers) were informed by TUSPCO that due to Mitchell Lange's theft, pursuant to Paragraph 6.5(5) of the PPSA, refunds of subscriptions would not be paid. This

FREEMAN, FREEMAN & SMILEY, LLP
PENTHOUSE, SUITE 1200
3415 SEPULVEDA BOULEVARD
LOS ANGELES, CALIFORNIA 90034-6060
(310) 255-6100

same information had been communicated by Galambos in and after 1984 after during all of his lecture courses. [RT, June 26, 2007 at 42:10-21] Consistent with this position, when plaintiffs Jean Mollenhauer and Gregg Rooten sought refunds in 1988 and 1992, respectively, those requests were denied. None of the other plaintiffs ever took any steps to challenge the "no refund" policy announced by TUSPCO in 1988. Thus, all plaintiffs acquiesced to the no-refund policy, and Mollenhauer and Rooten delayed over a decade after their refund requests were denied.

Further, permitting plaintiffs to pursue these claims is *absolutely prejudicial to defendants* for several reasons. For instance, *interest has accrued for nearly 20 years since the announcement of a no-refund policy.* Further, critical witnesses to the events (namely, Andrew J. Galambos, and his wife Suzanne Galambos) are deceased and unable to further augment the evidence by way of testimony relating to the no-refund policy. Thus, allowing plaintiffs to seek a refund is entirely prejudicial to defendants. As a result of the foregoing, all claims for refunds cannot be enforced due to laches.[13]

B. Plaintiffs' Refund Claims Are Time-Barred

The PPSA is subject to a four-year limitations period. See, Code of Civil Procedure § 337(1). In the usual case, the statute commences to run immediately on the occurrence of the event that creates the cause of action, without reference to the extent of plaintiff's knowledge to any other extraneous information or event. Neel v. Magana, Olney, Levey, Cathcart & Gelfand, 6 Cal. 3d 176, 187 (1971). Again, the evidence shows that plaintiffs were informed of the no-refund policy in 1988. They should have made a claim within four years of that time, not in 2006 when this case was filed. Further, as to plaintiffs Jean Mollenhauer and Gregg Rooten, the evidence shows that they sought refunds in spite

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[13] Plaintiffs contend that it does not matter that they waited over 19 years after the no-refund policy was announced to seek a refund because (according to plaintiffs) Civil Code § 1668 invalidates such a policy. ***However, even if the no-refund policy contravenes § 1668, plaintiffs are estopped from asserting such a defense.*** See, Tomerlin v. Canadian Indemnity Co., 61 Cal.2d 638, 648 (1964) [Insurance company estopped from asserting that judgment requiring coverage for insured's intentional tort was in contravention of public policy under Civil Code § 1668 because "defendant's liability here does not arise from a contract executed prior to plaintiff's wilful misconduct, but from an estoppel which arose *after* it."] Similarly, here, plaintiffs' conduct *following* the announcement of the no-refund policy (*i.e.*, sitting on their rights for 19 over years) results in an estoppel to assert the application of Civil Code § 1668.

FREEMAN, FREEMAN & SMILEY, LLP
PENTHOUSE, SUITE 1200
3415 SEPULVEDA BOULEVARD
LOS ANGELES, CALIFORNIA 90034-6060
(310) 255-6100

of the policy in 1988 and 1992, but their claims were rejected by TUSPCO. As such, any claims by plaintiffs to a refund under the PPSA are time-barred.

C. Plaintiffs Waived Any Claims For A Refund

"Waiver is the intentional relinquishment of a known right after knowledge of the facts." Roesch v. De Mota, 24 Cal.2d 563, 572 (1944). The evidence shows that each and every plaintiff waived their claim to a refund. With the exception of Jean Mollenhauer and Greg Rooten, plaintiffs simply accepted the 1988 announcement that no refunds would be issued in connection with Book 1. And with respect to Jean Mollenhauer and Greg Rooten, after their refund claims were rejected, they did not act any further. In other words, all of the plaintiffs intentionally relinquished their claims to refunds. The evidence shows they were given the facts and did not object. Therefore, judgment should be entered that plaintiffs waived their claims for refunds.[14]

D. The Refund Demanded Cannot Be Awarded Because Plaintiffs Received *Sic Itur Ad Astra*, Volume 1

Plaintiffs' inconsistent position in this matter is further exemplified by the refund claim. All of the plaintiffs received *SIAA* in April 1999. Marks testified that "it was of enormous value to me." [RT, June 21, 2007 at 48:18] Other witnesses described what a tremendous value was transmitted on that date. Nevertheless, plaintiffs demand a full refund of every dollar paid. Plaintiffs cannot have it both ways. Having received an admittedly tremendous value in April 1999, plaintiffs are not entitled to a full refund.

E. The Demand For Both A Refund *And* Specific Performance Is Improper

Even though plaintiffs are not entitled to any recovery in this action, it should nevertheless be noted that the demand for *both* specific performance and damages is plainly improper. As the

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[14] At they time they acquiesced to TUSPCO's explicit no-refund policy, plaintiffs did not assert any of the arguments they now assert regarding the format of Book 1 as conditions upon which they reserved the right to pursue refunds. They simply accepted that TUSPCO's assertion of a moral obligation to publish Book 1 as it is defined in the PPSA was an acceptable remedy in fulfillment of the contract. Nothing has changed, either in the definition of Book 1, or in the defendants' intent and actions to fulfill the contract as it is written. A decision in favor of the plaintiffs' refund demands would amount to a unilateral revision of the terms of the PPSA on behalf of the plaintiffs to the detriment of the defendants.

FREEMAN, FREEMAN & SMILEY, LLP
PENTHOUSE, SUITE 1200
3415 SEPULVEDA BOULEVARD
LOS ANGELES, CALIFORNIA 90034-6060
(310) 255-6100

California Supreme Court has determined "**a party may not obtain both specific performance and damages for the same breach of contract, either in single or multiple actions.**" Mycogen Corporation v. Monsanto Company, 28 Cal. 4th 888, 905 (2002) (Emphasis added). Plaintiffs' demand for a refund *and* specific performance is nothing less than a request for double-recovery – and, if awarded, would obviously result in an inappropriate windfall.

VI. ASSUMING *ARGUENDO* THAT DEFENDANTS REPUDIATED MARKS' PPSA BY FAILING TO PROVIDE FURTHER ASSURANCES OF PERFORMANCE, SUCH CONDUCT ONLY IMPLICATES THE FOUR COPIES OF BOOK 1 PERSONAL TO MARKS – NOT THE CLAIMS OF THE OTHER PLAINTIFFS OR THE ASSIGNORS

Marks only purchased 4 copies of Book 1, for which he paid $961.86. He purportedly obtained assignments from a number of individuals. See, Trial Exs. 4–10. By way of the assignments, Marks claims rights to an additional 197 subscriptions to Book 1. See, Trial Ex. 31. However, "[t]he assignment merely transfers the interest of the assignor. The assignee 'stands in the shoes' of the assignor, taking his or her rights and remedies, subject to *any defenses* that the *obligor* has against the assignor prior to notice of the assignment." 1 Witkin, Summary of California Law, *Contracts* at § 735 (italics in original). As noted elsewhere, "[t]he assignee stands in the shoes of his or her assignor; acquiring all of the rights and liabilities of the assignor, but the assignee of a nonnegotiable thing in action can acquire no greater right than that possessed by his or her assignor, and so also takes subject to all equities and defenses existing in favor of the obligor." 7 Cal. Jur. 3d, *Assignments* at § 43.

Marks claims that the defendants repudiated the PPSA because they failed to provide him with adequate assurances in response to a series of letters he sent to Joyner in 2005. *At that time, Marks did not hold the assignments*. In fact, Marks obtained the assignments between March 29, 2006 and November 2006, and only disclosed them to the defendants in November 2006. Finally, there is no evidence that Marks was acting on behalf of anyone other than himself during his meeting with Joyner.

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FREEMAN, FREEMAN & SMILEY, LLP
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3415 SEPULVEDA BOULEVARD
LOS ANGELES, CALIFORNIA 90034-6060
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As such, any failure to provide adequate assurances of future performance must be limited to the four subscriptions personal to Marks.[15]

VII. TNET SHOULD BE DISMISSED AS A DEFENDANT

There has been no showing that TNET is the alter ego of TUSPCO. Alter ego liability exists only where "(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and (2) that, if the acts are treated as those of the corporation alone, ***an inequitable result will follow***." Associated Vendors, Inc. v. Oakland Meat Co., 210 Cal. App. 2d 825, 837 (1962) (Emphasis added). As the Court further underscored:

> "It should also be noted that, while the doctrine does not depend on the presence of actual fraud, it is designed to prevent what would be fraud or injustice, if accomplished. ***Accordingly, bad faith in one form or another is an underlying consideration and will be found in some form or another in those cases wherein the trial court was justified in disregarding the corporate entity***." Id. at 838

In assessing whether alter ego liability exists, the Court examines several factors, including: "Commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses; the treatment by an individual of the assets of the corporation as his own; the failure to obtain authority to issue stock or to subscribe to or issue the same; the holding out by an individual that he is personally liable for the debts of the corporation; the failure to maintain minutes or adequate corporate records, and the confusion of the records of the separate entities; the identical equitable ownership in the two entities; the identification of the equitable owners thereof with the domination and control of the two entities;

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[15] In any event, Marks was provided with assurances of performance. He was consistently told that the trustees were working on the publication of Book 1. ***More detailed information was offered to Marks, but – at a time he was holding trust property (tapes of course V-201, which he later threatened to transcribe, publish and bill Joyner for the cost), and at a time when he was making multiple improper inquiries into the financial status and operational aspects of TNET – he refused to keep the information confidential.*** The evidence shows that to the extent Marks requested assurances of performance, he was provided them; and *Marks* elected to refuse more detailed information, which was to be received on a confidential basis.

FREEMAN, FREEMAN & SMILEY, LLP
PENTHOUSE, SUITE 1200
3415 SEPULVEDA BOULEVARD
LOS ANGELES, CALIFORNIA 90034-6060
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identification of the directors and officers of the two entities in the responsible supervision and management; sole ownership of all of the stock in a corporation by one individual or the members of a family; the use of the same office or business location; the employment of the same employees and/or attorney; the failure to adequately capitalize a corporation; the total absence of corporate assets, and undercapitalization; the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation; the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities; the disregard of legal formalities and the failure to maintain arm's length relationships among related entities; the use of the corporate entity to procure labor, services or merchandise for another person or entity; the diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another; the contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions; and the formation and use of a corporation to transfer to it the existing liability of another person or entity." Id. at 838-840 (internal citations omitted).

None of these factors have been established. Rather, Joyner's unrefuted testimony establishes that TUSPCO is a separate corporation, which holds annual meetings, and maintains a corporate minute book, with the day-to-day decisions being handled by its officers, Joyner and Hayes. [RT, June 26, 2007 at 56:2-56:22] TNET, on the other hand, has a board of trustees consisting of five members (Joyner, Hayes, Giansante, Cheryl Cerell and Linda Hayes), which board was established pursuant to an order obtained from the probate court in March 2004. The five trustees of TNET act jointly. [RT, June 26, 2007 at 7:7-19; RT, June 25, 2007 at 32:3-12 and 33:10-12] There has been absolutely no showing of improper activity or intermingling of the assets of TUSPCO and TNET. Moreover, there has not been any proof of bad faith on the part of any defendant. Thus, the alter ego claim must fail.

VIII. CONCLUSION

It is axiomatic that the plaintiffs were required to carry their burden of proof as to each of their

FREEMAN, FREEMAN & SMILEY, LLP
PENTHOUSE, SUITE 1200
3415 SEPULVEDA BOULEVARD
LOS ANGELES, CALIFORNIA 90034-6060
(310) 255-6100

causes of action. See, Evidence Code § 500. Plaintiffs have failed to do so, and for all of the foregoing reasons, judgment should be entered in favor of defendants.

DATED: July 12, 2007

FREEMAN, FREEMAN & SMILEY, LLP

By: _____
John P. Godsil
Attorneys for Defendants

FREEMAN, FREEMAN & SMILEY, LLP
PENTHOUSE, SUITE 1200
3415 SEPULVEDA BOULEVARD
LOS ANGELES, CALIFORNIA 90034-6060
(310) 255-6100

PROOF OF SERVICE

I, Brenda Goff, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Freeman, Freeman & Smiley, LLP, 3415 S. Sepulveda Boulevard, Suite 1200, Los Angeles, California 90034.

On July 12, 2007, I served the within document:

DEFENDANTS' BRIEF RE CLOSING ARGUMENT

☒ **by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, before 5:00 p.m. on this date; *and***

☒ **by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth below.**

☐ by placing the document(s) listed above in a sealed *Overnite Express* envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to an *Overnite Express* agent for delivery.

Jonathan K. Golden, Esq.
Law Offices of Jonathan Golden
1900 Avenue of the Stars
Suite 1900
Los Angeles, California 90067

Tel.: (310) 553-3830
Fax: (310) 553-1337

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

Executed on July 12, 2007 at Los Angeles, California.

Brenda Goff

FREEMAN, FREEMAN & SMILEY, LLP
PENTHOUSE, SUITE 1200
3415 SEPULVEDA BOULEVARD
LOS ANGELES, CALIFORNIA 90034-6060
(310) 255-6100