

OCT 30 2007

JOHN A. CLARKE, CLERK

BY E. FAJARDO, DEPUTY

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

FREDERICK G. MARKS et al.

Plaintiff,

v.

WAYNE JOYNER, et al.,

Defendants.

CASE NO. BC352639

TENTATIVE DECISION
(CRC 3.1590)

This court having considered the evidence admitted in this court and considering the pleadings, oral and written arguments and authorities brought to the court's attention now publishes its decision with respect to the issues presented.

**I.
PLEADINGS AND PARTIES**

The cross-complaint filed on April 17, 2007 was dismissed in its entirety on May 25, 2007 by the cross-complainant.

In the complaint, plaintiffs are Frederick G. Marks, Joseph Hentz, Stuart Smith, Jean Mollenhauer, Rogan Coombs, Joseph Droll, Greg Rooten, Thomas R. Wood, Greg Staininger, and John Fountain. Defendant Charles W. Hayes was dismissed on May 23, 2007

1 by the plaintiff. Defendant Wayne Joyner was dismissed by the court upon the motion of
2 plaintiff on June 21, 2007, the first day of trial. The remaining defendants are: The Universal
3 Scientific Publications Company, Inc. (TUSPCO), The Universal Scientific Publications
4 Company Trust (TUSPCO Trust) and the Natural Estate Trust (TNET). DOES 1 through 50
5 are now dismissed. The fourth cause of action for Breach of Fiduciary Duty was dismissed
6 by stipulation of the parties.
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8 II.

9 Factual Summary

10 The court finds the following facts have been proved by a preponderance of evidence:

11 In December, 1978, plaintiff Marks entered into an Pre-Publication Subscription
12 Agreement (PPSA) with The Universal Scientific Publications Company, Inc. (TUSPCO)
13 wherein Marks deposited \$961.86 in a special administrative trust fund and TUSPCO agreed
14 to produce and deliver a special limited first edition book, (Book 1) containing the theories
15 taught by Andrew J. Galambos (Galambos) in his volitional science courses (principally
16 courses V-50 and V-201) of the Free Enterprise Institute (FEI). All other plaintiffs entered
17 into the PPSA with TUSPCO at approximately the same time. In addition, David L. Wood,
18 Richard Sattro, Richard G. Curtin, John W. Deming, Brad J. Gladish, Jack H. Hurwitz,
19 Robert W. Thompson entered into the same agreement and have assigned their rights to
20 plaintiff Marks.
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23 Galambos was an astrophysicist who developed a philosophy known as the Science of
24 Volition, and who formed FEI to teach this philosophy. During the nineteen-sixties,
25 seventies and eighties, he gave numerous lecture courses for profit, presenting classes to
26 students at various locations in Southern California and through contractors who presented
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1 the same courses to interested students via audiotapes of his lectures. The introductory
2 course to the Science of Volition was titled V-50. It consisted of sixteen lectures and three
3 workshops. The advanced course was titled V-201 and consisted of forty-eight lectures and
4 three workshops.
5

6 Under the terms of the PPSA, Book 1 was to be written by Galambos, but in the
7 event of his death or incapacity, TUSPCO could produce an alternate form of edited
8 selections from Galambos' tape-recorded lectures. The editing was to be performed by the
9 authorized representatives of FEI and the proprietary heirs of Galambos. Book 1 had an
10 intended publication date in the year 1987.
11

12 The special trust to administer the advance book payments was named under the
13 contract as the TUSPCO Trust ("Trust"). Funds were to be held in escrow by the Trust and
14 paid to TUSPCO when (1) any production expenses were needed or (2) when any volume of
15 Book 1 was ready for delivery.

16 A full refund of any monies deposited in the Trust, plus interest, was to be made:

17 (1) If any book could not be delivered due to circumstances beyond TUSPCO's
18 control; or

19 (2) If Book 1 was not ready for delivery by 12/31/87 and the subscriber requested a
20 refund.
21

22 In the alternative, if Book 1 was not delivered before 12/31/87, and at the option of
23 the subscriber, the delivery date could be extended to such later time as TUSPCO would
24 propose. In that event, TUSPCO was to pay a negotiated amount to Subscriber to
25 compensate for the delay in delivery. Any subscriber who did not accept the proposed
26 extension of delivery date was to receive a full refund of all payments made, plus interest.
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1 TUSPCO guaranteed in full any payment required to be made from the Trust to the
2 subscriber, except under certain specified contingencies. One of the contingencies which
3 would excuse the obligations under the guarantee was if the assets of the Trust were seized or
4 made unavailable ". . . by any coercive force, the obligation of TUSPCO to make or
5 guarantee any refund to the subscriber would cease and be null and void."
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7 In 1984, Mitchell J. Lange, the then-trustee of the TUSPCO Trust looted the trust of
8 all its funds. Lange was prosecuted, stipulated to a judgment in the related civil matter, but
9 was unable to make restitution.

10 Galambos failed to publish Book 1 by the December 31, 1987 deadline.

11 The court specifically finds that on March 15, 1988, Galambos's spouse, Suzanne J.
12 Galambos (SJG) *wrote on behalf of TUSPCO to all plaintiffs and to all other PPSA*
13 *subscribers*, indicating that Lange had stolen 1.5 million dollars from the TUSPCO trust and
14 other Galambos entities, and *stating that no refunds would be made*, specifically, that ". . .
15 those of you who have been requesting refunds of book trust payments under Paragraph 6.4,
16 page 12, that this paragraph has been rendered null and void under paragraph 6.5(5), pages
17 14. Lange's theft invokes the latter paragraph as stated in the contract."
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19 SJG went on to write that "Since we are continuing to deliver the products, none of
20 our subscribers is being injured by Lange's theft . . ." and ". . . We are paying for the
21 publication of the books on the trust out of our own pocket . . ." *No projected time for*
22 *publication of the books was promised*, saying ". . . One of the reasons progress comes so
23 slowly is that that . . . [AJG and SJG] . . . must do everything that has to be done in our
24 various companies . . ." and ". . . we have lost prime production time in the years since 1984.
25 We have had to invoke the term in the book contract which enables us to put out Book 1 in
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1 several volumes. We had planned the first volume for publication in 1987. Galambos's
2 coronary thrombosis rendered that plan impossible of achievement."

3 Early in 1988 Plaintiff Jean Mollenhauer demanded a refund. On March 28, 1988,
4 TUPSCO refused her demand, indicating that under Paragraph 6.5(5) the duty to refund had
5 been "voided." At no time did she enter into an agreement to extend the delivery date.
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7 In the summer of 1992 Plaintiff Greg Rooten demanded a refund, threatening to sue if
8 his demand was not complied with. On July 9, 1992, TUPSCO refused his demand,
9 indicating under Paragraph 6.5(5) the "obligation to refund is null and void," and to arbitrate
10 if Rooten disagreed. Rooten did not sue due to financial reasons. At no time did he enter
11 into an agreement to extend the delivery date.
12

13 SJG died on February 14, 1996. Galambos died on April 10, 1997 without publishing
14 Book 1. His trust estate, known as TNET was designed to continue Galambos's work. The
15 directive to the trustees of the TNET is contained in the Declaration of Trust, indicating that
16 the trustee will ". . . concentrate the distribution from the trust on activities that will further
17 publication, perpetuation and protection of the innovations of [Galambos], including such
18 publication of the theories and other works of [Galambos] as may be appropriate."
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20 On April 17, 1999, more than eleven years after the original publication goal stated in
21 the PPSA, TUSPCO published a book entitled *Sic Itur Ad Astra, Volume One*, which was
22 delivered to the plaintiff and other subscribers. This book contained the V-50 lectures.
23 Future volumes were promised that would cover the V-201 lectures and three workshops.
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25 No additional volumes of Book 1 have yet been published, and the TNET trustees
26 have never denied an obligation to publish Book 1.

27 In 2004, plaintiff Marks contacted defendant Joyner and demanded to know the status
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1 of publication of the remainder of the volume(s) of Book 1. He was asked to sign a
2 nondisclosure agreement as a condition of learning the status. He refused, stating that every
3 subscriber had a right to a report as to the status of the publication. On October 13, 2004,
4 Defendant Joyner wrote a letter Plaintiff Marks's spouse declining to state what TNET and
5 TUSPO are doing to publish the V-201 materials.
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7 On May 19, 2006 the complaint in the above-entitled case.

8 **III.**

9 **DISCUSSION**

10 **Breach of Contract**

11 **1. Any breach based upon the failure to refund advance payments to the**
12 **TUSPCO trust is barred by the statute of limitations.**
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14 Per C.C.P. §337(1), the PPSA is subject to a four-year statute of limitations.
15 Galambos failed to deliver Book one by December 31, 1987. In 1988, the plaintiffs were
16 informed that no refunds would be made. No specific date was promised for delivery and no
17 offer was made to compensate the subscriber for the delay in delivery. Thus paragraphs 4.3,
18 6.1, 6.4 and 6.7 of the PPSA were breached. The breach of contract cause of action was
19 filed on May 19, 2006 and is thus barred by C.C.P. § 337(1). Plaintiffs Mollenhauer and
20 Rooten, they sought refunds in 1988 and 1992, were refused and took no further actions. As
21 to these two plaintiffs, the actions of TUSPCO constitute an additional breach of paragraph
22 6.4 and therefore a separate and independent ground for these two plaintiffs' claims being
23 time-barred. Accordingly, as to the third cause of action for breach of contract, judgment for
24 defendants.
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26 **2. Failure to publish more volumes does not constitute a breach of the PPSA**
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1 **since publication and delivery of *Sic Itur Ad Astra, Volume One* constituted full**
2 **performance.**

3 For this separate, independent reason, the court finds for defendant on the third cause
4 of action. Under paragraph 1.3 of the PPSA, Book 1 was to be written by Galambos and was
5 to contain both V-50 and V-201 lectures. However, if Galambos died, TUSPCO could fulfill
6 its obligations in an *alternate form of edited selections from the tape-recorded lectures*. This
7 is what occurred on April 17, 1999, and the court finds specifically that the production and
8 delivery of *Sic Itur Ad Astra, Volume One* to the plaintiffs constituted full performance.
9

10 **Specific Performance**

11 As discussed above, because the court finds there has been full performance, there is
12 nothing to specifically perform, so this cause of action must fail. However, for a separate
13 and independent ground, specific performance is denied because under Civil Code § 3390
14 (5), the subject obligation cannot be specifically enforced because the terms of the PPSA are
15 not sufficiently certain for the court to ascertain the precise acts to be done. The PPSA calls
16 for the inclusion of edited selections from Galambos's lectures. The process of selecting
17 what part of the lecture tapes are to be included in the book and which ones are to be deleted
18 is a creative and artistic effort. As with all artistic and creative endeavors, there is no
19 objective standard by which one can measure its completion. For this reason, as well as
20 those discussed above, judgment must be entered for defendants as to the second cause of
21 action.
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24 **Declaratory Relief**


25 Since there has been no breach of contract for failure to deliver Book 1, and since any
26 right to refund is barred by the statute of limitations, judgment for the defendants is
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1 appropriate as to the first cause of action for declaratory relief.

2 **FURTHER ORDERS**

3 Per CRC § 3.1590, this tentative decision will be final in ten days unless either party
4 specifies controverted issues or makes proposals not covered in this tentative decision.
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6 Dated: October 30, 2007.

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Kenneth R. Freeman, Judge

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