**NEW YORK COUNTY CLERK'S INDEX No. 60247/04**

*To Be Argued By:*
*RICHARD WARE LEVITT*

# Supreme Court of the State of New York Appellate Division: First Department

WILLIAM A. GALISON,

*Plaintiff-Appellant,*

-against-

JEFFREY A. GREENBERG, ESQ., BELDOCK, LEVINE & HOFFMAN, LLP and MADELEINE PEYROUX,

*Defendants-Respondents,*

-and-

ROUNDER RECORDS,

*Defendant.*

## BRIEF FOR RESPONDENT MADELEINE PEYROUX

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## Preliminary Statement

Defendant-Respondent Madeleine Peyroux submits this brief in opposition to the brief of appellant William A. Galison, seeking to reverse the award of summary judgment dismissing his case entered by Justice Bernard J. Fried (R 6-14). Ms. Peyroux joins in and adopts the arguments set forth in the brief filed on behalf of co-respondents Jeffrey A. Greenberg, Esq. and Beldock, Levine & Hoffman, LLP to the extent not inconsistent with the arguments herein. This brief addresses, and answers in the affirmative, the following questions:

1. Whether summary judgment was properly granted because plaintiff's defamation claim is barred by respondents' qualified "common interest" privilege.

2. Whether, to the extent that appellant argues that Ms. Peyroux did not join in her codefendants summary judgment motion, the argument is belied by the record and, in any event, was not preserved.

## Statement of Facts

The facts of this case are fully set forth in the brief filed on behalf of co-respondents Greenberg and Beldock, Levine & Hoffman and we adopt those facts on behalf of Ms. Peyroux as if fully set forth herein. We repeat

here some of those facts for the Court's convenience, and supplement them with facts specific to appellant's claims regarding Ms. Peyroux.

The Greenberg letter of December 17, 2003 ("Greenberg Letter"), upon which appellant's claim was based, was written by Mr. Greenberg, Ms. Peyroux's counsel at that time, to appellant's then attorney, Steven Robinson, in response to Robinson's letter of December 3, 2003 ("Robinson Letter") setting forth appellant's position regarding his right to commercially exploit the recording Got You On My Mind ("GYOMM") beyond the agreement between Ms. Peyroux and appellant (R 366-67). Specifically, in response to the statement in the Robinson Letter that, "shortly after the Recording was completed, Ms. Peyroux stopped working with Mr. Galison and arranged for other musicians to perform with her in preference to him," thus undermining Galison's investment in GYOMM and justifying his position (R 366)[1], Mr. Greenberg wrote the following allegedly libelous statement:

> Over the course of this year, we have obtained, directly and from Ms. Peyroux, evidence of numerous incidents of *physically and verbally abusive behavior* by Mr. Galison against Ms. Peyroux. This behavior contributed in part to Ms. Peyroux's ultimate decision to discontinue her business relationship with Mr. Galison in mid-2003. Thereafter Mr. Galison made numerous libelous and slanderous statements about Ms. Peyroux to her business

[1] Numbers in parentheses preceded by "R" refer to the Record on Appeal.

> colleagues and representatives (R 373). [emphasis supplied].

In her Interrogatory responses in this case, Ms. Peyroux set forth the specific incidents that, in part, informed Mr. Greenberg's statement regarding Galison's "physically and verbally abusive behavior." They are as follows:

> In or about summer 2003, Galison, in response to Peyroux's making a change to a guitar chord he had written for her, shouted at Peyroux in anger, and while standing in proximity to Peyroux, raised a guitar over his head and said he was "going to smash the guitar;"
>
> On or about July 13, 2003, while driving on I-95 in Connecticut, Galison, in response to Peyroux's statement that she did not concur with his suggestion that she sing a certain song in an upcoming show, became agitated, told Peyroux that he was going to "kill both of us" and began driving the car in an erratic fashion that caused Peyroux to fear that Galison intended to crash their vehicle into an exit sign. Galison then stopped the vehicle at the exit sign, jumped out of the car, ran across the highway and flagged down traffic. Peyroux drove the car to the side of the road. Galison returned to the car and began shouting at Peyroux. Police officers arrived shortly afterwards;
>
> On or about January 2003, while driving in Manhattan, Galison became agitated, expressed his anger at Peyroux, and ripped the rear view mirror apparatus from the windshield of Peyroux's vehicle. These actions caused Peyroux to fear that Galison intended to harm her or to further interfere with her driving in a manner that would harm them both;

> On numerous occasions subsequent to October 2002, Galison verbally abused Peyroux in person and via the telephone;
>
> On numerous occasions subsequent to July 2003, Galison made phone calls and sent emails to Peyroux's family, friends and business associates in which he complained about Peyroux and which caused her to feel harassed and intimidated (R 274-75).

Ms. Peyroux's Deposition Testimony

With respect to the Jury 13, 2003 incident above, Ms. Peyroux testified in her August 30, 2005 deposition that she and Galison were driving to a party Connecticut at which they were to perform when they got into an argument about her repertoire. After Ms. Peyroux rejected Galison's suggestions about what songs they should perform, Galison "exploded" and "went into a state of rage" (R. 257). Galison started to speed up the car, pointing it at an exit sign on the highway and stating, "I'm going to kill us both." He continued to accelerate, finally slamming on the brakes when he got to the sign (R 258). A driver of another car witnessed the incident and called the police, who investigated the situation (R 151).

Asked at her August 30, 2005 deposition whether she considered the January 2003 rear view window incident to be "physical abuse," Ms. Peyroux responded that she would consider it "a threatening form of

behavior," but that "whether or not it can be defined as physical abuse is not up to me" (R 247).

Ms. Peyroux was asked at her September 29, 2005 deposition whether the summer 2003 "guitar incident" was physical abuse. As is apparent from the following excerpts of that deposition, Ms. Peyroux's response was essentially the same; that appellant's behavior was threatening and abusive with a physical element, but that, as a layperson, she could not say whether it constituted physical abuse:

> Q: Were you facing each other when he picked up the guitar and held it over his head?
>
> A: Yes.
>
> Q: So if he had brought the guitar down, was he facing the way that it would hit you?
>
> A: He could have hit me at that time.
>
> Q: Did you think that that was about to happen?
>
> A: I didn't know what he was going to do with the guitar when he raised it over his head (SR 358-65)[2].
>
> *********
>
> Q: Now, this description occurs in response to a [interrogatory] question about times when you were

[2] Numbers in parentheses preceded by "SR" refer to the Supplemental Record on Appeal filed with this brief. The parties have Stipulated to enlarge the record to include this Supplemental Record which consists of the transcripts of the August 30, 2005 and September 29, 2005 depositions of Madeleine Peyroux.

physically and verbally abused by Mr. Galison. So this incident, letter A, is it a physical abuse, is it a verbal abuse or is it something else?

[COUNSEL FOR PEYROUX]: I'm going to object, because Ms. Peyroux's not a lawyer. We've discussed about definitions of abuse. You can ask her how she felt at the time and what she was thinking but - -

[COUNSEL FOR GALISON]: No. This … is Ms. Peyroux's answer defining times when she says that she was verbally abused or physically abused. Now, those are her words, not mine.

A: That's not true. I've never said I was physically abused by Mr. Galison. And that's something we went over last time, and I answered the same way.

I remember specifically that I was verbally abused. But whether or not I was physically abused is a totally different issue, because it is very vague what that stands for.

I know that I was - - that there was a lot of abusive behavior. I know that this is abusive. But whether or not you want to talk about legal terms and whether what - - if that's physical abuse for somebody to threaten you.

I certainly know that I was being threatened when he raised his guitar over his head. I know that that was a threat.

Whether or not he wanted me to believe that he was going to hit me or he just wanted me to think about him raising his guitar over his head in order to create, you know, a dynamic between us at that time, or whether or not he was not directing it at me.

He was in direct, you know, relation with me during that incident. So it affects me, you know.

It might be that he's venting and all that stuff. But it doesn't make it any easier for me to be on - - to be in that situation and to be dealing with that at that time.

It – and, yeah, it's abusive in that way, in that sense, that it's threatening.

You know, he did not ever physically attack me, you know. So does that mean – is there a way to define physical abuse in that regard? I don't even think it's an issue for me.

I know what happened. I know the dynamic between us in our relationship as a result of what happened. And I don't - - you know, I don't intend to define what's physically abusive for you.

I mean, you guys are lawyers….

Asked again if the guitar incident was verbal abuse or physical abuse, Ms. Peyroux responded:

It was a threat. It was a threat of physical - - of violence. It was a threat of violence. If that's called physical abuse by law, then it's physical abuse. But I'm not making any claim as to the legal definition of physical abuse. I'm just saying it was a violent threat. It was an act of violence. You know, it was a threat.

Asked whether it was a "verbal threat," Ms. Peyroux responded:

To raise his guitar over his head, it wasn't verbal because verbal abuse is - - is verbal. He was raising - - it was an act. It was a physical act of threatening someone (SR 358-65).

* * * * * *

In August 2003, as a result of appellant's abusive, erratic behavior that led her to believe he was "out of control," Ms. Peyroux decided that she could no longer work with him and told him not to appear at the Tin Angel gig.

Argument

Point One

SUMMARY JUDGMENT WAS PROPERLY GRANTED BECAUSE APPELLANT'S DEFAMATION CLAIM IS BARRED BY THE RESPONDENTS' QUALIFIED "COMMON INTEREST" PRIVILEGE AND APPELLANT FAILED TO MEET HIS BURDEN OF ESTABLISHING THAT THE RESPONDENTS ACTED WITH MALICE.[3]

Appellant does not appear to dispute that the letter on which appellant's claim is based was sent only to those with a common interest in its contents - - Ms. Peyroux, her agent and an attorney for Rounder Records who was directly involved in the matter. He argues principally that the common interest privilege is overcome because the statements at issue were made with malice (Appellant's Br. at 21-24). However appellant failed to establish that the statements at issue were made with malice, either constitutional or common law; he proved neither that Ms. Peyroux made

[3] We fully adopt the arguments set forth in co-respondents' brief, including Point I of that brief, but herein supplement that argument with respect to Ms. Peyroux.

statements with a high degree of awareness of their probable falsity nor that she made them out of spite or ill-will. Further, no reasonable jury could conclude that malice was the sole cause for the publication of the statements. Accordingly, there was no triable issue of fact and summary judgment was properly granted.

The governing law has been fully set forth in the brief on behalf of Ms. Peyroux's co-respondents. We reiterate the basic precepts here for the Court's convenience.

A conditional privilege extends to a "communication made by one person to another upon a subject in which both have an interest." Liberman v. Gelstein, 80 N.Y.2d 429, 437, 590 N.Y.S.2d 857 (1992) (court quoting Stillman v. Ford, 22 N.Y.2d 48, 53, 290 N.Y.S.2d 893(1968). "Once a qualified privilege is shown to exist, the burden of proof shifts to the plaintiff to offer evidentiary facts to establish that the communication was made in bad faith and was motivated solely by malice." Paskiewicz v. NAACP, 216 A.D.2d 550, 551, 628 N.Y.S.2d 405 (2d Dept. 1995) (court citing Liberman, supra, 80 NY2d 429; Kamerman v Kolt, 210 AD2d 454, 621 N.Y.S.2d 97 (2d Dept. 1994); Santavicca v City of Yonkers, 132 A.D.2d 656, 518 N.Y.S.2d 29 (2d Dept. 1987). Under the "constitutional malice standard," the plaintiff must demonstrate that the "statements [were]

made with [a] high degree of awareness of their probable falsity." Garrison v. Louisiana, 379 U.S. 64, 74, 85 S.Ct. 209 (1964). "In other words, there 'must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of [the] publication.'" Liberman, supra, 80 N.Y.2d at 438 (court quoting St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323 (1968); see also, Restatement § 600, comment b).

Common law malice is shown by demonstrating that the defendant was motivated in publishing the statement solely by spite or ill-will against the plaintiff. " Liberman, supra, 80 N.Y.2d at 439. Malice must be shown by "clear and convincing evidence." See Haywood v. University of Rochester, 209 A.D.2d 1021, 619 N.Y.S.2d 443 (4th Dept. 1994). Further, a triable issue is raised only if a jury could reasonably conclude that "malice was the one and only cause or the publication." Stukuls v. State of New York, 42 N.Y.2d 282, 397 N.Y.S.2d 740 (1977). Mere "conclusory allegations" of malice, or charges based upon surmise, conjecture, and suspicion are insufficient to defeat the claim of qualified privilege. Trachtman v. Empire Blue Cross and Blue Shield, 251 A.D.2d 322, 322-23, 673 N.Y.S.2d 726 (2d Dept. 1998); Roth v. Beth Israel Medical Center, 180 A.D.2d 434, 435 , 579 N.Y.S.2d 373 (1st Dept. 1992).

Ms. Peyroux certainly told Mr. Greenberg of incidents and behavior by appellant that were abusive and, ultimately, caused her to fire him from the Tin Angel gig, but she did not write the Greenberg letter and did not personally characterize the incidents as physically abusive. Indeed, as Ms. Peyroux indicated in her responses to questions at her deposition, she did not know whether these incidents, some of which involved what she perceived as a physical threat, "legally" constituted physically abusive behavior, but she had no reason to doubt that her attorneys did. Certainly some of the incidents described by Ms. Peyroux in her Interrogatory responses, particularly the guitar incident, the July 13th "kill us both" incident and the rear view mirror incident had elements of physical threat. Ms. Peyroux's uncertainty about whether appellant's conduct could be termed physically abusive in a legal sense is a "far cry" from being "highly aware" that the statement in the letter was "probably false." Liberman, supra, 80 N.Y.2d at 438 ("there is a critical difference between not knowing whether something is true and being highly aware that it is probably false."); Harris v. Hirsh, 228 A.D.2d 206, 207, 643 N.Y.S.2d 556 (1st Dept. 1996) ("simply not knowing whether something is true does not constitute actual malice") (court quoting, Stukuls v. State of New York, supra, 42 N.Y.2d at 282.

Appellant's statement that "Ms. Peyroux asserted that she has never told anyone that Galison physically abused her and that, in fact, he never did so," (Appellant's Br. at 23) was clearly taken out of context, and in its proper context, as discussed above, does not support his claim that Ms. Peyroux was aware that the Greenberg Letter was probably false.

Nor did appellant establish that Ms. Peyroux acted solely out of spite or ill-will in order to defame appellant. Appellant himself alleges that Ms. Peyroux made the statements out of her own self-interest in avoiding the cancellation of her contract with Rounder Records which, even if accepted as true, defeats his claim that she acted solely out of ill will (Appellant's Br. at 13, 16). Stukuls, supra, 42 N.Y.2d at 282. It is virtually beyond dispute, however, that the Greenberg Letter was produced in direct response to the Robinson Letter, and that the challenged passage was directly in response to the claim that Galison had a right to commercially exploit GYOMM, beyond selling it at Peyroux/Galison concerts, because Ms. Peyroux had arbitrarily decided not to perform with him. The reasons for Ms. Peyroux's decision not to perform with Galison were, thus, directly relevant to the issues being addressed in the letter and cannot be said to have been made out of ill will or spite.

Moreover, the letter was published only to the interested parties. Had Ms. Peyroux been motivated by spite or ill-will in order to defame appellant and damage his reputation she could easily have published the statements widely. See Liberman, supra, 80 N.Y.2d at 439 (defendant "did not make a public announcement of his suspicions- from which an inference could be drawn that his motive was to defame," but relayed them only to person with common interest). Ironically, it was appellant himself who was responsible for the widespread publication of the contents of the letter via every possible media source, including the Internet, which, for the reasons set forth in Point III of co-respondents' brief, also made him a "limited purpose public figure, requiring dismissal of his claim on that basis as well (see Co-respondents' Br. at 41).

Appellant cites Maule v. NYM Corp, 54 N.Y.2d 880, 444 N.Y.S.2d 909 (1981) for the broad proposition that the issue of malice must be determined by a jury or other fact finder (Appellant's brief at 22). By this reasoning, summary judgment could never be granted where the court finds that the defendants have a qualified privilege. This is not the holding of Maule, which did not involve a summary judgment motion, and is contradicted by numerous other cases, including at least one (Paskiewicz) cited by appellant in his brief (Appellant's Br. at 21), in which the courts

have affirmed dismissals on summary judgment on the very grounds the lower court did here. Paskiewicz, supra, 216 A.D.2d 550 (defendant's summary judgment motion should have been granted where plaintiff failed to present sufficient proof to sustain his burden of establishing that the defendant acted with malice and had not demonstrated how further discovery might reveal the existence of material facts in the control of the defendants that would warrant denial of summary judgment).

In fact, "summary judgment is particularly favored by New York courts in libel cases," Khan v. New York Times Co., Inc. 269 A.D.2d 74, 77-78, 710 N.Y.S.2d 41 (1st Dept. 2000), and when, as here, a plaintiff has failed to sustain his burden to show actual malice, the courts have not hesitated to grant summary judgment to the defendant. See e.g. Liberman, supra, 80 N.Y.2d 429 (court found "no triable malice issue," where appellant had failed to establish common law malice or that defendants were highly aware statement was probably false); Hutchinson v. Zurich Scudder Investments, Inc, 7 A.D.3d 329, 776 N.Y.S.2d 270 (1st Dept. 2004) (summary judgment granted, no issues of fact exist as to whether the statements were protected by the common interest privilege or uttered with malice); Sieger v. Union of Orthodox Rabbis of U.S. and Canada Inc., 1 A.D.3d 180, 767 N.Y.S.2d 78 (1st Dept. 2003) (summary judgment granted

because plaintiff has failed to demonstrate that the statements were made with malice); Priovolos v. St. Barnabas Hosp., 1 A.D.3d 126, 766 N.Y.S.2d 435 (1st Dept. 2003) (summary judgment granted since statements in the termination memorandum protected by the qualified common interest privilege); Present v. Avon Products, 253 A.D.2d 183, 687 N.Y.S.2d 330 (1st Dept. 1999) (summary judgment granted); Moore v. Dormin, 252 A.D.2d 421, 676 N.Y.S.2d 90 (1st Dept. 1998)(grant of summary judgment affirmed in joint interest case); Frazier v. Society of Stage Directors and Choreographers, Inc., 244 A.D.2d 192, 664 N.Y.S.2d 13 (1st Dept. 1997) (summary judgment granted where communication to subscribers involved in the industry was reasonable and appropriate under the circumstances and plaintiffs failed to raise an issue of fact with regard to malice); Shapiro v. Health Ins. Plan of Greater New York, 7 N.Y.2d 56, 194 N.Y.S.2d 509 (1959) (defendants entitled to summary judgment absent a showing of actual malice).

Since, for the reasons set forth above, plaintiff failed to satisfy his burden of establishing malice, and for the reasons set forth in co-respondents' brief, plaintiff has not shown that further discovery would lead to evidence of malice (Co-respondents' Br. at 51), summary judgment was properly granted.

## Point Two

## TO THE EXTENT THAT APPELLANT ARGUES THAT MS. PEYROUX DID NOT JOIN IN HER CODEFENDANTS' SUMMARY JUDGMENT MOTION, THE ARGUMENT IS BELIED BY THE RECORD AND, IN ANY EVENT WAS NOT PRESERVED

Appellant suggests in his brief that Ms. Peyroux did not join in her co-defendants' summary judgment motion (Appellant's Brief at 7). His assertion is simply belied by the record; Ms. Peyroux explicitly adopted codefendants' summary judgment motion without any objection from appellant. To the extent that appellant seeks to raise this issue in this appeal,[4] he is precluded from doing because he failed to raise it in the lower court and the issue is, thus, unpreserved.

In his October 30, 2006 Reply Affirmation, Richard Levitt ("Levitt Affirmation"), counsel for Ms. Peyroux, stated in no uncertain terms that Ms. Peyroux joined in the summary judgment motion that had been filed by her codefendants. The Levitt Affirmation stated the following:

> 1. I represent Madeleine Peyroux in the above-captioned case and submit this Reply Affirmation in

[4] Appellant does not include this issue among his questions presented for this Court's review and, therefore, presumably has abandoned the issue. Appellant states in his brief, however, that Ms. Peyroux "… requested that she be allowed to piggy-back onto the decision [granting summary judgment] based solely on the reply affirmation filed by Mr. Levitt on her behalf – she had made no effort to join in the affirmative motion of the Lawyers" (Appellant's Brief at 7). In light of this statement, we are compelled to address this matter to dispel any question that Ms. Peyroux joined in the summary judgment motion that is the subject of this appeal.

> further support of Ms. Peyroux's Motion For Summary Judgment.
>
> 2. In support of this Motion and Reply, I respectfully adopt the papers filed by counsel for Ms. Peyroux's codefendants.
>
> 3. Additionally, in support of this Motion, undersigned counsel annexes an Affidavit of Ms. Peyroux. Ms. Peyroux is presently out of town on tour and therefore has not yet been able to sign her affidavit before notary and return to the undersigned. I spoke and corresponded with Ms. Peyroux, however, on October 30, 2006 and she informed me that she approves the attached affidavit and will execute same before a notary as soon as practicable; the undersigned will then provide a signed copy to the court. (R 956-57).[5]

Appellant did not oppose Ms. Peyroux's adoption of her codefendants' summary judgment motion. On the contrary, his only response was to complain in his February and March 2007 letters to the court that Ms. Peyroux had not yet signed the Affidavit annexed to the Levitt Affirmation, and to dispute the contents of her unsigned Affidavit (R 952-54).[6]

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[5] It should be noted that Ms. Peyroux had retained Mr. Levitt in October 2006. Predecessor counsel, Frankfurt, Kurnit, Klein & Selz, PC., had also adopted codefendants' summary judgment motion on behalf of Ms. Peyroux. In the July 2006 Affirmation of firm associate Edward Hernstadt. Esq. that was filed as part of an unrelated motion, he stated that should the court dismiss the complaint against codefendants, it should also be dismissed as to Ms. Peyroux for the same reasons set forth in co-defendants' motion papers.

[6] Ms. Peyroux's executed Affidavit was subsequently filed on or about March 17, 2007 (R 949-50).

"The doctrine of preservation mandates that an issue is preserved for appellate review, and thus available as a basis for reversal or modification of an order or judgment, only if it was first raised in the nisi prius court." Sam v. Town of Rotterdam, 248 A.D.2d 850, 670 N.Y.S.2d 62 (3d Dept. 1998) (court quoting 1 Newman, N.Y. Appellate Practice § 2.02, at 2-4). By not objecting to Ms. Peyroux's adoption of her codefendants' summary judgment motion and by, moreover, addressing the actual contents of Ms. Peyroux's Affidavit in support of her summary judgment motion, appellant waived any argument that Ms. Peyroux did not properly join in the motion. Sam, Id. at 851-52 85; Fifth Avenue 4th Floor, LLC v. I.A. Selig, LLC, 45 A.D.3d 349, 845 N.Y.S.2d 274 (1st Dept 2007)(issue raised for first time on appeal waived); In Re Morgan Carol-Ann F., 44 A.D.3d 337, 841 N.Y.S.2d 874 (1st Dept. 2007); Firth v. State, 98 N.Y.2d 365, 372, 747 N.Y.S.2d 69 (2002); 676 R.S.D. Inc. v. Scandia Realty, 195 A.D.2d 387, 600 N.Y.S.2d 678 (1st Dept. 1993); Santiago v. Rodriguez, 38 A.D.3d 639, 832 N.Y.S.2d 589 (2d Dept. 2007).

Appellant again failed to make any objection when Ms. Peyroux moved to amend the court's Order granting summary judgment. In that April 4, 2007 letter motion, (referred to by appellant at page 6 of his brief), counsel reminded the court that Ms. Peyroux had adopted codefendants'

summary judgment motion, and that, in fact, the bases for the court's grant of summary judgment applied to Ms. Peyroux as well (R 955). Appellant did not respond in writing, nor did he make any objection when explicitly invited to do so at a subsequent proceeding before Judge Fried. Indeed, in granting Ms. Peyroux's motion and amending its Order dismissing the complaint to include Ms. Peyroux, the court specifically noted the lack of opposition by appellant (R 20).

Thus, to the extent that appellant argues on appeal that Ms. Peyroux should not have been granted summary judgment because she did not properly join in her codefendants' motion, his claim is completely belied by the record. Moreover, since appellant failed to raise this issue below he thereby waived it and is foreclosed from raising this issue on appeal. Sam, supra. 248 A.D.2d 850; Fifth Avenue 4th Floor, LLC, supra, 45 A.D.3d 34; In Re Morgan Carol-Ann F., supra, 44 A.D.3d 337; Firth, supra, 98 N.Y.2d 365 (2002); 676 R.S.D. Inc., supra, 195 A.D.2d 387.

## Point Three

## MS. PEYROUX JOINS IN THE ARGUMENTS ADVANCED BY CO-RESPONDENTS IN THEIR BRIEF

We are aware that co-respondents Greenberg and Beldock, Levine and Hoffman LLP are filing a responsive brief in this appeal and we join in and adopt the arguments they advance to the extent not inconsistent with the positions advanced herein.

## Conclusion

For the foregoing reasons, and those set forth in the brief filed on behalf of co- respondents Greenberg and Beldock, Levine & Hoffman LLP, the decision of the lower court granting defendants summary judgment should be affirmed.

Dated: New York, New York
March 18, 2008

Respectfully submitted,

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