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.

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

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CERTIFICATE REQUIRED BY CIRCUIT RULE 28-2.1

See certificates contained in individual briefs.

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I. THIS COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION OVER THIS APPEAL BECAUSE PLAINTIFF-APPELLANT DID NOT FILE A TIMELY NOTICE OF APPEAL.

A. JURISDICTION OF THE DISTRICT COURT.

Defendant-Appellees agree with the statement of subject matter jurisdiction of the District Court in Appellant's Brief.

B. A FINAL APPEALABLE ORDER WAS ENTERED BY THE DISTRICT COURT ON MARCH 31, 1987. THIS COURT DOES NOT HAVE JURISDICTION OVER THE APPEAL BECAUSE McCALDEN DID NOT FILE A TIMELY NOTICE OF APPEAL.

A final appealable order dismissing this lawsuit was entered by the District Court on March 31, 1987, when the District Court entered a final order dismissing all remaining claims against all remaining defendants. The issue of the finality of this order is fully briefed in the Motion of Defendants Rabbi Marvin Hier and the Simon Wiesenthal Center To Dismiss Appeal For Lack of Jurisdiction, that was 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, that was filed on April 19, 1988.

The statutory basis for jurisdiction of this Court is 28 U.S.C. Section 1291. However, since the Appellant David McCalden, d/b/a Truth Missions ("McCalden") did not file a timely notice of appeal, this Court lacks jurisdiction to hear the appeal.

C. THE NOTICE OF APPEAL WAS NOT TIMELY FILED BECAUSE THE ORDERS APPEALED FROM WERE ENTERED ON FEBRUARY 11, 1987, MARCH 24, 1987, AND MARCH 31, 1987, AND THE NOTICE OF APPEAL WAS NOT FILED UNTIL FEBRUARY 10, 1988.

The orders appealed from were entered on February 11, 1987, March 24, 1987, and March 31, 1987. These three orders dismissed all claims against all defendants. When the last order was entered on March 31, 1987, there was a final, appealable order. The Notice of Appeal was not filed until February 10, 1988, more than ten months after a final order was entered.

Federal Rule of Appellate Procedure 4(a) requires that the Notice of Appeal in a civil action shall be filed with the clerk of the District Court within 30 days after entry of the judgment or order appealed from. The time limit in which to file a notice of appeal under Federal Rule of Appellate Procedure 4(a) is "mandatory and jurisdictional." Browder v. Director, Dept. of Corrections of Illinois, 434 U.S. 257, 264, 54 L.Ed. 2d 521, 98 S.Ct. 556, 561 (1978). See also Felix v. Cardwell, 545 F.2d 92, 93 (9th Cir. 1976), cert. denied, 430 U.S. 910 (1977); Alaska Limestone Corp. v. Hodel, 799 F.2d 1409, 1411 (9th Cir. 1986); Ashby Enterprises v. Weitzman, Dym & Associates, 780 F.2d 1043 (D.C. Cir. 1986); Hall v. Community Mental Health Center of Beaver County, 772 F.2d 42 (3d Cir. 1985); Ali v. Lyles, 769 F.2d 204, 205 (4th Cir. 1985).

McCalden's appeal is untimely, and this Court therefore lacks jurisdiction to hear the appeal, because McCalden did not file his Notice of Appeal within 30 days of the entry of a final order on March 31, 1987.

On October 9, 1987, McCalden filed a Petition For Writ of Mandamus, requesting this Court to issue an order directing the District Court "to enter a final judgment dismissing the entire district court action." (McCalden v. United States District Court, Court of Appeals No. 87-7454, Petition For Writ of Mandamus, page 2.) McCalden's petition for a writ of mandamus was denied by this Court, in an Order filed January 27, 1988.

On March 31, 1988, Rabbi Hier and the Simon Wiesenthal Center filed a motion to dismiss the appeal for lack of jurisdiction. On May 2, 1988, this Court denied the Appellee's motion to dismiss the appeal for lack of jurisdiction, without opinion.

This Court did not state why it denied the motion to dismiss the appeal. Unless the denial of the motion to dismiss was based on a determination that McCalden timely filed his Notice of Appeal, this Court must now determine whether McCalden's Notice of Appeal was timely filed, before considering the merits of the appeal. The issue of whether the Notice of Appeal was timely filed and whether this Court has jurisdiction to hear the appeal has been fully briefed 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.

II. ISSUES PRESENTED FOR REVIEW

1. This Court lacks jurisdiction to hear McCalden's appeal because a final appealable order dismissing this lawsuit was entered by the District Court on March 31, 1987 and the Notice of Appeal was not filed until February 10, 1988. (This issue is discussed above.)

2. McCalden has failed to state a claim under 42 U.S.C. Section 1985(3), because McCalden has failed to demonstrate that he is a member of a class entitled to protection under 42 U.S.C. Section 1985(3). (This issue is discussed in Section IV.A of Appellees' Joint Brief.)

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

4. McCalden has failed to state a claim for interference with contract under California law, because he has not alleged that some identifiable pecuniary or economic benefit accrued to the defendants that formerly accrued to the plaintiff. (This issue is discussed in Section IV.C of Appellees' Joint Brief.)

5. 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. (This issue is discussed in Section IV.D of Appellees' Joint Brief.)

All other issues are discussed in the individual briefs of the Defendant-Appellees.

III. STATEMENT OF THE CASE.

See the individual briefs of the Defendant-Appellees.

IV. ARGUMENT.

A. 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.

Appellant McCalden alleges in his Fifth Cause of Action for "Conspiracy to Interfere with Civil Rights" that defendants American Jewish Committee ("AJC"), City of Los Angeles, Rabbi Marvin Hier ("Rabbi Hier"), the Simon Wiesenthal Center and Westin (hereinafter collectively "defendants") conspired to deprive him of the equal protection of the laws and of equal privileges and immunities under the laws, giving rise to a claim under 42 U.S.C. Section 1985(3).

McCalden alleges that the conspiracy was directed against him "because of his membership in a class known as Holocaust revisionists." (Second Amended Complaint, paragraph 54.) McCalden describes the "class" of "Holocaust revisionists" as follows:

> "The members of said class, numbering several thousand in North America and Europe, engage in research, writing, publication and discussion. Their aims and activities in the United States are lawful. Their position with regard to the Holocaust is, in general, 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.)

It is clear on its face that such a group is not entitled to Section 1985(3) protection because:

(1) McCalden has failed to establish that the courts have designated his alleged class as a suspect or quasi-suspect classification requiring more exacting scrutiny or that Congress has indicated through legislation that the class requires special protection.

(2) The class he alleges is at most a group of people claiming that their First Amendment rights have been violated. This Court and other courts have specifically held that Section 1985(3) does not apply to a "class" comprised of persons alleging free speech or free association violations.

1. **McCALDEN HAS THE BURDEN OF DEMONSTRATING THAT HE IS A MEMBER OF A CLASS ENTITLED TO SECTION 1985(3) PROTECTION.**

Title 42 U.S.C. Section 1985 (3) provides in relevant part:

> "If two or more persons in any state or territory conspire or go into disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . the parties so injured or deprived may have an action for recovery of damages occasioned by such injury or

deprivation, against any one or more of the conspirators."

In order to make 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).

2. IN ORDER TO STATE A CLAIM UNDER SECTION 1985(3), McCALDEN MUST ESTABLISH THAT THE COURTS HAVE DESIGNATED HIS ALLEGED CLASS AS A SUSPECT OR QUASI-SUSPECT CLASSIFICATION REQUIRING MORE EXACTING SCRUTINY OR THAT CONGRESS HAS INDICATED THROUGH LEGISLATION THAT THE CLASS REQUIRES SPECIAL PROTECTION.

In Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798 (1971), the Supreme Court held that a plaintiff alleging a claim under Section 1985(3) must be a member of a racial or other class protected under the equal protection clause. The Supreme Court stated:

> "The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all."

In United Brotherhood of Carpenters and Joiners v. Scott, 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983), the

Supreme Court reversed a Fifth Circuit holding that Section 1985(3) could be applied to protect plaintiffs who alleged civil rights deprivations resulting from economic discrimination. 463 U.S. at 830. The Supreme Court also indicated that Section 1985(3) would not provide a remedy for civil rights deprivations resulting from political discrimination. 463 U.S. at 834-837. The Court held that an actionable conspiracy under 1985(3) must be based upon an "invidiously discriminatory animus" aimed at a racial group or other constitutionally-protected class. 463 U.S. at 834.

The Ninth Circuit has strictly followed this restrictive reading of Scott. In Gibson v. United States, 781 F.2d 1334, 1341 (9th Cir. 1986), cert. denied, 107 S.Ct. 928 (1987), this Court affirmed the dismissal of a complaint alleging Section 1985(3) claims based on political activities. The Ninth Circuit stated:

> "The Supreme Court recently reaffirmed the specific intent requirement established in Griffin and, indeed, explicitly restricted the statutory coverage to conspiracies motivated by racial bias. United Brotherhood of Carpenters and Joiners of America, Local 610 AFL-CIO v. Scott, 463 U.S. 825, 834-35, 103 S.Ct. 3352, 3358-59, 77 L.Ed.2d 1049 (1983). Despite two separate opportunities to cure the deficiencies of their complaint, plaintiffs failed to allege that the law enforcement abuses they claim they suffered were on account of their race. Because we cannot 'supply essential elements of the claim that were not

initially pled,' [citation omitted], we affirm the dismissal of plaintiffs' section 1985(3) claim." 781 F.2d at 1341 (emphasis added).

See also Trerice v. Pedersen, 769 F.2d 1398, 1402-1403 (9th Cir. 1985) (claim based upon enlisted seaman's deprivation of civil rights dismissed for lack of allegation that defendant's conduct was motivated by racial or class based invidiously discriminatory animus); Schultz v. Sundberg, 759 F.2d 714 (9th Cir. 1985) (State representative's 1985(3) claim dismissed because complaint alleged only that the conspiracy had a political, rather than a racial animus).

The Ninth Circuit has also made clear that any expansion of the classes to which section 1985(3) applies must be based upon "the Governmental determination that some groups require and warrant special federal assistance in protecting their civil rights. This underlying principle must continue to determine the coverage of section 1985(3)." DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F.2d 327, 333 (9th Cir. 1979).

In Schultz v. Sundberg, 759 F.2d 714 (9th Cir. 1985), the Court stated:

> ". . . we have extended [the scope of section 1985(3)] beyond race only when the class in question can show that there has been a governmental determination that its members 'require and warrant special federal assistance in protecting their civil rights.'. . .
>
> "More specifically, we require either that the courts have designated the class in question a suspect

or quasi-suspect classification requiring more exacting scrutiny or that Congress has indicated through legislation that the class required special protection." 759 F.2d at 718.

3. McCALDEN HAS FAILED TO ALLEGE MEMBERSHIP IN A CLASS ENTITLED TO SECTION 1985(3) PROTECTION BECAUSE McCALDEN'S SUPPOSED CLASS HAS NOT BEEN DESIGNATED BY COURTS AS A SUSPECT OR QUASI-SUSPECT CLASSIFICATION AND CONGRESS HAS NOT INDICATED THAT THIS CLASS REQUIRES SPECIAL PROTECTION.

McCalden has failed to allege his membership in a class that either the courts have designated as a suspect or quasi-suspect classification or that Congress has indicated through legislation requires special protection. At most, McCalden alleges that he is a member of a group of persons who desire to spread "repugnant, hateful and untruthful" views about the Holocaust. (Second Amended Complaint, paragraph 43.) Neither the courts nor Congress has shown even the slightest indication that groups who deny the existence of the Holocaust should be granted special protection as a "class." If anything, Congress has evinced just the opposite intent. 1/

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1. For example, Senator Cranston made the following remarks in the Congressional Record, September 24, 1985, Vol. 131 no. 121 (contained in the addendum to this brief, p. 1):

> "[O]ne 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. ...

(footnote continued on next page)

In fact, McCalden admits in his appeal brief that he is not a member of a class which has been determined to be suspect or quasi-suspect. (Appellant's Brief, page 51.) Nevertheless, McCalden argues that the rule in DeSantis, that the section 1985(3) remedy is available only to members of previously determined suspect or quasi-suspect classes, should not be applied to his "class." McCalden argues that his "class" should not be subject to the DeSantis holding because "the sole and express purpose of the conspiracy was to deny plaintiff rights of free speech and association." (Appellant's Brief, page 52.) As is discussed below, however, the courts have specifically held that a class consisting of persons alleging First Amendment violations is not entitled to Section 1985(3) protection.

(footnote 1 continued)

> "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." (Addendum p. 1.)

Interestingly, David McCalden was one of the defendants in the lawsuit referred to in Senator Cranston's remarks.

4. SECTION 1985(3) DOES NOT PROVIDE PROTECTION TO CLASSES COMPRISED OF PERSONS ALLEGING FIRST AMENDMENT VIOLATIONS.

Section 1985(3), which is limited to equal protection rights, does not apply to a "class" comprised of persons alleging free speech or free association violations. Gibson v. United States, 781 F.2d 1334, 1341 (9th Cir. 1986); Carchman v. Korman Corp., 456 F.Supp. 730, 739 (E.D. Pa. 1978), aff'd, 594 F.2d 354 (3d Cir. 1979), cert. denied, 444 U.S. 898 (1980); Moats v. Village of Schaumburg, 562 F.Supp. 624, 631 (N.D. Ill. 1983) ("a class for purposes of Section 1985(3) cannot be composed of those who exercise rights of free speech or association or those who allege infringement of free speech or association rights.")

The district court in Carchman persuasively stated the case against conferring 1985(3) class status on a group comprised of persons alleging free speech or free association violations:

> "We are persuaded, however, that the rights of speech and association, despite their legal fundamentality, may not be used to define Griffin classes for two reasons. First, permitting a Griffin 'class' to be defined by those who exercise rights of speech or association would be in effect no limitation on the definition of a section 1985(3) class whatever. It would permit a virtually open-ended and limitless collection of groups to claim they were proper Griffin 'classes.' ... Yet, Griffin clearly intended its

'class' requirement to serve a limiting function. ...

"Second, defining a Griffin class solely on the basis that it consists of persons whose First Amendment rights have been infringed leads to analytical problems. ... If we define Griffin 'classes' in terms of First Amendment rights, we must first decide whether First Amendment rights can be protected, via section 1985(3), from a wholly private conspiracy ... [2/] If they cannot, then how can litigants possess a 'fundamental right' to speech or association sufficient to constitute a Griffin 'class'?" 456 F.Supp. at 739-740.

The Supreme Court's decision in United Brotherhood of Carpenters and Joiners v. Scott, supra, is consistent with Carchman and Gibson. The basis for the Fifth Circuit's holding in Scott that economic groups were covered by Section 1985(3) was the Fifth Circuit's reasoning that because political groups were intended to be protected by Section 1985(3), non-union employees were also intended to be protected by Section 1985(3) because "an animus directed against nonunion association is closely akin to animus directed against political association." Scott v. Moore, 680 F.2d 979, 994, reversed sub nom., United Brotherhood of Carpenters and Joiners v. Scott, 463 U.S. 825,

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2/ Since the Supreme Court has now determined that an alleged conspiracy to infringe First Amendment rights is not a violation of section 1985(3) unless it is proved that the State is involved in the conspiracy or the aim of the conspiracy is to influence the activity of the State, United Brotherhood of Carpenters and Joiners v. Scott, 463 U.S. at 832, it is now even clearer that persons allegedly deprived of freedom of speech or assembly cannot constitute a Griffin class.

103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983). Because the Supreme Court ruled that Section 1985(3) was not intended to "reach conspiracies motivated by bias towards others on account of their economic views, status or activities,' (Scott, supra, 463 U.S. at 837), the Fifth Circuit's reasoning leads to the conclusion that 1985(3) also was not intended to reach conspiracies motivated by bias on account of political views, status or activities.

The Supreme Court in Scott very strongly indicated that Section 1985(3) does not apply to any conspiracies motivated by bias on account of political views, status or activities:

> "Although we have examined with some care the legislative history that has been marshaled in support of the position that Congress meant to forbid wholly non-racial, but politically motivated conspiracies, we find difficult the question whether Section 1985(3) provided a remedy for every concerted effort by one political group to nullify the influence of or do other injury to a competing group by use of otherwise unlawful means. To accede to that view would go far toward making the federal courts, by virtue of Section 1985(3), the monitors of campaign tactics in both state and federal elections, a role that the courts should not be quick to assume. If respondents' submission were accepted, the proscription of Section 1985(3) would arguably reach the claim that a political party has interfered with the freedom of

speech of another political party by encouraging the heckling of its rival's speakers and the disruption of the rival's meetings." 463 U.S. at 836.

The Ninth Circuit has interpreted this language in Scott to mean that 1985(3) does not apply to a wholly political, non-racial conspiracy. See Gibson v. United States, 781 F.2d 1334, 1341 (9th Cir. 1986); Schultz v. Sundberg, 759 F.2d 714 (9th Cir. 1985) ("The Court [in Scott] also indicated that section 1985(3) probably did not extend to wholly political, non-racial conspiracies.") 3/

Nevertheless, McCalden argues that 1985(3) must be read to apply to every "class" comprised of persons alleging free speech or free association violations, or that it would be unconstitutional. McCalden argues that

"because any statute which burdens a fundamental right is itself subject to strict scrutiny, it makes sec. 1985(3) unconstitutional as applied. What compelling interest can the federal government have in affording a remedy for class-based deprivation of express

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3. The cases which McCalden cites in support of his argument that 1985(3) should be expanded to include any group which alleges denial of First Amendment rights, Gutierrez v. City of Chicago, 605 F.Supp. 973, 977-978 (N.D. Ill. 1985) and Stevens v. Rifkin, 608 F.Supp. 710, 719-726 (N.D. Cal. 1985), are inapposite. Gutierrez involved an allegation of racial discrimination as well as discrimination based on political affiliations and activities. Stevens involved an allegation of violation of Fifth Amendment rights because of political affiliation, and was decided before the Ninth Circuit decisions in Gibson and Sundberg. Furthermore, McCalden has not even alleged that he is a member of a political group; all he has claimed is that he is a member of a group that claims that the Holocaust did not take place. No political affiliation of such a group is alleged.

constitutional rights only to members of racial groups, gender groups, aliens, illegitimates and homosexuals?" (Appellant's Brief at p. 56.)

The problem with McCalden's argument is that 1985(3), as narrowly interpreted by both the Supreme Court and Ninth Circuit, does not burden any fundamental rights. Section 1985(3) only provides a remedy to certain classes of persons whose rights are deprived, it does not create any substantive rights. See Scott, supra, 463 U.S. at 833 ("Section 1985(3) ... 'provides no substantive rights itself' to the class conspired against.")

The fact that 1985(3) does not provide a remedy to some persons or groups does not burden those persons' rights; it merely fails to provide a remedy. There can be no question that Congress can pass a law providing a remedy for certain types of discrimination, such as racial discrimination, and not others. By passing such a law, Congress has not burdened anyone's rights.

McCalden concedes that DeSantis holds that the Section 1985(3) remedy is available only to members of previously determined suspect or quasi-suspect classes. Nevertheless, McCalden argues that "[t]here is no need for a prior determination of suspectness in free speech cases, since potential defendants are already on notice of the scope of the First Amendment." (Appellant's Brief, page 51.)

This argument, however, entirely ignores two important principles applicable to Section 1985(3): (1) First, the limiting function that the class requirement in Griffin was

supposed to have, and (2) Second, notice has been given by this Court that Section 1985(3) does not apply to a group of persons alleging free speech or free association violations.

The Supreme Court in Griffin and Scott, and the Ninth Circuit in Gibson, Trerice, Sundberg and other cases, have made it clear that 1985(3) does not apply to all classes. The courts have made it clear that these limitations on the classes entitled to protection under Section 1985(3) are not based only on a notice requirement, but on the language of the statute itself, as well as its legislative history. The holdings in Scott, Gibson, Carchman, and Moats make it clear that the scope of 1985(3) cannot be expanded to include a class composed of those who allege infringement of free speech or association rights, and it is not just the lack of notice which prevents such an expansion.

Furthermore, even if this Court did decide to extend 1985(3) to encompass a class composed of those who allege infringement of free speech or association rights, in light of the fact that this expansion would be a departure from previous rulings, DeSantis would require that the rule be prospective only, and not apply to McCalden's case.

5. THIS IS NOT THE PROPER CASE IN WHICH TO OVERRULE PRIOR NINTH CIRCUIT DECISIONS AND GREATLY EXPAND THE SCOPE OF SECTION 1985(3).

McCalden has failed to demonstrate that he is a member of a class entitled to section 1985(3) protection for two reasons:

(1) First, he has failed to establish that the courts

have designated his alleged class as a suspect or quasi-suspect classification requiring more exacting scrutiny or that Congress has indicated through legislation that the class required special protection, as required by the DeSantis, Sundberg line of cases.

(2) Second, the class he alleges is at most a group of people claiming that their first amendment rights have been violated. This Court and other courts have specifically held that 1985(3) does not apply to a "class" comprised of persons alleging free speech or free association violations. Gibson, supra; Carchman, supra; Moats, supra.

Section 1985(3) was never intended to apply to a particular plaintiff who creates a class around himself, tailored to the particular discrimination he claims to have suffered. Garcia v. Board of Education, 498 F.Supp. 880, 881 (D.N.M. 1980). In Garcia, plaintiff's contract as school superintendent was canceled after he spoke out against the school board. Plaintiff's 1985(3) claim alleged that he was a member of a "class of school administrators concerned with proper administration of education." 498 F.Supp. at 881. The court dismissed the claim, holding that Section 1985(3) did not apply to a plaintiff who "creates a class around himself, tailored to the particular discrimination he claims to have suffered." 498 F.Supp. at 881.

The Supreme Court in Griffin and Scott indicated that the intent of Congress in enacting Section 1985(3) may have been only to protect "Negroes and those who supported them." In

Scott, the Court stated:

> "[I]t is a close question whether Section 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans. . . . The predominant purpose of Section 1985(3) was to combat the prevalent animus against Negroes and their supporters." 463 U.S. at 836.

Courts, including the Ninth Circuit, have expanded the coverage of 1985(3) beyond blacks and their supporters. In doing so, however, the courts have always made it clear that expansion of the classes entitled to 1985(3) protection must be very limited. See DeSantis, supra, Sundberg, supra. It would certainly turn the Congressional intent of Section 1985(3) on its head to extend its protection to a group that espouses racist and Nazi doctrine, advocating discrimination based on race and religion. These were the very groups against which Section 1985(3) was intended to provide protection.

Therefore, for the reasons set forth above, the District Court's dismissal of McCalden's 1985(3) claim should be affirmed.

B. THE DISTRICT COURT'S DISMISSAL OF McCALDEN'S SIXTH CLAIM FOR NEGLECT 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's sixth cause of action against the AJC, City of Los Angeles, Rabbi Hier, Westin and the Simon Wiesenthal Center

is based on 42 U.S.C. Section 1986. (See Appellant's Brief, page 60.)

In order to state a claim under Section 1986, there must be a valid claim for relief under 42 U.S.C. Section 1985. Trerice v. Pedersen, 769 F.2d 1398, 1402 (9th Cir. 1985) ("a cause of action is not provided under 42 U.S.C. 1986 absent a valid claim for relief under 1985"); Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 626 (9th Cir. 1988).

McCalden "concedes that a cause of action is not provided under sec. 1986 absent a valid claim for relief under sec. 1985." (Appellant's Brief, page 60.)

For the reasons set forth above in Section IV.A of this brief, McCalden has failed to state a claim for violation of 42 U.S.C. Section 1985(3). Therefore, McCalden cannot state a claim under Section 1986, and the District Court's dismissal of McCalden's Section 1986 claim should be affirmed.

C. 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.

1. McCALDEN CANNOT STATE A CLAIM FOR INTERFERENCE WITH CONTRACT BECAUSE HE CONCEDES THAT HE CANNOT ALLEGE ANY PECUNIARY OR ECONOMIC BENEFIT OBTAINED BY DEFENDANTS, WHICH IS A NECESSARY ELEMENT OF A CLAIM FOR INTERFERENCE WITH CONTRACT.

McCalden's second claim for relief is entitled "Interference with Contract" and alleges that defendants American Jewish