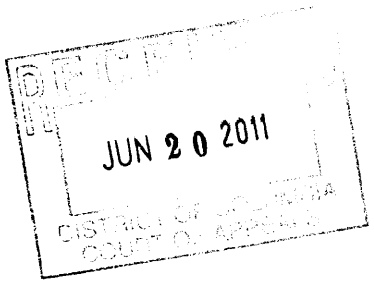
Appeal No. 11-cv-368

DISTRICT OF COLUMBIA COURT OF APPEALS



STEVEN J. ROSEN,

Plaintiff-Appellant,

v.

AMERICAN ISRAEL PUBLIC,
AFFAIRS COMMITTEE, INC., et al.,

Defendant-Appellee.

On Appeal from the Superior Court
of The District of Columbia, Civil
2009 CA 001256 B
(The Honorable Erik P. Christian, Judge)

BRIEF OF APPELLANT

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LIST OF PARTIES AND COUNSEL

Plaintiff-Appellant:	Steven J. Rosen
Plaintiff-Appellant's Counsel:	David H. Shapiro, Swick & Shapiro, P.C. (Washington, DC)
Defendants:	American Israel Public Affairs Committee, Howard Kohr, Melvin Dow, Bernice Manocherian, Howard E. Friedman, Lawrence Weinberg, Robert Asher, Edward C. Levy, Jr., Lionel Kaplan, Timothy F. Wuliger, Amy Friedkin, Patrick Dorton, and Rational PR, L.C.
Defendants-Respondents' Counsel:	Thomas L. McCally, Allie M. Wright, Carr Maloney P.C. (Washington, DC)

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STATEMENT OF THE ISSUES

I. Whether the Superior Court erred when it granted summary judgment and thereby dismissed Rosen's defamation cause of action, in view of the record evidence sufficient to establish at least a triable issue of fact on each of the elements of defamation?

II. Whether the Superior Court erred when it held AIPAC's statements (published in the March 3, 2008, *New York Times*) were not defamatory because its negative statements about Rosen's character and professional performance were "not provably false"?

STATEMENT OF THE CASE

Appellant Steven J. Rosen filed this lawsuit on March 2, 2009, for "Defamation (Libel and Slander)" against 13 defendants. Complaint, App. at 46-66. Defendants filed a motion to dismiss on May 13, 2009, Plaintiff filed his Opposition on July 8, and Defendants filed their reply on August 7, 2009. Docket, App. at 27. The Superior Court entered its Order granting in part and denying in part defendants' motion on October 30, 2009. App. at 75-90. In that Order the Superior Court dismissed all but one of Rosen's claims for defamation, and dismissed all Defendants except American Israel Public Affairs Committee (AIPAC) and Patrick Dorton ("Dorton"). Oct. 30 Order, App. at 75-90. (One defendant was dismissed as a party at the Initial Scheduling Conference on June 5, 2009). Docket, App. at 28-30.

The Complaint alleged Defendants had made and published knowingly false and defamatory statements about him (as set forth in the Complaint) causing him to suffer personal and professional humiliation, the destruction of his career with the attendant loss of earnings and income, anxiety, stress and other emotional pain and suffering. Compl. at ¶ 1, App. at 48. The one issue of defamation remaining after the October 30 Order arose from AIPAC's statements that were reproduced in a March 3, 2008 article in the *New York Times*. App. at 245-248.

Defendants AIPAC and Patrick Dorton (now collectively referred to as "AIPAC" because their arguments are joined) filed the instant motion for summary judgment on the

defamation claim; Plaintiff Rosen opposed it. Docket, App. at 8. On February 23, 2011, the Superior Court held there was no actionable defamation and entered judgment for AIPAC. Feb. 23, 2001 Order, App. at 93-102.

Rosen filed timely his notice of appeal on March 15, 2011. Docket, App. at 1. Rosen here submits his opening brief.

STATEMENT OF THE FACTS

Appellant Rosen had worked for the American Israel Public Affairs Committee (AIPAC) for almost 23 years, and was Director of Foreign Policy Issues at the time AIPAC dismissed him. Compl. ¶ 3, App. at 48 (undisputed). During his tenure as Director of Foreign Policy Issues, Rosen's job included working to "maintain relationships with [government] agencies, receive [foreign policy] information, and share it with AIPAC Board of Directors and its Senior Staff for possible further distribution." Compl. ¶ 18, App. at 53. On August 27, 2004, it was publicly disclosed that the United States Department of Justice ("Justice Department") was investigating Rosen and another AIPAC employee for receiving classified information. App. at 55. On February 17, 2005, AIPAC placed Rosen on involuntary leave. App. at 55-56. He was ultimately fired on March 21, 2005. App. at 58.

The Complaint alleges many acts of defamation, but those have been dismissed mainly on statute of limitations grounds, leaving this one issue for litigation and consideration on this appeal. The AIPAC spokesman spoke to the *New York Times* reporter, and subsequently the *Times* published a statement attributed to AIPAC in a March 3, 2008, *New York Times* article, stating in relevant part:

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

Defs. Mot. Ex. 3, App. at 245-248 (referred to here as the "March 3 Statement").

Dorton, the AIPAC spokesman, was authorized to make that statement by AIPAC's counsel, Nat Lewin. But Lewin later admitted that when he authorized Dorton, Lewin did not know whether or not AIPAC even had any standards for receiving or handling classified information; Lewin did not inquire about any standard. *See* Lewin Depo Tr., pp. 63, 61, 57, and 85-86, App. at268-308. In September 2004, AIPAC issued a public statement indicating neither AIPAC nor any employee (including Rosen) had violated any rules – but prior to that statement, AIPAC had not actually inquired into or reviewed AIPAC's practices for receiving and handling classified information. Deposition of Richard Fishman, Tr., pp. 136-137, App. at 488-498.

In addition, AIPAC's Deputy Executive Director Fishman admitted AIPAC had no "written standards" concerning the receipt and dissemination of classified information before August 27, 2004; Fishman even disclaimed any standard that might have been given orally to AIPAC personnel. *See* Fishman Depo. Tr., pp. 10-17, 98. App. at 488-498. During his tenure at AIPAC until August 27, 2004, Fishman never heard the word "classified information" in any AIPAC context or conversation, no written standard existed until 2008, and prior to August 2004 there was no "presumed standard." *Id.* App. at 488-498.

Further facts bear on the issue of AIPAC's asserted "standards" and reasons for firing Rosen. In or about February 1984, AIPAC employee Rosen was involved in

receiving classified information and the FBI had investigated the matter. In that situation, the FBI investigated 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. AIPAC management did not criticize, castigate or terminate Rosen, but instead obtained legal counsel for Rosen, endorsed Rosen's activities at the time, and gave Rosen high marks in his performance appraisals thereafter - all which information was disclosed to AIPAC counsel Nat Lewin in an email from Rosen in February of 2005. *See* February 24,2004 email from Steven Rosen to Nat Lewin (and his law partner Alyza Lewin), App. at 568-569, and Rosen Depo. Tr. pp. 120-131, App. at 462-472.

Other situations occurred prior to Rosen's in which AIPAC employees were involved in receiving classified material, notwithstanding AIPAC's denial. *See, e.g.*, the deposition of Howard Kohr, AIPAC's Executive Director, Tr., pp. 13-14 and 183, App. at 485-487, and AIPAC's Fund-Raising Letter of September 7,2004, signed by Howard Kohr, Executive Director, and Bernice Manocherian, AIPAC's President, App. at 502-503; *see also* the Confidential Portion of the Deposition of Ester Kurz,14 Confidential Depo. Tr., pp. 11-33 Filed under seal in Superior Court on December 14, 2010; FBI Form FD-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, App. at 481-484.

On August 4, 2005, a few months after his termination, Rosen was indicted on espionage charges by a federal grand jury. *See* Defs. Mot. Ex. 1, App. at 103-128. After Rosen's termination, beginning in April 2005, AIPAC's Board and spokesman Dorton made several statements to the press concerning Rosen's termination. The AIPAC statement at issue was made to the *New York Times*, which published it on March 3, 2008. App. at 245-248. The criminal indictment against Rosen was dismissed with prejudice on May 1, 2009. *See* Pl.'s Opp. Attachment No. 23. judgment for AIPAC, App. at 556-557. This lawsuit followed.

STANDARD OF REVIEW

Appellate review of a summary judgment granted in a defamation action is *de novo*. *Guilford Transp. Industries, Inc. v. Wilner*, 760 A.2d 580, 591 (D.C. 2000).

SUMMARY OF ARGUMENT

In an unusual move the Superior Court granted summary judgment and dismissed Plaintiff-Appellant Rosen's defamation action on a legal ground not argued by the parties. The Superior Court held that Defendant-Respondent AIPAC's statement in the *New York Times* was not defamatory as a matter of law chiefly because the statement's injurious elements were "not provably false." Notably, the Superior Court did *not* rule there was any lack of proof of any other element of Rosen's defamation claim.

Respectfully, the Superior Court's "provably false" analysis was not drawn from D.C. or Maryland precedents and it inaccurately stated and applied the law of defamation. AIPAC's saying Rosen was fired because he had violated AIPAC's "standards," and that AIPAC continued to hold that view long after the dismissal, constituted expressed or implied facts about: (1) the existence and content of the "standards"; (2) what Rosen did to supposedly violate those "standards"; and (3) AIPAC's view of Rosen as a person and employee. Those expressed or implied facts can be established (or disproved) by documents and witness testimony, and therefore they are "provable facts."

Moreover under D.C. law, notably *Guilford Transp. Indus., Inc. v. Wilner*, 760

A.2d 580 (D.C. 2000), AIPAC's statement was defamatory because it "tended to injure a person (Rosen) in his trade, profession or community standing." *Guilford*, controlling precedent, also holds a statement is libelous if "the defamatory utterance imputes any misconduct whatever in the conduct of the plaintiff's calling." AIPAC's public statement directly imputes professional misconduct against Rosen (by falsely saying that Rosen was fired for violating AIPAC's "standards"), and the statement undoubtedly tended to injure Rosen's career opportunities and community reputation. (The Superior Court's summary judgment decision did not give any weight to this aspect of defamation law.)

Because this Court's review of a summary judgment is *de novo*, Appellant Rosen hereby submits also the *prima facie* showing of all of the elements of defamation. The record evidence supports Rosen's Complaint's allegations, which the Superior Court had earlier held were sufficient to state a defamation claim. Appellant respectfully requests this Court to vacate the summary judgment and remand this case for further proceedings and trial on the merits.

ARGUMENT

I. Evidence Supports Each Element of Appellant Rosen's Defamation Claim; Summary Judgment Should Not Have Been Granted

Summary judgment should be denied when, as here, the nonmoving party plaintiff supplies evidence to support each of the elements of the cause of action. *See Kendrick v. Fox Television*, 659 A.2d 814, 818 (D.C. 1995). Rosen's defamation cause of action is triable to a jury because the evidence supports each element of a defamation cause of action:

(1) that the defendant made a false and defamatory statement concerning the plaintiff;

(2) that the defendant published the statement without privilege to a third party;

(3) that the defendant's fault in publishing the statement amounted to at least negligence; and

(4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm.

Oparaugo v. Watts, 884 A.2d 63, 76 (D.C. 2005)(internal quotation and citation omitted).

A. A Jury Could Find That AIPAC Made A False and Defamatory Statement Concerning Mr. Rosen.

1. Evidence That AIPAC's Statement Was False.

The statement at issue, printed in the March 3, 2008, *New York Times* article, is:

> The AIPAC spokesman on the Rosen and Weissman matter, Patrick Dorton, said at the time that the two men were dismissed because their behavior

"did not comport with standards that AIPAC expects of its employees." He said recently that AIPAC still held that view of their behavior.

App. at 245-248. Hereafter this statement is referred to as "the March 3 Statement."

A false statement is one that is not substantially true. *Moldea v. New York Times Co.*, 15 F.3d 1137, 1150 (D.C. Cir. 1994). Was it true that Rosen was dismissed because his "behavior did not comport with standards that AIPAC expects of its employees"?

Substantial record evidence shows the answer is *no*. AIPAC did not dismiss Rosen because his behavior violated AIPAC standards. AIPAC had no such standards. The evidence makes that showing as follows.

(a) AIPAC had no relevant written "standards" of employee behavior.

Speaking for AIPAC to the *New York Times*, Dorton said Rosen was dismissed for behavior not comporting with AIPAC standards. Dorton was authorized to make that statement by AIPAC's counsel, Nat Lewin. But Lewin later admitted that when he authorized Dorton, Lewin did not know whether or not AIPAC even had any standards for receiving or handling classified information; Lewin did not inquire about any standard. *See* Lewin Depo Tr., pp. 63, 61, 57, and 85-86, App. at 473-480. Prior to AIPAC's public statement in September 2004 indicating neither AIPAC nor any employee (including Rosen) had violated any rules, AIPAC had not actually inquired into or reviewed AIPAC's practices for receiving and handling classified information. Deposition of Richard Fishman, Tr., pp. 136-137, App. at 488-498.

In addition, AIPAC's Deputy Executive Director Fishman admitted AIPAC had no "written standards" concerning the receipt and dissemination of classified information before August 27, 2004; Fishman even disclaimed any standard that might have been given orally to AIPAC personnel. *See* Fishman Depo.Tr., pp. 10-17, 98, App. at 488-498. During his tenure at AIPAC until August 27, 2004, Fishman never heard the word "classified information" in any AIPAC context or conversation, no written standard existed until 2008, and prior to August 2004, there was no "presumed standard." *Id.*, App. at 488-498.

(b) AIPAC had supported and praised Rosen in a prior incident involving investigation of receipt of classified information.

AIPAC's assertions about violations of "standards" rings hollow for another reason. Rosen earlier in his AIPAC career (February 1984) was involved in receiving classified information and the FBI had investigated the matter. In that situation, the FBI investigated 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. Then-Executive Director of AIPAC (Tom Dine) and senior AIPAC directors did not criticize, castigate or terminate Rosen. On the contrary, they obtained legal counsel for Rosen, endorsed Rosen's activities at the time, and gave Mr. Rosen high marks in his performance appraisals thereafter; all of these facts were disclosed to Nat Lewin in an email from Rosen in February of 2004. *See* February 24,2004 email from StevenRosen to NatLewin

(and his law partner Alyza Lewin), App. at 568-569, and Rosen Depo. Tr. pp. 120-131, App. at 462-472.

(c) Other AIPAC employees previously had been involved with receiving classified material; these others were not fired under any of AIPAC's purported "standards."

There were in fact other situations before Rosen's instant situation in which AIPAC employees were involved in receiving classified material, notwithstanding AIPAC's denial. *See, e.g.*, the deposition of Howard Kohr, AIPAC's Executive Director, Tr., pp. 13-14 and 183, App. at 485-487, and AIPAC's Fund-Raising Letter of September 7,2004, signed by Howard Kohr, Executive Director, and Bernice Manocherian, AIPAC's President, App. at 502-503; *see also* the Confidential Portion of the Deposition (filed under seal in Superior Court on December 14, 2010) of Ester Kurz,14 Confidential Depo. Tr., pp. 11-33; FBI Form FD-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), App. at 481-484. AIPAC cannot credibly claim some written or other known "standard" existed that Rosen had somehow fallen below in the instant 2004 situation.

2. AIPAC's Statement Was Defamatory.

A statement is defamatory if it tends to injure a person in his or her trade, profession or community standing, or lowers him or her in the estimation of the

community. *Williams v. District of Columbia*, 9 A.3d 484, 491 (D.C. 2010) (internal citations omitted; *quoting Guilford Transp. Indus., Inc. v. Wilner*, 760 A.2d 580, 594 (D.C. 2000) (*quoting Howard University v. Best*, 484 A.2d 958, 989 (D.C. 1984))). The March 3 Statement was defamatory as shown here.

(a) Damage to community and occupational standing and reputation.

The March 3 Statement asserts Rosen was terminated because his "behavior did not comport with standards that AIPAC expects of its employees." App. at 245-248. Defamation is that which tends to injure "reputation" in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him. *Guilford,* 760 A.2d at 594 (internal quotation and citation omitted). A publication may convey a defamatory meaning if it "tends to lower the plaintiff in the estimation of a substantial, respectable group, though they are a minority of the total community or [of the] plaintiff's associates." *Id.* (internal quotations omitted), *quoting White v. Fraternal Order of Police*, 909 F.2d 512, 518 (D.C. Cir. 1990) *(quoting Afro-American Publ'g Co. v. Jaffe*, 366 F.2d 649, 654 n. 10 (D.C. Cir. 1966) (*en banc*)). AIPAC's statement – that Rosen was terminated because his "behavior" as a professional fell short of his employer's "standards" – could only diminish Rosen's reputation and esteem in the community generally and certainly in the segment comprised of his friends, colleagues, associates and potential employers. The March 3 Statement would generate negative attitudes toward

Rosen; one can imagine the readers of that statement clucking their dismay.

(b) Assertion of untrue allegation of criminal conduct.

The March 3 Statement is part of the *New York Times* March 3, 2008 article entitled "Trial to Offer Look at World of Information Tradition." Def. Exh. 3, App. at 245-248. That article provided more context amplifying the defamation where it stated, *inter alia*: "Mr. Rosen and Mr. Weissman each face one charge of conspiracy to communicate national defense information, and Mr. Rosen faces an additional charge of aiding and abetting the conspiracy." *Id.*, App. at 245-248.

The defamatory quality of a statement is evaluated by its own language and by the context where it appears. "[T]the publication must be considered as a whole, in the sense in which it would be understood by the readers to whom it was addressed." *Howard Univ.*, 484 A.2d at 989, *citing Afro-American Publishing Co.*, 366 F.2d at 655. Readers of the March 3 article thus received, at minimum, the context of Rosen's two criminal charges *and* AIPAC's statement that he was fired for falling below AIPAC's standards. The juxtaposition of those points would lead many or most readers to conclude that AIPAC thought Rosen had committed those crimes and thus had to be fired.

"[T]he false imputation of criminal conduct is inherently defamatory." *Fleming v. AT & T Information Services, Inc.*, 878 F.2d 1472, 1475 (D.C. Cir. 1989), *citing Washington Annapolis Hotel Co. v. Riddle*, 171 F.2d 732, 736 (D.C. Cir. 1948). "[T]o accuse one of a crime is libel per se." *Johnson v. Johnson Publishing Co.*, 271 A.2d 696,

698 (D.C. 1970). AIPAC's March 3 Statement, in an article telling readers Rosen was indicted for two felonies, imputes criminal conduct was the reason for Rosen's dismissal and is therefore defamatory.

(c) Assertion compounding the untrue criminal conduct allegation.

A related defamatory component appears in the March 3 Statement: "He [Dorton] said recently that AIPAC still held that view of their behavior." The imputation of criminal conduct as the reason for firing Rosen is thus compounded. In at least two April 21, 2005, articles in mainstream newspapers, Rosen's dismissal was directly connected to accusations of criminal conduct involving alleged breaches of national security. Pltf's Exhibit 36, 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,* App. at 499; Pltf's Exhibit 37, 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,* App. at 500-501.

For AIPAC to say it "still held that view" is to say AIPAC still considered Rosen (in March 2008) to have engaged in criminal misconduct and that he was fired for that reason. Such a statement is defamatory unless true – and it was not true in either particular. Rosen had *not* engaged in criminal misconduct; the charges were dismissed with prejudice later in 2008. And Rosen was *not* fired because of AIPAC's belief he had committed a crime. Record evidence establishes this latter fact. AIPAC's initial public

assertion after the criminal investigation against Rosen became known in September 2004 was: "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." App. at 502.

Subsequently, attorney Lewin wrote a letter to AIPAC counsel Howard Kohr, dated March 21, 2005, saying: "Because I am now satisfied [by evidence viewed at the U.S. Attorney's Office] that, *regardless of whether any criminal law was violated* 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 ..." App. at 264 (emphasis added). Confirming this fact, 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 (emphasis added), App. at 473-480.

The March 3 Statement thus was defamatory because it expressly and implicitly communicated that AIPAC had thought Rosen committed criminal acts at the time and continued to think it and proclaim it up through 2008. As Rosen had not committed criminal acts, and AIPAC itself did not actually think he had, the March 3 Statement was both false and defamatory.

B. The March 3 Statement Was Published and No Privilege Applies.

It is undisputed the March 3 Statement was published in the *New York Times*. App. at 245-248. AIPAC did not argue privilege on summary judgment below; none applies.

The Superior Court's Order granting summary judgment did not rest its decision upon a finding of privilege.

C. A Jury Could Find That AIPAC's Conduct in Making The March 3 Statement Was Reckless and Thus Sufficiently Culpable Under Defamation Law.

There is evidence upon where a reasonable jury could find that AIPAC's March 3 Statement was reckless and therefore actionable required under defamation law. To be negligent in publishing means to unreasonably fail, under the circumstances, "to take care that the statement was true." *Kendrick,* 659 A.2d at 821-822 (citation omitted). In March 3, 2008, AIPAC had no basis to publicly declare or imply that Rosen have violated AIPAC's "standards" when there were no written standards at the relevant time. As detailed *supra*, AIPAC had no reason to publicly declare or imply that Rosen had violated any criminal laws, when previously: (1) AIPAC had rewarded Rosen for similar information gathering work; (2) AIPAC had declared it and its employees had "never" violated rules or laws concerning classified information; (3) AIPAC's counsel had heard the most adverse evidence against Rosen and still concluded Rosen had violated no laws; (4 AIPAC's counsel had told AIPAC management they should fire Rosen even if no laws were broken; and (5) from 2005 to early 2008, the federal prosecutors had been unable or unwilling to move their case from indictment to trial. (A few months after the March 3 Statement, the prosecutors dismissed their case against Rosen entirely.)

In deed, the March 3 Statement defamed Rosen gratuitously. AIPAC had no reason

whatsoever to publicly declare in a newspaper article that AIPAC's view of Rosen had not changed since 2005, when that declaration could only amplify the readers' impression that AIPAC was quite certain Rosen had committed a crime. In sum, AIPAC lacked knowledge or reasonable basis to publicly defame Rosen, but did so anyway. That kind of conduct is negligent, i.e. unreasonable under the circumstances. Such issues are "not susceptible of summary adjudication"and therefore should be resolved by trial in the ordinary manner." *Childs v. Purll*, 882 A.2d 227, 233 (D.C. 2005) (internal quotation and citation omitted). To the extent AIPAC offers different conclusions or additional evidence on this point, AIPAC itself will only spotlight and confirm the triable issues of fact that preclude summary judgment here.

The evidence also supports a finding of Malice. Under the rule in *Columbia First Bank v. Ferguson*, 665 A.2d 650 (D.C. 1995), "[Malice is] the doing of an act without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the rights or feelings of others as to constitute ill will." *Id.* at 656 (citation omitted). The evidence shows AIPAC made a defamatory statement to the *New York Times,* without just cause or excuse, and without regard for the harm to Rosen's feelings or reputation. A knowingly false or recklessly made false statement that results in defamation is evidence for a jury to find malice. *Carter v. Hahn*, 821 A.2d 890, 894-895 (D.C. 2003) (holding a jury reasonably could conclude that defendant's lies resulted in the accusation that plaintiff committed a crime, thus injuring plaintiff in her trade, profession,

or community estimation). The evidence here raises a triable issue of AIPAC's malice, to the extent that element might come into play.[1]

D. AIPAC's March 3 Statement Was Actionable, Either As A Matter of Law or Because of the Harm it Caused to Rosen.

AIPAC's March 3 Statement was actionable as a matter of law because it implied Rosen had committed a crime when he had not. A statement is deemed libel *per se* when the defamatory statement actually imputes a criminal offense. *Johnson,* 271 A.2d at 698 (accusation of "a crime is libel per se"); *Bannum, Inc. v. Citizens for a Safe Ward Five, Inc.*, 383 F. Supp. 2d 32, 40 (D.D.C. 2005) (same rule); *accord, Fleming,* 878 F.2d at 1475 ("the false imputation of criminal conduct is inherently defamatory").

Damages for a false defamatory statement imputing criminal conduct may be presumed. *Baldi v. Nimzak*, 158 A.2d 915, 916 (D.C.1960) (an accusation of criminal conduct is defamatory and warrants the presumption of damages). In addition, the March 3 Statement caused harm to Rosen by besmirching his reputation as well as by encouraging and thus prolonging the federal prosecution that was only later dismissed entirely.

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[1] The issue of "malice" was not decided anew in the Superior Court's Order granting summary judgment. Evidence of "Malice" was found, however, by the Superior Court's Order of October 30, 2009, at page 15, denying AIPAC's motion to dismiss for failure to state a claim. The Superior Court's Order granting summary judgment did not disturb that finding. Order, p. 4 n.2, App. at 75-90. Rosen's pleaded evidence is the substantially the same as supplied in the summary judgment proceedings. As such, there is no reason for disturbing the Supreme Court's October 30, 2009 Order inferring malice.

II. The Superior Court's Order Does Not Accord With the Law of Defamation in the District of Columbia and Should Be Reversed

A. The Reasons Underlying the Dismissal Are Matters of "Provable" Fact.

As a factual matter, the statement that Rosen was dismissed because his behavior fell short of AIPAC standards is at least triably false. AIPAC had no applicable "standards" at the time, and AIPAC's prior and contemporaneous conduct showed AIPAC *wanted* Rosen to obtain inside information and *rewarded* him for doing so. (Please see full discussion *supra* with citations to record evidence.) Whether AIPAC had standards and whether Rosen violated those standards (or other of AIPAC's expectations) are questions of fact about which Rosen and others have testified. They therefore are "objectively verifiable facts."

B. AIPAC Executives Motives and Beliefs Are "Provable" Facts.

The phrase "that AIPAC still held that view of [Rosen's] behavior" is a statement of fact. An AIPAC executive can testify to his or her beliefs, including AIPAC's beliefs, about Rosen's behavior as facts. *See Chaloner v. Washington Post Co.*, 6 F.2d 712 (D.C. Cir. 1925) (newspaper executive testifies to newspaper's intentions in printing item); *Phelps v. George's Creek & C.R. Co.*, 60 Md. 536, 1883 WL 4141 *7-9 (1883) (witnesses, including business executives, may testify to their motives, beliefs and intentions); *Gambrill v. Schooley*, 95 Md. 260, 52 A. 500, 503 (1902) (same rule, in

defamation case);[2] *see also Fenje v. Feld,* 301 F. Supp. 2d 781, 816 (N.D. Ill. 2003) ("A witness may testify as to his or her own state of mind"). The Order errs when it deems AIPAC's beliefs about Rosen were mere theory or conjecture – AIPAC executives' mental states were and are matters of admissible testimony and "verifiable fact."

C. The March 3 Statement Mixed Fact and Opinion, Both Resting Upon Expressed or Implied Facts That Can Be Established or Disproved by Evidence.

The Superior Court errs in its conclusion about the phrase "the two were dismissed because their behavior 'did not comport with standards that AIPAC expects of its employees.'" Citing non-D.C. cases, the Order contends that phrase "is neither precise nor verifiable." Order at p. 7, App. at 93-102. But "precise and verifiable" are not required elements of a defamatory statement under D.C. law.[3]

As the Order correctly quotes, statements of opinion may be actionable "if they imply a provably false fact, or rely upon stated facts that are provably false." *Moldea v. New York Times Co.*, 22 F.3d 310, 313 (D.C. Cir. 1994). "[A] statement of opinion is actionable only if it has an *explicit or implicit factual foundation* and is therefore objectively verifiable." *Washington v. Smith*, 80 F.3d 555, 556 (D.C. Cir. 1996) (emphasis added). For AIPAC to say it fired Rosen because of his "behavior," AIPAC

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[2] Maryland precedents are persuasive on matters of common law, and especially so where D.C. precedents are silent. *Douglas v. Lyles*, 841 A.2d 1, 5 n.5 (D.C. 2004).

[3] A Westlaw search disclosed the "precise and verifiable" language does not appear in any D.C. or Maryland defamation precedent.

must have certain "behavior" in mind. What was that behavior? A witness can answer that question as a *fact*. That fact answer is part of the "factual foundation" for AIPAC's statement to the *New York Times*. That fact is *implicit* (not explicit) because the reader intuits AIPAC would not cite to Rosen's behavior unless AIPAC had some factual basis.

In addition, for AIPAC to say it fired Rosen because of behavior that violated AIPAC's standards, AIPAC must have had some "standards" in mind. What were those standards (if any)? A witness can answer that question as a *fact* also. That fact forms another part of the factual foundation for the March 3 Statement. That fact is *both explicit and implicit*: (1) explicit, because it refers to "standards" as something that purportedly exists; and (2) implicit, because it refers to the standards' content that itself is not actually set forth in the *Times* article. The reader understands from the March 3 Statement that AIPAC is claiming standards existed and that the standards forbade Rosen's conduct.

What the reader understands from a published statement is key. Thus in *Piscatelli v. Smith*, 197 Md. App. 23, 12 A.3d 164 (2011), the court explained: "The distinction between 'fact' and 'opinion,' although theoretically and logically hard to draw, is usually reasonably determinable as a practical matter: Would an ordinary person, reading the matter complained of, be likely to understand it as an expression of the writer's opinion or as a declaration of an existing fact?" *Id.* at 34. Nothing in the March 3 Statement suggests it is relaying a mere opinion; the Statement is instead expressly or implicitly

describing facts underlying AIPAC's decision to fire Rosen based upon some conduct in light of some "standards."

The *Piscatelli* court further explained: "If the defendant expresses a derogatory opinion without disclosing the facts on which it is based, he is subject to liability if the comment creates *the reasonable inference* that the opinion is justified by the existence of *unexpressed defamatory facts*." *Id.* at 40 (emphasis added; internal quotation and citations to authorities omitted). AIPAC essentially said "we fired Rosen because he violated our rules" – and that sort of statement implies unexpressed facts: Rosen did something wrong (a fact) and the existence and content of rules (also facts). That kind of situation is classic defamation.

D. The March 3 Statement is Actionable as Mixed Fact and Opinion Under *Milkovich*.

In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Court noted "expressions of 'opinion' may often imply an assertion of objective fact." *Id.* at 18. "Simply couching ... statements in terms of opinion does not dispel these implications." *Id.* at 19. The *Milkovich* Court therefore refused to "create a wholesale defamation exemption for anything that might be labeled 'opinion,'" but instead held opinions may be actionable where they "imply an assertion" of objective fact. *Id.* at 18, 21. If AIPAC's March 3 Statement about Rosen can be characterized as "opinion" at all, the Statement nevertheless implies the existence of standards (a fact) and certain behavior (a fact). Therefore, AIPAC's March 3 Statement is not "pure opinion" and can be actionable.

E. The *Fuste* Precedent Illustrates How Generalized Statements About a Terminated Employee Are "Provably False" and Actionable.

Following *Milkovich*, the Virginia Supreme Court in *Fuste v. Riverside Healthcare Ass'n, Inc.*, 265 Va. 127, 133, 575 S.E.2d 858 (2003), applied the same principle where the defendant former employer stated two physicians had "abandoned" their patients and that defendant had "concerns about their competence." The *Fuste* court held those statements were defamatory because (a) they tended to injure the doctors in their profession[4] but also because (b) they "contain[ed] a provably false connotation." *Id.* (internal quotation and citation omitted).

The court's reasoning parallels the instant case. To show the "provably false connotation," the *Fuste* court observed: "evidence could be presented to show whether there were, in fact, concerns about the plaintiffs' competence." *Id.* Also, the *Fuste* court noted, "the term 'abandon' has a particular connotation in the context of a doctor's professional responsibility to a patient, ... [therefore] the statement that Drs. Fuste and Vanden Hoek 'abandoned' their patients is demonstrably true or false." *Id.*

The reasoning in *Fuste* applies to the March 3 Statement. The Statement said Rosen's conduct was so unacceptable that the employer had to fire him. That accusation equates to the *Fuste* situation where the employer said the doctors's conduct (abandonment of patients) was so unacceptable that the employer had to fire them. The

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[4] Per *Guilford*, 760 A.2d at 600: "[T]o constitute a libel it is enough that the defamatory utterance imputes any misconduct whatever in the conduct of the [plaintiff's] calling." Restatement (Second) Torts § 569 cmt. (e) (1977).

March 3 Statement's accusation about Rosen's falling short of AIPAC's "standards" is similarly equivalent to the *Fuste* employer's saying the doctors had fallen short of the standards of practice for physicians ("concerns about competence").

III. The Superior Court's Order Expressly Supplies The Basis for Denying Summary Judgment.

The Superior Court Order, on page 8, states:

> Allowing Rosen's claim to go to trial would task the jury with [1] identifying the standards referred to in the March 3 Times article, [2] determining whether AIPAC had such express or implied standards, and [3] determining whether Rosen's conduct was in accordance with those standards. As explained above, these would be impossible tasks.

(Enumeration added.)

Each of the three determinations are questions for a jury to decide, and the Order expressly notes they would be decided on conflicting evidence. Order, pp. 7-8, App. at 93-102. Consider items [1] and [2]: the Order indicates the jury would have to hear evidence about whether "standards" existed and then evidence describing what those "standards" were.

AIPAC's March 3 Statement declared *as a fact* there were "standards" up to which Rosen did not perform. The Statement does not suggest any purely speculative ideas on this point – no indication of "if there were standards" or "if we had standards" or even some hypothetical "common standards." The Statement says "standards" without any weakening qualification. Either explicitly or implicitly, the Statement tells the *Times* readers there are "standards" that have some relevant content. Either AIPAC can provide

evidence or testimony to establish those standards, or AIPAC cannot. AIPAC's burden would be simply to either show the "standards" or admit it lied about "standards." If there is conflicting evidence about either the existence or content of the AIPAC "standards," then there is a jury question of fact that precludes summary judgment. Deciding such questions is not impossible – that is what a jury does.

Consider item [3]: the Order indicates a jury wold have to decide about Rosen's conduct *vis a vis* the "standards." That jury decision would require evidence of Rosen's actions as well as relevant context, background, and potential mitigating factors. All of this evidence could come from witness testimony and documents. Hearing evidence of "standards," and then deciding whether conduct comported with the "standards," is precisely what juries do in professional malpractice cases. *See Psychiatric Institute of Washington v. Allen,* 509 A.2d 619, 624 n.6 (D.C. 1986) (noting standard of care evidence in professional negligence, depending upon the case, may or may not require expert testimony)*; Pannu v. Jacobson*, 909 A.2d 178, 195-196 (D.C. 2007) (evidence of standard of care in professional negligence); *see, generally, Standardized Civil Jury Instructions for the District of Columbia*, No. 9-1, 9-2, 9-3, 9-5, 9-7, 9-8 (2008 rev. ed.)(instructing juries about how to receive and analyze evidence of standard of care and apply it to determine whether a defendant's conduct met the standard).

Terming the task "impossible," the Order (p. 8) appears concerned that a jury would have difficulty deciding what evidence to credit, whom to believe, and how to

render its verdict. Yet by design juries are called upon to render verdicts in factually conflicting, technical, difficult, and close situations. *See, e.g., Bushong v. Park*, 837 A.2d 49, 55 (D.C. 2003) (jury had to decide from evidence which of two collisions proximately caused plaintiff's injury); *Washington v. U.S.*, 390 F.2d 444, 446 (D.C. Cir. 1967) ("In insanity cases today, the jury must be prepared to hear evidence concerning diverse aspects of defendant's life and then to make difficult judgments regarding the impairment of behavioral processes and controls. By their very nature these judgments cannot be precise"). A jury's duty is to sift evidence, credit or disregard evidence, and ultimately determine the facts leading to a verdict. *See, generally, Standardized Civil Jury Instructions for the District of Columbia*, No. 1-4, 1-5, 2-1 thru 2-10, 3-1 thru 3-10 (2008 rev. ed.).

By viewing the triable factual issues inherent in deciding Rosen's defamation case as "impossible" for a jury to decide, the Superior Court Order held that the career and reputation-damaging March 3 Statement was not defamatory as a matter of law. No D.C. or Maryland case provides authority for the Order's view; the precedents run to the contrary. Appellant Rosen respectfully submits the Superior Court Order is thus erroneous as a matter of law and should be vacated on that ground as well as the others briefed above.

CONCLUSION

Appellant Rosen respectfully requests this Court to vacate the summary judgment and remand this case for further proceedings and trial on the merits.

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CERTIFICATE OF SERVICE

I certify that a copy of appellant's opening brief was served upon appellee by U.S. mail, first-class postage prepaid on to his attorney of record on June 20, 2011.

Antoinette Rogers