SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEVEN J. ROSEN,	
Plaintiff,	
v.	**Civil Action No. 09-1256**
	Calendar 12
AMERICAN ISRAEL PUBIC AFFAIRS COMMITTEE, INC., *et al.*,	**Judge Erik P. Christian**
Defendants.	

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT[1]

INTRODUCTION

Defendants, the American Israel Public Affairs Committee, Inc. (hereinafter "AIPAC") and Patrick Dorton, AIPAC's public relations consultant and spokesman, have now filed a second motion for summary judgment asking this Court to reverse its prior decision that"The issue of whether Defendants AIPAC and/or Dorton acted with malice in the role they allegedly played in the publication of the March 3, 2008 New York Times article should be decided by the jury, and not by the Court, as a matter of law." Order granting in part and denying in part Defendant's Motion to Dismiss, treating as Motion for Summary Judgment (October 30, 2009) (hereinafter "Mem. Op.") at 15.

Defendants have offered no new evidence to justify its request for this Court to depart from its earlier ruling. First, Defendants reiterate their arguments that the March 2008 statement

[1]Plaintiff respectfully asks that the Court set defendants' instant motion for summary judgment for oral argument.

is a republication and therefore time-barred. But, as this Court previously noted the *New York Times* article states that AIPAC, through Dorton, said "recently" (as of March 3, 2008) that AIPAC still held the view that it terminated Rosen because his behavior did not comport with its standards. Second, Defendants argue that the statement is true despite the testimony of AIPAC's own witnesses that Rosen was terminated to avert the disaster AIPAC would face if the public learned that AIPAC did not terminate him.

Defendants have come up one new argument: they now claim that when Dorton said that AIPAC terminated Rosen because he violated AIPAC's standards, he was referring, in part, to the allegation that Mr. Rosen viewed pornographic images on his computer. This post-hoc rationale is riddled with problems. First, Dorton's statement that Rosen was terminated because he violated AIPAC's standards referred to both Rosen and his colleague, Keith Weissman and there is absolutely no evidence--not even an allegation–that Weissman viewed such materials on his computer. Furthermore, the President of AIPAC's Board testified that she had not heard that Mr. Rosen was accused of looking at pornography when she and the Board voted to fire him. Defendants proffer of this false justification for its public statement that it terminated Rosen because he did not comport with AIPAC's standards is further evidence that AIPAC did not make the statement in good faith, that it did not believe the statement to be true, and that it acted with malice in making the public statement. Because there is a genuine dispute regarding the truth of the statement, the issue must be decided by a jury.

BACKGROUND[2]

Plaintiff Steven Rosen, a former senior official of AIPAC, is suing his former employer and its spokesman in defamation for having made a knowingly false and injurious statement about him which was published in an article in *The New York Times* on March 3, 2008. Until his involuntary termination on March 21, 2005, Mr. Rosen was employed by AIPAC as its long-time Director of Foreign Policy Issues. In that role he worked in close daily consultation with AIPAC's Executive Director, its President, and senior members of its Board of Directors. Mr. Rosen's primary responsibility while working for AIPAC was to obtain information about policy issues and decisions in the Executive Branch of the United States Government, especially those involving the National Security Council, the State Department and the Department of Defense. As a regular part of his job, he was expected to obtain and share with AIPAC's Executive Director, its President, and its Board of Directors such information concerning the foreign policy of the United States and other countries. Mr. Rosen was highly successful in his job, and was regularly praised and generously rewarded by AIPAC's Executive Director, its President, and its Board of Directors, including by those initially named as defendants in the instant civil action, all of whom are and/or were in those positions, for obtaining and sharing such information.

On August 27, 2004, it was publicly revealed that the U.S. Department of Justice was investigating of Steven Rosen and another AIPAC employee, Keith Weissman, for receiving information from a government source, a Department of Defense official named Larry Franklin, that they allegedly were "not authorized to receive." Initially AIPAC responded by asserting that

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[2]The statements made in this "Background" section are not intended as controversial or argumentative, but only as background to assist the Court in understanding this litigation. Accordingly, only to the extent that anything may be controversial are citations to record evidence provided in this short section.

Mr. Rosen and Mr. Weissman had done nothing wrong, and they both continued to perform their job duties at AIPAC, and Mr. Rosen continued to be highly praised for his work by its Executive Director, its then President, and its Board of Directors.

However, on February 17, 2005, the AIPAC Board of Directors placed him on involuntary administrative leave. This was done immediately after a meeting between AIPAC's counsel and federal prosecutors on February 15, 2005. On February 19, 2005, AIPAC's General Counsel, Phil Friedman told Richard Cullin, an attorney retained by AIPAC to represent Howard Kohr, AIPAC's Executive Director, with regard to the Justice Department's criminal investigation, that

> the [AIPAC] Advisory Committee in particular and the [AIPAC] Board [of Directors] as well, quite reluctantly, agreed to take a step in the direction of the government, in the hope that the government would reciprocate in some fashion . . . Placing . . . Steve [Rosen] on leave . . . [is a] significant concession.[3]

On the same day, another of AIPAC's attorneys stated:

> There was very vocal sentiment against taking even the first step of removing Steve [Rosen] . . . from [his] office, but a majority favored that action to demonstrate to [the lead federal prosecutor] that we are serious and want him now to take the next step [*i.e.*, relieving AIPAC of any chance of being a target of Justice Department's investigation].[4]

Taking exception to his being placed on involuntary leave, Mr. Rosen protested his innocence. Indeed, on March 10, 2005, Mr. Rosen sent a letter to AIPAC's Executive Director,

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[3]Email of February 19, 2005, from Phil Friedman to Richard Cullen, which is contained in Document No. 49 in Plaintiff's Document Production to Defendants, is contained in Attachment A hereto.

[4]Email of February 19, 2005, from Nat Lewin to Richard Cullen, which is also contained in Document No. 49 in Plaintiff's Document Production to Defendants, is also contained Attachment A hereto.

defendant Howard Kohr, its President, and to each member of AIPAC's Board of Directors who was on a special Advisory Committee, reminding all of them of the hundred of times he had briefed the Board, and the thousands of times he had briefed AIPAC's presidents and its executive directors with information he had obtained of the type described by the Justice Department as that which he was "not authorized to receive," and that this activity was not only well-known to Mr. Kohr and the others, but was approved and rewarded by them as among the most valued of Mr. Rosen's regular job duties. Mr. Rosen's letter detailed the fact that others, including all Executive Directors — defendant Howard Kohr being among them — and other members of AIPAC's senior staff, also regularly engaged in obtaining information of this type and sharing with AIPAC's presidents and its Board of Directors. In short, that was the normal practice at AIPAC.[5]

On March 15, 2005, the federal prosecutors played tape recordings of two FBI wire-tapped telephone conversations of Steven Rosen and Keith Weissman – one of which was with Glenn Kessler, a reporter with the *Washington Post,* for Nathan Lewin, a lawyer who had been retained to advise and represent AIPAC with regard to the Department of Justice's criminal investigation. A few days latter, on March 21, 2005, Nat Lewin wrote to AIPAC's Executive Director, Howard Kohr, recommending that Steven Rosen and Keith Weissman be fired by AIPAC " [b]ecause I [Lewin] am now satisfied [based on what he heard in the FBI wire-tapped telephone conversations] that, regardless of whether any criminal law was violated, Messrs. Rosen and Weissman engaged in activities that AIPAC cannot condone . . . ." That same day, Monday, March 21, 2005, AIPAC fired both Steven Rosen and Keith Weissman. Officially,

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[5]March 10, 2005 letter from Steven Rosen to Howard Kohr, *et al.*, which is Document No. 51 in Plaintiff's Document Production to Defendants, is contained in Attachment B hereto.

AIPAC informed Mr. Rosen that his employment was summarily terminated (after 23 years of loyal and highly praised service), without stating a reason for taking such adverse action or providing him with an opportunity to respond to any allegations of wrongdoing. Immediately after summarily firing Mr. Rosen, AIPAC's counsel and the attorney AIPAC was paying to represent Howard Kohr, its Executive Director, contacted federal prosecutors and informed them of the summary firing of both Mr. Rosen and Mr. Weissman by AIPAC.

On August 4, 2005, the day the federal prosecutors obtained an indictment of Mr. Rosen and Mr. Weissman from a federal grand jury in Alexandria, Virginia, the U.S. Attorney for the Eastern District of Virginia said that

> AIPAC as an organization has expressed its concern on several occasions with the allegations against Rosen and Weissman, and . . . it did the right thing by dismissing these two individuals.

Beginning shortly after summarily terminating Steven Rosen's and Keith Weissman's employment, AIPAC, acting through and with the advice of defendant Patrick Dorton, began making statements to the press about both Mr. Rosen and Mr. Weissman,[6] and have continued to make and publish such statements through March 3, 2008, when the statement at issue in this case was published in an article in *The New York Times*:

> The AIPAC spokesman on the Rosen [and Weissman] matter, Patrick Dorton, said at the time that the two men were dismissed because their behavior "did not

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[6]Initially, plaintiff had brought this defamation action against a host of additional individuals in AIPAC leadership in 2004-2009 – including AIPAC's then and current Executive Director, Howard Kohr, and its 2004-2005 President, Bernice Manocherian, and several members of the Board of Directors most closely involved with AIPAC's actions and statement at issue in this civil action. However, in a decision to grant in part defendants' earlier motion to dismiss, Judge Jeanette J. Clark of this Court, dismissed the claims other than the one involving the March 3, 2008 article in *The New York Times* on statute of limitations grounds, and the claims against all defendants except AIPAC and Patrick Dorton. *See* October 30, 2009 Order granting in part and denying in part defendants' Rule 12(b)(6) motion to dismiss.

comport with standards that AIPAC expects of its employees.'' He said recently that AIPAC still held that view of their behavior."[7]

It is plaintiff's contention that AIPAC's management knew absolutely that Steven Rosen had done nothing wrong; indeed, he had done nothing that AIPAC's leadership had not known about in advance and authorized. They had approved and rewarded the very behavior which they condemned in 2005 and continuing on through the March 3, 2008 statement at issue here, and did so in order to obtain favored treatment from the Justice Department. In fact, Howard Kohr, AIPAC's Executive Director, the several AIPAC presidents initially named as defendants in this case, had themselves each received information of this type, and shared it with others both inside and outside of AIPAC, independent of Mr. Rosen.

More to the point of this litigation, at no time in the 23 years Steven Rosen was employed by AIPAC did the organization provide in writing or orally any guidance or *standards* that he and other employees were expected to follow regarding the receipt and sharing of secret, sensitive or "classified" information that might be offered by government officials – such as was provided to Keith Weissman by Larry Franklin of the Defense Department in July 2004 that served to initiate the Department of Justice criminal investigation involved here. In fact, it is plaintiff's contention that no expressed "standards" existed at AIPAC on such matters – making Patrick Dorton's statements on AIPAC's behalf, including the March 3, 2008 statement published in *The New York Times* that is at issue, false. Moreover, any implied practices that were embodied in the organization's normal processes over these decades were completely consistent with Mr. Rosen's

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[7]Dorton statement that is currently at issue in the instant case was published in the "Trial to Offer Look at World of Information Trading" article by Neil A. Lewis in the March 3, 2008 edition of *The New York Times*, is contained in Attachment No. 17 to Plaintiff's Statement of Genuine Issues.

behavior in 2004. Accordingly, the repeated statements by AIPAC through its spokesmen that Mr. Rosen's conduct did not comport with AIPAC standards – specifically the one in the March 3, 2008 article in *The New York Times* – were knowingly false and actionable as defamatory.

In any event, the criminal case against plaintiff was officially dismissed with prejudice on May 1, 2009[8], just eight weeks after this civil action was filed, though it became increasingly evident this would occur a few weeks before that date. It is Steven Rosen's contention here that AIPAC's false statement in March 2008 damaged his reputation and put him in danger of being convicted of a crime he did not commit and suffering a lengthy term of imprisonment unjustly. This is what this civil action seeks redress for under the law of defamation.

STATEMENT OF GENUINE ISSUES OF MATERIAL FACT

In response to defendants' motion for summary judgment, and particularly in reaction to their statement of undisputed material facts, plaintiff has submitted herewith a statement of genuine issues of material fact which contains, as required by Rule 12-I(k) of the Superior Court Rules of Civil Procedure, direct response to defendants' claimed undisputed material facts. This document, to which is appended some 43 attachments containing the competing record evidence copiously cited to support the proposition that there exists here genuine issues of material fact – notwithstanding defendants' contention to the contrary. In addition, there are other record facts, not particularly responsive to defendants' specific claims of uncontested material facts, which

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[8]*See* the May 1, 2009 Order dismissing with prejudice all pending counts against Steven Rosen issued by the Hon. T.S. Ellis, U.S. District Judge, in *United States v. Lawrence Anthony Franklin, Steven J. Rosen, and Keith Weisman*, Case No. 1:05cr225, U.S. District Court (E.D.Va. - Alex. Div.), which is contained in Attachment No. 23 to Plaintiff's Statement of Genuine Issues.

also demonstrate that genuine issues of material fact predominate in this case. A review of the record evidence thus reveals that summary judgment cannot be had in the instant case.

I. The March 3, 2008 Statement by Patrick Dorton on AIPAC's Behalf is False.

Again, the statement at issue in this case, contained in the March 3, 2008 article in *The New York Times*, is as follows:

> The AIPAC spokesman on the Rosen and Weissman matter, Patrick Dorton, said at the time that the two men were dismissed because their behavior "did not comport with standards that AIPAC expects of its employees." He said recently that AIPAC still held that view of their behavior.

It is false – or, more to the point, it is seriously contested (*i.e.*, it is very much a genuine issue of material fact) because the record evidence suggests that in 2004, when the incidents that gave rise to the Justice Department criminal investigation that spawned the trouble for AIPAC and its employees Rosen and Weissman, AIPAC had no "standards" whatsoever concerning the receipt, handling, and dissemination of "classified" information obtained by its employees from U.S. Government sources.

First, the record evidence suggests that defendants had reckless disregard for the truth in having Patrick Dorton say on AIPAC's behalf that Steven Rosen and Keith Weissman were dismissed because their behavior "did not comport with the *standards* that AIPAC expects of its employees" (emphasis added) and that AIPAC still held that view of their behavior – as reported in *The New York Times* on March 3, 2008. This is so because at the time he authorized Dorton's statement, AIPAC's counsel Nate Lewin did not know whether or not AIPAC even had standards regarding the receipt/handling of "classified" information, and he made no inquiry as to whether

AIPAC had such a policy or what the policy may have been. *See* Lewin Depo.[9] Tr., pp. 63, 61, 57, and 85-86 (wherein Nat Lewin, AIPAC outside counsel, admitted that when he made his decisive recommendation to AIPAC's Board of Directors that Mr. Rosen and Mr. Weissman be fired and authorized defendant Patrick Dorton to start making the press statements in dispute in this litigation, he "did not know AIPAC's policy regarding the receipt of classified information" and he "did not inquire prior to that time as to AIPAC's 'policy . . . [he] just assumed, on the basis of what [he] knew regarding Washington mores and standards"); Lewin Depo. Tr., pp. 56-57 (wherein Lewin concedes that he was the one who authorized the Dorton to make the statements on AIPAC's behalf alleging that Mr. Rosen and Mr. Weissman violated AIPAC "standards," though he had no knowledge of AIPAC's actual standards, but only what he "assumed" to be AIPAC's standards). In this regard, *see also* the deposition of Richard Fishman,[10] Tr., pp. 136-137 (wherein AIPAC's Deputy Executive Director admits that no inquiry or review was made of AIPAC's practices before the organization publicly asserted, in September 2004 – just after the Rosen-Weissman Justice Department criminal investigation concerning receipt and dissemination of classified information surfaced, that "neither AIPAC nor any of its employees has ever violated the laws or rules, nor had AIPAC or its employees ever received information we believed was secret or classified").

Second, AIPAC's Deputy Executive Director admits that the organization had no "written standards" concerning the receipt and dissemination of classified information prior to August 27,

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[9]The portions of the transcript of the deposition of Nathan ("Nat") Lewin cited herein are contained in Attachment No. 2 to Plaintiff's Statement of Genuine Issues.

[10]The portions of the transcript of the deposition of Richard Fishman cited herein are contained in Attachment No. 35 to Plaintiff's Statement of Genuine Issues.

2004, nor did he claim that AIPAC had even a "standard" regarding the receipt and handling of classified information that was orally expressed prior to August 27, 2004. *See* Fishman Depo. Tr., pp. 10-17, and p. 98 (wherein AIPAC's Deputy Executive Director, Richard Fishman admitted that from his arrival at AIPAC in 1985 until August 27, 2004, he never heard the word "classified information" in any AIPAC context, that nobody ever spoke about classified information "in any conversation [that he] was part of, that a written standard concerning classified information did not exist before 2008, and that there was no "presumed standard" before August 27, 2004 either, other than we do not seek classified information; in fact, Mr. Fishman stated that what he knows about classified information comes "mostly from reading Robert Ludlum novels").

Third, Steven Rosen himself had at one time earlier in his AIPAC career (in February 1984) been involved in a situation in which he had received classified information and where the FBI had investigated the matter. In that situation, the FBI was investigating Mr. Rosen's receipt of classified information that members of Libya's U.N. Mission had provided money to a U.S. presidential candidate's staff, and the then-Executive Director of AIPAC (Tom Dine) and senior members of the AIPAC Board of Directors had obtained legal counsel for Mr. Rosen (Leonard Garment) and, being informed of Mr. Rosen's activities at the time, endorsed them and gave Mr. Rosen high marks in his performance appraisals thereafter – the substance of which was disclosed to Nat Lewin in an email from Mr. Rosen in February of 2005. *See* February 24, 2005 email from Steven Rosen to Nat Lewin (and his law partner Alyza Lewin)[11] and Rosen Depo. Tr.,

[11]The February 24, 2005 email from Steven Rosen to Nat Lewin (and his law partner Alyza Lewin) is contained in Attachment No. 40 to Plaintiff's Statement of Genuine Issues.

pp. 120-131 (making clear that the date of the original email was in 2005 not 2004 – which was a transcription typographical error made by Mr. Rosen).

Finally, there were in fact other situations before the 2004 Larry Franklin matter involving Steven Rosen and Keith Weissman in which AIPAC employees were involved in receiving classified material, notwithstanding AIPAC's denial (*see, e.g.*, the deposition of Howard Kohr,[12] AIPAC's Executive Director, Tr., pp. 13-14 and 183, and AIPAC's Fund-Raising Letter of September 7, 2004, signed by Howard Kohr, Executive Director, and Bernice Manocherian, AIPAC's President[13]). *See* the **Confidential Portion** of the Deposition of Ester Kurz,[14] **Confidential** Depo. Tr., pp. 11-33 [redacted]; *see also* FBI Form 302s dated March 21, 1986 and January 6, 1986 re: interviews of AIPAC officials concerning the possession by AIPAC of a USTR document back in 1984[15]

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[12]The portions of the transcript of the deposition of Howard Kohr cited herein are contained in Attachment No. 35 to Plaintiff's Statement of Genuine Issues.

[13]The September 7, 2004 Fund-Raising Letter signed by Howard Kohr, AIPAC's Executive Director, and Bernice Manocherian, AIPAC's President, is contained in Attachment No. 40 to Plaintiff's Statement of Genuine Issues.

[14]The **Confidential Portions** of the transcript of the deposition of Ester Kurz cited herein is contained in Attachment No. 16 to Plaintiff's Statement of Genuine Issues.

[15]The FBI Form 302s dated March 21, 1986 and January 6, 1986 re: interviews of AIPAC officials concerning the possession by AIPAC of a USTR document back in 1984, are contained

(which confirm the widespread distribution within AIPAC of this secret U.S. Government document back in 1984).

Accordingly, it is very much a genuine issue of material fact whether AIPAC had any "standards" whatsoever concerning the receipt, handling, and dissemination of "classified" information obtained by its employees from U.S. Government sources back in 2004 – when the Rosen/Weissman situation involving Larry Franklin that spawned dispute at issue here.

II. The March 3, 2008 Statement by Patrick Dorton on AIPAC's Behalf is Not Simply A Repetition of Earlier Statements.

Defendants want to portray Patrick Dorton's statement published in *The New York Times* article on March 8, 2008 as saying nothing different from that expressed in AIPAC's outside counsel Nat Lewin's letter of March 21, 2005 to Howard Kohr, AIPAC's Executive Director and the earlier iterations of Dorton's statements about Mr. Rosen and Mr. Weissman. But the record evidence leaves this point in genuine dispute.

The March 3, 2008 statement attributed to Dorton speaking on AIPAC's behalf is that Steven Rosen's (and Keith Weissman's) actions in 2004 did not comport with standards that AIPAC expects of its employees and that he (Dorton) said that in March 2008 AIPAC still held that view of their behavior. First, a comparison of the initial Dorton expression – that Rosen and Weissman's actions "did not comport with standards that AIPAC expects of its employees" – deviates significantly from what Nat Lewin's March 21, 2005 letter to Howard Kohr said (at ¶ 3):

> Because I am now satisfied [by evidence he viewed at the U.S. Attorney's Office on March 15, 2005] that, regardless of whether any criminal law was violated [and Lewin stated unequivocally in his deposition that he did not and does not believe that Rosen committed a criminal act – Lewin Depo. Tr., pp. 31, 55, 70], Messrs. Rosen and Weissman *engaged in activity that AIPAC cannot condone*, I must now

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in Attachment Nos. 14 and 15 to Plaintiff's Statement of Genuine Issues, respectively.

> recommend that AIPAC terminate the employment of Messrs. Rosen and Weissman . . . (emphasis added).

Obviously, the initial part of Dorton statement on behalf of AIPAC in March 2008 (and earlier) is plainly different from what Mr. Lewin said in his 2005 letter to AIPAC's Executive Director, Mr. Lewin's deposition testimony notwithstanding.

More importantly, however, the second part of Dorton's March 2008 statement is new and, in effect, very different from any of his earlier statements about Mr. Rosen and his colleague Mr. Weissman made for AIPAC: that in March 2008 Dorton *said recently that AIPAC still held that view of their behavior*. None of his earlier statements dealt with the time frame of March 2008, and none had the detrimental effect thereafter that this statement had.

In this regard, Mr. Rosen stated in definite terms in his deposition testimony in this case[16] (Rosen Depo. Tr., p. 393, lines 16-21) that the March 3, 2008 statement by Dorton on AIPAC's behalf "is not only a repetition of prior statements – it's an allusion to the prior statements *and their continued validity*." Emphasis added. This had grave repercussions for Steven Rosen. Just six weeks after publication of the March 2008 statement, the prosecutors in the Rosen/Weissman criminal case told the Court that they might well use AIPAC's actions against Messrs, Rosen and Weissman at trial! *See* Government's Consolidated Responses to Defendants' Daubert-Related and In Limine Motions, in *United States v. Steven J. Rosen and Keith Weissman*, Criminal No. 1:05CR225 (E.D.Va.)[17], pp. 9-10. In their own court filing on the subject of the government

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[16]The portions of the transcript of the deposition of Steven Rosen cited herein are contained in Attachment No. 1 to Plaintiff's Statement of Genuine Issues.

[17]The Government's Consolidated Responses to Defendants' Daubert-Related and In Limine Motions, in *United States v. Steven J. Rosen and Keith Weissman*, Criminal No. 1:05CR225 (E.D.Va.), is contained in Attachment No. 42 to Plaintiff's Statement of Genuine Issues.

possibly making use of AIPAC's actions against their client at the criminal trial, Rosen's and Weissman's defense team pointed out the potential prejudice to Messrs. Rosen and Weissman such evidence would have. See Defendants' Motion *In Limine* to Bar Admission of the Termination of Their Employment at AIPAC, in *United States v. Steven J. Rosen and Keith Weissman*, Criminal No. 1:05CR225 (E.D.Va.)[18], pp. 4-5 (wherein the criminal defense counsel told the Court:

> One could easily imagine a juror making an inferential leap something along the lines of: the defendants lost their jobs, *their employer agreed that they were guilty and fired them*, therefore the government's allegations must be true.

(Emphasis added)). In the criminal case, the District Judge denied the Rosen/Weissman request to exclude AIPAC's actions from the criminal trial, thereby leaving Steve Rosen (and his co-defendant) to suffer another year until the government gave up and asked that the indictment be dismissed – a request that the District Court granted on May 1, 2009.

Thus, while AIPAC's actions and previous statements may have helped place Steven Rosen in danger of being convicted of a crime he did not commit and, thereby, serving a lengthy term of incarceration, by reiterating the statement in March 2008 – and stating that it was still AIPAC's view as of March 2008 – as published in *The New York Times*, AIPAC and Patrick Dorton helped continue Mr. Rosen's dire situation for another 14 months: March 2008 to the May 1, 2009 dismissal of the criminal case! *See* Rosen Depo. Tr., pp. 312-319 and pp. 388-394. Accordingly, at the very least, whether the March 3, 2008 statement is simply a reiteration of

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[18]The Defendants' Motion *In Limine* to Bar Admission of the Termination of Their Employment at AIPAC, in *United States v. Steven J. Rosen and Keith Weissman*, Criminal No. 1:05CR225 (E.D.Va.), is contained in Attachment No. 43 to Plaintiff's Statement of Genuine Issues.

earlier statements by Dorton on AIPAC's behalf or something more harmful is very much a genuine issue of material fact.

Also, in raising the issue of whether the March 3, 2008 statement is merely a repetition of earlier statements to a similar effect by made Dorton on AIPAC's behalf about Mr. Rosen, and earlier dismissed from the case on statute of limitations grounds, defendants seek to re-litigate an issue that was firmly decided by Judge Clark in her October 30, 2009 Order granting in part and denying in part defendants' Rule 12(b)(6) motion to dismiss this point. *See* October 30, 2009 Order, pp. 13-15. As such, Judge Clark's decision is the law of the case and is to be respected.

III. It is Doubtful that Nathan Lewin Had the Unique "Experience" He Claims.

Much is made by defendants in the documentation submitted in support of their motion for summary judgment of the Nat Lewin "experience" – *i.e.*, the claim by AIPAC's outside counsel in the Larry Franklin disclosure criminal investigation, that he was so surprised and shocked by what he heard on tape recordings of two FBI wire-tapped telephone conversation on March 15, 2005, in which Steven Rosen and Keith Weissman spoke with non-AIPAC persons about what Weissman had been told by Larry Franklin, a Department of Defense official, that he almost immediately came to believe that, because it could not condone their conduct, AIPAC had to terminate the employment of both Messrs. Rosen and Weissman (a reversal of his thinking up until that point) and he so recommended to AIPAC on March 21, 2005 – which caused AIPAC to terminate Messrs. Rosen and Weissman that very day. The trouble is that, an examination of the record evidence casts a long shadow of doubt as to whether Nat Lewis had such an "experience" at all! Indeed, defendants' assertions in this regard to the contrary, the record evidence strongly suggests that Nat Lewin learned nothing new when federal prosecutors let him listen to the wire-

tap tapes, and that he and AIPAC, merely used the occasion to cut Rosen and Weissman out for the benefit of the AIPAC organization and its senior officials.

Certainly, federal prosecutors played the FBI's clandestine recording of Messrs. Rosen's and Weissman's joint telephone conversation with *Washington Post* reporter Glenn Kessler for Mr. Lewis. Of that there is no doubt. However, it is Nat Lewin's contention that it was not until he heard the FBI wire-tap tape – on Match 15, 2005 – that he learned or understood the "startling" fact that Weissman and Rosen were attempting to "sell" (meaning convince) the *Washington Post* reporter on writing a story with the information they were providing based on the notion that the disclosure of that information (which Weissman had obtained from DOD's Larry Franklin) could get Weissman into serious, perhaps criminal trouble. *See* Lewin Depo., Tr. 23-29. It was this that constitutes the claimed unique "experience" in Lewin's view; and it is this that is subject to significant doubt based on the record evidence.

First, there is the October 4, 2004 Memorandum From Abbe Lowell (Rosen's and Weissman's attorney in the criminal matter) to the Rosen/Weissman Files (with copies to Phil Friedman, AIPAC's General Counsel, and Nat Lewin, AIPAC's outside counsel in the criminal probe, re: "AIPAC Inquiry Background Facts: Revised" (Last Revised September 1, 2004)."[19] That memorandum says that

> SR [Steven Rosen] passed on the substance of the information to Glen Kessler at the *Washington Post* again without identifying the source; he may have passed on the parts about the oil fields and the operatives and not the Israeli threat; and no article occurred over the report; [p. 4]

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[19]The October 4, 2004 Memorandum From Abbe Lowell (Rosen and Weissman's attorney) To the Rosen/Weissman Files (copies to AIPAC's attorneys, including Phil Friedman and Nat Lewin) re: "Inquiry Background Facts: Revised (Last Revised September 1, 2004)," is Attachment No. 3 to Plaintiff's Statement of Genuine Issues.

and that Weissman reported that

> he had received some information from American intelligence sources about serious actions Iran was taking in Iraq. . . . KW [Keith Weissman] recalls that LF [Larry Franklin, Weissman's Defense Department source] said it was sensitive information or confidential (and he might have even said it was classified). . . . What KW does recall is that LF said you could be hurt or in trouble if he told KW. . . . KW went right back to the office and told SR. He told SR that it was from intelligence sources *but did not tell SR what LF had said about getting hurt or being in trouble*. . . . SR passed on the substance of the information to Glenn Kessler at The Washington Post again without identifying the source; he may have passed on the parts about the oil fields and the operatives and not the Israeli threat." [p. 8, emphasis added].

Further, even Nat Lewin does not dispute that he received the copy of the October 4, 2004 Memorandum re: "Inquiry Background Facts: Revised (Last Revised September 1, 2004)" that Abbe Lowell sent to him, and he concedes that he certainly reads what is sent to him. *See* Lewin Depo. Tr., pp. 37-48, 46.

While Mr. Lewin claims that the recording of the conversation between Messrs. Rosen, Weissman, and Kessler played for him by prosecutors left him with a disturbing impression (see Lewin Depo. Tr., pp. 23-25 and pp. 60-61), the October 4, 2004 Memorandum from Abbe Lowell – which is a revision of the same fact memo's earlier, September 1, 2004 rendition – certainly does recount Steve Rosen's conversation with the *Washington Post's* Glenn Kessler, and that document is *at least* five + months prior to Lewin being played the wire-tap tape by prosecutor! And, again, Mr. Lewin does not dispute that he received the copy of that October 4, 2004 Memorandum that Rosen's lawyer sent him and he concedes that he certainly reads what is sent to him.

There is even good reason in the record evidence to show that Steven Rosen did not know the information received by Keith Weissman from Larry Franklin, the Defense Department employee, was classified at the time he and Mr. Weissman tried to persuade Glenn Kessler of the

Washington Post to write a story based on that information. First, Mr. Rosen testified in his deposition that he did not know at the time of his and Weissman's conversation with Glenn Kessler that Weissman's Defense Department source, Larry Franklin, had told Weissman that the information they (Rosen and Weissman) were telling Kessler was "classified." Indeed, Mr. Rosen did not know at that time that Franklin had even used the word "classified" when he spoke to Weissman. *See* Rosen Depo. Tr., pp. 432-436.

Second, while Nat Lewin avers that he knew from the FBI tape that Mr. Rosen and Mr. Weissman were essentially trying to persuade Kessler to write a story in the *Washington Post* disclosing the information they provided to him from Weissman's Department of Defense source, by representing to Mr. Kessler that the information being provided was of a type for which they could be criminally punished for having disclosed to him (see Lewin Depo. Tr., p. 27), Mr. Rosen makes clear in his deposition testimony that in the FBI taped telephone conversation between Keith Weissman, himself and Glenn Kessler, he (Rosen) denied to Mr. Kessler that the information he and Weissman were providing to him was of a type that Rosen and Weissman could be criminally prosecuted for revealing. *See* Rosen Depo. Tr., pp . 429 and 255-56 . Indeed, Mr. Rosen makes plain in his deposition that he was not told by Mr. Weissman prior to the FBI-tapped telephone conversation they jointly had with Glenn Kessler that Mr. Weissman had been told by Larry Franklin that some of the material was sensitive or "classified" and that Weissman could get "in trouble" for its disclosure. *See* and Rosen Depo. Tr., p. 432 and pp. 434-435. In this, Rosen's recall is supported by the content of the October 4, 2004 Memorandum from Abbe Lowell, Weissman's attorney as well as Rosen's (which was copied to Nat Lewin and AIPAC General Counsel, Phil Friedman), at p. 8, where it reports that while Mr. Weissman was told by Larry Franklin that the information he was providing to Weissman was

"sensitive" or "confidential" and that he (Franklin) might have even used the word "classified" – and Weissman did say that Franklin said he (Weissman) could be hurt or in trouble if it was known that he (Franklin) had disclosed the information) – *it also clearly states that Keith Weissman did not disclose any of this to Steven Rosen*).

Further, it is independently clear from the record that Mr. Lewin and senior management of his client AIPAC knew, at least by October 5, 2004, what information Franklin provided to Weissman in the key July 21, 2004 meeting between them and when Weissman told Steve Rosen (who was not at the meeting) about what Franklin had disclosed in that meeting – and that Weissman *did not* tell Mr. Rosen that Franklin had said that any of the information provided was "classified." This is because we have "draft" dated October 5, 2004, of an AIPAC document entitled "AIPAC Briefing Paper on the Allegations Reported in the Media Regarding AIPAC and Two AIPAC Employees"[20] and within that document (*see* pp. 12-15), AIPAC management acknowledges that it knows these facts. In addition, we also have in an October 18, 2004 draft of the "Narrative Post Task Force Weekend Revisions" of a speech AIPAC was planning to have its Executive Director Howard Kohr give to AIPAC's most important members.[21] And that document also makes plain (at pp. 3-8) that the high-level AIPAC team preparing the propose Kohr speech acknowledged that hearing sensitive or classified information from government sources such as Larry Franklin and then sharing that information with others, as Steve Rosen and

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[20]The October 5, 2004 Draft of "AIPAC Briefing Paper on the Allegations Reported in the Media Regarding AIPAC and Two AIPAC Employees" is Attachment No. 4 to Plaintiff's Statement of Genuine Issues.

[21]The October 18, 2004 draft of the "Narrative Post Task Force Weekend Revisions" of a speech AIPAC's Executive Director Howard Kohr was to give to AIPAC's most important members, is Attachment No. 5 to Plaintiff's Statement of Genuine Issues.

Keith Weissman had been accused of doing, was not illegal, was what Rosen and Weissman were paid to do by AIPAC, and was common in Washington's foreign policy circles. *See also* the earlier, October 15, 2004 draft of those "Narrative Post Task Force Weekend Revisions" of the same speech AIPAC's Executive Director Howard Kohr planned to give (at pp, 2-7), to the same effect.[22]

With regard to the both the Briefing Paper and the Kohr speech, the record evidence establishes that the drafters included the highest personages at AIPAC, including retained counsel Nat Lewin, General Counsel Phil Friedman, Executive Director Howard Kohr, and Deputy Executive Director Richard Fishman. *See* Richard Fishman deposition testimony (**Confidential Portions**)[23] Depo. Tr., pp. 293-96 ([redacted]

[redacted]; pp. 51-54 ([redacted]

[redacted]

[22]The October 15, 2004 draft of the "Narrative Post Task Force Weekend Revisions" of a speech AIPAC's Executive Director Howard Kohr was planning to give to AIPAC's most important members, is Attachment No. 6 to Plaintiff's Statement of Genuine Issues.

[23]The **Confidential Portions** of the transcript of the deposition of Richard L. Fishman cited in this Statement of Genuine Issues are all contained in Attachment No. 7 hereto.

and Tr., pp. 63-64 ([redacted]

This being the case, it is doubtful that Nat Lewin had such a unique and shocking "experience" as he claims when – five months later, he heard the recording of the wire-tapped telephone conversation. At the very least, it is surely a fact in genuine dispute.

IV. The Record Evidence Leaves Reason to Doubt That AIPAC Would be "Substantially Damaged" if the Tape of the FBI Wiretap of the Telephone Conversation Between Messrs. Rosen and Weissman and Glenn Kessler of the *Washington Post* Became Public – Even if the Lewin "Experience" Were Real.

An essential feature of defendants' explanation of it conduct and, thus, justification for its March 3, 2008 statement, is that Nat Lewin, due to his "experience" believed that AIPAC would suffer "substantial damage" when the tape recording of the wire-tapped conversation became public at a criminal trial of Messrs. Rosen and Weissman if AIPAC continued to employ them and failed to distance itself from their conduct. *See* Lewin Depo. Tr., p. 79. However, the record evidence establishes that long before the 2004 incident involving Messrs. Rosen and Weissman and disclosure of allegedly "classified" information by DOD's Larry Franklin, AIPAC weathered a public disclosure of its staff dealing with "classified" information on a more serious scale that any allegation brought against Messrs. Rosen and Weissman, and it retained and defended the employees involved vigorously.

In this regard, an August 3, 1984, *Washington Post* article by Stuart Auerbach, entitled "FBI Investigates Leak on Trade To Israel Lobby"[24] reported on the 1984 incident noted *supra*, involving a previous incident of the receipt by an AIPAC official of a "classified" document,

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[24]A reprint of the article "FBI Investigates Leak on Trade To Israel Lobby" by Stuart Auerbach from the August 3, 1984 edition of the *Washington Post*, which was Document No. 6 in Plaintiff's Production of Documents, is Attachment No. 8 hereto.

that in that incident AIPAC had publicly defended its staff for receiving and re-transmitting an actual classified document – an act well beyond anything Mr. Rosen or Mr. Weissman was accused of doing – and AIPAC was not in that event "substantially damaged" by that act or that admission. In fact, that article reports that a spokesman for AIPAC (a) acknowledged that the organization had a copy of a classified government report but (b) said the AIPAC did nothing illegal, the article quoting the AIPAC spokesman as saying:

> We did not solicit it . We gave it back to them. *There was nothing illegal about our having something that was not solicited.*

Emphasis added).[25]

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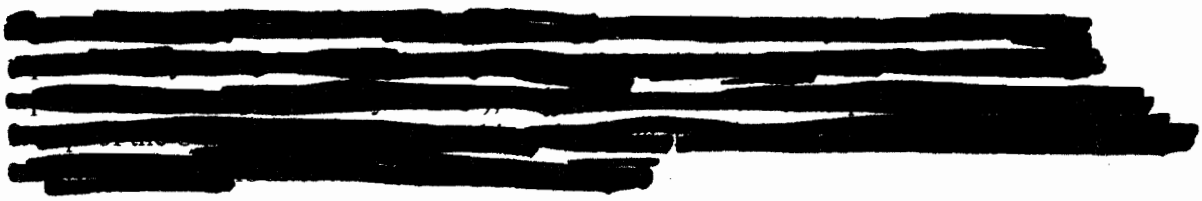
[25]*See also*: an FBI Telex of March 7, 1986, from Special Agent in Charge ("SAC"), Washington Field Office re: Theft and Unauthorized Disclosure of Documents from the U.S. Trade Representative ("USTR"), which is Attachment No. 9 to Plaintiff's Statement of Genuine Issues (which document states that an official of the Embassy of Israel confirmed that the embassy had received a classified USTR document from AIPAC); a March 9, 2009 letter from the Office of the U.S. Trade Representative , Executive Office of the President to Grant Smith of the Institute for Research, Middle Eastern Policy, which is Attachment No. 10 to Plaintiff's Statement of Genuine Issues (confirming that the 1984 document referenced in both Attachments 6 and 133 hereto is still "classified in its entirety"); an August 13, 1984 FBI Investigative Summary re: Theft of Classified Document from USTR, which is Attachment No. 11 to Plaintiff's Statement of Genuine Issues (confirming an official at AIPAC had access to this classified document or information contained in it); an FBI Telex of June 20, 1984, from Washington Field Office to Director, FBI re: Theft of Classified Documents from the Office of U.S. Trade Representative ("USTR"), which is Attachment No. 12 to Plaintiff's Statement of Genuine Issues (confirming an AIPAC official admitted to Associate General Counsel of USTR that AIPAC had a classified USTR document and, on demand, returned it to USTR); a January 6, 1986 FBI Form 302 regarding a January 6, 1986 interview of a female AIPAC official – with her attorney from the law firm of Dickstein Shapiro & Morin present, which is Attachment No. 13 to Plaintiff's Statement of Genuine Issues (wherein the AIPAC official confirmed that she had received the classified USTR report back in April 1984, that she had distributed it, and it had been photocopied, that she had had a copy and had taken it home and, after being told to destroy it, disposed of it by putting it down her trash chute); the FBI Form 302s dated March 21, 1986 and January 6, 1986 re: interviews of AIPAC officials concerning the possession by AIPAC of a USTR document back in 1984 which Attachment Nos. 14 and 15 to Plaintiff's Statement of Genuine Issues (which confirm the widespread distribution within AIPAC of this secret U.S. Government document back in 1984); *and see* Kurz **Confidential** Depo. TR, pp. 11-33 ([redacted]

Obviously, AIPAC had survived – indeed, flourished – and without loss of staff when it earlier stood by its employees in the face of true public revelations of their having received and disseminated a classified document. This creates at least a genuine issue as to whether AIPAC would have been "substantially damaged" if the tape of the FBI wiretap of the 2004 telephone conversation between Messrs. Rosen and Weissman and Glenn Kessler of the *Washington Post* had became public.

V. The Record Suggests That AIPAC's Actions and Statement – Including the Statement Published in The New York Times on March 3, 2008 – in Order to Curry Favor With the Government So As to Avoid Prosecution Itself.

Although in his deposition testimony Nat Lewin denies that AIPAC was ever a target of the Justice Department's investigation into the 2004 Larry Franklin disclosures to Keith Weissman and the dissemination of the information leaned from him (Franklin) by Messrs. Weissman and Rosen (*see* Lewin Depo. Tr., pp. 7-8) or that AIPAC was ever threatened by prosecutors with becoming a target unless it complied with the terms of the so-called "Thompson Memorandum" (*see* Lewin Depo. Tr. P. 51), the evidence of record leaves substantial reason to doubt Mr. Lewin's contentions on this point. And if the contrary is true – that at is, if AIPAC was coerced by the federal prosecutors investigating the Franklin disclosures with the prospect of conforming to the terms of the Thompson Memorandum or become a target of their probe along with Messrs. Rosen and Weissman – it would be a self-serving motive for AIPAC to take action against Steven Rosen's and Keith Weissman's employment and their compensation, and



disparaging them with knowingly false statements about their conduct – like, that they failed to meet "standards" that did not exist and that AIPAC still stood by that view three years after their employment was terminated (and while the government was still engaged in prosecuting them).

In this regard, the U.S. Justice Department has a set of published principles under which federal prosecutors were to consider whether or not to investigate and/or prosecute an organization for crimes committed by its employees while working for the organization. These principles were set out in a Department of Justice Memorandum on January 20, 2003 issued by then Deputy Attorney General Larry D. Thompson to the Heads Department Components and United States Attorneys. This memorandum – commonly known as the "Thompson Memorandum" – was titled "Principles of Federal Prosecution of Business Organizations" and it set out the factors that federal prosecutors are to consider in making a decision on charging a corporation with crimes committed by its officials.[26] Under Section II. "Charging a Corporation: Factors to Be Considered," the Thompson Memorandum states:

> In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:
>
> * * *
>
> 2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate managers . . . ;
>
> * * *

[26]The Thompson Memorandum, that is, the Department of Justice Memorandum dated January 20, 2003, issued by then Deputy Attorney General Larry D. Thompson to the Heads Department Components and United States Attorneys, titled "Principles of Federal Prosecution of Business Organizations," which was produced in discovery as Document No. 29 in Plaintiff's Document Production to Defendants, is contained in Attachment C hereto.

> 4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents . . . (*see* section VI, *infra*);
>
> * * *
>
> 6. the corporation's remedial actions, including any efforts to . . . to discipline or terminate wrongdoers . . . ;

Thompson Memorandum, pp. 2-3.

Under section VI of the Thompson Memorandum (cited in II.4., *supra*), "Charging a Corporation: Cooperation and Voluntary Disclosure," the document states:

> Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting the culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporations's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.

Thompson Memorandum, p. 5.

As was already noted, Nat Lewin denied that AIPAC was ever "threatened" with the Thompson Memorandum in the investigation into Rosen and Weissman's dealings with Larry Franklin's disclosures in his deposition testimony. However, he did concede that the prosecutors who were conducting the Justice Department investigation inquired about whether Messrs. Rosen and Weissman were still employed by AIPAC, whether AIPAC was still paying them, whether AIPAC was continuing to advance them attorneys fees for their criminal defense, etc.; and that he (Lewin) provided that information to them (*e.g.*, immediately informing the prosecutors when they had been terminated, answering their questions about continued payments). *See* Lewin Depo. Tr., pp. 51-56. In fact, Lewin conceded that what AIPAC did in March 2005 to Rosen and Weissman (*e.g.*, terminate them, end their pay, stop advancing attorneys fees for their criminal

defense, terminate AIPAC's joint defense agreement with them, etc.), all of which he informed the prosecutor of, were the kind of actions that the Thompson Memorandum says prosecutors are to look to as factors in deciding whether or not to investigate and charge a corporation for crimes committed by its employees. *See* Lewin Depo. Tr., pp. 51-56.

Moreover, there is other credible evidence that – in direct contravention of Nat Lewin's sworn denial – the Justice Department was actively pressuring AIPAC and its lawyers with the Thompson Memorandum to separate itself from Steve Rosen and his colleague Keith Weissman by taking employment actions against them and distancing itself from them publicly. In this regard, on July 18, 2006, Messrs. Rosen's and Weissman's criminal defense counsel filed a motion to dismiss the indictment or for other relief due to the government's violations of Messrs. Rosen's and Weissman's Fifth and Six Amendment rights.[27] In the memorandum of law accompanying that motion, the defense team recount how the prosecutors in the Rosen/Weissman case were using the Thompson Memorandum as a guide in their efforts to pressure AIPAC to cut off Messrs. Rosen and Weissman from their support apparatus – *e.g.*, employment, joint defense agreement, attorneys fee advances, etc. *See* Memorandum of Law, p. 6. Moreover, Messrs. Rosen and Weissman's defense counsel recount how – directly contrary to Mr. Lewin's deposition testimony – AIPAC was itself a subject of the federal investigation into early 2005, when prosecutors sought its cooperation specifically pursuant to all aspects of the Thompson Memorandum. Indeed, in the Memorandum of Law, these criminal defense lawyers

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[27]Defendants' Motion to Dismiss the Indictment or for Other Relief Due to the Government's Infringement of Defendants' Rights Under the Fifth and Sixth Amendments to the United States Constitution, filed on July 18, 2005, in *United States v. Steven J. Rosen and Keith Weissman*, Criminal No. 1:05CR225 (E.D.Va.), together with Memorandum of Law in support of that motion (with attached exhibits), all of which was produced in discovery as Document No. 96 in Plaintiff's Document Production to Defendants, is contained in Attachment D hereto.

lay out how, on March 18, 2005, prosecutors told attorneys for AIPAC and its Executive Director that AIPAC needed to fire Messrs. Rosen and Weissman (which AIPAC did just a single business day later, March 21, 2005, based on Mr. Lewin's recommendation of that same day), and that the Thompson Memorandum should be AIPAC's guide to its decisions regarding Messrs. Rosen and Weissman – all of which was later confirmed to Mr. Rosen's counsel by one of the prosecutors. *See* Memorandum of Law, p. 7. Soon thereafter, the Memorandum of Law continues, prosecutors began pressuring AIPAC to cut off Mr. Rosen's severance pay and his health benefits, as well as to stop the advance payments of Mr. Rosen's legal fees for his criminal defense (which AIPAC did shortly thereafter[28]). *See* Memorandum of Law, p. 8.[29]

Information about AIPAC being pressured by prosecutors to separate itself from Messrs. Rosen and Weissman specifically pursuant to the dictates of the Thompson Memorandum was further discussed by the Rosen/Weissman criminal defense team in another filing with the U.S. District Court in *United States v. Steven J. Rosen and Keith Weissman*, Criminal Case No. 1:05CR225 (E.D.Va.) – Defendants' Reply Memorandum in Support of Their Motion to Dismiss the Indictment or for Other Relief (filed on under seal on September 22, 2006, and unsealed by

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[28]*See* December 19, 2005 letter from Jamie S. Gorelick of WilmerHale to Abbe Lowell of Chadbourne & Parke LLP, re: Indemnification of Steven Rosen, which is Attachment No. 30 to Plaintiff's Statement of Genuine Issues.

[29]All the statements in the Memorandum of Law are supported by a July 16, 2006 sworn declaration of Abbe David Lowell, Esq., of Chadbourne & Parke LLP, (Mr. Rosen's criminal lawyer) which was an attachment to the Memorandum of Law, but was separately produced in discovery as Document No. 97 of Plaintiff's Production of Documents, an is contained in Exhibit E hereto, and a July 16, 2006 sworn declaration of Laura S. Lester, Esq., of Arent Fox PLLC (one of Mr. Weissman's criminal attorneys), which was also an attachment to the Memorandum of Law, but was separately produced in discovery as Document No. 98 of Plaintiff's Production of Documents, and is contained in Exhibit F hereto.

the District Court on March 22, 2007).[30] In that document, counsel for both Steven Rosen and Keith Weissman informed the District Court that on a February 16, 2005 conference call with them (Rosen's and Weissman's attorneys), AIPAC's counsel stated:

> [The U.S. Attorney] would like to end it with minimal damage to AIPAC. He is fighting with the FBI to limit the investigation to Steve Rosen and Keith Weissman and to avoid expanding it.

See Defendants' Reply Memorandum, p. 3. Further, according to the Rosen/Weissman criminal defense team, AIPAC counsel told them that, while AIPAC did not believe that Rosen and Weissman had committed any crime, they were fired in order to give AIPAC "credibility" with the government. *Id.*

Thus, the record evidence demonstrates that there exists a genuine issue of fact concerning AIPAC's motive for taking the action it did with regard to Steven Rosen and his colleague Keith Weissman (saving itself from investigation/prosecution) – including making false public statements about their conduct not conforming to AIPAC's standards (which, as we have shown, did not exist) and continuing to reiterate those statements adding affirmatively that AIPAC still believes the statement to be true into March 3, 2008. This would surely provide a jury with an amble basis for finding "actual malice" – particularly since AIPAC had the benefit a comprehensive and well reasoned expert legal opinion from Viet D. Dinh, former Department of

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[30]*See* Defendants' Reply Memorandum in Support of Their Motion to Dismiss the Indictment or for Other Relief in *United States v. Steven J. Rosen and Keith Weissman*, Criminal Case No. 1:05CR225 (E.D.Va.), filed on under seal on September 22, 2006 (and unsealed by the District Court on March 22, 2007), which was produced in discovery as Document 102 in Plaintiff's Production of Documents, is contained in Attachment G hereto.

Justice official (and Patriot Act author), that what Steve Rosen and Keith Weissman had done regarding the Larry Franklin disclosures was, simply put, not a violation of law.[31]

VI. Plaintiff Suffered Injury to His Reputation Based on the False and Malicious Statement Made by Defendants Contained in the March 3, 2008 article in *The New York Times.*

In his deposition testimony, Steven Rosen stated that certain witnesses important to his criminal defense in *United States v. Steven J. Rosen and Keith Weissman*, Criminal No. 1:05CR225 (E.D.Va.), would not cooperate with his attorneys because of the position that AIPAC was taking:

> "Q: As you sit here today, can you identify for me any individual or business that told you Mr. Dorton's statements in the March 3, 2008 New York Times article in any way lessened their opinion of you?
>
> A: The American Jewish Committee, the Anti-Defamation League, and *B'nai Brith* made it clear that they could not cooperate in our defense because of the position that AIPAC was taking.
>
> Q: Defense of the criminal case?
> A That's right . . . And their lack of cooperation increased the chance of conviction, because it was material to our defense.";

See Rosen Depo. Tr. pp. 305-307. Concerning others – *e.g.*, David Mack, the Deputy Director of the Middle East Institute, a prominent Think-Tank – said that he attributed a decline in Mr. Rosen's influence to AIPAC's publicly-stated position towards him. *See* Rosen Depo. Tr., pp. 313-14. Moreover, Mr. Rosen said that there was a reduction in the number of people who were willing or able to help him during the time he was under indictment, and virtually none of AIPAC's board members could help – not because none were sympathetic, but rather it was

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[31] *See* Memorandum re: Matter of AIPAC Employees, by Viet Dinh and Brian A. Benczkowski, of Bancroft Associates, PLLC, re: Matter of AIPAC Employees (37 pp.), which was produced in discovery as Document No. 48 as part of Plaintiff's Production of Documents, and is contained in Exhibit H hereto.

made plain to them by AIPAC that they were not permitted to do so. See , Rosen Depo. Tr., p. 319.

Further in this same vein, in response to being asked if he could distinguish the level of anxiety attributable to the objectionable sentence by Dorton (for AIPAC) in the March 3, 2008 article from that cause by being indicted under the Espionage Act, Mr. Rosen said:

> Yes, I can definitely do it. . . . I believe it was far more upsetting to be abandoned by my closest friends and colleagues and to be thrown to the wolves and be all alone in this situation. . . . And to be left the way they left me was . . . enormously upsetting.

See Rosen Depo. Tr., pp. 322-323. Continuing, Mr. Rosen explained that:

> [t]he criminal prosecution had surprisingly little effect on my psychological well-being. My psychologist; my wife or ex-wife with whom I live, Barbara; my closest friends; all commented on how well I was taking it . . . But when AIPAC fired me, it was different, because – it was my – the abandonment by AIPAC meant an end of my – an effective end to most of my career that I had built over four decades. It meant that 23 years of hard labor at AIPAC had come to a screeching halt, not because I did something wrong, but because AIPAC, because it was trying to protect itself, was abandoning me, and my severance [*sic*] from my closest friends, because most of my closest friends were fellow AIPAC employees, board members and others, and the complete ostracism I was subjected to. *And the statements of Patrick Dorton were the worst, because I could understand why Nat Lewin might conclude that as a practical matter AIPAC had to sacrifice Jonah to save the ship, but there was no necessity to go about telling people that I had done something wrong, that my actions weren't part of my job, and the other lies that AIPAC spread through Dorton's lips. There was no excuse for that. That was like throwing salt into a wound. I had thought that Nat Lewin and the others at AIPAC understood that this was something dire that was being done to an innocent man because it was necessary to protect the organization. But when they began making these statements, these statements to try to persuade people that I had actually done something wrong, that was unnecessary and far more hurtful. So for me, the emotional reaction was primarily to these statements.*)

See Rosen Depo. Tr., pp. 326-27 (emphasis added).

None of this testimony was challenged in any way in the record evidence. It stands as true for the purpose of considering defendants' summary judgment motion.

ARGUMENT

I. Legal Standard.

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Colbert v. Georgetown Univ.*, 641 A.2d 469, 472 (D.C.1994). Defendant is only entitled to summary judgment if a fair-minded jury could not return a verdict for plaintiff, even when the evidence is viewed in the light most favorable to him. *Hendel v. World Plan Executive Council*, 705 A.2d 656, 660 (D.C.1997).

Defendant, as the moving party, bears the burden of proving that no genuine issue as to any material fact exists and that it is entitled to judgment as a matter of law. *See Atkins v. Industrial Telecomm. Ass'n. Inc.*, 660 A.2d 885, 887 (D.C.1995). All reasonable inferences must be made in plaintiff's favor, though plaintiff must rebut material facts with specific evidence in support of a viable legal theory under his version of the facts. *Hill v. White*, 589 A.2d 918, 921 (D.C.1991); *Thompson v. Seton Investments*, 533 A.2d 1255, 1257 (D.C.1987).

II. As This Court Has Already Ruled, the March 3, 2008 Statement Is Not Time-Barred.

This Court has already ruled that the March 3, 2008 statement that "AIPAC still held that view" of Rosen was not a republication of defendants' earlier statements, and therefore not barred by the one-year statute of limitations. AIPAC has put forth essentially an identical argument on this point as it did in its Motion to Dismiss. The Court has already rejected this argument, and with good reason. As the Court explained:

> when the March 3, 2008 statement was published with the comment that 'he [Defendant Dorton] said recently that AIPAC still held that view of their behavior,' taking that statement and the reference to the earlier 2004 statement, a jury would have sufficient facts to infer that the *New York Times* spoke to Defendant Dorton, and based on his comments, published the March 3, 2008 article.

Memorandum Opinion regarding Summary Judgement ("Mem. Op.") at 15. Therefore, while the March 3, 2008 statement alluded to defendants' earlier defamatory statements, it was itself a fresh defamation of Rosen and a new cause of action accrued.

Defendants ignore the Court's ruling and repeat their arguments from their first dispositive motion. This time, Defendants base their argument that the March 2008 statement is not defamatory, by quoting a different statement from the article:

> As alleged by the Plaintiff, "Patrick Dorton said *at the time* that the two men were dismissed because their behavior 'did not comport with standards that AIPAC expects of its employees." On its face, the article only repeats a "statement" made by Defendant Dorton much earlier, namely *at the time of* Plaintiff's actual discharge from AIPAC in 2005.

Def.'s Mem. at 9. To be sure, the statement quoted in Defendants' brief is a republication of the earlier defamation. But the article contained another statement attributed to AIPAC that this Court has already found timely: "'he [Defendant Dorton] *said recently* that AIPAC still held that view of their behavior,'" Mem. Op. at 15 (emphasis added). Because AIPAC made a then-recent statement regarding its view of the Plaintiff, a timely defamation occurred.

Defendants' excerpting Mr. Rosen's deposition testimony does not alter this analysis. There is no question that the March 3, 2008 statement alluded to defendants' prior defamatory statements. This, however, does not change the fact that the March 3, 2008 statement was a new instance of defamation giving rise to a new cause of action.

In the final analysis, this Court should follow the well-established rule, which was cited by defendants themselves in their Motion to Dismiss, that each defamatory statement gives rise to a separate cause of action. Under this principle, the Court must at a minimum hold that, because defendants "stated recently" that they still held the defamatory view of Mr. Rosen in the March 3, 2008 *New York Times* article, plaintiff's claim for defamation was brought within the

statutory limitations period when this case was filed on March 2, 2009, and is thus not time barred. The Court rejected defendants' mischaracterization of this as a repetition or republication before, and it must do so again.

III. A Reasonable Jury Could Find That the March 3, 2008 Statement Is Defamatory.

Defendants argument that its March 3, 2008 assertion, that AIPAC dismissed Mr. Rosen because he did not comport with the standards that AIPAC expects of its employees, is not defamatory as a matter of law boils down to its contention that the statement is true. *See* Def.'s Mem. at 11-21. First, Defendants' brief states the elements of defamation without any argument. *Id.* at 10. Then, in point (1), they argue that truth is a complete defense to defamation. *Id.* at 11. Finally, in point (2), Defendants argue that the statement was not false when viewed in the proper context – and go on at length arguing the facts in the light most favorable to Defendants and calling that view the "proper" context. *Id.* at 13-21.

But at the summary judgment stage, the facts must be viewed in the light most favorable to the non-moving party-- in this case Mr. Rosen. Viewed in this proper context, that is, in Mr. Rosen's favor, Defendants' statement that it terminated him because he did not comport with AIPAC's standards is false.

AIPAC told the *New York Times* that AIPAC still held the view that "the two men were dismissed because their behavior 'did not comport with standards that AIPAC expects of its employees.'" But the record reveals that Rosen was terminated because AIPAC anticipated a severely negative public reaction to its failure to terminate Rosen, a reaction severe enough to render AIPAC ineffectual in its business. *See* Lewin Depo. Tr. p. 33 ("I believed that if it turned out, as I said, that this recording became public, then AIPAC would not be able to answer the question, how did you keep these people as employees after you knew that this is what they had

done?"). In fact, Nat Lewin testified that it would be more than a public relations disaster for AIPAC; it would be "a disaster in their ability to do what they do." *Id.* at 35. Thus a reasonable jury could conclude that AIPAC terminated Rosen to maintain its public image and not because AIPAC objected to his conduct as it stated to the *New York Times* in March 2008.

There is also evidence to support a jury finding that Rosen did not, in fact, run afoul of any AIPAC standard or practice during his conversation with Mr. Kessler. First, there is evidence that AIPAC condoned similar efforts by Rosen early in his career. Attachment No. 40 (Email from Rosen). When Mr. Rosen had received and shared potentially classified information concerning Libyan officials giving money to an American Presidential candidate in 1984, AIPAC did not disapprove of his actions but in fact, issued him a positive performance appraisal that year and every year thereafter. *Id.; see also* Attachment B at 337 ("At no point in this process was I told that I had done anything wrong in receiving this information or in sharing it with a staff member of the Senate Intelligence Committee as well as two *Washington Post* reporters. Indeed, my superiors indicated that they understood and shared my reasons for concern and supported my efforts to do something about it.").

Second, there is evidence that the receipt and distribution of confidential foreign policy information is a common practice for AIPAC. As explained by Mr. Rosen:

> I have in fact been encouraged for twenty-three years to learn all I can about policy developments early in the policy process, so that we as an advocacy organization and our friends in Congress can be in a position to influence the evolution of Administration policy before it is decided and "frozen in stone." One Executive Director after another has encouraged me to "go deeper" and to continue making Executive Branch contacts. The organization has utilized the information we have gathered in our executive branch interactions to its advantage in other forums. In my twenty-two annual personnel evaluations, all of which have been positive, it is my successes in this area that have been most highly praised and most rewarded.

Exhibit B, attached hereto.

Third, AIPAC condoned the receipt and distribution of classified information by another AIPAC official in the 1980's, and also promoted that official shortly after the admitted receipt and distribution of the classified document. *See* Attachment No. 9 (FBI Telex of March 7, 1986 stating that an official of the Embassy of Israel confirmed that the embassy had received a classified USTR document from AIPAC); Attachment No. 10 (March 9, 2009 letter from the Office of the U.S. Trade Representative , Executive Office of the President to the Institute for Research, Middle Eastern Policy, confirming that the 1984 document referenced in both Attachments 6 and 133 hereto is still "classified in its entirety"); Attachment No. 13 (January 6, 1986 FBI Form 302 regarding AIPAC official's confirmation that she had received the classified USTR report back in April 1984, that she had distributed it, and it had been photocopied, that she had had a copy and had taken it home and, after being told to destroy it, disposed of it by putting it down her trash chute); Kurz **Confidential** Depo. TR, pp. 11-33 ([redacted]

Fourth, and perhaps most significantly, AIPAC was aware of Rosen's conduct in the instant matter and did not voice any objection to Mr. Rosen's conduct here until federal prosecutors suggested that it would be to AIPAC's advantage to terminate both Rosen and Weissman. As noted by the Court in denying AIPAC's first dispositive motion, "Plaintiff

received a $7,000 award five months after the announcement of the government's criminal investigation," which could indicate to a jury that AIPAC did not object to Rosen's conduct. Mem. Op. at 15. In his letter to the Board, Rosen explains further that the information he received from Mr. Franklin was known to AIPAC's Executive Director and that he did not raise any concerns regarding the information or its distribution:

> When Keith [Weissman] and I went to see Howard [Kohr, AIPAC's Executive Director] on July 21, 2004 and reported what we heard, there was not one word expressed of concern. When Keith then wrote an e-mail [to AIPAC's Executive Director][32] and described his source as "a source familiar with U.S. intelligence," again there were no questions asked.
>
> * * *
>
> At no time since August 27 have I been told by any of my superiors that I violated any AIPAC policy in any way.

Finally, a reasonable jury could conclude that AIPAC's statement that it terminated Mr. Rosen because he allegedly tried to pass along classified information to a reporter is untrue based on AIPAC's dissembling. Defendants' brief goes on at length about facts it discovered after it terminated Rosen, i.e., sexual conduct and allegedly disobeying AIPAC's legal counsel. Nat Lewin testified at length that the decision to terminate Mr. Rosen was based solely on his alleged improper handling of confidential information. He did not indicate in his letter recommending Rosen's termination or at his deposition that allegations about Steven Rosen's use of the office computer or his sexual activity played any role whatsoever in his recommendation. *See* Lewin Depo. Tr., pp. 31, 55, 69-70; *see also* Attachment No. 20 (Lewin's March 21, 2005 letter to AIPAC's Executive Director recommending AIPAC terminate the employment of Messrs. Rosen and Weissman). "[A] fact finder could infer from the late appearance of [AIPAC's] justification

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[32]This **Confidential** e-mail is attached as Exhibit I hereto.

that it is a post-hoc rationale" and, therefore, false. *EEOC v. Sears Roebuck and Co.*, 243 F.3d 846, 853 (4th Cir. 2001); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (noting the general principle of evidence that "the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt.") (Internal citations omitted). In addition, because these facts were not even known to AIPAC's President at the time of Rosen's termination, they cannot possibly be the reason that AIPAC held the view that it terminated Mr. Rosen because his conduct did not comport with its standards. Manocherian Depo. Tr., pp. 21-22, pp. 28-31. Thus, there is ample evidence for a jury to conclude that AIPAC's statement that Rosen did not comport with its standards is false. Accordingly, summary judgment must be denied.

IV. Whether Defendants Acted With Malice Must Be Decided By A Jury.

The D.C. Court of Appeals has defined malice as follows:

> Malice is the doing of an act without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the rights or feelings of others as to constitute ill will.

Columbia First Bank v. Ferguson, 665 A.2d 650, 656 (D.C. 1995) (internal citations omitted). The fact-finder must look to the primary purpose behind the statement when determining if there is malice or bad faith. *Columbia First Bank*, 665 A.2d at 656, n.8. "Put another way, a qualified privilege exists only if the publisher believes, with reasonable grounds, that his statement is true." *Ingber v. Ross*, 479 A.2d 1256, 1264 n.9 (D.C. 1984) (internal citations omitted).

As this Court has already held:

> The issue of whether Defendants AIPAC and/or Dorton acted with malice in the role they allegedly played in the publication of the March 3, 2008 New York Times article should be decided by the jury, and not by the Court, as a matter of law.

Mem. Op. at 15. Discovery has not revealed any new information that to cause this Court to reverse its earlier decision. Indeed, there is now evidence that Mr. Lewin authorized Mr. Dorton to publicly state that AIPAC terminated Mr. Rosen because he did not comport with AIPAC standards, when, in fact, Mr. Lewin testified that the reason Mr. Rosen was terminated had more to do with maintaining AIPAC's public image. *See* Attachment No. 17 (*New York Times* article noting that AIPAC "said recently that AIPAC still held [the] view . . . that the two men [Rosen and Weissman" were dismissed because their behavior 'did not comport with standards that AIPAC expects of its employees.'"). *But see* Lewin Depo. Tr. pp. 33, 35 (testifying that Rosen was terminated because of the potential disaster for AIPAC if the public learned that it knew of his conduct and did not terminate him). In addition, there is ample evidence that AIPAC regularly approved of Rosen's efforts to gain foreign policy information and that even in this particular situation, no objection was voiced regarding his actions until AIPAC sought to curry favor with the federal prosecutors for its own advantage. Thus, as this Court has already held, whether AIPAC and Dorton acted with malice must be decided by a jury.

V. Plaintiff Has Suffered Compensable Damages Because of Defendants' March 3, 2008 Defamatory Statement.

Compensatory damages for defamation include compensation for "detraction from good name and reputation, for mental anguish, distress and humiliation; and for injuries to [plaintiff's] occupation." *Moss v. Stockard*, 580 A.2d 1011, 1033 n.40 (D.C. 1990) (internal citations omitted). While Defendants are correct that Mr. Rosen has chosen to forego damages for emotional distress, he is alleging "detraction from [his] good name and reputation," and "injuries to [his] occupation." Mr. Rosen testified that AIPAC's defamatory statement harmed his reputation in the Jewish political community as a whole and among his close friends at AIPAC.

See Rosen Depo. Tr. pp. 305-307 (wherein Mr. Rosen stated that "The American Jewish Committee, the Anti-Defamation League, and *B'nai Brith"* lessened their opinion of him because of AIPAC's statements); *see also id.* at 313-14 (testifying that a prominent Think-Tank attributed a decline in Mr. Rosen's influence to AIPAC's publicly-stated position towards him); *id.* at 322-323 ("I believe it was far more upsetting to be abandoned by my closest friends and colleagues and to be thrown to the wolves and be all alone in this situation. . . . And to be left the way they left me was . . . enormously upsetting"); *id.* at 326-27 ("when they began making these statements, these statements to try to persuade people that I had actually done something wrong, that was unnecessary and far more hurtful.").

Defendants' argument hinges on its legalistic interpretation of Mr. Rosen's use of the phrase "zone of danger" to describe his distress about the possibility of being convicted and imprisoned. Def.'s Mem. at 26. But Mr. Rosen is not a lawyer and clearly his use of the phrase "zone of danger" was in no way designed to raise a claim of negligent inflection of emotional distress. Rather, Mr. Rosen used the phrase to describe AIPAC's ostracization of him and the resulting danger that he would be convicted and imprisoned. *Id.* at 389; *see also* Fishman Depo., Tr., p. 235 (wherein AIPAC Deputy Executive Director admitted that AIPAC's action "could have complicated [Steven Rosen's] defense to the criminal charge"); Government's Consolidated Responses to Defendants' Daubert-Related and In Limine Motions, in *United States v. Steven J. Rosen and Keith Weissman*, Criminal No. 1:05CR225 (E.D.Va.), pp. 9-10 (in which, less than six-weeks after defendants' March 3, 2008 statement was published, prosecutors in the Rosen/Weissman criminal case told the Court that they might well use AIPAC's actions against Messrs, Rosen and Weissman at trial).

VI. A Reasonable Jury Could Find That Mr. Rosen Is Entitled to Punitive Damages.

Under the law of the District of Columbia, a plaintiff need not prove anything more than nominal compensatory damages to justify the imposition of punitive damages. *Ayala v. Washington*, 679 A.2d 1057, 1070 (D.C. 1996), *see also Robinson v. Sarisky*, 535 A.2d 901, 907 (D.C. 1988). Because a reasonable jury could find that Mr. Rosen suffered damage to his reputation and his occupation, the jury may award punitive damages.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment must be denied as there are here genuine issues of material fact and, accordingly, defendants are not entitled to judgment as a matter of law pursuant to Rule 56, Superior Court Rules of Civil Procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT the foregoing Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment (together with the attached Exhibits A - I thereto), along with Plaintiff Statement of Genuine Issues (together with Attachment Nos. 1 - 43 thereto) and a proposed order denying Defendants' Motion for Summary Judgment, are being electronically filed with the Clerk of the Superior Court for the District of Columbia using the Court's CaseFile Express system (which will automatically serve a copy of said filing via email to counsel of record for defendants, Thomas L. McCally (tlm@carmaloney.com) and Allie M. Wright (amw@carmaloney.com), of Carr Maloney, P.C., 2000 L Street, N.W., Suite 450, Washington, DC 20036), on this 14th day of December 2010.

Ellen K Renaud

Ellen K. Renaud

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEVEN J. ROSEN,	
Plaintiff,	
v.	**Civil Action No. 09-1256**
	Calendar 12
AMERICAN ISRAEL PUBIC AFFAIRS COMMITTEE, INC., *et al.*,	**Judge Erik P. Christian**
Defendants.	

ORDER

UPON CONSIDERATION OF defendants' motion for summary judgment, the memoranda and other materials submitted in support thereof and in opposition thereto, the entire record herein, and the arguments of counsel for the parties, it is by this Court this ___ day of _____ 2010

ORDERED that said motion be and the same hereby is DENIED as there are genuine issues of material fact and defendants are thus not entitled to judgment pursuant to Rule 56, Superior Court Rules of Civil Procedure.

HON. ERIK P. CHRISTIAN
ASSOCIATE JUDGE,
D.C. SUPERIOR COURT

Send copies of signed Order to:

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