

1 JONATHAN K. GOLDEN, ESQ. (CSB #49459)  
2 1900 Avenue of the Stars, Suite 1900  
3 Los Angeles, CA 90067  
4 Telephone: (310) 553-3830  
5 Facsimile: (310) 553-1337

6 Attorney for Plaintiffs

**FILED**  
LOS ANGELES SUPERIOR COURT

APR 23 2007

JOHN A. CLARKE, CLERK

BY VICTOR E. SINO-CRUZ, DEPUTY

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

11 FREDERIC G. MARKS, JOSEPH  
12 HENTZ, STUART SMITH, JEAN  
13 MOLLENHAUER, ROGAN COOMBS,  
14 JOSEPH DROLL, GREGG ROOTEN,  
15 THOMAS R. WOOD, MARILYN WOOD,  
16 GREG STAININGER, and JOHN  
17 FOUNTAIN,

18 Plaintiffs,

19 v.

20 WAYNE JOYNER and CHARLES W.  
21 HAYES, individually and as Trustees of  
22 THE UNIVERSAL SCIENTIFIC  
23 PUBLICATIONS COMPANY TRUST,  
24 THE UNIVERSAL SCIENTIFIC  
25 PUBLICATIONS COMPANY, INC., THE  
26 NATURAL ESTATE TRUST and DOES 1  
27 through 50, Inclusive,

28 Defendants.

CASE NO. BC352639

(Honorable Kenneth R. Freeman,  
Department 64)

**PLAINTIFFS' SEPARATE  
STATEMENT OF UNDISPUTED  
MATERIAL FACTS IN  
OPPOSITION TO MOTION FOR  
SUMMARY JUDGMENT/  
ADJUDICATION**

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

**Date Action Filed: May 19, 2006**  
**Trial Date: June 6, 2007**

24 Plaintiffs in the above-entitled action hereby submit this Separate Statement in  
25 Opposition to the Separate Statement of Undisputed Material Facts of Defendant Charles  
26 W. Hayes pursuant to *Code of Civil Procedure* §437c(b):

27 **Issue 1:** The first, second and third causes of action are barred by the applicable  
28 statute of limitations. (*Code of Civil Procedure* §337(3).) (Separate Statement of

1 Undisputed Facts, Nos. 1 to 11.)

2 **STATEMENT OF UNDISPUTED MATERIAL FACTS**

3 **Undisputed Material Facts and**  
4 **Alleged Supporting Evidence:**

**Response and Evidence:**

5 **Fact No. 1:** In the spring of 1978 plaintiff  
6 Marks, then TUSPCO's and Andrew J.  
7 Galambos's ("AJG") counsel, drafted a  
8 book contract (the Pre-Publication  
9 Subscription Agreement ["PPSA"]) and a  
10 trust (The Universal Scientific  
11 Publications Company, Inc. Book  
12 Subscription Trust ["TUSPCO Trust"]).

Undisputed.

13 **Supporting Evidence to Fact No. 1:**  
14 Exhibit "A" PPSA; Exhibit "D" TUSPCO  
15 Trust; Exhibit "S" Deposition of Frederic  
16 G. Marks ["Marks Depo."] 97:2-98:19;  
17 Complaint ¶¶1, 25, 46.

18 **Fact No. 2:** Plaintiffs are former students  
19 of AJG that contracted with defendant  
20 TUSPCO in or about 1978 to obtain copies  
21 of AJG's unwritten book that would  
22 encompass his courses V-50 (the  
23 introductory course) and V-201 (the  
24 advanced course) pursuant to the PPSA.  
25 Both of the introductory and advanced  
26 courses are intended to constitute "Book  
27 1."

Undisputed.

28 **Supporting Evidence to Fact No. 2:**  
Complaint ¶13.

**Fact No. 3:** TUSPCO "stated its written  
intention to publish Book 1 before  
December 31, 1987." Book 1 was not  
published by December 31, 1987.

**Supporting Evidence to Fact No. 3:**  
Complaint ¶13, 18; Exhibit "A," PPSA  
§6.4.

Disputed. Defendant misstates and  
mischaracterizes the terms of the contract  
which provides, in relevant part: "In the  
event of the inability of AJG to write Book  
1 due to his death or incapacity, Book 1  
may be supplied by TUSPCO in the  
alternate form of edited selections from the  
tape recorded lectures of AJG edited to the  
best of the ability of the authorized  
representative(s) of FEI and the  
proprietary heir(s) of AJG who would be  
performing such editing, it being  
understood that this alternative form would  
be second best, but vastly superior, to not  
having Book 1 exist at all. Book 1 is  
scheduled for publication during the year  
1987, it being the firm intention, but not  
the promise of guarantee of TUSPCO that  
Book 1 will be published in the year 1987.  
The reason for the lack of a promise or  
guarantee as to date of delivery is not only

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**Fact No. 4:** Pursuant to the PPSA, if Book 1 was not ready for delivery by December 31, 1987 the book subscriber could seek a refund.

**Supporting Evidence to Fact No. 4:** Complaint ¶14, Exhibit "A," PPSA §6.4.

**Fact No. 5:** On March 15, 1988 Suzanne Galambos (AJG's wife") advised plaintiff Marks, still counsel for AJG, that TUSPCO was invoking section 6.5(5) of the PPSA to nullify the refund guarantee clause of section 4.3 of the PPSA since M.J. Lange had stolen the money deposited in the TUSPCO Trust prior to July 1984. AJG intended to fund the publication of the book out of his "own pocket", not based upon any legal obligation, but that: "This is a moral decision which Professor Galambos has made."

**Supporting Evidence to Fact No. 5:** Exhibit "R," March 15, 1988 Letter from Suzanne J. Galambos to marks pp. 2-3.

the obvious possibility of the vis major in all human affairs, but also the precarious condition of this country's future as well as that of all mankind." Defendants' Exhibit "A", PPSA, ¶1.3.

Undisputed.

Disputed. Defendant misstates and mischaracterizes the substance of the letter. Mrs. Galambos did not deny a legal obligation to subscribers and she confirmed to Plaintiff Marks that TUSPCO would publish Book 1 notwithstanding Lange's theft, stating: "We also are funding the publication of Galambos's books ... out of our pockets since Lange embezzled the trust funds." \* \* Defendant's Exhibit "R," p. 2. "Since we are continuing to deliver the products, none of our subscribers is being injured by Lange's theft." Exhibit "R," p. 3. "We think you will agree that, given the handicaps which we are operating -- and we are operating -- getting books published and new concepts recorded on tapes via courses are the most important achievements we can complete at this time." Exhibit "R," p. 3. "[T]he monies you paid for your pre-publication subscriptions are the very least of what you have at stake." Exhibit "R," p. 4. "We have had to invoke the term in the book contract which enables us to put out Book 1 in several volumes." Exhibit "R," p. 4. "As of this writing, Book 1 is selling for \$750.00 and, when the first volume comes off the press, there is likely to be an additional increase, but this will not be retroactive. The increase will only affect new subscribers, not those of you who purchase books on the trust." Exhibit "R," p. 6. "We call your attention to the fact that all books will be shipped to subscribers at the subscribers' expense." Exhibit "R," p. 8.

PLFS'

1 **Fact No. 6:** Plaintiff Jean Mollenhauer  
2 also sought a refund after the December  
3 31, 1987 deadline, but was advised on  
4 March 28, 1988 of the "no refund" policy.  
5 **Supporting Evidence to Fact No. 6:**  
6 Exhibit "A" PPSA §6.4; Exhibit "T"  
7 March 28, 1988 Letter from Wayne Joyner  
8 to Jean Mollenhauer p. 2.

Disputed. Defendant has misstated and  
mischaracterized the content of Exhibit  
"T". There is no proof that Plaintiff  
Mollenhauer sought a refund, only that she  
made an "inquiry" which was met with a  
statement by TUSPCO's attorney that, in  
accordance with paragraph 6.5(5) of the  
PPSA, Lange's theft absolved TUSPCO of  
its guarantee to refund subscriber's money.  
Joyner discouraged any action to enforce  
the contract as follows: Anyone with  
gratitude and sensitivity would not request  
a refund under these circumstances.  
Although you cannot get your money back,  
with a little patience and understanding,  
you will still get the products you  
purchased." Exhibit "T," p. 3. Ms.  
Mollenhauer accepted Joyner's statements  
as true. Mollenhauer Dec., ¶¶6, 8.

11 **Fact No. 7:** Plaintiff Mollenhauer was  
12 further advised that, although no longer  
13 under legal obligation to do so, AJG had,  
14 on "moral" grounds, decided to "personally  
15 deliver on all obligations of the book and  
16 course Trusts."  
17 **Supporting Evidence to Fact No. 7:**  
18 Exhibit "T" March 28, 1988 Letter from  
19 Wayne Joyner to Jean Mollenhauer p. 3.

Disputed. TUSPCO's attorney and co-  
defendant Joyner stated: "Although not  
legally obligated to do so, Professor  
Galambos has undertaken to personally  
deliver on all obligations of the book and  
course Trusts." Exhibit "T," p. 2. The  
statement of no legal obligation was false,  
as a matter of law, and either Defendants  
knew it to be false, in which case it was  
fraudulent, or Joyner believed it but  
promised performance anyway and he did  
not view it as a breach.

20 **Fact No. 8:** On June 5, 1992 plaintiff  
21 Gregg Rooten wrote to AJG demanding a  
22 refund and *threatening a lawsuit*.  
23 **Supporting Evidence to Fact No.**  
24 **8:** Exhibit "U" June 5, 1992 Letter from  
25 Gregg Rooten to Mr. or Mrs. Andrew J.  
26 Galambos.

Disputed. Defendant misstates the content  
of Exhibit "U". Plaintiff Rooten stated an  
intention "to pursue all legal remedies".  
The PPSA provides for arbitration  
"conducted pursuant to the principles of  
volitional science as developed by Andrew  
J. Galambos. Defendant's Exhibit "A,"  
¶7.3.

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**Fact No. 9:** On July 9, 1992 Wayne Joyner responded that there would be no refunds.

**Supporting Evidence to Fact No. 9:** Exhibit "V" July 9, 1992 Letter from Wayne Joyner to Gregg Rooten.)

Disputed. Defendant's evidence is taken out of context. TUSPCO's attorney, and co-defendant Wayne Joyner, stated that Lange's theft excused TUSPCO's obligation to refund subscribers' money in accordance with ¶6.4 of the PPSA. Joyner stated: "You are required by Professor Galambos to read all of the trust agreement (including this paragraph) before you signed it. Since the assets of the Trust were seized, there is no obligation to make refunds." \* \* \* "I sincerely hope that you will not decide to arbitrate this matter in view of the theft and Professor Galambos' declining health. With more patience and understanding, you will still get the products you purchase." Defendant Exhibit "V," p. 2. Rooten acquiesced to Joyner's interpretation of the contract and was persuaded to wait for delivery of Book 1 rather than pursue a legal remedy. Rooten Dec., ¶¶7, 8.

**Fact No. 10:** AJG died on April 10, 1997.  
**Supporting Evidence to Fact No. 10:** Complaint ¶11 (which, mistakenly, states 1996.)

Undisputed.

**Fact No. 11:** The Complaint was filed on May 19, 2006.  
**Supporting Evidence to Fact No. 11:** Complaint, p. 1.

Undisputed.

Plaintiffs also contend that the following material facts are disputed:

<u>Disputed Material Fact</u>	<u>Supporting Evidence</u>
1. The scheduled delivery date for Book 1 was extended by agreement of the parties beyond December 31, 1987.	Exhibit "A" PPSA, ¶6.7: "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." Declaration of Marks, ¶¶14-30. Defense Exhibits "R", "T", "U" and "V".
2. No Plaintiff, other than Plaintiffs Mollenhauer and Rooten, ever communicated interest in a refund of the amounts they paid for Book 1.	Declaration of Marks, ¶37.
3. Defendant Hayes, and his predecessors at TUSPCO, made continuing promises of their intention to publish Book 1 to Plaintiffs.	Declaration of Marks, ¶¶14-30; Exhibits "1" through "9".

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4. Plaintiffs relied on Defendants' statements that they intended to publish Book 1 to the subscribers.

Declaration of Marks, ¶31; Declaration of Smith, ¶6; Decl. of Mollenhauer, ¶8; Declaration of Rooten, ¶8.

5. Defendants partially performed the contract by delivering Volume I of Book 1 in April, 1999.

Declaration of Marks, ¶26

6. Defendants first refused to give further assurances of their performance in or about June of 2005.

Declaration of Marks, ¶¶32-36

7. Defendants did not believe that initiation of a "no refund" policy in 1998 constituted a material breach of the contract, and neither did those plaintiffs who were notified of it.

Declaration of Marks, ¶¶15-17; Declaration of Mollenhauer, ¶6; Declaration of Rooten, ¶7; Exhibits. "T" and "V"

**Issue 2:** The fourth cause of action for breach of fiduciary duty fails as a matter of law because there is no causal link between any alleged breach and plaintiffs' alleged damages. (Separate Statement of Undisputed Facts, Nos. 12 to 20.)

**Undisputed Material Facts and Alleged Supporting Evidence:**

**Response and Evidence:**

**Fact No. 12:** In the spring of 1978 plaintiff Marks, then TUSPCO's and Andrew J. Galambos's ("AJG") counsel, drafted a book contract (the Pre-Publication Subscription Agreement ["PPSA"]) and a trust (The Universal Scientific Publications Company, Inc. Book Subscription Trust ["TUSPCO Trust"]).

Undisputed.

**Supporting Evidence to Fact No. 12:** Exhibit "A" PPSA; Exhibit "D" TUSPCO Trust; Exhibit "S" Marks Depo. 97:2-98:19; Complaint ¶¶1, 25, 46.

**Fact No. 13:** Plaintiffs are former students of AJG that contracted with defendant TUSPCO in or about 1978 to obtain copies of AJG's unwritten book that would encompass his courses V-50 (the introductory course) and V-201 (the advanced course) pursuant to the PPSA. Both of the introductory and advanced courses are intended to constitute "Book 1."

Undisputed.

**Supporting Evidence to Fact No. 13:** Complaint ¶13.

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**Fact No. 14:** On or about July 6, 1984 AJG discovered that the original trustee, M.J. Lange, stole all the money in the TUSPCO Trust.

Undisputed.

**Supporting Evidence to Fact No. 14:** Exhibit "A" PPSA ¶4.3; Exhibit "D" TUSPCO Trust, Preamble; Exhibit "B" RFA to Plaintiff Marks Nos. 14, 17; Exhibit "C" to Plaintiff Marks Response to RFA Nos. 14, 17.

**Fact No. 15:** All plaintiffs deposited their funds into the TUSPCO Trust well before July 1, 1984.

Undisputed.

**Supporting Evidence to Fact No. 15:** Complaint ¶13; Exhibit "F" Hayes' RFA to Other Plaintiffs; No. 5; Exhibit "G" Other Plaintiffs Response to RFA No. 5; Declaration of Charles W. Hayes ("Hayes Dec.") ¶2.

**Fact No. 16:** Plaintiff Mr. Marks, *drafted and verified* the complaint against Mr. Lange on behalf of AJG, defendant TUSPCO, defendant TUSPCO Trust and defendant Hayes.

Undisputed.

**Supporting Evidence to Fact No. 16:** Exhibit "B" RFA to Marks Nos. 4, 7; Exhibit "C" Plaintiff Marks's Response to RFA Nos. 4, 7.

**Fact No. 17:** After M.J. Lange depleted the TUSPCO Trust, Mr. Hayes became a successor trustee.

Undisputed.

**Supporting Evidence to Fact No. 17:** Exhibit "B" Hayes' RFA No. 21 to Plaintiff Marks; Exhibit "C" Plaintiff Marks's Responses to RFA No. 21.

**Fact No. 18:** The TUSPCO Trust agreement signed by Mr. Hayes states: "This trust shall consist only of funds received into the trust *on or after July 6, 1984.*"

Undisputed that Exhibit "P" so states. However, the legal affect of the statement is disputed. Plaintiffs contend that Defendant Hayes, as trustee, still owes fiduciary duties to all beneficiaries of the TUSPCO Trust. Hayes is also an officer of TUSPCO, Inc. and co-trustee of the Natural Estate Trust, which is the sole shareholder of TUSPCO, Inc. Answer of Defendant Hayes, ¶¶3-5.

**Supporting Evidence to Fact No. 18:** Exhibit "P" The 1992 TUSPCO Trust.

1 **Fact No. 19:** Lange was sent to prison  
2 and, although AJG received a Judgment  
3 against Lange, the TUSPCO Trust did not  
4 recover any funds pursuant to this  
5 Judgment.

6 **Supporting Evidence to Fact No. 19:**  
7 Exhibit "E," Declaration of Lange; Exhibit  
8 "H" Lange's Financial Statement; Exhibit  
9 "S" Marks Depo. 281:16-21; Exhibit Q,  
10 Judgment against Lange.

11 **Fact No. 20:** Plaintiff Marks testified that:  
12 "I don't think he [Mr. Hayes] voluntarily  
13 assumed the fiduciary obligations."

14 **Supporting Evidence to Fact No. 20:**  
15 Exhibit "S" Marks Depo. 300:15-16.

Undisputed.

Disputed. Defendants are taking the  
testimony out of context by quoting only  
one-half of a sentence. The complete  
sentence reads: "I don't want this to be  
construed as saying -- I don't think he  
voluntarily assumed the fiduciary  
obligations." Exhibit "S" Marks Depo.  
300:15-16; Marks' Decl. ¶46. Hayes  
voluntarily assumed fiduciary duties by  
becoming a Trustee.

16 Plaintiffs also contend that the following material fact is disputed:

17 Disputed Material Fact

Supporting Evidence

18 1. Defendant Hayes has wasted the assets  
19 of Galambos estate.

Declaration of Marks, ¶¶38-45.

20 **Issue 3:** The cause of action for breach of fiduciary duty fails to state a cause of action as  
21 a matter of law as plaintiffs cannot establish that there was any breach reflected by their  
22 vacuous discovery responses. (Separate Statement of Undisputed Facts, Nos. 21 to 32.)

23 Undisputed Material Facts and  
24 Alleged Supporting Evidence:

Response and Evidence:

25 **Fact No. 21:** Paragraph 5 of the  
26 Complaint alleges that Mr. Hayes  
27 "intermingled" and "dissipated" assets of  
28 TUSPCO, the TUSPCO Trust and the  
Natural Estate Trust in "violation of  
fiduciary duties owed to Plaintiffs."

**Supporting Evidence to Fact No. 21:**  
Complaint ¶5.

Disputed. Defendant takes paragraph 5 of  
the Complaint out of context. Paragraph 5,  
states: "There exists, and at all relevant  
times there existed, a unity of interest and  
ownership between Defendants TUSPCO  
and the Natural Estate Trust, such that the  
individuality and separateness between  
these Defendants have ceased, and the  
Natural Estate Trust (a charitable trust) is  
the alter ego of Defendant TUSPCO, in  
that the Natural Estate Trust owns 100% of  
the shares of TUSPCO and controls and  
dominates TUSPCO through Defendant  
Joyner, its sole trustee. \* \* \* Defendants  
Joyner and Hayes have intermingled the  
assets of TUSPCO and the Natural Estate  
Trust to suit their own convenience, to  
evade TUSPCO's liability to Subscribers to  
book contracts, and to



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pay substantial sums to themselves and others in violation of fiduciary duties owed to Plaintiffs, to TUSPCO and to the Natural Estate Trust. \* \* \* Plaintiffs are informed and believe that Joyner and Hayes have dissipated the assets of TUSPCO, the TUSPCO Trust and/or the Natural Estate Trust so that none of these entities is capable of performing its obligations under the Subscription Agreement or responding in damages for default."

**Fact No. 22:** In special interrogatory numbers 3-20, Mr. Hayes sought factual information, witnesses, and documents to support plaintiffs' allegations that he "dissipated" the assets of TUSPCO, the TUSPCO Trust and the Natural Estate Trust in breach of any fiduciary duty.

**Supporting Evidence to Fact No. 22:** Exhibit "I", Mr. Hayes's Special Interrogatories, Set one, to Plaintiff Marks ["Special Interrogatories to Marks"] Numbers 1-20.

Undisputed.

**Fact No. 23:** In response to each special interrogatory, Mr. Marks responded to see introductory paragraph 12. Introductory paragraph 12 states: that "Marks has yet to obtain discovery from Defendants who are sole possessors of the evidence supporting the contentions in paragraph 5 of the Complaint. The contention was made upon information and belief."

**Supporting Evidence to Fact No. 23:** Exhibit "J" Plaintiff Marks Responses to Mr. Hayes's Special Interrogatories, Set One, Numbers 1-20, Introductory paragraph 12.

Disputed. Defendant misleads the Court by quoting only the introductory paragraph to the answer to the interrogatory. The entire answer by Plaintiff Marks stated as follows: **"INTRODUCTORY PARAGRAPH NO. 12: DEFENDANTS' HANDLING ASSETS OF AJG, TUSPCO, etc.** Plaintiff Frederic G. Marks ("Marks") has yet to obtain discovery from Defendants who are sole possessors of the evidence supporting the contentions in paragraph 5 of the Complaint. The contention was made upon information and belief based upon the following:

1. The probable size of the assets of the estate of Mr. & Mrs. Galambos, the TUSPCO TRUST, TUSPCO and The Galambos Natural Estate Trust (TNET) as of July 1989 when Marks last served as attorney for Mr. and Mrs. Galambos and their companies;
2. Defendants' expenditure of monies of the Galambos and their companies for attorney's fees in dispute with William Martin;
3. Defendants' expenditure of \$8,000 per month for several years on the services of an individual or individuals who were hired to edit the transcripts of AJG's course V-201, and who failed to do so, but

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rather undertook to write a book containing the editor's own version of the teachings of AJG; Defendants' expenditures of monies of the Galambos' and their companies for the personal benefit of Defendant Joyner, specifically expenditures for Mr. Joyner's personal security in regard to possible harm feared by Mr. Joyner in connection with the dispute with Mr. William Martin;

4. Losses of the Galambos' estate and entity assets due to improvident operations in the stock market and mutual funds by Defendant Hayes with the consent of Defendant Joyner;

5. The stated intent of Hayes and Joyner to preserve the tape recordings of lectures of AJG, and their failure to spend the funds necessary to preserve the tape recordings;

6. The stated intent of Defendants Hayes and Joyner to preserve personal residence of Mr. & Mrs. Galambos as a Galambos museum and their failure to do so as evidenced by the sale of the residence.

7. The request of defendant Hayes to Franklin Moore to produce a compact disc version of Course V-201T for defendants followed by the refusal of Hayes to pay for the reasonable cost of the compact disc reproduction produced by Mr. Moore." Exhibit "J".

**Fact No. 24:** All other plaintiffs' responses to the same inquiries that sought factual information, witnesses, and documents to support plaintiffs' allegations that he "dissipated" the assets of TUSPCO, the TUSPCO Trust and the Natural Estate Trust in breach of any fiduciary duty were: "Plaintiff is unaware of any facts other than those set forth within the Complaint and those set forth by co-Plaintiff Frederic G. Marks' in his responses to Set of the Special Interrogatories previously propounded to him by Defendant Charles W. Hayes."

**Supporting Evidence to Fact No. 24:** Exhibit "K" Special Interrogatories to Joseph Hentz ["Special Interrogatories to Other Plaintiffs"] Numbers 1-20; Exhibit "L" Responses to Other Plaintiffs to Special Interrogatories, Numbers 1-20.

Undisputed. However, Plaintiffs may rely upon information possessed by a co-Plaintiff. *Pantzas v. Superior Court* (1969) 272 C.A.2d 499, 503.

1 **Fact No. 25:** In paragraph 47 of the  
2 Complaint plaintiffs claim that "Defendants  
3 abused [plaintiffs'] trust and confidence by  
4 expending TUSPCO Trust's funds,  
5 TUSPCO's the guarantor's funds . . . to  
6 unauthorized recipients."

7 **Supporting Evidence to Fact No. 25:**  
8 Complaint ¶47.

9 **Fact No. 26:** When asked for factual  
10 information, documents and witnesses in  
11 special interrogatories numbers 119-132 to  
12 support their serious allegations in support  
13 of their breach of fiduciary duty cause of  
14 action set forth in paragraph 47 of the  
15 Complaint, plaintiffs responded: "Plaintiff  
16 is unaware of any facts" other than the  
17 allegations in the complaint, "Plaintiff is  
18 unable to identify any such documents at  
19 this time" and as to witnesses "Unknown,  
20 except for Mr. Joyner and Mr. Hayes" (who  
21 deny plaintiffs' claims).

22 **Supporting Evidence to Fact No. 26:**  
23 See, Verified Answers of Defendants  
24 Joyner and Hayes to paragraphs ¶¶5, 47-48  
25 of the Complaint; Special Interrogatories to  
26 Other Plaintiffs Numbers 119-132; Exhibit  
27 "L" Responses to Other Plaintiffs to  
28 Special Interrogatories, Numbers 119-132.

17 **Fact No. 27:** To the same inquiries -- for  
18 factual information, documents and  
19 witnesses in support of the breach of  
20 fiduciary duty cause of action set forth in  
21 paragraph 47 of the Complaint -- in special  
22 interrogatories numbers 208-221 to  
23 plaintiff Marks, plaintiff Marks responded:  
24 "Marks has yet to obtain discovery from  
25 Defendants who are sole possessors of the  
26 evidence supporting the contentions in  
27 paragraph 5 of the Complaint. The  
28 Contention was made upon information  
and belief"; "Financial records of the  
TUSPCO Trust are in the exclusive  
possession and control of Defendants" and  
as to witnesses "Unknown."

**Supporting Evidence to Fact No. 27:**  
Exhibit "I" Special Interrogatories to Marks  
numbers 208-221; Exhibit "O" Plaintiff  
Marks's Supplemental Responses to  
Hayes's Special Interrogatories numbers  
208-221.

Disputed. Defendants take parts of  
paragraph 47 out of context. The relevant  
allegations in paragraph 47 are:  
"Defendants abused that trust and  
confidence by expending TUSPCO Trust's  
funds, TUSPCO's, the guarantor's funds  
and its alter ego's, the Natural Estate  
Trust's, funds to unauthorized recipients  
when Defendants knew that the  
Subscribers' books were neither ready for  
delivery, nor even in existence."

Disputed. The moving party, on motion  
for summary judgment, may not rely upon  
its own Answer as evidence; Defendant  
misstates the substance of Defendants'  
Answers to Special Interrogatories  
wherein they stated reliance upon  
information provided by Plaintiff Marks  
and refer to his answers to the same  
interrogatories.

Disputed. Defendants have taken only  
parts of the Introductory Paragraph which  
responded to various interrogatories: the  
entire response from Exhibit "O" is as  
follows: **INTRODUCTORY  
PARAGRAPH NO. 12: DEFENDANTS'  
HANDLING ASSETS OF AJG,  
TUSPCO, etc. Plaintiff Frederic G. Marks  
("Marks") has yet to obtain discovery from  
Defendants who are sole possessors of the  
evidence supporting the contentions in  
paragraph 5 of the Complaint. The  
contention was made upon information  
and belief based upon the following:**

1. The probable size of the assets of  
the estate of Mr. & Mrs. Galambos, the  
TUSPCO TRUST, TUSPCO and The  
Galambos Natural Estate Trust (TNET) as  
of July 1989 when Marks last served as  
attorney for Mr. and Mrs. Galambos and  
their companies;

2. Defendants' expenditure of monies  
of the Galambos and their companies for

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attorney's fees in dispute with William Martin;

3. Defendants' expenditure of \$8,000 per month for several years on the services of an individual or individuals who were hired to edit the transcripts of AJG's course V-201, and who failed to do so, but rather undertook to write a book containing the editor's own version of the teachings of AJG; Defendants' expenditures of monies of the Galambos and their companies for the personal benefit of Defendant Joyner, specifically expenditures for Mr. Joyner's personal security in regard to possible harm feared by Mr. Joyner in connection with the dispute with Mr. William Martin;

4. Losses of the Galambos' estate and entity assets due to improvident operations in the stock market and mutual funds by Defendant Hayes with the consent of Defendant Joyner;

5. The stated intent of Hayes and Joyner to preserve the tape recordings of lectures of AJG, and their failure to spend the funds necessary to preserve the tape recordings;

6. The stated intent of Defendants Hayes and Joyner to preserve personal residence of Mr. & Mrs. Galambos as a Galambos museum and their failure to do so as evidenced by the sale of the residence.

7. The request of defendant Hayes to Franklin Moore to produce a compact disc version of Course V-201T for defendants followed by the refusal of Hayes to pay for the reasonable cost of the compact disc reproduction produced by Mr. Moore."

**Fact No. 28:** Plaintiffs also claimed that Mr. Hayes refused to account for the assets of the TUSPCO Trust or TUSPCO. **Supporting Evidence to Fact No. 28:** Complaint ¶29.

Undisputed.

1 **Fact No. 29:** In response to special  
2 interrogatories 176-181 to plaintiff Marks  
3 regarding plaintiffs' request for an  
4 accounting, he responded to see  
5 introductory statements paragraph 11,  
6 which is regarding plaintiff Marks's  
7 "communication with other subscribers"  
8 and has nothing to do with any request for,  
9 an accounting to Mr. Hayes.

10 **Supporting Evidence to Fact No. 29:**  
11 Exhibit "I", Special Interrogatories to  
12 Marks Numbers 176-181; Plaintiff  
13 Marks's Responses to Special  
14 Interrogatories Numbers 176-181.

15 **Fact No. 30:** Plaintiffs never asked Mr.  
16 Hayes for an accounting of any entity.

17 **Supporting Evidence to Fact No. 30:**  
18 Hayes Dec. ¶6.

19 **Fact No. 31:** In response to co-defendant  
20 Joyner's special interrogatories, plaintiff  
21 Marks stated that the interrogatories in this  
22 regard are "irrelevant" because "this is not  
23 an action for an accounting."

24 **Supporting Evidence to Fact No. 31:**  
25 Exhibit "M" Joyner's Special  
26 Interrogatories to Plaintiff Marks  
27 Numbers 26, 27, and 28; Exhibit "N"  
28 Plaintiff Marks's Responses to Joyner's  
29 Special Interrogatories Numbers 26, 27,  
30 and 28.

31 **Fact No. 32:** In response to special  
32 interrogatories numbers 78-83 (which seek  
33 information in support of the allegations  
34 in paragraph 26 of the Complaint that Mr.  
35 Hayes "denied [that he] had any duty to  
36 account to Plaintiffs for the assets of the  
37 TUSPCO Trust or TUSPCO and therefore  
38 refused to do so") plaintiffs stated that  
39 they "have no personal knowledge on this  
40 subject."

41 **Supporting Evidence to Fact No. 32:**  
42 Complaint ¶26; Exhibit "K", Special  
43 Interrogatories to other Plaintiffs Numbers  
44 78-83; Exhibit "L" Responses to other  
45 Plaintiffs to Special Interrogatories,  
46 Numbers 78-83.

Disputed. Paragraph 11 to Marks'  
Response to Special Interrogatories relates  
that he sent letters to Defendants Joyner  
and Hayes and received no response.  
Exhibit "J".

Disputed. Marks sent letters to Defendants  
Joyner and Hayes requesting information  
but they did not respond. Declaration of  
Marks, ¶¶32-36.

Disputed. Defendant mischaracterizes and  
misstates Plaintiff Marks' response to  
interrogatories. Marks responded, among  
other things, that the interrogatories were  
"not relevant to the subject matter of this  
action because this is not an action for a  
formal accounting." Exhibit "N", Marks'  
Responses to Joyner's Special  
Interrogatories Nos. 26, 27 and 28.

Disputed. Defendant misstates Plaintiffs'  
Responses to Special Interrogatories  
wherein they stated they were relying upon  
information known to their co-Plaintiff,  
Mr. Marks. Specifically, they responded:  
"I have no personal knowledge on this  
subject but rely upon the facts and  
information provided by Mr. Marks,  
whose answer to this Interrogatory I  
adopt." Exhibit "L" Responses of  
Plaintiffs to Special Interrogatories Nos.  
78-83.

1 Plaintiffs also contend that the following material fact is disputed:

2 Disputed Material Fact

Supporting Evidence

3 1. Defendant Hayes has wasted the assets  
4 of Galambos estate.

Declaration of Marks, ¶¶38-45.

5 **Issue 4:** The cause of action for specific performance fails to state a cause of action as a  
6 matter of law because the contract is not amenable to specific performance. (Separate  
Statement of Undisputed Facts, Nos. 33 to 38.)

7 Undisputed Material Facts and  
8 Alleged Supporting Evidence:

Response and Evidence:

9 **Fact No. 33:** In the spring of 1978  
10 plaintiff Marks, then TUSPCO's and  
11 Andrew J. Galambos's ("AJG") counsel,  
12 drafted a book contract (the Pre-  
Publication Subscription Agreement  
["PPSA"] and a trust (The Universal  
Scientific Publications Company, Inc.  
Book Subscription Trust ["TUSPCO  
Trust"]).

Undisputed.

13 **Supporting Evidence to Fact No. 33:**  
14 Exhibit "A" PPSA; Exhibit "D" TUSPCO  
15 Trust; Exhibit "S" Deposition of Frederic  
G. Marks ["Marks Depo."] 97:2-98:19;  
Complaint ¶¶1, 25, 46.

16 **Fact No. 34:** Plaintiffs are former students  
17 of AJG that contracted with defendant  
18 TUSPCO in or about 1978 to obtain copies  
19 of AJG's unwritten book that would  
20 encompass his courses V-50 (the  
introductory course) and V-201 (the  
advanced course) pursuant to the PPSA.  
Both of the introductory and advanced  
courses are intended to constitute "Book  
1."

Undisputed.

21 **Supporting Evidence to Fact No. 34:**  
22 Complaint ¶13.

23 **Fact No. 35:** Section 1.3 of the PPSA  
24 states: "In the event of the inability of  
25 AJG to write Book 1 due to his death or  
26 incapacity, Book 1 may be supplied by  
TUSPCO in the alternate form of edited  
27 selections from the tape recorded lectures  
of AJG edited to the best of the ability of  
the authorized representative(s) of FEI and  
the proprietary heir(s) of AJG who would  
be performing such editing, ...."

Undisputed.

28 **Supporting Evidence to Fact No. 35:**  
Exhibit "A" PPSA section 1.3.

1 **Fact No. 36:** Publication may only be  
2 performed by AJG's explicitly named  
3 successor.

4 **Supporting Evidence to Fact No. 36:**  
5 Exhibit "A" PPSA section 1.3; see also  
6 Exhibit "R" March 15, 1988 Letter from  
7 Suzanne Galambos p. 4.

8 **Fact No. 37:** The trustees of the Natural  
9 Estate Trust were selected to determine the  
10 form of publication, not plaintiffs.

11 **Supporting Evidence to Fact No. 37:**  
12 Hayes Dec. ¶4.

13 **Fact No. 38:** The PPSA provides for  
14 plaintiffs to seek a refund not "transcripts  
15 of AJG's lectures in course V-201."

16 **Supporting Evidence to Fact No. 38:**  
17 Complaint ¶14, 42; Exhibit "A" PPSA  
18 §§1.3, 6.4.

19  
20 Plaintiffs also contend that the following material facts are disputed:

21 Disputed Material Fact

22 1. The term "edited selections from the  
23 tape recorded lectures of AJG" was  
24 intended to mean and has been understood  
25 by the parties as lightly edited transcripts  
26 of the verbatim lectures of AJG without  
27 any alteration or omission of any words as  
28 he spoke them or their sequence in the  
lecture.

2. Verbatim transcripts of AJG's lectures  
in course V-201 exist and have been  
transferred to digital compact disc.

Disputed. This is not a fact but is instead  
a legal conclusion which requires  
interpretation of Exhibit "A", which does  
not define or identify in paragraph 1.3 the  
"authorized representative(s) of FEI and  
the proprietary heir(s) of AJG. There is no  
evidence before the Court that AJG ever  
explicitly named a "successor."

Disputed. Defendant Hayes does not say,  
in paragraph 4 of his declaration, that he  
was selected to determine the form of  
publication, not Plaintiffs. He merely  
expresses an intention of publishing the  
entirety of Book 1 "based on the express  
desire and intent of Professor Galambos."  
The form of publication was selected, in  
advance, by Galambos himself and the  
contract expressly provides that in the  
event he did not write Book 1 during his  
lifetime, it "may be supplied by TUSPCO  
in the alternate form of edited selections  
from the tape recorded lectures of AJG  
edited to the best of the ability of the  
authorized representative(s) of FEI and the  
proprietary heir(s) of AJG who would be  
performing such editing." That is the form  
in which Defendants published Volume I  
of Book 1 in 1999. Exhibit "A" PPSA  
¶1.3; Declaration of Marks, ¶¶26,48,49.

Disputed. Nothing in the PPSA rules out  
specific performance. The contract itself  
calls for delivery of "edited selections  
from the tape recorded lectures of AJG."  
Exhibit "A" PPSA §1.3.

Supporting Evidence

Declaration of Marks, ¶¶26,48,49

Declaration of Marks, ¶48

1 **Issue 5:** The cause of action for specific performance fails to state a cause of action as a  
2 matter of law because the complaint implicates the Copyright Act and is therefore  
preempted. (Separate Statement of Undisputed Facts, Nos. 39 to 43.)

3 **Undisputed Material Facts and**  
4 **Alleged Supporting Evidence:**

**Response and Evidence:**

4 **Fact No. 39:** In the spring of 1978  
5 plaintiff Marks, then TUSPCO's and  
6 Andrew J. Galambos's ("AJG") counsel,  
7 drafted a book contract (the Pre-  
8 Publication Subscription Agreement  
9 ["PPSA"] and a trust (The Universal  
10 Scientific Publications Company, Inc.  
11 Book Subscription Trust ["TUSPCO  
Trust"]).

Undisputed.

9 **Supporting Evidence to Fact No. 39:**  
10 Exhibit "A" PPSA; Exhibit "D" TUSPCO  
11 Trust; Exhibit "S" Deposition of Frederic  
12 G. Marks ["Marks Depo."] 97:2-98:19;  
13 Complaint ¶¶1, 25, 46.

12 **Fact No. 40:** Plaintiffs are former students  
13 of AJG that contracted with defendant  
14 TUSPCO in or about 1978 to obtain copies  
15 of AJG's unwritten book that would  
16 encompass his courses V-50 (the  
17 introductory course) and V-201 (the  
18 advanced course) pursuant to the PPSA.  
19 Both of the introductory and advanced  
20 courses are intended to constitute "Book  
21 1."

Undisputed.

17 **Supporting Evidence to Fact No. 40:**  
18 Complaint ¶13.

18 **Fact No. 41:** Plaintiffs "request a decree  
19 that Defendants **deliver the verbatim**  
20 **transcripts** of AJG's lectures in course V-  
21 201, and/or any compact disc containing  
22 such transcripts, to Plaintiffs so that  
23 Plaintiffs may, at their sole expense,  
24 **publish and distribute** course V-201 (the  
25 remaining volumes of Book 1) to  
26 themselves and to any other fully paid  
27 original Subscriber to the Subscription  
28 Agreement who may so request."  
(Emphasis added.)

Disputed. Defendant mischaracterizes and  
misstates the allegations of paragraph 41  
of the Complaint, which requests an  
alternative form of relief if, and only if,  
Defendants claim that they are unable or  
that it is impossible to distribute to  
Plaintiffs the verbatim transcripts of  
course V-201. Paragraph 41 states: If, for  
any reason, Defendants are incapable of  
performing the contract, or they contend  
that the contract is impossible to perform,  
then Plaintiffs request a decree that  
Defendants deliver the verbatim transcripts  
of AJG's lectures in course V-201, and/or  
any compact disc containing such  
transcripts, to Plaintiffs so that Plaintiffs  
may, at their own expense, publish and  
distribute course V-201 (the remaining  
volumes of Book 1) to themselves and to  
any other fully paid original Subscriber to  
the Subscription Agreement who may so

24 **Supporting Evidence to Fact No. 41:**  
25 Complaint ¶41.



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request."

The primary relief requested by the Complaint is for an order that Defendants publish and distribute to Plaintiffs the remaining volumes of Book 1 in the form of edited, verbatim transcripts of the lectures of AJG in course V-201, materials which Defendants admit they have in their possession. Declaration of Marks, ¶¶48, 49; Complaint pg.12 lns. 9-16

**Fact No. 42:** The PPSA does not contemplate providing plaintiffs or any subscribers with the right to duplicate his lecture transcripts.

Undisputed. However, Plaintiffs do not seek the right to duplicate anything in violation of copyright laws.


**Supporting Evidence to Fact No. 42:** Exhibit "A" PPSA.

**Fact No. 43:** The PPSA does not contemplate providing plaintiffs with the right to distribute AJG's lectures.

Undisputed. However, Plaintiffs do not seek the right to distribute AJG's lectures to anyone in violation of copyright laws. They seek to enforce contractual rights to receive Book 1.

**Supporting Evidence to Fact No. 43:** Exhibit "A" PPSA.

DATED: April 20, 2007

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

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 April 20, 2007 I served the foregoing document described as **PLAINTIFFS' SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT/ADJUDICATION** on the interested parties in this action

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

Kevin S. Lacey, Esq.  
Lacey, Dunn & Do  
315 W. Arden Avenue  
Suite 11  
Glendale, CA 91203

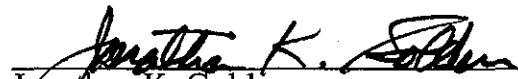
John Godsill, Esq.  
Freeman, Freeman & Smiley  
3415 Sepulveda Boulevard  
Suite 1200  
Los Angeles, CA 90034-6060

X **By mail** I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

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

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

  
Jonathan K. Golden