

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

CIVIL DIVISION

STEVEN J. ROSEN,)	
)	
Plaintiff)	
v.)	Civil Action No. 19-1256
)	Calendar 12
AMERICAN ISRAEL PUBLIC AFFAIRS)	Judge Erik P. Christian
COMMITTEE, INC., et. Al.,)	
)	
Defendants)	
)	

BRIEF OF AMICI CURIAE IN OPPOSITION TO DEFENDANTS REPRESENTATIONS ABOUT
THE 1984 TO 1987 FBI INVESTIGATION OF AIPAC FOR ESPIONAGE AND THEFT OF
GOVERNMENT PROPERTY AND CONSEQUENCES

The Plaintiff argues in his 12/13/2010 Plaintiff’s Memorandum Of Points And Authorities In Opposition To Defendants’ Motion For Summary Judgement that the Plaintiff was defamed by the Defendant for doing the very same thing other AIPAC employees did in the past by referencing the FBI’s 1984-1987 investigation of AIPAC. This investigation was pursued on the basis of the US Trade Representative’s criminal complaint to the FBI that AIPAC had in its possession the government classified document *Probable Economic Effect of Providing Duty Free Treatment for U.S. Imports from Israel, Investigation, No. 332-180*. This document was a product of an advice and consent process informing the US government whether or not to pursue a bilateral “Free Trade Agreement” with Israel in the mid-1980s. The Plaintiff has argued that this document is still classified by the US government by introducing into evidence a 2009 copy of the declassification and release denial response letter to the *amicus curiae’s* Freedom of Information Act (FOIA) and Mandatory Declassification Review (MDR)

request to the US Trade Representative.¹ This letter clearly states that *Probable Economic Effect of Providing Duty Free Treatment for U.S. Imports from Israel, Investigation No. 332-180* is still classified by the US government.

A. AIPAC WAS NOT CLEARED OF WRONGDOING OVER CIRCULATION OF 1984 CLASSIFIED US GOVERNMENT DOCUMENTS AS CLAIMED BY THE DEFENDANT.

The Defendant claims that after the incident relating to a “USTR document obtained by AIPAC in 1984” that the “Plaintiff fails to reveal is that following an FBI investigation of the matter, AIPAC was cleared of any wrongdoing and the document that framed the basis of the investigation contained no classified national defense information.” The Defendant then produces as its exhibit 151, a declassified 8/13/1984 FBI Washington Field Office investigation summary Washington Field Office that “captioned matter did not represent a violation of the espionage statute as it was reported that no national defense information was utilized in the preparation of the report.”²

The Defendant fails to mention that the investigation of AIPAC, as stated in the FBI communications, continued on and grew in intensity for another two and a half years (until 1/14/1987) as a theft of government property investigation since it involved AIPAC’s possession of US government information classified at the level of “confidential”. In 2009 the FBI declassified and released 82 pages of its investigatory files in response to the *amicus curiae*’s Freedom of Information Act request #1124826-000.³ A full reading of FBI case files produced after 8/13/1984 and relevant trade data that has become available through the passage of time refutes the Defendant’s representations

¹ See Amicus Curie’s Ex. A “US Trade Representative 03/09/2009 letter of Denial to Grant F. Smith’s FOIA #08122049”

² See Amicus Curie’s Ex. B “Declassified 08/13/1984 Washington Field Office investigation summary released under FOIA 1124826-000”

³ See Amicus Curie’s Ex. C “FBI response cover letter to Grant F. Smith dated 07/31/2009 releasing 82 pages under FOIA 1124826-000”

that AIPAC was in any way “cleared” of wrongdoing. Indeed, the question of AIPAC wrongdoing is still very much open and subject to future civil action and trade sanctions.

On November 15, 1985, more than a year after the Defendant claimed “AIPAC was cleared of any wrongdoing” and just as the Jonathan Pollard Israeli espionage incident was breaking, the FBI Director ordered the FBI Washington Field Office to “expeditiously conduct investigation in accordance with the provisions of Section 52, manual of Investigative Operations and Guidelines”⁴ into AIPAC’s possession of *Probable Economic Effect of Providing Duty Free Treatment for U.S. Imports from Israel, Investigation No. 332-180*. On 12/17/1985 FBI Special Agent John Hosinki reported on a meeting with AIPAC during which he demanded information about “1. Who at AIPAC had knowledge of this report being in the possession of AIPAC, 2. Who received or handled this report at AIPAC, 3. Who furnished this report to AIPAC,” and the current residence for an AIPAC employee with knowledge of the matter.⁵

FBI agents interviewed an AIPAC employee on 12/19/1985 who admitted that she had received the classified report. She stated to the FBI that “it was her responsibility to study any reports or documents pertaining to American Israeli trade and considered the receipt of this report a very ordinary event.”⁶ On 12/19/1985 FBI agents interviewed another AIPAC employee who confirmed that “this document was marked ‘confidential’” and that she received the document “from an Israeli Embassy official” whom she then identified by name.⁷ On 2/13/1985 the FBI interviewed a third AIPAC

⁴ See Amicus Curie’s Ex. D “FBI Director 11/15/1985 AIRTEL to FBI Washington Field Office to Reopen AIPAC investigation released under FOIA 1124826-000”

⁵ See Amicus Curie’s Ex. E “Special Agent John Hosinki 12/17/1985 memorandum to FBI Washington Field Office on theft and unauthorized disclosure of documents from the U.S. International Trade Commission released under FOIA 1124826-000”

⁶ See Amicus Curie’s Ex. F “FBI Form FD-302 Interview of AIPAC Female Employee #1 12/19/1985 released under FOIA 1124826-000”

⁷ See Amicus Curie’s Ex. G “FBI Form FD-302 Interview of AIPAC Female Employee #2 12/19/1985 released under FOIA 1124826-000”

employee who confirmed that after being ordered to return the classified document by the USTR, he “asked to have a duplicate copy of the document made so that the staff of the AIPAC could further examine the report.” The AIPAC employee also confirmed that an Israeli Embassy official “had initially provided the report to a representative of AIPAC.”⁸

The FBI Washington Field Office on 3/7/1986 interviewed this Israeli diplomat who provided the classified report to AIPAC. The diplomat “advised that he furnished the report to an employee at the American Israel Public Affairs Committee (AIPAC) during the Spring or Summer of 1984.” The diplomat further advised that “it would be impossible within the professional ethics of a diplomat to identify individuals who provide certain information to a diplomat.”

Contrary to the Defendant’s claim and selective evidence presented, AIPAC was never “cleared” of any wrongdoing over its possession, duplication, and retention of *Probable Economic Effect of Providing Duty Free Treatment for U.S. Imports from Israel, Investigation No. 332-180*. Rather, on 3/31/1986 the FBI Washington Field Office reported that this investigation which had resulted from an initial complaint from the US Trade Representative that “person(s) unknown had made available to the government of Israel, a confidential report” had run into an investigatory roadblock due to the fact that the Israeli diplomat interviewed “has claimed diplomatic immunity in this matter, active investigation into this matter will be discontinued at WFO. Washington Field will be contacted by the USTR or the ITC if pertinent information is developed regarding this or similar incidents.”⁹ On 1/14/1987, based on an August 25, 1986 Department of Justice order, the FBI Washington Field Office closed its investigation.

⁸ See Amicus Curie’s Ex. H “FBI Form FD-302 Interview of AIPAC Male Employee #3 02/13/1986 released under FOIA 1124826-000”

⁹ See Amicus Curie’s Ex. I “FBI Form FD-302 Interview of Israeli diplomat 03/07/1986 released under FOIA 1124826-000”

B. AIPAC'S CIRCULATION OF CLASSIFIED GOVERNMENT DOCUMENTS HARMED US INDUSTRIES AND WORKERS AND UNDERMINED THEIR CONFIDENCE IN GOVERNMENT

The Defendant describes the AIPAC's possession of *Probable Economic Effect of Providing Duty Free Treatment for U.S. Imports from Israel, Investigation No. 332-180* and the FBI investigation as "ancient" and "irrelevant to this action." Nothing could be further from the truth. To the contrary, the negative consequences of AIPAC's possession of this particular classified document grow more obvious and disturbing every year.

This is because *Probable Economic Effect of Providing Duty Free Treatment for U.S. Imports from Israel, Investigation No. 332-180* was no ordinary government document. Rather, it was a compilation of confidential US business information broadly solicited by the International Trade Commission, on behalf of the US Trade Representative, first announced through a 2/15/1984 *Federal Register* notice.¹⁰ The government specifically promised to protect all confidential business information submitted by industry organizations concerned about entering into a bilateral free trade area with Israel. The US Bromine Alliance complained bitterly to ITC Chairwoman Paula Stern on 11/01/1984 that "The US Bromine Alliance provided very sensitive cost information to the Commission in response to the Commission's requests for confidential business data in connection with its report on a free trade agreement with Israel. The Alliance presumes that these data were quoted in the Commission's confidential report to the USTR, a copy of which was obtained by representatives of the American-Israel Public Affairs Committee..."¹¹ ITC Chairwoman Paula Stern confirmed in an 11/29/1984 letter that the US Bromine Alliance had indeed lost a great deal of confidential business information when the report was circulated by the Israeli Government and given to AIPAC. "You requested us to describe,

¹⁰ See Amicus Curie's Ex. J "2/15/1984 *Federal Register* notice."

¹¹ See Amicus Curie's Ex. K "11/1/1987 US Bromine Alliance Letter to ITC over Data loss" ITC Public file

characterize, or specify what business confidential information submitted by the U.S. Bromine Alliance in your letter of April 27, 1984 was included in the U.S. International Trade Commission's confidential report to the U.S. Trade Representative on investigation No. 332-180, Probable Effect of Providing Duty-Free Treatment for Imports from Israel...Specific business confidential numbers extracted from the Alliance's letter and shown in the report included: (1) the production cost for bromine, (2) production cost, raw material cost, depreciation or manufacturing cost, by-product cost, and shipping cost for the compound TBBPA and (3) the length of time that sales of domestic TBBPA could be supplied from inventory."¹²

But the US Bromine Alliance, representing thousands of American jobs and vast sunk investments for domestic production, was far from the only US interest group negatively impacted by the circulation of the classified report. Many others were concerned that information delivered in strict confidence to the government could be so easily lost and turned against them. This undermined their faith in government. Footwear Industry Association executive vice president Fawn Evenson characterized AIPAC's action as "heavy handed".¹³ An analysis of all industry participants that participated in hearings or the preparation of *Probable Effect of Providing Duty-Free Treatment for Imports from Israel, No. 332-180* reveals that 76 organizations such as Monsanto, the AFL-CIO, and Dow Chemical lobbied against a US-Israel Free Trade Area by providing critical public and private input, 4 were neutral, and only 23 relatively minor entities providing information in favor of it.¹⁴

¹² See Amicus Curie's Ex. L "11/29/1987 ITC Letter to the US Bromine Alliance to over Data loss" ITC Public file

¹³ Hosenball, Mark "Footwear Industry News" 10/1/1984

¹⁴ See Amicus Curie's Ex. M "Organizations participating in Investigation No. 332-180" compiled from ITC Public file. Portions of this public file are available at <http://www.IRmep.org/economy>

That AIPAC and Israel were able to leverage the sensitive information from the classified document, unavailable from any legitimate market research or public domain source, in order to win unfair economic advantages has been quantitatively revealed over time.

With the report in hand, AIPAC and the Israeli Ministry of Economics launched a broad public relations campaign aimed at minimizing the impact of the US-Israel FTA and predicting inflated mutual benefits in order to win its ratification by Congress. In reality the actual trade benefits have been almost entirely one-sided, an anomaly among all US bilateral trade agreements.

Quantitatively the US-Israel FTA is America's single worst performing bilateral trade agreement as measured by its large contribution to the US trade deficit. Every other bilateral agreement¹⁵ either delivers a trade surplus to the US, or generates imports and exports roughly at par over time while increasing mutually beneficial overall trade volumes. Measured by the bilateral trade deficit, the 1985 US-Israel Free Trade Area agreement turned a generally balanced trading relationship in place through the mid-1980s into a chronic US deficit with Israel that steadily grew from zero to \$9.2 billion by 2009, and which is on track to reach \$9.6 billion this year. Under unfavorable conditions such as floating tariffs and "at risk" (no patent) launch of products such as generic pharmaceuticals or outright copycat drugs, the US share of Israel's total goods import market dropped from over 25% in 1985 to less than 15% in 2007 while Israel's share of the US market has spiraled.¹⁶ Since the year 2000 Israel appeared on the USTR's official "watch list" no less than four times as an intellectual property violator. This problem was foreseen in 1984 by Monsanto's leadership's concerns over Israeli patent protection.¹⁷ But Monsanto's right to petition government effectively was subverted along the concerns of the 73 other petitioner organizations when AIPAC obtained their trade and market secrets.

¹⁵ Australia, Bahrain, Chile, Jordan, Morocco, Singapore.

¹⁶ US Census Bureau International Trade Statistics Division TradeStat Express Database

¹⁷ See Amicus Curie's Ex. N "05/02/1984 Monsanto Letter to ITC over Patents" ITC Public file

Translated into direct and indirect jobs using US Census Bureau surveys of manufacturing employment by export revenues, the current US trade deficit with Israel is equivalent to 151,023 lost American jobs.

C. AIPAC'S PAST CIRCULATION OF CLASSIFIED GOVERNMENT DOCUMENTS IS NON TRIVIAL AND SUBJECT TO FUTURE REDRESS AND DISGORGEMENT

The Defendant claims in its 12/23/2010 motion that “many of the documents are almost 30 years old when AIPAC was a different organization, with different board members and a different executive director.” While all organizations undergo turnover, when it was incorporated in the District of Columbia in 1963 AIPAC was granted perpetuity of both lifespan and responsibility for its actions. Moreover when AIPAC applied for in 1967, and received in 1968, IRS tax exempt status as a social welfare organization, it became subject to even higher standards of conduct in order to maintain the many considerable benefits granted to charities by the IRS. While the Defendant may wish AIPAC to be exempt from the long term consequences of “ancient” incidents, as a corporation it is cannot escape the legal, moral and reputational consequences of its past actions through wishful thinking or court documents that attempt to rewrite history.

If the 1984 “incident” dismissed by AIPAC had occurred only a decade later, it likely could have been criminally prosecuted under the Economic Espionage Act. This 1996 Act protects US industries from economic intelligence gathering, including theft of trade secrets and business confidential information, in order to prevent rivals from unfairly gaining long term economic advantages. Because of the ongoing nature of trade and trade regulations, AIPAC may still have to face consequences for its actions in 1984. This is because *Probable Effect of Providing Duty-Free Treatment for Imports from Israel, No. 332-180* is currently undergoing an evaluation process for

release under appeal to the Interagency Security Classification Appeals Panel.¹⁸ This ISCAP appeal has been undertaken specifically to hold AIPAC accountable and achieve disgorgement of improper benefits in the near future.

The Interagency Security Classification Appeals Panel, or "ISCAP," was created under Executive Order 12958, "Classified National Security Information," when it was signed on April 17, 1995. Today the ISCAP receives its guidelines from Executive Order 13526. Member agencies of ISCAP include the Department of Defense, Department of Justice, Department of State, Office of the Director of National Intelligence, National Archives and Records Administration and National Security Staff. The ISCAP held its first meeting in May of 1996 and has met regularly since that time. Americans unsuccessfully seeking document declassification under FOIA and MDR can appeal to the ISCAP after all agency-level appeals for declassification and release is denied.

If the ISCAP declassifies *Probable Economic Effect of Providing Duty Free Treatment for U.S. Imports from Israel, Investigation No. 332-180* negatively affected US industry organizations may choose to pursue damage claims against AIPAC, the Israeli government, or both over the long term effects of the misappropriation of their trade secrets and confidential business information. They may do so in the US court system, Israeli courts, or under the auspices of World Trade Organization (WTO) procedures.

Also, the Defendant's claim that "the document that framed the basis of the investigation contained no classified national defense information" is false. The March 9, 2009 USTR letter cited by the Defendant specifically indicated that "the report is being withheld in full pursuant to 5. U.S.C. §552(b)(1), which pertains to information that is properly classified in the interest of national security

¹⁸ See Amicus Curie's Ex. 0 "ISCAP 10/21/2010 Letter to Grant F. Smith about process for declassification and release of *Effect of Providing Duty-Free Treatment for Imports from Israel*"

pursuant to Executive Order 12958.” The ISCAP could refuse to release the document in the future because of factors beyond the report’s sources as assessed in the midst of a 1984-1987 FBI investigation. While it may be, as stated in the FBI report, that the “captioned matter did not represent a violation of the espionage statute as it was reported that no national defense information was utilized in the preparation of the report” the fully edited, final, synthesized report and analysis contained therein may be considered to be national defense information under changing classification criteria other than origins of draft content, such as the strategic environment of the Middle East. In any case, the Court’s treatment of this evidence is of interest much broader than merely those of the Plaintiff and Defendant given new questions and concerns about the circulation of government classified information raised by high profile cases such as Wikileaks.

D. Conclusion

The Defendant clearly wishes to minimize the contents of the full FBI investigation file uncovered by the *amicus curiae*’s primary research and introduced as evidence by the plaintiff. While the Defendant is entitled to its own opinions about the relevance of this evidence, the Defendant is not entitled to manufacture its own facts and dismissals through misrepresentations and selective citations. From an outside perspective, the Defendants purposeful misrepresentations and omissions made in order to minimize AIPAC’s past handling of classified government documents are indistinguishable from the conduct for which it publicly and broadly chastised the Plaintiff in the news media as being outside “the conduct that AIPAC expects from its employees.” The *amicus curiae* would invite the Court to exercise its inherent powers to craft and issue the appropriate orders against the Defendant and its legal counsel as may be necessary in order to ensure that the court is able to reach a resolution that will be just and based on a full airing of all relevant past AIPAC activities.

The *amicus curiae* also notes that other courts, both criminal and civil, have started, or soon will be initiating, actions relevant to instances of classified US government information that is obtained and circulated by persons not entitled to receive it. The consequence for the circulation of classified information by nongovernmental entities and individuals is becoming a matter of much broader public interest. If the Court thought it would be helpful, the *Amicus Curiae* would be glad to participate in upcoming hearings, and, if the Court ordered the Defendant to appear at a hearing, to participate in any questioning of the Defendant.

Respectfully submitted
Grant F. Smith,



