**SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA**

**Civil Division**

| | |
|---|---|
| **STEVEN J. ROSEN,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**AMERICAN ISRAEL PUBIC AFFAIRS COMMITTEE, INC., *et al.*,**<br><br>**Defendants.** | **Civil Action No. 09-1256**<br>**Calendar 12**<br>**Judge Jeanette J. Clark** |

**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

**Introduction**

In this defamation action, plaintiff Steven J. Rosen, a former senior official of the American Israel Public Affairs Committee, Inc. (hereinafter "AIPAC"), is suing that organization its Executive Director, and several of its key current and past presidents and members of its Board of Directors, along with its official spokesman, for publishing a series of knowingly false statements to the effect that he violated AIPAC's standards of conduct which has had a devastating effect personal and professional reputation, destroying his career, and causing him to suffer grievously both financially and emotionally. In lieu of answering the complaint, defendants to this civil action have filed a motion to dismiss pursuant to Rule 12(b)(6) of the Superior Court Rules of Civil Procedure. In support of the contention that the complaint fails to state a claim upon which relief may be granted, defendants variously argue that: (A) the defamation claim is barred by the applicable statute of limitations; (B) the statement upon which

the claim rests is "not defamatory as a matter of law;" (C) the complaint fails "to allege facts sufficient to support a finding of actual malice;" and (D) the individual defendants other than AIPAC's Executive Director, Howard Kohr, and its official spokesman, Patrick Dorton, are "statutorily immune from liability" as they are "volunteers" with no involvement in the allegedly defamatory statements. As we now demonstrate, defendants arguments in support of these contentions are without merit and, accordingly, their motion to dismiss must necessarily be denied.

## Statement of Facts[1]

Until his involuntary termination on March 21, 2005, plaintiff Steven J. Rosen was employed by AIPAC as its long-time Director of Foreign Policy Issues. In that role he worked in close daily consultation with AIPAC's Executive Director, its President, and senior members of its Board of Directors. Mr. Rosen's primary responsibility while working for AIPAC was to obtain information about policy issues and decisions in the Executive Branch of the United States Government, especially those involving the National Security Council, the State Department and the Department of Defense. As a regular part of his job, he was expected to obtain and share with AIPAC's Executive Director, its President, and its Board of Directors such information concerning the foreign policy of the United States and other countries. Mr. Rosen was highly successful in his job, and was regularly praised and generously rewarded by AIPAC's Executive Director, its President, and its Board of Directors, including by those named as defendants herein, all of whom are and/or who were in those positions, for obtaining and sharing such information.

---

[1]Unless otherwise noted, the facts set out herein have been taken from the statement of facts contained in the complaint. Accordingly, they must be taken as true by this Court when considering defendants' motion to dismiss under Rule 12(b)(6). *See McBryde v. Amoco Oil Co.*, 404 A.2d 200, 202 (D.C. 1979).

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

On February 17, 2005, only two weeks after awarding Mr. Rosen the $7,000 special bonus for excellence in job performance, the AIPAC Board of Directors placed him on involuntary administrative leave. This was done immediately after AIPAC was threatened by the Justice Department in a meeting between AIPAC's counsel and its Executive Director Howard Kohr and federal prosecutors on February 15, 2005. There, the lead federal prosecutor stated that, "We could make real progress and get AIPAC out from under all of this," if AIPAC showed more cooperation with the government. On February 16, 2005, AIPAC's counsel said that the lead federal prosecutor "is fighting with the FBI to limit the investigation to Steve Rosen and [the other AIPAC employee] and to avoid expanding it." This warning implied that AIPAC's Executive Director and the AIPAC organization as a whole could become targets of the Justice

Department's investigation if AIPAC did not act against Mr. Rosen (and the other employee who had already been named publicly along with Mr. Rosen as a target of the Justice Department's investigation). The decision to place Mr. Rosen on involuntary leave was made in response to these threats from the Department of Justice. On February 19, 2005, one of AIPAC's attorneys told Mr. Rosen's counsel that

> the [AIPAC] Advisory Committee in particular and the [AIPAC] Board [of Directors] as well, quite reluctantly, agreed to take a step in the direction of the government, in the hope that the government would reciprocate in some fashion . . . Placing . . . Steve [Rosen] on leave . . . [is a] significant concession.

On the same day, another of AIPAC's attorneys stated:

> There was very vocal sentiment against taking even the first step of removing Steve [Rosen] . . . from [his] office, but a majority favored that action to demonstrate to [the lead federal prosecutor] that we are serious and want him now to take the next step [*i.e.*, relieving AIPAC of any chance of being a target of Justice Department's investigation].

Taking exception to his being placed on involuntary leave, Mr. Rosen protested his innocence. Indeed, on March 10, 2005, Mr. Rosen sent a letter to AIPAC's Executive Director, defendant Howard Kohr, and to each member of its Board of Directors, including defendants Dow, Friedman, Manocherian, Weinberg, Asher, Levy, Wuliger, Kaplan, and Friedkin – each of whom was also a past AIPAC president and a member of the so-called special "Advisory Committee" that had been set up by AIPAC's Board of Directors to advise it concerning matters relating to the allegations about Mr. Rosen in connection with the ongoing government investigation, reminding all of them of the hundred of times he had briefed the Board, and the thousands of times he had briefed AIPAC's presidents and its executive directors (including defendant Howard Kohr and many of the other named defendants) with information he had obtained of the type described by the Justice Department as that which he was "not authorized to

receive." This activity was not only well-known to Mr. Kohr and the other defendants who were members of the AIPAC Board of Directors and past AIPAC presidents, but was approved and rewarded by them as among the most valued of Mr. Rosen's regular job duties. Mr. Rosen's letter detailed the fact that others, including all Executive Directors — defendant Howard Kohr being among them — and other members of AIPAC's senior staff, also regularly engaged in obtaining information of this type and sharing with AIPAC's presidents and its Board of Directors. In short, that was the normal practice at AIPAC.

On March 18, 2005, the lead federal prosecutor told AIPAC through its counsel that placing Mr. Rosen on involuntary administrative leave was not sufficient, and that AIPAC needed to terminate his employment altogether if it wanted to obtain the good will of the Justice Department with regard to the investigation. In short, the federal prosecutors insisted that, at this point, and thereafter, if AIPAC wanted to be viewed as cooperative – and thereby avoid the risk of itself becoming a target of the criminal investigation – it would have to conform its conduct to the dictates of the so-called "Thompson Memorandum" – a January 20, 2003 Justice Department document entitled "Principles of Federal Prosecution of Business Organizations" which sets forth the criteria under which the Department of Justice will determine whether or not to prosecute a corporation for the alleged misdeeds of its employees. Prominent among these Thompson Memorandum criteria to be followed by organizations that themselves want to avoid prosecution are the firing of those employees of the organization whom the Justice Department alleges engaged in the wrongdoing, condemning their actions publicly, ending payments toward their legal costs, and denying them substantial severance payments.

Shortly after this meeting with officials of the Justice Department, AIPAC took all the steps required under the Thompson Memorandum with regard to Mr. Rosen, and did so with the

approval of its Board of Directors upon the recommendation of the AIPAC Executive Director, defendant Howard Kohr, and the so-called "Advisory Group" – on which all defendants except for Patrick Dorton served. These steps were taken in the hope that AIPAC would benefit by avoiding prosecution (and that the other defendants who were AIPAC officers and directors would also avoid similar trouble from the Justice Department.

On Monday, March 21, 2005, the very next business day after the lead federal prosecutor warned AIPAC to conform to the dictates of the Thompson Memorandum or risk prosecution, AIPAC fired Mr. Rosen. AIPAC's attorney told Mr. Rosen's counsel that, while AIPAC did not believe that Mr. Rosen had committed any crime or wrongdoing, he was being fired in order to give AIPAC "credibility" with the government. Indeed, at that point, AIPAC's attorney said that AIPAC still hoped to keep Mr. Rosen on its payroll. Officially, AIPAC thereafter informed Mr. Rosen through his attorney that his employment was summarily terminated (after 23 years of loyal and highly praised service), without stating a reason for taking such adverse action nor providing him with an opportunity to respond to any allegations of wrongdoing. Immediately after summarily firing Mr. Rosen, AIPAC's counsel and the attorney representing Howard Kohr, AIPAC's Executive Director, contacted federal prosecutors and informed them of the summary firing of Mr. Rosen by AIPAC.

On August 4, 2005, the day the federal prosecutors obtained an indictment of Mr. Rosen from a federal grand jury in Alexandria, Virginia, AIPAC was rewarded for its "cooperation" when the U.S. Attorney for the Eastern District of Virginia said that

> AIPAC as an organization has expressed its concern on several occasions with the allegations against Rosen and [the other employee indicted], and . . . it did the right thing by dismissing these two individuals.

Beginning shortly after summarily terminating Mr. Rosen's employment, AIPAC, and particularly defendants Kohr, Dow, Friedman Manocherian, Weinberg, Asher, Levy, Wuliger, Kaplan, and Friedkin, acting through and with the advice of Defendant Patrick Dorton, maliciously began making knowingly false and defamatory statements to the press about Mr. Rosen, and have continued to make and publish such knowingly false and defamatory statements about Mr. Rosen through March 3, 2008, and thereafter. The first such statement to be published appeared in the New York Times on April 21, 2005, and quoted Defendant Dorton as AIPAC's official spokesman, stating that Rosen was fired because his actions differed from "the conduct that AIPAC expects from its employees." The July 7, 2005 issue of the New Yorker magazine quoted AIPAC spokesman Patrick Dorton as saying that "Rosen [and his colleague] were dismissed because they engaged in conduct that was not part of their jobs, and because this conduct did not comport with the standards that AIPAC expects and requires of its employees." This was knowingly false and defamatory, and was issued in reckless disregard of the harm it would cause to Steven Rosen.

Defendants in this action, and the rest of AIPAC's Board of Directors, knew absolutely that Steven Rosen had done nothing wrong; indeed, he had done nothing that defendants had not known about in advance and authorized. They had approved and rewarded the very behavior which they now condemned in order to obtain favored treatment from the Justice Department. In fact, defendant Howard Kohr and the several AIPAC presidents named as defendants herein (all the other defendants, except for Patrick Dorton, were at one time or another president of AIPAC) had themselves each received information of this type, and shared it with others both inside and outside of AIPAC, independent of Mr. Rosen.

At no time in the 23 years Steven Rosen was employed by AIPAC did the organization provide in writing or orally any guidance or standards that he and other employees were expected to follow regarding the receipt and sharing of information that might be offered by government officials. No expressed standards existed at AIPAC on such matters. Moreover, the implied standards that were embodied in the organization's normal practices over these decades were completely consistent with Mr. Rosen's behavior. Accordingly, the repeated statements by AIPAC through its spokesmen that Mr. Rosen's conduct did not comport with AIPAC standards were knowingly false and defamatory. Such false and defamatory statements were repeated often by defendant Dorton on behalf of AIPAC and its Board of Directors, including defendants Kohr, Dow, Friedman Manocherian, Weinberg, Asher, Levy, Wuliger, Kaplan, and Friedkin. For example: (1) in the New York Times on April 21, 2005; (2) in New Yorker Magazine on July 7, 2005; (3) in the Jewish Telegraphic Agency on August 4, 2005, (4) in the Jewish Telegraphic Agency on August 5, 2005; (5) in the New York Jewish Week on August 17, 2005; (6) in the Washington Post on November 12, 2005; (7) in The Forward on December 23, 2005; (8) in the Baltimore Sun on March 8, 2006; (9) the Washington Post on April 21, 2006; (10) in the Jerusalem Post on June 29, 2006; (11) in the Jewish Telegraphic Agency on July 19, 2006; (12) in the Jewish Telegraphic Agency on March 27, 2007; (13) in the Jerusalem Report magazine on August 17, 2007; (14) in the Washingtonian Magazine of January 2008; (15) in the New York Times on March 3, 2008; and (16) to a reporter from The Forward on October 14, 2008. As it appeared in the New York Times on March 3, 2008, within a year of the filing of this civil action:

> The AIPAC spokesman on the Rosen [and the other employee] 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.

In addition to the above-formulation – which was repeated on many occasions – AIPAC, with the knowledge of and at the direction of defendants Kohr, Dow, Friedman Manocherian, Weinberg, Asher, Levy, Wuliger, Kaplan, and Friedkin, made other statements that were also false and defamatory regarding Mr. Rosen. In this regard, on May 23, 2005, the New York Sun reported a statement made by defendant Kohr directly on May 22, 2005, to a large audience of AIPAC members, stating:

> Yesterday, Mr. Kohr subtly tried to make the case that Messrs. Rosen's [and another AIPAC employee's] behavior was out of the ordinary for employees of the organization that considers itself one of the most powerful in Washington. At the same time, Mr. Kohr said he has taken steps to ensure that no lines in the future will be crossed by his lobbyists and analysts. "I will take steps necessary to ensure that every employee of AIPAC, now and in the future, conducts themselves in a manner of which you can be proud, using policies and procedures that provide transparency, accountability, and maintain our effectiveness," he said.

Further, on June 17, 2005, the Jewish Telegraphic Agency reported a different formulation of the defamation of Steven Rosen:

> "No current employee of AIPAC knew that classified information was obtained from Larry Franklin [the Pentagon office involved in one of the government's allegations against Mr. Rosen and the other AIPAC employee] . . . or was involved in the dissemination of such information," spokesman Patrick Dorton said."

In fact, defendant Howard Kohr had been told in writing that information obtained from Mr. Franklin originated from "intelligence" sources, and Mr. Rosen knew no more about those sources or classification of the information than did Mr. Kohr.

Yet another formulation of the false and defamatory statements about Mr. Rosen made by AIPAC with the acquiescence of defendants Kohr, Dow, Friedman Manocherian, Weinberg, Asher, Levy, Wuliger, Kaplan, and Friedkin, and with the advice of defendant Dorton, was reported by the Jewish Telegraphic Agency on August 4, 2005:

> AIPAC spokesman Patrick Dorton said in a statement that the group "could not condone or tolerate the conduct of the two employees under any circumstances. . . AIPAC dismissed Rosen [and another employee] because they engaged in conduct that was not part of their jobs, and because this conduct did not comport in any way with the standards that AIPAC expects of its employees," he said. "The organization

> does not seek, use, or request anything but legally obtained appropriate information as part of its work."

In fact, AIPAC did knowingly "tolerate and condone" the conduct undertaken on its behalf by Steven Rosen, and had done so for decades, though it fired him for that conduct. And, contrary to the implication of this statement, Mr. Rosen did not seek, use, or request anything but legally obtained appropriate information as part of his work, a fact of which defendants unquestionably were well aware.

On August 4, 2005, defendant Dorton, speaking for AIPAC, was quoted by the Jewish Telegraphic Agency as repeating that AIPAC

> could not condone or tolerate the conduct of the two employees [Mr. Rosen and one of his colleagues] under any circumstances. . . . The organization does not seek, use, or request anything but legally obtained appropriate information as part of its work.

On August 18, 2005, the Jewish Telegraphic Agency, reported that defendant Dorton again made the same statement on AIPAC's behalf, this time adding: "All AIPAC employees are expected and required to uphold this standard." Similar statements by Dorton were also reported in the New York Jewish Week on August 17, 2005, and by the Jewish Telegraphic Agency on June 17 2005.

On September 9, 2005, the Cleveland Jewish News reported about a statement made directly by defendant Howard Kohr, stating that:

> Kohr said AIPAC's Board of Directors fired the employees under investigation [Steven Rosen and a colleague] "upon learning of conduct we could not condone. Whether it was legal or illegal, that was not the reason they were terminated."

In fact, defendant Howard Kohr and AIPAC's Board of Directors, including specifically defendants Dow, Friedman, Manocherian, Weinberg, Asher, Levy, Wuliger, Kaplan, and Friedkin, knew in advance about Mr. Rosen's conduct and fully condoned it; indeed, they lauded it and rewarded him for engaging in such conduct.

On November 12, 2005, the Washington Post noted that AIPAC "[s]pokesman Patrick Dorton would say only that Rosen [and the other AIPAC employee involved] were fired for unauthorized activities." In fact, Steven Rosen engaged in no activities that were not fully known to and authorized by AIPAC, its Executive Director and its Board of Directors.

All the above-quoted statements were made at the urging and authorization of defendants, and each of them, and were knowingly and intentionally false and defamatory with respect to Steven Rosen, and it was known by defendants that such statements would cause him economic injury as well as personal and professional humiliation, career injury, and emotional harm.

At the same time, defendants sought to gain a distinct economic advantage for AIPAC by making these false and defamatory statements about Mr. Rosen. In fact, through their publication of the falsehoods about Mr. Rosen, defendants achieved an increase of millions of dollars in revenue for AIPAC. Whereas, had they told the truth about Mr. Rosen, AIPAC might well have suffered a significant decrease in fund-raising revenue, as well as an increase in legal costs for its own defense against criminal charges and, perhaps, for the costs of providing a legal defense for other individuals associated with AIPAC – like Howard Kohr or any of the other individual defendants in the instant case – whom might also then be at risk of criminal prosecution by the Justice Department.

In any event, the criminal case against plaintiff was not officially dismissed with prejudice until May 1, 2009[2], though it became increasingly evident this would ultimately occur in the weeks before that date. That is why the instant civil action was not filed until the day before the one-year statutory limitation period ran out. In truth, Mr. Rosen was still at some slight risk of compromising his criminal defense even when he filed this action on March 2, 2009.

**Applicable Legal Standard**

Dismissal under Rule 12(b)(6) of the Superior Court Rules of Civil Procedure is proper only when the moving party can show beyond doubt that the non-moving party is unable to prove any set of facts to support his claim. *District of Columbia v. Pizzuli*, 917 A.2d 620, 623 (D.C. 2007), citing *Cauman v. George Washington University*, 630 A.2d 1104, 1105 (D.C. 1993); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Moreover, when considering such a motion, the trial court must accept the

---

[2]*See* the May 1, 2009 Order dismissing with prejudice all pending counts against Steven Rosen issued by the Hon. T.S. Ellis, U.S. District Judge, in *United States v. Lawrence Anthony Franklin, Steven J. Rosen, and Keith Weisman*, Case No. 1:05cr225, U.S. District Court (E.D.Va. - Alex. Div.). It is appended hereto as Attachment 1.

allegations of the complaint as true and construe all facts and inferences in favor of the plaintiff. *McBryde v. Amoco Oil Co.*, 404 A.2d 200, 202 (D.C. 1979). Indeed, a Rule 12(b)(6) motion tests only the legal sufficiency of the complaint. *Vincent v. Anderson*, 621 A.2d 367, 372 (D.C. 1993). Accordingly, any uncertainties or ambiguities involving the sufficiency of the complaint must be resolved in favor of the pleader, and generally, the complaint must not be dismissed because the court doubts that plaintiff will prevail. *Amoco Oil, supra*, 404 A.2d at 203.

**Argument**

Given the above referenced facts, the allegations state a legitimate, judicable claim against each of the defendants. As we now demonstrate, it cannot be gainsaid that plaintiff can here prove no set of facts that will entitle him to relief against each of the defendants. In short, on the record as it exists currently, the complaint states a claim against each defendant upon which relief can be granted. Thus, it is not subject to dismissal pursuant to Rule 12(b)(6).

A. The Claim of Defamation Has Been Brought Within the Applicable Limitations Period

1. Defendants' 2005-2007 Defamatory Statements Remain Actionable.

This Court should deny defendants' motion to dismiss with respect to their defamatory statements of made in the period 2005 through 2007 because the statute of limitations was equitably tolled with regard to those statements during the pendency of the criminal charges against Mr. Rosen and, accordingly, it had not run by the time the instant civil action was brought. "In litigation between private parties, courts have long invoked waiver, estoppel, and equitable tolling to ameliorate the inequities that can arise from strict application of a statute of limitations." *Chung v. U.S. Dept. Of Justice*, 333 F.3d 273, 275-76 (D.C. Cir. 2003), citing *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 95 (1990). The doctrine of equitable tolling "revolv[es] around . . . the circumstances of the plaintiff . . . [E]quitable tolling . . . merely ensures that the plaintiff is not, by dint of circumstances beyond his control, deprived of a 'reasonable time' in which to file suit." *Chung*, 333 F.3d at 279, citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 466, 452 (7th cir. 1990); *Phillips v. Heine*, 984 F.2d 489, 492 (D.C. Cir. 1993).

However, the D.C. Circuit has explained that the doctrine of equitable tolling may be applicable even where a plaintiff was aware of his cause of action from the moment it accrued. In *Chung v. U.S. Dept. Of Justice*, the plaintiff was not practicably able to bring his claims against the Department of Justice under the Privacy Act before the statute of limitations period as strictly applied lapsed, because during that entire two year limitations period, he was obliged to cooperate with the government in its investigation into his own and others' allegedly illegal campaign contributions. *Id.*, 333 F.3d at 279. Consequently, the appeals court refused to affirm a dismissal of the complaint on statute of limitations grounds based on equitable tolling, saying the issue would "depend on the extent, if any, to which Chung's duty to cooperate with the Government interfered with his ability to prepare his claim." *Id.*

Similar to the situation confronting the plaintiff in *Chung*, the criminal investigation of Mr. Rosen made it practicably impossible for him to file his claim against defendants here for their statements made in 2005 through 2007 within the stricture of the one-year limitations period for defamation. Consequently, as in *Chung*, granting defendants' Rule the 12(b)(6) motion to dismiss on those statements would be inappropriate. The government did not drop criminal charges against Mr. Rosen until May 1, 2009. *See* Order of May 1, 2009 in *United States v. Lawrence Anthony Franklin, Steven J. Rosen, and Keith Weisman*, No. 1:05cr225, United States District Court for the Eastern District of Virginia (Alexandria Division), dismissing with prejudice all pending counts against Steven Rosen [Attachment 1]. Mr. Rosen was thus embattled with a criminal investigation and prosecution and could not feasibly have brought his suit against AIPAC within the original statutory period. Indeed, as AIPAC was cooperating with the Justice Department during that time – based on the decisions of defendants Kohr, Dow, Friedman, Manocherian, Weinberg, Asher, Levy, Wuliger, Kaplan, and Friedkin – and the defamatory statements were related to, indeed, the heart of that cooperation, it would have jeopardized Mr. Rosen's ability to defend himself against those criminal charges if he filed suit against AIPAC and those setting its policies with regard to him and who spoke for that organization concerning him while those charges were still seriously pending.

Defendants are unable to demonstrate that there is no set of facts that Mr. Rosen could prove that would properly toll the statute of limitations. Accordingly, this Court must deny defendants' motion to dismiss on statute of limitations grounds with regard to defendants' statements during the 2005 through 2007 time period based on the doctrine of equitable tolling.

2. Defendants' March 3, 2008 Statement Was Not Merely a Republication.

In their motion to dismiss, defendants assert that Patrick Dorton's statement on behalf of AIPAC of March 3, 2008 "was merely a republication by the media of a much earlier statement made on behalf of AIPAC, and cannot [therefore] be used to establish a new claim as to the Defendants as no Defendant is alleged to have made any statement within the statute of limitations period." Motion to Dismiss, at 5. This is a distortion of fact that ignores the text of the *New York Times* article in which the March 3, 2008 defamation was reported. In this regard, the *New York Times* article expressly states:

> The Aipac [*sic*] spokesman on the Rosen-[colleague] 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.*

*See* "Trial to Offer Look at World of Information Trading," *New York Times*, March 3, 2008 (emphasis added) [Attachment 2[3]]. At this stage of the litigation, of course, the quoted statement must be construed in favor of Mr. Rosen and against defendants as a reaffirmation of the falsehood. However, in their motion to dismiss, defendants characterize the last sentence as merely a "notation" in the article, adding that it contains no statement of defendant Dorton. Motion to Dismiss, at 10. In so arguing, defendants have omitted the words "He said recently" from their quotation of the article in the New York Times. *Id.* This is a naked attempt to distort the report of defendant Dorton's statement, which when construed in plaintiff's favor is a fresh defamatory statement by defendants that gives rise to a new cause of action with a newly initiated one-year limitations period.

In fact, defendants' attempt to mis-characterize the March 3, 2008 *New York Times* article as merely a republication of defendants' earlier statements is dishonest. For that *New York Times*

---

[3]Attachment 2 is a reprint of the article obtained from NYTimes.com.

article did not simply repeat defendants' original defamatory statements made in the distant past, but rather it reported that defendants themselves were presently expressing the false and defamatory sentiment that Mr. Rosen had engaged in misconduct while employed at AIPAC ("[Defendant Dorton] said recently that Aipac [*sic*] *still held* that view of their [Mr. Rosen's and his colleague's] behavior." Emphasis added.)

Indeed, even if this Court were to conclude that the statute of limitations ran on the statements Defendants made from 2005-2007 – wrongly given the proper application of the doctrine of equitable tolling (*see* Argument A.1. *supra*, pp. 12-13) – that would not give defendants or any of them permanent license to defame Mr. Rosen *again* in 2008. As defendants themselves concede in their own motion, "each individual statement constitutes 'a new assault on the plaintiff's reputation,' each giving rise to a separate action." Motion to Dismiss, at 6, citing *Wallace v. Skadden, Arps*, 715 A.2d 873, 882 (D.C. 1998). Notwithstanding their acknowledgment that each individual statement gives rise to a new cause of action for defamation, defendants appear to take the position that a defamer may re-defame his victim *ad infinitum* and with impunity, as long as the statute of limitations has run on the first instance he published his defamatory statements. However, this view of the law has been soundly rejected. In *Foretich v. Glamour*, 741 F.Supp. 247 (D.D.C. 1990), for example, the defendant, *Glamour* magazine, allegedly defamed the plaintiff in a published article. Over a year later – and, therefore, arguably beyond the limitations period for the defamation in the original article – *Glamour* allegedly gave an organization permission to use its defamatory statements against the plaintiff, and the plaintiff filed suit within a year of this later event. 741 F.Supp. at 248-49, 252. The District Court denied the defendant's dispositive motion concerning the cause of action for defamation concerning the latter statement, saying,

> If one or more defendants affirmatively consented to use or distribution of copies of the November 1988 Glamour article [the earlier publication of the defamatory statement], the case could be taken out of the "single publication" framework, and the limitations period for an action against defendants would extend to one year beyond such use [the latter publication], if the totality of facts and circumstances so warranted.

*Id.*, at 253.

Similarly, defendants in the instant case took an affirmative action to defame Mr. Rosen again as published in the March 3, 2008 article in the *New York Times*. This took the case out of the single publication rule, and gave rise to a new cause of action for defamation – one with a new one-year statutory limitations period that commenced on the date of that latter publication and did not run until March 3, 2009, the day after the instant case was filed with this Court.

Defendants cite *Judd v. Resolution Trust Corp.*, 1999 WL 1014964 (D.D.C. 1999), for their assertion that AIPAC spokesman's statement contained in the March 3, 2008 *New York Times* article was merely a republication of earlier statements. Motion to Dismiss, at 8. However, *Judd* was distinguishable from the instant case, and critically so, because it involved republications by third parties in credit reports on the plaintiff, rather than, as here, a reaffirmation by the original defamer. *See Judd v. Resolution Trust Corp.*, 1999 WL 1014964, *5 (D.D.C. 1999) [Attachment 3].

Neither does the decision in *Wallace v. Skadden Arps*, 715 A.2d 873 (D.C. 1998), undermine plaintiff's position, the assertion of defendant to the contrary notwithstanding. In that case, the same defendant had published defamatory statements both before and after the statute of limitations period had run. 715 A.2d at 882. There the court held the statements made prior to the statutory period running from the early statement to be time barred, but those made after were held not to be barred by the running of the limitations period that commenced with the date of earlier statements. *Id.*

Similarly, the instant case involves statements by the same party published both before and after the statute of limitations period that commenced with the earliest statements being published – though it is here plaintiff's position that the statute was equitably tolled on the 2005-2007 statements, and thus did not run by the March 2, 2009 filing of the instant civil action. *See* Argument A.1. *supra*. In any event, even without this Court's acceptance of the foregoing equitable tolling argument, there is no support in *Wallace* for the argument that the March 3, 2008 defamatory statement attributable to defendant Dorton and made on defendant AIPAC's behalf with the acquiescence, indeed, under the authorization of the other individual defendants (AIPAC officers and directors all) should be time barred.

In the final analysis, this Court should follow the well-established rule, cited by defendants themselves, that each defamatory statement gives rise to a separate cause of action. Under this principle, the Court must at a minimum hold that, because defendants stated that they currently "still held that view" – the earlier-expressed defamatory view – of Mr. Rosen in the March 3, 2008 *New York Times* article, plaintiff's claim for defamation was brought within the statutory limitations period when this case was filed on March 2, 2009, and is thus not time barred.

B. The March 3, 2008 Statement is Actionable Defamation

Defendants have asserted that the March 3, 2008 statement is not defamatory as a matter of law. Motion to Dismiss, at 9. Defendants have further argued that "plaintiff has not even alleged that the specific statement was false." *Id.* This is simply incorrect. By expressing that defendants "still held that view" – *i.e.*, that Mr. Rosen's behavior "did not comport with standards that Aipac [*sic*] expects of its employees" – defendants were expressing that this characterization of Mr. Rosen and his work was true. The complaint alleges the falsehood of this statement multiple times. *See* Complaint, at 14-15 ("[Defendants] began making knowingly false and defamatory statements to the press about Mr. Rosen, and have continued to make and publish such knowingly false and defamatory statements about Mr. Rosen through March 3, 2008, and thereafter." "Such false and defamatory statements were repeated often by Dorton on behalf of AIPAC and its Board of Directors . . . For example: . . . in the *New York Times* on March 3, 2008."). In short, plaintiff has quite explicitly alleged the falsehood of the March 3, 2008 statement in the Complaint.

Furthermore, defendants' assertion that the March 3, 2008 statement is not defamatory as a matter of law is also plainly wrong. Defendants assert that their statements taken in the context of the entire *New York Times* article cannot be defamatory or injure Mr. Rosen. Motion to Dismiss at 9. Plaintiff has alleged facts sufficient to state a claim that defendants' March 3, 2008 statements did in fact both injure him in his profession and with the community. *See* Motion to Dismiss at 9, citing *Moss v. Stockard*, 580 A.2d 1011, 1023 (D.C. 1990) (citations omitted) (holding that a statement is defamatory if it tends to injure the plaintiff in his trade, profession or community standing, or lower him in the estimation of the community). The Complaint alleges sufficient facts

to support a claim that the statements were more than "unpleasant or offensive; [it made] the plaintiff appear . . . infamous." Motion to Dismiss at 10, citing *Howard Univ. V. Best*, 484 A.2d 958, 989 (internal quotation marks omitted). The Complaint alleges that the statements contained in the March 3, 2008 article accuse Mr. Rosen of not conforming to AIPAC's standards. This is not an expression of an opinion about how foreign policy is made in the United States, as defendants attempt to argue. Motion to Dismiss at 10. To the contrary, such statements are very much about Mr. Rosen's conduct and competence in his former position of trust at AIPAC. As such, it certainly tends to injure his reputation within his profession and among those in his community. Furthermore, it is provably false. As the Complaint alleges:

> No expressed standards existed at AIPAC. Moreover, the implied standards that were embodied in the organization's normal practices over these decades, were completely consistent with Mr. Rosen's behavior.

Complaint at 15. Such statements do not receive full constitutional protection, because they were not only an opinion on a matter of public concern, but contained provably false factual connotations. *See Guilford Transp. Industries, Inc. v. Wilner*, 760 A.2d 580 (D.C. 2000).

Accordingly, it is inappropriate to dispose of Mr. Rosen's defamation claims against defendants on a Rule 12(b)(6) motion to dismiss, because the March 3, 2008 statements were indeed defamatory as a matter of law.

C. The Allegations in the Complaint are Sufficient to Support a Finding of Actual Malice

The D.C. Court of Appeals has adopted the following definition of malice as it relates to qualified privilege in defamation cases:

> 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.

*Columbia First Bank v. Ferguson*, 665 A.2d 650, 656 (D.C. 1995) (internal citations omitted.) Where the statement is not so extreme, unreasonable, or abusive that a reasonable trier of fact would have to find malice inherent in the statement itself, malice must be proven by extrinsic evidence. *Id.*, citing *Moss v. Stockard*, 580 A.2d 1011, 1024 (D.C. 1990). Furthermore, the fact-finder must look to the primary purpose behind the statement when determining if there is malice. *Columbia*

*First Bank*, 665 A.2d at 656. In short, all definitions of malice in substance come down to the equivalent of bad faith. *Id.*, n.8. "Put another way, a qualified privilege exists only if the publisher believes, with reasonable grounds, that his statement is true." *Ingber v. Ross*, 479 A.2d 1256, 1264 n.9 (D.C. 1984) (internal citations omitted).

Here, defendants had no reasonable grounds to believe that their statements that Mr. Rosen had not performed up to AIPAC's standards were true. Indeed, on January 31, 2005, five months after the Justice Department's ongoing investigation had been made public, AIPAC awarded Mr. Rosen a special $7,000 job performance bonus. Complaint at 10. Furthermore, defendant Kohr himself, and other senior staff at AIPAC, have engaged in the same type of information gathering as Mr. Rosen did that they later claimed to be below AIPAC's standards . *Id.* at 12. The statements may not have shown malice on their face, but there is ample extrinsic evidence that defendants acted with the requisite bad faith to allow a jury to find actual malice. Plaintiff is confident such evidence will be developed during the discovery phase, and at this stage, the facts as set out in complaint are to be taken as true. Therefore, it would be manifestly inappropriate to dispose of this issue on a pre-discovery motion to dismiss under Rule 12(b)(6).

D. None of the Defendants are Immune from Liability for the Defamation of Plaintiff

Plaintiff's claims should not be dismissed with respect to defendants Dow, Manocherian, Friedman, Weinberg, Asher, Levy, Jr., Kaplan, Wuliger, and Friedkin, as suggested in the motion to dismiss based on their having statutory immunity as mere "volunteers" in the AIPAC organization. Motion to Dismiss, p. 15. In fact, statutory immunity from civil liability is not available to these defendants. Volunteers do not enjoy immunity from civil liability under District of Columbia law for their "willful misconduct" nor are they entitled to such immunity for any "[a]n act or omission that is not in good faith and is beyond the scope of authority of the corporation [under D.C.'s corporate law] or the corporate charter." D.C. Code § 29-307.113(1),(5).

As an initial matter, we note that defendants assertion that "[t]he only allegation [in the Complaint] was that [defendants Dow, Manocherian, Friedman, Weinberg, Asher, Levy, Jr., Kaplan, Wuliger, and Friedkin] acquiesced in or authorized the statements by the mere fact that they are

Members of the Board of Directors ," and that [t]here is no allegation that any of the Board Member Defendants actually made any statements about the Plaintiff" (Motion to Dismiss at 15), is completely incorrect. In fact, the Complaint explicitly alleged that:

> Beginning shortly after summarily terminating Mr. Rosen's employment, AIPAC *and particularly* defendants Kohr, *Dow Friedman[,] Manocherian, Weinberg, Asher, Levy, Wuliger, Kaplan, and Friedkin*...began *making knowingly false and defamatory statements* to the press about Mr. Rosen, and have continued to make and publish such knowingly false and defamatory statements about Mr. Rosen through March 3, 2008, and thereafter.

Complaint at 14 (emphases added). Thus, the Complaint explicitly alleges that these AIPAC Board of Directors member defendants – all of whom both served as president of the organization and were members of the so-called "Advisory Committee" designated to deal with the situation presented by the Justice Department's criminal proceedings against Mr. Rosen – did more than simply acquiesce in the making of defamatory statements about plaintiff: they were integral to the authorization of and the making of such defamatory statements.

More pointedly, defendants' contention that, other than Howard Kohr, AIPAC's Executive Director, and Patrick Dorton, its outside spokesman, all the other individual defendants serve AIPAC as volunteers, and as such are immune from civil liability, is wholly without merit.

For their part, defendants ground this contention on two pillars: (a) the affidavit of AIPAC's Managing Director, that defendants Dow, Manocherian, Friedman, Weinberg, Asher, Levy, Jr., Kaplan, Wuliger, and Friedkin are all serve as unpaid "volunteer members of Board of Directors of AIPAC, which is a not-for-profit District of Columbia corporation" (*see* Motion to Dismiss, Exhibit 4, ¶¶ 2 and 4) and (b) that D.C. Code § 29-301.113 immunizes volunteers of a corporation from civil liability except where injury or damage results from their willful misconduct. Because injury resulted from their willful misconduct, however, the protection of statutory immunity for these individuals defendants is not available.

While it is true these defendants are unpaid as members of the AIPAC Board of Directors, in that capacity, under AIPAC's own Bylaws, they had "the responsibility and authority for the setting of policy and the overall management of the business affairs, activities, and property of

AIPAC . . ." *See* Bylaws of the American Israel Public Affairs Committee (Revised January 28, 2003), Article 2(a) , p. 3 [Attachment 4]. Thus, these individuals, though technically "volunteers" because they are unpaid, as members of the Board of Directors share the overall responsibility of setting the policies of and managing the affairs and activities of the AIPAC organization, under the governing principles of that organization. Further, all of these individual defendants were members of the so-called "Advisory Committee" specifically designated by the full Board of Directors to recommend action with regard to the matter that ensnares Steven Rosen in the Department of Justice criminal investigation and prosecution, and one, Melvin A. Dow, was the Chairman of the Advisory Committee. Thus, the injury done to and damage suffered by Mr. Rosen from the knowingly false and defamatory statements about him emanating from AIPAC in reality "resulted from the willful misconduct" of these particular defendants, as well as from AIPAC's professional Executive Director, defendant Kohr, and its outside official spokesman, defendant Dorton. Accordingly, they are not immune from being held liable for the defamation pursuant to the language of D.C. Code § 29-301.113.

Also, it is worth noting that two of these individual defendants served as AIPAC's President during the years that the defamatory statements about Steven Rosen were made on the organization's behalf (Bernice Manocherian from 2004 into 2006, and Howard E. Friedman from 2006 into 2008), and AIPAC's Bylaws clearly designate the organization's president – volunteer though he/she may be – as the "Chief Executive Officer of AIPAC." *See* AIPAC's Bylaws, Article 3(d) , p. 7 [Attachment 4]. Certainly, immunity for corporate volunteers provision of D.C. Code § 29-301.113 was not intended to relieve the chief executive officer of a not-for-profit organization of liability for the acts of the organization that he/she authorized, even if that CEO is unpaid.

In sum, in defendants Dow, Manocherian, Friedman, Weinberg, Asher, Levy, Jr., Kaplan, Wuliger, and Friedkin, we have those ultimately responsible for AIPAC's response to the pressure from the Justice Department in its treatment of Steven Rosen, including the issuing of the false and hurtful statements that form the essence of his instant claims of defamation. Certainly, under the governing authority set out in AIPAC's own Bylaws, these individuals were at least as culpable as

the organization's paid Executive Director (defendant Kohr) and its paid public relations consultant and spokesman (defendant Dorton) for the publication of the defamatory statements about plaintiff, their alleged posture as "volunteers" notwithstanding.

Finally, we note in this regard that as AIPAC's governing bylaws and structure hold these "volunteer" defendants to the highest responsibilities in the organization, any assertion of statutory immunity for the critical part they played in the defamatory acts at issue here will be lost upon showing "[a]n act or omission that is not in good faith and is beyond the scope of authority of the corporation pursuant to this subchapter or the corporate charter." *See* D.C. Code § 29-307.113(5). Given the presumption of the truth of the allegations contained in the Complaint at this juncture, it is simply inappropriate to dispose of the defamation claims at issue here on a motion to dismiss. Accordingly, as defendants cannot show that plaintiff can prove no set of facts that will entitle him to relief against defendants Dow, Manocherian, Friedman, Weinberg, Asher, Levy, Jr., Kaplan, Wuliger, and Friedkin, or any of them, the motion to dismiss must be denied as to each of them.

**Conclusion**

For the foregoing reasons, the Complaint as filed by plaintiff has timely raised multiple wholly actionable claims of defamation against each of the named defendants. Accordingly, defendants' motion to dismiss must be denied in its entirety.

Respectfully submitted,

David H. Shapiro
D.C. Bar No. 961326
SWICK & SHAPIRO
1225 Eye Street, N.W.
Suite 1290
Washington, D.C. 20005
Tel. 202-483-0300
Fax 202-842-1418
Email - dhshapiro@swickandshapiro.com

Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY THAT the foregoing memorandum of points and authorities in opposition to defendants' motion to dismiss, together with the four attachments thereto and a proposed order denying said motion, are being electronically filed with the Clerk of the Suoerior Court for the District of Columbia using the Court's CaseFile Express system (which will automatically serve a copy of said filing via email to counsel of record for defendants, Thomas L. McCally (tlm@carmaloney.com) and Allie M. Wright (amw@carmaloney.com), of Carr Maloney, P.C., 1615 L Street, N.W., Suite 500, washington, DC 20036, on this 8th day of July 2009.

David H. Shapiro
SWICK & SHAPIRO, P.C.

# ATTACHMENT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division



| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | No. 1:05cr225 |
| | ) | |
| | ) | |
| LAWRENCE ANTHONY FRANKLIN, | ) | |
| STEVEN J. ROSEN, and | ) | |
| KEITH WEISSMAN | ) | |

**ORDER**

The matter is before the Court on the government's motion (Docket No. 890) to dismiss (i) Count One of the Superseding Indictment as against defendants Rosen and Weissman, and (ii) Count Three of the Superseding Indictment as against defendant Rosen.

For good cause,

It is hereby **ORDERED** that the government's motion is **GRANTED**; accordingly, Count One of the Superseding Indictment is **DISMISSED WITH PREJUDICE** as to defendants Rosen and Weissman, and Count Three of the Superseding Indictment is **DISMISSED WITH PREJUDICE** as to defendant Rosen. Moreover, because dismissal of those counts in accordance with the government's motion dismisses all pending counts against defendants Rosen and Weissman, all motions and deadlines currently pending with respect to defendants Rosen and Weissman are **TERMINATED**, and all hearings and proceedings currently scheduled with respect to defendants Rosen and Weissman are **CANCELLED**.

It is further **ORDERED** that the government is **DIRECTED** to advise the Court, by 5:00 p.m., Thursday, May 14, 2009, regarding when it contemplates filing an appropriate motion with



891

respect to defendant Franklin.

The Clerk is directed to send a copy of this Order to all counsel of record, including counsel for defendants Franklin, Rosen, and Weissman.

Alexandria, Virginia
May 1, 2009

T. S. Ellis, III
United States District Judge

# ATTACHMENT 2

**March 3, 2008**

# Trial to Offer Look at World of Information Trading

**By NEIL A. LEWIS**

WASHINGTON — From its headquarters near the Capitol, the American Israel Public Affairs Committee, or Aipac, has for decades played an important though informal role in the formation of the United States government's Middle East policy.

Aipac, which does not work directly for Israel or its government, lobbies in Washington to advance Israel's interests. Its officials assiduously maintain contact with senior policymakers, lawmakers, diplomats and journalists. Those conversations are typical of the unseen world of information trading in Washington, where people customarily and insistently ask each other, "So, what are you hearing?"

But a trial scheduled for late April in federal court in Alexandria, Va., threatens to expose and upend that system. Moreover, the case comes with issues of enormous sensitivity and emotion, notably the nature and extent of the ways American Jewish supporters of Israel try to influence the United States government.

Two former senior analysts for Aipac, Steven J. Rosen and Keith Weissman, are charged with violating the World War I-era Espionage Act when they told colleagues, journalists and Israeli Embassy officials information about Iran and Iraq they had learned from talking to high-level United States policymakers.

Unless the government suddenly backs down, the courtroom will become the stage for an extraordinary parade of top officials being forced to testify about some of the unseen ways American foreign policy is made.

Over the strong objections of the Justice Department, the judge in the case ruled that the defense may call as witnesses Condoleezza Rice, the secretary of state; Stephen J. Hadley, the White House national security adviser; Elliot Abrams, a deputy national security adviser; Richard L. Armitage, former deputy secretary of state; Paul D. Wolfowitz, former deputy defense secretary; and a dozen other Bush administration foreign policy officials.

The defense's goal is to demonstrate that the kind of conversations in the indictment are an accepted, if not routine, way that American policy on Israel and the Middle East has been formulated for years.

Mr. Rosen's lawyer, Abbe Lowell, said the case raised "strange and troubling issues, notably the decision to target Aipac for common and proper behavior that goes on in Washington every day."

Mr. Lowell and John Nassikas III, who represents Mr. Weissman, plan to confront Ms. Rice and the other witnesses with explicit examples of exchanges in which they provided similar sensitive information to Aipac staff members as part of the regular back-channel world of diplomacy.

Although Aipac has not been charged in the case, the trial, to be heard by Judge T. S. Ellis III, will revolve

around how the group, renowned for its effectiveness in presenting Israel's case, exerts its influence in Congress and, especially in recent years, on the executive branch.

For Aipac and to some extent the larger pro-Israel community in the United States, the charges against Mr. Rosen and Mr. Weissman could raise what they regard as an unfair, even toxic question about whether some American Jews hold a loyalty to Israel that matches or exceeds their loyalty to the United States.

The trial will also take place only months after the eruption of an intense public debate about the American Jewish supporters of Israel that was occasioned by the publication of an article and book, "The Israel Lobby and U.S. Foreign Policy." The authors, John J. Mearsheimer of the University of Chicago and Stephen M. Walt of Harvard University, argue that the pro-Israel lobby successfully suppresses legitimate criticism of Israel and uses its influence to distort the public debate about Middle East policy.

Their views produced a ferocious counterattack in magazines and scholarly journals in which both their facts and conclusions were challenged.

The trial will as well be shadowed by the case of Jonathan Pollard, a civilian analyst for the Navy who was sentenced to life in prison in 1985 for spying on behalf of Israel. There is no question that the charges against Mr. Rosen and Mr. Weissman are vastly different than the actions of Mr. Pollard, who knowingly acted as a spy by stealing sensitive documents and passing them covertly to Israeli agents.

The emotional resonance of his case continues, however, because it directly raised the notion of dual loyalty and because his supporters think he has been denied parole to satisfy a national security community that was deeply angered over Israel's spying on the United States.

Avi Beker, who teaches what he calls "Jewish diplomacy" at the University of Tel Aviv and Georgetown University, said that while the two cases are greatly different, "they evoke a parallel psychological effect" both among American Jews who have an enduring anxiety about the dual loyalty charge and those who are suspicious of the Israel lobby.

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.

Justice Department officials would not discuss the case. But at the time of the indictment in 2005, Paul J. McNulty, then the chief prosecutor in the Eastern District of Virginia, said, "Those not authorized to receive classified information must resist the temptation to acquire it, no matter what their motivation may be."

According to the indictment, the defendants received sensitive information from at least three government sources that was passed on to journalists and Israeli officials. One of the sources was Lawrence A. Franklin, a Pentagon analyst who has pleaded guilty to passing on sensitive information to a journalist and an Israeli diplomat. Mr. Franklin has been sentenced to more than 12 years in prison.

After Mr. Franklin was arrested in 2004, he became a cooperating witness for the government and, while wearing a wire, met with Mr. Weissman and told him that Iran had learned that Israeli agents were in northern Iraq. Mr. Weissman, according to the indictment, told Mr. Rosen, and they both relayed that information to an Israeli diplomat and intelligence officer and an unnamed Washington Post reporter later identified as Glenn Kessler.

The other two sources of information received by Mr. Rosen and Mr. Weissman are identified in the indictment only as Government Official-1 and Government Official-2. Kenneth Pollack, who was the National Security Council specialist on the Persian Gulf, said in an interview that he thought he was Government Official-1 because on Dec. 12, 2000, he had had lunch with Mr. Rosen and Mr. Weissman.

Mr. Pollack, who is no longer with the government, said that he told government investigators, "I never revealed any classified information to Rosen and Weissman, and I never revealed any information that would be harmful to the security or interests of the United States."

The indictment also charges that Mr. Rosen received information in January 2002 from Government Official-2, who has been identified by people involved in the case as David M. Satterfield, who has since been promoted to the post of the State Department's senior adviser on Iraq. A spokesman for Mr. Satterfield would not comment.

Mr. Lowell, the defense lawyer, said there had been no explanation as to why neither Mr. Pollack nor Mr. Satterfield seemed to be in any legal jeopardy for imparting information to Mr. Rosen and Mr. Weissman that became part of the charges against them when they passed that information on to others.

Aipac, which spends nearly $2 million annually in lobbying, according to public filings, has worked to distance itself from the defendants.

Aipac dismissed them in early 2004 after federal prosecutors in Virginia played part of surreptitiously recorded conversations for Nathan Lewin, a veteran Washington lawyer representing Aipac. The tapes were of conversations in which Mr. Rosen and Mr. Weissman passed on information about the Middle East they had received from government officials to Mr. Kessler at The Washington Post.

Mr. Lewin, who has had a long history as a trusted counsel for various Jewish organizations, traveled back to Aipac's headquarters near Capitol Hill from Alexandria that day and advised the group to fire the men.

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.

Mr. Lewin would not discuss what he heard that day. But others familiar with the case said the defendants' boastful tone, which may have been used to suggest that their knowledge reflected their great influence within the administration, made the conversations potentially embarrassing.

This article has been revised to reflect the following correction:

Correction: March 6, 2008
An article on Monday about the impending trial of two former senior analysts for the American Israel Public Affairs Committee, or Aipac, on charges that they violated the Espionage Act, referred incorrectly to Aipac's work. The organization, a pro-Israel lobby, works in the United States to advance Israel's interests. It does not work directly for the state of Israel or its government.

# ATTACHMENT 3

Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 1999 WL 1014964 (D.D.C.)
**(Cite as: 1999 WL 1014964 (D.D.C.))**

**H**



United States District Court, District of Columbia.
Patricia JUDD and David JUDD, Plaintiffs,
v.
RESOLUTION TRUST CORPORATION, et al., Defendants.
**No. CIV.A.95-1074CKK/JMF.**

Aug. 17, 1999.

REPORT AND RECOMMENDATION

FACCIOLA.

*1 Plaintiffs, Patricia and David Judd, ("plaintiffs" or "the Judds") filed suit against six corporations alleging violations of the Real Estate Settlement Procedures Act ("RESPA") and several common law causes of action. On October 22, 1997, Magistrate Judge Attridge issued a report and recommendation recommending the granting in part and denying in part of motions by the defendants to dismiss and for summary judgment. Judge Kollar-Kotelly issued a memorandum opinion on November 10, 1998, which adopted in part and rejected in part Judge Attridge's recommendations. Judge Kollar-Kotelly dismissed with prejudice many of the claims brought by the Judds. What remains of the Judds' lawsuit is Count I (RESPA) and Count IV (Intentional Defamation of Credit) against the only remaining defendant, J.I. Kislak Mortgage Corporation ("Kislak"). Kislak has filed a motion for summary judgment which is presently before me for this report and recommendation. Upon consideration of that motion and the entire record herein, I recommend that defendant's motion be granted.

BACKGROUND

Magistrate Judge Attridge has set forth a detailed explanation of the loan servicing history at issue in the Judds' lawsuit. *See Judd v. Resolution Trust Corporation*, No. CIV.A.95-1074, 1997 WL 678171 (D.D.C. Oct.22, 1997). Over a period of time, the Judds were accused of not making mortgage payments they had unquestionably made. They found it impossible to get anyone in the various lending organizations to correct the false accusations and thus incorrect information was transmitted to a credit reporting agency. The Judds complain that they were denied credit as a result of being accused of not making mortgage payments they had unquestionably made. In the present posture of the case, I need only summarize the pertinent facts relating to Kislak's involvement with the Judds.

In January of 1990, the Judds entered into a 30-year mortgage agreement with the St. Louis County Federal Savings and Loan Association. St. Louis County Federal Savings Bank was placed in receivership and subsequently the servicing of their loan was transferred to the Resolution Trust Corporation ("RTC") and then to Kislak. On April 11, 1991, the Judds were notified by Kislak/RTC Mortgage Servicing Center that the RTC "acquired the assets of St. Louis Savings. The RTC has selected the Kislak organization to service its loans acquired through this transition. The transfer of your account was effective 03/08/91."Complaint, Exh. 4. From April 1, 1991, through August 1, 1992, Kislak serviced the Judds' home mortgage loan. David Judd Dep., February 9, 1999 at 9.

Somehow, St. Louis County Federal Savings Bank, Kislak's predecessor in interest as to the Judds' loan, mistakenly believed that the Judds had failed to make certain mortgage payments to them. Thus, when Kislak took over the mortgage, the file it received from St. Louis contained this mistaken information. Believing that the Judds were in default, Kislak demanded payment of what St. Louis mistakenly believed it was due from the Judds. Additionally, in a letter to the Judds, dated June 23, 1991, Kislak warned the Judds that they had not made their May, 1991 mortgage payment and would have to pay it to Kislak to avoid additional late charges, foreclosure, or acceleration. When that letter arrived, the Judds had already been informed that the servicing of their loan had been transferred from St. Louis to Kislak and that they should make their mortgage payments to Kislak. Accordingly, the Judds had already sent a check to Kislak for the May, 1991 mortgage payment, dated May 15, 1991. This check was cashed by Kislak on May 29, 1991. Thus, the letter from Kislak threatening foreclosure and acceleration for failing to make the May mortgage payment was dated one month *after* Kislak deposited the May mortgage payment check Kislak had received from the Judds.

***2** To further complicate matters, a Trans Union credit report for the Judds reflected late mortgage payments to St. Louis County Federal from July, 1991 in the amount of $6,174.[FN1] Somehow, Trans Union was mistakenly advised that the Judds had failed to make payments due St. Louis when they were due. Apparently, Trans Union was never informed by St. Louis County Federal, RTC, or Kislak, that the Judds no longer owed mortgage payments to St. Louis, effective March, 1991. Kislak contends that the report involves delinquent payment reports from St. Louis County Federal, before Kislak was even involved in servicing the Judds' loan payments.[FN2] That is half true. Thanks to another foul up, the Judds were accused of not making payments to St. Louis during a period of time when the Judds were obliged to make their payments to Kislak. Thus, the Judds made every payment to St. Louis and Kislak when they were due and were nevertheless accused of making late payments to St. Louis when (a) they were under no obligation to pay St. Louis and (b) had made timely payments, as directed, to Kislak.

FN1. D. Judd Exh. 45, *J.I. Kislak Mortgage Corporation' s Motion for Summary Judgment,* Credit Report of December 2, 1995.

FN2. *Objections of Defendant J.I. Kislak Corporation to Magistrate' s Report and Recommendation,* November 24, 1997 at 8. (Exhibit B).

In an attempt to resolve these problems with their mortgage account, the Judds sent copies of canceled checks to Kislak and made telephone calls to the customer service number. David Judd Dep., February 9, 1999 at 24-25 & 69. The credit problems were not resolved while Kislak serviced the loan and the loan was transferred to Standard Federal Savings Bank. Complaint & 48. The Judds complain that these mistaken allegations of delinquent payments did not stop when Kislak ceased serving the Judds' mortgage loan. Complaint & 50. The Judds complain that their credit rating suffered from the

reported delinquent mortgage payments and that they were denied credit on numerous occasions. Complaint, Exh. 31. The Judds now seek damages under RESPA and the common law claim of intentional defamation of credit. Kislak has filed a motion for summary judgment on both claims.[FN3]

FN3. One brief matter should be discussed prior to the consideration of the motion for summary judgment. The Judds allege that they have not received all the discovery requested in this case. Upon that representation, I ordered Kislak to respond to the Judds' allegations. In response, Kislak filed a response and an affidavit by Kislak's Senior Vice President, maintaining that all discoverable documents with the Judds' names and account number were provided and a diligent search produced no new documents. Further, Kislak argued that when the Judds' mortgage was transferred to Standard Federal Savings Bank, Kislak forwarded all pertinent documents without retaining copies. On May 12, 1999, Kislak informed the court that microfiche, one year-end interest statement, and an escrow analysis were found and that Kislak would provide them to plaintiffs. In May, 1999, Kenneth Bialy filed his third affidavit attesting to the completed discovery. Upon review of the Judds' motions, Kislak's responses and the affidavits filed by Kenneth Bialy, I have no reason to doubt the statements made under oath by Mr. Baily and I find that there is no indication that Kislak possesses any further documentation regarding the Judds' mortgage loan. Thus, I shall proceed to resolve Kislak's motion for summary judgment.

## STANDARD OF REVIEW

Summary judgment shall be granted upon a showing that there is no genuine issue of material fact and that the movant is entitled to summary judgment as a matter of law. Fed.R.Civ.P. 56(c). A court must view the facts in the light most favorable to the non-movant, thus giving the non-movant the benefit of all reasonable inference derived from the evidence in the record. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

## RESPA CLAIMS

*Effective Date of Transfer*

The plaintiffs' first claim under RESPA is based upon 12 U.S.C. § 2605(c)(2)(A) (1994), requiring mortgage institutions to notify the borrower when their loan has been transferred. Under this provision, the new institution acquiring the loan is required to contact the borrower within fifteen days after the "effective date of transfer" and inform them of the transfer. In the instant case, the Judds claim that Kislak failed to notify them within the statutory period required by RESPA.

***3** The Judds received their first letter from Kislak dated April 11, 1991. This letter informed the Judds that Kislak would be servicing their home mortgage loan and that "the transfer of your account was effective 03/08/91."Complaint, Exh. 4. The Judds therefore allege that Kislak violated the conditions imposed upon the loan institutions by RESPA by failing notify them within 15 days of March 8, 1991, which the letter described as the effective date of the letter. Kislak, however, disregards the statement in the letter and points instead to the plain language of the statute to define the "effective date of transfer." Judge Kollar-Kotelly has already indicated that Kislak's argument is well taken. While ruling upon the related but different question of whether the Judds' RESPA complaint stated a claim for relief, she stated:

In its objections, J.I. Kislak properly notes that "effective date of transfer is a term of art and that § 2605(i)(1) defines the phrase to mean 'the date on which the mortgage payment of a borrower is first due to the transferee servicer of a mortgage loan pursuant to the assignment, sale or transfer of the mortgage loan.' 12 U.S.C. § 2605(i)(1). In turn, J.I. Kislak maintains that the first payment it was to receive under the transfer was due April 1, 1991. Were this so, its April 11, 1991 letter would have been timely under § 2605(c)(2)(A)."

Memorandum Opinion, *Judd v. Federal Deposit Insurance Corp.*, CA NO. 95-1074(CKK) at 7.

As Judge Kollar-Kotelly indicated, according to RESPA § 2605(i)(1), "the term 'effective date of transfer' means the date on which the mortgage payment of a borrower is first due to the transferee servicer of a mortgage loan pursuant to the assignment, sale, or transfer of the servicing of the mortgage loan." 12 U.S.C. § 2605(i)(1)(1994). Kislak's assertion that the first payment was due on April 1, 1991, is supported by affidavit.[FN4] There is no contrary information in the record. Instead, Mr. Judd himself acknowledged that the first payment was due on April 1, 1991, in his deposition:

> FN4. The first date on which the mortgage payment of the the Judds was due to J.I. Kislak Mortgage Corporation pursuant to a certain Servicing/Sub-servicing and Transfer Agreement between J.I. Kislak Mortgage Service Corp. and the Resolution Trust Corporation in its Receivership capacity was April 1, 1991. *See* Affidavit of Kenneth S. Bialy, Senior Vice President of Kislak, at & 5.

Attorney for Kislak: The March payment, according to other correspondence you have received, in particular Exhibit No. S-7, you were to make the March payment to the RTC receiver at the same address that St. Louis County was located. Is that correct, sir?

David Judd: Yes.

Attorney for Kislak: So as of April 1, 1991, you were supposed to make your payment to Kislak?

David Judd: Yes.

Attorney for Kislak: So April 1 would have been the first payment that you would have been obligated to make to Kislak?

David Judd: Correct.[FN5]

> FN5. David Judd Deposition, February 9, 1999 at 34-35. Furthermore, the Judds provide photocopies of their canceled mortgage checks as exhibits to their complaint. Complaint, Exh. 10. While these canceled checks provide verification of their payments, they also reflect that April, 1991, was the first time that a payment was made by the Judds to Kislak. This confirms that April 1, 1991, was, according to RESPA, the "effective date of transfer."

RESPA clearly defines the first date of payment, April 1, 1991, as the date when the fifteen day requirement begins. Whatever Kislak may have meant by its use of the words "effective date," the statute upon which the Judds predicate their cause of action gives exclusive guidance as to the meaning of that term. Accordingly, Kislak had until April 15, 1991, to inform the Judds of the transfer of their home mortgage loan under RESPA. Thus, the evidence permits only the conclusion that the letter of April 11, 1991, was sent in compliance with the terms of RESPA, despite the "3/8/91" date stated in the letter. Since there is no evidence upon which a finder of fact could base any other conclusion, I must recommend that defendant's motion for summary judgment be granted as to this RESPA claim.

*Failure to Correct*

*4 The Judds allege a second violation of RESPA claiming that Kislak failed to respond to their inquires regarding misinformation in their account statement and delinquent payments. According to RESPA, the servicer of a mortgage loan is required to respond to a borrower's "qualified written request" regarding their account. The statute allows the loan servicer 20 days to respond to the borrower and assure the borrower that the request has been received. 12 U.S.C. § 2605(e)(1)(A)(1994). The servicer is then required to take affirmative action within 60 days of receipt of this "qualified written request." 12 U.S.C. § 2605(e)(2)(1994). RESPA places a duty upon the servicer to investigate the claim of the borrower or provide the appropriate explanation or information necessary to help the borrower understand the claims. But before that duty arises, RESPA requires that the aggrieved party submit a "qualified written request." RESPA § 2605(e)(1)(B) defines "qualified written request":

For purposes of this subsection, a qualified written request shall be a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that-

(i) includes, or otherwise enables the servicer to identify, the name and account number of the borrower; and

(ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

12 U.S.C. § 2605(e)(1)(B)(1994).

The Judds contend that they mailed photocopies of their canceled checks to Kislak to inform them that their payments were not delinquent. Complaint & 18, Exh. 10. These submissions obviously do not constitute qualified written requests under RESPA. According to the statute, these photocopies must be accompanied by a statement to the servicer which explains the problem with the loan; the canceled checks themselves do not suffice. 12 U.S.C. § 2605(e)(1)(B)(ii)(1994).

According to Kislak and the Judds' own deposition testimony, no written correspondence was sent to Kislak regarding the mortgage loan. David Judd Dep., February 9, 1999 at 53. During discovery, the Judds produced exhibits S-1 through S-34 and David Judd Exhibit No. 35. By the Judds' own admission, these exhibits represent a comprehensive compilation of all documents produced during Kislak's servicing of their mortgage loan. *Id.* at 8. Further, neither Mr. nor Mrs. Judd recalls ever sending a letter to Kislak during the servicing of their loan. *Id.* at 53.Kislak's customer service log reflects at least one

call from the Judds regarding their account.[FN6] But, the provisions of RESPA do not bind Kislak, as the loan servicer, unless they receive a "qualified written request" from the Judds and they never did. Since the Judds have provided no documentation whatsoever to substantiate a claim that they submitted to Kislak any "qualified written requests," a finder of fact could not find that they did and Kislak's motion for summary judgment as to the Judds' second RESPA claim must be granted as well.

FN6. *J.I. Kislak Mortgage Corporation's Reply Memorandum to Plaintiffs' Opposition To Kislak's Motion for Summary Judgment*, at 4.

INTENTIONAL DEFAMATION OF CREDIT

*Statute of Limitations*

*5 As explained, Kislak stopped servicing the Judds' loan at the end of July, 1992. By that time Kislak was well aware that the Judds disputed the statement in the credit report that they were late in their payments to St. Louis. There is no evidence whatsoever that, prior to transferring the loan to its successor, Kislak did any thing to help the Judds get the credit report corrected. To the contrary, Kislak, in their last communication to the Judds, indicated that they would have to seek assistance from their successor. Complaint Exh. 32, August 1, 1992 letter.

The Judds got no relief there either and, as late as 1995, Trans Union provided the Judds with a credit report containing the mistaken information. The Judds claim that the continued circulation harmed them in the following way: (1) in August 1992, they were denied a credit card by Norwest Financial, (2) in November 1992, May 1993, and June 1993 they were denied a credit card from Wachovia Bank Card Services, (3) in July 1993, they were denied a Visa card from Boatmans Bank of Delaware, (4) in August 1993 and January 1994, they were denied a credit request on their existing Mastercard by Commerce Bank, and (5) in June 15 1994, they were denied a credit card by First USA Bank. Complaint, Exh. 31. The Judds filed their complaint in this court on June 5, 1995.

Kislak claims that the Judds' intentional defamation of credit claim is barred by both the District of Columbia and Missouri statutes of limitation.[FN7]

FN7. *J.I. Kislak Mortgage Corporation's Memorandum in Support of Its Motion for Summary Judgement* at 5-6.

In diversity cases, "in determining which state's limitation period applies, the federal court looks to the choice of law rules of the state in which it sits. Looking to the D.C. choice-of-law rules, we see that they treat statutes of limitations as procedural, and therefore almost always mandate application of the District's own statute of limitations." *A.I. Trade Finance, Inc. v. Petra International Banking Corporation*, 62 F.3d 1454, 1458 (D.C.Cir.1995)."Plaintiffs' claim for publication of defamatory and false material is covered by the District of Columbia limitations period for libel, which is one year." *Foretich v. Glamour*, 741 F.Supp. 247, 251 (D.D.C.1990).

Kislak argues that the statute of limitations began to run from the moment of first publication of the defamatory material in 1991, when the credit report first appeared. In the alternative, and at best, Kislak suggests that, even if the statute of limitations was to be extended so that it began to run from March, 1994, which was the date David Judd testifies in his deposition was the last date he suffered specific monetary damage from the inaccurate information, the claim would still not survive. *J.I. Kislak Mortgage Corporation's Memorandum in Support of Its Motion for Summary Judgment* at 6, *citing,* Deposition of David Judd, February 10, 1999 at 42. Even applying the more forgiving two year statute of limitations under Missouri law, Kislak argues that the complaint against the proper defendant had to be filed by March, 1996, and it was not.

*6 On the other hand, the Judds assert that the statute of limitations did not begin to run until 1995, when they last secured for their own use a copy of their credit report. Thus, as the Judds would have it, the statute of limitations did not begin to run until at least the date of the 1995 credit report. Under that theory, it will never run as long as the Judds (or any one else) can secure the credit report with the incorrect information.

There is, to put it mildly, no warrant in present District of Columbia law for such a remarkable extension of the statute of limitations. To the contrary, in *Wallace v. Skadden, Arps, Slate, Meagher & Flom,* 715 A.2d 873 (D.C.1998) the court of appeals indicated that, once the plaintiff became aware of the damage done by the defamation, the statute began to run from the date of publication of the defamation. In doing so, that court invoked the traditional principles that (a) defamation occurs on publication and (b) a statement defamatory on its face causes damage immediately upon its publication. Thus, the court held that defamatory statements made one year before the plaintiff filed suit were barred by the statute of limitations:

The plaintiff contends that the defendants' defamatory statements were all a part of a single continuing course of conduct, and that the statute of limitations therefore did not begin to run until after the conduct ceased following her discharge. We do not agree with this contention. The complaint alleges that the defendants made a number of discrete defamatory communications. Each of these statements constituted "a new assault on the plaintiff's reputation," and each therefore gave rise to a separate right of action. *Jones v. Howard Univ.*, 574 A.2d 1343, 1348 (D.C.1990)."[T]he running of the statute [cannot] be prevented by repetitions of the [defamation], although, of course, a separate action will lie for any repetition within the statutory time."53 C.J.S. *Libel and Slander* § 122, at 206 (1987); and see authorities there cited.

715 A.2d at 882.

While the court of appeals thus indicated the existence of a common law rule that each defamatory utterance gave rise to a separate cause of action, it quoted *Corpus Juris Secundum* for the proposition that each separate action premised on each **republication** of the defamatory statement had to be asserted within "the statutory time." Under that logic, a plaintiff who was initially defamed on January 1, 1999, would have until January 1, 2000, to bring her lawsuit. If the defamation was republished on February 2, 1999, the statute would be extended until February 2, 2000, because the **republication** occurred within the one year statute of limitations which commenced to run when the defamation was first uttered on January 1, 1999. That principle, however, would not permit a lawsuit to be brought on January 1, 2004, based on the **republication** of the defamatory statement uttered on January 1, 2003, because that **republication** did not occur within one year of the original utterance on January 1, 1999. Accordingly, the **republication** rule is a narrow exemption to the statute of limitations, opening a window of opportunity to file a lawsuit within one year of a **republication** of the defamation which, in turn, occurs within one year of the initial publication. *See Moore v. Allied Chemical Corp.*, 480 F.Supp. 364, 376 (E.D.Va.1979).

*7 Additionally, when the plaintiff in the *Skadden Arps* case tried to premise her lawsuit upon a theory of a continuing tort,

the court of appeals stated:

In [ *National R.R. Passenger Corp. v.*] *Krouse* e. [ 627 A.2d 489, 497-498 (D.C.1993), *cert. denied*, 513 U.S. 817, 115 S.Ct. 75, 130 L.Ed.2d 30 (1994) ] we held that once the plaintiff has been placed on notice of an injury and of the role of the defendants' wrongful conduct in causing it, the policy disfavoring stale claims makes application of the "continuous tort" doctrine inappropriate. Id.*Krouse* was a case under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988) and its reasoning applies, a fortiori, to a defamation claim in which the plaintiff had alleged a number of separate and distinct slanders and libels.

*Id.* at 882.

It therefore is the law of the District of Columbia that the statute of limitations for defamation begins to run from publication, if the statement is defamatory on its face. There may be a narrow window of opportunity to extend the statute of limitations so that it begins to run from the date of any repetition of the defamatory statement if the repetition occurs within one year of the original publication. The statute of limitations cannot be evaded upon any "continuous tort" theory which views the individual defamatory statements as coalescing into a course of conduct permitting the plaintiff to premise her action upon statements uttered one year before she filed suit.

Under the clearly articulated law of the District of Columbia, the Judds therefore had one year from the publication of the incorrect information in the credit report in 1991 to file suit and did not do so. Even if, in defiance of the principle invoked in the *Skadden Arps* case that a statement defamatory on its face causes damage immediately upon its publication, one were to indulge the Judds by permitting them to await the discovery of damage from the defamation, they knew that the credit report had led to the denial of credit in 1992, and still did not file suit for three years. The Judds also cannot point to any **republication** of the defamatory statement by Kislak within one year of their filing suit in 1995.

Finally, this court's decision in *Foretich v. Glamour*, 741 F.Supp. 247 (D.D.C.1990) cannot rescue the Judds from the application of these clearly articulated principles.

That case involved the highly publicized dispute between Dr. Elizabeth Morgan and her former husband Eric Foretich concerning the custody of their child. In November 1988, *Glamour Magazine* published an article which Foretich claimed defamed him. Confronted with the assertion by *Glamour* that Foretich filed his lawsuit more than one year after the publication of the article, Foretich pointed to his allegation that *Glamour* had given its permission for a group supporting his wife to use the article in their public campaign on behalf of Dr. Morgan.

***8** Judge Gesell indicated that the District of Columbia rejects the common law rule that each sale of a magazine was a separate publication, giving rise to a cause of action in favor of a single publication rule that the statute of limitations runs from the date a magazine was first made available to the public. He then pointed out, however, that one who republishes a defamatory statement adopts it as his own and his **republication** of it may trigger a new cause of action and a new limitations period running from the date of the **republication**. It would therefore follow that:

If one or more defendants affirmatively consented to use or distribution of copies of the November 1988 Glamour article, the case could be taken out of the "single publication" framework, and the limitations period for an action against defendants

would extend to one year beyond such use, if the totality of facts and circumstances so warranted.

741 F.Supp. at 252.

That case has nothing to do with this one. It stands only for the proposition that the original generator of a defamatory statement, by republishing the defamatory statement or expressly permitting some one else to republish it, may take the case out of the single publication rule and commence a new statute of limitations running from the date of the use permitted by the original generator. Here, the Judds do not complain (nor could they) that Kislak either generated the false information nor expressly permitted some one else to use it and thereby republish it. To the contrary, their cause of action against Kislak is premised on its derivative responsibility for not correcting information generated by some one else; at no point did Kislak ever authorize the use of the defamatory statement by any one else. Thus, the *Glamour* case is utterly inapplicable.

*The Remaining Substantive Issues*

Kislak has also insisted that they cannot be held liable because they did not generate the defamatory information. Since I am of the view that the Judds' defamation action must be dismissed, there is no reason to reach that issue. In fact, there are two very good reasons not to. First, resolving that issue requires an analysis of Missouri law and what the Missouri courts would do if confronted with the facts of this case. This court, which cannot claim any expertise as to Missouri law, should not resolve such a complex issue unless it is unavoidable. Second, the reference to a magistrate judge cannot create jurisdiction where it is not otherwise available. Since the jurisdiction of the federal courts does not extend to moot or academic issues,[FN8] I lack jurisdiction to reach such issues as surely as Judge Kollar-Kotelly would if she had not referred this matter to me. I therefore lack jurisdiction to resolve whether Kislak's motion for summary judgment on the defamation count should be granted on grounds other than the statute of limitations.

FN8. *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70, 104 S.Ct. 373, 78 L.Ed.2d 58 (1983) (It is well settled that "[f]ederal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies."); *People of the State of California v. San Pablo & T.R. Co.*, 149 U.S. 308, 313, 13 S.Ct. 876, 37 L.Ed. 747 (1893) ("The Court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.").

CONCLUSION

***9** Upon a thorough review of the motion for summary judgment and the entire record therein, I find that as a matter of law, Kislak must prevail. Thus, I recommend that defendant's motion for summary judgment, as to both RESPA claims and the Intentional Defamation of Credit claim, be granted.

The parties should note that failure to file timely objections to the findings and recommendations set forth in this report in accordance with Rule 504(b) for the United States District Court for the District of Columbia may waive their right of appeal from an order of the District Court adopting such findings and recommendations. *See Thomas v. Arn*, 474 U.S. 140,

106 S.Ct. 466, 88 L.Ed.2d 435 (1985).VW ATTORJUD

D.D.C.,1999.
Judd v. Resolution Trust Corp.
Not Reported in F.Supp.2d, 1999 WL 1014964 (D.D.C.)

END OF DOCUMENT

# ATTACHMENT 4

Revised: January 28, 2003

# BYLAWS OF THE AMERICAN ISRAEL PUBLIC AFFAIRS COMMITTEE

STATEMENT OF PURPOSE: This organization shall be known as the American Israel Public Affairs Committee (AIPAC) and shall undertake appropriate activities to nurture and to advance the relationship between the United States and Israel, and to strengthen and to promote the mutual ideals and interests of both nations in accordance with the views of its members. In carrying out these tasks, AIPAC shall represent only the views of American citizens and shall receive neither funding nor direction from the State of Israel nor from any other foreign government. AIPAC is not a political action committee ("PAC"). It does not solicit funds for or contribute funds to political candidates or to political parties.

1. MEMBERS.

A. MEMBERSHIP REQUIREMENTS. The following are AIPAC members:

1

1) Individuals for whom membership applications have been completed and approved, who pay annual dues as set from time to time by the Board of Directors. In setting dues, the Board of Directors may create different categories of membership depending upon the amount of dues paid; and,

2) The chief lay officer of each organization that is a member of the Conference of Presidents of Major American Jewish Organizations may become a member without payment of dues during his or her term of office.

3) Any member who is not in financial arrears to AIPAC (as judged by the Board of Directors) is an AIPAC member in good standing.

4) All members of the Board of Directors (as described in Section 2.b.), the Executive Committee (as described in Section 4), and all other committees (as described in Section 5), as well as all officers (as described in Section 3), all State Chairpersons (as described in Section 7), and all Regional Chairpersons (as described in Section 8), and all Regional Council members (as described in Section 8.a-8.c), shall be AIPAC members in good standing.

b. RENEWAL. Membership must be renewed on a yearly basis through payment of dues except for members described at Section 1.a.2.

c. RIGHTS OF MEMBERS.

1) Notice of the annual Policy Conference shall be sent to all members not less than 20 nor more than 50 days before the date of the meeting. Each member may attend the annual Policy Conference for a fee determined by the Board of Directors.

2) All members shall be entitled to receive information regarding the voting records of Members of Congress as pertain to AIPAC issues.

3) Members in good standing as of 120 days prior to the annual Policy Conference who attend the annual Policy Conference will constitute the National Assembly which body shall elect certain members to the Board of Directors (as described in Section 2.c.2) and to the Executive Committee (as described in Section 4.b.5).

2. THE BOARD OF DIRECTORS. Powers, number, election, term of office and meetings.

a. POWERS. The Board of Directors shall have the responsibility and authority for the setting of policy and the overall management of the business affairs, activities and property of AIPAC, including the selection of the Executive Director.

b. NUMBER. The Board of Directors shall consist of such number not fewer than 25 nor more than 40 Directors, as determined by the Board from time to time, including those officers of AIPAC described in Section 3.a., who shall be members of the Board of Directors by virtue of their positions as officers of AIPAC. In addition, Past Presidents of AIPAC described in Section 3.e. shall be members of the Board of Directors by virtue of their position as Past President. In addition to these Directors, the President of the Near East Report, the President of the American Israel Education Foundation, the Chairperson of the Conference of Presidents of Major American Jewish Organizations, and the Executive Director of AIPAC will be ex officio members of the Board.

c. SELECTION AND TERM OF OFFICE. Those Members of the Board of Directors nominated by the Nominating Committee (described in Section 5.c.) shall serve for a term of approximately two years (21-27 months) after approval by vote of a majority of those members of the Board of Directors present and voting, who shall take into account political activity, support of AIPAC, community leadership, state geographical distribution, gender equity, and such other factors as the Board of Directors deems appropriate. Each such election shall take place at a Board of Directors meeting held at the Policy Conference with the term of each Director to

commence on the first day of the first month following the Policy Conference and finish on the first day of the first month following the Policy Conference held approximately two years (21-27 months) later. No elected member of the Board of Directors may serve for longer than three consecutive terms. Any member who has served three consecutive terms may be re-elected after a one-year absence from the Board of Directors. In computing the consecutive terms discussed in this provision, there shall not be included any term served on the Board of Directors by reason of the individual being the Chairperson of the Conference of Presidents of Major American Jewish Organizations. Notwithstanding the foregoing:

1) Each regional Council shall nominate and elect a member of the Board of Directors whose nomination shall be reviewed by the Nominating Committee (as described in Section 8.d.) and ratified by the Board of Directors.

2) The National Assembly shall elect one member of the Board of Directors nominated by the Nominating Committee.

3) The Executive Committee shall elect two members of the Board of Directors nominated by the Executive Committee Nominating Committee, which committee shall be appointed by the Chairperson of the Executive Committee who shall also chair the Executive Committee Nominating Committee. The said election shall be held at the Executive Committee meeting during the Policy Conference. The term of office of the Executive Committee members of the Board of Directors shall commence coincident with the term of office of the National Assembly member of the Board of Directors

on the first day of the first month following the Policy Conference and finish on the first day of the first month following the Policy Conference held approximately two years (21-27 months) later.

4) Each Regional, Executive Committee member, and National Assembly member of the Board of Directors shall serve for a term of approximately two years (21-27 months) and shall have the full privileges and responsibilities accorded to other members of the Board of Directors.

5) Each Executive Committee and National Assembly member of the Board of Directors shall serve no more than one term as a director in this capacity. However, Executive Committee and National Assembly directors may be elected to two additional consecutive terms as either at-large or Regional members of the Board of Directors.

6) Directors may be re-elected as directors only after a one year absence as a director except that:

a) Any director who is serving as an officer of AIPAC (as defined in Sections 3.a. and 3.h.) at the end of his or her third consecutive two-year term may continue to serve as a director for up to a maximum of three additional consecutive two-year terms so long as he or she remains an officer and,

b) Nothing herein contained shall preclude a person from serving more than two terms as President so long as his or her consecutive service as President is limited to no more than two two-year

terms, or as Chairperson of the Board from serving more than two terms as Chairperson of the Board so long as his or her consecutive service in that capacity is limited to no more than two two-year terms.

d. MEETINGS.

1) Regular Meetings. The Board of Directors shall meet at least six times a year. The presence of at least forty percent (40%) of the Directors in office shall constitute a quorum for the conduct of the business of the organization. At any meeting at which a quorum is present, the vote of a majority of those present and entitled to vote shall decide any matter unless the Articles of Incorporation, these Bylaws, or any applicable law requires a different vote.

2) Special Meetings. Special meetings of the Board of Directors may be called at any time only by the Chairperson of the Board or the President.

3. OFFICERS. Definition, selection, terms of office and powers.

a. DEFINITION. The officers of AIPAC shall consist of a President, President-elect, past Presidents, Chairperson of the Board, Vice Presidents, Secretary/Treasurer, and such additional officers as determined by the Board of Directors from time to time.

b. SELECTION. The Board of Directors, at its annual meeting at the Policy Conference or at any such date as set by the Board of Directors and acting upon recommendations of the Nominating Committee, shall elect the President, the President-elect, the Chairperson of the Board, and the Secretary/Treasurer of AIPAC,

whose terms shall commence on the first day of the first month following the Policy Conference and finish on the first day of the first month following the Policy Conference held approximately two years (21-27 months) later.

c. **TERMS OF OFFICE.** Officers shall serve for a term of approximately two years (21-27 months), renewable for no more than two succeeding two-year terms. Notwithstanding the foregoing:

1) The President and Chairperson of the Board shall serve in their respective office for no more than two consecutive full two year terms; however, the President may also serve a partial term of less than one year to complete the balance of a predecessor's term.

2) No officer shall be precluded from serving as President by virtue of the fact that he or she will have served as an officer for three consecutive terms at the time of his or her election as President.

d. **PRESIDENT.** The President shall be nominated by the Nominating Committee and elected by the Board of Directors. The President shall be the Chief Executive Officer of AIPAC and shall preside at meetings of the Board of Directors and shall perform all functions incident to the office of President, and such other powers and duties prescribed from time to time by the Board of Directors. The President shall designate the Chairperson of the Executive Committee from among the members of the Board of Directors, and the Vice Chairperson of the Executive Committee from the membership of the Executive Committee. The President shall

also appoint the chairpersons of the standing committees subject to the approval of the Board of Directors (as described in Section 5.d.).

e. PAST PRESIDENT. Each President of AIPAC, upon completion of his or her service, shall become a Past President of AIPAC. Past Presidents shall be officers of AIPAC for life with full voting privileges and shall not be subject to any limitation on their term of office so long as they affirm in writing their interest in being a Past President.

f. CHAIRPERSON OF THE BOARD. The Chairperson of the Board shall be nominated by the Nominating Committee and elected by the Board of Directors from among the Past Presidents. The Chairperson of the Board shall perform any functions as may be assigned by the President. In addition, if the office of President-Elect is vacant (as described in Section 3.g.), then the Chairperson of the Board shall act as President in the absence of the President.

g. PRESIDENT-ELECT. The President-Elect shall be nominated by the Nominating Committee and elected by the Board of Directors during the last year of the last term of the then current President. The current President shall make known to the Nominating Committee if he/she does not wish to run for a second term at least one year prior to the conclusion of his/her first term as President. The President-Elect shall perform all those functions as are incident to the office of President-Elect including acting as President in the absence of the President, and such other functions as may be assigned by the President. The President-Elect shall become President upon being elected President in accordance with Section 3.d.

h. VICE PRESIDENTS. Each Chairperson of a standing committee of the Board of Directors as defined in Section 5.d. shall be a Vice President.

i. SECRETARY/TREASURER. The Secretary/Treasurer shall have general supervision of the financial affairs of AIPAC, shall review periodic audits and financial reports, and shall perform all such functions as are incident to the office of the Secretary/Treasurer, and such other functions as may be assigned by the President.

4. EXECUTIVE COMMITTEE. Duties, number, selection and term of office.

a. DUTIES.

1) The Executive Committee shall act as an advisory body to AIPAC, shall participate in the work of the regions, and shall perform such functions as the President may, from time to time, direct.

2) The Executive Committee shall elect certain members of the Board of Directors as described in Section 2.c.3.

3) The Executive Committee shall approve the AIPAC Annual Policy Statement.

4) The President and the Executive Director of AIPAC shall report to the Executive Committee at every Executive Committee meeting as to the state of AIPAC and to any new AIPAC policy initiatives that have been taken or that are contemplated. The chairpersons of the Standing Committees of the Board of Directors shall report to the Executive Committee at least annually.

5) The Executive Committee may properly address those strategic issues relevant to the enhancement of the American Israel relationship. The Board of Directors shall give special consideration to those opinions enunciated.

6) After approval of amendments to these Bylaws by the Board of Directors in accordance with Section 10, said amendments must be submitted to the Executive Committee for approval by a majority of those present and voting, a quorum being present (Section 4.d.1), provided written notice of such meeting and the purpose of each such proposed amendment shall be been mailed to each member of the Executive Committee in accordance with Section 11.

b. NUMBER. The Executive Committee shall consist of the following.

1) The chief lay officer of each organization that is a member of the Conference of Presidents of Major American Jewish Organizations shall be invited to serve as a member of the Executive Committee. The chief lay officer of each such organization shall be permitted to designate (by giving written notice to AIPAC) a specifically named leader of the organization to attend an Executive Committee meeting in his or her absence with full participatory rights.

2) All members of the Board of Directors shall be members of the Executive Committee.

3) All State Chairpersons (as defined in Section 7) shall be members of the Executive Committee.

4) Up to four student members with full participatory rights may be appointed to the Executive Committee by the President.

5) Up to 300 additional Executive Committee members may be selected, half of whom shall be apportioned proportionately by regional memberships (regional nominees), and the other half of whom shall be elected by the Board of Directors (national nominees).

a) At least two Executive Committee members per region from the Young Leadership Group (as defined by each region) shall be included from each region's apportioned nominees.

b) All 300 additional members shall be first approved by the Nominating Committee.

c. SELECTION AND TERM OF OFFICE. All members of the Executive Committee referenced in Section 4.b.5) shall be nominated or approved by the Nominating Committee and shall be elected for a term of approximately one year (9-15 months).

1) The National Assembly shall elect by a majority vote the slate of Executive Committee members identified as regional nominees at the annual National Assembly meeting with the terms to commence on the first day of the first month following the Policy Conference and finish on the first day of the

first month following the next Policy Conference held approximately one year (9-15 months) later (Section 4.b.5).

2) The Board of Directors shall elect by a majority of those directors present and voting, those Executive Committee members identified as national nominees (Section 4.b.5). Such election shall take place at a Board of Directors meeting held at the annual National Assembly meeting with the term of the Executive Committee members thus elected to commence coincident with the term of regional nominees on the first day of the first month following the Policy Conference and finish on the first day of the first month following the next Policy Conference held approximately one year (9-15 months) later.

3) No member of the Executive Committee may serve for longer than five consecutive terms. Any member who has served five consecutive terms may be re-elected after one year's absence from the Executive Committee. In computing the five consecutive terms discussed in this provision, there shall not be included any term served on the Executive Committee by reason of the individual being either the chief lay officer of an organization that is a member of the Conference of Presidents of Major American Jewish Organizations or a Director of AIPAC.

4) Executive Committee members who are selected on a regional basis (regional nominees) shall be nominated by that region's nominating committee. Regional nominees are subject to the approval of the national

Nominating Committee at least 30 days in advance of the National Assembly meeting.

d. MEETINGS.

1) Regular Meetings. The Executive Committee shall meet at least three times a year. At each such meeting, the presence of at least 10% of the members shall constitute a quorum. At any meeting at which a quorum is present, the vote of a majority of those present and entitled to vote shall be adequate to decide any matter.

2) Special Meetings. Special meetings of the Executive Committee may be called at any time only by the Chairperson of the Board or the President.

COMMITTEES.

a. The President shall appoint all committee Chairpersons subject to the approval of the Board of Directors, and shall establish such ad hoc committees as may be necessary to carry out specific functions at AIPAC.

b. STEERING COMMITTEE. There shall be a standing committee called the Steering Committee, chaired by the President, which shall consist of the officers of AIPAC, the Chairperson of the Executive Committee, and the AIPAC Executive Director. At the call of the Chairperson of the Board or the President, the Steering Committee shall, in the event of exigent circumstances, meet in special session to take appropriate action until the Board of Directors can be convened for a duly authorized meeting.