Committee ("AJC"), Rabbi Marvin Hier ("Rabbi Hier"), the Simon Wiesenthal Center, the City of Los Angeles, and Westin Hotel Co. ("Westin") engaged in a course of conduct and/or conspired with one another to exert pressure upon defendant California Library Association ("CLA") to cancel its contracts with McCalden. (McCalden E.R. pp. 6-14.)

A necessary element of a claim for interference with contract under California law is that "[s]ome identifiable pecuniary or economic benefit must accrue to appellees that formerly accrued to appellants." Rickards v. Canine Eye Registration Foundation. Inc., 704 F.2d 1449, 1456 (9th Cir. 1983), cert. denied, 464 U.S. 994 (1983). See also Garter-Bare Co. v. Munsingwear. Inc., 723 F.2d 707 (9th Cir. 1984), cert. denied, 469 U.S. 980 (1984); DeVoto v. Pacific Fidelity Life, Insurance Co., 618 F.2d 1340 (9th Cir. 1980), cert. denied, 449 U.S. 869 (1980). 4/

McCalden admits in his brief that he "does not believe, and did not allege, that defendants engaged in such conduct [interfering with contract] in order to obtain an economic benefit." (Appellant's Brief p. 40.) Rather, McCalden contends now, as he contended below, that his allegations that defendants committed wrongdoing motivated "solely by malice," sufficiently

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4. The District Court dismissed McCalden's claim for interference with contract, on the grounds that the "second amended complaint [was] devoid of any allegations of pecuniary or economic benefit" and that McCalden "had failed to allege that defendants gained any pecuniary or economic benefit from their actions," relying on Rickards, DeVoto, and Garter-Bare. (Order entered February 11, 1987, McCalden E.R. p. 9.)

allege a viable claim for interference with contract. (See Appellant's Brief p. 39.)

McCalden's argument fails to recognize that a claim for interference with contract is essentially a business or competitive tort which is a species of the broader tort of "interference with prospective economic advantage." Buckaloo v. Johnson, 14 Cal.3d 815, 122 Cal.Rptr. 745 (1975). One California legal scholar has described the tort as follows:

> "The wrong consists of intentional and improper methods of diverting or taking business from another which are not within the privilege of fair competition." Witkin, 5 Summary of California Law (9th ed. 1988), Torts 651 at 740.

The Ninth Circuit recognized the competitive aspect of tortious interference with business or contract in DeVoto v. Pacific Fidelity Life, Insurance Co., 618 F.2d 1340 (9th Cir. 1980), cert. denied, 449 U.S. 869, 101 S.Ct. 206, 66 L.Ed.2d 89 (1980). After surveying a series of California decisions in this area, this Court identified three separate categories of tortious interference:

(1) Cases in which "the act of a defendant directly diminishes the value of the plaintiff's interests and simultaneously or subsequently transfers that value to the defendant." 618 F.2d at 1348. See, e.g., Imperial Ice Co. v. Rossier, 18 Cal.2d 33 (1941).

(2) Cases involving the wrongful appropriation of a prospective business advantage which has not yet ripened into a contract, such as "when two parties in a transaction cut out an

agent or middleman and implicitly split between them the value of the lost commission." 618 F.2d at 1348. See, e.g., Buckaloo v. Johnson, 14 Cal.3d 815, 122 Cal.Rptr. 745 (1975).

(3) Cases where tortious interference is accomplished by indirect means, such as "where the defendant acquired a business after depressing its value by telling prospective purchasers that defendant's contract with the business would not be renewed." 618 F.2d at 1348. See, e.g. Lowell v. Mothers Cake and Cookie Co., 79 Cal.App.3d 13, 144 Cal.Rptr 664 (1978).

This Court in DeVoto concluded:

> "In all these instances of contractual or business interference, some identifiable benefit accrues to the defendant which formerly belonged to the plaintiff, be it pecuniary or competitive." 618 F.2d at 1348.

The DeVoto court went on to hold that because the defendants did not stand to benefit from the commissions that were lost as a result of the breach of the subject contract, there was no tortious interference with contract.

Three years later, this Court in Rickards v. Canine Eye Registration Foundation, Inc., 704 F.2d 1449 (9th Cir. 1983) (which involved competition in the veterinary business), reaffirmed the application of the "pecuniary or economic benefit" test it had enunciated in Devoto, holding that:

> "Some identifiable pecuniary or economic benefit must accrue to appellees that formerly accrued to appellants . . ." 704 F.2d at 1456.

In Garter-Bare Co. v. Munsingwear. Inc., 723 F.2d 707, 716

(9th Cir. 1984) (which involved competition in the girdle business), this Court once again emphasized that the pecuniary or economic benefit was "essential" to a tortious interference with business claim.

McCalden does not claim that his second claim for relief falls into any of the categories enuciated by this Court in DeVoto. As stated above, McCalden concedes that he cannot allege "that defendants engaged in such conduct in order to obtain an economic benefit." (Appellant's Brief p. 40.)

Nor does McCalden dispute the existence of the precedents of DeVoto, Rickards, and Garter-Bare. Rather, McCalden argues that the previous statements by this Court requiring that defendant obtain a pecuniary or economic benefit are merely "gloss" and that he can state a claim for interference with contract by alleging that defendants committed the alleged wrongful acts because defendants were motivated by malice.

In making such an argument, McCalden ignores this Court's statement in DeVoto concerning the purpose underlying the intentional interference cause of action:

> "The [intentional interference] . . . cause of action tends to restrain impermissible behavior in the marketplace between competitors: it sets forth the ground rules of competition to confine business rivalry within acceptable bounds of conduct." (Id., 618 F.2d at 1350.)

Here, where plaintiff and defendants were not business competitors, a mere allegation of malice will not allow McCalden to state a claim for interference with contract.

McCalden relies on two decisions by the California Court of Appeal in contending that the intent to obtain an economic benefit is not an essential element of the claim for intentional interference: Gold v. Los Angeles Democratic League, 49 Cal.App.3d 365, 122 Cal.Rptr. 732 (1975) and Guillory v. Godfrey, 134 Cal.App.2d 628, 286 P.2d 474 (1955). However, those cases do not in any way detract from the clear holdings in Rickard, DeVoto, and Garter-Bare that in order to state a claim for interference with contract, a pecuniary or economic benefit must accrue to the defendant that formerly accrued to the plaintiff.

First, both Gold and Guillory predate the Devoto line of cases.

Second, there appears to be a competitive advantage which accrued to the defendant in both of those cases.

In Gold, the competitive advantage allegedly obtained by the defendant (Los Angeles Democratic League) and lost by the plaintiff (a candidate running against the candidate endorsed by the Democratic League) was the election of the defendant's candidate in place of the plaintiff. 49 Cal.App.3d at 371. The Los Angeles Democratic League therefore clearly stood to gain by the election of its candidate.

Although McCalden is quick to label the claim in Guillory as one for pure "malicious" disruption of business (Appellant's Brief p. 45), the case may have indeed involved some pecuniary or competitive features. For example, the defendants were not mere strangers off the street who stood in front of plaintiff's

cafe intimidating customers; rather, they were business people who owned a liquor store next door. The defendants may have been motivated by their own pecuniary interest, for example the hope that plaintiff's customers might instead patronize the defendant's store, or defendants' belief -- however repugnant -- that having a black cook next door would be bad for defendants' business.

Notwithstanding the factual inferences which may or may not be drawn in Guillory, this Court has determined that some pecuniary or economic benefit must accrue to the defendant for there to be a viable claim for intentional interference with contract. As this Court stated in DeVoto:

> "It is the intentional attainment of an unjust advantage which underlies the requirement that the interference be improper, Restatement (Second) of Torts [section] 767 (1979), and motive or purposes is usually an accurate measure of the advantage the actor sought and of its just or unjust character." 618 F.2d at 1348 (emphasis added).

Inherent in this formulation is the notion that one party must gain some economic advantage while the competitor loses the same economic advantage. However, in the instant case, there is no such economic advantage which defendants' could have obtained from McCalden.

Finally, McCalden attaches great significance to the statement of the court in Devoto that: "The defendant's spiteful satisfaction of an earlier grievance against the plaintiff would be a similar injury." 618 F.2d at 1348. A

"spiteful satisfaction of an earlier grievance," even if it were, as McCalden suggests, a substitute for pecuniary or competitive advantage, is much more specific than and does not necessarily translate into "malice." Moreover, for all of McCalden's reliance upon this sentence in Devoto, it is ironic that his Second Amended Complaint is utterly devoid of any allegation that defendants had an "earlier grievance" against McCalden or any "spiteful conduct" constituting a satisfaction of that earlier grievance.

McCalden by his own admission did not and could not allege the requirements for a claim for intentional interference with contract set forth in Devoto, Rickards, and Garter-Bare. McCalden has offered no justification for overruling this Court's three previous decisions which have definitively addressed this issue. The District Court's dismissal of McCalden's second claim for intentional interference with contract was proper and should be affirmed.

### 2. THE RULE THAT PLAINTIFF MUST ALLEGE THAT DEFENDANT OBTAINED A PECUNIARY BENEFIT IS SUPPORTED BY SOUND CONSTITUTIONAL CONSIDERATIONS.

In the instant case, the requirement that "some identifiable pecuniary or economic benefit must accrue to [defendant] that formerly accrued to [plaintiff]" is mandated by the First Amendment guarantees of free speech and assembly, and the right to petition government officials. If this requirement did not exist in cases such as this one, clearly protected speech, such as political speech, could give rise to liability for

interference with contract. See N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 915, 102 S.Ct. 3409, 73 L.Ed. 2d 1215 (1982) (distinguishing between a boycott growing out of economic interests, where liability may be imposed, and a boycott growing out of political interests where liability may not be imposed); State of Missouri v. National Organization for Women, 620 F.2d 1301, 1309, 1311-1312, 1316-1317 (8th Cir. 1980), cert. denied, 449 U.S. 842 (1980) ("activities that were meant to be covered [by the Sherman Act] are competitive activities by competitors with some self-enhancement motivation"; this also applies to claim for intentional infliction of economic harm.).

In Claiborne Hardware, 5/ the Supreme Court approvingly quoted the language of the Fifth Circuit, as follows:

> "There is no suggestion that the NAACP, MAP [Mississippi Action For Progress] or the individual defendants were in competition with the white businesses or that the boycott arose from parochial economic interests. On the contrary, the boycott grew out of a racial dispute with the white merchants and city government of Port Gibson and all of the picketing, speeches, and other communication associated with the boycott were directed to the

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5. See the Brief of Defendant-Appellees Rabbi Marvin Hier and the Simon Wiesenthal Center, Section IV.B, for a full discussion of Claiborne Hardware and other cases holding that the First Amendment prevents the imposition of civil liability in certain situations.

elimination of racial discrimination in the town. This differentiates this case from a boycott organized for economic ends, for speech to protest racial discrimination is essential political speech lying at the core of the First Amentment." 458 U.S. at 915 (emphasis added).

The Supreme Court held in Claiborne Hardware that "[w]hile States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case." 458 U.S. at 913.

In National Organization for Women, the state of Missouri sued the National Organization for Women ("NOW") for violation of the antitrust laws and for intentional infliction of economic harm, arising out of a convention boycott of states which had not ratified the Equal Rights Amendment. The court determined that all claims had to be dismissed, based on the findings that NOW was not motivated by any type of anticompetitive purpose, that the participants in the boycott were not in a competitive relationship with the plaintiff, that the boycott was noncommercial in that its participants were not business interests and its purpose was not increased profits, and that the boycott was "non-economic" as it was not undertaken to advance the economic self interests of the participants. 620 F.2d at 1303. The court concluded that "the orientation of both parties, NOW and Missouri, to the ERA is not one of profit motivation," and that NOW's activities were therefore privileged

under the First Amendment. 620 F.2d at 1312, 1317-1319.

Likewise, it is clear that defendants in the instant case were not motivated by economic profit or anticompetitive purpose, that the defendants were not in a competitive business relationship with McCalden, and that the alleged acts of the defendants were noncommercial.

The requirement set forth in DeVoto, Rickards and Garter-Bare of a pecuniary benefit is especially important in a case such as this one, involving First Amendment rights. It is one thing for courts to become involved in "restraining impermissible behavior in the marketplace between competitors." DeVoto, supra, 618 F.2d at 1350. It is quite another thing for courts to become involved in the marketplace of ideas, such as in the instant case. Redgrave v. Boston Symphony Orchestra, 855 F.2d 888, 904 (1st Cir. en banc 1988). The Constitutional protection afforded to certain activities which may cause the breach of a contract is fully discussed in Section IV.B of the Brief of Defendant-Appellees Rabbi Marvin Hier and the Simon Wiesenthal Center.

Furthermore, McCalden's allegations regarding a conspiracy to interfere with contracts, and allegations of malice, do not meet the pleading requirements for a claim which involves First Amendment rights of the defendants. See Section IV.B.1 of the Brief of Defendant-Appellees Rabbi Marvin Hier and the Simon Wiesenthal Center.

This Court should therefore follow its previous decisions in DeVoto, Rickards, and Garter-Bare, and affirm that it is

necessary to allege that "some identifiable pecuniary or economic benefit must accrue to [defendant] that formerly accrued to [plaintiff]," in order to state a claim for interference with contract, especially where First Amendment rights of the defendants are involved.

**D. EVEN IF ANY PART OF THIS CASE IS REVERSED AND REMANDED, McCALDEN HAS FAILED TO DEMONSTRATE PERSONAL BIAS ON THE PART OF JUDGE CONSUELO MARSHALL OR UNUSUAL CIRCUMSTANCES WARRANTING REMAND OF THIS CASE TO ANOTHER JUDGE.**

McCalden has requested in Appellant's Supplemental Brief that if this case is reversed and remanded, this Court order the reassignment of the case to another district judge, pursuant to local court rules. The basis for McCalden's request is that "McCalden believes the District Judge presently assigned to this case has shown bias against him in the handling of his case to date." (Appellant's Supplemental Brief p. 1.)

**1. THIS COURT MAY NOT REMAND THE CASE TO A DIFFERENT JUDGE UNLESS McCALDEN DEMONSTRATES PERSONAL BIAS OR UNUSUAL CIRCUMSTANCES.**

Remand by this Court to a different district judge is rarely granted. United States v. Jacobs, 855 F.2d 652, 657 (9th Cir. 1988); United States v. Arnett, 628 F.2d 1162, 1165 (9th Cir. 1979).

"In the absence of proof of personal bias, we may remand to a new district court judge only under 'unusual circumstances.'" Davis & Cox v. Summa Corp., 751 F.2d 1507, 1523 (9th Cir. 1985). See also Cinton v. Union Pacific R. Co., 813 F.2d 917, 921 (9th

Cir. 1987); United States v. Arnett, supra, 628 F.2d at 1165. The party seeking remand to the different judge has the burden of demonstrating personal bias or "unusual circumstances." Davis & Cox, supra, 751 F.2d at 1523; Cinton, supra, 813 F.2d at 921.

The bare fact that a district judge made erroneous rulings, or ruled adversely against a party a disproportionate number of times, is not sufficient grounds to justify remanding the case to a different judge. United States v. Grinnell Corp., 384 U.S. 563, 583, 86 Sup.Ct. 1698 (1966) ("The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."); Davis & Cox, supra, 751 F.2d at 1523 ("The bare fact that Judge Real has committed errors does not support our deviation from the 'usual remedy' of remanding the case to the original trial judge."); Matter of Beverly Hills Bancorp, 752 F.2d 1334, 1341 (9th Cir. 1984) ("Unfavorable rulings alone are legally insufficient to require recusal [citation omitted], even when the number of such unfavorable rulings is extraordinarily high on a statistical basis.").

In determining whether "unusual circumstances" exist to warrant remand to a different district judge, this Court will consider the following factors: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based

on evidence that must be rejected; (2) whether reassignment is advisable to preserve the appearance of justice; and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. Jacobs, supra, 855 F.2d at 657.

This Court has been very reluctant to determine that a district judge would have substantial difficulty putting previously-expressed views or findings out of his or her mind. See, e.g., Sederquist v. City of Tiburon, 765 F.2d 756 (9th Cir. 1984); Davis & Cox, supra, 751 F.2d at 1507; Cinton, supra, 813 F.2d at 917.

In Cinton, supra, plaintiff-appellant filed a complaint in the Central District prior to the running of the statute of limitations, but the complaint was returned by the clerk because it did not comply with the local rules. The complaint was re-filed in compliance with the local rules after the statute of limitations had run. The district court denied appellant's motion for an order directing the clerk to re-file the complaint as of the date it was initially received by the clerk and dismissed the appellant's action. This Court reversed the dismissal of the action, but refused to remand the case to a different judge, holding that "there is no reason to believe that the district court judge would have difficulty in putting out of his mind any erroneous views he held during previous proceedings in this case. The statute of limitations issue is now resolved and the facts related to that issue are now largely irrelevant." 813 F.2d at 921. Criticism of appellant's attorney by the judge was found to be insufficient to create an

appearance of injustice. Id.

In Davis & Cox, supra, the district judge was found to have erred on several matters. Nevertheless, this Court refused to remand the case to a different judge, holding that "The bare fact that Judge Real has committed errors does not support our deviation from the 'usual remedy' of remanding the case to the original trial judge."

The only case cited by McCalden in which this Court ordered that the case be remanded to a different district judge, United States v. Jacobs, 855 F.2d 652, 657 (9th Cir. 1988), involved egregious conduct on the part of the district judge. In Jacobs, as well as making erroneous rulings, the district judge repeatedly disparaged the government's case in front of the jury, berated government counsel in front of the jury, informed defense counsel that his client should win, offered defense counsel advice on how to win the case, and then summarily and erroneously dismissed the case on the basis of government misconduct, when there had in fact been no government misconduct, and refused to reconsider the dismissal. It is clear that McCalden has not alleged conduct on the part of Judge Marshall which is in any way comparable to that of the district judge in Jacobs.

### 2. McCALDEN HAS FAILED TO DEMONSTRATE PERSONAL BIAS OR UNUSUAL CIRCUMSTANCES.

McCalden has not even come close to proving the personal bias or unusual circumstances required for this Court to remand the case to a different judge. The District Judge has not

conducted herself in any manner warranting the award of such rare relief.

The examples of bias which McCalden cites in Appellant's Supplemental Brief do not show any bias:

1. It was not improper for the District Court to refer to McCalden as someone who believes that the Holocaust did not take place, when McCalden himself characterizes his beliefs to be that "available facts and scientific analysis do not support the popular perception of the Holocaust as a planned extermination of Jews and other persons by the Nazis." (Second Amended Complaint para. 54, McCalden E.R. p. 35.)

In the Second Amended Complaint, McCalden claimed that he was a member of a class entitled to protection under 42 U.S.C. Section 1983, 42 U.S.C. Section 1985(3), and the California Unruh Act. In order to rule on those claims, it was necessary for Judge Marshall to determine to what group of persons McCalden belonged. The District Court's determination that McCalden is a member of a group of persons who deny the existence of the Holocaust is reasonable and clearly is supported by the pleadings. Therefore, McCalden cannot show that Judge Marshall's characterization of his claims was based on personal bias, or that it came from a source other than what the judge learned from her participation in the case.

2. The District Court did not show bias in denying McCalden's request for entry of judgment, because that ruling was proper. Moreover, even if this Court determines that the denial of the request for entry of judgment was an error, an

incorrect ruling alone does not show bias.

McCalden failed to file a notice of appeal within 30 days of the entry of the District Court's final order. McCalden's request for entry of judgment was merely an attempt to revive the lapsed thirty-day time period within which to file a notice of appeal. The District Court's determination that it did not have authority to enter such an order was correct. This issue is fully discussed in the Motion of Defendants Rabbi Marvin Hier and the Simon Wiesenthal Center To Dismiss Appeal For Lack of Jurisdiction filed in this Court on March 29, 1988 and Reply Memorandum of Defendants Rabbi Marvin Hier and the Simon Wiesenthal Center In Support of Motion to Dismiss Appeal For Lack of Jurisdiction filed on April 19, 1988.

Even if this Court determines that the District Court should have granted McCalden's request for entry of judgment, the cases cited above make clear that the mere fact that the District Judge made erroneous rulings is not sufficient grounds to justify remanding the case to a different judge. Grinnell Corp., supra, Davis & Cox, supra, Matter of Beverly Hills Bancorp, supra.

Furthermore, the issue regarding the request for entry of judgment would be entirely irrelevant on remand, so that it should not be a factor in determining whether to remand to a different judge. See Cinton, supra, discussed above.

3. The fact that Judge Marshall warned McCalden that "the court will apply the standards set forth in 42 U.S.C. Section 1988 and F.R.Civ.P. 11 in reviewing any [third] amended complaint, and will impose sanctions for the filing of a

frivolous pleading" (February 11, 1987 Order p. 15, McCalden E.R. p. 15), certainly does not show any bias on the part of the District Judge. Informing a litigant of the potential adverse consequences of filing an inappropriate document (Rule 11) or the potential of the award of attorneys fees under the civil rights statutes is proper.

Furthermore, Rabbi Hier and the Simon Wiesenthal Center requested sanctions against McCalden pursuant to Federal Rule of Civil Procedure 11 and attorneys fees pursuant to Rule 11 and 42 U.S.C. Section 1988. Judge Marshall denied this request. (Order entered February 11, 1987 p. 14-15, McCalden E.R. p. 14-15.) If Judge Marshall was biased against McCalden, she would have awarded sanctions and attorneys fees. See Davis & Cox, supra, 751 F.2d at 1523 (noting that the party seeking a different judge did not lose on all matters before the original judge).

4. There was nothing improper in the District Court ordering McCalden to show cause why his remaining claims against the City of Los Angeles should not be dismissed for lack of prosecution, after all of the claims against all of the other defendants had been dismissed. McCalden, if he had wanted to, could have submitted the reasons to the District Court that the remaining claims against the City of Los Angeles should not have been dismissed. Instead, McCalden stipulated to the dismissal of those remaining claims against the City. (McCalden E.R. p. 57.) McCalden can hardly blame the District Judge for his failure to respond to the order to show cause, and his own

stipulation dismissing the remaining claims against the City.

5. McCalden has not established that Judge Marshall "ignored" his application to file documents pending admission of counsel, or that Judge Marshall was even aware of the application or knew who McCalden was at the time that he attempted to file those documents. Moreover, even if Judge Marshall knew about the application and failed to grant it, Judge Marshall's insistence on adherence to the local rules regarding admission of counsel to the bar of the United States District Court was entirely proper. This Court cannot hold that strict adherence to the local rules shows bias.

6. The basis for denial of the motion for entry of judgment was the District Court's determination that it did not have authority to enter such an order. That determination by the District Court was correct. See number 2, above.

McCalden has failed to demonstrate the personal bias or unusual circumstances warranting the unusual step of remanding this case to another judge. McCalden has made no showing that the District Judge acted so prejudicially that it would be reasonable to assume she would have substantial difficulty putting out of her mind the previously-expressed findings.

At most, McCalden has argued that Judge Marshall may have made an erroneous ruling. In contrast to some of the cases cited above, in the instant case there are not even any instances in which McCalden claims that the District Judge criticized McCalden or his attorney.

The appearance of justice will be severely impaired if, in the event of a remand, this Court remands to a different judge.

Litigants who are unhappy with a judge's ruling will learn that they can disqualify a judge simply by claiming that errors were the result of personal bias.

Therefore, it is clear that if any part of this case is remanded, it should be remanded to the original District Judge.

## V. CONCLUSION.

For the reasons set forth above and in the individual briefs of the Defendant-Appellees, McCalden has failed to state claims against the Defendant-Appellees. The District Court's order of dismissal should therefore be affirmed.

Dated: January 17, 1989

Respectfully submitted,

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# Congressional Record

PROCEEDINGS AND DEBATES OF THE 99th CONGRESS, FIRST SESSION

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## DENIAL OF HOLOCAUST REJECTED

Mr. CRANSTON. Mr. President, one of the most vicious and repugnant campaigns by some of the far-right groups in this country over the years has been an attempt to deny the Holocaust. It is extraordinarily difficult to comprehend what has motivated this effort. It is too easy to say simply that certain individuals still admire Hitler and his fanatic brand of fascism.

But for whatever reason, these groups have persisted. Particularly harrowing has been their effect on survivors of Hitler's war against the Jewish people and other minorities.

For this reason, it is heartening to note the recent decision by a California court to levy fines and mandate a court-ordered apology against one of these extremist organizations which has continued to publish "the Holocaust-was-a-lie" stories while offering monetary rewards—which they have then refused to pay—to anyone who produces proof the Holocaust occurred.

This California court decision is a victory for all who care about the truth and who oppose the efforts of these wacko groups to slander, pain and impugn Holocaust survivors.

Following is the text of the letter of apology submitted to the court by attorneys for the Liberty Lobby and other defendants in this case.

There being no objection, the material was ordered to be printed in the Record, as follows:

STATEMENT OF RECORD AND LETTER OF APOLOGY TO MEL MERMELSTEIN

"Whereas, the Legion for Survival of Freedom, and the Institute for Historical Review, sent by letter dated November 20, 1980, directly to Mel Mermelstein, a survivor of Auschwitz-Birkenau and Buchenwald, an exclusive reward offer in a letter marked "'personal'" dated November 20, 1980, offering Mr. Mermelstein a $50,000 exclusive reward for "'proof that Jews were gassed in gas chambers at Auschwitz'" "and further stating that if Mr. Mermelstein did not respond to the reward offer "'very soon'", "the Institute for Historical Review would 'publicize that fact to the mass media'. . . ."

"Whereas, Mr. Mermelstein formally applied for said $50,000 reward on December 18, 1980; and

"Whereas, Mr. Mermelstein now contends that the Institute for Historical Review knew, or should have known, from Mr. Mermelstein's letter to the editor of the Jerusalem Post dated August 17, 1980, that Mr. Mermelstein contended he was a survivor of Auschwitz-Birkenau and Buchenwald; knew, or should have known, that Mr. Mermelstein contended that his mother and two sisters were gassed to death at Auschwitz; and knew, or should have known, of his contention that at dawn on May 22, 1944, he observed his mother and two sisters, among other women and children, being lured and driven into the gas chambers at Auschwitz-Birkenau, which he later discovered to be Gas Chamber No. 5; and

"Whereas, on October 9, 1981, the parties in dispute in the litigation filed cross-motions for summary judgment resulting in the court, per the Honorable Thomas T. Johnson, taking judicial notice as follows:

"'Under Evidence Code Section 452(h), this Court does take judicial notice of the fact that Jews were gassed to death at the Auschwitz Concentration Camp in Poland during the summer of 1944'", and "'It just simply is a fact that falls within the definition of Evidence Code Section 452(h). It is not reasonably subject to dispute. And it is capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. It is simply a fact.'"

"Whereas, Mr. Mermelstein and other survivors of Auschwitz contend that they suffered severe emotional distress resulting from said reward offer and subsequent conduct of the Institute of Historical Review; and

"Whereas, the Institute for Historical Review and Legion for Survival of Freedom now contend that in offering such reward there was no intent to offend, embarrass or cause emotional strain to anyone, including Mr. Mermelstein, a survivor of Auschwitz-Birkenau and Buchenwald Concentration Camps of World War II, and a person who lost his father, mother and two sisters who also were inmates of Auschwitz;

"Whereas, the Institute for Historical Review and Legion for Survival of Freedom should have been aware that the reward offer would cause Mr. Mermelstein and other survivors of Auschwitz to suffer severe emotional distress which the Institute for Historical Review and Legion for Survival of Freedom, now recognize is regretable and abusive to survivors of Auschwitz.

LETTER OF APOLOGY TO MEL MERMELSTEIN

Each of the answering defendants do hereby officially and formally apologize to Mr. Mel Mermelstein, a survivor of Auschwitz-Birkenau and Buchenwald, and all other survivors of Auschwitz for the pain, anguish and suffering he and all other Auschwitz survivors have sustained relating to the $50,000 reward offer for proof that "Jews were gassed in gas chambers at Auschwitz".

## 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, 1989, I served the foregoing document(s) described as follows:

JOINT BRIEF OF ALL DEFENDANT-APPELLEES REGARDING CERTAIN ISSUES, SUBMITTED IN ADDITION TO THE INDIVIDUAL BRIEFS OF EACH DEFENDANT-APPELLEE

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, 1989, at Los Angeles, California.

Christopher J. Abreu
Type or Print Name

Signature

SERVICE LIST

Bruce B. McKee
944 Market Street
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Honorable Consuelo B. Marshall
United States District Court Judge
312 N. Spring Street
Los Angeles, CA 90013

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

Dated: January 17, 1989

BERMAN, BLANCHARD, MAUSNER & KINDEM

By: Jeffrey N. Mausner

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Rabbi Marvin Hier