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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

AUDREY PARKS SHABBAS, et al.,)	NO. 951031
)	
Plaintiffs,)	PLAINTIFFS' MEMORANDUM OF
)	POINTS AND AUTHORITIES IN
v.)	OPPOSITION TO DEFENDANT
)	ADL'S MOTION FOR
ANTI-DEFAMATION LEAGUE OF B'NAI)	PROTECTIVE ORDER AND IN
B'RITH, et al.,)	SUPPORT OF PLAINTIFFS'
)	MOTION TO COMPEL DOCUMENT
Defendants.)	<u>PRODUCTION</u>

Date: October 6, 1993
Time: 3:30 p.m.
Dept: 14

I. INTRODUCTION

The motions before the Court, Plaintiffs' Motion to Compel and Defendant ADL's Motion for a Protective Order, raise as important issues of Constitutional Law as the courts of California and nation have ever faced.

At issue is the balancing of four treasured constitutional rights which lie at the heart of the American experiment in a free democracy:

- (1) the right to truth in the judicial process;
- (2) the right to free expression and assembly in

1 political debate, unthreatened by retribution;

2 (3) the right of a free press to keep the citizenry
3 informed, particularly of secret criminal or unethical conduct
4 and the fitness of individuals to hold police office; and

5 (4) the right of individuals to privacy.

6 The balancing of these four constitutionally-protected
7 rights is presented in an unusual case, that of a powerful
8 private organization, with 31 national offices and international
9 offices throughout the world which for over 30 years has
10 vigorously and publicly pursued the praiseworthy goal of ending
11 bigotry against an ethnic minority.

12 Its very name, The ANTI-DEFAMATION LEAGUE OF B'NAI
13 B'RITH, evidences this benign public purpose.

14 But the ADL has a private side as well. As described
15 in the declarations submitted by Plaintiffs, the ADL for years
16 has secretly cultivated police officers to provide illegally-
17 disclosed information on private individuals and organizations
18 solely because of their expression or participation in political
19 activities opposed to the policies of Israel and South Africa.

20 The ADL has secretly disseminated its information to
21 both its national network of offices, members and supporters in
22 the United States, and on occasion to the governments of Israel
23 and South Africa.

24 Further the ADL has used this information to damage
25 the reputation and interfere with the gainful employment of
26 individuals who have expressed opposition to Israeli and South
27 African policies.

28 The ANTI-DEFAMATION LEAGUE's political targets have

1 included organizations as widely diverse as the Asian Law
2 Caucus, the American Civil Liberties Union, Mills College and
3 the University of California as well as individuals supporting
4 Proposition W and Palestinian Rights or opposing intervention in
5 Nicaragua or apartheid in South Africa.

6 The issue which ADL has presented in this case by its
7 motion is relatively simple: Can ADL protect its sources and
8 processes of obtaining and distributing private government
9 information from discovery by private individuals about whom it
10 has collected such information?

11 To protect its sources and processes, ADL seeks to
12 invoke the qualified constitutional free press protections
13 afforded public newspaper publishers in the landmark case of
14 Mitchell v. Superior Court, (1984) 37 Cal.3d 268, 208 Cal.Rptr.
15 152, 690 P.2d 635.

16 II. NARROWING THE ISSUE

17 For the purpose of contesting Defendant ADL's Motion
18 for Protective Order and in support of Plaintiffs' Motion to
19 Compel compliance with Plaintiff's Document Demand, Plaintiffs
20 withdraw that portion of their Demand which goes beyond
21 information pertaining to the nineteen named Plaintiffs and the
22 forty-three additional persons and seven organizations who have
23 specifically authorized Plaintiffs' counsel to represent them.¹

24 III. FACTUAL BACKGROUND

25 This action for invasion of privacy was filed on April
26 14, 1993 by nineteen Plaintiffs, each of whom had spoken out
27

28 ¹ Declaration of Paul N. McCloskey, Jr., Exhibit "A".

1 against apartheid in South Africa and/or Israeli policies and
2 conduct toward the Palestinians.

3 The San Francisco Police Department had been engaged
4 for several months in a widely-publicized investigation of
5 Officer Thomas Gerard who had allegedly illegally disclosed
6 police and government records, not otherwise public, to a paid
7 investigator for the Anti-Defamation League of B'nai B'rith
8 (ADL), Roy Bullock, acting under the direction of Richard
9 Hirschhaut, Director of the ADL's San Francisco office. This
10 investigation ultimately resulted in search warrants and the
11 search of ADL's offices in Los Angeles and San Francisco in
12 December, 1992 and April, 1993.

13 The charging allegations of Plaintiffs' Complaint were
14 essentially three: that the ADL Defendants (1) had invaded
15 Plaintiffs' privacy by secretly gathering information about
16 Plaintiffs, including confidential information from government
17 records, (2) had disclosed such information to its network
18 around the United States and abroad in violation of California
19 Civil Code §1798.53, and (3) had disclosed such information
20 intending to discredit Plaintiffs and cause them loss of
21 reputation, jobs or economic benefit. (Complaint, par. 11).

22 In April 1993, Judge Lenard D. Louie of this Court, in Case
23 No. 1423873, ordered public release of the Declaration of Police
24 Inspector Ron Roth with attachments which included admissions by
25 Bullock and another ADL investigator, David Gurvitz, that the
26 following facts were true:

- 27 1. For over 30 years Bullock was a paid covert
28 investigator for the ADL who cultivated contacts with
law enforcement officers such as Gerard, and furnished
the ADL with information such as drivers licenses from

- 1 government files. (Roth, p. 209, 484-7, 536.) Bullock
2 always provided the ADL with written reports. (Roth,
3 p. 212.)
- 4 2. Gurvitz, who worked in ADL's Los Angeles office, could
5 and did get driver's license numbers from Bullock
6 (Roth, p. 532); license plate information in ADL's
7 files "had to have been supplied by a law enforcement
8 official." (Roth, p. 533.)
- 9 3. The ADL routinely collected information on persons
10 engaged in anti-apartheid activities in the United
11 States (Roth, pp. 526 - 527) because the ADL was
12 "sensitive to the public's perceptions regarding the
13 degree of contact and cooperation between Israel and
14 South Africa;" (Roth, p. 527) Bullock gave
15 information on San Francisco Bay Area anti-apartheid
16 groups to the Government of South Africa (Roth, p.
17 500.)
- 18 4. Bullock had a clandestine relationship with the South
19 African Government, which paid him for information on
20 U.S. citizens in "crisp \$100 bills." (Roth, pp. 524
21 and 526.)
- 22 5. ADL memos generated in Los Angeles were routinely sent
23 to the New York and San Francisco ADL offices. (Roth,
24 pp. 534.)
- 25 6. The use of the term "official friends" in ADL parlance
26 meant a law enforcement source and was treated
27 confidentially. (Roth, p. 535.)
- 28 7. The ADL periodically sponsored trips to Israel for
U.S. law enforcement officers (Roth, pp. 150 and 536);
the Los Angeles office received information from other
law enforcement officers, including driver's license
information. (Roth, p. 536)
8. Bullock had the ability to obtain access to
computerized law enforcement data bases (Roth, p. 536)
9. On at least one occasion the ADL furnished information
to the Israeli Government about an Arab American about
to travel to Israel. (Roth, p. 537)
10. Of several hundred organizations included in Gerard's
and Bullock's computers the following 40 are exemplary
(Roth, pp. 103, 649-727):
1. Free Mose Mayekiso Committee (Roth, p. 650)
 2. San Francisco Anti-Apartheid Committee (Roth, p.
650)

- 1 3. Arab American Democratic Club (Roth, p. 652)
- 2 4. Arab American University Graduates (Roth, p. 652)
- 3 5. National Association of Arab Americans (Roth, p. 652)
- 4
- 5 "PINKO" Organizations
- 6 6. American Indian Movement (Roth, p. 655)
- 7 7. Artists Against Apartheid (Roth, p. 655)
- 8 8. Asian Law Caucus (Roth, p. 655)
- 9 9. Bay Area National Conference of Black Lawyers (Roth, p. 656)
- 10 10. Black Studies Dept., S.F. State (Roth, p. 656)
- 11 11. Canadians for Justice in the Middle East (Roth, p. 657)
- 12 12. Center for Middle East Studies, Berkeley (Roth, p. 657)
- 13 13. General Union of Palestinian Students (Roth, p. 660)
- 14 14. Irish Northern Aid Committee (Roth, p. 660)
- 15 15. Independent Grocers Association (Roth, p. 660)
- 16 16. International Jewish Peace Union (Roth, p. 660)
- 17 17. Israelis Against Occupation (Roth, p. 661)
- 18 18. Lawyers' Committee on Central America (Roth, p. 661)
- 19 19. New Jewish Agenda (Roth, p. 662)
- 20 20. Pacifica Foundation (Roth, p. 663)
- 21 21. Proponent of Measure J (Roth, p. 665)
- 22 22. San Francisco Women for Peace (Roth, p. 665)
- 23 23. Women in Black - Initials JEW (Roth, p. 668)
- 24 24. Yes on W Committee (Roth, p. 668)
- 25 25. Young Koreans United (Roth, p. 668)
- 26 26. American Civil Liberties Union (Roth, p. 682)

- 1 27. Harvey Milk Club - Initials GAY (Roth, p. 690)
- 2 28. Japanese American Citizens' League (Roth, p. 692)
- 3 29. Middle East Labor Bulletin (Roth, p. 693)
- 4 30. Mills College (Roth, p. 693)
- 5 31. Mother Jones (Roth, p. 693)
- 6 32. NAACP (Roth, p. 696)
- 7 33. Oakland Education Association (Roth, p. 696)
- 8 34. Peace and Freedom Party (Roth, p. 697)
- 9 35. Rainbow Coalition (Roth, p. 699)
- 10 36. U.S. China Friendship Association (Roth, p. 702)
- 11 37. United Farm Workers (Roth, p. 702)
- 12 38. United Auto Workers (Roth, p. 702)
- 13 39. Vietnam Veterans Action (Roth, p. 703)
- 14 40. Womens International League for Peace & Freedom
(Roth, p. 703)
- 15 11. Bullock received his ADL salary from Los Angeles
16 attorney Bruce Hochman who in turn received it from
the ADL (Roth, p. 101)
- 17 12. Of the 9,876 files maintained by Bullock in computer
18 files, 1394 drivers licenses and license plates were
19 listed, or roughly 14%. Of the 7011 files maintained
20 in the relevant data bases of Gerard's computer, the
21 San Francisco Police Department located 824 references
22 to drivers licenses and license plates, or roughly
23 12%. There was also FBI, CIA and local criminal
history information in both Gerard's and Bullock's
24 files. From this information Inspector Roth concluded
25 that "Roy Bullock and the ADL had numerous peace
26 officers supplying them with confidential criminal and
DMV information." (Roth, p. 103)
- 27 13. Bullock was also engaging in wiretapping and his
28 reports were left on Hirschhaut's desk. (Roth, pp.
106-107) Inspector Roth concluded Bullock was
directed by ADL's National Director, Irwin Suall as
well as by Hirschhaut. (Roth, p. 110)
14. Any Arab American with anti-Israel leanings would be
reflected in ADL's Los Angeles files. The Arab
American Anti-Discrimination Committee had numerous
ADL references and files. (Roth, p. 109)

1 15. For each successful inquiry by the ADL to a law
2 enforcement officer for confidential information Roth
3 believed a Penal Code §182 felony conspiracy charge
4 would lie. (Roth, p. 109)

5 **IV. LEGAL PROCEEDINGS IN ACTION NO. 1423873**

6 On February 11, 1993, the San Francisco City
7 Attorney's and District Attorney's offices moved this Court, the
8 Honorable Lenard D. Louie presiding, for an order permitting the
9 release of the Bullock, Gerard and ADL files to the victims of
10 Gerard's, Bullock's and ADL's alleged unlawful acts.
11 (Plaintiff's Request for Judicial Notice, Exhibit C)

12 The motion was based on the February 9, 1993
13 Declaration of Police Captain John E. Willett who stated that a
14 large group of Arab-Americans proposing to travel to Israel were
15 concerned for their safety, and that the San Francisco Police
16 Commission had proposed limited disclosure of evidence obtained
17 under the search warrants to the persons named therein.
18 (Judicial Notice Request Exh. B)

19 As of September 6, 1993, however, only two of the
20 Plaintiffs whose requests had been submitted as early as
21 February, 1993 under the Commission's procedures had received
22 their files from the District Attorney's Office. (Declarations
23 of Blankfort, Zeltzer, Shabbas, Aljouny, Edwards, and Helen
24 Hooper McCloskey)

25 A criminal complaint was filed against Gerard in May
26 1993, charging multiple violations of the Government and Penal
27 Codes, unlawful conspiracy to disclose confidential information,
28 and on at least 10 occasions delivering confidential government
records to Bullock or the ADL. (Judicial Notice Request Exh. D,

1 p. 23)

2 No criminal conspiracy charges have yet been filed
3 against either Bullock or the ADL.

4 Despite Plaintiffs' request for release to them of the
5 files containing their names, police indexing of the ADL files
6 has not yet been accomplished and the City Attorney cannot yet
7 set a future date for such completion and tender to Judge Louie
8 for his in camera inspection and decision as to their release.
9 (Declaration of Paul N. McCloskey, par. 4)

10 V. THE DOCUMENTS SOUGHT TO BE PRODUCED

11 Plaintiffs' Document Production Demand includes seven
12 basic categories of information from January 1, 1983 to the
13 present time:

14 1. Files and documents maintained by ADL which
15 include Plaintiffs' names.

16 2. Communications to or from the ADL pertaining to
17 Plaintiffs.

18 3. Communications to or from Defendant ROY BULLOCK:

19 (a) from or to Defendant RICHARD HIRSCHHAUT;

20 (b) from or to any government officer or agency
21 with reference to information sought or
22 received by BULLOCK on Plaintiffs; and

23 (c) from or to ADL attorney Bruce Hochman.

24 4. Communications to or from Hochman relating to
25 BULLOCK, BULLOCK's job assignments, work product and/or
26 compensation.

27 5. All communications relating to trips to Israel
28 sponsored by ADL for U.S. law enforcement personnel or other

1 government employees having access to government records not
2 available to the general public.

3 6. Copies of the ADL records seized by the San
4 Francisco Police Department from the Los Angeles and San
5 Francisco offices in its recent searches.

6 7. Publications distributed by the ADL containing the
7 names of Plaintiffs.

8 VI. DEFENDANT ADL'S OBJECTIONS

9 ADL objects to all but one of Plaintiff's document
10 requests. In response to Document Demand No. 7, Defendant ADL
11 has offered to make its public publications available for
12 inspection, but not its private blacklists nor its
13 communications about Plaintiffs circulated within ADL.

14 ADL has listed fourteen (14) objections to Plaintiffs'
15 other demands² and now seeks a protective order against all
16 disclosures save its public publications. ADL's memo focusses
17 on ADL's status as a journalist, and the balancing or "qualified
18 privilege" test established for journalists by the landmark case
19 of Mitchell v. Superior Court, (1984) 27 Cal.3d 268.

20 VII. ADL'S NON-PROTECTED ACTIVITY

21 Plaintiffs do not oppose ADL's historic and
22 praiseworthy purpose of educating the public on anti-Semitism
23 and bigotry. Plaintiffs concede that ADL's public journalistic
24 activities are Constitutionally-protected.

25 But ADL's activities go far beyond accepted journalist
26 activity intended for education of the public. (It should be
27

28 ² Rosenfeld Declaration, Exhibit "B".

1 noted here that both California Constitutional and statutory
2 protections are founded on protecting those who publish to the
3 public. See Calif. Const. Art. I, Section 2(b) and Evidence
4 Code §1070.)

5 ADL engages in political activity and in the secret
6 collection of information for political use against critics of
7 apartheid and Israeli policies. In the November 1983 blacklist
8 attached as Exhibit A to the Shabbas Declaration, privately
9 circulated from ADL's Boston office to ADL's network around the
10 world, the introduction, stamped "CONFIDENTIAL," states:

11 "THE PURPOSE OF THIS BOOKLET IS TO IDENTIFY THE
12 LEADING INDIVIDUALS AND ORGANIZATIONS WHICH HAVE
MOUNTED CAMPUS CAMPAIGNS AGAINST ISRAEL"

13 (Shabbas Declaration, Exhibit A, p. 3)

14 The cover letter transmitting the blacklist states:

15 "One note of caution -- this booklet should be
16 considered confidential. Although most of the
17 information contained in it is derived from public
sources, it could easily be misconstrued...."
(emphasis added)

18 (Shabbas Declaration, Ex. A, p. 1,
19 bottom)

20 When ADL argues as it does that ADL should be entitled
21 to "no less protection" than the New York Times, Washington Post
22 or CBS News (ADL memo, p. 3) with regard to this private
23 distribution of illegally-obtained confidential information,
24 ADL's argument seems almost facetious.

25 The Boston blacklist contains the names of Plaintiff
26 Yigel Arens, the husband of Plaintiff AUDREY SHABBAS, and the
27 organization of which he was president, the Association of Arab
28 American University Graduates. None of these are public figures

1 whose names might be of interest to The Times, The Post or CBS
2 News. The ADL file Plaintiff Blankfort received from Deputy
3 District Attorney Dwyer is headed with the words:

4 "The following information was supplied on a
5 confidential basis by an official source." (emphasis
6 added) (Blankfort Declaration, Exhibit A)

7 ADL's use of the word "official" indicates a law
8 enforcement source. (Roth, p. 535.)

9 ADL makes no contention that the information obtained
10 on Blankfort, Shabbas, Zeltzer and Arens was intended to be
11 published to the public. The four documents thus far obtained,
12 the 1983 memos from Boston and New York (Exhibits A to the
13 Declarations of Shabbas and Helen Hooper McCloskey) and the ADL
14 files on Blankfort and Zeltzer (Exhibits A to their respective
15 Declarations) indicate an intended distribution solely within
16 ADL and its membership.

17 The Declaration of Audrey Shabbas documents three
18 instances where ADL information was provided to third parties
19 to inhibit her employment opportunities as an educator on Arab
20 art and culture.

21 The Declaration of Colin Edwards indicates that he
22 lost his job as a news commentator because of ADL interference.

23 The ADL's Zeltzer file lists his drivers license
24 number. This record is confidential. Its unauthorized
25 disclosure is a misdemeanor, (See Vehicle Code §1808.46). Both
26 obtaining and distributing that license number is subject to
27 civil penalties to the DMV. (Veh. Code §1808.47)

28 ///

1 VIII. THE MITCHELL QUALIFIED PRIVILEGE DOES
2 NOT EXTEND TO ADL'S NON PROTECTED
3 ACTIVITIES

4 It must be emphasized that Mitchell does not prevent
5 discovery of relevant information from defendant journalists.

6 Mitchell indeed emphasized the importance of the right
7 to discovery. The Court quoted Justice Stewart in Garland v.
8 Torre, (2nd Cir. 1958) 259 F.2d 545, cert. denied, 358 U.S. 910,
9 79 S.Ct. 237, 3 L.Ed.2d 231, where he said:

10 "The concept that it is the duty of a
11 witness to testify in a court of law has
12 roots fully as deep in our history as does
13 the guarantee of a free press." (259 F.2d
14 at 548, cited in Mitchell, 37 Cal.3d at 275)

15 Such language is consistent with the Court's previous directive
16 that the discovery statutes should be liberally construed. See,
17 for example, Greyhound Corporation v. Superior Court, (1961) 56
18 Cal.2d 355, 384, 15 Cal.Rptr. 90, 104. This is also the general
19 policy of the San Francisco Superior Court:

20 "The policy of the law is one of liberality
21 in allowing discovery. Doubt will be
22 resolved in favor of permitting discovery."
23 (City and County of San Francisco Discovery
24 Manual of the Superior Court, Rule 301A)

25 It is within this context favoring discovery that the
26 California Supreme Court rendered its decision in Mitchell.

27 It is elemental that the First Amendment does not
28 afford journalists immunity from liability for invasion of
29 privacy by criminal or tortious conduct. In Rosato v. Superior
30 Court, (1975) 51 Cal.App.3d 190, 218, 124 Cal.Rptr. 427, 446,
31 the Court concluded:

32 As the Supreme Court pointedly observed in Branzburg
33 v. Hayes, supra, 408 U.S. at pages 691-692, 92 S.Ct.
34 at p. 2662: