No. A106618

In the Court of Appeal

Of the State of California

First Appellate District

Division 2

HEBREW ACADEMY OF SAN FRANCISCO,

Plaintiffs and Appellants,

v.

RICHARD N. GOLDMAN,
SAN FRANCISCO JEWISH FEDERATION, et al.

Defendants and Respondents.

# APPELLANTS OPENING BRIEF

Appeal from San Francisco County Superior Court
Case No. 414796
The Honorable Ronald E. Quidachay

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## STATEMENT OF APPEALABILITY

This appeal is taken from a final judgment following the grant of a motion for summary judgment and is appealable pursuant to Code of Civil Procedure section 904.1.

## STATEMENT OF THE CASE

Plaintiff and appellant Hebrew Academy of San Francisco ( Hebrew Academy ) and its founder, Rabbi Pinchas Lipner, initially filed a complaint on November 18, 2002 against defendants/respondents Richard N. Goldman, San Francisco Jewish Community Federation ( SFJCF ), and San Francisco Jewish Community Endowment Fund ( JCEF ), a division of SFJCF (collectively the Federation defendants ). In a First Amended Complaint filed on December 19, 2002, plaintiffs added the Regents of the University of California ( Regents ) as defendants. (Appellants Appendix ( AA ) 1.)

The Federation defendants filed a demurrer to the First Amended Complaint on the grounds that the case was barred by the statute of limitations, which the court sustained with leave to amend. (AA 9.) After plaintiffs filed a Second Amended Complaint for Damages

for Defamation ( SAC ; AA 15), the defendants demurred again, once more relying on the statute of limitations. (AA 23.) The court overruled the demurrers, (AA 35), and the Federation defendants answered the SAC on June 18, 2003. (AA 58.)

The Regents filed a motion to strike pursuant to Code of Civil Procedure section 425.16, which the court granted on July 29, 2003. (AA 109.)[1]

The Federation Defendants filed a motion for summary judgment on or about November 20, 2003, relying primarily on a declaration and exhibits that had been filed by the Regents in support of their motion to strike. (AA 112; see especially AA 356-742.) Although the motion raised other potential defenses, the court granted summary judgment solely on the basis of the statute of limitations. (AA 340; Reporter s Transcript 13-14.) Judgment pursuant to that order was filed on March 25, 2004, and this appeal followed. (AA 346-51.)

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[1] Appellants initially appealed from this order in Case No. A105168, but have since dismissed that appeal. Appellants have also filed an appeal from the court s award of attorney fees to the Regents, which is pending. (Case No. A106905.)

## STATEMENT OF FACTS

### A. ORIGINS OF THE ORAL HISTORY PROJECT

In 1989-90, the JCEF division of the SFJCF agreed to provide $60,000 in funding for a series of interviews of former Federation officials to be conducted under the auspices of the Regional Oral History Office ( ROHO ), a part of the University s Bancroft Library. (Deposition of Phyllis Cook ( Cook Dep. ) 22:20-23:18 ,30:4-9, 32:14-33:16, 99:24-100:14, and Ex. 18 pp. 9, 15-16, 18-23, attached as Exhibit 2 to Declaration of Paul Kleven ( Kleven Dec. ); AA 246, 248-49, 259, 269, 275-76, 278-83.)

In exchange for the funding, ROHO was to interview the officials, produce transcripts of the interviews for review by the interviewees and the Federation, and ultimately produce the corrected transcripts in a series to be called the Jewish Community Federation Oral History Project ( Oral History Project ). (Cook Dep. 37:18-38:2, and Ex. 18 pp 1-4, 8, 15-16; AA 250, 261-64, 268, 275-76.)

### B. PREPARATION AND LIMITED DISTRIBUTION OF TRANSCRIPT OF INTERVIEWS

ROHO employee Eleanor Glaser interviewed former

Federation president Richard Goldman on four occasions from April 27 to May 13, 1992. (Transcript of Goldman interviews ( Transcript ) p. xiv, attached as Ex. E to Declaration of Shannon Page ( Page Dec. ), which is attached as Ex. 2 to Declaration of Bradley M. Zamczyk ( Zamczyk Dec. ); AA 456[2].) Mr. Goldman received an advance transcript of the interviews for review and carefully made a substantial number of changes. (Transcript p. xv; AA 457; Declaration of Eleanor Glaser ( Glaser Dec. ) ¶ 2 and Ex. A, Ex. 3 to Kleven Dec.; AA 285.) Mr. Goldman denies receiving such an advance transcript, denies that he ever did more than glance at the transcript, and has no recollection of making any changes. (Deposition of Richard N. Goldman 13:11-14,

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[2] For the convenience of the court and the parties, appellants have made the Zamczyk Dec., to which are attached the nearly 400 pages of the Page Dec. and its exhibits, a separate volume of the Appellants Appendix. The Federation Defendants simply copied the entire Page Dec. and exhibits, which had originally been submitted by the Regents in support of the motion to strike, and attached them as Exhibit 2 to the Zamczyk Dec. (AA 356.)
Exhibits 1 and 3 to the Zamczyk Dec. were copies, respectively, of the Second Amended Complaint and the order granting the Regents motion to strike, (AA 356), and can be found where they appear chronologically in the Appendix at AA 15-22 and 109-13.

22:2-5, 22:24-25:1, 67:16-68:2, 163:12-24, Exhibit 1 to Kleven Dec; AA 204-06, 211, 226.)

Although the Transcript s cover sheet carries a copyright notice dated 1993, (AA 428), it was not actually produced until a reception held by the Federation in 1996 to honor a number of its benefactors. (Cook Dep. 46:19-49:15, Exhibit K to Page Dec.; AA 252, 674-76.) A copy of the Transcript was presented to Mr. Goldman at that time, but there was no discussion at the reception of the contents of the Transcript, and apparently neither Mr. Goldman nor any representative of the Federation read it at the time. (Cook Dep. 49:16-50:5, 51:1-3; AA 252; Goldman Dep. 72:4-9; AA 212.)

Mr. Goldman did not believe anyone would ever read the Transcript, and is not aware of anyone who ever has. (Goldman Dep. 96:9-23, 163:25-164:3, 187:24-188:9; AA 215, 226, 229.) Ms. Cook has no idea who might read any of the oral histories. (Cook Dep. 83:15-84:3; AA 257.) No one notified Rabbi Lipner of the statements, and neither Mr. Goldman nor Ms. Cook is aware of any means by which Rabbi Lipner could have become aware of the statements made about him. (Goldman Dep. 164:4-166:6, 167:15-168:13; AA 226-27; Cook Dep. 75:20-24; AA 256.)

Mr. Goldman is not aware of any copies of the Transcript except for one that is in his possession. (Goldman Dep. 72:10-22; AA 212.) The Federation is only aware of the location of the one copy it has, though it also purchased a copy for each of Mr. Goldman s three children. (Cook Dep. 27:1-28:3 and Ex. 18 p. 5; AA 247, 265.)

Transcripts of the ROHO interviews, including the Goldman Transcript, are kept at the Bancroft Library on the University of California campus, but the transcripts themselves are not readily available for viewing by the public. The transcripts are kept in the stacks, to which the general public does not have access, and must be specifically requested based on a review of the card catalog. Even after the transcripts are obtained, a member of the public cannot make copies, but must request copies of pages from the library. (Declaration of Miriam Real ( Real Dec. ) ¶ 3; AA 199.)

There was also evidence, to which objection was made, that the Transcript was available in a few other libraries, and was referred to in various indices. (AA 179-84, 334-35, 358-61, 625-38, 647-72.)

Rabbi Lipner had no knowledge of the defamatory

statements until on or about December 28, 2001, when a researcher provided him with copies of pages from the Goldman transcript containing the defamatory statements, which she had just discovered. (Lipner Dec. ¶ 9; AA 194-95; Real Dec. ¶ 4; AA 199.) Prior to that time, Rabbi Lipner had no knowledge of the interviews or of the defamatory statements, and none of the defendants ever advised plaintiffs that such defamatory statements had been made. (Lipner Dec. ¶ 9; AA 194-95.)

### C. THE TRANSCRIPT CONTAINS A NUMBER OF DEFAMATORY STATEMENTS MADE BY MR. GOLDMAN ABOUT PLAINTIFFS

As shown in the Transcript, Mr. Goldman made a number of false and defamatory statements about the Hebrew Academy and Rabbi Lipner during the course of the interviews. (Transcript pp. 40-41; AA 501-02.) These statements were republished in the Transcript under Section VII. CAPITAL FUNDS DRIVE, 1974, (Transcript p. 39; AA 500), and include the following:

#### 1. Rabbi Lipner Taking Hebrew Academy Students to Sit-In

> **I think [Rabbi] Lipner is a person who doesn t deserve respect for the way he conducts his affairs.... I don't think [Rabbi Lipner] is an honorable man. Anyone who would take**

> **children from a school and use them to protest by sitting in at the Federation offices is someone who doesn't appeal to me.**

(Transcript p. 40; AA 501.)

Mr. Goldman had no basis for believing these statements to be true, and they are in fact false. Mr. Goldman could not recall what he was referring to by the way he conducts his affairs, (Goldman Dep. 82:23-83:2; AA 213), and claimed to base his statement about Rabbi Lipner not being an honorable man on two incidents the sit-in referred to in the passage, and a prior lawsuit between the Hebrew Academy and the Federation. (Goldman Dep. 89:3-91:10; AA 214-15.)

Mr. Goldman has acknowledged that he has no knowledge as to whether Rabbi Lipner was even involved in the sit-in or took any children anywhere. (Goldman Dep. 50:12-53:7, 91:23-92:13, 95:1-9, 96:4-8, 96:24-98:13; AA 209-10, 214-16.) Although Mr. Goldman claims he was relying on newspaper articles in making the statement, the newspaper accurately stated that the protesters were a group of about 40 young men and women, and never mentioned Rabbi Lipner. (Lipner Dec. ¶ 4 and Ex. 1; AA 193, 198.)

The students of the Hebrew Academy never sat-in at

the Federation offices. College students from the University of California sat-in at the Federation offices, and at the time the Hebrew Academy did not even enroll children past the eighth grade. (Lipner Dec. ¶ 4; AA 193.)

At first, Mr. Goldman did not even recall the lawsuit, and even when he later cited it as support for his statement, had to admit that he had no idea as to the basis for the lawsuit, and professed no interest in understanding the basis for the suit. (Goldman Dep. 54:11-16, 91:11-22; AA 210, 214.) In fact, the suit was based on the Federation s fraud and breach of contract in cutting off all funding to the Hebrew Academy after soliciting donations based on claims that it would provide funds to the Academy, and was settled prior to trial on favorable terms for the Hebrew Academy. (Lipner Dec. ¶ 5; AA 193.)

**2. Comparing Rabbi Lipner to Hitler**

> **I remember a couple of occasions visiting the Hebrew Academy. When [Rabbi Lipner] would walk into the room, the children would stand at attention as if it were the Führer walking in.**

(Transcript p. 40; AA 501.)

Mr. Goldman similarly had no basis for making this false and outrageous statement, which he attempted to downplay at his deposition by claiming that he was simply using the word Führer as an adjective or a descriptive term that could apply not only to Adolf Hitler, but also to other German leaders and to German allies during World War II such as Benito Mussolini. (Goldman Dep. 100:21-105:20; AA 216-18.) Mr. Goldman acknowledges, however, that he cannot recall ever using the word Führer to refer to anyone but Hitler, or ever hearing it used by others to refer to anyone but Hitler. (Goldman Dep. 184:3-185:24, 188:10-189:12; AA 228-29.)[3]

Mr. Goldman claims that in his mind he meant a Führer rather than the Führer, though he does not know which phrase he actually used in talking to Ms. Glaser. (Goldman Dep. 101:2-25, 102:18-103:1, 183:9-23;

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[3] Mr. Goldman and his counsel did refer to recent Doonesbury cartoons referring to Governor Arnold Schwarzenegger as the Groping Fuhrer [the cartoon actually used Gröpenfuhrer ], but Mr. Goldman could not recall if he had used Führer in a joking manner. (Goldman Dep 101:17-102:7, 184:3-7, 191:23-192:2; AA 217, 228, 230.)
Gröpenfuhrer is a play on grüppenführer, a lesser rank than Hitler s that was held most famously by Reinhard Heydrich, chairman of the Wannsee conference and one of the main Nazi architects of The Final Solution.

AA 217, 228.) Despite the extensive corrections he made to other passages in the advance transcript that he received, however, Mr. Goldman did not correct the advance transcript, which contained the words, the Führer, to indicate that he actually meant a Führer. (Glaser Dec. ¶ 2 and Ex. A; AA 285-86.)

Whichever phrase he used, Mr. Goldman claims he had no idea whether Ms. Glaser would think he was referring to Hitler, gave no consideration to whether a reader of the transcript would think of Hitler, and did not consider whether comparing Rabbi Lipner to a Führer would cause him distress. (Goldman Dep. 114:14-115:15, 187:17-188:9; AA 220, 229.) At the time he made the statement, Mr. Goldman did not believe it would offend a Jewish person to be compared to Hitler. (Goldman Dep. 38:7-39:5; AA 207.)

Although students at the Hebrew Academy typically stand as a sign of respect when Rabbi Lipner or any other teacher enters the classroom, they do not stand stiffly at attention as if they were German children under Nazi rule and Adolf Hitler or other Nazi leaders were entering the room. (Lipner Dec. ¶ 6; AA 193-94.)

Photographs from that era show students standing

rigidly at attention and sometimes giving the Nazi salute. (Goldman Dep. Exhibits 4, 13-15; AA 233-43.) To Rabbi Lipner, who lived under Nazi occupation and lost many relatives in the Holocaust, the image of his Jewish students responding as to him as if he were the Führer is particularly abhorrent. (Lipner Dec. ¶¶ 1, 6; AA 192-94.)

Mr. Goldman has admitted that the Hebrew Academy students did not stand at attention or salute like the children shown in the photographs. (Goldman Dep. 107:24-109:17, 110:23-112:10, 196:20-197:3, 197:18-198:4 and Exhibits 4, 13-15; AA 218-19, 231, 233-43.)

### 3. Rabbi Lipner s Manipulation of Russian Émigrés

> **I know that as Russian immigration flourished, he was soliciting them to attend the Academy and then prevailed on the Federation to pay for their education. I don t think those people knew one school from another, but he was the first to approach them.**

(Transcript p. 40, AA 501.)

Among the corrections that he made to the advance transcript, Mr. Goldman changed a statement that Rabbi Lipner was the first to come and grab the kids to was the first to approach them. (Glaser Dec. ¶ 2 and Ex. A; AA 285-86.) The interviewer, Ms. Glaser, expressed

surprise at how manipulative you describe Rabbi Lipner is in grabbing onto these Russian children, and Mr. Goldman did not contradict her characterization of his statements. (Transcript p. 40; AA 501.)[4]

Mr. Goldman has admitted that he had no knowledge of how the Russians made decisions regarding their children s schools, no understanding of what he meant by soliciting, and no knowledge of how the Hebrew Academy came to educate a large number of Russian children. (Goldman Dep. 126:20-132:5, 199:14-201:7; AA 221-22, 232.)

In fact, when Jewish émigrés from Russia arrived in San Francisco in the 1980s, the SFJCF requested that the Hebrew Academy accept their children as students at the school, at a great financial sacrifice. Neither Rabbi Lipner nor anyone else at the Hebrew Academy attempted to solicit or manipulate them into coming there.

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[4] He does claim that Ms. Glaser erroneously changed what he said to imply that Rabbi Lipner was prevailing on the Federation specifically to pay for the Russian students education, as opposed to giving money generally to the school, (Goldman Dep. 128:23-130:4; AA 221-22), but the advance transcript actually shows that he insisted on the exact language used. (Glaser Dec. ¶ 2 and Ex. A; AA 285-86. )

(Lipner Dec. ¶ 7; AA 194.) Anita Friedman, Executive Director of the Jewish Family and Children s Services, which is a part of the Federation, expressed her deep appreciation to the Hebrew Academy for providing quality education to the émigré children in a December 4, 1990 letter. (Lipner Dec. ¶ 7 and Ex. 2; AA 194, 197.)

**4. Rabbi Lipner Was Run Out of Other Communities**

> **Goldman: [Rabbi Lipner] was run out of other communities before he got here....**
> **Glaser: Oh, I didn't know that.**
> **Goldman: I'm not sure but I think he had been in Cleveland before he came here. Somebody checked the record and found that community did not tolerate him.**

(Transcript p. 41; AA 502.)

Mr. Goldman actually had no idea where Rabbi Lipner had come from, had absolutely no basis for believing that he had ever been run out of any community, and had no knowledge of any community not tolerating him. (Goldman Dep. 43:2-44:18, 135:19-139:14; AA 208, 223-24.)

Mr. Goldman believed vaguely that the rabbi was from the Midwest, but the reference to Cleveland was only speculation, because Mr. Goldman had no clue

where he came from, nor do I care. (Goldman Dep. 43:13-44:8; AA 208.) Neither Mr. Goldman, nor anyone else as far as he was aware, ever investigated or otherwise checked the record regarding Rabbi Lipner. (Goldman Dep. 43:2-8, 44:12-18, 137:18-138:24; AA 208, 224.)

The statements are entirely false. Rabbi Lipner began his career in education in Washington, D.C., then went to Chicago, and was asked to come to San Francisco to found the Hebrew Academy in 1969. (Lipner Dec. ¶ 3; AA 193.) He has never lost a job, has never been requested to leave a community, and has never left a community due to any sort of scandal or because the community did not tolerate him. He has never been run out of any community. Rabbi Lipner never worked in Cleveland, and only visited that city once, to attend a wedding. (Lipner Dec. ¶ 8; AA 194.)

## ARGUMENT

### I. INTRODUCTION AND STANDARD OF REVIEW

In this case, the court must decide an issue that the California Supreme Court specifically left open in *Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1245 n.6 the applicability of the single-publication rule to written publications that receive an extremely limited distribution.

The distribution of the Transcript in this case gives new meaning to the concept of extremely limited. The Federation defendants have personal knowledge of only five copies, all of them in private hands. Apparently no one discussed or even read the Transcript at the time it was printed, giving the Hebrew Academy and Rabbi Lipner no reason to suspect that they had been harmed. They certainly had no reason to seek access to a document that they did not know existed.

Rabbi Lipner ultimately learned of the defamation from a researcher who found a copy of the Transcript in a local library, but even that copy was not readily available to the public, and had to be specifically requested.

In reviewing a grant of summary judgment, this

court must conduct a *de novo* review, liberally construing [plaintiff s] evidentiary submission while strictly scrutinizing defendants own showing, and resolving any evidentiary doubts or ambiguities in plaintiff s favor. (*Seelzer v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) The court should ignore the Federation defendants use of unauthenticated, hearsay documents copied from their co-defendant s motion, which may have erroneously led the trial court to conclude that the distribution was more extensive than it really was.

This is simply not a case like *Shively*, where the republication of defamatory statements in the mass media put all members of the public on constructive notice. The rule of discovery, rather than the single-publication rule, should govern cases such as this one, so that diligent plaintiffs do not lose the opportunity to clear their names before they even know they have been defamed.

## II. THE COURT SHOULD APPLY THE RULE OF DISCOVERY IN CASES INVOLVING THE EXTREMELY LIMITED DISTRIBUTION OF DEFAMATORY STATEMENTS

### A. The Rule of Discovery Protects Plaintiffs Who, With Justification, Are Unaware That They Have Been Defamed

While the statute of limitations in tort claims traditionally accrued when a wrongful act was done, in recent years the rule of discovery has provided an important exception to that traditional doctrine by postponing accrual in certain cases until a plaintiff discovers, or has reason to discover, the cause of action. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397-98.

> [T]he discovery rule most frequently applies when it is particularly difficult for the plaintiff to observe or understand the breach of duty, or when the injury itself (or its cause) is hidden or beyond what the ordinary person could be expected to understand.

(*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1248.)

If the rule applies, the cause of action does not accrue until the plaintiff at least suspects ... that someone has done something wrong to him. *N¢rgart*, 21 Cal.4th at 397.)

Over the years the courts have applied the rule of discovery in cases involving most of the torts governed by the one-year statute of limitations provided by Code of Civil Procedure section 340, subdivision (3), including: libel (*Schneider v. United Airlines, Inc.*

(1989) 208 Cal.App.3d 71, 77; *Manguso v. Oceanside Unified School District* (1979) 88 Cal.App.3d 725, 728-31); slander (*McNair v. Worldwide Church of God* (1987) 197 Cal.App.3d 363, 379-80); and invasion of privacy (*Cain v. State Farm* (1976) 62 Cal.App.3d 310, 314-15.)

In allowing plaintiffs to sue for improper surveillance that was only discovered years after the fact, *Cain* explained that while statutes of limitation are intended to bar those who neglect their rights and fail to use reasonable diligence, it is manifestly unrealistic and unfair to bar a negligently injured party s cause of action before he has had an opportunity to discover that it exists. (*Cain*, 62 Cal.App.3d at 314-15.)

Three years later, in extending the rule to libel cases, *Manguso* applied the same rationale and noted:

> It is not the policy of the law to unjustly deprive one of his remedy. ...
> The principal purpose of the rule permitting postponed accrual of certain causes of action is to protect aggrieved parties who, with justification, are ignorant of their right to sue.

(*Manguso*, 88 Cal.App.3d at 730-31.)

As the California Supreme Court has recently observed, the rule of discovery has been applied in

defamation cases when the defamatory statement is made in secret or is inherently undiscoverable, *Shively*, 31 Cal.4th at 1237), and those cases:

> turn upon the circumstances in which the defamatory statement is made and frequently involve a defamatory writing that has been kept in a place to which the plaintiff has no access or cause to seek access.

(*Shively*, 31 Cal.4th at 1249.)

*Manguso* applied the rule of discovery where the libel had been published in a confidential personnel file, and the plaintiff did not discover the publication for almost sixteen years. (*Manguso*, 88 Cal.App.3d at 727.) In *Schneider,* the defamatory statements were published in a credit report; the court held that a statute of limitations begins to run upon discovery of the publication [i]f a party could not reasonably have discovered the facts giving rise to the cause of action for libel. *Schneider*, 208 Cal.App.3d at 77.) *McNair* held that a slander cause of action did not accrue until the plaintiff heard a tape of a slanderous speech, even though the speech had been given to an audience of approximately 1,000 people. (*McNair*, 197 Cal.App.3d at 369, 379-80.)

The Hebrew Academy and Rabbi Lipner had not only

filed suit but also amended their complaint within one year of discovering on December 28, 2001 that they had been libeled. (AA 1, 194-95, 199.) Unless the rule of discovery applies, they cannot maintain their action and will have no opportunity to clear their names.

### B. The Single-Publication Rule Applies In Cases Involving Mass Media Publications

While courts have equitably delayed the accrual of the statute of limitations in cases where the plaintiff was legitimately unaware of the defamation, courts uniformly have *rejected* the application of the discovery rule to libels published in books, magazines, and newspapers. *Shively v. Bozanich*, (2003) 31 Cal.4th 1230, 1250 (emphasis in original).) In cases involving mass media publications, the cause of action is governed by the so-called single-publication rule, which has been codified in the Uniform Single Publication Act, (Civ. Code § 3425.3), and accrues when the defamation is first generally distributed to the public. (*Shively*, 31 Cal.4th at 1242, 1245-46; *McGuiness v. Motor Trend Magazine* (1982) 129 Cal.App.3d 59, 63.)

As the Supreme Court explained, the single-publication rule was a reaction to a common law doctrine

that each sale of a book or newspaper gave rise to a new cause of action, which had the potential to subject the publishers of books and newspapers to lawsuits stating hundreds, thousands, or even millions of causes of action for a single issue of a periodical or edition of a book. (*Shively*, 31 Cal.4th at 1244.) In addition, the common law recognized a new cause of action whenever a defamatory book or newspaper fell into the hands of a new reader, no matter how long ago the defamation had been distributed. (*Shively*, 31 Cal.4th at 1244.)

The single-publication rule protects publishers of mass communications of a single article in a newspaper or book or magazine where distribution may occur over time, (*Schneider v. United Airlines, Inc.* (1989) 208 Cal.App.3d 71, 76), by providing that publication occurs on the earliest date on which the allegedly defamatory information is substantially and effectively communicated to a meaningful mass of readers. (*Strick v. Superior Court* (1983) 143 Cal.App.3d 916, 922.)

> In claimed libels involving, for example, magazines, books, newspapers, and radio and television programs, the publication has been for public attention and knowledge and the person commented on, if only in his role as a member of the public, has had access to such published information.

(*McGuiness*, 129 Cal.App.3d at 63 n.2.)

*Shively* involved a slanderous statement to a deputy district attorney, who repeated the statement to an author, who repeated it again in a book published by William Morrow and Company. (*Shively*, 31 Cal.4th at 1238, 1247.) Although 33,000 copies of the book had been shipped for distribution by October 21, 1996, and thousands of copies were on sale by that date in plaintiff s home state of California, she did not file suit until October 22, 1997, claiming that the statute of limitations had not begun to run until she actually purchased the book and discovered its contents three months after it was published, in December 1996. (*Shively*, 31 Cal.4th at 1239-40, 1247.)

The Supreme Court refused to adopt plaintiff s suggested unprecedented expansion of the rule of discovery. While the discovery rule might have applied if plaintiff had discovered the existence of the defamatory statements in some other fashion:

> [T]he equitable basis for applying the discovery rule that a plaintiff should not forfeit a cause of action based on a confidential communication that he or she had no reasonable basis for discovering no longer exists once the original defamatory statement is published in a book that was distributed to the general public. In such

> circumstance, not only is the basis for the claim not hidden, but it has been trumpeted.

(*Shively*, 31 Cal.4th at 1253.)[5]

The Court specifically declined to address the issue presented by this case; *i.e.*, whether the single-publication rule should apply to written publications that receive extremely limited distribution. (*Shively*, 31 Cal.4th at 1245 n. 6.)

### C. The Rule of Discovery Should Apply In This Case Because The Extremely Limited Distribution of the Transcript Left Plaintiffs Justifiably Unaware of the Libel

Unlike the books in *Shively* that were readily available in California bookstores, or magazines and

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[5] While the Court used the term confidential communication, and also asserted that the Court of Appeal had relied on the assertedly confidential nature of the communications (*Shively*, 31 Cal.4th at 1251), the factual description of the communications gives no indication that either the original slander to the deputy district attorney, or the repetition of that slander to a writer working on a book for mass publication, had been confidential, but only that they involved relatively private communications with only one or two listeners. (*Shively*, 31 Cal.4th at 1237-38.) There is no indication in the lower court decision, which can no longer be cited it is still available on Lexis, that the court considered the communications to be confidential.

newspapers that are mailed to thousands and available on every street corner, the defamatory statements in the Transcript were never trumpeted to anyone. The Transcript received an extremely limited distribution, and was available only in a select few places.

Application of the discovery rule would not subject the Federation defendants to millions of claims they are aware of only 5 copies of the Transcript, all of them in private hands. (Goldman Dep. 72:10-22; AA 212; Cook Dep. 27:1-28:3 and Ex. 18 p. 5; AA 247, 265.) They are not aware of anyone who had actually read the Transcript, nor can they point to any means by which Rabbi Lipner could have become aware of the statements made about him. (Goldman Dep. 72:4-9, 96:9-23, 163:25-166:6, 167:15-168:13; 187:24-188:9; AA 212, 215, 226-27, 229; Cook Dep. 49:16-50:5, 51:1-3, 75:20-24, 83:15-84:3; AA 252-53, 256-57.)

Since the Federation defendants had no reason to think that the Hebrew Academy and Rabbi Lipner knew about the defamatory statements but had decided not to pursue the matter, they were in a much different position from a person who defames someone in a mass market publication. The mass market defamer has reason

to believe the target of the statement will be aware of the defamation and, after a year has passed, to believe that the statute of limitations would bar any claim. The plaintiff in *Shively* was actually aware of the defamatory statements in time to file a complaint, but negligently failed to do so until after her claim was barred. (*Shively*, 31 Cal.4th at 1238-40.)

Rabbi Lipner and the Hebrew Academy did not similarly sleep on their rights. They were justifiably unaware of Mr. Goldman s defamatory statements until a researcher discovered a copy of the Transcript at the Bancroft Library. Even that copy was not readily available to the general public, and a person who became aware of the Transcript s existence had to specifically request it and have it retrieved from the stacks. (Real Dec. ¶ 3; AA 199.)

Unless the rule of discovery applies, the Hebrew Academy and Rabbi Lipner will be unjustly denied their right to clear their names, even though the defamatory writing ... has been kept in a place to which the plaintiff has no access or cause to seek access. (*Shively*, 31 Cal.4th at 1249.) Under the trial court s ruling, they lost their rights forever before they even

knew that the Federation defendants had defamed them.

In the proceedings below, the Federation defendants argued that the plaintiffs should have been aware of the defamatory statements, relying on undisputed facts contained in a declaration previously submitted by the Regents in support of their motion to strike. (Defendants Memorandum at 2-3, 6-8; AA 119-20, 123-25; Defendants Separate Statement of Undisputed Material Facts in Support of Motion for Summary Judgment ( Defendants Separate Statement ), Facts 8-16; AA 132-33.)

But there is no indication that the person submitting that prior declaration had personal knowledge of any of the facts, as required by Evidence Code section 702, and she admittedly based her statements partially upon research, rather than on personal knowledge. (Page Dec ¶ 1, Ex. 2 to Zamczyk Dec.; AA 358.) While the Federation defendants belatedly contended that the documents were admissible as business records, (AA 300-15), the declaration does not demonstrate that any of the documents would be admissible under Evidence Code section 1271. (Page Dec.; AA 358-62.)

The Hebrew Academy and Rabbi Lipner therefore properly objected to most of the declaration, and the exhibits attached to it, as inadmissible hearsay, without foundation or authentication, and therefore in violation of Code of Civil Procedure section 437c, subdivision (d). (Plaintiffs Separate Statement of Undisputed and Disputed Facts In Opposition to Motion for Summary Judgment ( Plaintiffs Separate Statement ) Facts 3, 9-17; AA 179, 181-84; Plaintiffs Objection to Evidence; AA 334-35.) That evidence should not have been considered by the trial court, (*Lopez v. University Partners* (1997) 54 Cal.App.4th 1117, 1124), and this court should disregard it. (*Saelzer v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)[6]

Even if there were admissible evidence that certain

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[6] Some of the evidence regarding the publication and distribution of the Transcript has now been disputed by the Federation defendants own testimony, including the date of publication and the scope of the distribution. (Plaintiffs Separate Statement, Facts 9-10, 14; AA 182-84.) While the trial court declined to make specific evidentiary ruling, it did indicate that it relied solely on admissible evidence, as permitted under *Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1419-20. (RT 14.)

card catalogs and databases refer to the Transcript, such evidence would not establish that the Transcript was ever distributed to the general public. Those references provided no notice to the plaintiffs or the general public that Mr. Goldman had ever made any statements about the plaintiffs, because even the sometimes detailed descriptions of the contents made no mention of Rabbi Lipner or the Hebrew Academy. (Plaintiffs Separate Statement, Facts 12-15; AA 183-84; Page Dec. ¶¶ 7, 11-12 and Exhibits F, J; AA 359-60, 626, 632-33, 669.)

To distribute means to give out or deliver especially to a group (*distributing* magazines to subscribers). *Webster s Third New International Dictionary, Third Edition, Unabridged.)*

The Transcript was never distributed to the general public and was never part of a mass media publication. Plaintiffs could not have reasonably or constructively suspected that they had a claim until they discovered that defendants had defamed them, and the court should hold that the statute of limitations did not run as to the Federation defendants.

## III. FALSE STATEMENTS OF FACT ARE NOT PROTECTED BY THE FIRST AMENDMENT MERELY BECAUSE THEY ARE CONTAINED IN AN ORAL HISTORY

Although the trial court did not reach the remaining defenses raised in the motion, the issues were briefed in the lower court and will be addressed briefly here. In the event that the court considers affirming the summary judgment on a ground not relied on by the trial court, appellants assume there will be further briefing under Code of Civil Procedure section 437c, subdivision (m)(2).

The Federation defendants argued below that the statements attributed to them were protected as mere opinion. (Defendants Memorandum at 8-10; AA 125-27.) In California, defendants in defamation actions are liable for what is insinuated as well as what is stated explicitly. (*Maidman v. Jewish Publications, Inc.* (1960) 54 Cal.2d 642, 651.) Whether a statement is defamatory under Civil Code section 45 is measured by its natural and probable effect on the mind of the average reader, and it is no defense that a statement could be construed innocently, as long as one reasonable interpretation would be a defamatory one. (*MacLeod v. Tribune Publishing Co.* (1959) 52 Cal.2d 536, 547-48.)

There is no wholesale defamation exemption for anything that might be labeled opinion, *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 18-19), and no categorical exception for opinion exists independently under California law. *Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1607 n. 2.)

A court must determine whether the allegedly defamatory statements expressly or impliedly assert a fact that is susceptible of being proved false. (*Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1001, 1001 n.8.) As long as the statements are susceptible of both an innocent and a libelous meaning, it is up to the jury to decide the issue. (*Good Government Groups of Seal Beach, Inc. v. Superior Court* (1978) 22 Cal.3d 672, 682; *Campanelli v. Regents of the University of California* (1996) 44 Cal.App.4th 572, 578.)

*Milkovich* made it clear that simply claiming a statement is an opinion does not make it one.

> [E]xpressions of opinion may often imply an assertion of objective fact. If a speaker says, In my opinion John Jones is a liar, he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment

> of them is erroneous, the statement may still imply a false assertion of fact.

(*Milkovich*, 497 U.S. at 18-19.)

California courts look at the totality of the circumstances in determining whether a statement is fact or opinion, examining the language and the context in an attempt to look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed. (*Campanelli,* 44 Cal.App.4th at 578-79.)

While a boilerplate introduction to the Transcript indicates that oral history can be reflective, partisan, it also states that ROHO had interviewed participants in or well-placed witnesses to events and intended the histories to be for scholarly use. (Transcript, second page; AA 429.) Assuming that the average reader would have the introduction in mind while reading the transcript, there would be no reason for that reader to anticipate the use of epithets, fiery rhetoric or hyperbole. ¢*ampanelli*, 44 Cal.App.4th at 579.) Instead, the reader would anticipate that the participants and witnesses would be relating historical facts.

Turning to the statements themselves, all of them

assert a provably false fact, either expressly or impliedly. (*Weller,* 232 Cal.App.3d at 1001, 1001 n.8.) Rabbi Lipner either took children from [the Hebrew Academy] and use[d] them to protest by sitting in at the [SFJCF] offices, (Transcript at 40; AA 501), or he did not. Defendants apparently acknowledge this statement is factual, (Defendants Memorandum at 10; AA 127), and Mr. Goldman cannot immunize himself by surrounding that false statement of fact by also stating that Rabbi Lipner was not honorable, which implies the existence of a factual assertion that is false . (*Milkovich*, 497 U.S. at 18-19.)

Similarly, the Hebrew Academy students either stand at attention as if it were the Fuhrer walking in when Rabbi Lipner enters a room, (Transcript at 40; AA 501), or they do not. This is not simply rhetorical hyperbole, and the use of the term, the Führer, implies a sinister, fanatical effect on the children, as shown in the photographs that have been produced. (Goldman Dep., Exhibits 4, 13-15; AA 233-43.)

Presumably, the intended audience for the transcript would be older Jewish people, many of whom, like Rabbi Lipner, (Lipner Dec. ¶ 1; AA 192), had

undoubtedly lost family members as a result of the Holocaust perpetrated by Hitler with the help of other Nazis and thousands of ordinary people. The implication that the Hebrew Academy students were being indoctrinated to react as if they were Hitler Youth members is a grievously defamatory charge that can be proven false.

Regarding the Russian émigrés, again either Rabbi Lipner solicited and manipulated them into coming to the Hebrew Academy to get money from the SFJCF, (Transcript at 40; AA 501), or he did not, and the Federation defendants do not even argue that this is a statement of opinion. (Defendants Memorandum at 10; AA 127.)

Finally, the Federation defendants have apparently conceded that the statements regarding Rabbi Lipner being run out of other communities because they did not tolerate him, (Transcript at 41; AA 502), are not protected as opinion. (Defendants Memorandum at 10; AA 127.)

## IV. THE FEDERATION DEFENDANTS DID NOT ESTABLISH THAT THE HEBREW ACADEMY OR RABBI LIPNER WERE PUBLIC FIGURES, AND WAIVED ANY CLAIM REGARDING ACTUAL MALICE BY FAILING TO POINT TO ANY

**EVIDENCE REGARDING THAT ISSUE IN THE SEPARATE STATEMENT**

The Federation defendants will presumably contend on appeal that the Hebrew Academy and Rabbi Lipner are limited purpose public figures who must establish knowing or reckless falsity by clear and convincing evidence under *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-80 and *Reader s Digest Association v. Superior Court* (1984) 37 Cal.3d 244, 253-55. (Defendants Memorandum 10-12; AA 127-29.) As the California Supreme Court has explained, a public figure plaintiff must have undertaken some*voluntary* act through which he seeks to influence the resolution of the public issues involved. (*Reader s Digest*, 37 Cal. 3d at 254 (emphasis in original).)

While referring vaguely to scattered newspaper articles, the Federation defendants made no attempt below to show that either plaintiff had voluntarily inject[ed] himself or [been] drawn into a particular public controversy. (*Reader s Digest*, 37 Cal.3d at 253.) They not only failed to identify any voluntary acts on the part of the plaintiffs, they did not even identify a controversy. (Defendants Memorandum at 10-12; AA 127-29.) While arguing that plaintiffs are

limited purpose public figures with regard to the development of the Jewish community in the Bay Area, (Defendants Memorandum at 11; AA 128), the Federation defendants could not demonstrate that there was any controversy regarding that development, and appellants are not aware of any case that eliminates the particular public controversy element of the standard.

Even if the Federation defendants could establish that plaintiffs are public figures, they did not set forth a single fact on the issue of whether they acted with knowing or reckless falsity. (Defendants Memorandum 11-12; Defendants Separate Statement; AA 128-29.) There are no declarations claiming that the statements were published with any belief in their truth. Failure to comply with the requirement for a separate statement may, of course, be grounds for the denial of the motion as to this issue, (Code Civ. Proc. § 437c, subd. (b)(1)), and it is a violation of due process to premise a drastic remedy such as summary judgment on undisclosed facts. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 315-17.)

In the absence of argument or evidence on this

issue, the burden of opposing this part of the motion never shifted to the plaintiffs. (Code Civ. Proc. § 437c, subd. (p)(2); *Saelzer*, 25 Cal.4th at 768.) Out of an abundance of caution, however, appellants point to general principles of defamation law, which state that:

> Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant [or] is the product of his imagination,.... [A]ctual malice can be proved by circumstantial evidence. [E]vidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant s recklessness or of his knowledge of falsity.

(*Reader s Digest*, 37 Cal.3d at 257-58 .)

As set forth at length above and in Plaintiffs Separate Statement, Facts 27-30, (AA 188-91), Mr. Goldman had no basis for any of the statements that he made about the Hebrew Academy and Rabbi Lipner. As just one example, with respect to the statement that Rabbi Lipner was run out of other communities before he got here .... Somebody checked the record and found that community did not tolerate him, (Transcript at p. 41; AA 502), Mr. Goldman has admitted that he had no basis for making the statement, that no one had ever checked any record, and that he had no clue where [Rabbi

Lipner] came from, nor do I care. (Goldman Dep. 43:2-44:18; 135:19-139:14, AA 208, 223-24; Plaintiffs Separate Statement, Fact 30; AA 191.)

## V. FEDERATION SPECIFICALLY FUNDED THE GOLDMAN ORAL HISTORY, AND CANNOT ESCAPE LIABILITY FOR THE DEFAMATORY PUBLICATION IT MADE POSSIBLE

Finally, and almost parenthetically, the institutional defendants contended below that they had no responsibility for the statements contained in the interviews, (Defendants Memorandum at 12; AA 129), relying solely on the Declaration of Sam Salkin to argue that they had no control over the publication of the Transcript, only provided funding for ROHO s general research projects, and did not specifically fund the Goldman interview, but funded ROHO generally. (Defendants Separate Statement, Facts 23-26; AA 134; Salkin Declaration ¶¶ 2-5; AA 154.)

There is no indication that Mr. Salkin had personal knowledge of these facts, which occurred before he became an officer of the Federation. (Salkin Declaration ¶ 1; AA 153-54.) Under Code of Civil Procedure section 437c, subdivision (d), the declaration cannot serve as the basis for the motion.

As further demonstrated by Phyllis Cook, who was involved in the Oral History Project, Mr. Salkin s statements are false. The Federation agreed to provide $60,000 to fund the Oral History Project, and had been promised advance copies for review. (Cook Dep. 22:20-23:18, 30:4-9, 32:14-33:16, 37:18-38:2, 99:24-100:14, and Ex. 18 pp. 1-4, 8-9, 15-16, 18-23; AA 246, 248-50, 259-64, 268-69, 275-76, 278-83.) The Federation specifically allocated $15,000 to pay for the oral histories of defendant Goldman and two other officials. (Cook Dep. 32:19-33:18, 69:6-16, 101:3-10 and Ex. 18 pp 11-13, 18-23; AA 248-49, 255, 260, 271-73, 278-83.) While the Federation believed that ROHO would be doing only light editing of the interviews, it made no attempt to ensure that there was nothing scandalous or defamatory in the transcripts, and felt it had no obligation to do so. (Cook Dep.37:18-38:2, 41:8-19, 89:18-90:2, 91:2-9; AA 250-51, 258.)

The general rule for defamation is that everyone who takes a responsible part in the publication is liable for the defamation. *Ǫsmond v. EWAP, Inc.* (1984) 153 Cal.App.3d 842, 852; see also *McGuire v. Brightman* (1978) 79 Cal.App.3d 776, 789.) Defendants

attempted below to rely on *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 549, in which an individual defendant had simply contributed money to a political organization which later published an allegedly defamatory flyer, of which he had no knowledge.

In this case, however, the institutional defendants did take a responsible part in the publication, which would never have occurred except for their unwavering support of the Oral History Project in general and the production of the Goldman oral history in particular. While the institutional defendants did not physically publish the transcript, they were sufficiently involved in the preparation, review or publication, (*Matson* 40 Cal.App.4th at 549), to be held responsible for that republication of the slanderous statements. (*Mitchell v. Superior Court* (1984) 37 Cal.3d 268, 281; *Schneider*, 208 Cal.App.3d at 75.)

## CONCLUSION

There is no reason to allow these defendants to escape responsibility for the damage they have done to the Hebrew Academy and Rabbi Lipner. This was not the type of mass media publication that would have provided constructive notice of the defamation. Instead, as the discovery has now shown, there was an extremely limited distribution of this Transcript which the Federation defendants knew would provide no notice that the defamation had occurred.

DATED: March 22, 2007 LAW OFFICE OF PAUL KLEVEN

by:_____
PAUL KLEVEN

## CERTIFICATE OF COUNSEL

I certify that this Appellant s Opening Brief contains 8268 words, as calculated by my WordPerfect 11.0 word processing program.

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PAUL KLEVEN