SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------x

Bibliotechnical Athenaeum,
Plaintiff,

-against- Index No.: 653668/2016

National Lawyers Guild, Inc., &
The National Lawyers Guild
Foundation, Inc.,

Defendants.
----------x

**DEFENDANT NATIONAL LAWYERS GUILD'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S SUMMARY JUDGMENT MOTION**

Defendant National Lawyers Guild (the "Guild") submits this Memorandum of Law in opposition to Plaintiff Bibliotechnical Athenaeum's motion for summary judgment.

## PRELIMINARY STATEMENT

There is no basis for granting summary judgment on Plaintiff's claims under the New York State and City Human Rights Laws, as Plaintiff's motion is based on a misunderstanding of the law, unsupported legal conclusions and most importantly, facts which are in dispute. It is well-settled First Amendment jurisprudence that publications like the Guild's Dinner Journal may reject advertisements on the basis of political viewpoint. Plaintiff's Motion does not dispute that the Dinner Journal is a publication deserving of First Amendment protection.

However, there are also significant disputed fact issues:

- Whether Guild employee Moro correctly expressed Guild policy when rejecting the ad (she did not).
- Whether the Guild, the Annual Banquet or the Dinner Journal are "public accommodations" (they are not).

- Whether the Guild "refused to sell advertisement space to Plaintiff because of Plaintiff's Israeli national origin and citizenship" (it did not).

Plaintiff has filed this motion before discovery has commenced, preventing Defendant from discovering key information with respect to Plaintiff's identity.

The moving party on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact", *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *Zuckerman v City of New York*, 49 NY2d 557 (1980). The court's role on a motion for summary judgment is issue finding, not issue determination, *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied, *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978).

## ARGUMENT

### Point One

### SUMMARY JUDGMENT SHOULD BE DENIED ON FIRST AMENDMENT GROUNDS

As a threshold matter, Plaintiff does not dispute that the Guild's Dinner Journal is a publication that engages in expressive conduct requiring editorial decisionmaking. First Amendment jurisprudence is crystal clear that publications are free to reject content, including advertisements with which they disagree. The lead case is *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), in which the Supreme Court invalidated a Florida right-of-reply law, holding that "the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment"; *see also Resident Participation of Denver, Inc. v. Love,* 322 F. Supp.

1100 (District of Colorado 1971) (newspapers declined activist group's ads opposing a meat processing plant); *United Food & Commercial Workers Local 919, etc. v. Ottaway Newspapers, Inc.*, 1991 U.S. Dist. LEXIS 20844 ( District of Connecticut 1991) (District Court, following *Tornillo,* dismissed a union's claim that a newspaper was legally required to publish its ad); *Morrow v. USA Today Newspaper,* 1988 U.S. Dist. LEXIS 4368 (Southern District of New York 1988)(refusal to run prisoner's classified ad); *Leeds v. Meltz,* 85 F.3d 51 (2d Circuit 1996) (student newspaper declined alumnus's controversial advertisement).

New York common law is in accord. In *Poughkeepsie Buying Service, Inc. v. Poughkeepsie Newspapers, Inc*., 205 Misc. 982 (Supreme Court Orange County 1954), plaintiff claimed that defendant's virtual monopoly as the sole Poughkeepsie newspaper caused irreparable harm when it declined to print plaintiff's advertisements. The court ruled: "it has been generally held that the publication and distribution of newspapers is a private business and that newspaper publishers lawfully conducting their business have the right to determine the policy they will pursue therein and the persons with whom they will deal". In *Camp-of-the-Pines, Inc. v. New York Times Co.*, 184 Misc. 389 (Supreme Court Albany County 1945), the Court vindicated the *New York Times'* refusal to accept advertising for the plaintiff's vacation resort, finding that "the law is definite and certain" as to "the rights of a publisher of a newspaper to sell its product to whomever it pleases and to refrain from selling to those it deems undesirable". For similar cases from other common law jurisdictions, see H. Wayne Judge, "Business Tort: Newspaper's Refusal to Accept Advertising," *Boston College Law Review* Vol. 3, Issue 3 (1962), http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2672&context=bclr,.

In 2016, a well-known web-based publication, *Buzzfeed,* announced its refusal to accept any Republican- or Donald Trump-related advertising, stating that "We don't run cigarette ads because they are hazardous to our health, and we won't accept Trump ads for the exact same reason,", Ryan

Grenoble, "BuzzFeed Refuses To Run Trump Ads, Backs Out Of Agreement With RNC", The Huffington Post, June 16, 2016 http://www.huffingtonpost.com/entry/buzzfeed-donald-trump-republican-ads_us_57558b62e4b0ed593f14e63b. In another instance, Google announced it would no longer carry pay day loan advertising, Hillary Miller, "Who Are the Winners and Losers Following Google's Refusal to Carry Payday-Loan Advertising?", *Medium.com* May 12, 2016 https://medium.com/@hilarybmiller/who-are-the-winners-and-losers-following-googles-refusal-to-carry-payday-loan-advertising-57e433364642#.9vbnkiyny

The Guild's long-standing opposition to illegal Israeli settlement activity "is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments. [T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process...[B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost", *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886 (1982) (quotes and citations omitted). In any event, even supposing the Guild's views were somehow politically or morally "incorrect", they would still fall squarely within the Supreme Court's ruling in *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992), in which the Court held that "The First Amendment does not permit [the government] to impose special prohibitions on those speakers who express views on disfavored subjects".

This Court has previously questioned whether *Tornillo*, which involved a "traditional newspaper", is applicable to the Dinner Journal, and thus whether the Dinner Journal is deserving of First Amendment coverage. The First Amendment and *Tornillo* absolutely apply to the Dinner Journal. As a threshold matter, organizational publications such as printed programs and yearbooks clearly fall within the ambit of the First Amendment, *R.I. Affiliate v. Begin,* 431 F. Supp. 2d 227 (District of Rhode Island 2006); *Douglass v. Londonderry Sch. Bd.,* 372 F. Supp. 2D 203 (District of New Hampshire 2005).

A review of the Dinner Journal, which is attached as Exhibit A to Plaintiff's motion for summary judgment, clearly confirms that it is a First Amendment-protected work full of assertions of political opinion. For example, the cover image depicts a 1982 photograph of Guild members marching for nuclear disarmament under a banner, which states, in all capital letters, "NATIONAL LAWYERS GUILD DEMANDS DISARMAMENT". The next page describes the dinner as "an evening of celebration, to savor reflection with *like-minded legal activists* and recommit to the work of justice" (Emphasis added). A Google search on "National Lawyers Guild like-minded" turns up numerous other contexts, on its web site and elsewhere, in which the Guild has used this phrase to describe itself.

The Dinner Journal, describing honoree Soffiyah Elijah, expresses an opinion critical of the US government's response to Hurricane Katrina, its bomb-testing in Vieques, Puerto Rico, and prison conditions. Other assertions of political opinion include language honoring attorney Michael Deutsch for defending Black Panthers, Palestinian community organizers and recently-deported Chicago activist Rasmea Odeh, which the journal describes as a "former Palestinian political prisoner and torture survivor." The Dinner Journal also expresses the political belief that "unjust racist and sexist police and prosecutorial practices … result in mass incarceration and the literal disenfranchisement of huge segments of our population." Language honoring attorney Audrey Bomse expresses the political view that nation-states should not torture, that Israel's attack on a humanitarian flotilla to Gaza was an unlawful "naval assault," and that Egyptian human rights movements should be supported.

Many of the ads in the Journal contain political content as well. For example, an ad congratulating honoree Michael Deutsch says he has fought for "the self-determination of the....Palestinian Peoples and their political prisoners....and many other freedom fighters and targets of racist and political repression". An ad congratulating Audrey Bomse is placed by the "Free Gaza Movement Board" – which advances the viewpoint that the Gaza Strip is not free, and is deserving of freedom. The Arab American Action Network ad congratulates honoree Deutsch for "incredible work defending the rights of Palestinians in Chicago".

**T**his Court's March 30, 2017 ruling on the Defendants' first motion to dismiss appears to misapprehend the scope of the First Amendment as applied to the facts of this case. The Court stated in its Decision and Order of March 30, 2017 that "alleged discrimination....is not protected by the First Amendment". This is not a correct statement of the law. *R.A.V. v. City of St. Paul, supra,* is completely clear that even discriminatory and hateful speech is protected, and that any other result would permit government to outlaw certain disfavored ideas. The Court found it unacceptable that the City of St. Paul had outlawed only "fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas."

The Court in incorrectly stating a First Amendment exception for discriminatory speech relies on two cases, neither of which support that proposition. *Cyntje v. Daily News,* 551 F. Supp. 403 (D. V.I. 1982) holds that the plaintiff could not compel the defendant newspaper to accept an advertisement. Given that holding, the statement, in passing, that the refusal to publish the ad was "not the result of racial discrimination" was mere dicta. Of more significance, but still inapplicable, is *Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations,* 413 U.S. 376 (1973), which also did not compel a newspaper to accept an unwelcome ad; instead it mandated that the paper could no longer, pursuant to a local ordinance, list the employment ads it had already determined to accept, by gender. The 5-4 majority was careful to limit the holding in a way which clearly underlines its irrelevance here: "We hold only that the Commission's modified order, narrowly drawn to prohibit placement in sex-designated columns of advertisements for nonexempt job opportunities, does not infringe the First Amendment rights of Pittsburgh Press".

*Pittsburgh Press Co.* stressed that the advertisements involved were generic, innocuous "commercial speech" and did not involve the expression of opinions: "None expresses a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other

sex, nor does any of them criticize the Ordinance or the Commission's enforcement practices. Each is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech". By contrast, the Plaintiff's proposed ad was controversial, and not mere commercial speech, because it communicated that Gush Etzion is part of Israel. *Miami Herald v. Tornillo, supra,* decided the following year, actually took pains to distinguish *Pittsburgh Press*: "Recently, while approving a bar against employment advertising specifying 'male' or 'female' preference, the Court's opinion in *Pittsburgh Press Co. v. Human Relations Comm'n,....* took pains to limit its holding within narrow bounds". The Supreme Court even cited favorably two of the dissenters in *Pittsburgh Press,* Justices Stewart and Douglas, who said that no "government agency -- local, state, or federal -- can tell a newspaper in advance what it can print and what it cannot."

This Court's citation of *Pruneyard Shopping Center v. Robins,* 447 US 74 (1980), in footnote #3, p. 7, of its March 30, 2017 decision, was inapposite. *Pruneyard,* a private shopping mall case, simply has no applicability to the facts of the present case. The holding, that the private owners of a shopping mall were compelled to tolerate leafleting, contradicts the bulk of Supreme Court jurisprudence on the same topic, *Lloyd Corp. v. Tanner,* 407 U.S. 551 (1972) ("We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights"); and *Hudgens v. NLRB*, 424 U.S. 507 (1975) (labor union did not have First Amendment right to picket in private mall). *Pruneyard* narrowly held that the California constitution could extend a right of free speech greater than that granted by the First Amendment—but the New York Court of Appeals expressly decided *not* to extend the *Pruneyard* rationale to New York shopping malls, *SHAD Alliance v. Smith Haven Mall,* 66 N.Y.2d 496 (1985). Other New York cases holding there is no right of free speech in private malls include *Downs v Town of Guilderland,* 70 A.D.3d 1228 (3rd Dept. 2010), *appeal dismissed,* 15 N.Y.3d 742 (2010); and *Kings Mall, LLC v. Wenk*, 42 A.D.3d 623 (3rd Dept. 2007) (preliminary injunction

granted against protests in mall); *Bruno v. Pembrook Management,* 212 A.D.2d 314 (2nd Dept. 1995) (mall could terminate lease of tenant wishing to display Nativity scene) ("The Human Rights Law is not a statutory basis for extending constitutional proscriptions against the infringement of free speech and the free exercise of religion to the private sector"); *see also Rodriguez v. Winski,* 973 F. Supp. 2D 411 (SDNY 2013), rejecting the applicability of the First Amendment in a private park ("The Supreme Court has rejected the notion that privately owned space lose[s] its private character merely because the public is generally invited to use it for designated purposes. Indeed, the Court has expressly retracted its erstwhile amenability to applying First Amendment protections to privately owned space" (cites and quotes omitted)). Finally and most emphatically, *Pruneyard* is a *non sequitur* to the present litigation because its plaintiffs were asserting free speech rights. Plaintiff in this action is not asserting any such rights.

The First Amendment generally protects us from being forced to utter messages in which we do not believe, *West Virginia Bd. of Ed. v.Barnette*, 319 U.S. 624 (1943), or to be compelled to use our own property to convey such messages, *Wooley v. Maynard,* 430 U.S. 705 (1977). Set against this background, the proposed ad submitted by Plaintiff, expressed its own political message repugnant to the views of the Guild – the notion that the West Bank is part of Israel.

As is clearly established by the Dinner Journal and the Gehi Affidavit, the controversy underlying this action is wholly a First Amendment battle of voices within the entirety of American society, of anti- and pro-settlement opinions, in which Plaintiff is asking this Court to assure that the national pro-settlement side wins the debate, not because it prevails in the free marketplace of ideas, but by getting this Court to place its thumb in the balance, by policing content-based political expression. In fact, Plaintiff, by seeking to chill the Guild's First Amendment protected speech, is asking this Court to carve out an exception to First Amendment protection, for speech opposing Israeli government settlement policy, and to define that speech as a disfavored category, imposing an

illegitimate content-based discrimination. The government is not permitted to single out categories of speech as "more deserving of First Amendment protection" than others, *Carey v. Brown*, 447 U.S. 455 (1980). "[T]he government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace", *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.,* 502 U.S. 105 (1991).

The mission statement of Plaintiff's counsel, The Lawfare Project, makes abundantly clear both the nature of the underlying debate, and the Plaintiff's use of litigation as a tactic for winning it. Lawfare defines its unusual name as follows: "Through its Legal Fund, the LP facilitates and finances offensive and defensive counter-lawfare actions regarding *pressing issues*". https://thelawfareproject.org/mission-2/ (Emphasis added.) By describing itself with these words, Lawfare in effect acknowledges that it is attempting to influence *the outcome of a debate.*

Lawfare indisputably has a First Amendment right to express its opinion in favor of Israeli settlement policy in Gush Etzion and elsewhere. But so does the Guild have an equivalent right to take a stand against illegal settlements. By bringing this lawsuit, The Lawfare Project is, sad to say, committing an act of "lawfare" itself, asking this Court to place its "thumb on the scales of the marketplace of ideas in order to influence conduct". *IMS Health Inc. v. Sorrell,* 630 F.3d 263 (2d Circuit 2010), *affirmed* 564 U.S. 552 (2011).

**Point Two**

**NEITHER THE DINNER JOURNAL, NOR THE DINNER ITSELF, CONSTITUTE "PUBLIC ACCOMODATIONS" WITHIN THE DEFINITION OF THE NEW YORK STATE AND NEW YORK CITY HUMAN RIGHTS LAWS**

Plaintiff states in its Amended Complaint that Defendants' dinner event constitutes a "public accommodation"--but a review of the statutes and case law Plaintiff cites, make clear that as a matter of law, it cannot establish the basic premise required to sustain that burden.

"The National Lawyers Guild is a progressive bar association committed to advancing civil

rights and civil liberties, and it provides representation for persons who voice dissent from governmental policies", *Cohen v. City of New York*, 255 F.R.D. 110 (Southern District of New York 2008). As such, it is inherently a private organization, and by no stretch of the imagination are its meetings, conferences or dinners "public accommodations" within the meaning of New York law. In fact, as quoted above, the Dinner Journal described the fund-raising dinner as "an evening of celebration, to savor reflection with *like-minded legal activists* and recommit to the work of justice" (emphasis added). The description "like-minded legal activists" emphatically communicates the private nature of the Guild and the event. As is set forth in the Gehi Affidavit, the Guild Constitution provides that members who do not hold the views of the Guild may be expelled, a necessary element in the formation of an ideological, activist organization; any such organization forced to admit people who are not "like-minded" would be compelled to countenance its own hijacking, by an influx of new members who could, for example, turn the Guild into a pro-settlement organization, or even one that opposes human rights. "The hallmark of a 'private' place within the meaning of the Human Rights Law is its selectivity or exclusivity", *Cahill v. Rosa,* 89 N.Y.2d 14 (1996).

The cases cited by this Court in its March 30, 2017 order are distinguishable. Both dentists offices and facilities to be rented for weddings are commercial operations intending to profit by the sale of services to the public. In each case, the alleged discrimination was a "but for" exception: we will treat anyone except the HIV positive; we will allow any wedding here except for same sex couples. There is no similarity to the Guild, which is not a commercial organization and offers *no services whatever* to the general public, but simply looked to attract "like-minded" people to a fund raising event. No one who was *not* "like-minded" would ever imaginably wish to contribute to the Guild, or attend a Guild event (other than to engage in a ruse setting up a law suit).

The Human Rights laws, relied on by Plaintiff, clearly envision "public accommodations" as permanent physical installations, such as hotels, restaurants, beach clubs and private eating clubs. Section 292 of the New York State Human Rights Law defines a ""place of public accommodation,

resort or amusement" as including “inns, taverns, road houses, hotels, motels....restaurants, or eating houses....buffets, saloons, barrooms ….barber shops, beauty parlors, theatres, motion picture houses, airdromes, roof gardens, music halls, race courses, skating rinks...” The law creates a specific exception for “any institution, club or place of accommodation which proves that it is in its nature distinctly private”. New York City Administrative Code Section 8-102(9) is very similar to the state law, and also excepts “distinctly private” organizations.

New York courts have rejected attempts to expand the “public accommodation” doctrine beyond its bounds, *see e.g., Ness v. Pan American World Airways,* 142 A.D.2d 233 (2d Dept. 1988); *Thompson v Andy Warhol Found. for the Visual Arts,* 2015 N.Y. Misc. LEXIS 2866 (Supreme Court New York County 2015) (“the Warhol Authentication Board is a non-profit organization and thus is not a place of public accommodation”). New York courts are expert at drawing a line to prevent state power from reaching into private spaces, *see New York Roadrunners Club v. State Div. of Human Rights,* 55 N.Y.2d 122 (1982) (running club was “ private, though not-for-profit, organization....under no legal compulsion” to admit certain contestants); *Fagan v. Axelrod,* 146 Misc. 2d 286 (Supreme Court Albany County 1990) (“no smoking” law “does not apply to significantly private areas, such as private homes, residences, automobiles, hotel or motel rooms, or to private events”).

Even if the dinner itself were (improbably) held to be a public accommodation, that does not mandate that the Dinner Journal itself is. Plaintiff has cited no precedent to support the proposition that, despite *Miami Herald v. Tornillo,* and its progeny, *supra,* a First Amendment-protected publication can itself be treated as a “public accommodation” under the New York State and New York City Human Rights law.

Plaintiff attempts to stretch “public accommodation” law to the breaking point in applying it to Defendants' dinner and Journal.

**Point Three**
**ISSUES OF FACT EXIST WHICH MAKE SUMMARY JUDGMENT INAPPROPRIATE**

Issues for the trier of fact which should prevent a grant of summary judgment include the First Amendment protected status of the Dinner Journal (Point One above) and the Dinner Journal and the dinner's status as non-public accommodations (Point Two).

Additionally, questions of fact exist as to the Plaintiff's identity:

- Does Bibliotechnical Athenauem have any offices, officers, employees or business activities, or was it in fact created in order to bring this lawsuit?
- What New York contacts or activities does it have which would allow it to invoke New York jurisdiction or the Human Rights laws?
- Does it accept any Israeli government money which would establish it as a government entity or require it to register as a foreign agent on American soil?
- Was it in fact formed solely for the purpose of bringing this action?
- David Abrams, plaintiff's principal who submitted the ad to the Guild, has not asserted in any pleading or filing that he has Israeli citizenship himself. Under the circumstances, if Abrams is an American citizen, can he assert discrimination against persons of Israeli nationality for the rejection of his ad?

All of these issues bear on the Plaintiff's standing to bring this action and the question whether it did so with clean hands. Summary judgment should not be granted where issues of fact exist regarding a plaintiff's corporate status or activities, *Toroy Realty Corp. v. Ronka Realty Corp*., 113 A.D.2d 882 (2d Dept. 1985); *Ulster Sav. Bank v. Goldman,* 183 Misc. 2d 893 (Supreme Court, Rensselaer County 2000); *First Bank of the Americas v. Motor Car Funding, Inc*., 257 A.D.2d 287 (1st Dept. 1999); *Aubrey Equities v. SMZH 73rd Assocs.*, 212 A.D.2d 397 (2d Dept. 1995). A party's standing to bring an action similarly raises fact issues requiring a denial of a summary judgment motion, *Growbright Enters., Inc.*

*v Barski,* 2012 N.Y. Misc. LEXIS 6473 (Supreme Court, New York County 2012); *Deutsche Bank Natl. Trust Co. v Rivas,* 95 A.D.3d 1061 (2nd Dept. 2012); *LaBarbera v. D'Amico*, 240 A.D.2d 640 (2d Dept. 1997).

There is a critical fact issue as to whether David Abrams has standing to assert discrimination against people of Israeli nationality when he has nowhere asserted he is Israeli himself. As a threshold matter, a plaintiff in a discrimination case must himself be a "member of a protected class", *Keller v. Great Lakes Collection Bureau, Inc.*, 2005 U.S. Dist. LEXIS 46973 (W.D.N.Y. 2005). People affiliated or associated with protected class members have been held to lack standing to assert discrimination claims, *Lugo v. St. Nicholas Assocs.*, 2 Misc. 3d 212 (Supreme Court, New York County 2003) *modified in part on other grounds,* 18 A.D.3d 341 (1st Dept. 2005) (home health aide to disabled person could not assert discrimination claim); *Puckett v. Northwest Airlines, Inc.,* 131 F. Supp. 2D 379 (EDNY 2001) ("It was [plaintiff's] disabled sister, and not she, who could not be accommodated on the flight from Memphis"). Summary judgment should be denied where a fact issue exists as to whether a plaintiff is a member of a protected class, *Leonard v. Katsinas,* 2007 U.S. Dist. LEXIS 27079 (Central District of Illinois 2007) ("Plaintiffs will bear the burden of proving at trial, through competent evidence, that they are members of the protected class"). Discrimination claims in particular are fact-intensive and not suitable for summary judgment, *Asabor v Archdiocese of N.Y.,* 102 A.D.3d 524 (1st Dept. 2013), citing *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623 (1997) (discrimination cases involve "subtle" fact situations).

*Hudson Valley Freedom Theater Inc. v. Heimbach,* 671 F.2d 702 (2nd Cir. 1982), the Second Circuit case cited by plaintiff in the Amended Complaint, paragraph 22, stands only for the proposition that a corporation formed years earlier for the purpose of performing minority theater has standing to claim that it was the target of discriminatory practices. It apparently has never been cited by a New York court. It should not be extended to mean, as Plaintiff argues, that a nonmember of a protected class can bootstrap himself into standing by forming a corporation for the sole purposes of bringing

suit. Issues both of fact and of law exist as to whether an Israeli corporation whose sole shareholder is an American citizen would be entitled to allege national origin discrimination against Israelis: "The standing of an organization such as respondent to maintain an action on behalf of its members requires that some or all of the members themselves have standing to sue, for standing which does not otherwise exist cannot be supplied by the mere multiplication of potential plaintiffs", *Dental Soc. of New York v. Carey,* 61 N.Y.2d 330 (1984).

Attempts by plaintiffs to use procedural or technical devices to "bootstrap" themselves into standing are disfavored, *Murray v. Empire Ins. Co.*, 175 A.D.2d 693 (1st Dept. 1991); *Matter of Montgomery v Metropolitan Transp. Auth.,* 25 Misc. 3d 1241(A) (Supreme Court, New York County 2009) (allowing a plaintiff to improvise standing would "eliminate the concept of standing as we know it"); *E. Thirteenth St. Cmty. Ass'n v. New York State Urban Dev. Corp.,* 84 N.Y.2d 287 (1994).

If Abrams' incorporation of an Israeli entity and submission of the ad was a ruse, there is not a real case or controversy for determination, as Abrams himself was not injured, *Cumberbatch v. Lytle,* 55 Misc. 2d 1041 (Supreme Court, Erie County 1967). "[A] self-inflicted injury cannot create standing", *Matter of Brennan Ctr. for Justice at NYU Sch. of Law v New York State Bd. of Elections,* 52 Misc. 3d 246 (Supreme Court, Albany County 2016), *affirmed* 159 A.D.3d 1299 (3rd Dept. 2018) ("To establish standing to pursue this litigation, petitioners must show that they have suffered injury-in-fact and that the injury is within the zone of interests protected by the statute at issue"). Too broad an interpretation would "create standing for any citizen who had the desire to challenge virtually all" actions of an organization such as the Guild, *Rudder v. Pataki,* 93 N.Y.2d 273 (1999).

The Guild has also raised a fact issue as to the inaccuracy of Tasha Moro's statement in her email to David Abrams stating the reason the proposed ad was rejected. Given that Plaintiff's summary judgment motion must stand or fall entirely on Tasha Moro's words, a trier of fact must determine what Ms. Moro meant and whether her email correctly stated the Guild's policy, *Cox v Prudential Found., Inc.*, 2018 N.Y. Misc. LEXIS 2788 (Supreme Court, New York County 2018). This Court cannot, on a

summary judgment motion, assume the truth of a hearsay statement, *Arnold Herstand & Co. v. Gallery: Gertrude Stein, Inc.,* 211 A.D.2d 77 (1st Dept. 1995). The burden is on Plaintiff to establish admissibility of the Tasha Moro email for the truth of the matter asserted, and it has not made any attempt to do so on this motion, *Fulton Holding Group, LLC v Lindoff*, 2018 N.Y. App. Div. LEXIS 7113 (2nd Dept. 2018); *Raz Acupuncture, P.C. v GEICO Gen. Ins. Co.,* 33 Misc. 3d 137(A) (Appellate Term, 2nd Dept. 2011).

Whether the Guild can be held responsible for Moro's words, even if discriminatory, raises a completely independent fact issue. An "employer cannot be held liable for an employee's discriminatory act unless the employer became a party to it by encouraging, condoning, or approving it", *State Div. of Human Rights ex rel. Greene v. St. Elizabeth's Hosp.,* 66 N.Y.2d 684 (1985) (citations and quotes omitted); *Totem Taxi v. New York State Human Rights Appeal Bd.*, 65 N.Y.2d 300 (1985) ("[I]t cannot be rationally concluded under the present statute that an employer has been guilty of discrimination whenever any employee at any level commits, out of personal pique, a disapproved and unanticipated discriminatory act").

The sole relief requested by Plaintiff on its summary judgment motion is a permanent injunction. Balancing of the equities here requires a trial, *People v. Record Club of America, Inc.,* 51 A.D.2d 709 (1st Dept. 1976) ("In our view a full exploration of the relevant facts and circumstances is necessary to enable the court to balance the equities and arrive at a proper decision"); *Sam Dev., LLC v. Dean*, 292 A.D.2d 585 (2nd Dept. 2002); *Classis of Queens v Members of Superceded Consistory of Taiwanese American Reformed Church in Queens,* 2008 N.Y. Misc. LEXIS 10370 (Supreme Court, Queens County 2008) ("[P]laintiff's motion for summary judgment granting a permanent injunction is not appropriate. The standard of summary judgment requires the proponent to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case, and such showing must be made by producing evidentiary proof in admissible form").

Numerous and complex fact issues exist which mandate the denial of Plaintiff's summary judgment motion.

**Point Four**

**SUMMARY JUDGMENT SHOULD BE DENIED AS PREMATURE BECAUSE NO DISCOVERY HAS BEEN CONDUCTED**

Plaintiff makes this summary judgment motion prematurely, seeking to preempt defendant from conducting discovery regarding the fact issues described in the Gehi affidavit and in Point Three above.

CPLR 3212(f) states: "Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.", *Valdivia v Consolidated Resistance Co. of Am., Inc.,* 54 AD3d 753 (2008), *Venables v Sagona,* 46 AD3d 672 (2007); *Juseinoski v. New York Hosp. Med. Ctr. of Queens,* 29 A.D.3d 636 ( 2d Dep't 2006). "It is axiomatic that a summary judgment motion is properly denied as premature when the nonmoving party has not been given reasonable time and opportunity to conduct disclosure relative to pertinent evidence that is within the exclusive knowledge of the movant or a codefendant." (*Metichecchia v. Palmeri,* 23 A.D.3d 894 (3rd Dept 2005)) *ANDIERO v. DUGGAN,* 2007 N.Y. Misc. LEXIS 2246 (2007) ("At the very least, Duggan is entitled to discovery to prove her contention… And again, since Duggan has not had discovery concerning the insurance policy, she has not had the opportunity to gather whatever evidence she can in that regard"); *Dorritie v Buoscio,* 2008 N.Y. Misc. LEXIS 9414 ( Sup. Ct. 2008) ("A summary judgment motion is properly denied as premature when the nonmoving party has not been given a reasonable time and opportunity to conduct disclosure relative to pertinent evidence that is within the exclusive knowledge of the movant or co-defendant"); *Juseinoski v. New York Hosp. Medical Center of Queens, 29 AD 3d 636,* (2nd Dept. 2006);

*Metichecchia v. Palmeri,* 23 AD 3d 894 (3rd Dept. 2005) ("This motion is premature as there has been no discovery and depositions of parties and witnesses have not been conducted"); *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494 (1993) ("[S]ummary judgment was properly denied since, *inter alia,* it is evident that the essential facts necessary for plaintiff to oppose the motion are within the possession of defendants"), *CBS Corp. v. Dumsday,* 268 A.D.2d 350 (1st Dept. 2000); *Juseinoski v. New York Hosp. Med. Ctr. of Queens,* 29 A.D.3d 636 (2d Dept. 2006); *Stevens v. Grody,* 297 A.D.2d 372, (2d Dep't 2002) ("Moreover, the issue of whether the defendants' friends used the boat dock as house guests or as permanent seasonal users was within the exclusive knowledge of the defendants, and no discovery had taken place").Summary judgment has specifically been denied in cases where a party sought to investigate the status or identity of the adversary's corporate entity, *First Bank of the Americas v. Motor Car Funding, Inc*., 257 A.D.2d 287 (1st Dept. 1999) ("As a result of the failure to produce documents, moreover, questions of fact existed as to whether the corporate veil should be pierced, necessitating the denial of Pirrera's motion"); *Aubrey Equities v. SMZH 73rd Assocs.*, 212 A.D.2d 397 (2d Dept. 1995) ("the IAS court was premature in granting summary judgment at this juncture as the Goldbergs are entitled to obtain necessary discovery concerning ….whether sufficient grounds exist to pierce the corporate veil").

This Court in its order of March 2, 2018, denying the second motion to dismiss, said: "Without having the benefit of discovery, it is questionable whether the proposed advertisement is forced speech.....In sum, this case may eventually turn on the First Amendment, but the issues presented on this motion must first be borne out through discovery before the court can make that determination".

A grant of summary judgment before any discovery has been conducted is premature.

## CONCLUSION

The motion for Summary Judgment should be denied in its entirety.

DATED: Amagansett, N.Y.
November 20, 2018

/s/ Jonathan Wallace
PO 728
Amagansett, N.Y. 11930
917-359-6234
jonathan.wallace80@gmail.com