SUPER SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEVEN J. ROSEN	:	
	:	
Plaintiff	:	
	:	
v.	:	Case No.: 2009 CA 001256
	:	Judge Erik Christian
AMERICAN ISRAEL PUBLIC AFFAIRS COMMITTEE, INC., *et. al.*	:	Next Event: Dispositive Motions Decided
	:	Date: January 3, 2011
	:	
Defendants	:	

CONSENT MOTION FOR LEAVE TO FILE DEFENDANTS REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Defendants, the American Israel Public Affairs Committee, Inc. and Patrick Dorton, through counsel, Carr Maloney P.C. submit this Consent Motion for Leave to File Defendants Reply in support of their Motion for Summary Judgment and in response to Plaintiff's Opposition Memorandum. Defendants filed a Motion to Strike Plaintiff's Opposition and for Sanctions based on Plaintiff's flagrant violations of the protective order by Plaintiff not filing exhibits marked as confidential under the protective order under seal. Should the Court still consider Plaintiff's Opposition, Defendants submit and respectfully move the Court to consider this Consent Reply as further support and clarification for their Motion for Summary Judgment.

Respectfully submitted,

CARR MALONEY P.C.

By: /s/

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CONSENT REPLY MEMORANDUM OF DEFENDANTS IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

I. PROCEDURAL HISTORY

On March 2, 2009, Plaintiff filed his Complaint for Defamation in the Superior Court of the District of Columbia. On May 13, 2009, all then named Defendants filed a Motion to Dismiss Plaintiff's suit for failure to state a claim upon which relief could be granted. On July 8, 2009, Plaintiff submitted his opposition brief to Defendants' Motion to Dismiss.[1] On October 30, 2009, the Court (Clark, J.) granted in part and denied in part Defendants' Motion to Dismiss.

In the Court's Order and Memorandum, the Court dismissed claims based on all statements except for the statement contained in the March 3, 2008 article, and dismissed all parties except AIPAC and Dorton. The Court also found, as conceded by Plaintiff, that he is a public figure for purposes of establishing a claim for defamation. The parties have now completed discovery and on November 8, 2010 Defendants filed their Motion for Summary Judgment.[2]

[1] On August 7, 2009 and August 24, 2009, Defendants and Plaintiff filed a Reply and Sur-Reply with the Court.
[2] The motion was filed on November 5, 2010 but due to an unresolved clerical error with the electronic filing system, Defendants re-filed on November 8, 2010.

At Plaintiff's request, and with the consent of the Defendants, the Court entered an order extending the time for Plaintiff to file his Opposition to the Defendants Motion for Summary Judgment until December 2, 2010. Plaintiff consented to Defendants filing this Reply Memorandum in their initial agreement to extend Plaintiff's time to file his Opposition.

Despite the fact that Plaintiff himself agreed to this date, Plaintiff nonetheless completely disregarded that deadline, and waited until the date his Opposition was due to seek an additional exorbitant continuance of yet another 18 days. Defendants opposed this additional extension. The Court granted Plaintiff until December 14, 2010 to file his opposition.

When Plaintiff finally filed his Opposition on December 14, 2010, Plaintiff improperly included a plethora of documents marked confidential and that were protected under the plain terms of this Court's Protective Order. Plaintiff's counsel filed his Opposition Memorandum with five hundred thirty four (534) pages of exhibits containing documents and exhibits that were marked as confidential pursuant to the Protective Order at various depositions during discovery.

II. ARGUMENT

A. Summary Judgment is Proper

Summary Judgment is proper here because "(1) taking all reasonable inferences in the light most favorable to the non-moving party, (2) a reasonable juror, acting reasonably, could not find for the non-moving party, (3) under the appropriate burden of proof." *Gross v. District of Columbia,* 734 A.2d 1077, 1083 (D.C. 1999). Plaintiff does not defeat the arguments made in the motion for summary judgment, and his conclusory allegations or legal conclusions masquerading as factual allegations will not suffice. *Warren v. District of Columbia*, 353 F.3d

36, 39 (D.C. Cir. 2004). Moreover, Plaintiff fails to address numerous arguments addressed in Defendants motion, which should be taken as conceded.[3]

After months of discovery involving the exchange of documents and no less than ten depositions of AIPAC employees and members of the board, Mr. Rosen's defamation claim is essentially made of the following "facts": 1) Mr. Rosen concedes the March 2008 statement is nothing but repetition of statements that fall outside of the statute of limitations; 2) Mr. Rosen suffered no emotional damage and incurred no economic losses; 3) Mr. Rosen contends he was defamed not because of what AIPAC said, but because of AIPAC's action in terminating his at-will employment in March, 2005; and 4) such termination occurred only after a) AIPAC's attorney recommended his termination upon hearing previously undisclosed evidence from the U.S. Attorney's Office that led him to conclude that Mr. Rosen's conduct was conduct AIPAC could not condone and b) Mr. Rosen was given the extraordinary opportunity to present his own version of events to the AIPAC advisory board, before the full board acted upon its attorney's recommendations to terminate Mr. Rosen's at will employment. These facts have no relevance to the actual claim before the Court, which is a claim of defamation not a claim of wrongful termination. Moreover, these facts taken separately, or together, abundantly demonstrate Mr. Rosen cannot prove a claim for defamation.

Plaintiff's Opposition provides nothing more than conclusory statements and unsupported allegations by Plaintiff. He has not proffered any evidence to meet his burden of proof as a public figure, to establish that the statement was made with malice or was defamatory, or to establish the existence of any disputed *material* facts in this defamation claim. Instead, Plaintiff

[3] *See generally, Gard v. U.S. Dept. of Educ.*, 2010 WL 4780804, at *7 (D.D.C. November 23, 2010) citing *Buggs v. Powell,* 293 F.Supp.2d 135, 141 (D.D.C. 2003) ("It is understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded").

attempts to make his case by using inadmissible documents and confusing this defamation action with a wrongful termination suit. Plaintiff ignores the numerous arguments set forth in the Motion for Summary Judgment, and instead bases his entire claim on the erroneous contention that a lack of written standards regarding classified information made the March 3, 2008 republication false, and that the March 3, 2008 republication "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."[4] As demonstrated below, nothing in Plaintiff's Opposition precludes this Court from properly entering summary judgment in favor of Defendants.

B. Plaintiff has not established compensable damages.

Notably, Plaintiff has admitted under oath that he is not making a claim for any emotional distress or for any lost wages, and that his only claim of damages was for allegedly being placed in the zone of danger of a wrongful conviction.[5] Now in his Opposition, he claims compensable damages for "detraction from [his] good name and reputation, and injuries to [his] occupation."[6] Despite his attempt to belatedly make up a claim for damages, and disavow his sworn testimony admitting he had no damages, nothing in his Opposition establishes any disputed material facts that would defeat Defendants' Motion. Plaintiff only cites on page 40 of his Opposition his empty claim that his reputation was harmed in the "Jewish Political community" as proof of damage to his reputation, but has not provided any witnesses or affidavits to establish any harm to his reputation or malice, as required for public figures such as Plaintiff. To the contrary, as

[4] Plf.'s Opp. Mem., pp. 7-8.
[5] *See* Ex. A, Rosen Dep. 328-329, 386-389
[6] Plf.'s Opp. Mem., pp. 39-40. Should the Court deny the motion for summary judgment and find that Plaintiff's alleged damages are disputed, Defendants shall move to re-open discovery on this issue.

demonstrated by his own current employer, his reputation in this self-defined community remains undiminished.[7]

Plaintiff's Opposition also does not establish his claim for damages stemming from an alleged "zone of danger." Plaintiff and his counsel incredibly claim that Defendants should not use the legal definition of "zone of danger" even though this is a legal matter. Irrespective of whatever definition or implication Plaintiff uses, he has not established any damages based on an alleged "zone of danger." Simply put, any such danger was eliminated after AIPAC, in the most profound expression of an absence of malice, paid Mr. Rosen's attorneys $4.9 million to remove him from this alleged "zone of danger." The undisputed fact is that any alleged "zone of danger" has not existed since May of 2009, yet Plaintiff has maintained this suit with no damages and no potential for injury for over a year.

The most simple of reasons why the Defendants' motion for summary judgment must be granted is the unambiguous testimony of Plaintiff that he has suffered no emotional or economic damages. The facts are that from the time Plaintiff was terminated from AIPAC until the present, he netted more in gifts, severance payments, health benefits, and other income than he would have made had he remained employed at AIPAC. Plaintiff does not address the fact that he received hundreds of thousands of dollars from individuals in the Jewish community, which clearly shows that their opinion of him was not diminished. Additionally, when questioned about any damage to his occupation, Plaintiff conceded that he never actually applied for any jobs after his termination and therefore, he could not establish any actual damage to his occupation based on the March 2008 AIPAC statement.[8]

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[7] *See* Ex. B, March 10 2009 MEF Press Release "Comment on Charles Freeman's Withdrawal from the NIC"; Ex. C, May 1, 2009 MEF Press Release "MEF Congratulates Visiting Fellow Steven J. Rosen."

[8] *See* Ex. A, Rosen Dep.334- 344.

Plaintiff has not produced any evidence that his occupation suffered, because, quite frankly, it has not. Plaintiff is currently employed making nearly as much as, if not more, in salary than when employed by AIPAC.[9] Further, Plaintiff has not established any record evidence showing any alleged damage was caused by the republication of AIPAC's statement in 2008 as opposed to the more obvious occurrence of Plaintiff's criminal indictment and subsequent prosecution, which were initiated in August 2005. Plaintiff even admits that any damage to his occupation was attributed to this federal indictment: "Q: Tell me how the indictment, first, affected your employability. A: During the five years that I was under indictment, very few organizations want to be drawn into a controversy with someone who has been indicted for a felony. And so the indictment affected me during the period of indictment, and greatly reduced my employability."[10]

Plaintiff knew the facts showed that he had no damages and yet decided to file this unsupported action. Plaintiff cannot overcome his plain statement that he has suffered no injury. Clearly, as Plaintiff has no damages, he has no case, and summary judgment should be granted in Defendants favor.

C. The contemporaneous facts and evidence known at the time of the statement's issuance establish the statement's truth and that there was no malice.

Plaintiff also ignores that this Court must take into account all of the contemporaneous facts known at the time of the statement in issue, which was republished in March 2008. It is the facts that were known by the Defendant as of this time that are relevant in determining the truth of the statement, and in ascertaining whether evidence of actual malice exists. Conveniently, Plaintiff's Opposition ignores the fact that as a public figure, Plaintiff must establish the higher

[9] *See* Ex. A, Rosen Dep. 345-347. Plaintiff was hired by his current employer, the Middle East Forum in September 2008, *after* the March 3, 2008 statement. Plaintiff also works for ELNET in Brussels. His combined salary for his two positions is $198,000 per year.

[10] *See* Ex. A, Rosen Dep. 334.

burden of actual malice. Plaintiff has not put forth any disputed material facts establishing evidence sufficient for a reasonable jury to find malice by convincing clarity, or any facts that make the March 2008 statement false. To the contrary, Plaintiffs inconsistent arguments in his Opposition support Defendants assertion that the statement was true and that there is no evidence whatsoever of malice by any Defendant.

Mr. Rosen extraordinarily contends that when AIPAC confirmed its opinion in 2008 that Mr. Rosen's conduct did not comport with standards that AIPAC expects of its employees, that the following facts were simply irrelevant to the truth of that statement: 1) his federal indictment and the facts giving rise to his federal indictment[11]; 2) his failure to follow the instructions of counsel; 3) his lack of candor to AIPAC regarding his meetings with Larry Franklin; 4) his lack of candor regarding his contacts with the FBI; 5) his violation of AIPAC's policy regarding the use of AIPAC computers to collect and store pornography; 6) the potential embarrassment his sexual exploits could cause to the organization; and 7) the determination of counsel that his conduct could not be condoned. Taken individually, or collectively, each factor supports that truth of AIPAC's statement. Ignoring them, as Mr. Rosen has chosen to do in his opposition brief, does not make these facts disappear.

Try as he might to make this defamation claim into a wrongful termination action, Mr. Rosen has done nothing to address the most simple of facts, namely, as he is suing on the basis of a statement made in 2008, the facts that formed the predicate for that statement, and what the Court must consider, are *what facts that existed in 2008.* Instead, Mr. Rosen tries to have it both ways. In an argument, that frankly makes no sense, Mr. Rosen concedes, as he must, that the 2008 statement is a republication of a statement made in 2005, but then insists the republication

[11] Indeed, the facts known to the Department of Justice were sufficient to support an indictment and criminal prosecution. Those same facts, when made known to AIPAC by the Department of Justice, certainly form a malice free basis for the utterance of the statement at issue.

is an actionable statement within the statute of limitations whose truth must be analyzed as if time froze in 2005.[12] In short, Mr. Rosen cannot have it both ways. Either the statement is a republication of a statement that falls outside the statute of limitations, or the statement is an actionable statement whose truth must be determined by the facts known when the statement was made. Under either view, Mr. Rosen has failed to demonstrate any facts that would support a claim for defamation.

i. Plaintiff fails to address all the factors Defendants listed as contributing to fact that his conduct did not comport with AIPAC Standards.

It is Plaintiff's burden to prove the alleged defamatory nature of the March 2008 statement, and Plaintiff has not done so.[13] Plaintiff failed to dispute the factual information available to Defendants in 2008 as support for why the March 2008 statement was true. As such, he has conceded the truth of that factual information.[14] Plaintiff does not dispute that by the time the March 2008 article was republished, the additional factual information AIPAC knew included, but was not limited to, AIPAC's concern that Plaintiff may have lied to the FBI, his actions resulted in a criminal Federal Indictment, Plaintiff directly disregarded an order from AIPAC's General Counsel, Plaintiff's lack of candor to his superiors at AIPAC regarding both his relationship with Lawrence Franklin and his initial contact with FBI in this matter, the "experience" of AIPAC's counsel Nathan Lewin in which he heard an audio recording of Plaintiff, and the discovery of extensive graphic pornography on Plaintiff's work computer. Plaintiff's Opposition does nothing but try to pinpoint a reason for his firing and disprove it. However, the reason for his firing has no bearing on this defamation case. The only question in

[12] Importantly, many facts supporting this statement were known to AIPAC in 2005, rendering the statement accurate and truthful even as of that time. By 2008, however, additional information had been discovered by AIPAC giving further credence to the accuracy and truth of this statement.

[13] *See Howard Univ. v. Best,* 484 A.2d 958, 989 (D.C. 1984).

[14] *See* generally, *Gard v. U.S. Dept. of Educ.*, 2010 WL 4780804, at *7 (D.D.C. November 23, 2010).

this case is whether, as of March 2008, the statement that "Rosen's conduct did not comport with AIPAC standards" was untrue, defamatory, and made with malice. The undisputed evidence clearly indicates that when the statement was made, it was accurate, not defamatory, and was not made with any malice whatsoever.

In a desperate attempt to avoid dismissal, Plaintiff stoops now to unjustifiably inferring that Mr. Lewin, a respected attorney, did not actually have the "experience" of listening to evidence provided by the Department of Justice, an experience in which the evidence clearly established that Plaintiff attempted to hustle what he believed to be classified information to Glenn Kessler of the Washington Post.

Plaintiff provides no credible evidence to rebut Mr. Lewin's sworn testimony regarding his experience at the Department of Justice, nor does Plaintiff dispute that the evidence clearly reflected that Plaintiff believed that he was acting in an inappropriate manner. Instead, Plaintiff attempts to disguise his inappropriate conduct, by asserting that Mr. Lewin was aware of conversations between Plaintiff and Mr. Kessler as early as October 2004 and inferring that Mr. Lewin considered the conduct acceptable.[15] Make no mistake, after learning from the Department of Justice the true extent of Plaintiff's actions, it was clear to Mr. Lewin that Plaintiff had acted in a manner that was not in conformance with AIPAC's policies. AIPAC's statement was made in good faith, based upon the advice of counsel, after exposure to the evidence, which formed the basis of the Department of Justice's indictment of Plaintiff.

As Plaintiff concedes on page 17 of his Opposition, Mr. Lewin was played an audio recording of the conversation between Plaintiff, Mr. Weissman, and Mr. Kessler. Even if Mr. Lewin were aware generally of the conversation, it would have been based on Plaintiff giving his

[15] Plaintiff cites to a privileged document as support for his proposition and has filed the document as an exhibit in violation of the Protective Order entered April 30, 2010. For reasons discussed in the Reply, this document is not admissible and should not be considered by the Court.

own watered down version of the conversation, which, by the information notably omitted from Plaintiff's Opposition, did not include Plaintiff's boastful tone or admittedly jocular manner in which Plaintiff mentioned the Official Secrets Act.[16] Plaintiff provides no evidence to dispute that when Mr. Lewin was presented with the actual audio recordings of the conversation and experienced what really happened, it was a stark contrast to the incomplete versions Plaintiff previously presented to his employers.[17] The egregious boldness and severity of Plaintiff's actions were not appreciated until Mr. Lewin heard Mr. Rosen's voice on the FBI tapes. Indeed, even Mr. Rosen acknowledged that the FBI tapes made him look "sinister."[18]

Plaintiff also does not dispute that he violated AIPAC policies by browsing and viewing large amounts of pornography on his work computer.[19] Nor does he dispute he disobeyed an order from AIPAC's General Counsel. Most telling though is Plaintiff's failure to dispute in his Opposition the material fact that being criminally indicted is not conduct that comports with standards an employer expects of an employee. Plaintiff simply cannot dispute the fact that it was the totality of the circumstances known in 2008 that supported and gave truth to the statement that Plaintiff's actions did not comport with standards AIPAC expected of its employees. Plaintiff does not dispute that any one of these facts, let alone all of them combined, would have supported the statement, and made it true and non-defamatory.

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[16] Plaintiff does not dispute the facts claimed in the March 2008 Article are accurate and that Plaintiff indeed had a "boastful tone [in the recordings]". *See* Plf.'s Statement of Genuine Issues, p. 2; and Exhibit 3 to Defendants' Motion for Summary Judgment.

[17] Notably, the inadmissible speeches and timelines that Plaintiff references in his Opposition to support his contention that Mr. Lewin had prior knowledge of such conversations were, as Plaintiff admits, never actually delivered, or used. Such non-use fully supports Defendants' assertion that Plaintiff's lack of candor and failure to be forthcoming with AIPAC, made any document that relied on only the Plaintiff's version of events lacking in credibility.

[18] Ex. D, May 11, 2010, SpyTalk Article

[19] Plaintiff has erroneously made numerous statements to the press claiming that it was allegedly normal practice for employees to view pornography. The undisputed testimony is that other AIPAC employees only inadvertently opened what they did not know was pornography when it was sent to them from someone outside the organization. The only evidence of an AIPAC employee knowingly and intentionally searching, browsing for, and downloading pornography at work is Plaintiff's own testimony that Plaintiff himself did so, sometimes on a daily basis. *See* Ex. A, Rosen Dep. 69-70; Ex. E, Kohr Dep. 240-242.

ii. Plaintiff has not established any evidence sufficient for a reasonable jury to find by convincing clarity that Defendants acted with actual malice.

Plaintiff does not dispute the fact that as a public figure. Clearly, to prevail he must "prove by clear and convincing evidence" as a matter of law, that AIPAC made the statement "with actual malice, *i.e.,* intentional or reckless disregard for [the] falsity" of the statement. *Clampitt v. American University*, 957 A.2d 23, 42 (D.C. 2008) (citing *Moss v. Stockard*, 580 A.2d 1011, 1029 (1990). Plaintiff cannot prevail over Defendants motion for summary judgment because he has not and cannot establish sufficient evidence in the record that by clear and convincing evidence, a reasonable jury would find as a matter of law the March 2008 statement was made with any malice, let alone *actual malice*.

There is no evidence in the record that shows the statement was false when looked at in context of the supporting information known to Defendants in 2008. Defendants' knowledge of the facts in 2008 and Mr. Rosen's conduct destroys Plaintiff's malice argument. The record, as crafted by Plaintiff himself, demonstrates the careful and deliberate actions AIPAC took before ultimately terminating Plaintiff's at will employment in 2005, and thereafter issuing a statement that his conduct did not comport with what AIPAC expected of its employees.

First, despite the learning early in August 2004, that Plaintiff was the subject of a federal criminal investigation, AIPAC did not terminate Plaintiff. Rather, AIPAC mounted a vigorous defense and waited until it learned precisely why Mr. Rosen was being investigated before it took any steps to terminate him. Even then, despite being an at-will employee, Plaintiff was given the opportunity to address AIPAC's advisory committee of the board prior to his termination to disclose any facts he deemed relevant to that determination. Additionally, after his termination, AIPAC paid $4.9 million to his defense attorneys to remove him from the very zone of danger he now contends AIPAC placed him in by firing him, rather than the statement

AIPAC made upon terminating him. As conceded by Plaintiff, these attorneys' fees were paid notwithstanding the lack of any obligation of AIPAC to do so. Plaintiff's termination or any issues related to attorneys' fees do not demonstrate any malice, nor, for that matter, are they facts that support a defamation claim.

iii. The Thompson Memorandum is not material to this defamation claim.

The U.S. Government indicted Mr. Rosen for disseminating information he thought was classified. Mr. Rosen's central thesis in his defamation claim appears to be that AIPAC fired him in March 2005 in an effort to curry favor with the U.S. government and avoid its own prosecution for conduct that was allegedly no different from that practiced by Mr. Rosen.[20] The thesis is not only false; it is also irrelevant to this defamation action. Mr. Rosen claims to be suing AIPAC for what it said in the March 2008 article, but is actually prosecuting his case solely on the grounds of what AIPAC did, which was to terminate his employment.

iv. Plaintiff's arguments regarding a lack of standards regarding classified information are not determinative of the defamation claim

Plaintiff's arguments regarding a lack of standards on classified information are not material to this defamation claim, and more importantly, they are undermined by Plaintiff's own testimony and documents he produced. Plaintiff's references to a lack of any stated policy regarding classified information are a red herring designed to detract attention from the truth.

Mr. Rosen asserted then, and asserts now that he was indicted for conduct that AIPAC knew about and that he was routinely praised and rewarded for, yet, after taking numerous

[20] Mr. Rosen asserts that the Thompson Memorandum guided AIPAC's decisions to terminate Mr. Rosen. Although this assertion is not supported in the record, the assertion is also not supported by the actual facts. As stated by Mr. Rosen, the Thompson Memorandum would require Mr. Rosen's termination and AIPAC's separation from Mr. Rosen entirely, including the termination of attorneys' fees, health benefits, and monetary support. As is plain from the facts, AIPAC paid Mr. Rosen's attorneys $4.9 million for the privilege of successfully defending Mr. Rosen and thereafter being sued by him. In addition, AIPAC paid Mr. Rosen a six-month severance, as well as extended health benefits to provide him with some financial wherewithal during the defense of his criminal case.

depositions in this case, Plaintiff cannot point to a single witness that acknowledged having ever engaged in the conduct for which Plaintiff was indicted. In fact, Mr. Rosen himself said it most definitively when he wrote in an e-mail that a decades old matter of alleged Libyan campaign funds to a presidential campaign was they *only* incident concerning classified information that Plaintiff could remember in 23 years at AIPAC. ("I do not recall any other occasion in which AIPAC policy toward receipt of information that might be alleged to be classified came up in the past twenty-three years . . ." [21]

Moreover, this truth is borne out in the record of multiple depositions taken by the Plaintiff, that AIPAC has never condoned dealing in classified information. As stated by Rafael Danziger, AIPAC's Director of Research and Information:[22]

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Q Other than Rosen and Weissman, is it your understanding that no one other than them received classified information at AIPAC?
A I've never heard of such a case that anybody received U.S. classified information.
Q You've never heard of such a case?
A No, not that I recall.

Or, as stated by Richard Fishman, AIPAC's Managing Director, when asked about communications with government official prior to AIPAC's official policy on classified information:[23]

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Q Up to there was an official policy, and if a Government person told you something, you took it to not be classified?
MR. McCALLY: Objection; asked and answered previously about what the policy was.

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[21] *See* Ex. F, Plf.'s Document Production number 30.
[22] *See* Ex. G, Danziger Dep. 66. Mr. Danziger is the Director of Research and Information at AIPAC and has been an employee of AIPAC since 1990.
[23] *See* Ex. H, Fishman Dep. 285-287. Mr. Fishman is the Managing Director at AIPAC and has been an employee of AIPAC since 1986.

THE WITNESS: We do assume -- we still assume the Government officials know what they can share and know what they can't share. That doesn't mean that anyone is absolved of their responsibility of understanding whether or not they are being given information they shouldn't have or not have.

The only difference between then and now is that we treated that as a common sense understanding, how someone should operate, and now we've made that policy explicit.

BY MR. SHAPIRO:

Q "Now" being within the last two years?

A Right. I mean Steve understood that to some

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extent because he used to open his meetings with a brief speech about how he didn't want to get information that he wasn't supposed to have.

Q Over which meetings?

A With Government officials.

Q You were there for those meetings?

A He told me about it.

Q He told you about it?

A Yeah.

Q When did he tell you that?

A He told me about it -- I don't know exactly when he told me about it, but he told me about it in the course of our conversations over the years.

Q After August 27, 2004?

A Yes.

Q Before August 27, 2004?

A Maybe. I'm not certain of that.

Q What did Steve say, that he opened his conversations with?

A He opened his conversations -- I never heard it myself, others have, but he would say I'm here to learn as much as I can, but I'm not here to learn

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information that I'm not supposed to have and I'm not seeking classified information for you to share with me.

That would indicate to me that Steve well understood the standards that are expected in terms of interaction with Government officials.

Or as stated by AIPAC's Executive Director Howard Kohr:[24]

Page 12

Q You never sought to get classified information ?
A That is correct.
Q Okay. Did you get classified information?
A Did I get classified --
Q Yes,
A -- information here? To my knowledge, no.
Q At no time?
A At no time.
Q During – we're talking the period '9- -- sorry – '87 to '91.
A '87 till today.

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A By the way, most employees of AIPAC do know about classified information, including opportunities even working Steve. I remember directly Steve even

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having conversations with people that we weren't seeking classified information in meetings that he and I would go into.
Q Yes, but --
A As he did with other, as well.
Q -- did you get classified information?
A the answer is no.

Or, as stated by Renee Rothstein, AIPAC's Communications Director:[25]

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Q Okay. Aside from Steve Rosen and Keith Weisman, do you believe that there was never any other member of APEC's [sic] staff that received classified information?
A Yes.
Q You believe that's true?
A Yes.

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Q I see. So in your belief you don't believe that

[24] *See* Ex. E, Kohr Dep. 12, 190-191. Mr. Kohr is the Executive Director of AIPAC and has been an employee of AIPAC since 1987.

[25] *See* Ex. I, Rothstein Dep. 27, 38, 40-41. Ms. Rothstein is the Director of Communications at AIPAC and has been an employee since 1989.

anybody at APEC [sic] ever received classified information?
A No, I don't. I've never heard the word until this case in my entire tenure at APEC [sic] and in sitting in any senior staff meeting for more than a decade.

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Q Okay. Just to round this out. You don't believe that anybody in the legislative department of APEC [sic] ever received classified information?
MR. MCCALLY: Objection. Asked and answered.
MR. SHAPIRO: I don't think I asked that.
MR. MCCALLY: You asked anyone and she said no, no one has received it.
BY MR. SHAPIRO:
Q Is that right, ma'am?
A Which question?
Q The legislative branch -- the legislative department at APEC [sic]. You don't believe that anybody in the legislative department received classified information?
A At the time?
Q At any time.
A No, I don't. Can I edit that. I mean, I only can speak to the time that I worked at APEC [sic].
Q Yes. And when did you start at APEC [sic]?
A 1989.
Q Was it ever reported to you that before you started at APEC [sic] people at APEC [sic] had received classified information?

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A No, it was never reported to me.
Q And you never heard that?
A It was never reported to me.
Q And you never heard that?
A It may -- I don't remember. It may have been asserted by Steve in some of our private conversations.
Q I see.
A His suspicion.
Q His suspicion. But other than Steve -- perhaps Steve expressing a suspicion, you never heard that from anybody else; is that correct?
A Correct.

Plaintiff incorrectly infers that because AIPAC did not have any written policy dealing with classified information prior to 2005, that AIPAC generally accepted behavior that would

include dealings with classified information. As the above conclusively demonstrates, there is simply no evidence to support this assertion. In fact, Plaintiff's own testimony and evidence demonstrates that there was no need for a formal policy, as it was generally understood and accepted that trading classified information would not be condoned by AIPAC.

At the time Mr. Rosen was actually terminated, every other AIPAC employee deposed in this matter understood that they were not to seek or otherwise disseminate classified information, notwithstanding the absence of a written policy to that affect. Indeed, as the depositions clearly reveal, this was an unwritten standard that Mr. Rosen himself understood and habitually stated to government officials with whom he had contact.[26] However, as Plaintiff plainly revealed in his deposition, even if a written policy had existed, it would not have mattered. To Plaintiff, the AIPAC Policy Manual, with its at will employment provisions and prohibitions on the use of AIPAC computers to download explicit pornography did not apply to him.[27]

AIPAC does not now, nor has it ever, condoned obtaining or disseminating classified information. The undisputed evidence, set forth in the record, clearly evidences this fact. Plaintiff's intentional attempt to distribute what he unquestionably believed to be classified information clearly did not comply with AIPAC standards. The republication of a statement in 2008 was not defamatory, and was not made with malice. Instead, it was based, in part, on the evidence provided by and discovered as the result of the Department of Justice's investigation and indictment of Plaintiff. That evidence was sufficient to support a Federal indictment, and it is also sufficient to support the statement at issue.

D. Most of Plaintiff's alleged documents are inadmissible and therefore are improper "support" for Plaintiff's arguments and should not be considered.

[26] *See* Ex. E, Kohr Dep. 190-191; *See* Ex. H, Fishman Dep. 285-287.
[27] *See* Ex. A, Rosen Dep. 56-61, 63-81, 98-99.

Instead of attempting to challenge the government and hold it accountable for its criminal prosecution against Plaintiff, Plaintiff instead attempts to deflect blame and to tar AIPAC's reputation with false assertions that have nothing to do with the defamation claim before the Court. Plaintiff's aim is clearly not to prove his case, but to use his litigation as the vehicle to file confidential and privileged documents designed to do nothing but generate stories Plaintiff hopes will be embarrassing to AIPAC.[28] In fact, he has stated in the press that this is his intention.

These documents were clearly marked as confidential under an attorney-client/joint-defense privilege and/or work product protection. AIPAC has not waived their privilege or work product protections on any of those documents. As such, they are inadmissible and cannot support or establish any of Plaintiff's arguments. *See Neku v. U.S.*, 620 A.2d 259, 261 (D.C. 1993). Notwithstanding the fact Plaintiff and his counsel should be appropriately sanctioned for violating the terms of this Court's protective Order, as well as using inadmissible evidence in support of their filing, the fact remains that none of Plaintiff's documents actually support his defamation case. The documents are irrelevant and simply do not create disputed facts material to a defamation claim.

To support his argument that he was indicted for the very same thing other AIPAC employees did, he points to two instances that are so remote in time that they have no probative value. Many of the documents are almost 30 years old when AIPAC was a different organization, with different board members and a different executive director.

The first is a 1983 incident involving Plaintiff himself, in which Plaintiff assured AIPAC that it was the only instance during his work at AIPAC that he recalls remotely involving classified information. Of course, of the people now working at AIPAC some 25 years later, no

[28] Ex. J, Various articles published since filing of Defendants Motion for Summary Judgment.

one recalls this matter and no one was otherwise involved with it. The second "incident" relates to a USTR document obtained by AIPAC in 1984. What 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.[29] Nevertheless, even if these "admittedly ancient" incidents (as characterized by Plaintiff) involved what Plaintiff erroneously contends they involved, that fact is irrelevant to this action.

E. The law of the case doctrine is not applicable.

Plaintiff asserts that the "law of the case" bars the Court from considering this Motion, because the Court previously denied in part the Motion to Dismiss that was filed at the inception of this litigation. Plaintiff's claim is without merit.

"The 'law of the case' doctrine bars a trial court from reconsidering the same question of law that was presented to and decided by another [judge] of coordinate jurisdiction...." *Pannell v. District of Columbia*, 829 A.2d 474, 477-478 (D.C. 2003) (*citing Tompkins v. Washington Hospital Center,* 433 A.2d 1093, 1098 (D.C.1981)). "The doctrine applies "when (1) the motion under consideration is substantially similar to the one already raised before, and considered by, the first court; (2) the first court's ruling is sufficiently final; and (3) the prior ruling is not clearly erroneous in light of newly presented facts or a change in substantive law." *Id.* at 478, (*quoting P.P.P. Productions, Inc. v. W & L, Inc.,* 418 A.2d 151, 152 (D.C.1980)) (citation and internal quotation marks omitted).

It is proper for Judge Christian to review Defendants motion for summary judgment because as in *Guilford Transp. Industries, Inc. v. Wilner*, 760 A.2d 580 (D.C. 2000), Judge Christian is not reviewing the same record as Judge Clark. In *Guilford*, the defendant moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The initial

[29] *See* Ex. K, Plf.'s Document Production number 151.

judge denied that motion, and then the parties conducted discovery. After discovery was completed, the defendant moved for summary judgment, which was granted. Plaintiff appealed citing the law of the case doctrine. The Court of Appeals stated that "the law of the case doctrine merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power. The courts have thus held that denial of a motion for summary judgment by one judge does not foreclose grant of summary judgment by another judge." *Guilford,* at 593 (internal citations omitted).

Judge Clark's ruling was based on a motion to dismiss that was converted to a motion for summary judgment based on attachments to Defendants motion to dismiss. Judge Clark's ruling was made based on only the allegations in the complaint and a scant record. At the time of filing Defendants motion to dismiss in 2009, the parties had not conducted any discovery and not a single witness had been deposed. Judge Clark's ruling only denied Defendants' motion based on a review of the allegations claimed in Plaintiff's Complaint. The law of the case doctrine is not applicable because Defendants' motion to dismiss is not the same as their motion for summary judgment before Judge Christian. There have been numerous additional facts discovered since Defendants filed their motion to dismiss in 2009 and those newly discovered facts support the assertion in their motion for summary judgment that Plaintiff cannot prove, even considering the facts and inferences in his favor, that a reasonable jury could find malice under a clear and convincing evidentiary burden. Thus, it is proper for Judge Christian to consider, viewing the record in its entirety, whether Plaintiff has sufficient proof.

III. CONCLUSION

By March 2008, with Rosen's criminal indictment having been issued and the Department of Justice sharing additional information with AIPAC's counsel, there can be little doubt that

AIPAC's statement was not only a legitimate opinion, but also a non-defamatory truthful statement for which there were reasonable grounds to believe its truth. Plaintiff cannot prove either the falsity of the statement or any malice behind its issuance. Most importantly, Plaintiff has unambiguously conceded he has suffered no compensatory damages.

For the forgoing reasons, these Defendants respectfully requests that this Honorable Court grant summary judgment in their favor and dismiss Plaintiff's Complaint in its entirety with prejudice, and award the Defendants costs and other such relief as this Honorable Court deems just and proper.

Respectfully submitted,

CARR MALONEY P.C.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of January, 2011, I will electronically file the foregoing with the Clerk of the Court using the CaseFile Express system, which will then send a notification of such filing to David H. Shapiro, attorney for Plaintiff.

/s/
Allie M. Wright

SUPER SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEVEN J. ROSEN	:	
	:	
Plaintiff	:	
	:	
v.	:	Case No.: 2009 CA 001256
	:	Judge Erik Christian
AMERICAN ISRAEL PUBLIC	:	Next Event: Dispositive Motions Decided
AFFAIRS COMMITTEE, INC., *et. al.*	:	Date: January 3, 2011
	:	
Defendants	:	

CONSENT ORDER

UPON CONSIDERATION of the Consent Motion for Leave to File Defendants Reply Memorandum in support of their Motion for Summary Judgment it is this ____ day of _____, 20__, hereby:

ORDERED, that the Consent Motion for Leave to File Defendant's Reply Memorandum in support of their Motion for Summary Judgment be and hereby is GRANTED.

_____
Judge Erik Christian

cc: David H. Shapiro
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