5. Fifth Cause of Action - Conspiracy to Interfere with Civil Rights against the American Jewish Committee, City of Los Angeles, Rabbi Hier, Westin Hotel Co., and the Simon Wiesenthal Center.

6. Sixth Cause of Action - Neglect to Prevent Conspiracy against the American Jewish Committee, City of Los Angeles, Rabbi Hier, Westin Hotel Co., and the Simon Wiesenthal Center.

7. Seventh Cause of Action - Violation of the Unruh Civil Rights Act against the American Jewish Committee, Westin Hotel Co., Rabbi Hier, and the Simon Wiesenthal Center.

8. Eighth Cause of Action - For Injunction against the City of Los Angeles.

## 2. PROCEEDINGS IN THE DISTRICT COURT.

On October 11, 1985, McCalden filed his original complaint in the United States District Court for the Eastern District of California. (CR 1.) On November 27, 1985, McCalden filed a First Amended Complaint. (CR 2.)

### a. Change of Venue to the Central District of California.

Because McCalden improperly filed the lawsuit in the Eastern District of California, all the defendants moved to transfer the case to the Central District. On June 17, 1986, Judge Ramirez filed an Order transferring the case to the Central District. (CR 38.)

### b. Dismissal of the Lawsuit By the United States District Court.

After the case was transferred to the Central District of

California, various defendants made various motions to dismiss, which were heard on November 17, 1986. McCalden filed a Countermotion For Leave to File a Second Amended Complaint, which was also heard on November 17, 1986. In response to these motions, the District Court entered three orders, on February 11, 1987, March 24, 1987, and March 31, 1987. In these three orders, the District Court granted McCalden's motion to file a Second Amended Complaint and dismissed all claims against all defendants.

### i. The February 11, 1987 Order

On February 11, 1987, the District Court (Marshall, J.) entered a "Memorandum Opinion Granting Moving Defendants' Motion to Dismiss." (CR 52, McCalden E.R. pp. 1-16.) As part of the February 11, 1987 Order, the District Court granted McCalden's motion to file the Second Amended Complaint. The District Court then analyzed the Second Amended Complaint in considering defendants' motions to dismiss. (McCalden E.R. p. 2, February 11, 1987 Order, p. 2 ft. nt. 2.) It is important to note that McCalden's attorney stated at oral argument on the motion to dismiss that he had made all the factual allegations in the Second Amended Complaint that he was able to make. (McCalden E.R. p. 86, Transcript of November 17, 1986 hearing p. 21.)

The District Court ordered that McCalden's first (breach of contract), second (interference with contract), fifth (conspiracy to interfere with civil rights, 42 U.S.C. Section 1985(3)), sixth (neglect to prevent conspiracy, 42 U.S.C. Section 1986) and seventh (Unruh Act) claims were dismissed with

prejudice for failure to state a claim upon which relief can be granted. (February 11, 1987 Order, p. 15, McCalden E.R. p. 15.)

The District Court dismissed the fourth cause of action (deprivation of rights, 42 U.S.C. Section 1983), the only remaining claim against Rabbi Hier and the Simon Wiesenthal Center, without prejudice, allowing McCalden 20 days to file a third amended complaint. The order stated that if McCalden did not timely file a third amended complaint, the fourth cause of action would be deemed dismissed with prejudice. (February 11, 1987 Order, p. 15, McCalden E.R. p. 15.)

ii. The March 24, 1987 Order

Because McCalden did not file a Third Amended Complaint within twenty days of the February 11, 1987 Order, Rabbi Hier and the Simon Wiesenthal Center requested the District Court to dismiss the fourth claim (deprivation of rights, 42 U.S.C. Section 1983) with prejudice, and to dismiss the entire lawsuit against them. In response to defendants' request, on March 24, 1987, the District Court entered an Order Granting Moving Defendants' Motion to Dismiss. (CR 54, McCalden E.R. pp. 55--56.) The order entered by the Court on March 24, 1987 states that "Plaintiff's entire lawsuit against defendants Rabbi Marvin Hier, Simon Wiesenthal Center, American Jewish Committee, California Library Association, Westin Hotel Co. and Westin Bonaventure Center, Inc. is dismissed with prejudice."

iii. The March 31, 1987 Order

On March 30, 1987, McCalden and the City of Los Angeles filed a Stipulation and Order For Dismissal of Claims Without Prejudice, requesting the District Court to dismiss the only

remaining claims against the City of Los Angeles, the only remaining defendant. On March 31, 1987, the District Court entered the Stipulation and Order For Dismissal of Claims Without Prejudice, dismissing all the remaining claims against the City of Los Angeles. (CR 55, McCalden E.R. pp. 57-58.)

**iv. The July 30, 1987 Order Denying Plaintiff's Motion For Entry of Judgment.**

On June 16, 1987, McCalden served a Motion For Entry of Judgment, requesting that the District Court enter judgment dismissing the action. (CR 60-63.)

Rabbi Hier and the Simon Wiesenthal Center opposed McCalden's Motion for Entry of Judgment, on the grounds that a final, appealable order had already been entered by the District Court. Rabbi Hier and the Wiesenthal Center argued that it was clear that McCalden had missed the deadline for filing an appeal, and was engaged in an attempt to revive the time period during which he could file an appeal. (CR 64.)

On July 30, 1987, the District Court filed an Order Denying McCalden's Motion For Entry of Judgment. (CR 71.) The District Court held that the February 11, 1987 and March 24, 1987 orders of dismissal became final and appealable when the District Court dismissed the remaining claims against the remaining defendant, on March 31, 1987. The District Court ruled that McCalden should have filed his notice of appeal with respect to the District Court's February 11 and March 24, 1987 orders shortly after he filed the stipulation dismissing the remaining claims against the City of Los Angeles. (CR 71, Order Denying

Plaintiff's Motion For Entry of Judgment, p. 4.)

## IV. ARGUMENT.

### A. SCOPE AND STANDARD OF REVIEW.

Rabbi Hier and the Simon Wiesenthal Center agree with McCalden's statement (Appellant's Brief p. 28) that the standard of review of a dismissal for failure to state a claim is de novo. Patee v. Pacific Northwest Bell Telephone Co., 803 F.2d 476, 477 (9th Cir. 1986).

Rabbi Hier and the Simon Wiesenthal Center argued in their Motion To Dismiss before the District Court that the alleged conduct of Rabbi Hier and the Simon Wiesenthal Center was Constitutionally protected and statutorily privileged under California Civil Code Section 47(2). (Motion To Dismiss, CR 12; Reply Memorandum Of Defendants Simon Wiesenthal Center and Rabbi Marvin Hier In Support of Motion To Dismiss, CR 26). However, because the District Court dismissed the Second Amended Complaint on other grounds, the District Court did not reach these issues. (Order entered February 11, 1987 p. 13 ft. nt. 4, McCalden E.R. p. 13.)

As discussed in Section IV.B, infra, if the decision below is correct on any grounds, it must be affirmed, even if the affirmance is based on grounds other than those relied on by the district court. In making a determination on an issue that was not relied on by the District Court, this Court must, of course, consider the matter de novo. Keniston v. Roberts, 717 F.2d 1295, 1300 (9th Cir. 1983).

B. THE DISTRICT COURT'S DISMISSAL OF ALL CLAIMS AGAINST RABBI HIER AND THE SIMON WIESENTHAL CENTER SHOULD BE AFFIRMED, BECAUSE THE ALLEGED CONDUCT OF RABBI HIER AND THE SIMON WIESENTHAL CENTER WAS CONSTITUTIONALLY PROTECTED AND STATUTORILY PRIVILEGED.

McCalden alleges in his Second Amended Complaint that the Simon Wiesenthal Center and Rabbi Hier performed the following acts:

1. It is alleged on information and belief that Rabbi Hier, acting individually and as dean of the Simon Wiesenthal Center, requested his City Councilman to introduce a City Council resolution regarding McCalden's participation in the California Library Association ("CLA") conference. It is alleged on information and belief that in so doing, Rabbi Hier misrepresented to his City Councilman the nature and purpose of McCalden's intended program at the CLA conference, McCalden's beliefs, and other matters. (CR 53, Second Amended Complaint para. 27, McCalden E.R. p. 24.)

2. It is alleged on information and belief that Rabbi Hier and/or the Simon Wiesenthal Center and/or the AJC sought and obtained the cooperation of public officials, including Mayor Tom Bradley, Assembly Speaker Willie Brown, State Senate President David Roberti, and Assembly Majority Floor Leader Mike Roos, as part of a conspiracy to pressure the CLA to cancel its contracts with McCalden, and that in furtherance of the conspiracy each of these officials contacted the CLA for the purpose of inducing the CLA to cancel the contracts. (CR 53,

Second Amended Complaint para. 36.)

3. It is alleged on information and belief that Rabbi Hier, acting individually and as dean of the Simon Wiesenthal Center, threatened to organize and organized a demonstration against McCalden's program, in order to pressure the CLA into canceling its contracts with McCalden. It is alleged on information and belief that Rabbi Hier knew and intended that the demonstration would create a reasonable probability of property damage and violence. (CR 53, Second Amended Complaint para. 32-33.)

4. It is alleged on information and belief that Rabbi Hier and/or the Simon Wiesenthal Center and/or the AJC allowed information concerning McCalden's exhibit and program to pass to members of certain militant, violence prone groups who thereupon made plans to attend and disrupt McCalden's program. (CR 53, Second Amended Complaint para. 34.)

5. It is alleged on information and belief that representatives of the American Jewish Committee ("AJC") contacted a representative of the CLA and informed him that if McCalden's contracts were not canceled, the CLA conference would be disrupted, there would be damage to property, and the CLA would be "wiped out." It is further alleged on information and belief that Rabbi Hier and the Simon Wiesenthal Center urged, requested, knew, and approved of this contact by the AJC. (CR 53, Second Amended Complaint para. 24.)

6. It is alleged on information and belief that the Simon Wiesenthal Center, at the direction of Rabbi Hier, rented a conference room at the Bonaventure Hotel for the same evening that McCalden had rented a conference room for his presentation.

(CR 53, Second Amended Complaint para. 29.) McCalden alleges on information and belief that the principal purpose that the Simon Wiesenthal Center rented the conference room was to position itself to be able to disrupt McCalden's program. (CR 53, Second Amended Complaint para. 30.)

Although the District Court did not reach the issue because it disposed of every claim against Rabbi Hier and the Simon Wiesenthal Center on other grounds, it is clear that the alleged acts of Rabbi Hier and the Simon Wiesenthal Center were constitutionally protected, under the First Amendment rights to petition government and freedom of speech and assembly, and statutorily privileged under Section 47(2) of the California Civil Code. The District Court's dismissal of the claims against Rabbi Hier and the Simon Wiesenthal Center should therefore be affirmed on this basis. 3/

1. **IN A CASE INVOLVING CONDUCT WHICH IS PRIMA FACIE PROTECTED BY THE FIRST AMENDMENT, COURTS MORE THOROUGHLY SCRUTINIZE THE PLEADINGS IN ORDER TO PREVENT A CHILLING OF THE DEFENDANT'S FIRST AMENDMENT RIGHTS**

The alleged conduct of Rabbi Hier and the Simon Wiesenthal Center is prima facie protected by the First Amendment rights of

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3. The rule is settled that in the review of judicial proceedings, if the decision below is correct on any grounds, it must be affirmed, even if the affirmance is based on grounds other than those relied on by the district court. Keniston v. Roberts, 717 F.2d 1295, 1300 n. 3 (9th Cir. 1983); Trerice v. Pedersen, 769 F.2d 1398, 1400 (9th Cir. 1985); Lowe v. City of Monrovia, 775 F.2d 998, 1007 (9th Cir. 1985); Helvering v. Gowran, 302 U.S. 238, 245, 58 S.Ct. 154, 157, 82 L.Ed. 224 (1937).

freedom of speech, freedom of association, freedom of assembly, and the right to petition the government for redress of grievances.

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). If First Amendment rights may be involved, in order to assure that First Amendment rights are not chilled by the mere pendency of a lawsuit, courts require more specific allegations than in a case not involving First Amendment rights. Franchise Realty, supra 542 F.2d at 1082-1083; Boone v. Redevelopment Agency of City of San Jose, 841 F.2d 886, 894 (9th Cir. 1988).

In Franchise Realty, plaintiffs sought permits from the city for construction of restaurants. Defendants, a restaurant employer association and labor union, opposed the grant of the permits. Plaintiffs brought an action against the defendants, claiming antitrust violations arising out of their opposition to the permits. Plaintiffs sought to file a second amended complaint in which they alleged that defendants had picketed, interfered with deliveries, and harassed customers at plaintiffs' restaurants. 542 F.2d at 1085. The District Court dismissed the first amended complaint without leave to amend and denied plaintiffs' motion for leave to file a second amended complaint.

The Ninth Circuit affirmed, stating the following:

"The Supreme Court has consistently recognized the sensitivity of First Amendment guarantees to the threat of harassing litigation, and has erected barriers to safeguard those guarantees. ...

"What we do hold is that in any case, whether antitrust or something else, 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.

"It is no answer to say that there are better ways in which the defendants can show the lack of merit of the action. Reference is usually made to a motion for summary judgment. But this is not an answer in most cases. We are told that the motion is usually inappropriate in complex cases. [Citation omitted.] Moreover, it takes little to establish a conflict of evidence as to a material fact . . . .

"The Supreme Court seems now to be aware of a fact long known to practitioners. The liberal discovery rules of the Federal Rules of Civil Procedure offer opportunities for harassment, abuse, and vexatious imposition of expense that can make the mere pendency of a complex lawsuit so burdensome to defendants as to force them to buy their peace regardless of the merits

of the case." 542 F.2d at 1082-83 (emphasis added).

See also Boone v. Redevelopment Agency of City of San Jose, 841 F.2d 886, 894 (9th Cir. 1988) ("Although we may be more generous in reviewing complaints in other contexts, our responsibilities under the first amendment in a case like this one require us to demand that a plaintiff's allegations be made with specificity.").

In the instant case, all of the allegations against Rabbi Hier and the Simon Wiesenthal Center impact on First Amendment rights. All Rabbi Hier and the Simon Wiesenthal Center allegedly did was petition their elected representatives, threaten to organize a demonstration, inform certain groups of McCalden's exhibit, urge the AJC to make certain statements to the CLA, and rent a conference room. This alleged conduct is at the heart of the First Amendment. Therefore, in examining McCalden's Second Amended Complaint, this Court must thoroughly scrutinize the pleadings and require specificity, in order to prevent a chilling of Rabbi Hier's and the Simon Wiesenthal Center's First Amendment rights.

**2. THE ALLEGED COMMUNICATIONS BETWEEN RABBI HIER AND THE SIMON WIESENTHAL CENTER ON THE ONE HAND AND GOVERNMENT OFFICIALS ON THE OTHER HAND WERE PROTECTED UNDER THE FIRST AMENDMENT RIGHT TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES AND CALIFORNIA CIVIL CODE SECTION 47(2).**

McCalden alleges on information and belief that Rabbi Hier, acting individually and as dean of the Simon Wiesenthal Center,

requested his City Councilman to introduce a City Council resolution regarding McCalden's participation in the CLA conference. McCalden further alleges on information and belief that in so doing, Rabbi Hier misrepresented to his City Councilman the nature and purpose of McCalden's intended program at the CLA conference, McCalden's beliefs, and other matters. (CR 53, Second Amended Complaint para. 27, McCalden E.R. p.24)4/

McCalden also alleges, on information and belief, that Rabbi Hier and/or the Simon Wiesenthal Center and/or the AJC sought and obtained the cooperation of public officials, including Mayor Tom Bradley, Assembly Speaker Willie Brown, State Senate President David Roberti, and Assembly Majority Floor Leader Mike Roos, to pressure the CLA to cancel its contracts with McCalden, and that each of these officials contacted the CLA for the purpose of inducing the CLA to cancel the contracts. (CR 53, Second Amended Complaint para. 36, McCalden E.R. p. 28.)

Rabbi Hier's and the Simon Wiesenthal Center's alleged conduct in contacting these government officials was constitutionally protected under the First Amendment's guarantee of the right to petition government for redress of grievances

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4. McCalden's allegation in the Second Amended Complaint paragraph 27 that Rabbi Hier made certain "misrepresentations" to his City Councilman is contradicted by McCalden's statement in his Memorandum In Opposition To Motions To Dismiss, Transfer, etc., filed in the District Court (CR 21, p. 43), that he "doesn't even know what defendant Hier said to Councilman Yaroslavsky." Nevertheless, even if McCalden's allegation that misrepresentations were made is accepted, such misrepresentations cannot form the basis for any claim because Rabbi Hier's statements were absolutely protected by the First Amendment and California Civil Code section 47(2), as discussed below.

and was absolutely privileged under California Civil Code Section 47(2). In fact, the alleged conduct constitutes the clearest case imaginable of the constitutionally protected right to petition the government for redress of grievances and of statutorily privileged conduct. As a result, McCalden cannot maintain any claim for relief based on these alleged communications between Rabbi Hier and the Simon Wiesenthal Center and government officials.

a. The Alleged Communications With Government Officials were Protected Under the First Amendment Right to Petition the Government for Redress of Grievances

The First Amendment guarantees "the right of the people ... to petition the government for a redress of grievances." This right is "among the most precious of the liberties safeguarded by this Bill of Rights." United Mine Workers of America v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967).

The First Amendment precludes civil liability for attempts to influence government to adopt a policy or law which results in damage to a plaintiff. Eastern R.R. Presidents Conference v. Noerr Freight, Inc., 365 U.S. 127, 135-137 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657, 669-71 (1965); Sierra Club v. Butz, 349 F. Supp. 934 (N.D. Cal. 1972) ("This court agrees that when a suit based on interference with advantageous relationship is brought against a party whose 'interference' consisted of petitioning a governmental body to alter its previous policy a privilege is created by this

guarantee of the First Amendment.")

The First Amendment also precludes liability for a private party for damages caused by governmental action induced by the private party. Pennington, supra, 365 U.S. at 135-137; Sierra Club, supra, 394 F. Supp. at 939 ("[L]iability can never be imposed upon a party for damage caused by governmental action he induced ... ").

The privilege to petition government is absolute and cannot be defeated by an allegation of malice. Pennington, supra, 381 U.S. at 669-71; Noerr, supra, 365 U.S. at 138-140; Sierra Club v. Butz, supra.

In Noerr, supra, the trial court found that defendant's sole purpose had been to inflict competitive injury and the tactic employed had been deceptive and unethical. Nevertheless, the Supreme Court stated that:

> "The right of the people to inform their representative in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. . . . Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. . . .
>
> "We . . . hold that, at least insofar as the railroads' campaign was directed toward obtaining

> governmental action, its legality was not at all affected by any anticompetitive purpose it may have had." 365 U.S. at 139-40.

See also United Mine Workers v. Pennington, supra, 381 U.S. at 670; 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 a 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"); Brownsville Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155 (3rd Cir. 1988) (in connection with claim for interference with contract, the court held that "liability cannot be imposed for damage caused by inducing legislative, administrative, or judicial action"); Havoco of America, Ltd. v. Hollobow, 702 F. 2d 643, 648-49 (7th Cir. 1983) (claim for tortious interference with business opportunity); Subscription T.V. v. Southern California Theatre Owners, 576 F. 2d 230, 233 (9th Cir. 1978).

The absolute protection of the First Amendment right to petition for redress of grievances also applies to civil rights claims. Evers v. County of Custer, 745 F.2d 1196, 1204 (9th Cir. 1984). In Evers, the plaintiff asserted claims against private citizens under the federal civil rights laws, for complaints that the private citizens made about the plaintiff to County Commissioners. The Ninth Circuit held that even though defendants expressed a "hostile attitude" toward plaintiff, the "activity falls within the first amendment's protection of the

right to petition the government for redress of grievances." See also Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 615 (8th Cir. 1980) (defendants who successfully petitioned city board of directors to rezone certain area to prevent plaintiff from constructing high-rise apartment not liable for violation of 42 U.S.C. Section 1983); First Nat'l Bank v. Marquette, 636 F.2d 195, 199 n.4 (8th Cir. 1980), cert. denied, 450 U.S. 1042 (1981) (42 U.S.C. Section 1983); Stern v. U.S. Gypsum, 547 F.2d 1329 (7th Cir. 1977), cert. denied, 434 U.S. 975 (1977) (42 U.S.C. Section 1985); Weiss v. Willow Tree, 467 F. Supp. 803 (S.D.N.Y. 1979) (42 U.S.C. Sections 1983 and 1985). 5/

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5. The only exception to the absolute protection discussed above is the so-called "sham exception," in which 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, nor has McCalden raised this issue on appeal. In fact, the complaint 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

(footnote continued on next page)

Applying the principles set forth above to the instant case, it is clear that the alleged conduct of Rabbi Hier and the Simon Wiesenthal Center, of requesting the City Councilman to introduce a City Council resolution and requesting other government officials to take action, is absolutely protected by the First Amendment. As discussed above, in Evers, supra, the act of complaining to county commissioners about plaintiff's activities, even with a hostile attitude, was found to be Constitutionally protected by this Court. Applying that holding to the instant case, the conduct of Rabbi Hier and the Simon Wiesenthal Center in complaining to their elected officials about McCalden's activities must also be found to be Constitutionally protected. This is exactly the type of activity that the First Amendment was meant to protect. 6/

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(footnote 5 continued)

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 alleged 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 the alleged success in achieving official action, clearly establish that the alleged acts do not fall within the sham exception.

6. Furthermore, as discussed above, the First Amendment precludes liability for a private party for damages caused by governmental action induced by the private party. Pennington, supra, 365 U.S. at 135-137; Sierra Club, supra, 394 F. Supp. at 939. For this reason as well, Rabbi Hier and the Simon Wiesenthal Center cannot be held liable for any damages which McCalden allegedly incurred as a result of the City Council Resolution or any other government actions.

b. The Alleged Communications with Government Officials were Privileged Under California Civil Code Section 47(2)

Civil Code Section 47(2) provides:

"A privileged publication or broadcast is one made---

1. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law.... "

The privilege provided by California Civil Code Section 47(2) is absolute and cannot be defeated by an allegation of malice. Scott v. McDonnell Douglas Corp., 37 Cal. App. 3d 277, 285, 112 Cal. Rptr. 609 (1974); Bledsoe v. Watson, 30 Cal. App. 3d 105, 110, 106 Cal. Rptr. 197 (1973).

Section 47(2) immunity applies to City Council members, Scott v. McDonnell Douglas Corp., 37 Cal. App. 3d 277, 112 Cal. Rptr. 609 (1974); Lake Country Estates v. Tahoe Reg. Plan, 440 U.S. 391 (1979), and to concerned citizens who communicate with their City Council. Scott v. McDonnell Douglas Corp., Supra, 37 Cal. App. 3d at 288; Brody v. Montalbano, 87 Cal. App. 3d 725 738, 151 Cal. Rptr. 206 (1978), cert. denied, 444 U.S. 844 (1979). Section 47(2) immunity also applies to communications between a constituent and the Assembly Speaker, State Senate President, and Assembly Majority Floor Leader. See Scott v. McDonnell Douglas Corp., 37 Cal. App. 3d 277, 112 Cal. Rptr. 609 (1974).

The absolute immunity provided by Civil Code Section 47(2) applies to statements made before the City Council, Scott v.

McDonnell Douglas Corp., supra, 37 Cal. App. 3d at 286-88, and to letters written to City Council members. King v. Borges, 28 Cal. App. 3d 27, 34, 104 Cal. Rptr. 414 (1972); Bledsoe v. Watson, 30 Cal. App. 3d 105, 110, 106 Cal. Rptr. 197 (1973); Brody v. Montalbano, Supra, 87 Cal. App. 3d at 733.

Section 47(2) immunity specifically applies to claims for inducing breach of contract. Brody v. Montalbano, Supra, 87 Cal. App. 3d at 738; Financial Corporation of America v. Wilburn, 189 Cal.App. 3d 764, 771, 234 Cal.Rptr. 653 (1987); Forro Precision, Inc. v. International Business Machines Corp., 745 F.2d 1283 (9th Cir. 1984), cert. denied, 471 U.S. 1130 (1980); Hancock v. Burns, 158 Cal. App. 2d 785, 323 P.2d 456 (1958). As the court stated in Brody v. Montalbano, Supra, 87 Cal. App. 3d at 738:

> "It has been determined that justification for interference with contractual relations is closely analogous to privilege in defamation, and that the tort of inducing breach of contract cannot be used to close the channel of communication through which citizens may express their grievances to public officials."

Application of the principals set forth above to the allegations in McCalden's Second Amended Complaint makes clear that the alleged communications, between Rabbi Hier and the Simon Wiesenthal Center on the one hand and their City Councilman and members of the California legislature on the other hand, were absolutely privileged under California Civil Code Section 47(2). This privilege was designed to apply to

the very type of communications with the specific public officials which McCalden has alleged.

3. **THE ALLEGED ACTS OF RABBI HIER AND THE SIMON WIESENTHAL CENTER OF THREATENING TO ORGANIZE A DEMONSTRATION, INFORMING CERTAIN GROUPS OF MCCALDEN'S EXHIBIT, URGING THE AJC TO MAKE CERTAIN STATEMENTS, AND RENTING A CONFERENCE ROOM, WERE PROTECTED UNDER THE FIRST AMENDMENT RIGHTS OF FREEDOM OF SPEECH AND FREEDOM OF ASSEMBLY**

McCalden alleges that Rabbi Hier and the Simon Wiesenthal Center threatened to organize a demonstration, informed certain groups of McCalden's exhibit, urged the AJC to make certain statements to the CLA, and rented a conference room.

Threatening to organize a demonstration, informing others of an exhibit, urging another organization to make certain statements, and renting a conference room, are protected under the First Amendment rights of freedom of speech and freedom of assembly. N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982); Thornhill v. Alabama, 310 U.S. 88, 99, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed. 2d 1 (1971); Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); Alliance to End Repression v. City of Chicago, 742 F.2d 1007 (7th Cir. en banc 1984).

In N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982), white merchants in

Mississippi who had been damaged as a result of a civil rights boycott sued participants in the boycott, including Charles Evers, and civil rights organizations. During the boycott, blacks who had violated the boycott were publicly branded as traitors to the black cause, called demeaning names, and socially ostracized. 458 U.S. at 904. Charles Evers, one of the leaders of the boycott, threatened blacks that "If we catch any of you going in any of them racist stores, we're gonna break your damn neck" and stated that boycott violators would be "disciplined by their own people." 458 U.S. at 902. Violence did take place: shots were fired at houses, a brick was thrown through a windshield, a flower garden was damaged. 458 U.S. at 904.

The Supreme Court held that the statements made by Charles Evers and the social coercion exercised against persons who did not comply with the boycott were constitutionally protected. The Court stated the following regarding the social coercion exercised against boycott violators:

> "Petitioners admittedly sought to persuade others to join the boycott through social pressure and the 'threat' of social ostracism. Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action." 458 U.S. at 909-910.

The Supreme Court in Claiborne Hardware recognized not only that a nonviolent, politically motivated boycott is constitutionally protected, but also that such constitutional