

THE LOCAL CHURCH,  
an unincorporated association, et al.,

Plaintiffs.

vs.

HARVEST HOUSE PUBLISHERS, an  
entity incorporated in Oregon and California;  
JOHN ANKERBERG, an individual; and  
JOHN WELDON, an individual,

Defendants.

§ IN THE DISTRICT COURT OF  
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§ HARRIS COUNTY, TEXAS  
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§ 80TH JUDICIAL DISTRICT  
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**PLAINTIFFS' SUR-REPLY TO DEFENDANTS' MEMORANDUM BRIEF IN  
SUPPORT OF DEFENDANTS' AMENDED MOTION FOR SUMMARY JUDGMENT**

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## I.

### INTRODUCTION

Defendants' amended motion for summary judgment ("Motion") was filed on February 18, 2003. Its 11 pages contained lengthy quotations from the Encyclopedia of Cults and New Religions (the "Book"), quotes from Plaintiffs' Original Petition, one or two procedural points and little else.

Not a single theory cognizable under defamation law was articulated. Not a single case or learned treatise was cited. Apart from sheer divination, the only means by which Plaintiffs could make legal sense of the motion was to work backward from its unsupported conclusions and hazard guesses as to the strained arguments that might be advanced to support them. By proceeding in this manner, Plaintiffs anticipated two arguments. Plaintiffs replied to those arguments in their responsive opposition memorandum ("Opposition"), filed March 10, 2003.

Plaintiffs responded to the Motion's contention that the challenged statements "are not capable of a defamatory meaning as to plaintiffs," by demonstrating that the statements can be – and have been – understood to refer to and "concern" the Local Church and Living Stream Ministry. Plaintiffs' evidence on this point consisted of language from the Book and testimony from its readers. (See Opposition at pg. 9-15.) Plaintiffs could only guess at the thrust of the Motion's vague assertion that the defamatory statements refer to "large numbers" of subjects. On the assumption that this was a reference to the "group libel" doctrine – pursuant to which anonymous members of a defamed group lack standing to sue – Plaintiffs explained that the doctrine is inapplicable to Local Church and Living Stream Ministry. In this regard, Plaintiffs demonstrated that both Plaintiffs are referred to by name in the Book and singled out from the undifferentiated "group" of cults as a whole. Thus, they are not anonymous members of a defamed group who happen to have suffered vicarious injury as a result of statements made solely about the group. Rather they are expressly identified in the Book, and are direct targets of the defamatory statements. These facts are the antithesis of "group libel."

On March 21, 2003, Defendants filed a 27-page Memorandum in support of their Motion for Summary Judgment (hereinafter the “Reply”). There, *for the first time*, Defendants identified the “of and concerning” and “group libel” doctrines by name and cited cases that purportedly lent support to their singular vision of those doctrines. The doctrine of non-actionable opinion also surfaced for the first time in the Reply. The Reply was served upon Plaintiffs’ local counsel late Friday afternoon.<sup>1</sup> Despite counsels’ mutual understanding that important documents would be served electronically to facilitate timely response, Plaintiffs’ primary counsel did not receive the reply memorandum until Monday, March 24th – the day on which the motion was to be submitted to the Court.<sup>2</sup>

Almost without exception, the arguments made in the Reply misstate the law and are unsupported by any authority. That these arguments were not asserted forthrightly until the filing of the Reply suggests that Defendants themselves lacked confidence in them.

The purpose of this Sur-Reply is to respond to issues that were not raised at all, or were only alluded to, in Defendants’ skeletal moving papers. In these pages, Plaintiffs will first refute Defendants’ defamatory meaning argument. Specifically, Plaintiffs will repudiate the notion that defamatory meaning may be determined by a decontextualized examination of the challenged statements alone, without reference to the Book as a whole and without consideration of the circumstances surrounding its publication. As will be shown, the Court may not, consistent with Texas law, employ such a sterile analysis. Second, Plaintiffs will refute the argument that the challenged language is capable of only one meaning – the meaning advanced by Defendants themselves. In doing so, Plaintiffs will establish that – at the very least – the statements are susceptible to two meanings, one of which is defamatory. Such ambiguity is all that is necessary to overcome summary judgment. Third, Plaintiffs will show that Defendants’ “group libel”

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<sup>1</sup> See Declaration of Deborah Drooz in Support of Plaintiffs’ Sur-Reply to Defendants’ Memorandum Brief In Support of Defendants’ Amended Motion for Summary Judgment, filed concurrently herewith, ¶ 5.

<sup>2</sup> *Id.*, ¶ 6.

argument is based upon a fundamental misunderstanding of the group libel doctrine. As will be shown, Defendants' assumption that the organizations identified in the Book constitute a "group" for group libel purposes is sorely mistaken. Plaintiffs will further demonstrate that well-settled exceptions to the "group libel" doctrine make it inapplicable here. Fourth, Plaintiffs will refute the argument – that statements in the Book's Doctrinal Appendix are ones of non-actionable opinion. Having defined their own terms with statements of verifiable fact, Defendants cannot take refuge in the opinion doctrine. Throughout this Sur Reply, Plaintiffs will demonstrate that Defendants' authorities not only fail to support their arguments but are frequently directly at odds with them.

## II.

### **PLAINTIFFS' OPPOSITION IS A PROPER "ANSWER" OR "OTHER WRITTEN RESPONSE" UNDER RULE 166A(C) OF THE TEXAS RULES OF CIVIL PROCEDURE.**

Before addressing the substance of the Reply, Plaintiffs address one procedural issue. Defendants' contention that Plaintiffs' Opposition to Defendants' Motion for Summary Judgment is not an "answer or response" is without merit. It is well established that a "non-movant must expressly present to the trial court, by written answer or response, any issues defeating the movant's entitlement," and must support the reasons with summary judgment proof to establish a fact issue. McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337, 343 (Tex. 1993); accord Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 907 (Tex. 1982); Tex. R. Civ. P. 166a(c) ("the adverse party . . . may file and serve opposing affidavits or other written response") (emphasis added). Notably, it is not necessary that the written response adhere to a particular form or be titled an "answer" or "response." Rather, "[t]he written answer or response to the motion must fairly apprise the movant and the court of the issues the non-movant contends should defeat the motion." City of Houston v. Clear Creek Basin Authority, 589 S.W.2d 671, 678 (Tex. 1979). Plaintiffs' Opposition does just that.

Plaintiffs' Opposition and supporting affidavits satisfy Texas' summary judgment pleading requirements by expressly informing Defendants and the Court of the reasons Plaintiffs contend defeat Defendants' entitlement to summary judgment. Plaintiffs initially explained how through the challenged statements the authors impute specific abhorrent acts and practices to the organizations in the Book. (Opposition at 5-7.) Further, in countering Defendants' argument that the challenged statements are "not capable of a defamatory meaning as to plaintiffs" (Motion at 10.), Plaintiffs exhaustively detailed that the challenged statements are "of and concerning" the Plaintiffs. (Opposition at 8-15.) Additionally, Plaintiffs clearly set forth the reasons why the "group libel" rule does not apply and, thus, cannot form a basis for granting Defendants' motion for summary judgment. (Id., at 16-19.) Plaintiffs' Opposition expressly presented to the Court and Defendants the reasons seeking to avoid Defendants' entitlement to summary judgment.

McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337 (Tex. 1993), cited by Defendants, does not support their contention that Plaintiffs' Opposition is not an "answer or response" under Rule 166a(c). McConnell held that the grounds defeating a motion for summary judgment must be set out in an "answer" or "other written response" itself and cannot be furnished by a "brief in support" filed contemporaneously. Id. at 341, 343. The McConnell court neither held nor implied that a non-movant's "answer" or "other written response" could not take the form of a "brief". Rather the court simply held that any issues defeating movant's entitlement must be presented in a single "answer" or "other written response." Id.

Plaintiffs' Opposition expressly presented the issues Plaintiffs contend defeat Defendants' entitlement to summary judgment. (Opposition at 5-19.) Therefore, it is of no moment that Plaintiffs' Opposition was not titled a "Response" or "Answer" or that Plaintiffs' Opposition is in the form of a "brief." "Rule 166a(c) is important because it provides the opposing party with notice of all matters expected to be asserted in arguing the motion." McConnell, 858 S.W.2d at 341 quoting Weaver v. Stewart, 825 S.W.2d 183, 184-185 (Tex. App. – Houston 1992, writ denied). Defendants concede that Plaintiffs' Opposition contains

“argument of grounds” as to why the Motion should be denied (Motion at 6.), but essentially complain that these grounds are not listed succinctly enough. Not only does this argument lack legal merit, but it elevates form over substance. No magical terminology or format is required. What is of import is that Plaintiffs served and filed a “written response” that clearly alerted the Court and Defendants of the reasons defeating Defendants’ entitlement to summary judgment.

### III.

#### **STATEMENT OF UNDISPUTED FACTS**

1. The Book is styled as an “Encyclopedia” i.e., a “comprehensive reference work” containing information about a variety of subjects or a particular field.<sup>3</sup>

2. The stated subject matter of the Book is “Cults and New Religions.” (Book, passim.)

3. The Book initially states that the organizations discussed in its pages are “cults” and “new religions.” (Book pgs. ix, xxi.)

4. The Book goes on to state that the term “new religions” is misleading when applied to the organizations discussed in its pages and that a more accurate term is “cults.” (Book pg. xxi.)

5. The Book states: “the groups [discussed] herein deserve the title [cult],” (Book pg. xxi) and “all the groups discussed in this volume accept occult powers.” (Book pg. 708.)

6. The Book’s Introduction defines a “cult” as an organization that participates in at least some of twelve specific “characteristics,” ranging from “fraud” in financial matters to “intimidation” of its members. (Book pgs. xxii-xxvi.) Nothing in the Book enables a reader to distinguish between cults that participate in “all the characteristics” and those that participate in only some. (Book pg. xxiii.)

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<sup>3</sup> American Heritage Dictionary of the English Language, Third edition.

7. The Book's Introduction states that "cults" have engaged in and/or acquiesced to a litany of abhorrent acts including rape, beating, drug smuggling and murder. The specific language used to convey this message is "[S]uch things have occasionally happened even in what many people regard as *respectable* cults." (Book pg. xxv (emphasis in the original).) The phrase "respectable cults" is not defined, and nothing in the text enables a reader to distinguish between the cults that have engaged in or acquiesced to these acts and those that have not.

8. The Book states that there are as many as "5000 [cults] worldwide" (Book pgs. xvi, ix), and that the organizations named and discussed in its pages "are only the tip of the iceberg." (Book pg. ix.)

9. The Book's Introductory chapters explain that these named organizations were singled out for discussion because they "have the largest membership, most significant impact on Christianity or greatest social influence." (Book pg. xii.)

10. Plaintiffs Local Church and Living Stream Ministry are among the organizations singled out for discussion in the Book and are identified therein by name.

11. The Harvest House editorial personnel who worked on the Book admit that the introductory materials can reasonably be read to apply to the organizations discussed in the Book. (See Deposition of Carolyn McCready, dated March 26, 2003, at 73 (Drooz Decl., Ex. C.); Deposition of Betty Fletcher, dated March 25, 2003, at 129 (Drooz Decl. Ex. D.)

#### IV.

**ISSUES OF DEFAMATORY MEANING—INCLUDING THE “OF AND CONCERNING” ISSUE – ARE RESOLVED BY VIEWING THE CHALLENGED WORK AS A WHOLE, WITH DUE REGARD FOR THE CIRCUMSTANCES SURROUNDING PUBLICATION.**

**A. The Publication Must be Construed As A Whole**

Defendants argue that the challenged statements in the Book's Introduction cannot be read to be defamatory of Plaintiffs because Plaintiffs are not "named" or "alluded to" in that

portion of the Book. (Reply at pg. 20.) This argument runs afoul of the very rule that (as defendants themselves concede) must be applied when defamatory meaning is at issue, to wit: “the language alleged to be libelous must be measured by the language in the Encyclopedia *in context*.” (Reply at pg. 10, emphasis added.) Having paid lip service to this well-settled rule, Defendants go on to argue that the challenged statements must be analyzed in a vacuum without reference to their context in the Book and without regard to the circumstances surrounding publication. This is not the law.

Time and time again, the courts of this state have emphasized that issues of defamatory meaning must be resolved by an evaluation of the challenged language *in the context of the work as a whole*. In the recently decided case of Allied Marketing Group, Inc. v. Paramount Pictures Corp., 2003 Tex. App. LEXIS 2441 (11th Dist. - Eastland), the Texas Court of Appeal explained the process by which the trial court determines the issue in the first instance. “[T]he trial court construes the allegedly defamatory publication as a whole in light of surrounding circumstances based on how a person of ordinary intelligence would perceive the publication.” *Id.* at 15, citing Turner v. KTRK Television, Inc., 38 S.W. 3d 103, 114 (Tex. 2000) (“[A]n allegedly defamatory publication should be construed as a whole in light of surrounding circumstances based upon how a person of ordinary intelligence would perceive it.”); Musser v. Smith Protective Services, Inc., 723 S.W. 2d 653, 655 (Tex. 1987). *See also* Guisti v. Galveston Tribune Co., 105 Tex. 497, 507, 150 S.W. 874 (1912) (same).<sup>4</sup>

When the challenged statements are construed in the context of the Book as a whole, there can be no doubt that an ordinary reader could reasonably understand that they do apply to Living Stream and Local Church. This construction is reasonable because the Book informs the reader that the organizations it focuses upon are to be understood as “cults,” and that – by definition – every cult possess *at least* some of the “characteristics of cults” that contain the

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<sup>4</sup> *See also* Kapellas v. Kofman, 1 Cal. 3d 20, 34, 81 Cal Rptr. 360, 459 P.2d 912 (1969) (same).

challenged statements. (See Plaintiffs’ Undisputed Facts 3-7, supra at pg. 3-4.) It goes without saying that the Local Church is one of the organizations that the Book focuses upon. Together with Living Stream Ministry, it is the sole subject of the Book’s twenty-first chapter. Thus, the reader has been told that it is a cult and that it possesses some or all of the “characteristics of cults.”

Notwithstanding Defendants’ argument to the contrary, the Book’s statement that “not all groups have all the characteristics” underscores rather than negates this inference because it tells the reader that all of the organizations discussed in the Book possess some – and may possess all – of the characteristics of cults.

**B. The Challenged Statements Must Be Evaluated In Context.**

As noted above, the court must also consider the context in which the challenged statements appear. Here, it is important to note that the challenged publication is a “reference book” that promises readers “up to date facts” and “comprehensive information” about the organizations discussed in its pages.<sup>5</sup> The introduction to such a work presumably contains preliminary remarks about, and an overview of, the subject matter discussed therein.

Accordingly, the reader can reasonably infer that the defamatory statements in the Introduction refer to the organizations discussed in the Book. Harvest House’s own editorial staffers have conceded that the content of the Book’s Introduction relates to the chapters about individual religious organizations and can be read to apply to those organizations. (See McCready Depo. at 71, 73; Fletcher Depo. at 128-129, Exhs. C and D to Drooz Decl., respectively.)

Consideration must also be given to the fact that the Book was written by men who are heralded on its cover as accomplished scholars in the fields of “theology” and “comparative religions.” (Id.) Such individuals are likely to be perceived as sources of accurate information in these fields, are likely to be taken literally and are likely to be believed. The Court should also

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<sup>5</sup> The quoted phrases appear on the Book’s back cover.

consider the fact that the Book is directed toward an audience of evangelical Christians who have a negative view of cults and are pre-disposed to believe the worst about any organization who the authors select for inclusion in a book of cults.<sup>6</sup>

Given this context, it is *Defendants'* construction of the challenged statements that is unreasonable: No reader could reasonably conclude that the acts and practices imputed to "cults" in the Book's Introduction have no application to the organizations identified in the Book. Since the Book draws no distinction between the groups that participate in any given characteristic and those that do not, the only conclusion that may be drawn is that the challenged language of the Introduction *may well* be defamatory of the Local Church and Living Stream. The legal significance of this conclusion is clear: "If a defamatory meaning *may* exist, then the publication is considered ambiguous, and the court must allow the jury to determine whether an ordinary reader would perceive the statement as defamatory." Allied Marketing Group, Inc., 2003 Tex. App. LEXIS 2441 at 15-16, citing Golden Bear Distributing Systems of Texas, Inc. v. Chase Revel, Inc., 708 F.2d 944, 948 (5th Cir. 1983) (applying Texas law) (emphasis added). The Allied Marketing court concluded by stating: "Thus, if a publication is capable of two interpretations, one of which is defamatory, the trial court is required to submit the publication to the jury." Id.<sup>7</sup>

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<sup>6</sup> McCready testified that Harvest House publications are directed toward an evangelical Christian audience and are sold primarily in Christian bookstores. (McCready Depo. at 31, 40.) She further testified, on the basis of her status as an evangelical Christian, that evangelical Christians view cults negatively. (Id. at 31-32.)

<sup>7</sup> It is of particular interest that the court in Allied Marketing rejected a defense argument that is analogous to one advanced by Defendants here. At page 13 of their Reply, Defendants argue that the cult characteristics set forth in the final paragraph of the Book's page xxv (withholding blood transfusions and medical access, encouraging prostitution, etc.) refer only to "cult leaders or gurus" and not to the cults themselves. Similarly, defendants in Allied Marketing argued that the challenged portions of their television program "only commented about con-men 'who adopt the trappings of legitimate sweepstakes companies as a means of perpetrating fraud,'" and could not reasonably be understood to refer to the sweepstakes company plaintiff. The court pointedly disagreed, emphasizing that "the segment did not indicate – by statements or otherwise – that [plaintiff] Sweepstakes Clearing House was a legitimate company. Nor did the segment clearly indicate – by statements or otherwise – that it was intended only as a comment about con-men or that it was not intended as a negative comment about [plaintiff]." Allied Marketing, 2003 Tex. App. Lexis 2441 at 14. This reasoning is directly applicable here in light of the absence of any language in the Book that would suggest that the challenged statements refer only to "cult leaders and gurus" and were not intended as negative comments about the cults discussed in the Book.

**C. Extrinsic Evidence – Including The Testimony of Witnesses – Must be Considered.**

Defendants’ defamatory meaning argument is unmeritorious in one final respect: It rests in part on the erroneous premise that the court may not consider “extrinsic evidence” (including witness testimony) to interpret the challenged language “until [it] finds that it is subject to more than one reasonable construction.” (Reply at 16.) On its face, this proposition arouses skepticism given the appellate courts’ repeated directive that the trial courts consider the “circumstances surrounding publication” in making their initial defamatory meaning assessments. What would an evaluation of such circumstances entail if not the consideration of evidence “extrinsic” to the publication itself? Skepticism gives way to incredulity when we examine the case that defendants cite in support of this argument, i.e., National Union Fire Ins. Co. v. CBI Indus., 907 S.W. 2d 517, 529 (Tex. 1995). National Union is not a defamation case but a *contract* case. The quoted prohibition against the introduction of “extrinsic evidence” is nothing more than the court’s reiteration of the parol evidence rule as applied to a written agreement between the parties. The case has no applicability whatsoever to any issue before this Court and provides no authority for Defendants’ theory that extrinsic evidence may not play a part in the defamatory meaning analysis. An examination of yet another case cited by Defendants reveals that the courts of this state have expressly held that extrinsic evidence – particularly in the form of witness testimony – *should* be considered by the trial court when it rules on the “of and concerning” issue. In Gibler v. Houston Post Co., 310 S.W. 2d 377 (Tex. Civ. App., 1958, writ ref’d n.r.e.) the court squarely addressed the question of whether to admit the testimony of individuals who read an allegedly libelous publication and concluded that it referred to the plaintiff. The court stated:

“[T]he weight of authority is that such testimony is admissible, and we think such testimony should be admitted. As stated in Prosser on Torts, 2d Ed., p. 583, with supporting authorities: ‘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; *and it is not necessary that every listener understand it, so long as there are some who reasonably do.*' (Emphasis [the court's].) In the instant case, there can be little question but that the friends and acquaintances of the appellant, as well as men engaged in newspaper work, identified the party accused in the broadcast in question as appellant, Frank Gibler." Id. at 384-385.

Witness testimony was also clearly considered by the Allied Marketing court. Indeed, the court's ruling in plaintiff's favor on the "of and concerning" issue hinged in part upon the fact that "[plaintiff] presented evidence that a viewer [of the subject television program] did perceive that [plaintiff] Sweepstakes Clearinghouse was engaging in the scam." Allied Marketing, 2003 Tex. App. LEXIS 2441 at 15. In light of this authority, Defendants' demand that this Court disregard the witness affidavits submitted by Plaintiffs together with their opposition memorandum must be rejected. The affidavits provide valuable insight as to how individual readers did in fact interpret the challenged language. Such evidence is highly relevant to the issue of whether such interpretations are reasonable.

Defendants cite Turner v. KTRK Television, Inc., 38 S.W.3d 103 (Tex. 2000) as authority for the proposition that "the testimony of a reasonable reader's interpretation of the Encyclopedia as a whole" may not be considered by the court because "[a] publication as a whole can only be defamatory, according to Turner, if it creates 'a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way.'" (Reply at 18.) Defendants apparently attempt to argue that witness testimony (and other evidence of context and surrounding circumstances) may not play a part in the defamatory meaning analysis unless "material facts have been left out or misleadingly juxtaposed" in the defamatory publication. Turner provides no authority for this counterintuitive proposition and, in fact, inveighs against it.

In Turner, the Texas Supreme court held that a publication that contains *true* statements of fact may nonetheless be defamatory as a whole if those facts are presented in a misleading way. "[A] publication can convey a false and defamatory meaning ... even though all the story's

individual statements considered in isolation were literally true or non-defamatory.” Turner, 38 S.W.3d at 114. In this case, it goes without saying that none of the challenged statements have been admitted or proven true; the entire premise of the complaint is that they are false. Moreover, Plaintiffs do not allege that the Book is “defamatory as a whole.” On the contrary; their Original Petition identifies specific statements that are false and defamatory as to Plaintiffs. Nor do Plaintiffs’ defamatory meaning witnesses purport to construe the Encyclopedia “as a whole.” They speak of their understanding of the challenged statements. When Plaintiffs urge that the Court should consider the challenged statements in the context of the publication “as a whole,” they merely assert the well-settled rule of construction that must be applied to questions of defamatory meaning.

Finally, it must be emphasized that the Turner court did *not* hold that allegedly defamatory language may only be construed in the context of the publication as a whole only under certain conditions. Far from it: The Turner court expressly stated: “We have long held that an allegedly defamatory publication should be construed as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it.” Id. at 114 (citing Musser v. Smith Protective Servs., 723 S.W.2d 653, 655 (Tex. 1987)). Defendants’ reliance on Turner is misleading and utterly misplaced.

## V.

### **DEFENDANTS GROSSLY MISCONSTRUE THE DOCTRINE OF GROUP LIBEL**

Defendants’ “group libel” theory amounts to this: Someone whose name unjustly appears on a list of individuals charged with heinous crimes has no cause of action for libel simply because others are accused with him. No court has ever interpreted the “group libel” doctrine in this way. The group libel doctrine applies when plaintiff is an unnamed or unidentifiable member of a group and the defamatory language is directed toward the group (e.g., city building inspectors took bribes; Texas beef growers spread mad cow disease; maintenance department personnel disrupted company operations). The doctrine does *not* apply

in cases like this one in which the defamatory publication identifies individual plaintiffs by name.

The courts and the commentators are in accord: If the plaintiff is identified by name or otherwise “singled out in some way,” or if the reputational injury caused by the defamation is “sufficiently well focused to satisfy the ‘of and concerning’ requirement,” the group libel doctrine is inapplicable. See Rodney Smolla, Law of Defamation, 2nd Ed., § 4:50. See also Eskew v. Plantation Foods, Inc., 905 S.W. 2d 461 (Tex. App. -Waco 1995, no writ); Webb v. Sessions, 531 S.W.2d 211, 213 (Tex. Civ. App. -Eastland 1975, no writ) (when plaintiff is a member of a group but the defamatory publication “points to” or “singles out” the plaintiff, the publication is actionable by that plaintiff). When plaintiff is named in a defamatory publication, he is thereby “singled out,” and made a target of the defamation. That other individuals are also named does not negate the fact that plaintiff is targeted nor does it lessen plaintiff’s injury.

Defendants have cited no case, because there is none, in which a court has applied the group libel doctrine against a plaintiff who is identified by name. In Evans v. Dolcefino, 986 S.W.2d 69 (Tex. App. -Houston 1999, no pet.), cited at page 24 of the Reply, the two plaintiffs who were named in the broadcast lost on summary judgment because the statements about them were “substantially true.” Id. The only plaintiff whose claim was denied on group libel grounds was an individual who was *not* mentioned by name in the challenged broadcasts. Id. at 77. The court ruled against this plaintiff on group libel grounds because the broadcast contained “*nothing to single out the plaintiff.*” Id. (citing Eskew v. Plantation Foods, Inc., 905 S.W. 2d 461, 462 (Tex. App. -Waco 1995, no writ) and Wright v. Rosenbaum, 344 S.W. 2d 228, 231-32 (Tex. Civ. App.-Houston 1961, no writ)).

Defendant’s invocation of the group libel doctrine is inapposite for a related reason: defendants mistakenly assert that a list of names constitutes a “group.” Specifically, defendants posit that the Book’s list of 57 organizations carefully culled from “thousands of cults

worldwide”<sup>8</sup> is the relevant “group” in this case. But a list of named entities is not an “undifferentiated group” for purposes of group libel. This becomes clear when we examine the underpinnings of the group libel doctrine. The group libel rule represents a compromise between the conflicting interests of free speech and individual reputation. The courts have determined that, because all libel actions seek to punish speech, they should be available only to plaintiffs to whom the defamatory statements can reasonably be understood to apply. If a statement can only be understood to be applicable to a large, indeterminate class, if the publication makes no express or implied reference to specific members, and if the circumstances surrounding publication do not permit the inference that a reference to a particular member is intended, the statement is not actionable by an individual member. This is the case because such a statement is no more than an impersonal reproach directed to the undifferentiated group as a whole. Any reputational injury suffered by an unnamed member is indirect and sustained only by virtue of membership. See, e.g., Prosser & Keeton on Torts, § 111 at 784; McCullough v. Cities Service Co., 676 P.2d. 833, 836-37 (Okla. 1984); Gintert v. Howard Publications, Inc., 565 F. Supp. 829, 834-35 (N.D. Ind. 1983); Brady v. Ottaway Newspapers, 445 N.Y.S. 2d 786 (1981). *However, when a defamatory publication identifies a plaintiff by name, it automatically singles him out from the indeterminate class and focuses suspicion upon him.*

The truly undifferentiated “groups” referred to by the Book are those of “cults” and “new religions.” The composite of all of the individual organizations in the Book only appear together there because Defendants single them out for inclusion. They do not otherwise constitute any definable group or class. Defendants should not be permitted to create a custom-made “group” and then defame its individual members with impunity by asserting the group libel doctrine. This is particularly true since Defendants themselves do not treat these organizations as an

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<sup>8</sup> See Book, pg. ix.

undifferentiated class. Rather, they afford each organization individual attention in separate chapters in the Book.

In sum, organizations described in the Book are not a “group” for group libel purposes. Each is singled out from the genuine group -- that of cults. The Introduction’s aspersions – which purportedly refer to all “cults” – can reasonably be read to apply with particular force to each “cult” that is specifically referred to in the Book – including the Local Church and Living Stream Ministry.

## VI.

### **STATEMENTS THAT ACCUSE PLAINTIFFS OF ENGAGING IN OR ACCEPTING THE OCCULT ARE ACTIONABLE UNDER TEXAS LAW**

For the first time in this litigation, defendants contend that statements that impute to Plaintiffs involvement in and acceptance of occult practices are non-actionable statements of opinion. (See Reply at 22.) Before reaching the merits of this argument, Plaintiffs vigorously assert that the “opinion” argument was not even alluded to in Defendants’ moving papers and should not be considered when raised for the first time in the Reply.

If the court decides to reach the merits of the argument it must nevertheless reject it. The question of whether a challenged statement constitutes a non-actionable opinion is one of constitutional dimension and can only be resolved by employing an evaluation that is congruous with the test applied by the Supreme Court in Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). Defendants’ conclusory, one-paragraph analysis does not remotely resemble the Milkovich test. That test considers: (1) *The context in which the statement appears*<sup>9</sup>: (here, the context is that of a purportedly factual “reference work”, specifically, an “Encyclopedia”); (2) *The tone and tenor of the language used*<sup>10</sup> (here, the Book states, as a matter of fact, that “all groups discussed in this volume accept occult powers to some degree,”);

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<sup>9</sup> See Milkovich, 497 U.S. at 19-21.

<sup>10</sup> See Milkovich, 497 U.S. at 19-21.

and (3) *Whether the statement is capable of being proved true or false*<sup>11</sup> (here, Plaintiffs can put on objective evidence that establishes that they do not accept or engage in any of the acts and practices that the Book itself describes as “occult”). Because Defendants have ignored all of these factors, they are clearly not entitled to summary judgment on this issue.

What’s more, the Texas court of Appeal has expressly found that false accusations that characterize plaintiff’s actions as “cult-like or occult” are actionable. In Hooper v. Pitney Bowes, Inc., 895 S.W.2d 773 (Tex. App.-Texarkana 1995, writ denied), plaintiff sued her employer after discovering that she had been accused of being “cult-like” and “in the occult.” Id. at 776. In upholding the verdict in plaintiff’s favor, the court of appeal stated: “In these times, a high degree of opprobrium has attached to terms such as ‘cultist,’ ‘occult,’ ‘unchristian,’ and especially ‘sorceress,’ ‘satanistic,’ and ‘witch.’ False accusations against or characterizations of persons using those and similar terms, we believe, can certainly be considered to be beyond all bounds of decency and to be atrocious and utterly intolerable in a civilized society.” Id. Particularly in light of the court’s holding in Hooper, Plaintiffs submit that the false charges concerning the “occult” -- a term which the authors themselves define and illustrate in the Book – cannot be construed as non-actionable opinion.

## VII.

### **BECAUSE THE LANGUAGE OF THE DOCTRINAL APPENDIX IS DESCRIPTIVE OF PLAINTIFFS IT IS CAPABLE OF DEFAMATORY MEANING OF PLAINTIFFS**

The Doctrinal Appendix contains defamatory statements which imply that cults are associated with “idolatry” and “human sacrifice” and engage in “murder,” “child sacrifice,” “prostitution,” and “snake worship.” (Book pgs. 708, 710, 714, 721, 722.) Defendants claim that these statements are unambiguously descriptive of others, not including Plaintiffs and, thus, are not capable of defamatory meaning of Plaintiffs. (Reply at 22-23.) Their argument is

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<sup>11</sup> See Milkovich, 497 U.S. at 20.

without merit. Because the challenged statements in the Doctrinal Appendix reference “cults” or the “occult” and since the authors label the organizations in the Book “cults”, a reader could reasonably understand that the challenged statements apply to Plaintiffs.

Each of the challenged statements contained in the Doctrinal Appendix reference “cults” or the “occult”. For example, the references to “idolatry” and “human sacrifice” are explicitly linked to “occult practices”<sup>12</sup> and “cults.”<sup>13</sup> Similarly, the authors present the abhorrent practices of “murder,” “child sacrifice,” “prostitution,” and “snake worship,” in the context of either the universality of cultic idolatry (Book pg. 721-723) or these practices’ relevance in today’s “world of the cults and the occult.” (Book pg. 714.) And, of course, given the topic, layout and tenor of the Book, the mere inclusion of these despicable acts are referenced to “cults” by implication.

Further, the organizations contained in the Book, including 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 “deserve the title [cult], even if they disagree”. (Book pg. xxi.) This theme is echoed in the Doctrinal Appendix wherein the authors assert that “. . . all the groups discussed in this volume accept occult powers to some degree”. (Book pg. 708.) Because it is styled an “encyclopedia,” the Book creates the expectation that its contents consist of accurate facts about the subjects discussed in its pages. 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.”

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<sup>12</sup> The authors write “. . . occult practices were associated with idolatry . . . and inevitably led to human sacrifice.” (Book pg. 710.)

<sup>13</sup> The authors write “The cults universally promoted idolatry . . . .” (Book page. 721.)

When the challenged statements in the Doctrinal Appendix are analyzed in the context of the Book as a whole, a reasonable reader could interpret the statements to mean that any of the organizations in the Book are involved in the listed practices. Because the language of the Book raises this possibility, it satisfies the “ambiguity” standard that precludes summary judgment.

**VIII.**

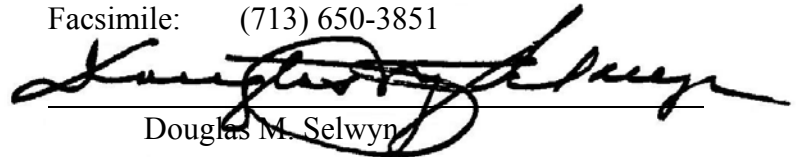
**CONCLUSION**

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

Dated: April 15, 2003

Respectfully submitted,

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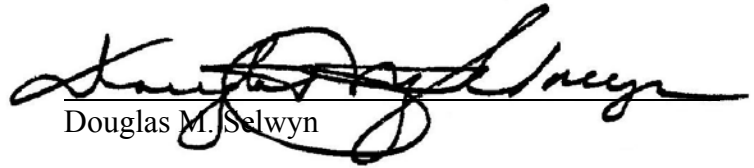


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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing **PLAINTIFFS' SUR-REPLY TO DEFENDANTS' MEMORANDUM BRIEF IN SUPPORT OF DEFENDANTS' AMENDED MOTION FOR SUMMARY JUDGMENT**, directed to Defendants John Weldon, John Ankerberg and Harvest House Publishers, Inc., by and through their attorneys, J. Shelby Sharpe, Esq., Sharpe & Tillman, 6100 Western Place, Suite 901, Fort Worth, Texas 76107, 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 First Class U.S. Mail, on this 15th day of April, 2003.

  
Douglas M. Selwyn