

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. STATEMENT OF FACTS	3
A. The Libelous Publication.....	3
1. The Book's Authors Are Purported Authorities on Religious Matters.	3
2. The Book's Appendix Can Reasonably Be Read To Apply to All Organizations Discussed Therein.....	3
3. The Individual Organizations Discussed in the Book Were Selected From A Field of Thousands.	4
4. The Book's Overwhelming Emphasis Is On the Topic of Cults; the Concept of New Religions Is All But Abandoned.....	4
5. The Word "Cult" Is Intended To Apply To Each Group In The Book.....	5
6. The Authors Impute Specific Abhorrent Acts And Practices To Cults.	6
B. The Evidence Suggests That The Authors Intended To Impute Despicable Misconduct To Each And Every Organization In The Book.....	6
III. STANDARD ON SUMMARY JUDGMENT	8
IV. THE CHALLENGED STATEMENTS ARE "OF AND CONCERNING" THE PLAINTIFFS.....	9
A. The "Of And Concerning" Rule.....	9
B. The References To Plaintiff Need Not Be Direct.....	11
C. It is Not Necessary For All Readers To Understand That The Statements Refer To The Plaintiffs.	14
D. The Defamatory Statements Are Ones Of Fact And Do Not Involve Issues Of Religious Belief Or Doctrine.....	15
V. THE CHALLENGED STATEMENTS CANNOT BE CHARACTERIZED AS GROUP LIBEL.....	16
VI. CONCLUSION.....	19

TABLE OF AUTHORITIES

CASES

	<u>Page(s)</u>
<u>American Civil Liberties Union, Inc. v. Kiely</u> , 40 F.2d 451 (2d Cir. 1930).....	18
<u>Davis v. Davis</u> , 734 S.W. 2d 707 (Tex. App. - Houston 1987).....	13
<u>Diaz v Rankin</u> , 777 S.W.2d 496 (Tex. App. - Corpus Christi 1989).....	13
<u>Dolcefino v. Randolph</u> , 19 S.W.3d 906 (Tex. App. - Houston 2000).....	9
<u>Eskew v. Plantation Foods, Inc.</u> , 905 S.W.2d 461 (Tex. App. - Waco 1995).....	16, 17
<u>Evans v. Dolcefino</u> , 986 S.W. 2d 69 (Tex. App. 1999).....	17
<u>Fong v. Merena</u> , 655 P.2d 875 (Haw. 1982).....	8
<u>Gibler v. Houston Post Co.</u> , 310 S.W.2d 377 (Tex. Civ. App. - Houston 1958).....	14
<u>Guisti Tribune v. Galveston Tribune</u> , 105 Tex. 497, 150 S.W. 874 (1912).....	8, 10, 18
<u>Louisville Times Co., v. Emrich</u> , 252 Ky. 210, 66 S.W.2d 73 (1933).....	18
<u>Musser v. Smith Protective Services, Inc.</u> , 723 S.W.2d 653 (Tex. 1987).....	9
<u>New Times Inc. v. Isaaks</u> , 91 S.W.3d 844 (Tex. App. - Fort Worth 2002).....	9
<u>New York Times v. Sullivan</u> , 376 U.S. 254 (1964).....	9
<u>Newspapers Incorporated v. Matthews</u> , 161 Tex. 284 (1960).....	9, 14
<u>Outlet Company & Baxter Gentry v. International Security Group, Inc.</u> , 693 S.W.2d 621 (Tex. App. - San Antonio 1985).....	8, 11, 13, 14
<u>Poe v. San Antonio Express News Corp.</u> , 590 S.W.2d 537 (Tex. Civ. App. - San Antonio 1979).....	9, 11, 14
<u>Red River Valley Publishing Co. v. Bridges</u> , 254 S.W.2d 854 (Tex. Civ. App. 1952).....	14

TABLE OF AUTHORITIES (CONT'D)

CASES

	<u>Page(s)</u>
<u>Rudin v. Dow Jones and Co.</u> , 557 F. Supp. 535 (S.D.N.Y. 1983).....	8
<u>Sellards v. Express News Corp.</u> , 702 S.W.2d 677 (Tex. App. - San Antonio 1985)	7, 10, 17, 18
<u>Texas Beef Group v. Winfrey</u> , 11 F. Supp. 2d 858 (N.D. Tex. 1998)	17
<u>Webb v. Sessions</u> , 531 S.W. 2d 211 (Tex. App. 1975).....	17
<u>Wilcox v. St. Mary's University of San Antonio, Inc.</u> , 531 S.W.2d 589 (Tex. 1975).....	7

STATUTES

Tex. R. Civ. P. 166a(c)	16
-------------------------------	----

MISCELLANEOUS

L. Eldredge, THE LAW OF DEFAMATION § 10 at 50 (1978).....	6
PROSSER & KEETON ON TORTS, § 111, at 783.....	6, 11
RESTATEMENT (SECOND) OF TORTS, § 564A	6, 17
RESTATEMENT (SECOND) OF TORTS § 614 (1977).....	8
Rodney Smolla, LAW OF DEFAMATION, 2d ed., West Group 2001, § 4.10[1]	16

readily conclude that the defamatory statements refer to Plaintiffs. Second, the challenged statements *have* been so construed by a number of “reasonable readers” whose declarations accompany these papers. Third, the evidence obtained to date demonstrates that defendants *intended* the statements in the Book’s introduction and appendix to apply to Plaintiffs. Indeed, Defendants emphasize in the Book’s introduction¹ that part of the factual basis for their “intolerance” of cults and new religions “will be mentioned in the introduction.”

Also addressed in this brief is the related issue of “group libel” which is alluded to, though not squarely raised, in the moving papers. Defendants’ group libel theory also fails because Defendants single Plaintiffs out from a “group” of roughly “5000 cults” (according to Defendants’ own estimates), and repeatedly refer to them by name, i.e., “The Local Church” and “Living Stream Ministry.” Thus, it cannot be said that Plaintiffs are anonymous members of a “group” who are claiming injury on the basis of libels directed solely to the group. On the contrary; because they are specifically referenced in the Book, they are set apart from the “group” of cults as a whole.

In a related vein, Defendants cannot plausibly argue that the 57 organizations that they chose to discuss in the Book are a “group” for group libel purposes. Viewed collectively, these organizations make up a carefully chosen *list* of cults within the broad “group” of all cults. According to Defendants, the organizations on this list are especially “deserv[ing] of the title cult.” (See Book’s introduction at pg. xxi.)

In sum, Defendants cannot prevail on their motion. In order to do so, they would have to demonstrate that statements in an “encyclopedia of cults” that lists the “characteristics of cults,” informs readers that the organizations discussed in its pages “deserve the title cult” and count the Local Church and Living Stream as among those organizations cannot be understood by *any* reasonable reader to refer to those Plaintiffs. Such a showing cannot be made under Texas law.

¹ Under a heading entitled “The Virtue of Intolerance,” (Introduction page xix).

II. STATEMENT OF FACTS

A. The Libelous Publication.

1. The Book's Authors Are Purported Authorities on Religious Matters.

The Book that gave rise to this action is styled as an “encyclopedia,” specifically an ENCYCLOPEDIA OF CULTS AND NEW RELIGIONS. It comprises 762 pages and purports to “provide comprehensive information on major religious groups from both Western and Eastern traditions.” (Ex. 1, Book, Back Flap.) The Book’s authors are John Ankerberg and John Weldon, whose numerous published writings in the field of religion are listed on the Book’s final page. (Ex. 2, Book, Final page.) Readers learn from the Book’s Introduction that Ankerberg is not only an author but also the creator and host of an “award winning weekly television program, The John Ankerberg Show” which is described as a resource for “information on any religious group, philosophy or subject.” (Ex. 3, Introduction, pg. ix.)

2. The Book's Appendix Can Reasonably Be Read To Apply to All Organizations Discussed Therein.

The Book is divided into three main sections. The first contains introductory material including a subsection entitled “How to Use this Book.” The second and most voluminous section consists of synopses of the 57 “cults and new religions” of the title. Each of these synopses contain, among other things, a section entitled “Doctrinal Summary.” The final section of the Book is a “Doctrinal Appendix.” The Doctrinal Appendix is described in the “How To Use This Book” sub-section as a “*more thorough general treatment of the doctrinal sections...*” (Ex. 4, Book, pg. vii.) Although this description seems innocuous, it is indicative of the manner in which the authors intend the contents of the Introduction and Doctrinal Appendix to be used. Read in context, the phrase “doctrinal sections” is an obvious reference to the brief “Doctrinal Summar[ies]” that are included in each of the 57 synopses of the groups treated in the Book.² (Id.) Thus, readers learning “how to use” the Book are informed on the very first page that the

² There can be no doubt of this since the preceding paragraphs inform the reader that each synopsis or “chapter” begins with three short sections carrying quick facts about a group: 1) a primary Table of Contents...2) Information at a Glance... and 3) *Doctrinal Summary.*”

Doctrinal Appendix is a storehouse of supplementary information that provides “a more thorough general treatment” of all of the groups in the Book.³

3. The Individual Organizations Discussed in the Book Were Selected From A Field of Thousands.

At page ix, the reader is informed that “[T]he scope of any one volume work is limited and thus the religions and cults in this Encyclopedia are only the tip of the iceberg.” According to the authors, “estimates [of the number of cults are] as high as 5,000 worldwide.”⁴ (Ex. 5, Book, pg. xvi.) From these pronouncements, the reasonable reader can infer that the authors engaged in a careful selection process in deciding which cults to include in the Book. This inference is confirmed in the text itself: Under the sub-heading “Categorization of Subjects,” the authors explain how they chose the few from the many: “Generally, we included those groups having the largest membership, most significant impact on Christianity or greatest social influence.” (Ex. 6, Book, pg. xii.) Thus, it can be reasonably inferred that each organization discussed in the Book was singled out as a particularly appropriate subject for an Encyclopedia of Cults and New Religions.

4. The Book’s Overwhelming Emphasis Is On the Topic of Cults; the Concept of New Religions Is All But Abandoned.

From its title, a reasonable reader might assume that the Book focuses equally on “cults” and “new religions.” This notion is quickly dispelled by the Book’s opening pages which emphasize “cults” almost to the exclusion of “new religions.” In the introductory sections of the Book, the word “cult”⁵ appears 197 times. Six sub-headings in the Book’s Introduction are expressly devoted to some aspect of cultism. These subsections offer the reader a normative and definitional overview of cults. See “Evaluating Cults: The Standard” (pg. xx), Use of the Term

³ Further evidence that the Doctrinal Appendix applies to the Book can be found on the Appendix’s first page (pg. 661) in which the authors inform the readers that all of the chapters in the Book are supplemented by the Doctrinal Appendix: “[whatever] ... chapter you are in, you can know that a biblical corrective is supplied in this appendix.”

⁴ See also pg. ix: “worldwide there are thousands...” (Ex. 3.)

⁵ Or some variation of that word, e.g., cultic, counter-cult or cultist.

“Cult” (pgs. xx-xxii), “Characteristics of Cults” (pgs. xxii-xxvi), “Christians as Cultists?” (pgs. xxvii-xxviii), “The Cults’ Influences On Christianity” (pg. xxix), and “Cultic Behavior and Serious Errors on the Church Fringes” (pgs. xxix-xxx) (collectively, Ex. 7, Book.)

By contrast, the term “new religions”⁶ appears only 33 times in these same pages. When it appears, it is used interchangeably with the word “cult.” But, unlike the term “cult,” “new religions” is never defined and does not receive sustained attention in any introductory subsection. Indeed, the authors admit that “new religions” is a misleading term when applied to the groups in the Book. The authors emphasize that “[t]he use of terms such as ‘alternate faiths’ or ‘new religious movements’ tend to imply that all religions have equal validity, which does not convey what needs to be conveyed about the groups in this Encyclopedia”. (see, Ex. 7, Book, pg. xxi.) The authors proceed to express a decided preference for the term “cult” on the ground that it is more accurate. (Id.) Weighted lopsidedly toward the topic of “cults,” the introductory sections send readers a clear message: the term “new religions” is a euphemism. This Book’s true focus is on cults.⁷

5. The Word “Cult” Is Intended To Apply To Each Group In The Book.

The introductory sections’ insistent repetition of the word “cult,” their lengthy discussions of cults and cultism and their virtual abandonment of the concept of “new religions” suggests to the reader that many, if not all, of the groups described in the Book are “cults.” At the very least, it suggests that the term “cult” could apply to any of those groups. But the authors go far beyond tacit suggestion. At page xx, they conspicuously state that, “**with varying degrees of applicability, the groups herein deserve the title [cult],** even if they disagree.” (Ex. 7, Book, pg. xxi.) This theme is echoed on page 708 of the Doctrinal Appendix wherein the authors assert that “... all the groups discussed in this volume accept occult powers to some

⁶ And variations thereof.

⁷ Significantly, Defendants state “The characteristics of cults illustrates the applicability of the term. Here are a dozen characteristics of cults and new religions that we’ve documented.” This language (particularly the conjunction “and”) suggests to the readers that the “characteristics of cults” that are enumerated in the introduction applies to the groups in the Book whether they are “cults” or “new religions.”

degree.” (Ex. 8, Book, pg. 708.) Short of inserting a bold-faced heading on the point, the authors could hardly communicate more clearly that the groups in the Book are cults and, conversely, that the term “cult” is to be understood as a reference to each group in the Book.

6. The Authors Impute Specific Abhorrent Acts And Practices To Cults.

Having indoctrinated the reader with the idea that the Book is about “cults” and the groups in the Book are to be understood as “cults,” the authors proceed to catalog the abhorrent acts and practices in which cults purportedly engage. The imputation of misconduct begins in the introductory sub-section entitled “Characteristics of Cults” (Ex. 7, Book, pgs. xxii-xxvi.) However, it continues throughout the Introduction and Doctrinal Appendix, cropping up almost everywhere the term “cult” appears. For example, “cults” (and hence each group in the Book) allegedly “subject [members] psychological, physical and spiritual harm.” (Id., Book, pg. xxiv.) They engage in “occult practices” and “shamanism.” (Id.) They use “intimidation and deception on both members and outsiders.” (Id.) They commit “fraud” on their members regarding “fund-raising, front groups and financial cost.” (Id.)

As the authors hit their stride, the charges become progressively more shocking and repellant. Cult members purportedly condone or abet their leaders’ crimes including the raping of women, beating of disciples, and molesting of children. They practice “black magic,” and “engage[d] in drug smuggling and other criminal activity including murder...” (Ex. 7, Book, pg. xxv.) The Doctrinal Appendix goes farther still by claiming that “... [C]ults universally promote idolatry.” The authors quickly follow this claim with a definition of “idolatry” that involves acts of “child sacrifice, human sacrifice, prostitution and snake worship.” (See Ex. 9, Book, pgs. 710, 714, 721-722.)

B. The Evidence Suggests That The Authors Intended To Impute Despicable Misconduct To Each And Every Organization In The Book.

None of the Defendants have yet been deposed in this case. Notwithstanding Plaintiffs’ repeated requests for deposition dates and the noticing and re-noticing of Defendants’ depositions, Defendants have refused to be deposed until March 24, 2003. As a result, much

remains unknown about Defendants' intent to target each of the organizations identified in the Book, including the Local Church and Living Stream. When deciding the "of and concerning" issue the court is required to consider whether a libel defendant intends to refer to the plaintiff.⁸ Until Plaintiffs have been allowed to examine the authors and the publisher's editorial staff on this issue, they should not be required to respond to the instant motion. However, even without the benefit of deposition testimony, Plaintiffs' evidence raises a genuine issue of fact as to whether defendant Weldon intended the reader to understand that the defamatory statements refer to the organizations identified in the Book, including the Plaintiffs. That evidence consists of "Volume 2 Guidelines" which served as instructions for editors of the Book. This material was produced by Weldon in the course of discovery. (Ex. 10, Bates No. JW 08449-08455.) In those "Guidelines", Weldon instructs his collaborators to make the accusations in the Book as "damaging" as possible so that the reader is left with a profoundly negative impression of the organizations in the Book. For example, Weldon directs them to: "Take out the most damaging quote you can find and just stick it in plus the full reference itself." (Ex. 10, pg. 1); "[use] the clearest, most damning citation..." *id.* "Always use the most damaging material." (Ex. 10, pg. 4) Weldon then explains that "What I'm trying to do is to save time or space. Rather than showing what the Bible teaches on all these subjects in every chapter, the idea is to document what the cult believes *and then at the end of a major section, to tell the reader...(e.g.,) see Appendix A.*" (Ex. 10, pg. 6, Bates Nos. JW 08452, 08454, emphasis added.) In other words, Weldon made a conscious decision to print the statements in the introduction and appendix only once and did so with the intent that they would be understood to apply to all organizations discussed in the Book.

⁸ See RESTATEMENT (SECOND) OF TORTS § 564 comment a (1977) (if a defendant intends to refer to a particular person, the communication will be deemed "of and concerning" that person if it is so understood by the recipient of the communication, no matter how bizarre or extraordinary it is that the communication was in fact so understood). See also L. Eldredge, THE LAW OF DEFAMATION § 10 at 50 (1978); PROSSER & KEETON ON TORTS, § 111, at 783. In other words, if the author intends the statement to refer to plaintiff, the "reasonableness" component of the defamatory meaning analysis need not be met provided that someone – reasonably or otherwise – understood the statement as a reference to plaintiff.

III. STANDARD ON SUMMARY JUDGMENT

Defendants have cast their motion as a “traditional motion for summary judgment based on undisputed facts.” (Motion at 2.) Thus, in order to prevail, Defendants must establish that there is no genuine issue of fact with respect to the point in question. Wilcox v. St. Mary’s University of San Antonio, Inc., 531 S.W. 2d. 589, 592-93 (Tex. 1975). To succeed on the theory that the challenged statements are not “of and concerning” the Local Church and Living Stream Ministry, Defendants must show that an “encyclopedia” that lists “the characteristics of cults,” and informs readers at the outset that all “groups herein deserve the title [cult]” and then expressly identifies the Local Church and Living Stream as among those “groups,” cannot be reasonably understood by any reader to refer to those Plaintiffs. Further, Defendants must establish that there is no ambiguity on the issue: **“If the statement is ambiguous, that is, if a statement may have a defamatory meaning [as to plaintiff] but is not necessarily defamatory [of him], the issue must be submitted to a jury.”** Sellards v. Express News Corp., 702 S.W. 2d 677, 679 (Tex. App. - San Antonio 1985); see also Guisti Tribune v. Galveston Tribune, 105 Tex. 497, 150 S.W. 874 (1912) (holding that summary judgment on an ambiguous statement is improper). Plaintiffs submit that Defendants have failed to meet their burden here. At the very least, a reasonable reader could understand that the defamatory accusations in the Book “may” apply to the Plaintiffs. Under Guisti, that is sufficient to defeat the Motion.

In the first instance, it is for the judge to determine whether the statements in question are susceptible to the interpretation alleged by plaintiff. See RESTATEMENT (SECOND) OF TORTS §614 (1977). Unless the challenged communications *could not possibly have a defamatory effect on the plaintiff*, the court must refer to the jury the question of whether the communication did in fact refer to plaintiff. Id. In determining a statement’s susceptibility to the meaning asserted by plaintiff, the courts have routinely considered testimony from social science and linguistics experts. See, e.g., Rudin v. Dow Jones and Co., 557 F. Supp. 535 (S.D.N.Y. 1983); Fong v. Merena, 655 P. 2d 875, 877 (Haw. 1982) (additional citations). The courts of this state also consider the testimony of witnesses who heard or read the subject communications. See Outlet

Company & Baxter Gentry v. International Security Group, Inc., 693 S.W.2d. 621, 626 (Tex. App. - San Antonio 1985) (“We are persuaded that the texts themselves point directly to [plaintiff] and taken with the testimony of witnesses who so understood the broadcast, the jury finding [on the “of and concerning” issue]... is amply supported.”).

IV. THE CHALLENGED STATEMENTS ARE “OF AND CONCERNING” THE PLAINTIFFS

A. The “Of And Concerning” Rule.

Defendants do not expressly refer to the “of and concerning” rule in their moving papers. It is apparent, however, that they assert an artificially constricted variation of that rule as the primary basis for their argument that the challenged statements are “not capable of a defamatory meaning as to plaintiffs.” (Motion at 10.) In order to respond to Defendants’ argument, it is necessary to set forth the rule and its various exceptions. In Texas, as in every other state since the U.S. Supreme Court handed down its decision in New York Times v. Sullivan, 376 U.S. 254 (1964), a statement is not actionable under defamation law unless it refers to some ascertainable person, and that person must be the plaintiff.” Poe v. San Antonio Express News Corp., 590 S.W.2d 537, 541 (Tex. Civ. App. - San Antonio 1979); Newspapers Incorporated v. Matthews, 161 Tex. 284, 288 (1960). Put another way, the defamatory statement must “concern” the plaintiff in order to be actionable by the plaintiff.

The “of and concerning” requirement raises a question of defamatory meaning. Like all questions of defamatory meaning, the “of and concerning” issue must be resolved by analyzing the challenged statements in context and as a whole and by viewing them from the perspective of the ordinary, reasonable hearer or reader. See New Times Inc. v. Isaaks, 91 S.W. 3d 844, 853 (Tex. App. - Fort Worth 2002) (“court must construe the allegedly defamatory publication as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive it.”); Dolcefino v. Randolph, 19 S.W.3d 906, 916 (Tex. App. - Houston 2000) (same); Musser v. Smith Protective Services, Inc., 723 S.W.2d 653, 654 (Tex. 1987) (same).

Notwithstanding Defendants' assertion to the contrary, questions of defamatory meaning are *not* to be evaluated solely "in light of the allegations in the petition." (Motion at 2.)

When an appropriate evaluation is undertaken in this case, the challenged statements' susceptibility to the interpretation advanced by Plaintiffs cannot legitimately be disputed. Because it is styled as an "encyclopedia," the Book creates the expectation that its contents consist of comprehensive and accurate facts about the subjects that are discussed in its pages.⁹ Because the title indicates that the Book's subjects are "cults and new religions," a reasonable reader will infer that any subject organization is a "cult" or "new religion." Because the Book's own introduction criticizes the term "new religion," expresses a preference for the term "cult" and then proceeds to discuss cults at length, a reasonable reader can infer that most, if not all, of the organizations discussed in the Book are "cults."¹⁰ Having led the readers to the understanding that those organizations are "cults," the Book proceeds to define the term "cult" by listing specific practices in which cults engage. It does so without introducing any language that exempts any particular group or groups from this definition and even makes a point of noting that organizations who profess to be Christians are often "cults." A reasonable reader can only infer that each organization may be guilty of any of the abhorrent acts or practices identified by the authors under the heading "Characteristics of Cults."

Defendants protest that the Book contains a qualifying statement, to wit: "not all groups [discussed in the Book] have all the characteristics and not all groups have every characteristic in equal measure." (Motion at 5 citing Book pg. xxiii.) But the effect of this statement is not ameliorative because it expressly links the "Characteristics of Cults" to the organizations discussed in the Book. Further, because nothing in the Book suggests that any specific

⁹ As the authors say, "Facts are facts. Some will be mentioned in this Introduction and many more in the individual chapters." (Ex. 7, pg. xix; see also Affidavit of Philip Jenkins in Support of Plaintiffs' Opposition to Defendants Motion for Summary Judgment ("Jenkins Affid."), ¶ 5; Affidavit of Keith Walters in Support of Plaintiffs' Opposition to Defendants Motion for Summary Judgment ("Walters Affid."), ¶¶ 6, 8, filed concurrently herewith.)

¹⁰ This understanding is especially likely where the authors themselves state that, "the groups herein deserve the title [cult] even if they disagree." (Exh. 7, Book, pg. xxi.)

organization is free of any particular cultish characteristic, the phrase leads reasonable readers to understand that *all* of the organizations in the Book possess some of the “characteristics of cults,” and that any specific organization *may well* possess any or all of those characteristics.

Religion professors Dr. Philip Jenkins and Dr. Gordon Melton and linguistics scholar Dr. Keith Walters concur that Defendants’ “not all” phraseology does not dispel the idea that the organizations in the Book are cults and possess the characteristics of cults. (See Jenkins Affid., ¶ 10; Walters Affid., ¶ 7; accord Affidavit of Gordon Melton (“Melton Affid.”), ¶ 11, filed concurrently herewith.) The legal significance of these facts is plain: if the statements can reasonably be understood as either defamatory or non-defamatory as to plaintiffs, their defamatory meaning is “ambiguous” and the question of whether they were in fact understood in a defamatory sense is to be resolved by a jury. Sellards, supra, 702 S.W.2d at 679; Guisti Tribune, supra, 150 S.W. at 878.

B. The References To Plaintiff Need Not Be Direct.

Defendants argue (twice) that the defamatory statements are not “of and concerning” Plaintiffs because they are not immediately proximate to Plaintiffs’ names. At page 4 of their Motion, Defendants state: “The names of Plaintiffs do not appear in the Introduction of the Encyclopedia, pgs. xv-xxxi.” At page 6, they state: “In the 66 page Doctrinal Appendix, the Local Church is mentioned only in a chart with 15 other religious groups under a title of “Different Concepts of God” and in a subsection titled “Religions, Cults and the Deity of Jesus Christ.” Though unsupported by legal argument, these statements are intended to convey the notion that defamatory statements cannot be understood to refer to Plaintiffs if the reference is indirect. This notion is belied by Texas law. The courts of this state have repeatedly held that defamatory statements can be “of and concerning” the plaintiff even if they refer to plaintiff indirectly. Indeed, they need not refer to Plaintiffs by name at all. In Poe v. San Antonio Express, the court addressed the issue as follows: “A publication may clearly be defamatory as to somebody, and yet on its face make no reference to the individual plaintiff. He need not, of course, be named and *the reference may be an indirect one;*” 590 S.W. 2d at 542, quoting

Prosser on Torts, 2d. Ed., p. 583. (emphasis added); see also Outlet Company v. International Security Group, *supra*, 693 S.W. 2d at 626 (“[Plaintiff] need not ... be named and the reference may be an indirect one.”).

Obviously, the Plaintiffs here are explicitly referenced by name in the text. The name The Local Church appears on the first page of the Book’s Table of Contents in bold-faced, capital letters. It appears again in a (roughly) 24 point, bold-faced chapter heading on pages 211-212. It is repeated twice more on that page in standard type and is also referenced on pages 369 (“cults ... such as The Local Church of Witness Le”) and 377 and 386. It is also repeated twice in the Doctrinal Appendix on pages 673 and 689, and in the index on page 730. The name Living Stream Ministry appears on pages 211-212 and 692 of the text. Moreover, as explained above, the Plaintiffs are labeled as “cults” by virtue of their inclusion in the Book and because the authors expressly state that all groups in the Book can properly be branded with that epithet. Thus, the defamatory statements refer directly to the “cults” in the Book and indirectly to the Plaintiffs. This indirect but explicit reference satisfies the “of and concerning” requirement.

Defendants disingenuously assert that some of the calumnies in the Books’ Introduction refer to “cult leaders” rather than to the cults themselves. (Motion at pg. 6, quoting Introduction at pg. xxv.) By making this observation, Defendants appear to argue that defamatory statements about the practices of cult leaders who are acting in that capacity cannot be understood as statements about the cults that they lead. Even if the cult leader/cult distinction could reasonably be drawn here (which it cannot for the reasons set forth below), Defendants’ argument would still be irrevocably flawed. The only reasonable inference that can be drawn from the charge that “cult leaders,” “*encourage their followers to,*” e.g., engage in “prostitution for making converts,” and “sometimes rape women, beat their disciples, molest children, practice black magic ...,” etc., is that the cults themselves participate in, condone or abet these practices. At the very least, these statements imply that “cults” allow themselves to be passively involved in these illegal and highly repugnant activities. Imputations such as these are defamatory if false. Significantly, Defendants Harvest House and Ankerberg have conceded in their responses to interrogatories,

they *are* false as to the Local Church and Living Stream. (See Answer and Objections of Defendant Harvest House Publishers to Plaintiffs' First Set of Specially Prepared Interrogatories and Answer and Objections of Defendant John Ankerberg to Plaintiffs' First Set of Specially Prepared Interrogatories, conceding that Defendants do not contend that the defamatory statements are true as to Plaintiffs, Exhs. 11 and 12, respectively, attached hereto.)

More importantly, the distinction that Defendants' attempt to draw between "cult leaders" and cults evaporates when the quoted passage is examined as a whole. After reciting the inventory of cult leaders' abhorrent practices, the authors conclude the passage with the following words: "And such things *have occasionally happened even in what many people regard as the 'respectable cults'.*" (Introduction at pg. xxv.) Fairly parsed, this statement informs the reader that the cults themselves – particularly those identified in the Book – take part in these activities. Granted, the authors do not assert that everyone of the cults engage in all of the abominations listed. Nevertheless they raise the specter that some surely do. Even when viewed in the light most favorable to Defendants (which is not the standard that the court may employ on Motion for Summary Judgment), the statements can only be interpreted to mean that any of the organizations in the Book may have been involved in any of the listed practices. Because the language of the Book clearly raises this possibility, it satisfies the "ambiguity" standard that precludes summary judgment.

Here again, the scholars are in accord: Professor Jenkins states that the phrase "such things have occasionally happened even in what many people regard as 'respectable cults'" causes a reader¹¹ "to think that many or most small and fringe religions - - although apparently respectable - - in fact carried on these misdeeds in private ..." (Jenkins Affid., ¶ 6.) Dr. Keith Walters states that the qualifying phrase creates an ambiguity that is fatal to Defendants' position: "Certainly the quoted paragraph does refer to 'those cult leaders ... who have encouraged their followers, to engage in particular activities. However [in light of the qualifying phrase] it can also be read to refer to the cults themselves ... At the very least the catalogue of

¹¹ Particularly the class of evangelical Christians toward whom the Book was directed.

egregious acts ... can be understood as practices that are condoned and accepted by the cults.” (Walters Affid., ¶ 9.)

In sum, it is well-established that a communication may be defamatory even when it does not refer to the plaintiff by name. For example, in Diaz v Rankin, 777 S.W. 2d 496, 498 (Tex. App. - Corpus Christi 1989) the court stated “[i]n Texas, a statement does not have to specifically name the plaintiff in order to be defamatory ... [A] statement may clearly be defamatory concerning someone, and yet on its face make no reference to the plaintiff.” All that is required is that some listener or reader reasonably understand the statement to refer to plaintiff. “Every listener does not have to understand the statement to be a reference to the [plaintiff] as long as there are some who reasonably do. Id. at 498 citing Davis v. Davis, 734 S.W. 2d 707, 711 (Tex. App. Houston 1987, writ ref’d n.r.e; Outlet Co. v. International Security Group, Inc., 693 S.W. 2d 621, 626 (Tex. App. - San Antonio 1985). Because the challenged publication refers to Plaintiffs by name and contains numerous verbal cues that causes the reader to understand that the libelous statements refer to the Plaintiffs, the “of and concerning” requirement is met — even if the references to Plaintiffs are indirect.

C. It is Not Necessary For All Readers To Understand That The Statements Refer To The Plaintiffs.

As alluded above, Texas law provides that the “of and concerning” requirement is satisfied if only *some* recipients of the defamatory communication reasonably understand that it refers to the plaintiff. “[I]t is not necessary that every listener understand it, so long as there are some who reasonably do.” Poe v. San Antonio Express News, supra, 590 S.W. 2d at 542; see also Newspapers Incorporated v. Matthews, 161 Tex. 284, 289-90 (1960), citing Gibler v. Houston Post Co., 310 S.W. 2d 377 (Tex. Civ. App. - Houston 1958). (It is sufficient that “those who knew and were acquainted with the plaintiff understood from reading the publication that it referred to plaintiff.”); see also, Red River Valley Publishing Co. v. Bridges, 254 S.W. 2d 854 (Tex. Civ. App. 1952).

By the Affidavits of Dr. Milton Baxter (“Baxter Affid.”), Alex Shubin (“Shubin Affid.”) and Dennis Brown (“Brown Affid.”) as well as those of Jenkins, Melton and Walters, Plaintiffs have established that “some” of the individuals who read the challenged statements in context did indeed understand that those statements refer to the Local Church and Living Stream. For example, Dr. Milton Baxter, a lay witness, understood that the “characteristics of cults” described in the Introduction (and indeed all of the Book’s references to “cults”) referred to the organizations in the Book, including the Local Church and Living Stream Ministry.” (Baxter Affid., ¶ 5, filed concurrently herewith; see also Shubin Affid., ¶ 5; Brown Affid., ¶ 5, filed concurrently herewith.) That these readers understood the defamatory statements to refer to Plaintiffs is sufficient to defeat the instant motion. It cannot be overemphasized that Texas courts have given reader testimony considerable weight in deciding the “of and concerning” issue. See Outlet Co. v. International Security Group, Inc., *supra*, at 626.

D. The Defamatory Statements Are Ones Of Fact And Do Not Involve Issues Of Religious Belief Or Doctrine.

Defendants take the untenable position that the challenged statements are incapable of defamatory meaning because “[t]he term ‘cult’ as used in the Encyclopedia is ‘used as a religious term’ with recognition that ‘secularists also use the term.’” (Motion at 4, quoting Book, pg. xxi.) The problem with this argument is that Defendants’ use of the epithet “cult” is not the basis of this libel action. Only a passing reference to the Original Petition reveals that it is the Book’s description of the acts, practices and “characteristics” of the cults listed in the Book that form the foundation of Plaintiffs’ defamation claim.

According to Professors Jenkins and Walters, the word “cult” *is* sufficiently specific and disparaging to be capable of a defamatory interpretation. Jenkins notes, for example, that no organization applies the term to itself. (See Jenkins Affid., ¶ 9.) Both scholars note that the word has a particularly negative connotation among Fundamentalist and Evangelical Christians who are the most likely readers of the book. (Jenkins Affid., ¶ 9; Walters Affid., ¶ 6.) However, even if the word “cult” were non-defamatory, the Book’s (ostensibly) fact-intensive statements

concerning cult “characteristics” remain false and defamatory as to these Plaintiffs. There is nothing “religious” or “doctrinal” about accusing an organization of crimes such as “fraud”, “child molestation” and “rape”, or of encouraging its followers to engage in “drug smuggling” or “murder.” Whether or not such things actually occur within The Local Church - - or any given organization - - is not a matter of belief or interpretation. It does not involve religious principle or doctrine. It is not dependent on church policy. Rather, it is a fact-based matter that is susceptible to objective proof. By asserting that the word cult is “religious” (i.e., subjective) in character, Defendants attempt to distract attention from the objective, fact-dependant accusations that have been leveled against these Plaintiffs. The fact that the Plaintiffs are religious organizations does not alter the objective nature of those accusations.

V. **THE CHALLENGED STATEMENTS CANNOT BE CHARACTERIZED AS GROUP LIBEL**

Several times in their moving papers, Defendants note that the defamatory statements apply to large numbers of subjects. (See Motion, pgs. 4, 6 and 9.) Plaintiffs anticipate that Defendants will contend that, in so doing, they have raised and preserved the issue of “group libel.” Since Defendants do not cite the group libel doctrine or offer any legal arguments or authorities concerning it, they have waived the issue and should not be permitted to argue it in their reply brief or at the time of the hearing. Tex. R. Civ. P. 166a(c). However, even if the issue had been properly raised in the moving papers, it would be of no avail to Defendants.

The doctrine of group libel provides, in essence, that defamatory speech that is directed toward a large undifferentiated group (e.g., New York taxi drivers or members of the Teamsters’ Union or Philadelphia police officers) is not actionable by an individual member of the group. The rationale for this rule is that such a statement targets the group rather than the individual and cannot reasonably be interpreted as a statement that was directed toward the individual unless the individual is “singled out” in some way. Eskew v. Plantation Foods, Inc., 905 S.W.2d 461, 462 (Tex. App. – Waco 1995); Rodney Smolla, LAW OF DEFAMATION, 2d ed., West Group 2001, §4.10[1].

Before applying the rule and its exception to the facts of this case, one important point should be emphasized. The organizations discussed in the Book cannot be collectively characterized as a “group” for group libel purposes. Taken together, they constitute a *list* of 57 expressly identified individual entities that have been carefully selected and singled out from the true “group,” i.e., the undifferentiated group of all “cults.” By Defendants’ own admission, these organizations were chosen for inclusion in the Book because they have special significance in a discussion of “cults and new religions.” (See “How to Use This Book,” introductory material at pg. xii.) The fact that Defendants isolated these organizations from the world’s “thousands” of other cults, focused attention upon them by including them in the Book and singled them out by name is enough – in and of itself – to put all group libel theories to rest. Like the other groups on Defendants’ list, Plaintiffs’ identities are clearly distinguishable from the group “cults” as a whole. Thus, they are not anonymous members of a “group” and the doctrine of group libel does not apply.

Even if the organizations in the Book could be considered a “group” for group libel purposes, the group libel rule is subject to two important exceptions, both of which preclude its applicability here. First and foremost, the group libel rule does not apply to a group member plaintiff who is singled out from the group. The RESTATEMENT (SECOND) OF TORTS, § 564A provides that an individual member of a group may maintain suit for a libel directed at the group if “the circumstances of publication reasonably give rise to the conclusion that there is a particular reference to the member.”¹² Here, of course, the Book contains many specific references that single out the Plaintiffs from cults in general. It also contains statements (referred to above) that lead readers to understand that its accusation against “cults” are applicable to those organizations who are discussed in its pages. Thus, the circumstances of publication indicate that the Book’s references to “cults” refer to Plaintiffs.

¹² See Evans v. Dolcefino, 986 S.W. 2d 69, 77 (Tex. App. 1999) where plaintiff is “singled out” from the group, he has an individual cause of action for libel); Webb v. Sessions, 531 S.W. 2d 211, 213 (Tex. App. 1975) (“when the group or class is large, the defamatory matter must point to or single out the plaintiff”).

On every occasion in which the courts of this state have applied the group libel rule, plaintiff has been an unnamed, anonymous member of the group. See, e.g., Eskew v. Plantation Foods, Inc., 905 S.W. 2d 461 (Tex. App. 1995) (plaintiff was not named in defamatory article but was one of a large group of individuals alleged to have been “involved” in “irregularities” in his company’s maintenance department. Thus, there was nothing to single him out.) See also Sellards v. Express News Corp., 702 S.W. 2d 677 (Tex. App. 1985) (plaintiff’s name did not appear in the defamatory article; she was one of a group among whom some were alleged to have been under the influence of drugs); Texas Beef Group v. Winfrey, 11 F. Supp. 2d 858, 863-64 (N.D. Tex. 1998) (statements that did not name plaintiffs but concerned Mad Cow Disease generally could not reasonably be understood to disparage plaintiffs, Texas cattle growers). It hardly need be said that the instant case contrasts sharply with these cases. Here, Plaintiffs are named, are identified as “cults” and hence are the specific objects of statements about cults.

There is a second reason that Defendants’ group libel theory must fail in a motion for summary judgment. The group libel rule does not apply when a defamatory statement can be construed to apply to all the members of the group. See American Civil Liberties Union, Inc. v. Kiely, 40 F.2d 451, 453 (2d Cir. 1930) (“When [the defamatory statement] reflect[s] on every member of a class, each one may have an action because the charge is made broadly against all”); see also Louisville Times Co., v. Emrich, 252 Ky. 210, 215, 66 S.W. 2d 73, 75 (1933). Here, the defamatory statements can reasonably be understood to target every organization that can be characterized as a “cult” – particularly those listed in the Book. This is because the Book does not distinguish between the organizations that possess “all the characteristics of cults” (see Book pg. xxiii) and those that possess only some of those characteristics. Nor does it make any attempt to exclude any particular organization from any “characteristic of cults.” Nor does it remotely suggest that any organization discussed in its pages is free of all “characteristics of cults.” As touched upon above, the reader can only infer that each organization in the Book possesses some or all of the “characteristics of cults.” If it did not possess such characteristics, it would not be listed in the Book. For this reason, the Defendants’ qualifying phrase “not all

groups have all the characteristics [of cults]” does not insulate them from liability here because the clear implication of the language of this section is that all organizations have some of the characteristics and many have all of them. As noted above at pages 7-8, if a challenged statement is ambiguous, that is, if it can be read to be either defamatory or non-defamatory of plaintiff, summary judgment on the issue of defamatory meaning is improper. It is the jury who must decide how the statement was actually understood. Sellards v. Express News, *supra*, 702 S.W. 2d at 697; Guisti Tribune, *supra*, 105 Tex. 497.

Finally, Plaintiffs have submitted both expert analysis and lay witness testimony all attesting to the fact that a reasonable reader of the Book would understand that the challenged statements refer to or concern Plaintiffs. (Jenkins Affid., ¶¶ 3-6; Walters Affid., ¶¶ 4, 7-13; Baxter Affid., ¶ 5, filed; Shubin Affid., ¶¶ 5-13; Brown Affid., ¶¶ 5-13.) This evidence is sufficient to rebut any argument Defendants may assert belated in their reply brief on the group libel issue.

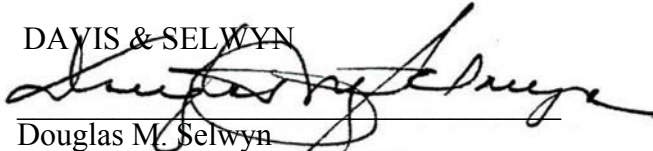
VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants’ Motion for Summary Judgment.

Dated: March 10, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing **Plaintiffs' Opposition to Defendants' Motion for Summary Judgment with attached Exhibits and Affidavits in Support and proposed Order directed to** Defendants Harvest House Publishers, John Weldon and John Ankerberg, by and through their attorneys, J. Shelby Sharpe, Esq., Sharpe & Tillman, 6100 Western Place, Suite 901, Forth Worth, Texas 76107, via certified mail, return receipt requested, and to Thomas J. Williams, Esq., Haynes and Boone, LLP, 201 Main Street, Suite 2200, Fort Worth, Texas 76102-3126, via First Class U.S. Mail, and to Donald Jackson, Esq., Haynes and Boone, LLP, 1000 Louisiana Street, Suite 4300, Houston, Texas 77002-5012, via hand delivery, on this 10th day of March 2003.


DOUGLAS M. SELWYN