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

COURT OF APPEALS NO. 88-5727

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

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.

REPLY TO PLAINTIFF'S RESPONSE TO PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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1. ALL PARTIES AGREE THAT REHEARING BY THIS COURT IS APPROPRIATE

In a letter to the Court dated August 9, 1991, McCalden's attorney states:

> "In the opinion filed on November 20, 1991, the court declined to decide whether appellant had stated a claim under 42 U.S.C. Section 1983. The question was remanded to the district court because the Section 1983 claim may involve constitutional issues that have not been adequately briefed. McCalden v. California Library Ass'n, 919 F.2d 538, 547 n. 11 (9th Cir. 1990). Since those issues have now been briefed in petitions for rehearing and response thereto, there is no apparent reason why a decision on the Section 1983 claim could not be made at this time.
>
> I believe that unless there is an authoritative decision as to whether or not such a claim has been stated, the issue is likely to end up in this court on a subsequent appeal, with further delay and expense for appellant. For this reason, appellant does not oppose rehearing if the court will decide whether she has stated a Section 1983 claim. ...
>
> [O]n the basis of briefs now on file, it would be an exercise in judicial economy to decide the issue at this time." (Emphasis added.)

In addition to all parties requesting that the Court rehear this case, this Court should grant a rehearing or rehearing in banc because:

1) The panel's majority opinion has a chilling effect on the exercise of the First Amendment Rights to Petition Government for Redress of Grievance, Freedom of Speech, and Freedom of Association. In particular, given this Court's earlier ruling, citizens no longer know whether and under what circumstances they can be subjected to a civil lawsuit for petitioning their City Councilman or other elected officials.

2) At the time this Court rendered its opinion, it was unclear whether the California Supreme Court would hold that a person who claims that the Holocaust did not take place is a

member of a group protected by the Unruh Act. Since this Court rendered its opinion, and subsequent to the filing of the petitions for rehearing, the California Supreme Court decided Harris v. Capital Growth Investors XIV, 52 Cal. 3d 1142, ___ Cal. Rptr. ___ (February 28, 1991), which restricts the groups entitled to protection under the Unruh Act and makes clear that a person who claims that the Holocaust did not take place is not a member of a group protected by the Act.

2. **McCALDEN CONCEDES THAT THE ALLEGED ACTS OF RABBI HIER AND THE SIMON WIESENTHAL CENTER IS CONDUCT THAT, STANDING ALONE, APPEARS TO BE LEGAL. SUCH LEGAL AND CONSTITUTIONALLY PROTECTED ACTS CANNOT BECOME ILLEGAL MERELY BY ALLEGING THAT THEY ARE PART OF A CONSPIRACY.**

McCalden admits that the alleged acts of Rabbi Hier and the Simon Wiesenthal Center "is conduct that, standing alone, appears to be legal." (McCalden Response p. 6.) McCalden argues that the legal (and Constitutionally protected) acts of Rabbi Hier and the Simon Wiesenthal Center somehow become illegal because they are alleged to be part of a conspiracy. (McCalden Response pp. 1-2.) However, it is well settled that Constitutionally protected acts cannot lose their protection merely by claiming that these purported acts are part of a conspiracy. Likewise, Rabbi Hier and the Wiesenthal Center cannot become part of some broad conspiracy based only on the performance of acts which are Constitutionally protected. The Supreme Court in N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) held :

"When such conduct occurs in the context of constitutionally

protected activity, however, 'precision of regulation' is demanded. [citation omitted] Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages. ...

Only those losses proximately caused by unlawful conduct may be recovered." 458 U.S. at 916-918 (emphasis added)

In Eastern R.R. Presidents Conference v. Noerr Freight, Inc., 365 U.S. 127, 135-137 (1961), the Supreme Court held that a claim of an illegal conspiracy under the Sherman Act cannot be maintained if the defendants merely solicited government action with respect to the passage and enforcement of laws. The Court held that group solicitation of governmental action was Constitutionally protected, and therefore not an illegal conspiracy, even though the railroads' sole purpose was to destroy the truckers as competitors.

In United Mine Workers v. Pennington, 381 U.S. 657, 669-671 (1965), the Supreme Court overruled the lower courts for their failure to exclude Constitutionally protected acts from the allegations of conspiracy:

"We agree with the UMW that both the Court of Appeals and the trial court failed to take proper account of the Noerr case. In approving the instructions of the trial court with regard to the approaches of the union and the operators to the Secretary of Labor and to the TVA officials, the Court of Appeals considered Noerr as applying only to conduct 'unaccompanied by a purpose or intent to further a conspiracy to violate a statute. ...' Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. The Court of Appeals, however, would hold the conduct illegal depending upon proof of an illegal purpose.

The instructions of the trial court to the jury exhibit a similar infirmity. The jury was instructed that the approach to the Secretary of Labor was legal unless part of a conspiracy to drive small operators out of business ... If, therefore, the jury determined the requisite anticompet-

itive purpose to be present, it was free to find an illegal conspiracy based solely on the Walsh-Healy and TVA [petitioning] episodes, or in any event to attribute illegality to these acts as part of a general plan to eliminate Phillips and other operators similarly situated. Neither finding, however is permitted by Noerr for the reasons stated in that case. Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. **Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act."** 381 U.S. at 669-670 (emphasis added).

Here, McCalden claims that Rabbi Hier and the Wiesenthal Center can be held liable, as part of a conspiracy, for acts purportedly committed by others, only because Rabbi Hier and the Wiesenthal Center are alleged to have petitioned the government and engaged in other Constitutionally protected behavior. However, Claiborne Hardware, Noerr, and Pennington make clear that Rabbi Hier and the Wiesenthal Center cannot be liable as co-conspirators when their conduct consists of Constitutionally protected acts.

This Court's earlier ruling has the effect of imposing liability on parties exercising their Right to Petition their elected government representatives and other First Amendment Rights, on the mere basis of vague conspiracy allegations found in McCalden's complaint. 1/ This result is directly

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1. McCalden goes so far as to claim that Rabbi Hier and the Wiesenthal Center, because they are parties to an alleged conspiracy, are liable for the alleged refusal of the City of Los Angeles to provide special police protection to him. (See McCalden Response p. 6.) However, as discussed at page 25 of the Brief of Defendant-Appellees the Simon Wiesenthal Center and Rabbi Marvin Hier, filed on January 20, 1989, the First Amendment precludes liability for a private party for damages caused by governmental action, even if it is induced by the private party. Eastern R.R. Conference v. Noerr Motor Freight, 365 U.S.

(footnote continued on next page)

contrary to the Supreme Court's rulings in Claiborne Hardware, Noerr, and Pennington. For this Court to even suggest that there may be liability on the part of Rabbi Hier and the Simon Wiesenthal Center for petitioning their elected representatives and otherwise engaging in Constitutionally protected conduct, as was done in the panel majority's opinion, will cause Rabbi Hier, the Simon Wiesenthal Center, and others to abstain from exercising these core First Amendment Rights. 2/ This Court should rehear this matter and rule that the alleged acts of Rabbi Hier and the Simon Wiesenthal Center were Constitutionally protected.

(footnote 1 continued)

127, 135-138 (1961); Sierra Club v. Butz, 349 F.Supp. 934, 939 (N.D. Cal. 1972) ("[L]iability can never be imposed upon a party for damage caused by governmental action he induced ... "). It is therefore clear that Rabbi Hier and the Wiesenthal Center cannot possibly be liable for governmental inaction (failure to provide special police protection), when there is not even an allegation that they directly induced such inaction.

2. The cases cited by McCalden for the proposition that "acts which were themselves legal lost that character by becoming constituent elements of an illegal scheme" (McCalden Response p. 5) did not deal with Constitutionally protected acts. In Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690, 707 (1962), the act in question was purchasing vanadium from a certain source. In Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1020-1021 (9th Cir. 1985), the acts in question were providing confidential information concerning Transgo's pricing structure and primary customers without Transgo's consent, purchasing a product in order to copy it, advising another party to leave the name off the package and instruction sheets, and answering the telephone with a similar name, in order to pass off a product as the product of another company. None of these acts are Constitutionally protected, so that they can be elements of an illegal conspiracy. See United Mine Workers v. Pennington, supra, 381 U.S. at 671 n. 4. By contrast, as Claiborne Hardware, Noerr, and Pennington hold, Constitutionally protected acts cannot be illegal, either standing alone or as part of an allegation of conspiracy.

3. AFTER THOROUGHLY REVIEWING THE PLEADINGS, THIS COURT MUST CONCLUDE THAT THE ALLEGED CONDUCT OF RABBI HIER AND THE SIMON WIESENTHAL CENTER WAS CONSTITUTIONALLY PROTECTED.

Where First Amendment rights may be involved, the court is required to more thoroughly scrutinize the pleadings, to determine whether the alleged conduct is Constitutionally protected. Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd., 542 F.2d 1076, 1082-1083 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977); Boone v. Redevelopment Agency of City of San Jose, 841 F.2d 886, 894 (9th Cir. 1988). As this Court stated in Franchise Realty, "in any case ... where a plaintiff seeks damages or injunctive relief, or both, for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." 542 F.2d at 1082-1083. See also Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499, 510-511 (1984).

The opinion of the panel majority failed to scrutinize the pleadings in the manner required by Claiborne Hardware, Franchise Realty, and Boone. As discussed above, this will result in the chilling of the defendants' First Amendment rights. For this reason, this Court should withdraw its previous opinion and issue a new opinion that complies with the rulings in Claiborne Hardware, Franchise Realty, and Boone.

In his Response Brief, McCalden distinguishes between what he calls the "Petitioning" allegations (Rabbi Hier calling his City Councilman and other elected representatives) and the

"Threat" allegations. McCalden concedes that the "Petitioning" allegations could be stricken from the complaint. (McCalden Response pp. 8-9.) Since the "Petitioning" allegations cannot withstand the scrutiny required by Claiborne Hardware, Franchise Realty, and Boone, and because McCalden concedes that these allegations could be stricken, the opinion of the panel majority should be amended to hold that these acts were Constitutionally privileged and cannot form the basis for liability against Rabbi Hier and the Simon Wiesenthal Center.

McCalden's Response brief then discusses the so called "threats." The most he alleges regarding Rabbi Hier and the Wiesenthal Center is the following:

> "Hier's threatening a probably violent demonstration and then offering to remove threat if CLA canceled plaintiff's program; Hier, Wiesenthal and/or AJC's creating likelihood of violence by informing violence-prone Jewish organizations." (McCalden's Response p. 9.)

The allegation that Hier threatened a "probably violent demonstration" does not meet the requirements of Franchise Realty. What did Rabbi Hier allegedly say, and who did he say it to? What is a probably violent demonstration, and who was going to make it probably violent? Communicating the fact of a demonstration is the clearest form of free speech and freedom to petition. As demonstrated above, more is required than a vague allegation of a "probably violent demonstration." If Evers' threats to break necks in Claiborne Hardware was Constitutionally privileged (see Petition for Rehearing pages 7-14 and Brief of Defendant-Appellees the Simon Wiesenthal Center and Rabbi Marvin Hier filed on January 20, 1989 pages 28-33), a threat to

organize a demonstration must be privileged. The opinion of the panel majority must therefore be amended to hold that this act was constitutionally privileged and cannot form the basis for liability against Rabbi Hier and the Simon Wiesenthal Center.

Finally, informing "violence prone Jewish organizations" that McCalden was going to have his conference cannot form the basis of liability. If it could, every newspaper, radio station, and television station in Los Angeles was also guilty of this act and can be held equally liable as a co-conspirator. Indeed, McCalden himself must have also been a co-conspirator, since he sought publicity regarding his conference. By failing to make clear that informing others of matters of utmost interest is the clearest form of protected speech, the panel's majority opinion inevitably will have a very chilling effect on free speech. Furthermore, this allegation does not meet the requirements of Franchise Realty. 3/

4. A RECENT OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IS PERSUASIVE ON THE ISSUE OF THE LEGALITY OF A BOYCOTT TO INDUCE THE CANCELLATION OF McCALDEN'S CONTRACT WITH THE CLA.

Since this court issued its opinion on November 20, 1990, the United States District Court for the Southern District of New York decided the issue of whether a group boycott for political or religious reasons can form the basis of an award of

3. In his reply brief, McCalden does not argue that Rabbi Hier and the Wiesenthal Center are responsible for the alleged threat made by the AJC. This matter is discussed in the Brief of Defendant-Appellees the Simon Wiesenthal Center and Rabbi Marvin Hier filed on January 20, 1990 pages 37-38 and Petition For Rehearing pages 13-14.

liability. See Jews For Jesus, Inc. v. Jewish Community Relations Council of New York, 88 Civ. 1985 (RO) (July 29, 1991), a copy of which is attached hereto as Exhibit 1. In that case, several Jewish organizations decided that they would not patronize a particular hotel unless the hotel breached its contract to host a convention of another organization, Jews for Jesus. The Jewish organizations communicated their intention to boycott the hotel to the hotel, which thereupon breached its contract with Jews for Jesus. The court held that the acts of the Jewish organizations were Constitutionally protected:

> "In order to facilitate the analysis of this issue, it is useful to view the defendants' speech in two parts. First, there are the private conversations in which the various Jewish groups communicated to each other that, in order to protect the integrity of their religion, ... they did not wish to patronize a hotel that also accommodated Jews for Jesus. Those conversations obviously involve pure speech, which is protected by the First Amendment. [citations omitted]
>
> The second part of defendants' speech involves the communication of the defendants' desire not to patronize a hotel also used by Jews for Jesus to a third party, the Stevensville Hotel. At the outset, whether one considers that speech or conduct, it definitely is not an unlawful economic boycott under Federal Trade Commission v. Superior Court Trial Lawyers' Association, 58 U.S.L.W. 4145 (January 22, 1990), as plaintiff argues. [footnote omitted] To the contrary, I conclude that the speech is protected under the First Amendment.
>
> The only difference between the first speech (the speech amongst the Jewish organizations) and the second speech (the communication of the first speech to [the hotel]) is that the second speech arguably had a purpose, to encourage the Stevensville to cancel the Jews for Jesus reservations or else, presumably, the defendants would find another hotel to patronize to protect their religious purity. It would seem clear that the plaintiff would have no cause to complain if the defendants had simply stopped patronizing the Stevensville without explaining why. The fact that the defendants decided to collectively convey their message, however, brings this case within NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), in which the

Court upheld NAACP members' boycott of white merchants to force political and business change on the ground that it was fully protected by the First Amendment. [citations omitted]." (Opinion and Order pp. 4-5)

To the extent that McCalden claims that the alleged acts of Rabbi Hier and the Simon Wiesenthal Center constitute an illegal boycott, those claims are disposed of by the Jews for Jesus case, as well as Redgrave v. Boston Symphony Orchestra, 855 F.2d 888 (1st Cir. in banc 1988) (see Brief of Defendant-Appellees the Simon Wiesenthal Center and Rabbi Marvin Hier filed on January 20, 1989 p. 33) and State of Missouri v. National Organization for Women, 620 F.2d 1301, 1317 (8th Cir. 1980), cert. denied, 449 U.S. 842 (1980) (in connection with claim of interference with prospective contractual relation, the court held "that the right to petition is of such importance that it is not an improper interference even when exercised by way of a boycott.") 4/

5. THE "SHAM EXCEPTION" TO PROTECTION AFFORDED BY THE CONSTITUTIONAL RIGHT TO PETITION GOVERNMENT OFFICIALS IS NOT APPLICABLE BECAUSE MCCALDEN DOES NOT ALLEGE ANY FACTS TO SUGGEST THAT RABBI HIER'S OR THE SIMON WIESENTHAL CENTER'S ALLEGED COMMUNICATIONS WITH THE CITY COUNCILMAN OR OTHER GOVERNMENT OFFICIALS WERE A SHAM AND BECAUSE HE AFFIRMATIVELY ALLEGES THAT SUCH EFFORTS WERE SUCCESSFUL.

In his Response brief, McCalden for the first time raises

4. The act of renting a conference room as part of a group's exercise of free speech rights, or even an economic boycott, is Constitutionally protected. Indeed, McCalden now complains of the very act that he claims he was deprived of -- i.e., the ability to rent a conference room and to exercise free speech rights.

the argument that the "sham exception" to the First Amendment Right to Petition may be applicable in this case. However, the "sham exception" can arise only where the defendant's purpose is not to influence the government, but solely to use his communication with the government to accomplish an unrelated, illegitimate purpose, such as to gain publicity for a defamatory statement. McCalden has not alleged any facts demonstrating that Rabbi Hier's or the Simon Wiesenthal Center's alleged communications with the City Councilman or any other government officials were a sham. On the contrary, McCalden's complaint specifically alleges that the purpose in contacting the City Councilman was to lobby for passage of a City Council resolution, and that the effort was successful. (CR 53, Second Amended Complaint para. 26-27.) The alleged purpose for contacting the other public officials was to obtain the cooperation of those officials in pressuring the CLA to cancel its contracts with McCalden, and allegedly those efforts were also successful. (CR 53, Second Amended Complaint para. 36.) Courts have held that one of the clearest indications that the defendant is not engaged in sham activities is if the defendant is successful in achieving the governmental action he seeks. See, e.g., Franchise Realty Interstate Corp. v. S.F. Local Joint Exec. Bd., 542 F.2d 1076, 1080-81 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977) ("We find it particularly hard to accept the characterization as 'baseless' or 'frivolous' of opposition which is entirely successful in obtaining the governmental action sought, as apparently was the case here"; the sham "exception does not extend to direct lobbying efforts as those alleged here, but only to

publicity campaigns, which this complaint does not allege."); Subscription T.V. v. Southern Calif. Theatre Owners, 576 F. 2d 230, 233 (9th Cir. 1978) (defendants' success in achieving their desired legislative results was persuasive factor in finding that their efforts were not a "sham."); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 615 (8th Cir. 1980) ("The genuineness of defendants' lobbying effort is manifested by its success; demonstrably it was not a sham.")

The claimed purpose of the contacts between Rabbi Hier and the Simon Wiesenthal Center on the one hand and government officials on the other hand, as well as their alleged success in achieving official action, clearly establish that the alleged acts do not fall within the sham exception.

6. THIS COURT SHOULD RECONSIDER THAT PART OF ITS OPINION REINSTATING MCCALDEN'S CLAIM UNDER THE UNRUH ACT, IN LIGHT OF THE CALIFORNIA SUPREME COURT'S DECISION IN HARRIS V. CAPITAL GROWTH, WHICH WAS RENDERED AFTER THIS COURT'S OPINION.

In its opinion, the panel majority reversed the district court's dismissal of McCalden's claim under Section 51.7 of the California Civil Code (the Unruh Act). The district court had dismissed this claim on the ground that appellant did not fall within a group protected by the Unruh Act. 919 F.2d at 543.

The panel majority recognized that the California courts had not determined whether a person who claims that the Holocaust did not take place is a member of a group protected by the Unruh Act. The panel majority attempted to determine "what the California courts might do in this case," 919 F.2d at 544, based

on general language in the California Supreme Court decisions of In re Cox, 3 Cal.3d 205, 90 Cal. Rptr. 27 (1970) and Marina Point, Ltd. v. Wolfson, 30 Cal.3d 721, 180 Cal. Rptr. 496, cert. denied, 459 U.S. 858 (1982).

Since the panel majority rendered its decision, and after the filing of the petitions for rehearing, the California Supreme Court decided Harris v. Capital Growth Investors XIV, 52 Cal. 3d 1142, ___ Cal. Rptr. ___ (February 28, 1991).

In Harris, the California Supreme Court stated that there should not be a judicial expansion of the specifically listed classifications in the Unruh Act to include whatever the courts might label "arbitrary" discrimination. 52 Cal. 3d at 1154. The court held that any judicial expansion of the specifically listed classifications should be "confined to discrimination based on personal characteristics similar to the statutory classifications of race, sex, religion, etc." 52 Cal.3d at 1156.

The California Supreme Court held:

> "The Legislature's decision to enumerate personal characteristics, while conspicuously omitting financial or economic ones, strongly suggests a limitation on the scope of the Unruh Act. ... The California cases also support the limitation. When courts have applied the Act to arbitrary discrimination beyond the listed categories of race, sex, religion, etc., personal characteristics and not financial status or capability provided the basis of decision. In Cox ... the arbitrary discrimination was directed against the unconventional dress and physical appearance of petitioner's companion. In Marina Point ... and O'Connor ... its object was the presence of children in apartments and condominiums. In other cases, its purpose was to exclude persons based on homosexuality. [citation omitted]
>
> The parties have cited no case nor has our research disclosed any in which distinctions based on financial or economic status (as opposed to personal characteristics) have been subject to scrutiny under the Act." Id. at 1161.

Most importantly, the California Supreme Court held that judicial expansion of the specifically enumerated classes in the Unruh Act should be limited to the "classes of persons who have achieved historical recognition as distinct objects of adverse treatment":

> "In addition to representing personal characteristics, the categories listed in the Act are also the subject of large bodies of statutory and constitutional law on both state and federal levels designed to protect classes of persons who have achieved historical recognition as distinct objects of adverse treatment by public and private entities, e.g., Blacks, Hispanics, and women. Plaintiffs have cited no federal or state constitutional or statutory provision (nor are we aware of any) that would place financial or economic status on the same footing with the specified categories of discrimination the Legislature has chosen to include in the Unruh Act. (See San Antonio School District v. Rodriguez (1972) 411 U.S. 1, 28-29 (observing that discrimination based on wealth does not possess the traditional indicia of a suspect classification under equal protection clause analysis and has not been treated as such by the Supreme Court.)" 52 Cal. 3d at 1161, n. 9 (emphasis added).

This Court has already determined that McCalden is not within a class of persons protected by 42 U.S.C. Section 1985(3), by holding that a so called "Holocaust revisionist" does not require special federal assistance in protecting his civil rights. 919 F.2d 545-546. Similarly, a person who falsely claims that Nazis did not murder millions of Jews from 1933 to 1945, in order to spread hatred of Jews, is not someone who is entitled to protection under the Unruh Act. As such, under the standards enunciated by the California Supreme Court in Harris, McCalden is not a member of a group protected by the Unruh Act.

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).

McCalden's conduct -- not his status -- was the basis of any alleged action taken against him. McCalden's conduct consists of spreading false statements about the Holocaust, in order to create hatred of Jews. Thus, Harris and Frantz make clear that the Unruh Act cannot apply to McCalden.

The District Court determined that McCalden had failed to 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.) In light of the California Supreme Court's recent decision in Harris limiting the protected classes under the Unruh Act, the determination by the District Court should be upheld, and the dismissal of McCalden's claims under Section 51.7 should be affirmed.

7. CONCLUSION.

For the reasons stated above and in the Petition for Rehearing with a Suggestion for Rehearing in Banc, this Court should rehear this matter and withdraw its earlier opinion.

Dated: August 22, 1991

Respectfully submitted,

BERMAN, BLANCHARD, MAUSNER & KINDEM

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEWS FOR JESUS, INC.; and DAVID A. LIPKOWITZ,
Plaintiffs,

- v -

JEWISH COMMUNITY RELATIONS COUNCIL OF NEW YORK, INC.; MICHAEL MILLER; ROBERT KAPLAN; and PHILIP D. ABRAMOWITZ,

Defendants.

OPINION AND ORDER
88 Civ. 1985 (RO)

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(over)

Exhibit 1

Richard
Owen, District Judge:

Defendants in this case decided that they would not patronize a particular hotel because they did not wish to share facilities with members of Jews for Jesus. Jews for Jesus' resulting lawsuit challenges the defendants' ability to convey that information to the hotel in question. The question posed by this summary judgment motion is whether the defendants' conduct is protected by the First Amendment. I conclude that it is.

Some time in 1987, the Jewish Community Relations Council, an umbrella organization comprised of about 60 Jewish groups, learned that Jews for Jesus was having its yearly Ingathering at the Stevensville Country Club, a kosher resort facility in the Catskills region of New York State.[1] Jews for Jesus is an "evangelistic missionary society" whose followers, Jews and non-Jews alike, believe that Jesus was the Messiah, a belief that conflicts with traditional Jewish doctrine. JCRC, among other Jewish organizations, feels that Jews for Jesus uses deceptive tactics in promoting its doctrine and, in particular, that Jews for Jesus missionaries fraudulently and misleadingly use Jewish symbols to associate themselves with Judaism and to attract followers.

According to plaintiff's version of the facts, which for purposes of this motion I accept as true, JCRC also learned that Agudath Israel, an Orthodox Jewish group, was scheduled to have its annual meeting at the Stevensville a week after the planned Jews for Jesus event. JCRC contacted Agudath Israel, told it about Jews for Jesus' reservations at the Stevensville, and inquired whether Agudath Israel would still have its meeting at the

[1] Although the Stevensville is a kosher facility that is patronized by Jewish groups and families, the record reflects that approximately 70 percent of the hotel's business derives from non-Jews, including church groups and other Gentile organizations.

Stevensville. Agudath Israel said it would not.[2]

Acting at the behest of Agudath Israel, JCRC also called four other Jewish organizations and asked them "if a circumstance would arise that it would be known that Jews for Jesus were using or planning on using a kosher catering facility or the like and you had plans to use the same facility, would you, in fact, continue to plan to use the same facility."[3] Those groups also said that they would not use the same hotel facility as Jews for Jesus.

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[2] It should be noted that defendants do not object to the presence at the Stevensville of all non-Jewish groups or individuals. At his deposition, Rabbi Morris Sherer, president of Agudath Israel, which is not named as a defendant in this action, see infra note 5, explained why his organization would object to Jews for Jesus' presence at the Stevensville:

> By having these conventions back-to-back in this type of hotel it would mean that a large percentage of our leaders and members would not be able to attend. They would consider this harmful to the interests of the Jewish community and its survival.
>
> . . .
>
> Because . . . the Jews for Jesus is conceived in our eyes as a missionary group that harms basic religious interests of our people.
>
> . . .
>
> Agudath Israel's acceptance in the community is because people consider us very loyal to tenets of Judaism. And people, the general public would have believed that we are compromising our principals (sic) by our willingness to have an even distant relationship with a group of this nature.
>
> . . .
>
> [I]n our view, the Jews for Jesus group uses deceptive tactics in trying to win over Jewish boys and girls to their group. They seek a certain credibility and anyone who aids that approach of that Jews for Jesus group is doing something harmful to the furtherance of our religion.

[3] Defendant Michael Miller, JCRC's Executive Director, stated at his deposition that Agudath Israel informed him that it was planning on cancelling its reservation at the Stevensville and it wanted to know whether other Jewish organizations would react similarly. Miller also stated that he did not mention the Stevensville by name when he posed this question. The four organizations that were surveyed were the Union of American Hebrew Congregations, the Union of Orthodox Jewish Organizations of America, the United Synagogue of America and the Young Israel.

Finally, JCRC and Agudath Israel separately contacted Mehl Caterers, a Glatt kosher catering concern that subleases and books the Stevensville over the Passover holiday. Agudath Israel had hired Mehl to cater the group's upcoming convention at the Stevensville. Like Agudath Israel, Mehl perceived the Jews for Jesus reservations as a problem and the caterer's president contacted the Stevensville to voice his concern.[4]

Having thus conferred with the various Jewish entities, JCRC Executive Director Michael Miller contacted Kenneth Dinnerstein, the Stevensville's President.[5] Mr. Dinnerstein states in an affidavit that JCRC told him that if the hotel hosted the Jews for Jesus event, the Jewish community would boycott the hotel, "there would be a one hundred and eighty degree turnaround in Jewish support for the Stevensville Country Club," and the Jewish Press newspaper would be contacted.[6] Dinnerstein cancelled the Stevensville's contract with Jews for Jesus and returned the group's deposit. Dinnerstein explained that he made the choice he did because "the economics of these threatened sanctions could have

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[4] Agudath Israel's President, Rabbi Sherer, stated in his deposition that he contacted Mehl and told the caterer that Agudath Israel would have to cancel its convention at the Stevensville if Jews for Jesus' Ingathering were held there the prior week. According to Sherer, Mr. Mehl agreed that the Stevensville would have to make a choice and he also indicated that he was not sure that he could cater the Passover week under those circumstances.

[5] Rabbi Sherer also contacted Dinnerstein and informed him that the hotel would have to make a choice between Agudath Israel and Jews for Jesus. However, plaintiffs did not name Agudath Israel as a defendant in its original complaint, which was filed in 1988. In April 1990, plaintiffs were denied leave to amend their complaint to add claims against Agudath Israel, on the ground that the application was untimely since the facts cited in support of the claims were known to plaintiffs at a much earlier time.

[6] I note that there is some dispute as to what statements were made in this conversation. Mr. Miller's account of his conversation with Dinnerstein suggests that there was more of an informative tone and purpose to the exchange, and not a threatening one. However, for purposes of this motion, I accept Mr. Dinnerstein's version, which is the version set forth by plaintiffs.

resulted in bankruptcy for the Stevensville Country Club."

Jews for Jesus sued JCRC, alleging a conspiracy to violate plaintiff's civil rights under 42 U.S.C. §§ 1985(3) and 1986, as well as under state law.[7] Both parties now move for summary judgment, their contentions focusing on whether defendants' speech was protected by the First Amendment.

In order to facilitate the analysis of this issue, it is useful to view the defendants' speech in two parts. First, there are the private conversations in which the various Jewish groups communicated to each other that, in order to protect the integrity of their religion, see supra note 2, they did not wish to patronize a hotel that also accommodated Jews for Jesus. Those conversations obviously involve pure speech, which is protected by the First Amendment. Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).[8] See also Brandenburg v. Ohio, 395 U.S. 444 (1969) (Ku Klux Klan's expression of racist ideas protected by First Amendment).

The second part of defendants' speech involves the communication of the defendants' desire not to patronize a hotel also used by Jews for Jesus to a third party, the Stevensville Hotel. At the outset, whether one considers that speech or conduct, it definitely is not an

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[7] Count One of plaintiffs' complaint charges that defendants conspired to interfere with civil rights in violation of 42 U.S.C. § 1985(3). Count Two charges defendants with neglecting to prevent conspiratorial wrongs in violation of 42 U.S.C. §§ 1985(3) and 1986. Counts Three, Four and Five charge defendants with violations of various provisions of New York State law.

[8] In Keefe, a racially integrated community organization alleged that a real estate broker had engaged in "blockbusting" and "panic peddling" regarding the sale of local homes to Blacks. The group asked the broker to agree not to solicit property in their community. When he refused, the group distributed leaflets near the broker's home that were critical of his business practices. A state court enjoined that activity, finding that it was coercive and intimidating and therefore not entitled to First Amendment protection. The Supreme Court reversed.

unlawful economic boycott under Federal Trade Commission v. Superior Court Trial Lawyers' Association, 58 U.S.L.W. 4145 (January 22, 1990), as plaintiff argues.' To the contrary, I conclude that the speech is protected under the First Amendment.

The only difference between the first speech (the speech amongst the Jewish organizations) and the second speech (the communication of the first speech to Mr. Dinnerstein) is that the second speech arguably had a purpose, to encourage the Stevensville to cancel the Jews for Jesus reservations or else, presumably, the defendants would find another hotel to patronize to protect their religious purity. It would seem clear that the plaintiff would have no cause to complain if the defendants had simply stopped patronizing the Stevensville without explaining why. The fact that the defendants decided to collectively convey their message, however, brings this case within NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982), in which the Court upheld NAACP members' boycott of white merchants to force political and business change on the ground that it was fully protected by the First Amendment. See also Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Weiss v. Willow Tree Civic Ass'n, 467 F. Supp. 803, 817 (S.D.N.Y. 1979).

Because I conclude that defendants' speech is protected by the First Amendment, summary judgment is granted in their favor. This ruling is limited to the federal claims herein asserted, and since I decline to retain jurisdiction over plaintiff's state law claims, the action is dismissed. Submit order on notice.

' Superior Court involved a claim by the FTC that a boycott by Washington, D.C. attorneys who regularly acted as court-appointed defense counsel violated the antitrust laws. The object of the boycott was to influence the District of Columbia to increase the compensation of court-appointed lawyers. In rejecting the attorneys' argument that their conduct was protected by the First Amendment, the Supreme Court held that a boycott conducted in order to economically advantage its participants is not protected by the First Amendment because it violates antitrust provisions. However, plaintiff does not argue that defendants' speech or conduct implicated any such issues, and therefore I do not believe that Federal Trade Commission v. Superior Court Trial Lawyers' Association applies to these facts.

Dated: July 29, 1991
New York, New York

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United States District Judge

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 August 23, , 1991, I served the foregoing document(s), described as follows:

Reply to Plaintiff's Response to Petition for Rehearing

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

See Attached Service List.

X (BY MAIL) I placed such envelope with fully prepaid postage thereon 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 foregiong is true and correct.

X (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 foregiong is true and correct.

Executed on August 23, , 1991, at Los Angeles, California.

Jennifer Lee

TYPE OR PRINT NAME

Jennifer Lee

SIGNATURE

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