No. S134873

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HEBREW ACADEMY OF SAN FRANCISCO, et al,	)	First District Court of Appeal No. A106618
Plaintiffs and Appellants,	)	(San Francisco County Superior Court
v.	)	Case No. 414796)
RICHARD GOLDMAN, et al.,	)	
Defendants and Respondents.	)	

ANSWER TO *AMICI CURIAE* BRIEFS

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INTRODUCTION

Although they devote almost 85 pages to the effort, *amici curiae* cannot establish that affirming the Court of Appeal s judgment in this case would have the catastrophic effect that they claim. The Court of Appeal answered the question specifically left open in *Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1247 n.6, but the decision that this Court has under review is simply not the revolutionary document denounced in these briefs.

In attempting to convince this Court that the single-publication rule must be extended to publications that have receive[d] an extremely limited distribution, (*id.*), *amici curiae* essentially urge the Court to ignore the Legislature s inclusion of the phrase, such as any one issue of a newspaper or book or magazine, in Civil Code section 3425.3. This is contrary to the normal principles of statutory construction, and to the specific principles purportedly relied on by *amici* Aeonix/Nestlé. (*Amici Curiae* Brief of Aeonix Publishing Group ... In Support of Defendants Richard N. Goldman *et al.* (Aeonix/Nestlé Brief)[1] 15-18.)

The contention that the defamatory statements here were widely distributed because they were readily discoverable through available online resources does not

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[1] While a number of publishing and library entities such as Aeonix have joined in this brief, it was written by the same law firm that, solely on behalf of Nestlé USA, Inc, submitted a letter on July 7, 2005 in support of the petition for review; that firm is also representing Nestlé in an appeal of a $15,000,000 judgment against it that involves the single-publication rule. Aeonix/Nestlé Brief 4; *Christoff v. Nestlé USA, Inc.*, Case No. B182880.

withstand even minimal scrutiny. An attempt to demonstrate a hypothetical online search for the Goldman transcript (Aeonix/Nestlé Brief 36-38), inadvertently but emphatically demonstrates that the defamatory statements about Rabbi Pinchas Lipner and the Hebrew Academy of San Francisco were inherently undiscoverable, even if appellants had somehow been put on inquiry.

Both Aeonix/Nestlé and *amicus* The Regents of the University of California (Regents)[2], argue that almost no victims of defamation should be allowed to raise the discovery rule, but neither addresses any of the equitable issues that would determine whether the discovery rule is appropriate. (Answer Brief On The Merits 13-35.) While both are writing in support of the respondents, the complete failure of *amici curiae* to address such issues as the courts legitimate interest in protecting the reputations of individuals and having cases decided on the merits considerably limits the usefulness of these briefs in assisting this Court.

In short, the concerns voiced by the *amici curiae* are grossly exaggerated, and a fair evaluation of the issues raised in their briefs leads to the conclusion that the Court of Appeal reached the right result.

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[2] The Regents published the oral history of Richard N. Goldman (Transcript) that contains the allegedly defamatory statements giving rise to this litigation, and was previously a defendant in this case. The Regents made a successful motion to strike pursuant to Code of Civil Procedure section 425.16, based on the same statute of limitations argument at issue before this Court.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE SINGLE-PUBLICATION RULE, AS WELL AS STANDARD PRINCIPLES OF STATUTORY CONSTRUCTION, SUPPORT THE COURT OF APPEAL S JUDGMENT RESTRICTING ITS SCOPE

As the Court is well aware, Code of Civil Procedure section 3425.3 provides that only one defamation action can be:

> founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture.

Pointing to the absence of any language regarding mass media or mass communication in the statute, The Regents argues that the references to newspapers, books and magazines are merely illustrative, not exhaustive; that the single-publication rule applies to any publication, no matter how limited the distribution; and that no language confines the statute to only the specific types of publications section 3425.3 happens to mention. (Brief of *Amicus Curiae* The Regents of the University of California In Support of Respondents (Regents Brief) 10-11.) Aeonix/Nestlé also contend that the rule applies to any publication, and that the Legislature was merely providing an illustrative list of

types of publications. (Aeonix/Nestlé Brief 15-18.)

But *amici s* attempt to read out of the single-publication rule the Legislature s listing of newspapers, books and magazines runs afoul of the overriding principle governing the determination of legislative intent, which requires courts to give ordinary import to the statute s plain language and accord[] significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. *Dyna-Med, Inc. v. Fair Employment & Housing Commission* (1987) 43 Cal.3d 1379, 1386-87. (See Aeonix/Nestlé Brief 21.)

Aeonix/Nestlé s purported reliance on the more specific doctrines of *ejusdem generis* and *noscitur a sociis* is completely misplaced, because those principles of statutory construction actually preclude courts from doing what *amici* is asking this Court to do. (Aeonix/Nestlé Brief 17-18.) As this Court has explained, *ejusdem generis* has long been codified in Civil Code section 3534 (Particular expressions qualify those which are general), and holds that:

> where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. [It] is based on the obvious reason that if the [writer] had intended the general words to be used in their unrestricted sense, [he or she] would

> not have mentioned the particular things or classes of things which in that event would become mere surplusage.

(*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1160.)

Regardless of whether the specific words precede or follow the general words, the general term or category is restricted to those things that are similar to those which are enumerated specifically. (*Harris*, 52 Cal.3d at 1160 n.7.) Courts cannot simply ignore the particular illustrations that the Legislature happens to mention, because if the Legislature had intended a general word to be used in its unrestricted sense, it would not have offered the examples. (*Pour Le Bebe, Inc. v. Guess? Inc.* (2003) 112 Cal.App.4th 810, 827.) Courts must determine the meaning of each example listed by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope. (*Moore v. California State Board of Accountancy* (1992) 2 Cal.4th 999, 1012.)

Since newspapers, books and magazines are all part of the mass or traditional media, the plain language of section 3425.3 fully supports the Court of Appeal s conclusion that the single-publication rule is confined to communications in the mass media. (*Hebrew Academy of San Francisco v. Goldman* (2005) 129 Cal.App.4th 391, 398.) While both *amici* deride the Court of Appeal for its supposed distortion of the applicable caselaw, neither can point to any California decision that has applied the single-publication rule to

communications that fell outside of the mass media.[3]

Aeonix/Nestlé attempts to argue that oral histories are similar to newspapers, books and magazines, but the crux of the argument is simply that oral histories are more like those publications than they are like personnel files, which are hidden from view. (Aeonix/Nestlé Brief 18-21.) As explained in evidence initially produced by the Regents while a party to the case, oral histories are somewhat hidden from public view because they are not directed at the public, but at historical researchers for potential use in the future. (Baum, *Oral History for the Local Historical Society* (3d ed. 1995) at pp. 1, 52-53, 57; Appellants Appendix in Lieu of Clerk s Transcript (AA) 392, 418, 420.)[4] As Baum makes clear, The primary use [of oral histories], of course, is for historical research, and most of this will be in the future. (Baum at p. 57; AA 420.)

Oral histories are therefore quite different from newspapers, books and magazines, which are immediately and widely distributed to the general public. In

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[3] The Regents cites to New York cases extending the scope of the single-publication rule in that state (Regents Brief 13-14), but the only Court of Appeals decision analyzing the scope of the rule was an Internet case where the Court reasoned that [c]ommunications accessible over a public Web site resemble those contained in traditional mass media, only on a far grander scale. (*Firth v. State* (2002) 98 N.Y.2d 365, 370.)

[4] In their opposition to the motion for summary judgment in the trial court, respondents Richard N. Goldman, *et al.* had relied almost entirely on a declaration and supporting documents previously submitted by the Regents in support of its motion to strike. (AA 119-20, 355-742.)

cases that have applied the single-publication rule, the statute begins to run upon the first general distribution of the publication to the public, (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1245, quoting *Belli v. Roberts Brothers Furs* (1966), 240 Cal.App.2d 284, 289), when the defamatory material has been substantially and effectively communicated to a meaningful mass of readers. (*Strick v. Superior Court* (1983) 143 Cal.App.3d 916, 922.)

Amici do not even try to argue that the Goldman Transcript at issue here, or any other oral history, has ever been generally distributed to the public, much less to a meaningful mass of readers, in the way that newspapers, books and magazines are routinely distributed. Instead, they focus on the Transcript s purported accessibility to the public, while acknowledging that accessing the physical transcript might have been somewhat inconvenient. (Regents Brief 19-20, 27-28; Aeonix/Nestlé Brief 27-37.) But as discussed at more length in section III, *infra*, the inclusion of references to the Goldman Transcript in online indices was not remotely comparable to a general distribution of the Transcript to the public, and provided no notice to Rabbi Lipner that he and the Hebrew Academy had been defamed..

II. ALTHOUGH *AMICI* ASK THE COURT TO CONSIDER THE HISTORICAL CONTEXT SURROUNDING PASSAGE OF THE SINGLE-PUBLICATION RULE, THEY LARGELY

IGNORE THAT CONTEXT, WHICH DID NOT IN ANY WAY INVOLVE ORAL HISTORIES

Aeonix/Nestlé cites a string of cases to support the undisputed contention that courts should consider the "wider historical circumstances of [a statute's] enactment ... in ascertaining the legislative intent." (*Dyna-Med, Inc. v. Fair Employment & Housing Commission* (1987) 43 Cal.3d 1379, 1387; see Aeonix/Nestlé Brief 21-22.) It then provides a bewildering array of statistics to demonstrate that, at the time that the Legislature enacted the single publication rule, the mass media were producing thousands of newspapers, books and magazines each year. (Aeonix/Nestlé Brief 22-27.)

While Aeonix/Nestlé focuses on the difficulty of researching the mass media prior to the availability of online research, it ignores the critical point that emerges from the historical context – that the single-publication rule was developed by the courts, and ultimately codified by legislatures, because "the advent of books and newspapers that were circulated among a mass readership threatened unending and potentially ruinous liability as well as overwhelming (and endless) litigation,..." (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1244.) Until the rise of the modern mass media there was no need for the single-publication rule – over 100 years passed between *The Duke of Brunswick v. Harmer* (Q.B. 1849) 117 Eng. Rep. 75, and California's adoption in 1955 of Civil Code section 3425.3.

While authorities agree that the single-publication rule was a response to problems caused by the mass media, (see, *e.g.*, 2 Harper, et al., Law of Torts (2d ed. 1986) § 5.16, pp. 126-27; 50 Am.Jur.2d (1995) Libel and Slander, § 264-65), there is absolutely no evidence that any such problems had arisen regarding oral histories, or that any court or legislature had any concerns about oral histories. On the contrary, Aeonix/Nestlé elsewhere explains that [o]ral history remained a lethargic enterprise in the1950 s, and did not begin to take off in a significant way until the 1960 s. (Aeonix/Nestlé Brief 33.) Even then, oral historians did not apparently encounter any problems due to defamation claims, and evidence produced by the Regents established that to all intents and purposes, slander or libel is a nonexistent danger to an oral history project. (Baum, at pp. 52-53; AA 418.)

Historical context confirms the Legislative intent that is evident from the language of the single-publication rule, with its particular enumeration of newspapers, books and magazines the rule was enacted to protect the publishers of newspapers, books and magazines that were widely distributed to the general public. Oral histories do not pose any of the problems presented by the mass media, and there is no reason to believe that the Legislature intended to include them within the protection of the single-publication rule.

III. IN ATTEMPTING TO SHOW THAT THE GOLDMAN ORAL

HISTORY WAS READILY AVAILABLE TO THE PUBLIC, *AMICI* INADVERTENTLY DEMONSTRATE THAT THE DEFAMATORY STATEMENTS WERE INHERENTLY UNDISCOVERABLE

Contending that the Court of Appeal simply failed to understand the ease with which the Goldman oral history can be located using modern research tools, (Aeonix/Nestlé Brief 27), Aeonix/Nestlé demonstrate step-by-step how Rabbi Lipner could hypothetically have conducted such a search. (Aeonix/Nestlé Brief 36-37 and Appendix.) *Amici* claim that the public was so aware of the Goldman Transcript that it was comparable to a mass media publication, making the single-publication rule applicable even under the Court of Appeal s holding. (Aeonix/Nestlé Brief 27-28, 33-41.) To arrive at this conclusion, *amici* must ask the Court to overlook several obvious problems with the hypothetical search, and one hidden one; the demonstration actually proves how difficult it would have been for Rabbi Lipner or anyone else to discover that Mr. Goldman had defamed the appellants.

Cases analyzing mass media defamation have held that the single-publication rule applies because:

> the publication has been for public attention and knowledge and the person commented on, if only in his role as a member of the public, has had access to such published information.

(*McGuiness v. Motor Trend Magazine* (1982) 129 Cal.App.3d 59, 63 n.2, quoting *Tom Olesker s Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.* (1975) 61 Ill. 2d 129, 137-37, 334 N.E.2d 160, 164-65; see also *Shively*, 31 Cal.4th at 1249-50; *Hebrew Academy of San Francisco v. Goldman* (2005) 129 Cal.App.4th 391, 404-06.)

Aeonix/Nestlé make no attempt to show that this type of constructive notice applied to the Goldman Transcript, and begin the demonstration of the potential search with the assumption that, [h]ad Rabbi Lipner tried to locate books about himself, he could have readily found the Goldman oral history. (Aeonix/Nestlé Brief 36.) The demonstration thus assumes a level of diligence and activity that would not be expected of anyone defamed in a mass media publication.

Aeonix/Nestlé s next step follows Rabbi Lipner as he hypothetically searches using the OCLC online database, rather than Google or any other widely known search engine that an individual might be expected to use. (Aeonix/Nestlé 36-37.) There is a major problem with this step, which Aeonix/Nestlé does not disclose to the Court.

The OCLC is a members-only database available only to cooperating libraries, not to individuals in their homes. (AA 627-31; www.oclc.org/about/default.htm.) The demonstration, therefore, unrealistically assumes that Rabbi Lipner not only had some reason to locate books about himself, but also knew that

he had to go to a library that provided access to a particular members-only online database. Had he attempted the search from his own computer, he would have been unable to access the OCLC.

As Aeonix/Nestlé candidly admits, even if Rabbi Lipner had searched the OCLC for his own name, or for the Hebrew Academy, he would not have found anything useful. (Appendix 1-2.) If he then decided to search more generally for San Francisco Jewish Community, he would have found a reference to the Goldman transcript, along with 153 other results, though there would be no indication that any of them discussed him. (Aeonix/Nestlé Brief 36-37; Appendix 3.) There were also other means from that point of learning about the Goldman Transcript online. (Aeonix/Nestlé Brief 37; Appendix 4-5.)

After all of this work, however, Rabbi Lipner would still have no idea that Mr. Goldman had compared him to Adolf Hitler, or had stated that he had been run out of other communities before he got here. (Transcript pp. 40-41; AA 501-502.) That information was only available if he went to the Bancroft Library, requested that the Transcript be retrieved from the stacks, reviewed the index for references to himself, and then filled out a form requesting copies of the pertinent pages. (AA 198-99.)

It is safe to say that no court has ever required a tort victim to undertake such an arduous, unlikely investigation simply because he or she might have discovered some factual basis for a claim. Far from showing that the Goldman

Transcript had been for public attention and knowledge, this demonstration emphatically proves that the Court of Appeal correctly concluded that Rabbi Lipner would have learned nothing to justify further investigation from a review of the online catalogues and databases, and that the factual basis for appellants libel claims was so hidden from public view that reasonable diligence would not have led to its discovery within the statutory period. (*Hebrew Academy*, 129 Cal.App.4th at 400, 403.) The Goldman transcript was inherently undiscoverable. (*Hebrew Academy*, 129 Cal.App.4th at 406; see *Shively*, 31 Cal.4th at 1237, 1248-50)

IV. APPLYING THE RULE OF DISCOVERY TO INHERENTLY UNDISCOVERABLE, NON-MASS MEDIA COMMUNICATIONS WILL NEITHER REQUIRE AN INTRICATE FACTUAL INQUIRY NOR HAVE A CATASTROPHIC EFFECT ON ORAL HISTORIANS, SMALL PUBLISHERS AND LIBRARIES

Amici curiae s repeated warnings of the consequences that will ensue if this Court affirms the judgment of the Court of Appeal seem to be based in part on a misreading of the law, and of the judgment. (Regents Brief 1-2, 6, 15-19, 21-23; Aeonix/Nestlé Brief 8-9, 41-52.)

Under Civil Code section 3425.3 and this Court s decision in *Shively v.*

Bozanich (2003) 31 Cal.4th 1230, the single-publication rule applies, and the rule of discovery does not, in any case involving "libels published in books, magazines and newspapers." (*Id.* at 1250.) The Court of Appeal followed this settled law. (*Hebrew Academy of San Francisco v. Goldman* (2005) 129 Cal.App.4th 391, 398, 402.)

The purported concerns of *amici curiae* as to whether small publishers and local newspapers would qualify as "mass media," and whether a complex factual inquiry would be necessary to determine if a magical level of distribution had been reached, is therefore wholly unwarranted. (Regents Brief 15-19; Aeonix/Nestlé Brief 41-45.) Under section 3425.3 and *Shively*, all newspapers, books and magazines are entitled to the protection of the single-publication rule, which was not in any sense "eviscerate[d] by *Hebrew Academy*." (Regents Brief 20-23, 28.) Despite citing over 100 authorities, *amici curiae* cannot point to a single California case that would have to be decided differently if this Court affirmed that judgment.

Undoubtedly, there will be the rare victim of defamation in a newspaper, book or magazine who, despite the constructive notice provided by a publication in the mass media, does not actually learn of the defamation until more than a year after its general distribution to the public. While the single-publication rule may in those cases bar a meritorious claim by a diligent plaintiff, this inequitable result does not, as *amici* argue, provide any justification for requiring the same inequitable result in non-mass media cases such as this one. (Regents Brief 29-31;

Aeonix/Nestlé Brief 38-41.)[5]

As discussed at length in section II, *supra*, the single-publication rule was a necessary response to problems caused by the rise of the mass media; those problems are entirely absent from this case, as they are from most non-mass media defamation cases. Rabbi Lipner and the Hebrew Academy have filed one action, and cannot file another. In the absence of the compelling need for the single-publication rule in mass media publications, there is no reason to deprive diligent libel victims of the right to delayed accrual enjoyed by all other tort plaintiffs. (See Answer Brief on the Merits 13-30.)

In most cases of mass media defamation, the constructive notice will be effective, because the defamatory statements have been disseminated to a meaningful mass of readers including not just the victim, but also the victim s friends, enemies, families, business associates and acquaintances. Defamation victims are now even more likely to learn of the defamation, due to the likelihood that it will be republished on the Internet.

In cases such as this one, where the distribution of the defamatory statements is so limited that they are inherently undiscoverable (Aeonix/Nestlé Brief 36-38), there is no plausible likelihood that the defamer s victim will have

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[5] Contrary to the suggestion of both *amici*, the single-publication rule did not bar a meritorious action in the unfortunate case of *Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, 895, because the court also held that plaintiff could not state a claim.

any kind of notice. There was no chance that Rabbi Lipner s cousin would stumble upon the Goldman transcript at the local Borders book store, but Ms. Shively discovered and was able to purchase a copy of the allegedly defamatory book shortly after it was distributed to book stores throughout California. (*Shively*, 31 Cal.4th at 1239-40.)

Appellants do not deny the valuable role played by libraries and oral histories, but emphatically deny that affirming the judgment of the Court of Appeal would have the apocalyptic consequences described by *amici curiae*.[6]

As respondents San Francisco Jewish Community Federation (SFJCF), and San Francisco Jewish Community Endowment Fund (JCEF) argued below, only those who have played a responsible role in the publication of defamatory material can be liable for the defamation. (AA 32-33, 129; *Shively*, 31 Cal.4th at 1245; *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 549.) Libraries can only be liable if they actually know or have reason to know of the defamatory character of a document (*Osmond v. EWAP, Inc.* (1984) 153 Cal.App.3d 842, 851-53), and are also be entitled to the constitutional protections afforded by *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323. The Regents, for example, would have a

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[6] See, *e.g.*, Regents Brief 1 (an academic library would face the possibility that it could be sued for defamation *every time that someone took off the shelf or borrowed written materials that had not previously been distributed in the mass media.* (emphasis in original)).

complete defense to almost any suit based on the 500,000 volumes and 50,000,000 manuscript items in the Bancroft Library (Regents Brief 19), except in cases such as this one where the Regents actually played a responsible role in publishing the defamatory material.

Both malicious defamers and serious oral historians have an obvious interest in limiting the time when they might be subject to suit, but even in the absence of the single-publication rule, a defamation victim must be able to meet the strict requirements of the discovery rule in order to file suit more than a year after publication. (Answer Brief on the Merits 30-35.) If they are concerned about a possible defamation action, defamers and oral historians could limit their exposure by providing some form of notice to potential defamation victims, either by distributing the oral history to them, or possibly by putting detailed indices of any potentially defamatory documents online. Actual notice of the defamation would presumably defeat any attempt to come within the rule of discovery.

Even if the victim or the public becomes aware of the defamatory statements more than a year after the oral history is transcribed, the risk of a defamation suit is not as great as *amici curiae* claim. Their briefs do not cite any other reported cases arising out of oral histories and, presumably, most oral historians do not permit the process to degenerate into the type of statements that appeared in the Goldman Transcript. Even where the oral historian allows or encourages defamatory statements, oral histories are not intended to be read by

contemporary audiences, but by future historians, at a time when defamation victims may have died. (Baum, *Oral History for the Local Historical Society* (3d ed. 1995) at pp. 1, 52-53, 57; AA 392, 418, 420.)

Responsible oral historians and libraries can usually avoid a lawsuit by agreeing to remove the defamatory material, which will otherwise distort the historical record:

> False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual s reputation that cannot easily be repaired by counterspeech, however persuasive or effective.

(*Hustler Magazine v. Falwell* (1988) 485 U.S. 46, 52.)

Unlike mass media publications, publications that have received an extremely limited distribution can be retrieved and corrected. In this case, only three copies of the Goldman transcript had been purchased by public libraries (AA 198-99, 626, 632-37, 659, 667), making correction of the record a simple task.

If oral historians and libraries refuse to correct damaging information, such as Mr. Goldman s false and defamatory statements about Rabbi Lipner and the Hebrew Academy, then they deserve to be put to their defense. They should not

be allowed to distort the historical record and destroy reputations with impunity, simply because the victims justifiably did not discover the defamation within a year of transcription.

CONCLUSION

Despite their length, the briefs of *amici curiae* do not raise any legitimate issues that would call into question the correctness of the Court of Appeal s decision in this case.

This Court should affirm the judgment.

DATED: March 22, 2007 LAW OFFICE OF PAUL KLEVEN

by:_____

PAUL KLEVEN

CERTIFICATE OF COUNSEL

I certify that this Answer to *Amici Curiae* Briefs contains 4236 words, as calculated by my WordPerfect 11.0 word processing program.

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PAUL KLEVEN