

"With regard to Theresa Fox, the plaintiff alleges only that she urged Joyce to prevent The Keyes from opening. ... This allegation suffers from the same defect as the allegations pertaining to Thomas J. Fox. The plaintiff simply has not made sufficient factual allegations to support his claim of a conspiracy." 652 F.Supp. at 369. 9/

3. MCCALDEN'S SECOND AMENDED COMPLAINT DOES NOT MEET THE REQUIREMENTS OF 42 U.S.C. SECTION 1983.

As fully described in Section IV.C.1 above, the Second Amended Complaint alleges that Rabbi Hier and the Simon Wiesenthal Center:

1. Threatened to organize a demonstration against McCalden's exhibit. (Second Amended Complaint para. 32-33.)

2. Allowed information concerning McCalden's exhibit and program to pass to other persons who were not government officials. (Second Amended Complaint para. 34.)

3. Urged, requested, or knew that representatives of the AJC contacted a representative of the CLA in order to get the CLA to cancel McCalden's contracts. (Second Amended Complaint para. 24.)

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9. It should be noted that Ashelman v. Pope, 769 F.2d 1360 (9th Cir. 1985), the only case cited by McCalden for the proposition that he sufficiently plead the existence of a conspiracy, does not even deal with the issue of whether the defendants acted under color of state law. All of the defendants in Ashelman were government officials. Ashelman therefore is not authoritative on the question of the sufficiency of allegations of conspiracy when those allegations are the only allegations which can establish that the defendants acted under color of state law.

4. Rented a conference room at the Bonaventure Hotel for the same evening that McCalden had rented a conference room for his presentation. (Second Amended Complaint para. 29.)

5. Requested the City Councilman to introduce a City Council resolution regarding McCalden's participation in the CLA conference. (Second Amended Complaint para. 27.)

6. Sought and obtained the cooperation of public officials to pressure the CLA to cancel its contracts with McCalden. (Second Amended Complaint para. 36.)

7. It is further alleged on information and belief that the City of Los Angeles, through its Mayor, Police Department, City Council and others, knew and either tacitly approved or failed to prevent or deter the conduct of the Simon Wiesenthal Center and/or Rabbi Hier. (Second Amended Complaint para. 39.)

It is not alleged, and it is clear that it could not be alleged, that in doing the acts set forth in paragraphs 1-4 above, the Simon Wiesenthal Center or Rabbi Hier acted under color of state law. Each of the acts alleged in paragraphs 1-4 above are purely private acts, involving only private parties. There is no allegation of a nexus between any state action and the private acts of Rabbi Hier and the Simon Wiesenthal Center, as required by Canlis, supra and Reichardt, supra. Therefore, those acts cannot give rise to liability under 42 U.S.C. Section 1983.

The alleged acts of Rabbi Hier or the Simon Wiesenthal Center or the AJC set forth in paragraphs numbered 5 and 6 above constitute nothing more than petitioning government officials.

Sykes, Schatte, Scott, and the other cases cited in Section IV.C.2.a above make it clear that such petitioning of government officials does not constitute state action and cannot give rise to liability under 42 U.S.C. Section 1983. 10/

The allegations set forth in paragraph 7 above do not allege any state action on the part of Rabbi Hier or the Simon Wiesenthal Center. All that is alleged is that the City of Los Angeles did not stop Rabbi Hier and the Simon Wiesenthal Center from performing the acts set forth in paragraphs 1-6 above.

McCalden's Second Amended Complaint is absolutely devoid of any factual allegations regarding the existence of a conspiracy between Rabbi Hier and the Simon Wiesenthal Center on the one hand, and any government official on the other. There are no factual allegations showing a meeting of the minds to deprive McCalden of any Constitutional rights, and no factual allegations showing meetings, communications, correspondence, or any indicia of conspiracy between Rabbi Hier and the Simon

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10. Rabbi Hier's alleged conduct does not rise to the level of direct participation in the passage of the City Council resolution. The complaint on its face (Exhibit D, transcript of City Council meeting, McCalden E.R. pp. 49-54) suggests that Rabbi Hier was not present during the Council's public discussion of the resolution, and that the form and scope of the proposed resolution was altered by Councilmen Cunningham and Wachs, with whom Rabbi Hier had no contact. The Rabbi's lack of direction or control over these events precludes any claim that he was a state actor for 1983 purposes. See Mann v. City of Tucson, 782 F.2d 790, 793 (9th Cir. 1986) (Private defendant who gave police list of items allegedly stolen by plaintiff, leading to unlawful search of plaintiff's home, was not a state actor because he did not direct or control the search or investigation; dismissal granted); Arnold v. Intern. Bus Machines, Inc., 637 F.2d 1350, 1355-58 (9th Cir. 1980) (IBM not a state actor, despite providing information to police leading to plaintiff's arrest, because IBM did not direct or control the investigation).

Wiesenthal Center on the one hand and government officials on the other, as required by Lebbos, Tarkowski, Aldabe, and the other cases cited above. The Second Amended Complaint makes it clear that all Rabbi Hier and the Simon Wiesenthal Center did was petition government officials. Such acts do not give rise to a violation of 42 U.S.C. Section 1983.

Therefore, the dismissal of McCalden's fourth claim, for deprivation of rights, should be affirmed, and McCalden should not be given leave to amend. 11/

D. THE DISTRICT COURT'S DISMISSAL OF McCALDEN'S FIFTH CLAIM FOR CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS MUST BE AFFIRMED, BECAUSE McCALDEN HAS FAILED TO DEMONSTRATE THAT HE IS A MEMBER OF A CLASS ENTITLED TO SECTION 1985(3) PROTECTION AND BECAUSE McCALDEN HAS FAILED TO ALLEGE FACTS WHICH SHOW STATE INVOLVEMENT WITH RABBI HIER AND THE SIMON WIESENTHAL CENTER OR THAT RABBI HIER AND THE SIMON WIESENTHAL CENTER ACTED UNDER COLOR OF STATE LAW OR AUTHORITY.

In order to state a claim under Section 1985(3), the plaintiff has the burden of demonstrating that he is a member of a class entitled to section 1985(3) protection, Canlis v. San Joaquin Sheriff's Posse Comitatus, 641 F.2d 711, 720 (9th Cir. 1981), cert. denied, 454 U.S. 967 (1981) and that the defendant

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11. McCalden's attorney acknowledged at oral argument on the motion to dismiss that he had made all the factual allegations in the Second Amended Complaint that he was able to make. (McCalden E.R. p. 86, Transcript of November 17, 1986 hearing p. 21.)

was acting under color of state law or was involved with the state actor, United Brotherhood of Carpenters and Joiners v. Scott, 463 U.S. 825, 832 (1983).

1. McCalden has failed to demonstrate that he is a member of a class entitled to Section 1985(3) protection.

In order to state a claim under Section 1985(3), the plaintiff has the burden of demonstrating that he is a member of a class entitled to section 1985(3) protection. Canlis v. San Joaquin Sheriff's Posse Comitatus, 641 F.2d 711 , 720 (9th Cir. 1981); Sykes v. State of California, 497 F.2d 197, 200 (9th Cir. 1974).

The District Court's dismissal of McCalden's Fifth Claim, for conspiracy to interfere with civil rights under 42 U.S.C. Section 1985(3), should be affirmed because McCalden has failed to demonstrate that he is a member of a class entitled to protection under Section 1985(3). This issue is discussed in Section IV.A of Appellee's Joint Brief.

2. McCalden has failed to allege facts which show state involvement with Rabbi Hier and the Simon Wiesenthal Center or that Rabbi Hier and the Simon Wiesenthal Center acted under color of state law or authority.

McCalden alleges in his Fifth Cause of Action for "Conspiracy to Interfere with Civil Rights" that defendants AJC, City of Los Angeles, Rabbi Hier, the Simon Wiesenthal Center and

Westin conspired to deprive him of his rights. (Second Amended Complaint para. 38, 42, 52, 53, McCalden E.R. pp. 29-34.)

McCalden claims that the rights that were allegedly infringed were First Amendment rights of free speech and association. (Appellant's Brief pp. 52, 8; Second Amended Complaint para. 38, 42, 52, 53, McCalden E.R. pp. 29-34.)

The District Court's dismissal of McCalden's claim under 42 U.S.C. Section 1985(3) should also be affirmed on the basis that McCalden has failed to allege facts which show state involvement with Rabbi Hier or the Simon Wiesenthal Center or that Rabbi Hier and the Simon Wiesenthal Center acted under color of state law or authority.

The Supreme Court, in United Brotherhood of Carpenters and Joiners v. Scott, 463 U.S. 825, 832 (1983), held that an alleged "conspiracy to violate First Amendment rights [under 42 U.S.C. Section 1985(3)] is not made out without proof of state involvement." See also Brown v. Reardon, 770 F.2d 896, 906 (10th Cir. 1985) ("state involvement is necessary in stating a 1985 claim stemming from alleged First Amendment deprivations."); Grimes v. Smith, 776 F.2d 1359, 1367-1368 n. 16 (7th Cir. 1985) ("the dismissal of the plaintiffs' Section 1983 claim ... could arguably lead to the conclusion that there was inadequate state involvement for Section 1985(3)."); Conklin v. Lovely, 834 F.2d 543, 548 (6th Cir. 1987) ("by its very terms ... the First Amendment only prohibits actions having state involvement. ... [W]holly private conspiracies to violate the First Amendment protections are not actionable under section 1985(3).").

This Court, in Sykes v. State of California, 497 F.2d 197, 200 (9th Cir. 1974), held that "Under Section 1985, a plaintiff is required to allege: ... (3) that the defendants acted under color of state law and authority ... " 12/

In fact, McCalden concedes in his Appellant's Brief that under the current state of the law, he must allege that the state was involved in the conspiracy or that the aim of the conspiracy was to influence the activity of the state, 13/ in order to state a claim for violation of Section 1985(3). (Appellant's Brief pp. 53-55.)

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12. Life Insurance Company of North America v. Reichardt, 591 F.2d 499, 503 n. 7 (9th Cir. 1979) criticized this holding in Sykes and stated that it is no longer the law of this circuit. In so stating, Reichardt relied on two cases, Briley v. State of California, 564 F.2d 849, 858-59 (9th Cir. 1977) and Phillips v. International Assoc. of Bridge, Structural and Ornamental Iron Workers, 556 F.2d 939, 941 n. 1 (9th Cir. 1977). However, Briley did not consider the question of whether there is a requirement that plaintiff allege that defendant acted under color of state law in order to maintain a claim under Section 1985.

Phillips questioned whether an action under section 1985(2) requires an allegation that defendants acted under color of state law. However, McCalden's Second Amended Complaint specifies that the Fifth Cause of Action for Conspiracy to Interfere with Civil Rights is brought under 42 U.S.C. Section 1985(3). (Second Amended Complaint para. 56, McCalden E.R. p. 36; Appellant's Brief p. 51.)

In any case, Reichardt, Briley, Phillips, and Sykes were all decided before the Supreme Court's decision in United Brotherhood v. Scott. There can now be no question that a claim under Section 1985(3), which alleges infringement of First Amendment rights, must allege that the private defendants were involved with the state actors or that the private defendants acted under color of state law.

13. It is clear from McCalden's Second Amended Complaint that the aim of the alleged conspiracy was not to influence the activity of the state, but to induce the CLA to cancel its contracts with McCalden. See Grimes v. Smith, supra, 776 F.2d 1359, 1368 n. 16.

As discussed above in Section IV.C dealing with McCalden's claim under 42 U.S.C. Section 1983, McCalden has failed to adequately allege a conspiracy between Rabbi Hier and the Simon Wiesenthal Center on the one hand and any governmental officials on the other hand. Therefore, McCalden has failed to adequately allege state involvement in any of the alleged acts of Rabbi Hier or the Simon Wiesenthal Center.

As also discussed above in Section IV.C, McCalden has failed to allege facts which show that Rabbi Hier or the Simon Wiesenthal Center acted under color of state law or authority. It is clear that the alleged acts of Rabbi Hier and the Simon Wiesenthal Center in threatening to organize a demonstration, allowing information about McCalden's exhibit to pass to others, approving or urging the AJC's statement to the CLA, and renting a conference room at a hotel are purely private acts, involving only private parties. As previously discussed, the alleged contacts between Rabbi Hier and the Simon Wiesenthal Center on the one hand and government officials on the other hand constitute nothing more than petitioning government officials. The cases discussed in Section IV.C above make it clear that such petitioning of government officials does not constitute action under color of state law, and therefore cannot give rise to liability under 42 U.S.C. Section 1985(3) as well as Section 1983.

McCalden's Second Amended Complaint fails to adequately allege that the state was involved in any of the alleged acts of Rabbi Hier and the Simon Wiesenthal Center or that Rabbi Hier

and the Simon Wiesenthal Center acted under color of state law. Therefore, it is clear that McCalden has failed to state a claim under 42 U.S.C. Section 1985(3) against Rabbi Hier or the Simon Wiesenthal Center.

E. THE DISTRICT COURT'S DISMISSAL OF McCALDEN'S SIXTH CLAIM FOR NEGLIGENCE TO PREVENT CONSPIRACY MUST BE AFFIRMED, BECAUSE McCALDEN HAS FAILED TO ALLEGE AN UNDERLYING CLAIM FOR RELIEF UNDER 42 U.S.C. SECTION 1985(3).

McCalden has failed to state a claim under 42 U.S.C. Section 1986, because he has failed to allege an underlying claim for relief under Section 1985(3). This issue is discussed in Section IV.B of Appellee's Joint Brief.

F. THE DISTRICT COURT'S DISMISSAL OF McCALDEN'S SECOND CLAIM FOR INTERFERENCE WITH CONTRACT MUST BE AFFIRMED, BECAUSE McCALDEN CONCEDES THAT HE CANNOT ALLEGE ANY PECUNIARY OR ECONOMIC BENEFIT OBTAINED BY DEFENDANTS.

McCalden has failed to state a claim for interference with contract, because he does not allege that some identifiable pecuniary or economic benefit accrued to the defendants that formerly accrued to McCalden. This issue is discussed in Section IV.C of Appellee's Joint Brief.

G. THE DISTRICT COURT'S DISMISSAL OF McCALDEN'S SEVENTH CLAIM FOR VIOLATION OF THE UNRUH CIVIL RIGHTS ACT MUST BE AFFIRMED, BECAUSE McCALDEN DID NOT ALLEGE THAT RABBI HIER OR THE SIMON WIESENTHAL CENTER COMMITTED ANY ACTS OF VIOLENCE OR MADE ANY THREATS OF VIOLENCE TO McCALDEN, AND BECAUSE

McCalden HAS FAILED TO SHOW THAT HE IS A MEMBER OF ANY CLASS SUBJECT TO PROTECTION UNDER THE UNRUH ACT.

McCalden alleges in his seventh cause of action that the alleged acts of Rabbi Hier and the Simon Wiesenthal Center constituted a violation of the California Unruh Act.

The Unruh Act, California Civil Code Section 51.7, provided as follows at the time of the acts alleged in the Second Amended Complaint:

"All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute."

1. THE DISTRICT COURT'S DISMISSAL SHOULD BE AFFIRMED BECAUSE McCalden DID NOT ALLEGE THAT RABBI HIER OR THE SIMON WIESENTHAL CENTER COMMITTED ANY ACTS OF VIOLENCE OR MADE ANY THREATS OF VIOLENCE TO McCalden.

In order to state a claim under Civil Code Section 51.7, plaintiff must allege that violence or threats of violence committed by the defendant were directed against the plaintiff. Plaintiff cannot sue for violence or threats allegedly directed against a third person. Coon v. Joseph, 192 Cal.App. 3d 1269 (1987).

In Coon, a male who was refused entry to a municipal bus by the driver, and who then witnessed the driver verbally abuse and

strike his intimate male friend, sued for violation of Section 51.7. The trial court sustained a demurrer without leave to amend. The Court of Appeal affirmed, holding as follows:

"[A] brief review of the statute upon which he relies -- Civil Code section 51.7 -- establishes he has no claim. That section provides, inter alia, that all persons have the right to be free from any violence, intimidation or threat thereof 'committed against their persons' because of race, religion, sex or sexual orientation. The unambiguous language of this section gives rise to a cause of action in favor of a person against whom violence or intimidation has been committed or threatened. The complaint establishes that no violence or intimidation was committed or threatened against appellant's person and thus no cause of action exists in his own right." 192 Cal.App. 3d at 1278 (emphasis added).

While McCalden's Second Amended Complaint is extremely vague as to what threats Rabbi Hier or the Simon Wiesenthal Center allegedly made, it is absolutely clear that the Second Amended Complaint does not allege that Rabbi Hier or the Simon Wiesenthal Center made any threats to McCalden or directed any violence at McCalden.

Paragraph 24 of the Second Amended Complaint alleges on information and belief that representatives of the American Jewish Committee ("AJC") contacted a representative of the California Library Association ("CLA") and informed him that if McCalden's contracts were not canceled, the CLA conference would

be disrupted, there would be damage to property, and the CLA would be "wiped out." It is further alleged on information and belief that Rabbi Hier and the Simon Wiesenthal Center urged, requested, knew, and approved of this contact by the AJC.

It is clear that these alleged acts cannot give rise to a Section 51.7 claim by McCalden, pursuant to the holding in Coon and the plain language of Section 51.7. Any alleged statements which McCalden characterizes as "threats" were directed to the CLA, rather than to McCalden.

McCalden's Second Amended Complaint also alleges on information and belief that Rabbi Hier, acting individually and as dean of the Simon Wiesenthal Center, threatened to organize a demonstration against McCalden's program, in order to pressure the CLA into canceling its contracts with McCalden. (Second Amended Complaint para. 32-33.) Once again, any alleged "threat" was directed at the CLA rather than at McCalden.

Therefore, the District Court's dismissal of McCalden's claims under Section 51.7 should be affirmed.

**2. THE DISTRICT COURT'S DISMISSAL SHOULD BE AFFIRMED BECAUSE MCCALDEN HAS FAILED TO SHOW THAT HE IS A MEMBER OF ANY CLASS SUBJECT TO PROTECTION UNDER THE UNRUH ACT.**

McCalden claims that he is a member of a group of "Holocaust revisionists." (Second Amended Complaint para. 54.) It is clear that McCalden does not belong to any of the classes specifically enumerated in Section 51.7.

Instead, McCalden relies on an amendment to Section 51.7 which added the language that "The identification in this

subdivision of particular bases of discrimination is illustrative rather than restrictive." 14/

Even if it is assumed that this amendment to Section 51.7 applies to the alleged acts set forth in McCalden's Second Amended Complaint, it is clear that McCalden is not a member of any class subject to protection under the Unruh Act, as amended.

The Unruh Act prohibits only arbitrary discrimination, based on status. It does not prevent discrimination which is not arbitrary, based on conduct. Frantz v. Blackwell, 189 Cal. App. 3d 91, 96, 234 Cal.Rptr. 178 (1987); Newby v. Alto Riviera Apartments, 60 Cal.App. 3d 288, 131 Cal.Rptr. 547 (1976); Ross v. Forest Lawn Memorial Park, 153 Cal.App. 3d 988, 203 Cal.Rptr. 468 (1984). The court in Frantz stated the following regarding the scope of the Unruh Act:

"Individualized treatment of others without regard to status seems to be the aim of a civil rights statute such as the Unruh Act. 'Entrepreneurs unquestionably possess broad authority to protect their enterprises from improper and disruptive behavior' ... There was no Unruh Act violation in Newby v. Alto Riviera Apartments (1976) 60 Cal.App.3d 288 [131 Cal.Rptr. 547], where a tenant's instigation of a rent strike singled her out for her landlord's exclusionary attention. ... The significant feature

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14. This language was not added to Section 51.7 until September 1985. (See Addendum to Appellant's Brief, page 15.) All of the alleged acts set forth in McCalden's Second Amended Complaint took place in 1984.

of these cases [where Unruh Act liability was found not to exist] is that the person's conduct, as opposed to his status, produced the discrimination alleged to be arbitrary [citation omitted]. The Unruh Act seeks to remedy arbitrary discrimination. It does not seek to remedy traditional wrongs arising out of tort or breach of contract, nor does it seek to remedy discrimination based on purely personal grounds."

189 Cal.App. 3d at 95-96 (emphasis added).

McCalden is not a member of a class subject to protection under the Unruh Act. McCalden is a person who spreads the lie that the Holocaust did not take place. McCalden argues that because there are other people who spread the same lie, they should all be protected under the Unruh Act. In effect McCalden is arguing that people who tell lies should be designated as a protected class under the Unruh Act. That is an utterly absurd position; liars should not be afforded protection as a class under the California Civil Rights statutes.

It is also clear that McCalden's conduct, rather than his status, was the basis of any alleged action taken against him. McCalden's conduct consists of spreading false statements about a generally accepted historical event. Frantz makes clear that the Unruh Act only applies to discrimination on the basis of status. Therefore, the Unruh Act cannot be applicable in the instant case.

The District Court determined that McCalden had failed to identify any political affiliation or otherwise state that he is

a member of any class subject to protection under the Unruh Act, as amended. (Order entered February 11, 1987 p. 14, McCalden E.R. p. 14.) This determination by the District Court should be upheld, and the dismissal of McCalden's claims under Section 51.7 should be affirmed.

#### **V. CONCLUSION**

The District Court's order dismissing all claims against Rabbi Marvin Hier and the Simon Wiesenthal Center should be affirmed. All of the alleged acts of Rabbi Hier and the Simon Wiesenthal Center were Constitutionally protected and statutorily privileged. The Second Amended Complaint filed by McCalden merely alleges that Rabbi Hier and the Simon Wiesenthal Center contacted their elected representatives in the City Council and the State Legislature and requested that they take certain official actions; threatened to organize and organized a demonstration; informed others about McCalden's activities; urged another organization to make certain statements; and rented a conference room at a hotel. It is clear that all of these acts are privileged.

Furthermore, for the reasons discussed above and in Appellee's Joint Brief, McCalden has failed to state a claim against Rabbi Hier and the Simon Wiesenthal Center for interference with contract, violation of 42 U.S.C. Sections 1983 and 1985, or violation of the Unruh Act or Tom Bane Civil Rights Act.

Dated: January 16, 1989

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California.

I am over the age of 18 and am not a party to the within action; my business address is: 4727 Wilshire Boulevard, Suite 500, Los Angeles, California 90010.

On January 20, 198<sup>9</sup>, I served the foregoing document(s) described as follows:

BRIEF OF DEFENDANT-APPELLEES THE SIMON WIESENTHAL CENTER  
AND RABBI MARVIN HIER

on the interested party(ies) in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Please see attached service list.

XX (BY MAIL) I placed such envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California.

       (BY PERSONAL SERVICE) I delivered such envelope by hand to the addressee(s) or to the office of the addressee(s).

       (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

XX (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on January 20, 198<sup>9</sup>, at Los Angeles, California.

Christopher J. Abreu  
Type or Print Name

  
Signature

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH JUDICIAL CIRCUIT

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COURT OF APPEALS NO. 88-5727

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA  
Honorable Consuelo B. Marshall, Judge

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DAVID McCALDEN, d/b/a TRUTH MISSIONS

Plaintiff-Appellant,

vs.

CALIFORNIA LIBRARY ASSOCIATION, CITY  
OF LOS ANGELES, AMERICAN JEWISH COMMITTEE,  
MARVIN HIER, WESTIN HOTEL CO., AND  
THE SIMON WIESENTHAL CENTER

Defendant-Appellees.

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STATEMENT OF RELATED CASES  
AS REQUIRED BY CIRCUIT RULE 28-2.6

The undersigned counsel of record for Rabbi Marvin Hier and the Simon Wiesenthal Center, Defendant-Appellees, certifies that there are no related cases pending in this Court, other than the case identified in Appellant's Brief.

Dated: January 16, 1989

BERMAN, BLANCHARD, MAUSNER & KINDEM

By:

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