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JUN 16 1957
DISTRICT COURT
OF CALIFORNIA
DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COPY

DAVID McCALDEN, d/b/a Truth Missions,)	CASE NO. CV86-4755 CBM
)	
Plaintiff,)	MEMORANDUM OPINION
)	GRANTING MOVING DEFENDANTS'
)	MOTION TO DISMISS.
vs.)	
)	
CALIFORNIA LIBRARY ASSOCIATION,)	
a California Corporation,)	
CITY OF LOS ANGELES, AMERICAN)	
JEWISH COMMITTEE, a New York)	
Corporation, MARVIN HIER, an)	
individual, WESTIN HOTEL CO. OF)	
UAL, INC., a corporation d/b/a)	
WESTIN BONA VENTURE CENTER, INC.,)	
a California corporation,)	
)	
Defendants.)	

This matter is before the court on the motions to dismiss the first amended complaint for failure to state a claim filed by defendants California Library Association, American Jewish Committee, Westin Hotel Company, Westin Bonaventure Hotel, Simon Wiesenthal Center, and Rabbi Marvin

1 Hier,¹ and, plaintiff David McCalden's motion to file a second amended
2 complaint to cure certain admitted deficiencies of the first amended
3 complaint.

4 A hearing was held on November 17, 1986 before the Honorable
5 Consuelo B. Marshall, United States District Court Judge, presiding. The court
6 having considered the pleadings submitted and the arguments of counsel,
7 hereby issues the following memorandum opinion granting plaintiff's motion
8 to file a second amended complaint and granting moving defendants' motion
9 to dismiss.²

10 **FACTS AND PROCEDURAL HISTORY**

11 Plaintiff David McCalden filed his original complaint on October 11,
12 1985 in the United States District Court of the Eastern District of California,
13 and prior to the filing of responsive pleadings, plaintiff filed a first amended
14 complaint on November 27, 1985. Shortly thereafter, defendants filed their
15 respective motions to transfer venue to the United States District Court for
16 the Central District of California contemporaneously with their respective
17 motions to dismiss. The Honorable Raul A. Ramirez granted defendants'
18 motion to transfer venue, and in view of such transfer, ruled that it would be
19 inappropriate to reach the merits of the remaining motions. Accordingly,
20 this action was transferred to the Central District.

21 ^{1/} The motion for change of venue filed by defendant City of Los Angeles
22 primarily sought to have the action transferred to the Central District of
23 California, and requested in the alternative that the action be dismissed. As
24 the City's motion is centered on the change of venue, it does not raise any
25 arguments concerning the insufficiency of plaintiff's claims.

26 ^{2/} Due to the circumstances in which the motions came before the court, the
27 court analyzed the proposed second amended complaint in order to assess
28 whether the proposed changes cured the defects raised in defendants'
pleadings. Therefore, the court's decision granting defendants' motion to
dismiss certain claims therefore applies to those claims enumerated in the
second amended complaint.

1 After this action was transferred to the Central District of California,
2 plaintiff filed a motion for leave to file a second amended complaint on
3 October 1, 1986 in order to cure certain admitted deficiencies in the first
4 amended complaint.

5 According to plaintiff's second amended complaint, the following facts
6 are alleged: plaintiff David McCalden, d/b/a Truth Missions, is a citizen of
7 the United Kingdom and a legal permanent resident of the United States.
8 Plaintiff is a member of an organization which engages in research, writing,
9 publication and discussion to advocate the position that the Holocaust is
10 merely a hoax and that the genocide of the Jews by the Nazis has never
11 occurred. On or about July 19, 1984, plaintiff entered into a contract with
12 defendant California Library Association ("CLA") to rent exhibit space at
13 CLA's 86th Annual Conference scheduled for December 1984 at the Westin
14 Bonaventure Hotel in Los Angeles. Plaintiff described the exhibit on his
15 application form as "Publishers of revisionist, libertarian and atheist
16 research. Specializing in the defense of civil liberties for unpopular causes."

17 On or about August 17, 1984, plaintiff entered into an additional
18 written contract with defendant CLA for the presentation of a program
19 entitled "Free Speech and the Holocaust - An overview from several
20 speakers of the severe censorship and intellectual terrorism which inhibits
21 any objective, open discussion of this controversial subject" at the same
22 conference.

23 After plaintiff entered into the contracts with CLA and prior to the
24 conference, defendants allegedly engaged in a series of acts designed to
25 prevent plaintiff from presenting his proposed exhibit and oral presentation.
26 Defendant American Jewish Committee contacted representatives of CLA and
27 informed them that if plaintiff's contracts were not cancelled, the conference
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1 would be disrupted, property would be damaged, and CLA would be "wiped
2 out." Defendant City of Los Angeles, acting through its City Council, passed
3 an unanimous resolution to request that CLA remove plaintiff from the
4 conference and to sever the City's participation with the conference. This
5 resolution was based upon representations of Councilman Yaroslavsky at the
6 specific request of one of his constituents, defendant Rabbi Marvin Hier. In
7 addition, the City of Los Angeles, acting through its Police Department,
8 informed the Director of CLA that they received "real" death threats against
9 him if he should allow plaintiff to participate in the conference and that the
10 City of Los Angeles would be unable to provide adequate police protection or
11 security measures for the conference, participants of the conference, or the
12 CLA representatives.

13 Defendant Simon Wiesenthal Center, at the direction of Rabbi Hier and
14 with the approval of American Jewish Committee, rented a conference room
15 from defendants Westin Bonaventure Hotel which was adjacent to the room
16 in which plaintiff's program was scheduled to take place. Plaintiff believes
17 that the principal reason Simon Wiesenthal Center rented the adjacent room
18 was to position itself so as to be able to disrupt plaintiff's program. Plaintiff
19 also believes that Westin Bonaventure Hotel knew that the rental of the
20 room to the Simon Wiesenthal Center would constitute a breach of its
21 agreement with defendant CLA to provide adequate security to the
22 conference area.

23 Plaintiff believes that defendants participated in a deliberate and
24 concerted effort through the application of political pressure and threats of
25 political sanctions to force CLA to cancel its contracts with plaintiff, and as a
26 result of defendants' actions, CLA cancelled plaintiff's exhibit and program.

27 DISCUSSION

1 Although the new allegations in the second amended complaint state
2 that CLA's conduct was intentional and without legal justification, the
3 allegations of the complaint still indicate the existence of an affirmative
4 defense which appears on the face of the complaint. The complaint avers
5 that CLA was informed by the Los Angeles Police Department that "certain
6 militant, violence prone Jewish organizations" had made "plans to attend and
7 disrupt Plaintiff's program and to disrupt Defendant CLA's conference
8 through demonstrations." The LAPD also informed the Director of CLA that
9 they had received death threats directed against him, and that they would
10 "be unable to provide adequate police protection or security measures for
11 the CLA's annual conference, for the CLA itself, for the Director of CLA, and
12 for Plaintiff." Information was also allegedly communicated to CLA by
13 representatives of the American Jewish Committee, with the cooperation of
14 Marvin Hier and Simon Wiesenthal Center, Inc., that the conference would be
15 disrupted, property would be damaged and CLA would be "wiped out."

16 The doctrine of impossibility or impracticability operates in limited
17 circumstances to excuse the promisor from commencing performance, or to
18 discharge the promisor from the contract where performance of the contract
19 will "involve a risk of injury to person or property, of one of the parties or of
20 others, that is disproportionate to the ends to be attained by performance."
21 Restatement of the Law, Contracts, §261(d); see e.g., 1 Witkin, Summary of
22 California Law, §600(b). In the present action, the allegations indicate that
23 the performance of the contracts would have involved a risk of injury to
24 individuals and property due to the threatened criminal activities by third
25 persons, and that the cancellation of plaintiff's exhibit and conference was
26 necessary to forestall threatened criminal activities by third persons which
27 could have resulted in injury to individuals and damage to property. The
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1 acute hazard posed by the risks of violence and disruption therefore
2 operated to excuse CLA from the contract.

3 Notwithstanding the issue of impossibility or impracticability, the
4 application for an exhibit booth expressly reserves to the California Library
5 Association "the right to restrict exhibits that may be objectionable or to
6 order the removal of any portion of an exhibit which in the judgment of the
7 Association is detrimental to or detracts from the general order of the
8 exhibits." Thus, the application, on its face, expressly permits the CLA to
9 remove or restrict exhibits deemed to be objectionable, and provides an
10 alternative justification for CLA's cancellation of the exhibits.³

11 Accordingly, plaintiff's first cause of action for the alleged breaches of
12 contract shall be dismissed with prejudice.

13 **2. Interference with Contract.**

14 To adequately allege a claim for interference with contract, plaintiff
15 must allege the following elements: 1) the existence of a specific economic
16 relationship between plaintiff and third parties that may economically
17 benefit plaintiff; 2) knowledge by the defendants of this relationship;
18 3) intentional acts by the defendants designed to disrupt the relationship;
19 4) actual disruption of the relationship; and 5) damages to the plaintiff.

20 Rickards v. Canine Eye Registration Foundation, Inc., 704 F.2d 1449, 1456
21 (9th Cir. 1983), citing Buckaloo v. Johnson, 14 Cal. 3d. 815 (1975). Courts
22 have also required that "some identifiable pecuniary or economic benefit"
23 accrue to defendants that formerly accrued to plaintiff. Garter-Bare Co. v.
24 Munsingwear Inc., 723 F.2d 707, 716 (9th Cir. 1984), citing Rickards v.

25
26 ^{3/} The court notes that the reservation in the agreement only applies to the
27 removal of exhibits, and does not apply to cancellation of the conference
28 room.

1 Canine Eye Registration Foundation, Inc., 704 F.2d at 1456. See De Voto v.
2 Pacific Fidelity Life Insurance Co., 618 F.2d 1340, 1348 (9th Cir.), cert.
3 denied, 449 U.S. 869 (1980).

4 Despite case-law to the contrary, plaintiff takes the position that
5 where defendant's interference is motivated by malice, spite and ill will, he
6 does not need to plead an accrual of an economic benefit to the defendants.
7 Plaintiff relies upon two cases, Gold v. Los Angeles Democratic League, 49
8 Cal. App. 3d 365 (1975) and Guillory v. Godfrey, 134 Cal. App. 2d 628
9 (1955), in support of its position.

10 In Gold, the court held that appellant had adequately stated a cause of
11 action for intentional interference with plaintiff's prospective employment
12 as a city controller where the complaint alleged that appellees intentionally
13 mailed a deceptive pamphlet to prospective voters prior to the election
14 which gave the appearance that a different candidate was endorsed by the
15 Democratic Party. As a result of this intentional interference, plaintiff was
16 not elected to the position. This case is inopposite to plaintiff's contention
17 since the pecuniary or competitive advantage obtained by the defendant and
18 lost by the plaintiff was the election to the position of the city controller.

19 In Guillory, the court affirmed the judgment in favor of plaintiffs for
20 defendants' malicious interference with plaintiff's business. Plaintiffs in this
21 action were owners of a cafe located in Los Angeles located next to
22 defendants' liquor store. Whenever prospective customers were about to
23 enter plaintiffs' cafe, defendants would harass the customers by making
24 disparaging racial remarks concerning the owners and its employees.
25 Because of defendants' conduct, plaintiff sustained a substantial loss of
26 business.

1 Although Guillory makes no mention of the pecuniary or competitive
2 advantage obtained by defendant, subsequent cases have determined that
3 some pecuniary or economic benefit must accrue. For instance, in DeVoto v.
4 Pacific Fid. Life Ins. Co., 618 F.2d 1340 (9th Cir. 1980), cert. denied, 449 U.S.
5 869 (1980), the court described the relationship of defendant's motive or
6 purpose to a cause of action for tortious interference with prospective
7 business advantage. Recognizing that interference inspired by ill will or
8 spite may be tortious, the court stated that:

9 [i]n all these instances of contractual or business interference,
10 some identifiable benefit accrues to the defendant which
11 formerly belonged to the plaintiff, be it pecuniary or
12 competitive. . . It is the intentional attainment of an unjust
13 advantage which underlies the requirement that the
14 interference be improper, . . . and motive or purpose is usually
15 an accurate measure of the advantage the actor sought and of
16 its just or unjust character." Id. at 1348.

17 This requirement of "some identifiable pecuniary or economic benefit"
18 has been reaffirmed in several other federal decisions applying California
19 law. See Garner-Bare Co. v. Munsingwear Inc., 723 F.2d 707, 716 (9th Cir.
20 1984); Rickards v. Canine Eye Registration Foundation, Inc., 704 F.2d at
21 1456.

22 Plaintiff's second amended complaint is devoid of any allegations of
23 pecuniary or economic benefit. Instead, the second amended complaint
24 alleges that actions of various defendants were taken for the "purpose of
25 creating a threat of political and economic sanction that would force
26 Defendant CLA to cancel its contract with Plaintiff" and that such actions
27 were "motivated solely by fear and hatred of Plaintiff's views concerning the
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1 Holocaust" and to "prevent Plaintiff from Associating with or expressing his
2 views to CLA members." Therefore, plaintiff's failure to allege that
3 defendants gained any pecuniary or economic benefit from their actions
4 requires plaintiff's second cause of action for interference with contract be
5 dismissed with prejudice.

6 **3. Deprivation of Rights**

7 Plaintiff's fourth claim alleges that the City of Los Angeles, Simon
8 Wiesenthal Center, American Jewish Committee and Rabbi Hier deprived
9 him of "fundamental rights, privileges and immunities" secured to him by
10 the Constitution and the laws of the United States by their action or inaction
11 in pressuring CLA to cancel the contracts. The main defect of this claim is
12 that plaintiff fails to specifically state the Constitutional or statutory basis for
13 the alleged wrong, and therefore plaintiff's conclusory pleading shall be
14 dismissed without prejudice for failure to state a claim. Although
15 defendants liberally construe this claim to arise under 42 U.S.C. §1983, the
16 examination of this claim in the context of a particular statute is premature.

17 **4. Conspiracy to Interfere with Civil Rights**

18 Plaintiff alleges in his fifth claim for conspiracy to interfere with civil
19 rights that defendants City of Los Angeles, Simon Wiesenthal Center, Rabbi
20 Hier, American Jewish Committee, and the Westin Hotels conspired to violate
21 his rights under §1985(3) by engaging in "an escalating series of threats and
22 inducements intended to force defendant CLA to cancel its contracts with
23 plaintiff."

24 The statutory basis for plaintiff's claim, 42 U.S.C. §1985(3), provides,
25 in relevant part:

26 If two or more persons in any state or territory conspire to go
27 into disguise on the highway or on the premises of another, for
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1 the purpose of depriving, either directly or indirectly, any
2 person or class of persons of the equal protection of the laws, or
3 of equal privileges and immunities under the laws. . . the
4 parties so injured or deprived may have an action for recovery
5 of damages occasioned by such injury or deprivation, against
6 any one or more of the conspirators.

7 In order to state a claim under §1985(3), plaintiff must allege the following:

8 (1) that he is a member of a protected class of persons under the federal
9 equal protection clause; (2) that defendants participated in a conspiracy to
10 deprive him of his rights; (3) that the purpose of the conspiracy was racial
11 or otherwise class-based invidious discrimination. See United Brotherhood
12 of Carpenters v. Scott, 463 U.S. 825 (1983).

13 In Griffin v. Breckenridge, 403 U.S. 88 (1971), the Supreme Court
14 determined that "there must be some racial, or perhaps otherwise class-
15 based, invidiously discriminatory animus behind the conspirators' action."
16 Id. at 102. Since the facts in Griffin involved racial animus against blacks
17 and those who supported them, the facts before the Court involved a
18 situation of invidious racial discriminatory intent which was the Legislature's
19 central concern in enacting §1985(3).

20 In Carpenters v. Scott, a construction company and two of its
21 employees brought suit against a trade council, local unions and certain
22 individuals asserting that the defendants conspired to deprive them of their
23 First Amendment right not to associate with a union. In discussing whether
24 a conspiracy motivated by invidiously discriminatory intent other than racial
25 bias could be actionable under §1985(3), the Supreme Court held that
26 §1985(3) could not be construed to reach conspiracies motivated by bias
27 towards others on account of their economic views, status, or activities. In
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1 dicta, the Supreme Court withheld judgment on whether §1985(3) should
2 apply to politically-motivated conspiracies since the central concern of the
3 statutory provision was designed to combat "the violent and other efforts of
4 the Klan and its allies to resist and to frustrate the intended effects of the
5 Thirteenth, Fourteenth, and Fifteenth Amendments." Carpenters v. Scott,
6 463 U.S. at 837 (Blackmun, J., dissenting).

7 The Ninth Circuit has extended §1985(3) claims beyond race "only
8 when the class in question can show that there has been a governmental
9 determination that its members 'require and warrant special federal
10 assistance in protecting their civil rights.'" Schultz v. Sundberg, 759 F.2d
11 714, 718 (9th Cir. 1985)(transitory coalition of state representatives held not
12 to be a protected class); see e.g., Trerice v. Pedersen, 769 F.2d 1398, 1402
13 (9th Cir. 1985)(military prisoners held not to be a protected class). In order
14 to allege a non-racial §1985(3) claim, this circuit requires that the class be
15 designated by the courts as either a suspect or quasi-suspect classification
16 requiring more exacting scrutiny or that Congress indicate through
17 legislation that the class requires special protection. Id.; see DeSantis v.
18 Pacific Telephone & Telegraph Co., 608 F.2d 327, 333 (9th Cir. 1979); accord
19 Canlis v. San Joaquin Sheriff's Posse Comitatus, 641 F.2d 771, 720 (9th Cir.
20 1981).

21 In his second amended complaint, plaintiff avers that he is a member
22 of

23 a class known as Holocaust revisionists. The members of said
24 class, numbering several thousand in North America and
25 Europe, engage in research, writing, publication and discussion.
26 Their aims and activities in the United States are lawful. Their
27 position with regard to the Holocaust is, in general, that
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1 available facts and scientific analysis do not support the popular
2 perception of the Holocaust as a planned extermination of Jews
3 and other persons by the Nazis. ¶ The views of Holocaust
4 revisionist are extremely unpopular in most of Europe and
5 North America. Because of their views, Holocaust revisionists
6 themselves have been subject to invidious discrimination, not
7 only with respect to their efforts to express their views but also
8 in their jobs, businesses, schools and homes.

9 As presently alleged in the second amended complaint, plaintiff
10 alleges animus based upon unpopular and repugnant views concerning the
11 mass extermination of the Jewish people by the Nazis during World War II.
12 The court finds that plaintiff's allegations, as presently alleged, fail to
13 adequately allege that he is a member of a suspect or quasi-suspect class
14 which is subject to protection under §1985(3). Therefore, the fifth cause of
15 action for conspiracy shall be dismissed with prejudice.

16 **5. Neglect to Prevent Conspiracy**

17 Plaintiff's sixth cause of action is based on 42 U.S.C. §1986 which
18 renders actionable certain failures to prevent conspiracies arising under
19 §1985. Since this circuit adopts the principle that a claim under 42 U.S.C.
20 §1986 cannot stand absent a valid claim for relief under §1985, this claim
21 must also be dismissed with prejudice. See Trerice v. Pedersen, 769 F.2d at
22 1403.

23 **6. Seventh Claim - Violation of Unruh Civil Rights Act**

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1 Plaintiff's seventh claim alleges that the actions allegedly undertaken
2 by defendants American Jewish Committee, Westin Hotels, Rabbi Hier⁴ and
3 Simon Wiesenthal Center, were undertaken because of plaintiff's "race, color,
4 religion, ancestry, national origin, political affiliation, sex, sexual orientation,
5 age, disability, or position in a labor dispute, in violation of Section 51.7 of
6 the California Civil Code," and thus violate the Unruh Civil Rights Act.

7 California Civil Code §51.7(a) as amended in 1984, provides, in
8 relevant part, as follows:

9 All persons within the jurisdiction of this state have the right to
10 be free from any violence or intimidation by threats of violence,
11 committed against their persons or property because of their
12 race, color, religion, ancestry, national origin, political affiliation,
13 sex, sexual orientation, age, disability, or position in a labor
14 dispute. The identification in this subdivision of particular basis
15 of discrimination is illustrative rather than restrictive.

16 (emphasis in original).

17 In his opposition, plaintiff invokes the protections of this statute on
18 the grounds that defendants' actions were committed because of his "political
19 affiliation or membership in a group subject to invidious discrimination."

20 4/ Rabbi Hier raises a separate defense that his actions were constitutionally
21 protected under the First Amendment guarantee of the right to petition the
22 government for redress of grievances and also invokes the absolute privilege
23 under Cal. Civil Code §47(2) which protects any statement in any legislative
24 proceeding or "in the initiation or course of any other proceeding . . ." This
25 absolute privilege provision is said to apply to City Council members and to
26 those concerned citizens who communicate with their City Council and cannot
27 be defeated by an allegation of malice. See Scott v. McDonnell Corp., 37 Cal.
28 App. 3d 277, 288 (1974); see also, Brody v. Montalbano, 87 Cal. App. 3d 725
(1978), cert. denied, 444 U.S. 844 (1979). In light of the court's findings and
conclusions regarding the other defects of the complaint, the court will not
address the individual defenses raised herein.

1 These conclusory allegations, however, fail to identify the political affiliation
2 with which plaintiff is affiliated since the second amended complaint merely
3 states that the is a member of a group of "Holocaust revisionists."

4 The purpose of the Unruh Civil Rights Act was to provide a remedy for
5 those individuals subject to the denial of civil rights or discrimination
6 because of their race, religion, national origin, or other classes of suspect or
7 quasi-suspect classifications. As presently plead, the complaint fails to
8 identify any political affiliation, or otherwise state that plaintiff is a member
9 of any class subject to protection under the Act. Therefore, the seventh
10 claim shall also be dismissed with prejudice.

11 **7. Request for Sanctions and Attorney's Fees.**

12 Defendants Simon Wiesenthal Center and Rabbi Hier request the court
13 to impose sanctions pursuant to F.R.Civ.P. 11 against the plaintiff for the
14 filing of an action that is without legal or factual basis, and in addition,
15 request attorney's fees pursuant to Rule 11 and 42 U.S.C. §1988. Defendants
16 contend that this lawsuit is vexatious, frivolous and that plaintiff filed to this
17 action in order to harass the defendants.

18 At this juncture, the court declines to impose sanctions against
19 plaintiff for the filing of this action. However, the court grants moving
20 defendants' request for attorneys fees pursuant to 42 U.S.C. §1988 since the
21 moving defendants are prevailing parties as defined by the statute.

22 **CONCLUSION**

23 Based upon the above discussion, the court summarizes its order as
24 follows:

25 1) Plaintiff's motion to file a second amended complaint is granted
26 and the second amended complaint is deemed filed;

1 2) Plaintiff's first, second, fifth, sixth and seventh claims are
2 dismissed with prejudice for failure to state a claim upon which relief can be
3 granted, and;

4 3) Plaintiff's fourth cause of action is dismissed without prejudice.
5 Plaintiff shall have 20 days from the filing date of this order to file a third
6 amended complaint which cures the deficiencies of the fourth cause of action
7 as set forth in this order. If plaintiff fails to timely file a third amended
8 complaint, the fourth cause of action shall be deemed dismissed with
9 prejudice. The court, however, cautions plaintiff that the court will apply the
10 standards set forth in F.R.Civ.P. 11 and 28 U.S.C. §1972 in reviewing any
11 amended complaint, and will impose sanctions for the filing of a frivolous
12 pleading.

13 The only claims remaining in the instant lawsuit are the third and
14 eighth causes of action against the City of Los Angeles.

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16 DATED: JANUARY 16, 1987

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20 CONSUELO B. MARSHALL, JUDGE
21 UNITED STATES DISTRICT COURT
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