SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEVEN J. ROSEN,	
Plaintiff,	**Case No. 2009 CA 1256** **Calendar 12**
v.	**Judge Jeanette J. Clark**
AMERICAN ISRAEL PUBLIC AFFAIRS COMMITTEE, INC., *et al.*,	**Next Event: Discovery Closed December 2, 2009**
Defendants.	

ORDER GRANTING, IN PART, AND DENYING, IN PART, DEFENDANTS, AMERICAN ISRAEL PUBLIC AFFAIRS COMMITTEE, INC., KOHR, DOW, MANOCHERIAN, FRIEDMAN, WEINBERG, ASHER, LEVY, KAPLAN, WULIGER, FRIEDKEN AND DORTON'S, RULE 12(b)(6) MOTION TO DISMISS

Upon consideration of Defendants, American Israel Public Affairs Committee, Inc., ("AIPAC"), Kohr, Dow, Manocherian, Friedman, Weinberg, Asher, Levy, Kaplan, Wuliger, Friedken ("Board Member Defendants") and Dorton's Rule 12(b)(6) Motion to Dismiss ("Motion"), the Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss ("Opposition"), Defendants, American Israel Public Affairs Committee, Inc., Kohr, Dow, Manocherian, Friedman, Weinberg, Asher, Levy, Kaplan, Wuliger, Friedken and Dorton's Reply to Plaintiff's Opposition to the Motion to Dismiss ("Reply"), and the entire record herein, the Motion is granted, in part, and denied, in part, for the reasons stated below.

I. FACTUAL AND PROCEDURAL HISTORY

On March 2, 2009, Plaintiff filed his Complaint for "Defamation (Libel and Slander)" against thirteen (13) defendants: AIPAC, Howard Kohr ("Kohr"), Melvin Dow ("Dow"), Bernice Manocherian ("Manocherian"), Howard E. Friedman ("Friedman"),

Lawrence Weinberg ("Weinberg"), Robert Asher ("Asher"), Edward C. Levy, Jr., ("Levy"), Lionel Kaplan ("Kaplan"), Timothy F. Wuliger ("Wuliger"), Amy Friedkin ("Friedkin"), Patrick Dorton ("Dorton"), and Rational PR, L.C., who was dismissed as a party at the Initial Scheduling Conference on June 5, 2009. Plaintiff brought

> this action against the American Israel Public Affairs Committee, its Executive Director and its current and former presidents, and its strategic consultants and spokesmen, for making and publishing knowingly false and defamatory statements about him as set forth [in the Complaint] causing him to suffer personal and professional humiliation, the destruction of his career with the attendant loss of earnings and income, anxiety, stress and other emotional pain and suffering.

Compl. at ¶ 1. Plaintiff held the position of Director of Research and Information at AIPAC and later as its Director of Foreign Policy from 1982 through 2005, almost 23 years. Plaintiff alleges that

> [o]n August 27, 2004, it was publicly revealed that the U.S. Department of Justice was engaged in an investigation of Steven Rosen and another AIPAC employee for receiving information that they allegedly were "not authorized to receive." This allegation was not true, and initially AIPAC responded by asserting that Mr. Rosen (and other (sic) employee) had done nothing wrong. Thereafter, Mr. Rosen continued to perform his job duties at AIPAC, and he continued to be highly praised for his work by its Executive Director, defendant Howard Kohr, its then President, Bernice Manocherian, and its Board of Directors, which included defendants Melvin Dow, Howard Friedman, Lawrence Weinberg, Robert Asher, Edward Levy, Lionel Kaplan, Timothy Wuliger, and Amy Rothschild Friedkin, all of whom are former presidents of AIPAC. Indeed, on January 31, 2005, five months after the Justice Department's ongoing investigation had been made public, AIPAC awarded Mr. Rosen a special job performance bonus of $7,000.

Compl. at ¶ 21.

Plaintiff was terminated from his job on March 21, 2005. Afterwards,

> [a] spokesman for Aipac, Patrick Dorton, said on Wednesday, "The action that Aipac has taken was done in consultation with counsel

> after recently learned information," adding that "the conduct that Aipac expects of its employees" was also considered.

Mot., Exh. 1 at 2 (New York Times, April 21, 2005).

Plaintiff further alleges that

> [b]eginning shortly after summarily terminating Mr. Rosen's employment, AIPAC, and particularly defendants Kohr, Dow, Friedman (sic) Manocherian, Weinberg, Asher, Levy, Wuliger, Kaplan, and Friedkin, acting through and with the advice of defendants Rational PR, L.C., and its principal and employee defendant Patrick Dorton, began making knowingly false and defamatory statements to the press about Mr. Rosen, and have continued to make and publish such knowingly false and defamatory statements about Mr. Rosen through March 3, 2008, and thereafter.

Compl. at ¶ 24.

Plaintiff goes on to allege that

> . . .false and defamatory statements were repeated often by Dorton on behalf of AIPAC and its Board of Directors, including defendants Kohr, Dow, Friedman (sic) Manocherian, Weinberg, Asher, Levy, Wuliger, Kaplan, and Friedkin. For example: (1) in the New York Times on April 21, 2005; (2) in New Yorker Magazine on July 7, 2005; (3) in the Jewish Telegraphic Agency on August 4, 2005; (4) in the Jewish Telegraphic Agency on August 5, 2005; (5) in the New York Jewish Week on August 17, 2005; (6) in the Washington Post on November 12, 2005; (7) The Forward on December 23, 2005; (8) in the Baltimore Sun on March 8, 2006; (9) the Washington Post on April 21, 2006; (10) in the Jerusalem Post on June 29, 2006; (11) in the Jewish Telegraphic Agency on July 19, 2006; (12) in the Jewish Telegraphic Agency on March 27, 2007; (13) in the Jerusalem Report magazine on August 17, 2007; (14) in the Washingtonian Magazine of January 2008; (15) in the New York Times on March 3, 2008; and (16) to a reporter from The Forward on October 14, 2008[,] . . . within a year of the filing of this civil action . . .

Id. In his Complaint, Plaintiff provided the alleged defamatory statements noted above for the following articles: (1) the April 21, 2005 New York Times article; (2) the August 4, 2005 Jewish Telegraphic Agency article; and (3) the Washington Post November

12, 2005 article. *See* Comp. at ¶ 24. No specific statements were provided in the Complaint for the remaining twelve articles and one alleged occurrence[1] noted above. Additionally, other paragraphs of the Complaint contained alleged defamatory statements: (1) the May 23, 2005 New York Sun article, *Id.* at 25; (2) the June 17, 2005 Jewish Telegraphic Agency article, *Id.* at 26; (3) the August 18, 2005 Jewish Telegraphic Agency article, *Id.* at 28; and (4) the September 9, 2005 Cleveland Jewish News article, *Id.* at 29.

Specifically, the March 3, 2008 New York Times article provided, in pertinent part, the following:

> The Aipac spokesman on the Rosen-[ ] 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.

Opp'n, Exh. 2 at 3 (New York Times, March 3, 2008). It should be noted that the two New York Times articles differ in the quotes attributed to Defendant Dorton. The March 3, 2008 quote has the words "did not comport with standards that Aipec expects of its employees," but the April 21, 2005 quote stated "the conduct that Aipac expects of its employees."

Defendants filed the instant Motion on May 13, 2009 and an Opposition was filed on July 8, 2009.[2] Subsequently, Defendants filed a Reply on August 7, 2009.

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[1] One of the examples was not an article but an alleged occurrence of when Defendants allegedly spoke with a reporter on October 14, 2008. *See* Compl. at ¶ 24.

[2] Plaintiff filed a Sur-Reply to Defendants' Reply on August 24, 2009 and Defendants filed a Sur-Sur-Reply on September 3, 2009 without leave of Court. Therefore, the Court did not consider the arguments made in those pleadings. *See* Super. Ct. Civ. R. 12-I(e).

II. STANDARD OF REVIEW

B. Motion to Dismiss

On a motion for failure to state a claim, the District of Columbia Court of Appeals has stated that "in granting the motion to dismiss. Our review is *de novo.* In considering the sufficiency of the complaint [ ], we – like the trial court – are obliged to 'accept its factual allegations and construe them in a light most favorable to' the plaintiffs. If the complaint 'adequately states a claim' when thus viewed, 'it may not be dismissed based on a . . . court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder.' And [ ] a motion to dismiss for failure to state a claim 'may not rely on any facts that do not appear on the face of the complaint itself.'" *Luna v. A.E. Eng'g Servs., LLC,* 938 A.2d 744, 748 (D.C. 2007).

The District of Columbia Court of Appeals explained that

> [i]n reviewing the complaint, the court must accept its factual allegations and construe them in a light most favorable to the non-moving party. *Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58, 62 (D.C. 2005). However, '[f]actual allegations must be enough to raise a right to relief above the speculative level . . . . '*Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965. . . (2007). Furthermore, dismissal under Rule 12 (b)(6) is appropriate where the complaint fails to allege the elements of a legally viable claim. *See Jordan Keys & Jessamy*, 870 A.2d at 62 (affirming dismissal for failure to state a claim; 'We agree with the trial judge that Jordan Keys' amended complaint, viewed in the light most favorable to the pleader, does not allege the elements of an implied-in-fact contract'); *Taylor v. FDIC*, . . . 132 F.3d 753, 761 ([D.C. Cir.] 1997) ('Dismissal under Rule 12 (b)(6) is proper when, taking the material allegations of the complaint as admitted, and construing them in plaintiffs' favor, the court finds that the plaintiffs have failed to allege all the material elements of their cause of action.') (citations omitted). To be sure, 'complaints need not plead

> law or match facts to every element of a legal theory,' *Krieger v. Fadely*, . . ., 211 F.3d 134, 136 ([D.C. Cir.] 2000) (internal quotation marks and citation omitted), but 'the pleader must set forth sufficient information to outline the legal elements of a viable claim for relief or to permit inferences to be drawn from the complaint that indicate that these elements exist.' 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 1357, at 683 (2004). *See In re Plywood Antitrust Litigation*, 655 F.2d 627, 641 (5th Cir. 1981) ('Despite the liberality of modern rules of pleading, a complaint still must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory').

Chamberlain v. Am. Honda Fin. Corp., 931 A.2d 1018, 1023 (D.C. 2007). Indeed, consistent with *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009), the Court of Appeals informed that in deciding whether a party has sufficiently pled its claims

> we look for guidance to Super. Ct. Civ. R. 8 (a), which "sets forth the minimum requirements for pleading a claim for relief." *Bolton v. Bernabei & Katz, PLLC*, 954 A.2d 953, 963 (D.C. 2008) (internal citations and quotation marks omitted). "All that is required when we consider the sufficiency of the pleading is a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* The purpose of this statement is to "give the defendant fair notice of what the [pleader's] claim is and the grounds upon which it rests[.]" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).

Solers, Inc., v. Doe, 2009 D.C. App. LEXIS 342, *13 (D.C. 2009).

In support of its Motion, Defendants attached exhibits to their Motion, which were not included on the face of the Complaint. Indeed, "[a] defendant raising a 12(b)(6) defense cannot assert any facts which do not appear on the face of the complaint itself." *Carey v. Edgewood Mgmt. Corp.*, 754 A.2d 951, 954 (D.C. 2000). "When the trial court decides a Rule 12(b)(6) motion by considering factual material outside the complaint, the motion shall be treated as if filed pursuant to Rule 56, which permits the grant of summary judgment if there are no material facts in dispute and the movant is entitled to

judgment as a matter of law." *Kitt v. Pathmakers, Inc.*, 672 A.2d 76, 79 (D.C. 1996); *Washkoviak v. Sallie Mae*, 900 A.2d 168, 177-78 (D.C. 2006). Accordingly, the Court treats the Motion as one for Summary Judgment because of the exhibits attached to Defendants' Motion.

B. Motion for Summary Judgment

Summary Judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anthony v. Okie Dokie, Inc.*, 2009 D.C. App. LEXIS 331, *7-8 (D.C. 2009)[3](quoting *Magwood v. Giddings*, 672 A.2d 1083, 1084 (D.C. 1996)); *Kibunja v. Alturas*, 856 A.2d 1120, 1127 (D.C. 2004); *Phelan v. City of Mt. Rainier*, 805 A.2d 930, 936 (D.C. 2002) ((citing *Morgan v. Psychiatric Inst. Of Wash.*, 692 A.2d 417, 420 (D.C. 1997) (citing *Nader v. de Toledano*, 408 A.2d 31, 41 (D.C. 1979) (quoting Super. Ct. Civ. R. 56I). On the other hand, ". . .if an impartial trier of fact, crediting the non-moving party's evidence, and viewing the record in the light most favorable to the non-moving party, may reasonably find in favor of that party, then the motion for summary judgment must be denied." *Cormier v. D.C. Water & Sewer Auth.,* 959 A.2d 658, 663 (D.C. 2008) (quoting *Weakley v. Burnham Corp.*, 871 A.2d 1167, 1173 (D.C. 2005)). In other words, "[w]here there is a genuine issue of material fact in dispute, summary judgment cannot be granted." *Young v. District of Columbia*, 752 A.2d 138, 145 (D.C. 2000). However, "[t]he opposition, . . ., must consist of more than conclusory

[3] The D.C. Court of Appeals reversed the trial court's grant of summary judgment in favor of Defendant because "there was sufficient evidence in the record to create genuine issues of material fact about whether Anthony was assaulted by INK security guards and accordingly, that the matter should have been permitted to go to a jury." *Anthony*, 2009 D.C. App. LEXIS at *10.

allegations, and be supported by affidavits or other competent evidence tending to prove disputed material issues of fact." *Estenos v. PAHO/WHO-FCU*, 952 A.2d 878, 892 (D.C. 2008).

Moreover, "[i]n considering a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party, who is entitled to 'all favorable inferences which may reasonably be drawn from the evidentiary materials.'" *Phelan*, *supra* (citing *Hendel v. World Plan Exec. Council*, 705 A.2d 656, 660 (D.C. 1997) (quoting *Beard v. Goodyear Tire & Rubber Co.*, 587 A.2d 195, 198 (D.C. 1991)).

III. ANALYSIS

Defendants made five arguments in support of their Motion: (1) the statute of limitations bars Plaintiff's defamation claims for the years 2005, 2006, and 2007; (2) the continuing tort doctrine does not apply to defamation claims and, therefore, the defamation claims for the years 2005, 2006, 2007, and 2008 should be dismissed; (3) the alleged March 3, 2008 statement is not defamatory as a matter of law; (4) Plaintiff is a public figure and has failed to allege any facts to support a claim that the alleged statements were made with actual malice; and (5) all Defendants, except AIPAC and Defendant Dorton, are volunteer members of the Board of Directors of AIPAC and therefore, are statutorily immune from civil liability pursuant to D.C. Code § 29-301.113 (1981).

A. Plaintiff's Defamation Claims for the Years 2005, 2006, and 2007 Are Dismissed Because They Are Time-Barred by the Statute of Limitations. Furthermore, the Continuing Tort Doctrine Does Not Apply to Defamation Claims and, Specifically, Does Not Apply to the 2008 Defamation Claim.

Pursuant to D.C. Code § 12-301(4), the right to maintain actions for libel accrue one year after the alleged conduct which gives rise to the cause of action. Defamation cases fall under this section of the statute. *See Maupin v. Haylock,* 931 A.2d 1039, 1041-42 (D.C. 2007). The alleged defamatory statements for the years 2005, 2006, and 2007 are time-barred because they were not filed within one year of their defamatory publication. *See Mullen v Wash. Free Weekly, Inc.,* 785 A.2d 296, 298 (D.C. 2001). "Where a statement is defamatory on its face, the plaintiff's reputation is damaged immediately upon publication." *Id.* (citation omitted).

The D.C. Court of Appeals also noted that "virtually all jurisdictions have adopted the modern 'single publication' rule, i.e., for purposes of the statute of limitations in defamation claims, a book, magazine, or newspaper has one publication date, the date on which it is first generally available to the public." *Id.* at n. 2 (citations omitted). Here, the alleged defamatory statements, contained in paragraphs 24, 25, 26, 28, and 29 of the Complaint, were allegedly defamatory on their face and allegedly damaged Plaintiff's reputation at the first time of publication.

Furthermore, the continuing tort doctrine does not apply to toll the statute of limitations in defamation cases. "The complaint alleges that the defendants made a number of discrete defamatory communications. Each of these statements constituted 'a new assault on the plaintiff's reputation,' and each therefore gave rise to a separate

right of action." *See Wallace v. Skadden, Arps, Slate, Meagher & Flom,* 715 A.2d 873, 882 (D.C. 1998) (citation omitted).

As to Plaintiff's argument that the doctrine of equitable tolling should apply to toll the running of the statute of limitations, the Court agrees with Defendants' contentions that

> [t]he doctrine of equitable tolling, however, only allows a plaintiff to delay filing his claims if "despite all due diligence [he] is unable to obtain vital information bearing on the existence of his claim." *Chung*, 33 F.3d at 278. Nothing in the government's investigation or subsequent prosecution barred Plaintiff from obtaining a single fact necessary to bring his defamation claim. Because the Plaintiff was aware of the alleged defamatory statements on which he bases his claims during the time of their initial publication and well before he filed suit, the Plaintiff could have brought his claims against AIPAC within the proper one (1) year statute of limitations but simply failed to do so.

Reply at 6. Moreover, the criminal charges pending against Plaintiff did not provide justification for his delay in bringing claims that were more than one year old. Indeed, when Plaintiff filed the instant action on March 2, 2009, criminal charges in the August 4, 2005 indictment were pending against him and were not dismissed until May 1, 2009. Comp. at ¶ 23; Opp'n at Exh. 1.

Therefore, the claims of defamation for the time period of 2005 – 2007 are barred by the statute of limitations and the doctrine of equitable tolling does not apply.

B. Plaintiff Failed to Allege Sufficient Facts to Meet the First Element of Defamation Claims for Twelve of the Fifteen Articles Noted and the Alleged Conversation With a Reporter in Paragraph 24 of the Complaint.

As a preliminary matter, there are twelve mass media articles and an alleged conversation with a reporter identified in paragraph 24 of the Complaint, for which specific defamatory statements were not provided. Alleged defamatory statements

were provided for only three of the fifteen articles cited in paragraph 24 of the Complaint. They include: (1) the April 21, 2005 New York Times article; (2) the August 4, 2005 Jewish Telegraphic Agency article; and (3) the Washington Post November 12, 2005 article. *See* Comp. at ¶ 24. No specific statements were provided in the Complaint for the remaining twelve articles and the alleged conversation with a reporter in paragraph 24 of the Complaint.

Plaintiff must allege sufficient facts to support the four elements of defamation which are: "(1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Bean v. Gutierrez,* 2009 D.C. App. LEXIS 447 at *3 (D.C. 2009)(citing to *Blodgett v. Univ. Club*, 930 A.2d 210, 222 (D.C. 2007)(citation and internal quotations omitted)).

For the twelve noted articles and the alleged conversation with a reporter, the first element was not met by Plaintiff because he failed to allege any specific defamatory statements. Therefore, these allegations also are dismissed for failure to allege sufficient facts to support Plaintiff's defamation claims.

C. All Defendants, Except Defendants AIPAC and Dorton,[4] Are Volunteer Members of the Board of Directors of AIPAC and Are Immune from Civil Liability Pursuant to D.C. Code § 29-301.113.

D.C. Code § 29-301.113 provides, in relevant part, for "[i]mmunity from civil liability for a volunteer of the corporation" and subsection (b) goes on to state, in

[4] Statements allegedly made in the 2005 – 2007 timeframe, attributed to Defendant Kohr, and any cause of action for such statements are barred by the statute of limitations for the reasons stated above.

relevant part, that "[a]ny person who serves as a volunteer of the corporation shall be immune from civil liability except where the injury or damage was a result of: (1) [t]he willful misconduct of the volunteer. . . [or] (5) [a]n act or omission that is not in good faith and is beyond the scope of authority of the corporation pursuant to [D.C. Code § 29-301.113] or the corporate charter."

Here, Defendants argue that Plaintiff has alleged no facts supporting his claims of willful misconduct by the Board Member Defendants. Mot. at 15. Furthermore, Defendants contend that "the Complaint is entirely void of any factual allegation that would support a finding of willful misconduct on the part of any of the Board Member Defendants . . . [and] Plaintiff has failed to state a viable cause of action against the Board Member Defendant[s] because they have statutory immunity and because there is no allegation that any Board Member Defendants willfully made any defamatory statements about the Plaintiff within the statute of limitations period." *Id.*

In contrast, while conceding that the Board Member Defendants are volunteers, Plaintiff argues that

> [t]hese individual defendants were members of the so-called "Advisory Committee" specifically designated by the full Board of Directors to recommend action with regard to the matter that ensnares Steven Rosen in the Department of Justice criminal investigation and prosecution, and one, Melvin A. Dow, was the Chairman of the Advisory Committee. Thus, the injury done to and damage suffered by Mr. Rosen from the knowingly false and defamatory statements about him emanating from AIPAC in reality "resulted from the willful misconduct" of these particular defendants, as well as from AIPAC's professional Executive Director, defendant Kohr, and its outside official spokesman, defendant Dorton. Accordingly, they are not immune from being held liable for the defamation pursuant to the language of D.C. Code § 29-201.113. . . .[and] as AIPAC's governing bylaws and structure hold these "volunteer" defendants to the highest responsibilities in the organization, any assertion of statutory immunity for the critical part

> they played in the defamatory acts at issue here will be lost upon showing "[a]n act or omission that is not in good faith and is beyond the scope of authority of the corporation pursuant to this subchapter or the corporate charter." *See* D.C. Code § 29-307.113(5)."

Opp'n at 21-22. Plaintiff has not alleged sufficient facts to satisfy a showing of willful misconduct by Board Member Defendants nor any act or omission by the Board Member Defendants that is not in good faith and is beyond the scope of authority of the corporation pursuant to D.C. Code § 29-301.113 or the corporate charter. Plaintiff has simply made generalizations and conclusory statements in his Complaint as well as in the arguments made in his Opposition. "The opposition, . . ., must consist of more than conclusory allegations, and be supported by affidavits or other competent evidence tending to prove disputed material issues of fact." *Estenos v. PAHO/WHO-FCU*, 952 A.2d 878, 892 (D.C. 2008). Having failed to allege sufficient facts to support claims of willful misconduct or an act or omission that is not in good faith and is beyond the scope of authority of the corporation pursuant to D.C. Code § 29-301.113 or the corporate charter, Board Member Defendants Kohr, Dow, Manocherian, Friedman, Weinberg, Asher, Levy, Kaplan, Wuliger, and Friedkin are dismissed from the case.

D. Whether the Alleged March 3, 2008 Statement Is Defamatory Should Be Decided Before a Jury and Plaintiff Alleged Sufficient Facts for a Jury to Consider Whether Defendants AIPAC and Dorton Acted with Malice in Making the March 3, 2008 Statement.

As a threshold matter, Defendants argue that the March 3, 2008 statement was in an "Article [that] contain[ed] a repetition of a statement made in 2005 as to AIPAC's termination of the Plaintiff due to their belief that Plaintiff did not reflect AIPAC standards." Mot. at 10. Next, Defendants argues that Plaintiff "is a public figure . . .[and] Plaintiff has failed to allege any facts which would support a finding that any of

these Defendants made any alleged defamatory statement with actual malice which is a prerequisite to recovery in light of the fact that Plaintiff was a public figure at the time that the alleged defamation occurred." Mot. at 11. Plaintiff does not dispute that he was a public figure during the relevant periods concerning this lawsuit.

However, Plaintiff argues that the "Complaint alleges that the statements contained in the March 3, 2008 article accuse Mr. Rosen of not conforming to AIPAC's standards . .. such statements are very much about Mr. Rosen's conduct and competence in his former position of trust at AIPAC. As such, it certainly tends to injure his reputation within his profession and among those in his community." Opp'n at 18. Plaintiff goes on to assert that "[s]uch statements do not receive full constitutional protection, because they were not only an opinion on a matter of public concern, but contained provably false factual connotations." *Id.*

Next, Plaintiff contends that

> defendants had no reasonable grounds to believe that their statements that Mr. Rosen had not performed up to AIPAC's standards were true. Indeed, on January 31, 2005, five months after the Justice Department's ongoing investigation had been made public, AIPAC awarded Mr. Rosen a special $7,000 job performance bonus. Complaint at 10.

Id. at 19. Quoting *Columbia First Bank v. Ferguson,* 665 A.2d 650, 656 (D.C. 1995) (internal citations omitted)'s definition of malice which "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," Plaintiff argues that a trier of fact should decide the issue of malice and whether Defendants acted with the requisite bad faith. *Id.* at 18-19.

It is clear from the allegations in the Complaint that Plaintiff has alleged sufficient facts for a jury to consider whether Defendants acted with malice inasmuch as Plaintiff received a $7,000 award five months after the announcement of the government's criminal investigation. Therefore, 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. Compl. at ¶ 24. Therefore, malice and bad faith by Defendant AIPAC, acting through its agent Defendant Dorton, could be inferred or directly proven at trial. 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.

IV. CONCLUSION

Accordingly, the Motion is granted, in part, and denied, in part, for the reasons stated above.

WHEREFORE, it is this 30th October 2009, hereby,

ORDERED, that the Motion is **GRANTED, in part, and DENIED, in part,** for the reasons stated above; and it is

FURTHER ORDERED, that Board Member Defendants Kohr, Dow, Manocherian, Friedman, Weinberg, Asher, Levy, Kaplan, Wuliger, and Friedkin are **DISMISSED**; and it is

FURTHER ORDERED, that the defamation claims for the time period 2005-2007 are **DISMISSED**; and it is

FURTHER ORDERED, that Defendants AIPAC and Dorton must file an Answer to the Complaint no later than **November 11, 2009**; and it is

FURTHER ORDERED, that for each Motion filed, the parties must e-mail a copy of the proposed order in Microsoft Word Format to the following e-mail addresses pursuant to this Court's General Order: **Clarkjj2@dcsc.gov** and **Clarkjj3@dcsc.gov**.

SO ORDERED.

Jeanette J. Clark

Judge Jeanette J. Clark
D.C. Superior Court

Copies e-filed, e-served, and docketed on this 30th day of October 2009:

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