SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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

PLAINTIFF'S STATEMENT OF GENUINE ISSUES

Pursuant to Rule 12-I(k), D.C. Superior Court Rules of Civil Procedure, and in opposition to defendants' motion for summary judgment, plaintiff, by and through his below-signed attorney, hereby submits the following statement setting forth all material facts as to which there exists a genuine issue necessary to be litigated.[1]

1. Plaintiff Steven Rosen was the subject and target of a Federal investigation that resulted in a Federal grand jury indictment against him for alleged violations of the Espionage Act.

[1]In keeping with the dictates of Rule 12-I(k), and for the convenience of the Court, counsel has numbered the paragraphs herein to correspond with those set forth in this statement of facts which defendants contend are both material and undisputed. In order to do so, any factual assertion made by defendants in their statement that, for the purpose of considering the motion for summary judgment, plaintiff agrees is both undisputed and material to the disposition of the case will be noted as such, without citation. Where, for the purpose of considering the motion for summary judgment, plaintiff does not dispute a factual assertion made in defendants' statement, but does not agree that it is material to the resolution of this litigation, that will be noted and, where appropriate, explained. Regarding each of defendants' asserted undisputed material facts that plaintiff contends is actually a matter in genuine dispute, plaintiff will state the matter in terms of a contested factual issue, with citations comparing the competing record evidence (with the citation to the record given by defendants in their statement of claimed undisputed facts being given first (after the heading of "Compare") and then plaintiff's competing citations to the record, etc. after the heading "With").

Agreed.

2. Plaintiff is a public figure in Middle East Policy Issues.

Agreed.

3. This Court dismissed all claims based on any statement other than the March 3, 2008, article in *The New York Times*.

Agreed. However, this "fact" is not material.

4. The factual background in the March 3, 2008 article in *The New York Times* is accurate.

Agreed – although the statements made by Patrick Dorton repeated in the March 3, 2008 article are knowingly false, and accordingly, are actionable defamation.

5. Whether the following "statement" by Defendant Patrick Dorton, spokesman for defendant American Israel Public Affairs Committee, Inc. ("AIPAC"), contained in the March 3, 2008 New York Times Article, is a mere repetition of earlier statements by him on AIPAC's behalf, or a new, reaffirmation of such earlier statements, is a genuine material issue of fact:

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

[Emphasis added]?

COMPARE: Rosen Deposition ("Depo.") Tr.[2] , p. 393, lines 10-15 (in which plaintiff seems to agree that the Dorton's March 3, 2008 statement merely repeats his earlier statements made on AIPAC's behalf);

WITH: Rosen Depo. Tr., p. 393, lines 16-21 (in which plaintiff states more definitively that the March 3, 2008 statement by Dorton on AIPAC's behalf "is not only a repetition of prior statements – it's an allusion to the prior statements and their continued validity.")

6. Plaintiff was an at-will employee of AIPAC.

Agreed. However, this fact is not material to the resolution of this civil action as it is not one for unjust discharge.

7. The FBI surreptitiously made recordings of a call between plaintiff's co-worker, Keith Weissman, Steven Rosen, and *Washington Post* reporter Mr. [Glenn] Kessler.

Agreed.

8. That prosecutors played the FBI's clandestine recording of Messrs. Rosen's and Weissman's joint telephone conversation with *Washington Post* reporter Glenn Kessler for AIPAC lawyer Nathan Lewis is certainly true; but whether this event was a unique "experience" for Mr. Lewis is a material fact in genuine dispute.

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[2]The portions of the transcript of the deposition of Steven Rosen cited in this Statement of Genuine Issues are all contained in Attachment No. 1 hereto.

COMPARE: Lewin Depo. Tr.[3], pp. 23-25 (wherein Lewin states that prosecutors played the tape of a FBI phone-tap of a conversation in which Mr. Weissman – with Mr. Rosen "interjecting" – tells Glenn Kessler of the *Washington Post* information that he (Weissman) had previously learned could land him in "serious trouble" – perhaps even criminal difficulties – if disclosed; and Rosen Depo. Tr., pp. 246-248, 425-429 (in which he describes this conversation that was clandestinely recorded by the FBI and played for Nat Lewin by the prosecutors); as well as Lewin depo. Tr., pp. 26-29 (wherein Lewin contends that it was not until he heard the FBI wire-tap tape – on Match 15, 2005 – that he learned or understood the "startling" fact that Weissman and Rosen were attempting to "sell" the Washington Post reporter on writing a story with the information they were providing, based on the notion that the disclosure of that information could get Weissman into serious, perhaps criminal trouble – *i.e.,* this was the unique "experience" in Lewin's view);

WITH: The October 4, 2004 Memorandum From A.D. ["Abbe"] Lowell (Rosen's and Weissman's attorney in the criminal matter) To the Rosen/Weissman Files (with copies to P. Friedman [AIPAC's General Counsel, N. Lewin and J. Campbell [AIPAC's outside counsel in the criminal probe] re: "AIPAC Inquiry Background Facts: Revised" (Last Revised September 1, 2004)"[4] (which states at page 4 that

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[3]The portions of the transcript of the deposition of Nathan ("Nat") Lewin cited in this Statement of Genuine Issues are all contained in Attachment No. 2 hereto.

[4]The October 4, 2004 Memorandum From Abbe Lowell (Rosen and Weissman's attorney) To the Rosen/Weissman Files (copies to AIPAC's attorneys, including Nat Lewin) re:

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

and at 8 that Weissman reported that

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

and Lewin Depo. Tr., pp. 37-48, 46 (wherein Mr. Lewin does not dispute that he received the copy of the October 4, 2004 Memorandum from Messrs. Rosen's and Weissman's attorney, re: "Inquiry Background Facts: Revised (Last Revised September 1, 2004)" that Abbe Lowell sent to him and he concedes that he certainly reads what is sent to him).

"Inquiry Background Facts: Revised (Last Revised September 1, 2004)," which is Document No. 37 in Plaintiff's Document Production to Defendant, is Attachment No. 3 hereto.

9. Whether the recording of the conversation between Messrs. Rosen, Weissman, and Kessler played for him by prosecutors left a disturbing impression on Nathan Lewin?

COMPARE: Lewin Depo. Tr., pp. 23-25 (to the effect noted above at Genuine Issue No. 8) and pp. 60-61 (wherein Lewin again says that he did not know before March 15, 2005 – when prosecutors played the FBI tape of the phone tapped conversation between Rosen, Weissman and Washington Post reporter, Glenn Kessler for him – that Messrs. Rosen and Weissman sought to get Mr. Kessler to publish a story in the *Washington Post* regarding what Larry Franklin of DOD had told Weissman);

WITH: The October 4, 2004 Memorandum From A.D. Lowell (Rosen and Weissman's attorney) To the Rosen/Weissman Files (with cc to P. Friedman [AIPAC's General Counsel, N. Lewin and J. Campbell [AIPAC's outside counsel] re: "AIPAC Inquiry Background Facts: Revised (Last Revised September 1, 2004)," p. 4, (In which Rosen's conversation with the *Washington Post's* Glenn Kessler is report), cited in noted Genuine Issue No. 8 above; and Lewin Depo. Tr., pp. 37-48, 46 (wherein Lewin does not dispute that he received the copy of that October 4, 2004 Memorandum that Rosen's lawyer sent him and he concedes that he certainly reads what is sent to him).

10. Whether Steven Rosen knew the information received by Keith Weissman from Larry Franklin, a Defense Department employee, was classified at the time he and Mr. Weissman tried to persuade Glenn Kessler of the *Washington Post* to write a story based on that information?

COMPARE: Lewin Depo. Tr., pp. 23-25;

WITH: Rosen Depo. Tr., pp. 432-436 (Mr. Rosen did not know at the time of his and Weissman's conversation with Glenn Kessler that Weissman's Defense Department source, Larry Franklin, had told him (Weissman) that the information they were telling Kessler was "classified;" indeed, Mr. Rosen did not know at that time that Franklin had even used the word "classified" when he spoke to Weissman), and by March 2008, Rosen's attorneys in the criminal case had notified the judge in that criminal case that they intended to present at trial, evidence that the material disclosed to Mr. Kessler by Messrs. Rosen and Weissman was not in fact "classified" according to the law.

11. Nat Lewin assumed the [FBI wire-tape] recorded conversation [between Steve Rosen and Keith Weissman, on the one hand, and Glenn Kessler [of the *Washington Post*] would become public at trial.

Agreed.

12. Whether prior to March 15, 2005 – when prosecutors played the taped telephone conversation between Rosen and Weissman and Glenn Kessler for Nat Lewin – Mr. Lewin knew that Mr. Rosen and Mr. Weissman were essentially trying to persuade Kessler to write a story in the *Washington Post* disclosing the information they provided to him from Weissman's Department of Defense source, by representing to Mr. Kessler that the information being provided was of a type for which they could be criminally punished for having disclosed to him?

COMPARE: Lewin Depo. Tr., p. 27;

WITH: Rosen Depo. Tr., pp . 429 and 255-56 (wherein Mr. Rosen makes clear that in the FBI taped telephone conversation between Keith Weissman, himself and Glenn Kessler, he (Rosen) denied to Mr. Kessler that the information they were providing to him was of a type that Rosen and Weissman could be criminally prosecuted for providing), and Tr., p. 432 and pp. 434-435 (where Mr. Rosen was not told by Mr. Weissman prior to the FBI-tapped telephone conversation with Glenn Kessler that Mr. Weissman had been told by Larry Franklin that some of the material was sensitive or "classified" and that Weissman could get "in trouble" for its disclosure; *see also,* the October 4, 2004 Memorandum From Abbe Lowell (Rosen and Weissman's attorney) To the Rosen/Weissman Files (with cc to AIPAC's attorneys, including N. Lewin) re: "AIPAC Inquiry Background Facts: Revised (Last Revised September 1, 2004)," p. 8 (where the memo states that while Mr. Weissman was told by Larry Franklin that the information he was providing to Weissman was "sensitive" or "confidential" and the he (Franklin) might have even used the word "classified" (and he did say that Franklin said he himself (Weissman) could be hurt or in trouble if it was known that he (Franklin) had disclosed the information), *the memo also clearly states that Keith Weissman did not disclose any of this to Steven Rosen*), and Lewin Depo. Tr., pp. 37-48, 46 (wherein Nat Lewin does not dispute that he received the copy of that October 4, 2004 Memorandum that Rosen's lawyer sent him and he concedes that he certainly reads what is sent to him); *and see* October 5, 2004 Draft of "AIPAC Briefing Paper on the Allegations Reported in the Media

Regarding AIPAC and Two AIPAC Employees,"[5] pp. 12-15 (wherein AIPAC management acknowledges that it knows (at least by October 5, 2004) what information Franklin provided to Weissman in the key July 21, 2004 meeting between them and when Weissman told Steve Rosen (who was not at the meeting) about what Franklin had disclosed in that meeting – and that Weissman *did not* tell Mr. Rosen that Franklin had said that any of the information provided was "classified"); and the October 18, 2004 draft of the "Narrative Post Task Force Weekend Revisions" of a speech AIPAC's Executive Director Howard Kohr was planning to give to AIPAC's most important members,[6] pp. 3-8 (wherein the high-level AIPAC team preparing this speech, headed by AIPAC's Deputy Executive Director Richard Fishman, acknowledged that hearing sensitive or classified information from government sources such as Larry Franklin and then sharing that information with others, as Steve Rosen and Keith Weissman had been accused of doing, was not illegal, was what Rosen and Weissman were paid to do by AIPAC, and was common in Washington's foreign policy circles), and the earlier, October 15, 2004 draft of those "Narrative Post Task Force Weekend Revisions" of the

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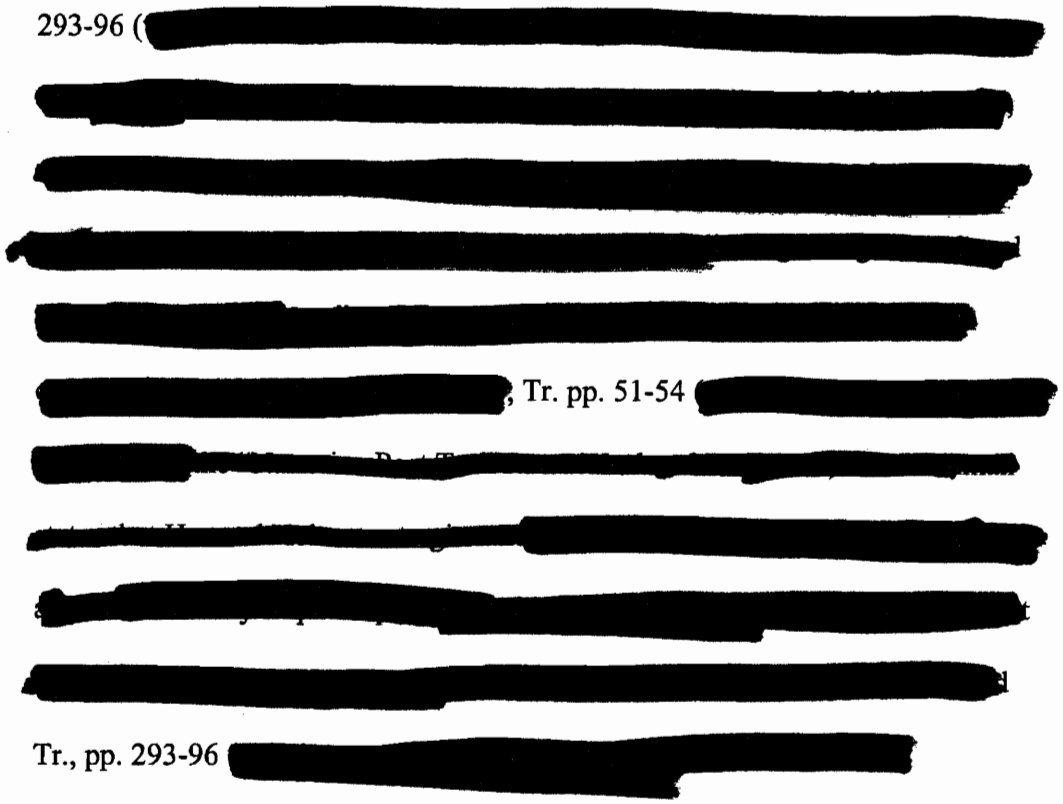
[5]The October 5, 2004 Draft of "AIPAC Briefing Paper on the Allegations Reported in the Media Regarding AIPAC and Two AIPAC Employees," which is Document No. 38 in Plaintiff's Document Production to Defendant, is Attachment No. 4 hereto.

[6]The October 18, 2004 draft of the "Narrative Post Task Force Weekend Revisions" of a speech AIPAC's Executive Director Howard Kohr was planning to give to AIPAC's most important members, which was Document No. 40 in Plaintiff's Production of Documents, is Attachment No. 5 hereto.

same speech AIPAC's Executive Director Howard Kohr planned to give,[7] pp. 2-7 (to the same effect); *see also*: Fishman Depo. (**Confidential Portions**)[8] Tr., pp. 293-96 ([redacted]



, Tr. pp. 51-54 [redacted]

Tr., pp. 293-96 [redacted]

13. Whether AIPAC would be "substantially damaged" if the tape of the FBI wiretap of the telephone conversation between Messrs. Rosen and Weissman and Glenn Kessler of the *Washington Post* became public?

COMPARE: Lewin Depo. Tr., p. 79;

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[7]The October 15, 2004 draft of the "Narrative Post Task Force Weekend Revisions" of a speech AIPAC's Executive Director Howard Kohr was planning to give to AIPAC's most important members, which was Document No. 39 in Plaintiff's Production of Documents, is Attachment No. 6 hereto.

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

WITH: "FBI Investigates Leak on Trade To Israel Lobby," an article by Stuart Auerbach in the August 3, 1984 edition of the *Washington Post*[9] (revealing the fact that in a previous incident involving the receipt by an AIPAC official of a "classified" document, AIPAC publicly defended its staff for receiving and re-transmitting an actual classified document – an act well beyond anything Mr. Rosen or Mr. Weissman was accused of doing – and AIPAC was not in that event "substantially damaged" by that act or that admission – in fact, this article reports that a spokesman for AIPAC acknowledged that the organization had a copy of the classified report, but said the AIPAC did nothing illegal, the article quoting the AIPAC spokesman as saying:

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

Emphasis added) ; *see also* FBI Telex of March 7, 1986, from Special Agent in Charge ("SAC"), Washington Field Office, to Director, FBI re: Theft and Unauthorized Disclosure of Documents from the U.S. Trade Representative ("USTR")[10] (which documents that an official of the Embassy of Israel confirmed that the embassy had received a classified USTR document from AIPAC); March

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

[10]The FBI Telex of March 7, 1986, from Special Agent in Charge ("SAC"), Washington Field Office re: Theft and Unauthorized Disclosure of Documents from the U.S. Trade Representative ("USTR"), which was Document No. 133 in Plaintiff's Production of Documents, is Attachment No. 9 hereto.

9, 2009 letter from the Office of the U.S. Trade Representative , Executive Office of the President, to Grant Smith of the Institute for Research, Middle Eastern Policy[11] (confirming that the 1984 document referenced in both Attachments 6 and 133 hereto is still "classified in its entirety"); August 13, 1984 FBI Investigative Summary re: Theft of Classified Document from USTR[12] (confirming an official at AIPAC had access to this classified document or information contained in it); FBI Telex of June 20, 1984, from Washington Field Office to Director, FBI re: Theft of Classified Documents from the Office of U.S. Trade Representative ("USTR")[13] (confirming an AIPAC official admitted to Associate General Counsel of USTR that AIPAC had a classified USTR document and, on demand, returned it to USTR); January 6, 1986 FBI Form 302 regarding a January 6, 1986 interview of female AIPAC official (with her attorney from the law firm of Dickstein Shapiro & Morin present[14] (wherein the AIPAC official confirmed that she had received the classified USTR report back in April

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[11]The March 9, 2009 letter from the Office of the U.S. Trade Representative , Executive Office of the President to Grant Smith of the Institute for Research, Middle Eastern Policy, which was Document No. 132 in Plaintiff's Production of Documents, is Attachment No. 10 hereto.

[12]The August 13, 1984 FBI Investigative Summary re: Theft of Classified Document from USTR, which was Document No. 137 in Plaintiff's Production of Documents, is Attachment No. 11 hereto.

[13]The FBI Telex of June 20, 1984,from Washington Field Office to Director, FBI re: Theft of Classified Documents from the Office of U.S. Trade Representative ("USTR"), which was Document No. 150 in Plaintiff's Production of Documents, is Attachment No. 12 hereto.

[14]The January 6, 1986 FBI Form 302 regarding a January 6, 1986 interview of female AIPAC official, which was Document No. 156 in Plaintiff's Production of Documents, is Attachment No. 13 hereto.

1984, that she had distributed it, and it had been photocopied, that she had had a copy and had taken it home and, after being told to destroy it, disposed of it by putting it down her trash chute); *see also* FBI Form 302s dated March 21, 1986 and January 6, 1986, respectively, re: interviews of AIPAC officials concerning the possession by AIPAC of a USTR document back in 1984[15] (which confirm the widespread distribution within AIPAc of this secret U.S. Government document back in 1984); *see also* Kurz **Confidential** Depo.[16] TR, pp. 11-33 [redacted]

14. Whether AIPAC would have been able to explain how it could have learned of Mr. Rosen's and Mr. Weissman's receipt of the information from Larry Franklin, and their dissemination of it to Glenn Kessler of the *Washington Post* and yet still retained Mr. Rosen and

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[15]The FBI Form 302s dated March 21, 1986 and January 6, 1986 re: interviews of AIPAC officials concerning the possession by AIPAC of a USTR document back in 1984, which were Document Nos. 157 and 158, respectively, in Plaintiff's Production of Documents, are Attachment Nos. 14 and 15 hereto, respectively.

[16]The **Confidential Portions** of the transcript of the deposition of Ester Kurz cited in this Statement of Genuine Issues are all contained in Attachment No. 16 hereto.

his co-worker as AIPAC employees?

COMPARE: Lewin Dep. Tr., pp. 25, 28-30, and 57-59;

WITH: All the record citations in support of plaintiff's position in Genuine Issue No. 13, *supra* (in fact, in a previous incident of AIPAC officials receiving the classified USTR document back in 1984 – which was investigated by the FBI in 1986 – AIPAC defended its staff for receiving and re-transmitting an actual "classified" document – an act well beyond anything which Mr. Rosen or Mr. Weissman were accused of – and AIPAC did retain the employees involved; indeed, it did so without ever disciplining at least one of them for her part in the USTR matter, in fact, it promoted her to a senior position thereafter; and AIPAC did not appear to suffer substantial any damage to the organization at all).

15. Nat Lewin made the recommendation for termination only after hearing the government's evidence.

Agreed. However, as noted in the citations supporting plaintiff's position in Genuine Issue Nos. 8-10 and 12, *supra*, it nonetheless is a genuine issue of fact whether the FBI recording of the wiretapped conversation between Mr. Rosen, Mr. Weissman and the *Washington Post's* Glenn Kessler provided Mr. Lewin with any information not previously disclosed to him via Steven Rosen and Keith Weissman and their attorney, Abbe Lowell (*e.g.*, via the October 4, 2004 Memorandum From Abbe Lowell To the Rosen/Weissman Files (with copies to AIPAC's General Counsel, Nat Lewin, its outside counsel] re: "AIPAC Inquiry Background Facts: Revised (Last Revised September 1, 2004)."

16. Whether the wiretapped recording of the telephone conversation between Messrs. Rosen and Weissman and Glenn Kessler of the *Washington Post* played for Nat Lewin had the effect of making Steven Rosen look "very sinister" and "portray[ed] him as a secret agent rather than a lobbyist?"

COMPARE: The quote in the May 11, 2010 "Spy Talk" article by Jeff Stein, in the blog.washingtonpost.com (Exhibit 6 submitted by defendants in support of their Motion for Summary Judgment. [Plaintiff objects to this exhibit as inadmissable hearsay being offered for its truth, and notes that, as it is not admissible evidence, it cannot support a motion for summary judgment.];

WITH: Rosen Depo. Tr., pp. 257-59 (in which Mr. Rosen explains: "I didn't say they made me look sinister. I said they [the prosecutors] wanted to make me look sinister . . . I think they failed to make me look sinister.")

17. Whether Steven Rosen made a comment about "not getting in trouble" over the information in the wiretapped conversation he and Keith Weissman had with Glenn Kessler?

COMPARE: The statement as posited by defendants at No. 17, citing Rosen Depo. Tr., pp. 255-56;

WITH: Rosen Depo. Tr., pp. 255-56 (wherein Mr. Rosen actually says precisely the opposite of what defendants set forth: "I didn't say that [the comment about not getting into trouble]. . . Weissman said that." In fact, in the deposition, defendants' counsel asked plaintiff: "Did you oppose that [the statement by Weissman about getting into trouble] at all?" And Mr. Rosen responded: "I

immediately said, 'that's crazy.)

18. Whether the statement about "not getting in trouble" meant that Messrs. Rosen and Weissman "could get in trouble because maybe [the information] is classified."

COMPARE: The statement as posited by defendants at No. 17, citing Rosen Depo. Tr., p. 429;

WITH: Rosen Depo. Tr., pp. 255-56 and 432-33 (in fact, here again plaintiff said precisely the opposite of what defendants' set forth in his deposition testimony: Mr. Rosen actually stated in response to hearing Weissman make the comment about getting into trouble: "I immediately said, that's crazy, we don't have an Official Secrets Act in the United States")

19. Whether plaintiff said on the wiretapped phone call at issue, "At least we have no Official Secrets Act"?

COMPARE: Rosen Depo. Tr., pp. 255-59; and July 4, 2005, The New Yorker, "Real Insiders" article, at 6 (Exhibit 8 submitted by defendants in support of their Motion for Summary Judgment) [Plaintiff objects as the article is inadmissable hearsay since it is offered for its truth (Plaintiff is not quoted), and, as it is not admissible evidence, it cannot support a motion for summary judgment.];

WITH: Rosen Depo. Tr., pp.255-56 (Mr. Rosen did not say "*At least* we have no Official Secrets Act" in the phone conversation that the FBI taped; what he said in his deposition testimony was that when Weissman alluded to getting into trouble in the conversation with Kessler, he immediately said "that's crazy, we don't have an Official Secrets Act in the United States."

20. The Official Secrets Act is a British law under which journalists can be prosecuted if they publish classified material.

Agreed.

21. Whether plaintiff admits to the "inferential logic" that he knew the information was classified otherwise there would be no reason to mention the Official Secrets Act?

COMPARE: Rosen Dep. Tr., pp. 257-58;

WITH: Rosen Depo. Tr., pp. 257-59, and p. 428 (therein Mr. Rosen *did not admit* that this is correct "inferential logic"; indeed, in that deposition testimony, Mr. Rosen said that this was false "inferential logic" by which the prosecutors hoped to mislead a jury away from the truth in the case – which was that he (Rosen) had no "guilty knowledge" that the information being discussed with Glenn Kessler was "classified" or of a type that otherwise could get himself and Keith Weissman "in trouble" for disclosing it to Glenn Kessler).

22. Mr. Lewin *stated* that Mr. Rosen should be terminated, but that his legal fees in the criminal matter should continue to be paid.

Agreed. However, AIPAC stopped paying Mr. Rosen's legal fees when it terminated him and continued to refuse to pay for his legal defense for some two-and-a-half-years (until it made a compromise with his (Rosen's) attorney). *See* Rosen Depo. Tr., p. 287. Actually, Lewin made the statement about both Steven Rosen and Keith Weissman – both about terminating them and

continuing to pay their legal fees.

23. AIPAC paid in excess of $4.9 million for Mr. Rosen's legal fees.

Agreed (however, see Genuine Issue No. 22, *supra*).

24. Did Patrick Dorton's "statement" on March 3, 2008 say nothing different from that expressed in AIPAC's outside counsel Nat Lewin's letter of March 21, 2005 to Howard Kohr, AIPAC's Executive Director?

COMPARE: Lewin Depo. Tr., pp. 56-58, 90;

WITH: *See* defendant Patrick Dorton's (defamatory) statement – on AIPAC's behalf – of March 3, 2008[17] (in which he said that AIPAC still held the view in March 2008 – that Steven Rosen's (and Keith Weissman's) actions in 2004 *"did not comport with standards that AIPAC expects of its employees"* – that he (Dorton) had expressed on AIPAC's behalf in March of 2005 (emphasis added))[18], and compare

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[17]The Dorton statement was published in the "Trial to Offer Look at World of Information Trading" article by Neil A. Lewis in the March 3, 2008 edition of *The New York Times*, which was Document No. 111 in Plaintiff's Production of Documents, is Attachment No. 17 hereto.

[18]Examples of publication of defendant Dorton's defamatory statement made on AIPAC's behalf back in back 2005 include the Letter from Washington: Real Insider article "A Pro-Israel Lobby and an F.B.I. Sting" by Jeffrey Goldberg, published in the July 4, 2005 edition of *The New Yorker* Magazine, which was Document No. 64 in Plaintiff's Production of Documents, is Attachment No. 18 hereto, and the "U.S. Indicts 2 in Case of Divulging Secrets" article by Dan Eggen and Jamie Stockwell, published in the August 5, 2005 edition of the *Washington Post*, which was Document No. 68 in Plaintiff's Production of Documents, is Attachment No. 19 hereto.

it to Nat Lewin's March 21, 2005 letter to Howard Kohr,[19] at ¶ 3 (in which he states that

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

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

25. Whether the telephone conversation tape recorded by the FBI was evidence that Steven Rosen "knew that they [he and Keith Weissman] were engaging in conduct that the government would consider criminal"?

COMPARE: Lewin Depo. Tr., pp. 31-33(in which AIPAC's outside attorney asserts that it does constitute such evidence);

WITH: Rosen Depo. Tr., pp. 255-59 and pp. 428-33 (wherein Mr. Rosen testified that he specifically and emphatically denied during that wiretapped conversation that there was any such law that he had violated or could be seen to have violated it).

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[19]Nat Lewin's March 21, 2005 letter to Howard Kohr, which was Document No. 181 in Plaintiff's Production of Documents, is Attachment No. 20 hereto.

26. By March 2008, Steven Rosen had been indicted on charges of allegedly violating the Espionage Act.

Agreed. However, it is hardly a material fact with regard to the instant case. Actually, Steven Rosen (as well as his colleague at AIPAC, Keith Weissman) was indicted for allegedly violating the 1917 Espionage Act on August 4, 2005,[20] almost three years before the most recent defamatory statement made by defendant Dorton on behalf of defendant AIPAC was published in *The New York Times* on March 3, 2008. The criminal case with regard to Mr. Rosen (and Mr. Weissman) was dismissed with prejudice on May 1, 2009,[21] less than two months after the instant civil action was filed in this Court. Accordingly, it seems obvious that the fact that Mr. Rosen had been indicted some three years before the defamatory statement of defendants is of no relevance to the claims here.

27. Plaintiff engaged in "sexual experimentation" by soliciting other married men through Craig's List.

This "fact" is not relevant and is surely not material to the resolution of the instant case. Indeed, it has been placed in their Statement of Material Facts Not in Dispute by defendants and their counsel in an effort to embarrass plaintiff and in the apparent hope that it will bias the Court

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[20]*See* Superceding Indictment in *United States v. Lawrence Anthony Franklin, Steven J. Rosen, and Keith Weissman*, Criminal No. 1:05CR225 (E.D.Va.), originally produced by defendants as an attachment to AIPAC's Request for Admissions, Attachment No. 21 hereto.

[21]*See* Government's Motion to Dismiss Criminal No. 1:05CR225 (E.D.Va.) as to Steven Rosen and Keith Weissman of May 1, 2009, and the Court's Order dismissing Criminal No. 1:05CR225 (E.D.Va.) as to Mr. Rosen (etc.) of May 1, 2009. Attachment No. 22 hereto and Attachment 23 hereto, respectively.

against him in this case. In placing it in the papers submitted in support of their motion for summary judgment, defendants and their counsel have committed a truly scurrilous act. As a matter of fact, Nat Lewin, defendant AIPAC's outside counsel, emphasized throughout his deposition that his recommendation that AIPAC terminate plaintiff and his colleague, Keith Weissman, and his authorization to defendant Patrick Dorton to make the statements about their (Rosen and Weissman) not having met AIPAC "standards," was based solely on issues involving their receipt and dissemination of allegedly "classified" information from a government official. Lewin never indicated that allegations about Steven Rosen's use of the office computer or his sexual activity played any role whatsoever in his recommendation. *See* Lewin Depo. Tr., pp. 31, 55, 69-70; *see also* Lewin's March 21, 2005 letter to AIPAC's Executive Director recommending AIPAC terminate the employment of Messrs. Rosen and Weissman;

Moreover, the President of AIPAC at the time Steven Rosen's employment was terminated, Bernice Manocherian, said AIPAC's Board of Directors, in making its decision on terminating Messrs. Rosen's and Weissman's employment, was based on Mr. Lewin's views on the issue of classified information, and she said she was not aware of sexual allegations regarding Mr. Rosen at the time the decision was made to terminate his employment. *See* Manocherian Depo.[22] Tr., pp. 21-22, pp. 28-31, pp. 65-66. Indeed, with regard to such sexual matters and the decision to terminate Mr. Rosen's employment, Ms. Manocherian commented: "I don't know what it would have to do with it anyway." *See* Manocherian Depo. Tr., Depo. Tr., p. 66.

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[22]The portions of the transcript of the deposition of Bernice Manocherian cited in this Statement of Genuine Issues are all contained in Attachment No. 24 hereto.

Further, Steven Rosen was not reprimanded for alleged private sexual activity at any time before or during his termination [In fact, he never heard any objection on this matter prior to filing the Complaint in instant case in March of 2009 – years after his termination and the defamatory statement(s) at issue in this case.] Instead, Mr. Rosen was given support, praise and financial rewards, and not a word of criticism about this matter. *See* Kohr Depo.[23] Tr., pp. 95-96; *see also* AIPAC's $7,000.00 bonus check for 2004, dated January 31, 2005;[24] and the December 15, 2007 email from attorney Abbe Lowell to Steve Rosen documenting AIPAC's General Counsel, Phil Friedman, saying – more than two-and-a-half years after terminating Mr. Rosen – that "when this [the criminal prosecution] is all over we will do right by Steve [Rosen]."[25]

Further, Nat Lewin, AIPAC's outside counsel, told prosecutor Paul McNulty on February 15, 2005, that in effect the AIPAC lawyers did not come over any evidence of wrongdoing by Rosen and Weissman in their post-August 27, 2004 review and, specifically, "I have yet to see any evidence of anybody having done anything wrong." Lewin Depo. Tr., pp. 69-70.

Also, in October 2007, AIPAC paid some $4 million in legal fees for Steven Rosen's defense in the criminal case – despite defendant Dorton's previous and later statements (in March 2008) that Mr. Rosen's actions were not part of his job and were beneath AIPAC's "standards" –

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[23]The portions of the transcript of the deposition of Howard Kohr cited in this Statement of Genuine Issues are all contained in Attachment No. 25 hereto.

[24]AIPAC's $7,000.00 bonus check to Plaintiff for 2004, dated January 31, 2005, which was Document No. 47 in Plaintiff's Production of Documents, is Attachment No. 26 hereto.

[25]The December 15, 2007 email from attorney Abbe Lowell to Steve Rosen documenting AIPAC's General Counsel's (Phil Friedman), statement regarding eventually making Mr. Rosen whole, which was Document No. 109 in Plaintiff's Production of Documents, is Attachment No. 27 hereto.

and under AIPAC's Bylaws the organization is not obligated to indemnify an employee for attorney's fees if they result from his own "gross negligence" or "bad faith" or "willful misconduct" or "willful breach of . . . duties and responsibilities in any material respect." *See* Phil Friedman Depo.[26] Tr., pp. 60-62; AIPAC's Bylaws[27], at Art. 15, p. 17; *see also* the letter of December 19, 2005 from Jamie S. Gorelick of WilmerHale, an attorney retained by AIPAC, to Abbe Lowell, Steve Rosen's attorney, re: Indemnification of Steven Rosen[28] (asserting that AIPAC was not obligated under its Bylaws to advance Rosen's attorneys fees – though it had done so to that point in time.

Finally, on May 12, 2005, two months after firing him for what it says were severe acts of misconduct and violating AIPAC's "standards," AIPAC provided Steven Rosen with a severance payment of $114,221 – equal to six months of his salary, and then paid his family health care benefit for 18 months. *See* Check Stub from the May 12, 2005 AIPAC Check No. 061162 to Steven Rosen[29] (covering the $27,360 payment for 18 months of COBRA Premiums and the $68,280.08 net of severance pay) and AIPAC's Statement regarding the

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[26]The portions of the transcript of the deposition of Phil Friedman cited in this Statement of Genuine Issues are all contained in Attachment No. 28 hereto.

[27]The Bylaws of the American Israel Public Affairs Committee (dated March 21, 1999), which was Document No. 14 in Plaintiff's Production of Documents, is Attachment No. 29 hereto.

[28]The December 19, 2005 letter from Jamie S. Gorelick of WilmerHale to Abbe Lowell of Chadbourne & Parke LLP, re: Indemnification of Steven Rosen, which was Document No. 134 in Plaintiff's Production of Documents, is Attachment No. 30 hereto.

[29]Check Stub from the May 12, 2005 AIPAC Check No. 061162 to Steven Rosen, which was Document No. 169 in Plaintiff's Production of Documents, is Attachment No. 31 hereto.

withholdings/deductions from severance pay to Steven Rosen[30] (showing $55,858.61 in net and withholdings/deductions from severance pay); *see also*, Friedman Depo. Tr., pp. 57-61 (wherein AIPAC's General Counsel testified that AIPAC paid Mr. Rosen half a year of salary as severance pay and gave him money enough to pay 18 months worth of health insurance premiums upon firing him in the spring of 2005 for not conducting himself in a manner up to AIPAC's standards.

All of which belies AIPAC's assertions that plaintiff had engaged in sexual misconduct or that it had anything to do with his termination – or that it was true that his conduct had in anyway violated AIPAC's "standards" for that matter).

28. The possible disclosure of his "sexual experimentation" would have been "embarrassing" and the potential embarrassment from that discovery of his sexual conduct "was very disturbing to [him]."

This "fact" is simply not relevant and surely not material to the resolution of the instant case. Indeed, it has been placed in their Statement of Material Facts Not in Dispute by defendants and their counsel in an effort to embarrass plaintiff and in the apparent hope that it will bias the Court against him in the case. Like the factual assertion in defendant's Statement of Material Facts Not in Dispute No. 27 *supra*, it has been placed in the papers submitted in support of defendants' motion for summary judgment, as a scurrilous act designed to vex Mr. Rosen and bias the Court. *See* the discussion and record citation contained in No. 27, *supra*.

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[30]AIPAC's Statement regarding the withholdings/deductions from severance pay to Steven Rosen, which was Document No. 173 in Plaintiff's Production of Documents, is attachment No. 32 hereto.

29. Whether plaintiff's own attorneys in the criminal case had concerns that Mr. Rosen would be indicted for lying to the FBI?

COMPARE: Rosen Depo. Tr., pp, 451-52;

WITH: Rosen Depo. Tr., pp. 451 and 195 (wherein Mr. Rosen states that: "I wasn't concerned that I could be indicted because I lied to the FBI, because I did not lie to the FBI. I was concerned that I could be indicted because they were already bringing an indictment for something that I didn't do, and they could have expanded it to other things that I didn't do" (p. 451) and "I would not lie to the FBI or want to lie to the FBI. I did not lie to the FBI." (P. 195)). Indeed, Mr. Rosen was not reprimanded for allegedly lying to the FBI at any time before or during his termination, and, in fact, he never heard any objection on this matter prior to filing the Complaint in the instant case in 2009. To the contrary, *see* the catalog of positive comment made by Nat Lewin concerning the lack of evidence of misdeeds by Mr. Rosen uncovered by AIPAC's post August 27, 2004 investigation and positive benefits bestowed on Mr. Rosen by AIPAC since that date (indeed, since his termination) that belie any belief that he lied to the FBI contained under Genuine Issue No. 27, *supra*. All of which are in complete contradiction to AIPAC's assertions that anyone believed that plaintiff lied to the FBI).

30. Plaintiff used his AIPAC work computer to browse pornographic websites.

This "fact" is simply not relevant and surely is not material to the resolution of the instant case. Indeed, it has been placed in their Statement of Material Facts Not in Dispute by defendants and their counsel in an effort to embarrass plaintiff and in the apparent hope that it will bias the Court against him in the case. Like the factual assertions in defendant's Statement of Material Facts Not in Dispute Nos. 27 and 28, *supra*, this "fact" has been placed in the papers submitted in support of defendants' motion for summary judgment, as a scurrilous act designed to vex Mr. Rosen and bias the Court. *See* the discussion and record citation contained in No. 27, *supra*, particularly the deposition testimony of the President of AIPAC at the time Steven Rosen's employment was terminated, Bernice Manocherian, who said she was not aware of allegations concerning pornography-viewing by Mr. Rosen at the time the decision was made to terminate his employment and commented: "with regard to Mr. Rosen's alleged sexual practices, she commented: "I don't know what it would have to do with it anyway." *See* Manocherian Depo. Tr., pp. 65-66.

31. Plaintiff used his AIPAC work computer to view pornographic images.

This "fact" is simply not relevant and surely is not material to the resolution of the instant case. Indeed, it has been placed in their Statement of Material Facts Not in Dispute by defendants and their counsel in an effort to embarrass plaintiff and in the apparent hope that it will bias the Court against him in the case. Like the factual assertions in defendant's Statement of Material Facts Not in Dispute Nos. 27, 28, and 30, *supra*, this "fact" has been placed in the papers submitted in support of defendants' motion for summary judgment, as a scurrilous act designed to vex Mr. Rosen and bias the Court. *See* the discussion and record citation contained

in No. 27, *supra*, particularly the deposition testimony of the President of AIPAC at the time Steven Rosen's employment was terminated, Bernice Manocherian, who said she was not aware of allegations concerning pornography-viewing by Mr. Rosen at the time the decision was made to terminate his employment and commented: "with regard to Mr. Rosen's alleged sexual practices, she commented: "I don't know what it would have to do with it anyway." *See* Manocherian Depo. Tr., pp. 65-66.

32. AIPAC discovered a large amount of graphic pornography on Mr. Rosen's office computer after an FBI raid at AIPAC's headquarters. Maintaining pornography on AIPAC computers is in violation of AIPAC policies.

This "fact" is simply not relevant and surely not material to the resolution of the instant case. Indeed, it has been placed in their Statement of Material Facts Not in Dispute by defendants and their counsel in an effort to embarrass plaintiff and in the apparent hope that it will bias the Court against him in the case. Like the factual assertions in defendant's Statement of Material Facts Not in Dispute Nos. 27, 28, 30 and 31, *supra*, this "fact" has been placed the papers submitted in support of defendants' motion for summary judgment, as a scurrilous act designed to vex Mr. Rosen and bias the Court. *Again see* the discussion and record citation contained in No. 27, *supra*, particularly the deposition testimony of the President of AIPAC at the time Steven Rosen's employment was terminated, Bernice Manocherian, who said she was not aware of allegations concerning pornography-viewing by Mr. Rosen at the time the decision was made to terminate his employment and commented: "with regard to Mr. Rosen's alleged

sexual practices, she commented: "I don't know what it would have to do with it anyway." *See* Manocherian Depo. Tr., pp. 65-66.

33. Whether by the time the March 3, 2008 article in The New York Times containing defendant Patrick Dorton's allegedly defamatory statement on behalf of defendant AIPAC about plaintiff Steven Rosen was published, AIPAC had learned additional information from the indictment, three (3) years of internal inquiries, sustained media attention to the FBI investigation and criminal prosecution resulting in numerous articles, and Mr. Lewin's "experience," that clarified and supported the opinion that the plaintiff had not acted in accordance with the standards AIPAC expected of an employee?

COMPARE: Dorton Depo.[31] Tr., pp. 55-57;

WITH: Mr. Dorton is not authoritative when it comes to what AIPAC learned and when and how it learned it. *See* Lewin Depo. Tr., pp. 10-16 (defendant Dorton was not employed by AIPAC, but by Nathan Lewin's law firm for the limited role of consulting with AIPAC and its lawyers on media relations during the criminal investigation that spawned the Rosen/Weissman prosecution; his statement to the media on AIPAC's behalf were in all cases authorized by Mr. Lewin, AIPAC's outside counsel with regard to the criminal investigation); Dorton Depo. Tr., pp. 5-7 (Dorton confirms that he is retained on the AIPAC matter by Nat Lewin – not

[31]The portions of the transcript of the deposition of Patrick Dorton cited in this Statement of Genuine Issues are all contained in Attachment No. 33 hereto.

AIPAC) and Dorton Depo. **Confidential Portion**[32] Tr., pp. 8-9 ([redacted]

[redacted]

[redacted] Dorton Depo. Tr., pp. 10-19

[redacted]; Fishman Depo.[33] Tr., pp. 203-207 (AIPAC's Deputy Executive Director testified that defendant Dorton was a consultant to Nat Lewin, AIPAC's outside counsel on the government investigation that spawned the criminal case against Messrs. Rosen and

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[32]The **Confidential Portions** of the transcript of the deposition of Patrick Dorton cited in this Statement of Genuine Issues are all contained in Attachment No. 34 hereto.

[33]The portions of the transcript of the deposition of Richard Fishman cited in this Statement of Genuine Issues are all contained in Attachment No. 35 hereto.

Weissman, and, though he was a member of AIPAC's working group, his role was to help with communications and to be AIPAC's spokesman on the Justice Department investigation – saying whatever Nat Lewin, AIPAC's outside counsel on the matter, authorized); Lewin Depo. Tr., pp. 69-70 (wherein Nat Lewin, AIPAC's outside counsel, stated that as of February 15, 2005, AIPAC lawyers had not come across any evidence of wrongdoing by Steven Rosen in their post-August 27, 2004 review).

34. Whether a criminal indictment is not in accord with what AIPAC expects of any of its employees by any objective or subjective measure.

COMPARE: Dorton Depo. Tr., pp. 76-77;

WITH: Defendant Patrick Dorton repeatedly made the statement on behalf of defendant AIPAC that Steven Rosen's conduct was not in accord with what "AIPAC expects of its employees" long before Mr. Rosen was indicted – so these statements were not connected to the indictment. *See* the quote of Mr. Dorton on AIPAC's behalf in "Israel Lobby Reportedly Fires 2 Top Aids in Spy Inquiry," an article by David Johnson in the April 21, 2005 edition of The New York Times,[34] and the quote of Mr. Dorton on AIPAC's behalf in "2 Senior AIPAC Employees Ousted," an

[34]A reprint of the article "Israel Lobby Reportedly Fires 2 Top Aids in Spy Inquiry," by David Johnson, published in the April 21, 2005 edition of *The New York Times*, which was Document No. 54 in Plaintiff's Production of Documents, is Attachment No. 36 hereto.

article in the April 21, 2005 edition of the Washington Post,[35] while the indictment of Steven Rosen did not occur until August 4, 2005 (*see* the Superceding Indictment in *United States v. Lawrence Anthony Franklin, Steven J. Rosen, and Keith Weissman*, Criminal No. 1:05CR225 (E.D.Va.), filed August 4, 2005).

35. On the morning of August 27, 2004, two FBI agents came to Plaintiff's house, and after an "intense exchange of words" issued a "threat [to Plaintiff] about getting a lawyer by 10:00 a.m. [that day]."

Agreed. However, this is simply not a material fact to the resolution of this civil action.

36. Whether, upon his calling Phil Friedman, AIPAC's General Counsel, on the morning of August 27, 2004, to inform him that he had just been visited by two FBI agents that morning, Friedman instructed Steven Rosen to speak with no one and to go directly to AIPAC's offices to meet with him (Friedman)?

COMPARE: Rosen Depo. Tr., pp. 206-207;.

WITH: Rosen Depo., Tr., pp. 201-210 (Rosen makes clear that his recollection of the events following the FBI agents coming to his home early on the morning of August 27, 2004, are clouded by the situation being very agitated, but that his recollection *does not* include an instruction from Phil Friedman to speak to no one

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[35]A reprint of the article "2 Senior AIPAC Employees Ousted," by Dan Eggen and Jerry Markon, published in the April 21, 2005 edition of the *Washington Post*, which was Document No. 55 in Plaintiff's Production of Documents, is Attachment No. 37 hereto.

and go directly to AIPAC's office to meet with Friedman – a meeting that did not even take place until that afternoon). *See also* Kohr Depo. Tr., pp. 95-96 (wherein AIPAC's Executive Director – and Mr. Rosen's supervisor – concedes that he never reprimanded or disciplined Mr. Rosen in any way (indeed, never criticized him at all) for failing to follow Phil Friedman's alleged telephone instruction to come immediately to AIPAC's offices and to speak to no one before doing so (instructions plaintiff does not recall receiving from Friedman in that agitated early morning telephone conversation on August 27, 2004)).

37. Whether before going to AIPAC's offices and informing his superiors at AIPAC of his visit from the FBI, Steven Rosen went to Bread & Chocolate restaurant to speak with an Israeli Embassy Official, where he discovered that FBI agents had followed him there?

COMPARE: Rosen Depo. Tr., pp. 212, 219-220, and Kohr Depo. Tr., p. 55;

WITH: Rosen Depo. Tr., pp. Tr., pp. 201-210 (Rosen's account was that the unexpected early morning visit to his home of two FBI agents and their hostile questioning of him had caused him to try to telephone Howard Kohr, AIPAC's Executive Director (without success) and to then contact its General Counsel, Phil Friedman, by telephone and tell him about the FBI's visit to his home that morning) – therefore, according to Mr. Rosen, he *had* "inform[ed] his superiors at AIPAC of his visit from the FBI, and he did so before going to AIPAC's offices that same day. As for the citation to the deposition testimony of Howard Kohr, *supra*, a review reveals that it is his take on an allegation, not a statement of fact – which

he could not make of his own knowledge in any case as he was not present at plaintiff's home on the morning of August 27, 2004, nor was he on the telephone call that morning between Mr. Rosen and Mr. Friedman. *See also* Kohr Depo. Tr., pp. 95-96 (wherein AIPAC's Executive Director – and Mr. Rosen's supervisor – concedes that he never reprimanded or disciplined plaintiff in any way (indeed, never criticized him at all) for failing to follow Phil Friedman's alleged telephone instruction to come immediately to AIPAC's offices and speak to no one before doing so (instructions plaintiff does not recall receiving from Friedman in that agitated early morning telephone conversation on August 27, 2004).

38. Whether Steven Rosen had concerns about the FBI's reasons for visiting him and Keith Weissman at AIPAC's office to ask about Lawrence Franklin and concerns about whether he had been caught lying to the FBI, and whether Mr. Rosen ever informed anyone at AIPAC about his concerns surrounding these FBI's visits?

COMPARE: Rosen Depo. Tr., p. 195; "This Is the FBI- Can We Talk?" article published in the January 1, 2008 edition of the *Washingtonian* magazine;[36]

WITH: Rosen Depo. Tr., p. 195 (wherein, in fact, Mr, Rosen states unequivocally that "I would not lie to the FBI or want to lie to the FBI. I did not lie to the FBI.");

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[36]A reprint of the article "This Is the FBI- Can We Talk?" published in the January 1, 2008 edition of the *Washingtonian* magazine, was originally appended as Exhibit 12 to defendants' motion for summary judgment, is Attachment No. 38 hereto for the Court's convenience.

General Counsel, and Nat Lewin [AIPAC's outside counsel] re: "AIPAC Inquiry Background Facts: Revised (Last Revised September 1, 2004)" (in which the attorney representing both Steven Rosen and Keith Weissman lays out for AIPAC's counsel (both outside counsel Nat Lewin and General Counsel Phil Friedman) the entirety of the contacts between plaintiff and Larry Franklin, what Keith Weissman did and did not make clear to Steve Rosen regarding what Franklin had told him alone, and the entirety of Steven Rosen's activities regarding the FBI, Israeli Embassy personnel, AIPAC Executive Director Howard Kohr, and Glenn Kessler of the Washington Post), and Lewin Depo. Tr., pp. 37-48, 46 (wherein Mr. Lewin does not dispute that he received the copy of that October 4, 2004 Memorandum that Rosen's lawyer sent him and he concedes that he certainly reads what is sent to him); *and see also* October 5, 2004 Draft of "AIPAC Briefing Paper on the Allegations Reported in the Media Regarding AIPAC and Two AIPAC Employees, as well as both the October 15, 2004 and the October 18, 2004 drafts of the "Narrative Post Task Force Weekend Revisions" of a speech AIPAC's Executive Director Howard Kohr was planning to give to AIPAC's most important members, respectively (which taken together demonstrate that AIPAC's senior management, including its Executive Director, Howard Kohr, and its Deputy Executive Director, Richard Fishman, and both its General Counsel, Phil Friedman, and its outside counsel for this Justice Department investigation, Nat Lewin, as well as its spokesman, defendant Patrick Dorton, had been fully briefed by Steven Rosen and Keith Weissman and their

counsel on the totality of their activities, and were thus well aware of the full situation concerning their contacts and activities with regard to Larry Franklin, Israeli Embassy personnel, Glenn Kessler of the Washington Post, the FBI, and the events of August 27, 2004); and Fishman Depo. (**Confidential Portions**) Tr., pp. 165-67 [redacted] Fishman Depo. (**Confidential Portions**) Tr. pp. 51-54 [redacted] (**Confidential Portions**) Tr., pp. 163-64 [redacted]

40. Whether various media articles, the factual record stated in the indictment, and AIPAC's experience dealing with Steven Rosen on this matter, provided AIPAC with reasonable evidence to believe that Mr. Rosen had not revealed the full extent of his relationship with Mr. Franklin when the matter initially arose in 2004?

COMPARE: Dorton Depo. Tr., pp. 85-86, 89-90; Kohr Depo. Tr., pp. 55-62;

WITH: *See* the entirety of the record materials cited above with regard to Genuine Issue No. 39 (which demonstrates that AIPAC had no evidence whatsoever for believing that Steven Rosen had not made complete disclosure to its management and attorneys regarding the full extent of his relationship with Larry Franklin just as soon as the issue arose in 2004 – actually, the record evidence demonstrates fairly conclusively that Mr. Rosen made such full disclosure to AIPAC immediately).

41. Whether Steven Rosen characterized Mr. Franklin as a "kook, a nobody, an insignificant figure" who "was much less important to [Rosen] than a lot of other people . . ."?

COMPARE: Rosen Depo. Tr., pp. 169-172 and 222;

WITH: The October 4, 2004 Memorandum From Abbe Lowell (Rosen and Weissman's attorney) To the Rosen/Weissman Files (with copies to Phil Friedman [AIPAC's General Counsel, and Nat Lewin [AIPAC's outside counsel] re: "AIPAC Inquiry Background Facts: Revised (Last Revised September 1, 2004)" (in which the attorney representing Steven Rosen (and Keith Weissman), Abbe Lowell, lays out for AIPAC's counsel (both outside counsel Nat Lewin and General Counsel Phil Friedman), *inter alia*, the entirety of the contacts between Mr. Rosen and Larry Franklin and what plaintiff thought about Mr. Franklin at various points in time, and the entirety of Steven Rosen activities regarding Mr. Franklin – and does so comprehensively beginning just three days after the FBI came to Rosen's home on the morning of August 27, 2004); and Lewin Depo. Tr., pp. 37-48, 46 (wherein

Mr. Lewin does not dispute that he received the copy of that October 4, 2004 Memorandum that Abbe Lowell, Rosen's and Weissman's lawyer, sent him and he concedes that he certainly reads what is sent to him). Moreover, the citation to Steven Rosen's deposition testimony at pp. 169-172 and 222, given by defendants does not square with the proposition it is cited as supporting; in fact, what Mr. Rosen states regarding his view of Larry Franklin and what he (Franklin) told Keith Weissman on July 21, 2004 is much more nuanced in the depositions passages cited by defendants in support of their statement of undisputed material facts no. 41.

42. Plaintiff found Larry Franklin credible enough to take information from him to a *Washington Post* reporter on at least two (2) occasions, as well as to an Embassy Official.

Agreed. However, this is not a fact that is material to the resolution of this civil action. *See* Rosen Depo. Tr., pp. 169-172 and 222.

43. This Court has found that plaintiff is a public figure and must meet the higher burden of proving actual malice.

Agreed. Although this is not a material fact, but rather a conclusion of law by this Court.

44. Whether defendants made the alleged defamatory statement in March 2008 with "actual malice"?

COMPARE: "Record, *generally*" (the citation given by defendants in support of their proposition that "[t]here are no facts established or [*sic*] support a finding that the Defendants made the alleged defamatory "statement" with actual malice" contained in defendants' statement of undisputed material facts at fact no. 44);

WITH: First, the record evidence suggests that defendants had reckless disregard for the truth in having Patrick Dorton say on AIPAC's behalf that Steven Rosen and Keith Weissman were dismissed because their behavior "did not comport with the standards that AIPAC expects of its employees" and that AIPAC still held that view of their behavior – as reported in *The New York Times* on March 3, 2008, in an article by Neil A. Lewis entitled "Trial to Offer Look at World of Information Trading" – as Lewin did not know whether or not AIPAC even had standards regarding the receipt/handling of "classified" information, and he made no inquiry as to whether AIPAC had such a policy or what the policy may have been. *See* Lewin Depo. Tr., pp. 63, 61, 57, and 85-86 (wherein Nat Lewin, AIPAC outside counsel, admitted that when he made his decisive recommendation to AIPAC's Board of Directors that Mr. Rosen and Mr. Weissman be fired and authorized Dorton to start making the press statements in dispute in this litigation, he "did not know AIPAC's policy regarding the receipt of classified information" and he "did not inquire prior to that time as to AIPAC's 'policy . . . [he] just assumed, on the basis of what [he] knew regarding Washington mores and standards"); Lewin Depo. Tr., pp. 56-57 (wherein Lewin concedes that he was the one who authorized Dorton to make the statements on AIPAC's behalf alleging that Mr. Rosen (and

Mr. Weissman) violated AIPAC standards, though he had no knowledge of AIPAC's actual standards, but only what he "assumed" to be AIPAC's standards); *see also* Fishman Depo. Tr., pp. 136-137 (wherein AIPAC's Deputy Executive Director admits that no inquiry or review was made of AIPAC's practices before the organization publicly asserted, in September 2004 – just after the Rosen-Weissman Justice Department criminal investigation concerning receipt and dissemination of classified information surfaced, that "neither AIPAC nor any of its employees has ever violated the laws or rules, nor had AIPAC or its employees ever received information we believed was secret or classified").

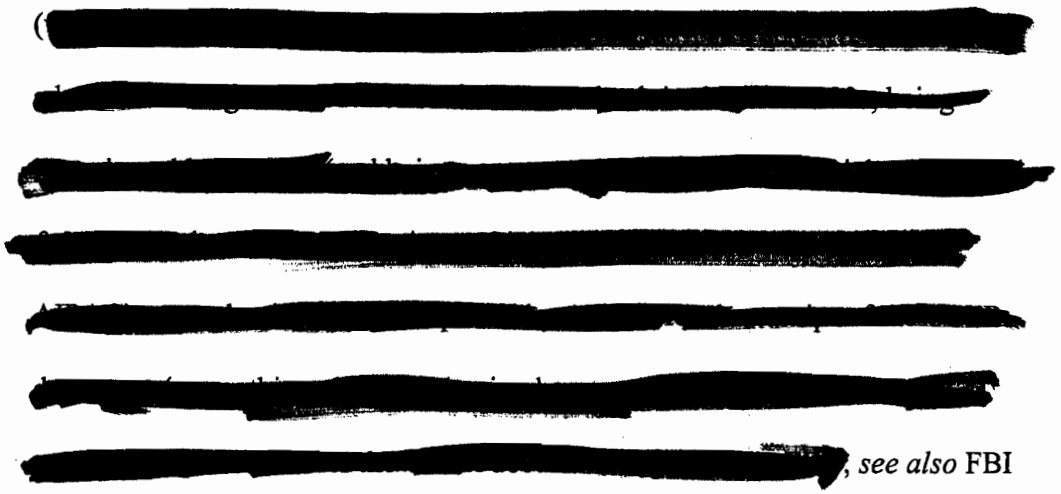
Second, AIPAC admits that it had no "written standards" concerning the receipt and dissemination of classified information prior to August 27, 2004, nor does AIPAC claim that it had even a "standard" regarding the receipt and handling of classified information that was orally expressed prior to August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

Third, in fact Mr. Rosen had himself at one time earlier in his AIPAC career – in February 1984 – been involved in a situation in which he had received classified information and where the FBI had investigated the matter. In that situation, the FBI was investigating Mr. Rosen's receipt of classified information that members of Libya's U.N. Mission had provided money to a U.S. presidential candidate's staff, and the then-Executive Director of AIPAC (Tom Dine) and senior members of the AIPAC Board of Directors had obtained legal counsel for Mr. Rosen (Leonard Garment) and, being informed of Mr. Rosen's activities at the time, endorsed them and gave Mr. Rosen high marks in his performance appraisals thereafter – the substance of which was disclosed to Nat Lewin in an email from Mr. Rosen in February of 2005. *See* February 24, 2005 email from Steven Rosen to Nat Lewin (and his law partner Alyza Lewin)[38] and Rosen Depo. Tr., pp. 120-131 (making clear that the date of the original email was in 2005 not 2004 – which was a transcription typographical error made by Mr. Rosen).

Fourth, there were in fact other situations before the 2004 Larry Franklin matter involving Steven Rosen and Keith Weissman in which AIPAC employees were involved in receiving classified material, notwithstanding AIPAC's denial (*see e.g.*, Kohr Depo. Tr., pp. 13-14 and 183, and AIPAC's Fund-Raising Letter of September 7, 2004, signed by Howard Kohr, Executive Director, and Bernice

[38]The February 24, 2005 email from Steven Rosen to Nat Lewin (and his law partner Alyza Lewin), which was Document No. 30 in Plaintiff's Production of Documents, is Attachment No. 40 hereto.

Manocherian, AIPAC's President[39]). *See* Kurz **Confidential** Depo. Tr., pp. 11-33 (



, *see also* FBI Form 302s dated March 21, 1986 and January 6, 1986 re: interviews of AIPAC officials concerning the possession by AIPAC of a USTR document back in 1984 (which confirm the widespread distribution within AIPAc of this secret U.S. Government document back in 1984).

45. Whether there is circumstantial evidence to support a finding malice on defendants' part?

COMPARE: "Record, *generally*" (the citation given by defendants in support of their proposition that "[t]here are no facts that establish or support finding malice even by circumstantial evidence" contained in defendants' statement of undisputed material facts at fact no. 45);

WITH: In fact, the circumstantial evidence overwhelmingly supports a finding of "malice" on the part of defendants in making the statements that Steven Rosen's

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[39]The September 7, 2004 Fund-Raising Letter signed by Howard Kohr, AIPAC's Executive Director, and Bernice Manocherian, AIPAC's President, which was Document No. 36 in Plaintiff's Production of Documents, is Attachment No. 41 hereto.

actions with regard to his receipt and handling of the information provided to Keith Weissman by DOD official Larry Franklin was beneath or did not meet AIPAC's "standards." *See* the comparison set forth in Genuine Issue No. 44 *supra*. Further, Steven Rosen was not reprimanded for his conduct – despite the full disclosures made of his activities to AIPAC by himself, Keith Weissman, and by their attorney, Abbe Lowell, in a September 1, 2004 memorandum (revised on October 4, 2004) – Attachment No. 3 hereto – from August 27, 2004 to anytime before his termination. Instead of being reprimanded, Mr. Rosen was given support, praise and financial rewards, and not a word of criticism about this matter. *See* Kohr Depo. Tr., pp. 95-96; *see also* AIPAC's $7,000.00 bonus check for 2004, dated January 31, 2005; and the December 15, 2007 email from attorney Abbe Lowell to Steve Rosen documenting AIPAC's in-house counsel, Phil Friedman saying – more than two-and-a-half years after terminating Mr. Rosen – that "when this [the criminal prosecution] is all over we will do right by Steve [Rosen]." Further, Nat Lewin, AIPAC's outside counsel, told the prosecutor on February 15, 2005, that in effect the AIPAC lawyers did not come across any evidence of wrongdoing by Rosen and Weissman in their post-August 27, 2004 review and, specifically, "I have yet to see any evidence of anybody having done anything wrong." Lewin Depo. Tr., pp. 69-70. Moreover, in October 2007, AIPAC paid some $4 million in legal fees for Steven Rosen's defense in the criminal case – despite Dorton's previous and later statements (in March 2008) that Mr. Rosen's actions were not part of his job and were beneath AIPAC's

standards – and under AIPAC's Bylaws the organization is not obligated to indemnify an employee for attorney's fees if they result from his own "gross negligence" or "bad faith" or "willful misconduct" or "willful breach of . . . duties and responsibilities in any material respect." *See* Phil Friedman Depo. Tr., pp. 60-62; AIPAC's Bylaws, at Art. 15, p. 17; *see also* the letter of December 19, 2005 from Jamie S. Gorelick of WilmerHale, an attorney retained by AIPAC, to Abbe Lowell, Steve Rosen's attorney, re: Indemnification of Steven Rosen (asserting that AIPAC was not obligated under its Bylaws to advance Rosen's attorneys fees – though it had done so to that point in time). Also, on May 12, 2005, two months after firing him for what it says were severe acts of misconduct and violating AIPAC's "standards," AIPAC provided Steven Rosen with a severance payment of $114,221 – equal to six months of his salary, and then paid his family health care benefit for 18 months. *See* Check Stub from the May 12, 2005 AIPAC Check No. 061162 to Steven Rosen (covering the $27,360 payment for 18 months of COBRA Premiums and the $68,280.08 net of severance pay) and AIPAC's Statement regarding the withholdings/deductions from severance pay to Steven Rosen (showing $55,858.61 in net and withholdings/deductions from severance pay); *see also*, Friedman Depo. Tr., pp. 57-61 (wherein AIPAC's General Counsel testified that AIPAC paid Mr. Rosen half a year of salary as severance pay and gave him enough money to pay 18 months worth of health insurance premiums upon firing him in the spring of 2005 for not conducting himself in a manner up to AIPAC's standards). All of which serves to belie AIPAC's assertion at "fact" no.

45 in its statement of undisputed material facts that [t]here are no facts that establish or support a finding malice even by circumstantial evidence."

46. Whether Steven Rosen suffered injury as a result of defendants' making the false statements that he was terminated because his conduct violated or did not conform to AIPAC's standards?

COMPARE: Rosen Depo. Tr., pp. 328-329 and pp. 386-389;

WITH: While it is true that plaintiff is not making a claim for lost wages or for mental (*i.e.*, psychological) damages, Mr. Rosen did suffer injury as a result of defendants' false statement published in *The New York Times* on March 3, 2008, and certainly is making a claim for damages to compensate him for that injury. In this regard, AIPAC's March 8, 2008 knowingly false statement, made through its spokesman Patrick Dorton, increased the danger of Mr. Rosen being convicted of a crime – violations of multiple sections of the Espionage Act, 18 U.S.C. §§ 793(d),(e) and (g) – which he did not commit, and for which he could have suffered a sentence of up to 10 years of imprisonment for each count (20 years imprisonment in all). *See* 18 U.S.C. § 793. These statements were made for the material benefit of AIPAC, despite the fact that they "could have complicated [plaintiff's] defense to the criminal charges" and led to the wrongful conviction and lengthy incarceration of Mr. Rosen. *See, e.g.*, Lewin Depo. Tr., pp. 23-36 (terminating plaintiff for violating AIPAC's standards – the public statement made by Dorton on AIPAC's behalf – was done to prevent a public relations

disaster for AIPAC); *see also* Fishman Depo. Tr., pp. 235 (wherein AIPAC's Deputy Executive Director admitted that AIPAC's action could have complicated [Plaintiff's] defense to the criminal charge). In fact, the prosecutors in the Rosen/Weissman criminal case told the Court that they might well use AIPAC's actions against Messrs. Rosen and Weissman at trial – and did so less than six-weeks after defendants' March 3, 2008 statement was published! *See* Government's Consolidated Responses to Defendants' Daubert-Related and In Limine Motions, in *United States v. Steven J. Rosen and Keith Weissman*, Criminal No. 1:05CR225 (E.D.Va.)[40], pp. 9-10. In their own court filing on the subject of the government making use of AIPAC's actions against their client at the criminal trial, Rosen's and Weissman's defense team pointed out the potential prejudice to Messrs. Rosen and Weissman such evidence would have. See Defendants' Motion *In Limine* to Bar Admission of the Termination of Their Employment at AIPAC, in *United States v. Steven J. Rosen and Keith Weissman*, Criminal No. 1:05CR225 (E.D.Va.)[41], pp. 4-5 (wherein the criminal defense counsel told the Court:

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[40]The Government's Consolidated Responses to Defendants' Daubert-Related and In Limine Motions, in *United States v. Steven J. Rosen and Keith Weissman*, Criminal No. 1:05CR225 (E.D.Va.), which was Document No. 142 in Plaintiff's Production of Documents is Attachment No. 42 hereto.

[41]The Defendants' Motion *In Limine* to Bar Admission of the Termination of Their Employment at AIPAC, in *United States v. Steven J. Rosen and Keith Weissman*, Criminal No. 1:05CR225 (E.D.Va.), which was Document No. 141 in Plaintiff's Production of Documents is Attachment No. 43 hereto.

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

(Emphasis added)). In the criminal case, the District Judge denied the Rosen/Weissman request to exclude AIPAC's actions from the criminal trial, leaving Steve Rosen and his co-defendant to suffer another year until the government gave up and asked that the indictment be dismissed – a request that the District Court granted on May 1, 2009. Thus, AIPAC's actions and statements helped place Steven Rosen in danger of being convicted of a crime he did not commit and, thereby, serving a lengthy term of incarceration; and by reiterating the statement in March 2008, as published in *The New York Times*, AIPAC and Patrick Dorton helped continue Mr. Rosen's dire situation for another 14 months (March 2008 to May 2009). *See* Rosen Depo. Tr., pp. 312-319 and pp. 388-394.

47. Whether plaintiff can distinguish any harm to his reputation or decrease in anyone's opinion of him based on the false statement made by defendants concerning his activities regarding the information disclosed to Keith Weissman by DOD official Larry Franklin in August 2004 contained in the March 3, 2008 article in *The New York Times*?

COMPARE: Rosen Depo. Tr., pp. 315-316;

WITH: Rosen Depo. Tr. pp. 305-307 (wherein Mr. Rosen stated, for example, that certain witnesses important to his criminal defense in *United States v. Steven J. Rosen*

and Keith Weissman, Criminal No. 1:05CR225 (E.D.Va.), would not cooperate with his attorneys because of the position that AIPAC was taking:

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

see also Rosen Depo. Tr., pp. 313-14 (concerning others – *e.g.*, David Mack, the Deputy Director of the Middle East Institute, a prominent Think-Tank – who attributes a decline in Mr. Rosen's influence to AIPAC's publicly-stated position towards him); Rosen Depo. Tr., p. 319 (wherein Mr. Rosen said that there was a reduction in the number of people who were willing or able to help him during the time he was under indictment, and virtually none of AIPAC's board members could help – not because none were sympathetic, but rather it was made plain to them by AIPAC that they were not permitted to do so); Rosen Depo. Tr., pp. 322-323 (wherein, in response to being asked if he could distinguish the level of anxiety attributable to the objectionable sentence by Dorton (for AIPAC) in the March 3, 2008 article from that cause by being indicted under the Espionage Act, Mr. Rosen said:

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

and Rosen Depo. Tr., pp. 326-27 (wherein Mr. Rosen states that:

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

Emphasis added).

48. Whether the false statements made by defendants contained in the March 3, 2008 article in *The New York Times* contributed to the criminal prosecution against Steven Rosen or increased the danger of his being convicted?

COMPARE: Rosen Depo. (Vol. II) Tr., pp. 392;

WITH: Fishman Depo., Tr., p. 235 (wherein AIPAC Deputy Executive Director admitted that AIPAC's action "could have complicated [Steven Rosen's] defense to the criminal charge"); Government's Consolidated Responses to Defendants' Daubert-Related and In Limine Motions, in *United States v. Steven J. Rosen and Keith Weissman*, Criminal No. 1:05CR225 (E.D.Va.), pp. 9-10 (in which, less than six-weeks after defendants' March 3, 2008 statement was published, prosecutors in the Rosen/Weissman criminal case told the Court that they might well use AIPAC's actions against Messrs, Rosen and Weissman at trial); Defendants' Motion *In Limine* to Bar Admission of the Termination of Their Employment at AIPAC, in *United States v. Steven J. Rosen and Keith Weissman*, Criminal No. 1:05CR225 (E.D.Va.), pp. 4-5 (where, in their own court filing on the subject of the government making use of AIPAC's actions against their client at the criminal trial, Rosen's and Weissman's defense pointed out the potential prejudice to Messrs. Rosen and Weissman such evidence would have to the Court:

> One could easily imagine a juror making an inferential leap something along the lines of: the defendants lost their jobs, *their employer agreed*

> *that they were guilty and fired them*, therefore the government's allegations must be true.

(Emphasis added)). In fact, in the criminal case, the District Judge denied the Rosen/Weissman request to exclude AIPAC's actions from the criminal trial, leaving Steve Rosen and his co-defendant to suffer another year until the government gave up and asked that the indictment be dismissed – a request that the District Court granted on May 1, 2009 (Attachment Nos. 21 and 22 hereto, respectively).

Respectfully submitted,

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