SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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JOHN LANGAN, as Executor of the Estate of
NEAL CONRAD SPICEHANDLER a/k/a
NEAL SPICEHANDLER, Deceased, and
JOHN LANGAN, Individually,

Plaintiffs,

Index No: 11618/2002
Justice John Dunne

Return Date: January 29, 2003

- against -

ST. VINCENT'S HOSPITAL OF NEW YORK,

Defendant.

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MEMORANDUM OF LAW OF PLAINTIFF JOHN LANGAN IN OPPOSITION TO DEFENDANT SAINT VINCENT'S MOTION FOR PARTIAL DISMISSAL AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

PLAINTIFF RESPECTFULLY REQUESTS ORAL ARGUMENT ON THIS MOTION

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Preliminary Statement

Plaintiff John Langan, as Executor of the Estate of Neal Conrad Spicehandler (Deceased) and in his individual capacity ("John"), by his attorneys Lambda Legal Defense and Education Fund, Inc., respectfully submits this memorandum of law in opposition to the motion of defendant St. Vincent's Hospital of New York ("defendant" or "St. Vincent's Hospital") for partial dismissal for failure to state a claim pursuant to C.P.L.R. 3211(a)(7). Because defendant's motion relies on evidentiary materials, plaintiff requests that it be deemed one for partial summary judgment. In addition, plaintiff hereby cross-moves for partial summary judgment, and respectfully submits this memorandum of law in support of that motion as well.

St. Vincent's Hospital has been accused of medical malpractice that caused the death of Neal Conrad Spicehandler ("Conrad").[1] Rather than file an answer or respond in any way to the substance of the malpractice charges against it, defendant is asking this Court to deprive John of the ability to continue to receive the enormous financial support that he had been receiving from Conrad throughout their more than 15 years together in a stable, committed and loving life partnership, *even if malpractice is proven*. Defendant's motion should be denied for three reasons, any one of which would be sufficient standing alone. First, New York's wrongful death statute allows recovery by "spouses," and John and Conrad were spouses as a result of entering a civil union in Vermont. The civil union law unequivocally states that the parties to a civil union are "spouses," with all the same legal responsibilities, benefits and protections "whether they derive from statute, administrative or court rule, policy, common law or any other source of civil

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[1]Neal Conrad Spicehandler was called "Conrad" (his middle name) by his spouse John and many of his friends and "Neal" (his first name) by his birth family and professional colleagues. This memorandum of law refers to the deceased by the name that was used by his spouse, who is the plaintiff in this case.

law, as are granted to spouses in a marriage." Vt. St. Ann. tit. 15, § 1204(a) (attached to Affirmation of Adam L. Aronson, dated January 8, 2003 ("Aronson Aff."), as Exhibit 2).

Second, even were New York not automatically to accept a Vermont spouse as a spouse under New York law, New York should respect the reality of John's and Conrad's lengthy, committed relationship, which was one of treating each other and being recognized by everyone else as each other's spouses.

Third, for the state to deny John and Conrad the benefits of the wrongful death statute because they were not married, without having allowed them to marry, would violate the equal protection guarantee of the New York Constitution.

Defendant asks this Court to ignore that John and Conrad legally became spouses; to ignore that their family, friends, work colleagues and virtually everyone else who knew them (including the staff at St. Vincent's Hospital) recognized them as full-fledged spouses; and to ignore their 15-year committed life partnership, until death did they part. Defendant requests that this Court deny John and Conrad's civil rights to give a windfall to a tortfeasor, in violation of New York's public policy underlying the wrongful death statute as well as New York's longstanding public policy against discrimination, specifically including sexual orientation discrimination. Defendant's motion should be denied, and plaintiff's should be granted.

Factual Background

A. John And Conrad Took Every Step Possible To Protect Each Other, Including Becoming Spouses Pursuant To Vermont's Civil Union Law.

For over 15 years, John and Conrad were mates and spouses in a loving, stable, and committed life partnership. Affidavit of John Langan, dated January 6, 2003 ("Langan Aff."), at ¶ 2. They met on November 1, 1986, when John was 25 and Conrad was 26. Eight months later, they moved in together, and they lived together as a couple in a committed life partnership for the rest of Conrad's life. They loved each other as deeply as any two people can love, and they did everything that they could to formalize, legalize, and protect their relationship and their commitment to each other. Id. at ¶¶ 2-3, Exhibit A (photos of John and Conrad).

1. John And Conrad's Civil Union As Spouses.

In August 2000, when the couple had been together for almost fourteen years, but only weeks after Vermont's civil union law went into effect, Conrad asked John whether he would enter into a civil union with him. John enthusiastically agreed to do so. As a lawyer, Conrad understood the legal implications of entering into a civil union and, once he explained them to John, both were eager finally to obtain legal recognition of their relationship as spouses, with all that entails. Id. at ¶¶ 4-5; see Vt. St. Ann. tit. 15, §§ 1204(a)-(b) (defining parties to civil unions as "spouses" with "all the same benefits, protections and responsibilities under law" as "spouses in a marriage.") (Aronson Aff., Exhibit 2).

On November 11, 2000, the couple had a formal wedding in Burlington, Vermont. Langan Aff. at ¶¶ 7-10, Exhibit B (Vermont License and Certificate of Civil Union). At the wedding ceremony, which was videotaped and witnessed by a Justice of the Peace and

approximately forty of the couple's family members and friends, each took identical vows to the other, stating:

> *I [Neal Conrad/John Robert]*
> *Take you [John Robert/Neal Conrad]*
> *To be my spouse in our civil union,*
> *To have and to hold from this day on,*
> *For better, for worse,*
> *For richer, for poorer,*
> *To love and to cherish forever.*

Id. at ¶ 11. After the couple exchanged vows, they exchanged wedding bands and said, "With this ring, I join you in this civil union." Id. at ¶ 12, Exhibit C (wedding cards received from family members and friends).

It was always John and Conrad's understanding that, in entering into a civil union, each had taken on the same legal responsibilities, and likewise had the same legal protections and benefits, as spouses in a marriage. For them, it was legal recognition of the loving and committed life partnership that they already had been sharing for over a decade. Id. at ¶ 13.

2. Other Steps John and Conrad Took To Formalize, Legalize, And Protect Their Relationship And Each Other.

As a lawyer, Conrad had long been concerned about the couple's lack of legal protections in the absence of being legal spouses. In 1993, John and Conrad executed health care proxies to ensure that each would be able to make healthcare decisions for the other in case of any emergency. Langan Aff. at ¶¶ 36-37, Exhibits G and H (1993 Health Care Proxies designating the respective other as the sole health care agent). Beginning in 1991, when each purchased life insurance for the first time in their lives, and continuing through their last beneficiary designation forms completed in 1999, each consistently designated the other as "primary" and "direct"

beneficiaries of the life insurance policies. Id. at ¶ 38, Exhibit I. The couple's homeowners' insurance policy, in listing them jointly, evidenced that they were joint owners of all their property. Id. at ¶ 39, Exhibit J. Likewise, they are jointly named in their Personal Liability Umbrella Policy, evidencing joint and intermingled financial obligations. Id. at ¶ 40, Exhibit K.

In December 1999, just before leaving on a trip for Iceland, the couple made out wills, naming each other sole Beneficiaries and Executors of each other's estates. Id. at ¶ 41, Exhibits L and M. At the same time, they updated their health care proxy designations. Id. at ¶ 42, Exhibit N.

At different times in their relationship, John and Conrad each took greater or lesser responsibility for their overall expenses, depending on their respective incomes, and were financially interdependent. Id. at ¶ 45, Exhibit O (copies of leases).

B. John And Conrad Treated Each Other As Spouses And Were Recognized As Each Other's Spouse By Their Family, Friends, And Colleagues.

1. The History Of The Couple's Committed Life Partnership and Spousal Union.

When they first met in late 1986, Conrad was a young lawyer, a 1985 graduate of Albany Law School, still living at home with his parents in Eastchester, New York, and commuting every day to work at a small Manhattan law firm. John was just getting started as an insurance claims representative, living in Prospect Park, New Jersey. Id. at ¶ 14

The couple moved in together in July 1987, and continued to live together until Conrad's untimely death on February 15, 2002. Because Conrad was a lawyer with a Manhattan law firm, his income was substantially greater than John's, and he paid almost all of the couple's bills, including their rent, for the first several years. Id. at ¶¶ 16-17.

In September 1988, Conrad took a new job as a commercial litigation associate with the Manhattan office of Graham & James, where he continued to work until the fall of 1995. During Conrad's seven years working at Graham & James, he introduced John to many of his colleagues as his life partner, and the couple became friends with several of the Graham & James lawyers. Gradually, each of their families became more accepting of their relationship, and eventually came to embrace them as spouses and members of the respective other's family. Id. at ¶¶ 18-20, Exhibits D, E & F (photos of John and Conrad with their two families); see also supporting affidavits from sixteen family members, friends and professional colleagues.

In the fall of 1991, John and Conrad moved to Westchester County, where Conrad grew up and where to this day his mother and much of his family live. After this move, living together in a loving and committed life partnership, the couple saw Conrad's family, including his parents, at least once a week. Until Conrad's death, Conrad and John often invited Conrad's family over for dinner, and they spent many major holidays together. Although John was raised Catholic, he always enjoyed spending the Jewish holidays with Conrad's family, and was glad that they welcomed him for these and many other occasions. Langan Aff. at ¶¶ 21-22, Exhibit E; see also Affidavit of Ruth Spicehandler (Conrad's mother), dated January 2, 2003 ("R. Spicehandler Aff."), at ¶¶ 2, 4-5; Affidavit of Jeremy Spicehandler (Conrad's youngest brother), dated December 23, 2002 ("J. Spicehandler Aff."), at ¶¶ 3, 11, 13; Affidavit of Elliot Spicehandler (Conrad's middle brother), dated December 31, 2002 ("E. Spicehandler Aff."), at ¶ 6; Affidavit of Laura Spicehandler, dated January 4, 2003 ("L. Spicehandler Aff."), at ¶¶ 9-13.

In October 1995, John was offered a management position in Nassau County that he hoped might lead to becoming a full-fledged independent agent. Conrad and John both saw this

as an important opportunity, and moved to Massapequa Park, New York. Around the time of that move, Conrad left Graham & James and began working as a sole practitioner. Over the next 6-1/2 years, until his death, as Conrad continued his litigation practice, he also spent an increasing amount of time helping John succeed in his insurance business. Conrad's contributions were enormously valuable, and working together, they became a family business. Id. at ¶¶ 25-26

After John became a trainee agent in July 1998, Conrad was instrumental in helping them obtain enough business as an insurance agency and build their family business. Moreover, Conrad was a quick study, and by December 1998, he became licensed as a "sub-agent" to sell all lines of insurance coverage – automobile, fire, life, and health. He was the agency's "marketing guru," helping the couple to obtain business that John never would have been able to obtain on his own. Conrad's legal knowledge and experience was also extremely valuable to the couple's agency in many different contexts. Id. at ¶¶ 29-33.

Most important to John and Conrad was their spousal partnership. Each was there for the other, in the best of times, the worst, and all the ones in between. When Conrad's father died suddenly and unexpectedly, John grieved with him, and was a crucial source of support not just to Conrad, but to his entire family. Id. at ¶¶ 46-49, 51; see also R. Spicehandler Aff. at ¶ 6 ("When my husband died, John proved to be an important support for Neal. I appreciate John's help as well."); J. Spicehandler Aff. at ¶¶ 10-11. John supported Conrad and his family in similar ways when Conrad's grandmother died in the fall of 1999. Langan Aff. at ¶ 50.

Because John and Conrad for many years had been very close to each other as well as to each other's families, their civil union ceremony in November 2000 was the culmination, formal expression, and legalization of the long-existing reality of their relationship as spouses. Id. at

¶ 52.

2. Conrad's Leg Injury, Hospitalization, and Sudden Death.

When Conrad was hit by a car and brought to St. Vincent's Hospital on February 12, 2002, he asked the hospital to call only one person – his spouse John. John in turn notified Conrad's family. Id. at ¶¶ 53-55.

When John arrived at the hospital, Conrad was on his way into surgery. His brother Elliot, who works in Manhattan not far from St. Vincent's Hospital, had arrived a little earlier. Elliot gave John a handwritten note from Conrad. It reads:

> *John*
>
> *I'm going under. I haven't had a chance to see you.*
> *I love you.*
> *I've made my life in your heart.*
>
> *Conrad*

Id. at ¶¶ 55-56, Exhibit P.

When John told the staff at the hospital that he was Conrad's life partner, they let him go up to the operating room to meet the surgeon and the anesthesiologist. Like any spouse, John helped with making health care decisions, like what kind of anesthesia John should get. Indeed, throughout Conrad's remaining time alive, St. Vincent's Hospital treated John as the spouse that he is. Id. at ¶¶ 57-58.

When Conrad came out of surgery, still groggy from the anesthesia, upon seeing John his first words were: "Hello, my sweetheart." Id. at ¶ 59. John stayed with Conrad in the hospital until approximately 2 a.m. that night. Id. at ¶ 60.

On Wednesday, February 13, and Thursday, February 14, John again spent the day by Conrad's side. Id. at ¶¶ 61-68. On February 14, Conrad underwent a second surgery. After the surgery, around midnight, when Conrad was wheeled into his hospital bedroom, John was waiting for him. John did everything he could to make Conrad comfortable, including helping him with his glasses, brushing his teeth and washing his face. John then told Conrad that he would see him the next day and kissed him goodnight. Conrad said, "Goodnight my sweetheart." Id. at ¶¶ 64-68.

On Friday, February 15, at 7:15 a.m., John was awoken by a call from Dr. Steven Touliopoulos of St. Vincent's Hospital. To John's complete shock, disbelief, and horror, Dr. Touliopoulos informed him that Conrad had "expired" that morning. John was the first and only one that St. Vincent's Hospital called with this news. Even in Conrad's death, until this motion that they have now filed against him, St. Vincent's Hospital treated John as Conrad's spouse. Id. at ¶¶ 69-70.

John's world was suddenly and completely shattered by this horrifying news. Overcome with grief, he sat on the living room stairs and cried, just as Conrad had done when he heard his father had died. See id. at ¶ 71, Exhibits Q (news articles concerning Conrad's death, identifying John variously as Conrad's "longtime partner," his "companion," and his "partner."); R (Conrad's obituary that appeared in The New York Times, identifying John first in the list of survivors as Conrad's "partner."); S (State Farm Insurance e-mail sent out to employees and agents, identifying Conrad as John's "life partner."); T (sympathy cards to John from nieces, nephews and friends' children, making clear that these children understood John and Conrad's relationship as spouses).

John has never been closer to anyone than he was to Conrad. The couple had plans, goals and dreams that John will never be able to fulfill. John misses everything about Conrad, every moment of his life. He misses Conrad saying every morning "two more minutes," after the alarm rings, and he misses seeing Conrad still asleep in bed 30 minutes later. He misses Conrad's love, affection, and caring, and he misses giving all those things back to Conrad. Every night, John still waits for Conrad to walk through the door, the way he would every night, hug John, and say to their dogs, "Hellozens to the Snarkies!" Id. at ¶¶ 77-78.

John buried Conrad with John's tears on Conrad's face, and the ring that John gave him at their wedding placed on Conrad's heart. As Conrad wrote in his final note to John, he and John lived in each other's hearts, and Conrad will continue to live in John's heart, forever. Id. at ¶ 79.

C. The Factual Error That Plaintiff's Probate Counsel Made In The Petition For Letters Testamentary Was Immaterial To Those Proceedings And Is Of No Consequence Here.

Although defendant concedes that John declared in petitioning to the Nassau County Surrogate for probate and letters that he was Conrad's spouse, see Memorandum of Law of Defendant St. Vincent's Catholic Medical Centers of New York ("Def. Mem.") at 6, defendant makes much ado about an erroneous but wholly immaterial statement on a form petition that Conrad had "No" spouse, Def. Mem. at 3-4; see also Affirmation of Richard Paul Stone ("Stone Aff."), Exhibit D (Form Petition for Probate), page 2. Defendant does not mention that the next page of the same document identifies John as Conrad's "Partner" and "Sole Beneficiary and Executor" of Conrad's Estate. Stone Aff., Exhibit D, page 3.

John's probate attorney has submitted an affidavit to this Court explaining that he did not know and, for purposes of the probate proceedings, had no need to know the legal significance of

a Vermont civil union. See Affidavit of Richard E. Burns, Esq., dated December 26, 2002 ("Burns Aff."), at ¶¶ 6-8. Because the express terms of Conrad's Will, naming John as Sole Beneficiary and Executor of Conrad's Estate, by themselves were sufficient to issue letters testamentary and all of the assets of Conrad's Estate to John, Mr. Burns did not research Vermont's civil union law. Id. at ¶ 8. Moreover, John has no memory of seeing the small print "No" next to "Spouse" on the form, nor would he have signed off on the form had he noticed the error. Langan Aff. at ¶ 43.

Indeed, Mr. Burns testifies that John and Conrad "went to great lengths to ensure that they would have all the legal protections of spouses." Burns Aff. at ¶ 5; see also E. Spicehandler Aff. (Conrad's brother), at ¶¶ 3-4, 8 (explaining that, as an attorney, Conrad was aware of and concerned about securing all available spousal legal protections for John and himself as a couple). For example, Conrad's Will included specific instructions as to how John should be treated the same as a surviving spouse in probate proceedings and in the disposition of Conrad's Estate, regardless of whether the Surrogate's Court (or John's probate attorney) understood that the parties to a civil union are legal spouses. Burns Aff. at ¶ 5. Having now examined the relevant civil union law, Mr. Burns testifies that "it is plain that [John] and [Conrad] were legal 'spouses,'" and that "the Petition in [the probate proceeding] was erroneous in indicating that [Conrad] had 'No' spouse." Id. at ¶ 10.

Likewise, Mr. Burns testifies that his "Affidavit of Heirship in [the probate] proceeding was erroneous in stating that Ruth Spicehandler, [Conrad's] mother, was [Conrad's] 'only distributee.'" Id. at ¶ 11. "Distributee" is a statutory term of art under the intestacy laws, cross-referenced in the wrongful death statute. See N.Y. Est. Powers & Trusts Law §§ 1-2.5 (defining

"distributee"), 4-1.1 (identifying "distributees"), 5-4.4 (identifying "distributees" entitled to distribution of wrongful death damages, with cross-reference to § 4-1.1). "Mr Langan's status as sole Beneficiary under the Will renders intestacy 'distributee' provisions irrelevant [to the probate proceeding]. In any event, [Mr. Burns] made that statement unaware of the legal status of [John] as [Conrad's] surviving spouse." Burns Aff. at ¶ 11.

"In sum, in contrast to the pending case, in the entirely separate probate proceeding, the spousal status of [Conrad] and [John] was not material. In addition, at that time, [John's probate counsel] lacked knowledge of the Vermont civil union law. Therefore, statements relating to spousal status in the entirely separate probate proceeding have no bearing on the issues in this wrongful death action." Id. at ¶ 13. John is now properly asserting his right to protection as a legal surviving spouse, based on the legal spousal relationship that he so formally and legally entered into with Conrad, with scores of relatives and friends and a Justice of the Peace witnessing their oaths of lifelong and legal commitment. See Langan Aff., Exhibit B (Vermont Civil Union Certificate).

Indeed, sixteen family members, friends, and professional colleagues have stepped forward to provide this Court with sworn affidavits testifying to the strength and nature of John and Conrad's relationship as spouses.[2]

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[2]R. Spicehandler Aff. at ¶ 8 ("Neal and John formalized their relationship using whatever legal opportunities available. They were as much a couple as any two people can be, and they should have the same rights as any other couple."); E. Spicehandler Aff. at ¶ 7 ("Neal and John were regarded as spouses."); J. Spicehandler Aff. at ¶ 2 ("I have come to think of [John] and care for him as a family member, my brother's spouse. . . ."); Affidavit of Marilyn Penn (Conrad's aunt), dated December 24, 2002, at ¶ 5 ("Neal and John . . . were recognized as spouses by everyone in our family."); L. Spicehandler Aff. (Conrad's sister-in-law) ("[M]y husband, my children and I all treated Neal and John as spouses. . . ."); Affidavit of Rev. Rhoda D. Conn

(continued...)

Procedural Background

Defendant has moved for partial dismissal of all claims regarding recovery for pecuniary injury to John, as Conrad's spouse. See Defendant's Notice of Motion, dated Nov. 25, 2002, at 1.[3] Because defendant has submitted documentary evidence as well as an affirmation regarding John and Conrad's relationship, and plaintiff is now responding in kind with documents and affidavits, defendant's motion for partial dismiss should be deemed a motion for partial summary judgment. In addition, plaintiff hereby cross-moves for partial summary judgment. Based on the undisputed facts, this Court should issue a judgment recognizing John as Conrad's surviving spouse, entitled to recovery and distribution under New York's wrongful death law.

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[2](...continued)
(Conrad's cousin), dated December 27, 2002, at ¶ 4; Affidavit of Daniel J. Langan and Barbara Langan (John's parents), dated December 30, 2002, at ¶ 6 ("Over time, we came to see that John and Conrad were really no different from other spouses. . . ."); Affidavit of Kim Marie Merritt and Michael T. Merritt (John's cousin and her spouse), dated December 31, 2002, at ¶ 4 ("Conrad became, in our eyes, John's spouse. . . ."); Affidavit of Suzanne Aral-Boutros (John's work colleague), dated December 27, 2002, at ¶ 8 ("[M]y work colleagues and I treated Conrad the same as any other work colleague's spouse . . . ."); Affidavit of Jennine DiSomma (Conrad's work colleague), dated January 2, 2003, at ¶¶ 6-8; Affidavit of Jay Sherwood (executive at company that hired Conrad as lawyer), dated January 3, 2003, at ¶ 4; Affidavit of Alan Matzkin (longtime friend), dated January 2, 2003, at ¶¶ 11, 18; Affidavit of Nancy M. Starzynski (longtime friend), dated December 23, 2002, at ¶ 5.

[3]Thus, defendant effectively concedes that regardless of the outcome of this motion, this case will continue, because Conrad's mother, Ruth Spicehandler, is entitled to recovery under the wrongful death statute. See N.Y. Est. Powers & Trusts Law §§ 4-1.1, 5-4.4 (parent is distributee regardless of whether decedent is survived by spouse).

ARGUMENT

POINT I

DEFENDANT'S DISMISSAL MOTION, WHICH SHOULD BE TREATED AS A MOTION FOR PARTIAL SUMMARY JUDGMENT, SHOULD BE DENIED, AND INSTEAD PLAINTIFF SHOULD BE GRANTED PARTIAL SUMMARY JUDGMENT

"Whether or not issue has been joined" by defendant's submission of an answer, where a party's motion to dismiss makes reference to evidentiary materials, as does defendant's motion here, the court should treat the motion as one for summary judgment. C.P.L.R. 3211(c). The court need not provide the parties with additional notice that a motion to dismiss will be treated as one for summary judgment where "the parties chart[] a course for summary judgment" through the submission of documentary evidence and affidavits, or where "the question presented is a purely legal one." Kulier v. Harran Transportation Co., Inc., 189 A.D.2d 803, 804, 592 N.Y.S.2d 433, 434 (2d Dep't 1993) (summary judgment treatment appropriate though parties not given formal advance notice by Supreme Court); see also O'Dette v. Guzzardi, 204 A.D.2d 291, 292, 611 N.Y.S.2d 294, 295 (2d Dep't 1994) (no notice by court necessary because parties submitted documentary evidence and affidavits).

Both grounds are present here: defendant has submitted documentary evidence and an affirmation concerning the relationship between John Langan and Neal Conrad Spicehandler, and plaintiff is responding in kind. Moreover, defendant has not refuted, nor can it, the fact of John and Conrad's Vermont civil union, nor the fact of their more than 15-year committed life partnership. This Court is therefore left with a pure question of law as to whether either the civil union, or the nature of the couple's committed life partnership, or both considered together, are

sufficient to deem John a surviving spouse entitled to distribution under New York's wrongful death law.

A third exception to the notice requirement exists where one or both parties request that the court treat the dismissal motion as one for summary judgment. See Huggins v. Whitney, 239 A.D.2d 174, 174, 657 N.Y.S.2d 50, 51 (1st Dep't 1997); Shah v. Shah, 215 A.D.2d 287, 289, 626 N.Y.S.2d 786, 789 (1st Dep't 1995). Plaintiff John Langan hereby requests that this Court treat defendant's motion as one for summary judgment, based on the evidentiary material submitted. See Plaintiff John Langan's Notice of Cross-Motion For Summary Judgment, dated January 7, 2003.

On a motion for summary judgment, the court must accept as true the opposing party's evidence and any evidence of the movant that favors the opposing party. McKinney's C.P.L.R. 3212, Practice Commentary C3212:17. Here, in ruling on defendant's motion, all pleadings and available evidence must be construed in the light most favorable to John, as nonmoving party. Bolm v. Triumph Corp., 41 A.D.2d 54, 61, 341 N.Y.S.2d 846, 853-854 (4th Dep't), aff'd, 33 N.Y.2d 151, 160, 305 N.E.2d 769, 774, 350 N.Y.S.2d 644, 651 (1973); see also S.D.I. Corp. v. Fireman's Fund Ins. Companies 208 A.D.2d 706, 708-709, 617 N.Y.S.2d 790, 792 (2d Dep't,1994) (moving party has burden of proof). If this Court does not convert the pending motion into one for summary judgment, the motion to dismiss standards are even more deferential to plaintiff: "the pleadings must be given 'their most favorable intendment,' and the plaintiff's allegations which are contrary to the documentary evidence must be accepted." Sopesis Construction, Inc. v. Solomon, 199 A.D.2d 491, 493, 605 N.Y.S.2d 402, 403-404 (2d Dep't

1993) (quoting Arrington v. New York Times Co., 55 N.Y.2d 433, 442, 434 N.E.2d 1319, 449 N.Y.S.2d 941 (1982)) (reversing dismissal of complaint).

In any event, the undisputed evidence establishes that John and Conrad entered into a civil union, making them legal spouses pursuant to Vermont statute; that they lived their lives for 15 years as spouses; and that they were recognized by family, friends, and work colleagues as spouses. John is therefore entitled to partial summary judgment permitting him to proceed with this action as Conrad's spouse.

POINT II

THE VERMONT CIVIL UNION MAKES JOHN A SURVIVING "SPOUSE" ENTITLED TO RECOVERY UNDER NEW YORK'S WRONGFUL DEATH LAW

Defendant has confused the issues on this motion by raising a slew of red herrings concerning the legality of same-sex marriage in New York State, whether New York *could* refuse to recognize same-sex marriages performed in other states under the federal Defense of Marriage Act, and what the common law had to say about a loss of consortium claim that plaintiff has not made. None of this is relevant.[4]

Rather, what is relevant is that John is a surviving "*spouse*," entitled to recovery and distribution of damages pursuant to New York's wrongful death law. See N.Y. Est. Powers &

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[4]In Liff v. Schildkrout, 49 N.Y.2d 622, 404 N.E.2d 1288, 427 N.Y.S.2d 746 (1980), the Court of Appeals held that there is no claim for loss of consortium, whether under the common law or by statute, for any period following the death of a spouse. Rather, a loss of consortium claim lies only "to reflect loss of consortium during the period of decedent's conscious pain and suffering." Id. at 634, 404 N.E.2d at 1292, 427 N.Y.S.2d at 750 (1980).

In the pending case, Conrad died less than three days after he was admitted to the hospital. Plaintiff has raised no loss of consortium claim, and the words appear nowhere in plaintiff's complaint. Defendant seems to have contrived a loss of consortium claim out of thin air for the sole purpose of quoting extensive "marriage" language from common law and citing other cases that are utterly irrelevant to the pending action and bear on none of plaintiff's claims.

Trusts Law §§ 5-4.4(a) (entitling "distributees" under the intestacy laws to wrongful death damages); 4-1.1(a) (designating a surviving "spouse" as the principal "distributee"). New York has consistently recognized "spousal" status lawfully created in a sister state or foreign nation, regardless of whether those spouses became so in the way one would in New York, and even if the spouses could not have become married in New York. The word "marriage" is nowhere to be found in the wrongful death statute. Defendant's analysis, which focuses on whether John and Conrad could have married in New York, therefore misses the mark entirely. Rather, John and Conrad's status as spouses by virtue of their civil union should be recognized under New York law, and John's wrongful death action should be permitted to proceed.

A. New York Has Recognized Spousal Unions That Were Legal Where Created, Regardless Whether They Could Be Created In New York.

New York courts generally recognize spousal unions that were validly created in sister states and foreign nations. Thus, although so-called "common-law\ marriages" are, pursuant to statute, not marriages at all in New York, and cannot be created in New York, see N.Y. Dom. Rel. Law § 11 (forbidding creation of common-law marriages in New York), "[i]t has long been settled law that . . . a common-law marriage contracted in a sister State will be recognized as valid here if it is valid where contracted." Mott v. Duncan Petroleum Trans, 51 N.Y.2d 289, 292, 414 N.E.2d 657, 658-659, 434 N.Y.S.2d 155, 157 (1980) (citing cases) (extending Workers' Compensation spousal death benefit to survivor of a "common-law marriage"); see also Carpenter v. Carpenter, 208 A.D.2d 882, 617 N.Y.S.2d 903 (2d Dep't 1994) (parties to common law marriage given spousal recognition); Marino v. Anheuser-Busch, Inc., 182 A.D.2d 1073, 1073, 583 N.Y.S.2d 68, 69 (4th Dep't 1992) ("a common law marriage contracted in a sister state will

be recognized as valid here if it is valid where contracted."); In re Mandel's Estate, 108 N.Y.S.2d 922 (Surr. Ct. N.Y. County 1949) (recognizing common law marriage to allow widow to take elective spousal statutory share), aff'd, 278 A.D. 682, 103 N.Y.S.2d 674 (1st Dep't 1951); In re Valente's Will, 18 Misc. 2d 701, 704, 188 N.Y.S.2d 732, 735-736 (Surr. Ct. Kings County 1959) (Italian "proxy marriage," a concept at least as foreign to New York as "civil unions," not "repugnant" to New York public policy or natural law); In re Fagan's Estate, 84 N.Y.S.2d 558 (Surr. Ct. N.Y. County 1948) (recognizing common law marriage to allow widower to take elective spousal statutory share); In re Lamond's Estate, 68 N.Y.S.2d 690 (Surr. Ct. Bronx County) (recognizing common law marriage to allow widow to take elective spousal statutory share), aff'd, 273 A.D.2d 751, 75 N.Y.S.2d 509 (1st Dep't 1947); In re Schneider's Will, 206 Misc. 18, 131 N.Y.S.2d 215 (Surr. Ct. Kings County 1954) (same).

Moreover, New York has even extended spousal recognition to relationships that neither fulfilled the statutory prerequisites for creation in New York, nor involved travel to a state that recognized common-law marriages, if the parties did nothing more than have a ceremonial wedding without a marriage license. See In re Gruntfest's Will, 7 A.D.2d 1005, 184 N.Y.S.2d 272 (2d Dep't 1959) (ceremonial marriage, even without marriage license, created right to take an intestate share against provisions of will of decedent); In re Liberman's Estate, 6 Misc. 2d 396, 398-399, 162 N.Y.S.2d 62, 65 (Surr. Ct. N.Y. County) (marriage ceremony by a rabbi, without a marriage license, created right to election against will), rev'd on other grounds, 4 A.D.2d 512, 167 N.Y.S.2d 158 (1st Dep't 1957), aff'd, 5 N.Y.2d 719, 152 N.E.2d 665, 177 N.Y.S.2d 707 (1958).

New York thus has a long history of extending all the legal benefits, protections, and rights of marriage to relationships that are not "marriages" at all in the traditional sense or under New York statute. In Mott, for example, it was "undisputed that John and Mary Mott were never ceremonially married in New York or elsewhere." Id. at 291, 414 N.E.2d at 658, 434 N.Y.S.2d at 157. Nonetheless, the Court of Appeals held that the Motts, who lived in New York for the entirety of their nine years together until John's death, were entitled to be treated as spouses solely on the basis that the they functioned as spouses, "represented themselves to the local community as such," and continued to function as such during travel for as little as a few weeks to a sister state that recognizes so-called "common law marriages." Id. at 291-292, 414 N.E.2d at 658, 434 NY.S.2d at 157.

With the parties to "common-law marriages" having failed to take any of the formal, legal steps toward marriage, these relationships have much less in common with traditional, formal marriage than do Vermont's civil unions, which require the parties to follow a set of procedures essentially identical to the procedures for obtaining a marriage, working with precisely the same government agencies, and resulting in a relationship that, by statute, has precisely the same legal responsibilities, benefits, and protections as marriage. See Vt. St. Ann. tit. 15, § 1204; Vt. St. Ann. tit. 18, §§ 5160-5169 (procedural provisions) (Aronson Aff., Exhibit 2). Indeed, other than the gender of the parties, the only legal difference between civil unions and marriages is the label used to identify each.

New York has also extended "spousal" or "marriage" recognition to marriages if valid where created, even though the parties could not have married in New York. See, e.g., In re May's Estate, 305 N.Y. 486, 114 N.E.2d 4 (1953) (recognizing marriage between uncle and

niece, prohibited by New York statutory law but validly created in Rhode Island); Van Voorhis v. Brintnall, 86 N.Y. 18, 24-25, 40 Am.Rep. 505, 1881 WL 12957, at *3 (1881) (recognizing Connecticut marriage, though deceased had been forbidden by then-existing New York statute and court decree from remarrying during lifetime of his former wife, due to his adultery); cf. Bronislawa K. v. Tadeusz K., 90 Misc. 2d 183, 393 N.Y.S.2d 534 (N.Y. Fam. Ct. 1977) (holding that previous undissolved religious marriage in Poland was not valid under Polish law, so that present marriage in New York was valid and not bigamous).[5] In short, with certain narrow exceptions discussed below involving marriages that are "abhorrent" and "repugnant" to New York public policy, New York has extended comity to the laws of other jurisdictions, to recognize the spousal relationships validly created in those jurisdictions, regardless of whether they could have been created in New York.

B. Based On The Plain And Unequivocal Terms Of The Civil Union Law, John and Conrad Were "Spouses."

With New York recognizing spousal relationships validly created in other jurisdictions, and with John and Conrad having taken the significant step of entering into a civil union in

[5]Indeed, one of the cases that defendant relies on, Fisher v. Fisher, 250 N.Y. 313, 165 N.E. 460 (1929), see Def. Mem. at 11, is a classic example of New York extending legal recognition to marriages that could not be created in New York. In Fisher, the Court of Appeals upheld the validity of a marriage that the Court assumed was permitted by "no law of any state, territory or district of the United States" at that time, involving one who had been barred from re-marrying because of adultery. Id. at 317, 165 N.E. at 461. The marriage was nonetheless held valid and binding on the grounds that the two parties were "able and willing to contract," voluntarily took each other as husband and wife, and there was no law that specifically "*condemned* the marriage". Id. at 316-317, 165 N.E. at 461-462 (emphasis in original). Defendant relies on "husband and wife" language in that decision that was not defining the limits of marriage, was of utterly no relevance to the legal issues in the case, and is of utterly no relevance to this case.

Vermont, the law provides a simple answer to the question whether they are "spouses": "A party to a civil union shall be included in any definition or use of the term[] 'spouse' . . . and other terms that denote the spousal relationship, as those terms are used throughout the law." Vt. St. Ann. tit. 15, § 1204(b) (Aronson Aff., Exhibit 2). Thus, John and Conrad were validly "spouses" and pursuant to the law of a sister state, John is Conrad's surviving "spouse," entitled to recovery and distribution of any damages obtained pursuant to a wrongful death action.[6]

In defining the parties to a civil union as "spouses," section 1204(b) by itself leaves little doubt as to the couple's legal "spousal" status. But the civil union law goes yet a step further, to confirm that "spouses" in a civil union should be treated *identically*, under all aspects of every law, as "spouses" in a marriage. Vt. St. Ann. tit. 15, § 1204(a) ("Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.") (Aronson Aff., Exhibit 2). This unambiguous statutory language, notably absent from defendant's moving papers, can leave no question as to what the civil union law intends to accomplish. This Court should give full effect to the plain and

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[6]Defendant correctly notes that civil unions were established to extend all the same benefits, protections, and responsibilities to same-sex couples as marriage extends to different-sex couples. See Def. Mem. at 8-9. Yet in discussing how the system arose because Vermont's constitution provides more protection than the federal Equal Protection Clause, defendant demonstrates not that Vermont is "unique," Def. Mem. at 8, but instead how Vermont and New York are alike. See, e.g., People v. Scott, 79 N.Y.2d 474, 489, 593 N.E.2d 1328, 1337, 583 N.Y.S.2d 920, 929 (1992) (citing examples of how New York's Constitution is more protective than the federal Constitution, including with respect to Equal Protection); People v. Kern, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990) (same). Indeed, New York has adopted a "balancing test" precisely like the one that defendant acknowledges Vermont has adopted. Cooper v. Morin, 49 N.Y.2d 69, 79-82, 399 N.E.2d 1188, 1193- 1195, 424 N.Y.S.2d 168, 174-176 (1979) (rejecting federal standard in favor of a more protective balancing of state interests against the harm imposed); Def. Mem. at 8-9; see also infra, Point IV.

unambiguous legal "spousal" status that John and Conrad entered into, along with its practical and legal significance. See E. Spicehandler Aff. at ¶¶ 3-5; Langan Aff. at ¶¶ 5, 7.

Defendant's heavy reliance on In re Cooper, 187 A.D.2d 128, 592 N.Y.S.2d 797 (2d Dep't 1993) and Raum v. Restaurant Assocs., Inc., 252 A.D.2d 369, 675 N.Y.S.2d 343 (1ST Dep't 1998), is misplaced. Both Cooper and Raum were decided before the Vermont civil union law was enacted, and unlike the present case, did not involve couples that had indeed become legal spouses under that law. Neither of these cases involved any claim that the surviving same-sex partner had entered into a legal "spousal" relationship in a sister or foreign jurisdiction, entitled to comity in New York. Indeed, there is no indication that the couples in either case had entered into any kind of formal legal union, whether by registering as domestic partners or otherwise. Those cases in no way suggest that recognition of such legal unions would be forbidden by either New York law or public policy. Their analyses and holdings, therefore, including their *dicta* as to whether same-sex couples could legally marry in New York (there was no assertion that the couples in either case had attempted to do so) are entirely irrelevant to the legal issues presently before this Court. See also infra notes 11, 13.

Furthermore, in Raum, a decision not binding on this Court, the majority and dissenting opinions expressed conflicting views as to whether a provision disqualifying certain surviving spouses from recovering under the wrongful death and intestacy laws includes an implicit definition of "spouse." But under either view, given the undisputed facts here, John meets the definition of a surviving spouse under the wrongful death statute. The majority construed N.Y. Est. Powers & Trusts Law § 5-1.2 as an implicit definition of "surviving spouse" to include "[a] husband or wife." See Raum, 252 A.D.2d at 370, 675 N.Y.S.2d at 344. Assuming *arguendo* that

the Raum majority was correct, John qualifies as a "husband" and therefore as a "surviving spouse" entitled to recovery under New York's wrongful death law based on the Vermont civil union law's statement that "[a] party to a civil union shall be included in any definition or use of the terms 'spouse' . . . and other terms that denote the spousal relationship, as those terms are used throughout the law." Vt. St. Ann. tit. 15, § 1204(b) (emphasis supplied) (Aronson Aff., Exhibit 2). "Husband" is plainly among the "terms that denote the spousal relationship," and therefore is embraced by the civil union law.

The Raum dissent had the stronger argument, though, pointing out that Est. Powers & Trusts Law § 5-1.2 does not purport to be definitional. 252 A.D.2d at 371, 675 A.D.2d at 345 (Rosenberger, J., dissenting). The dissent argued that the section should not be stretched beyond its intended purpose of disqualifying spouses who have abandoned, divorced, or separated from decedents to limit the meaning of "spouse" to include only a "husband or wife." Id. Regardless, section 1204(b) of the civil union law leaves no doubt that John is both a surviving "husband" and a surviving "spouse," and therefore is entitled to wrongful death recovery in New York under either reading of the provision.

John and Conrad entered into the most protective legal relationship that specifically has been made available to same-sex couples in this country, a Vermont civil union, precisely to create and secure their legal status as spouses. Defendant does not contend that John and Conrad's legal process of becoming spouses under Vermont's civil union law was defective, void, or voidable in any way under the plain terms of Vermont's law. Significantly, John and Conrad went to these great lengths to protect their relationship and each other precisely so that each would be legally

recognized as the "spouse" of the other under such unforeseeable and tragic circumstances as now face this Court.

C. Principles Of Comity Require New York To Recognize That John And Conrad Became Spouses.

John and Conrad satisfied all the legal requirements to become spouses under Vermont law. Throughout this nation's history, New York, like every other state, almost automatically has accorded legal recognition to spousal bonds created in sister jurisdictions and foreign nations. There is no legal or rational basis for a different outcome in this case. Indeed, there is absolutely no authority in New York specifically preventing recognition of John and Conrad's spousal relationship lawfully entered into in a sister state. Moreover, plaintiff is not aware of a single New York case, and defendant has not presented one, in which New York has denied legal recognition to a spousal union that two fully informed and consenting adults, unrelated by blood, legally entered into in the place where the union was celebrated.

Instead, defendant argues that this Court must adopt an unreasonably strict standard, unsupported by case or statutory law, for recognition of John and Conrad's validly created bond as spouses. Specifically, defendant contends that John could not be a surviving "spouse," entitled to state a claim for his pecuniary loss due to Conrad's wrongful death, because John and Conrad could not have been "married" in New York. See Defendant's Mem. at 6-7 (arguing that John and Conrad could not have married in New York, and assuming, without discussion, that their purported inability to do so in New York establishes that their undisputed legal spousal union in Vermont should be given no recognition in New York). Defendant presents an entirely erroneous standard for New York's recognition of spousal relationships created in sister jurisdictions.

1. New York Extends Comity To The Legal Acts Of Other States And Nations.

The standard is not, as defendant suggests, whether the relationship could have been *created* in New York. Quite the contrary, the general rule under comity is that New York will confer recognition upon spousal relationships which never could have been legally created in New York, even where New York law expressly *forbids* their creation in New York, as long as the spousal bond was legally created in the place where the relationship was celebrated.[7] See, e.g., In re May's Estate, 305 N.Y. 486, 490, 114 N.E.2d 4, 6 (1953); Van Voorhis v. Brintnall, 86 N.Y. 18, 24-25, 1881 WL 12957, at *3 (1881). All of the case law defendant cites as to whether same-sex marriages can be performed in New York, therefore, is irrelevant to the pending motion.

There are only two exceptions to the general principle extending recognition to spousal unions that were valid where created, neither of which has any application to this case: first, if New York law specifically prohibits recognition of such spousal relationships when created outside of New York; and second, where recognition of the spousal bond would be "offensive to the public sense of morality to a degree regarded generally with abhorrence." May's Estate, 305 N.Y. at 492-493, 114 N.E.2d at 7; see also People v. Ezeonu, 155 Misc. 2d 344, 588 N.Y.S.2d 116 (Sup. Ct. Bronx County 1992) (bigamous Nigerian marriage involving rape of 13-year-old "second wife" not recognized as legal because "repugnant" to New York public policy); In re Valente's Will, 18 Misc. 2d 701, 704, 188 N.Y.S.2d 732, 735 (N.Y. Surr. Ct. 1959) (Italian proxy marriages must be recognized because not "repugnant" to New York public policy).

[7]Notably, New York law does not expressly forbid the creation of a spousal relationship between two persons of the same sex, but even if it did, under well settled principles of comity, that prohibition would in no way preclude recognition of John and Conrad's spousal bond. See infra.

In May's Estate, 305 N.Y. 486, 114 N.E.2d 4 (1953), the Court found significant that while other states had enacted laws to preclude recognition of certain kinds of marriages even if valid where created, New York had not done so (and, indeed, to this day has not). Thus, the first exception still has no application in New York.

With respect to the second exception, in both Van Voorhis and in May's Estate, the Court of Appeals recognized only two classes of spousal unions that were so "abhorrent" to New York public policy that New York should refuse to recognize them even if valid where celebrated: cases involving polygamy, or incest in a very close degree of consanguinity. May's Estate, 305 N.Y. at 491, 114 N.E.2d at 6; see also Van Voorhis, 86 N.Y. at 26, 1881 WL 12957, at *3 (citing "incest or polygamy" as only exceptions to general rule of recognition). Moreover, in May's Estate, the Court affirmed the recognition of the marriage between an uncle and a niece despite the specific prohibition against such marriages in New York, despite the parties' domicile in New York, and despite their undisputed effort to avoid the New York prohibition by traveling to a sister state that permitted the marriage. 305 N.Y. at 489-491, 114 N.E.2d at 5-7. Though incestuous, and though specifically forbidden from being created in New York, the degree of consanguinity did not make the relationship so "abhorrent" to New York public policy as to deny recognition.

Neither exception to the general rule extending recognition to spousal unions applies here. New York has no specific statute forbidding a same-sex marriage or spousal union, and as discussed below, far from being "abhorrent" to New York public policy, legal recognition of lesbian and gay families is entirely consistent with and even mandated by New York public policy and law.

That most cases involving spousal recognition in New York have involved "marriages," while the pending case involves a "civil union," is of no legal or rational consequence to the analysis. Vermont has defined "civil unions" as same-sex "spousal" unions that are the legal equivalent of heterosexual spousal unions through marriage. The word "marriage" is simply irrelevant. For purposes of New York's wrongful death law, the question is whether New York should give comity to a sister jurisdiction's conferral of legal "spousal" status, not whether it should give comity to a sister jurisdiction's conferral of "marriage."

Moreover, when states encounter an entity that they themselves do not have under their own law, they consistently treat that entity as the closest analogue under their own law. Thus, as discussed above, New York does not permit so-called "common-law marriages," which are quite distinct from traditional marriages and involve none of the formal, written, and ceremonial procedures required for traditional marriages. Yet despite the significant differences between the two entities, New York treats "common-law marriages," validly created in a sister jurisdiction, as their closest analogue, full-fledged "marriages," in New York. See cases cited supra, Point II(A). Likewise, New York has treated "proxy marriages" (an entity that does not exist in New York) as full-fledged marriages.

The principle that a legal entity of a sister jurisdiction should be given comity and treated as its closest local analogue is well settled throughout the law, not just in the context of relationship and spousal recognition. Thus, foreign entities can receive corporate recognition "even though the organization goes by some other name in the state of its formation." Restatement (Second) of Conflict of Laws §298, comment a. The U.S. Supreme Court has discouraged reliance on the formal name of the entity, and focused instead on the function and

attributes of the entity in question. See Hemphill v. Orloff, 277 U.S. 537, 550, 48 S. Ct. 577, 579 (1928) ("If clothed with the ordinary functions and attributes of a corporation, it is subject to similar treatment."); 36 Am. Jur. 2d § 4 ("Whether a body is called a corporation, partnership, or trust is not the essential factor in determining the powers of a state concerning it, and the real nature of the organization must be considered.").

Thus, "[w]hatever the effect of a legislative declaration of the status of [an] association, such declaration has no force to prevent the courts of a foreign jurisdiction from inquiring into the actual character of the association in determining whether or not it will be considered a corporation." 17 Fletcher Cyclopedia of the Law of Private Corporations § 8297. For example, in Liverpool Ins. Co. v. Massachusetts, the U.S. Supreme Court disregarded an express declaration made by the English Parliament that, in creating an association, it should *not* be regarded as a corporation. After inquiring into the actual character of the association, the Court held it to be a corporation, rendering it liable for a tax imposed upon foreign insurance corporations. 77 U.S. 566, 576, 19 L. Ed. 1029, 10 Wall. 566 (1870) ("[W]hatever may be the effect of such a declaration in the courts of that country, it cannot alter the essential nature of a corporation or prevent the courts of another jurisdiction from inquiring into its true character, whenever that may come into issue"); see also Hill-Davis Co. v. Atwell, 215 Cal. 444, 447-448, 10 P.2d 463, 464-65 (1932) (holding that Michigan "partnership" should be treated as a "foreign corporation").[8]

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[8]Similarly, courts have generally analogized foreign business entities to the closest entity within the forum state. For example, in People of Puerto Rico v. Russell & Co., 288 U.S. 476, 481-82, 53 S. Ct. 447 (1933), the U.S. Supreme Court held that a "sociedad en comandita" organized under the Puerto Rican Commercial Code should be regarded as a corporation in light (continued...)

As applied to a civil union, if a civilly united couple wanted to have their union recognized as a marriage, the corporate analogy would suggest a comparison of the "attributes" of a civil union to the attributes of a marriage in the forum state. With spouses to a civil union assuming all the same responsibilities, and entitled to all the same benefits and protections as spouses in a marriage, treating a civil union as a marriage in New York is entirely warranted. Yet this Court need not go even so far. Regardless whether civil unions are regarded as the legal and functional equivalent of marriage in all respects, the issue under New York's wrongful death law is not whether the parties are married, but whether they are *spouses*. Because Vermont law specifically defines the parties to a civil union as full-fledged spouses, a legal concept that is as well defined under New York law as it is under Vermont's, and with virtually identical meanings, this Court need not seek the New York analogue for a Vermont "spouse."[9] Rather, the basic principles of

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[8](...continued)
of how it was structured under the civil law of Puerto Rico, not a limited partnership as it might be considered under common-law. Similarly, a Philippine "sociedad anonima" was considered a corporation under Ohio law, even though it did not have all the attributes of an Ohio corporation. Perkins v. Benguet Consol. Min. Co., 155 Ohio St. 116, 98 N.E.2d 33 (1951), judgment vacated on other grounds, 342 U.S. 437, 72 S. Ct. 413 (1952). The Ninth Circuit analogized an "anstalt" from Liechtenstein to a corporation. Cohn v. Rosenfeld, 733 F.2d 625, 629 (9th Cir. 1984) ("like the *sociedad* in *Russell*, the *anstalt* presents an exotic creation of the civil law that is regarded as a juridical person by the law that created it").

[9]Defendant's central reliance on *dicta* in In re Cooper, 187 A.D.2d 128, 592 N.Y.S.2d 797 (2d Dep't 1993), and Raum v. Restaurant Assocs., Inc., 252 A.D.2d 369, 675 N.Y.S.2d 343 (1st Dep't 1998), concerning whether same-sex couples could legally marry in New York, is therefore misplaced for this reason as well. See also supra, Point II(B). Defendant's reliance on trial court decisions that decline to permit same-sex marriages to be performed in New York is even more misplaced. See Def. Mem. at 7, 10 (citing Storrs v. Holcomb, 168 Misc. 2d 898, 645 N.Y.S.2d 286 (Sup. Ct. Tomkins County 1996), vacated for failure to join necessary party, 245 A.D.2d 943, 666 N.Y.S.2d 835 (3d Dep't 1997), and Anonymous v. Anonymous, 67 Misc. 2d 982, 983-984, 325 N.Y.S.2d 499, 499-500 (Sup. Ct. Queens County 1971). For the reasons
(continued...)

comity require that Vermont spouses be treated as their New York *equivalent* – New York spouses, entitled to (among other protections and benefits) recovery under the wrongful death law.

2. Far From Preventing Recognition Of Same-Sex Spouses Joined In Vermont Civil Unions, New York's Public Policy Supports Recognition Of Such Bonds.

Any public policy exception to the comity doctrine requires not merely that the relationship could not have been initially created in New York, but that recognition of it be "repugnant" and "abhorrent" to New York public policy. See, e.g., May's Estate, 305 N.Y. at 492-493, 114 N.E.2d at 7; People v. Ezeonu, 155 Misc. 2d 344, 346, 588 N.Y.S.2d 116, 117 (Sup. Ct. Bronx County 1992); In re Valente's Will, 18 Misc. 2d 701, 704, 188 N.Y.S.2d 732, 735 (N.Y. Surr. Ct. 1959). Recognition of the parties to civil unions as "spouses" under New York's wrongful death law is not "repugnant" to New York public policy. Indeed, contrary to defendant's argument, see Def. Mem. at 10-14, far from having any public policy that would prevent recognition of same-sex relationships legally contracted in a sister state, New York public policy supports recognition of these relationships. This should be especially clear within the context of the wrongful death statute.

The purpose of New York's wrongful death statute is to compensate those whom the deceased normally would have assisted for the pecuniary benefits that they would have received

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[9](...continued)
discussed above, whether same-sex unions could be created in New York is of no relevance to whether such unions legally created in a sister jurisdiction should be given comity. Moreover, the trial court's decision in Storrs was vacated on appeal for failure to join a necessary party, rendering the trial court's decision of no precedential effect. And the 30-year-old decision in Anonymous involved one party's fraudulent misrepresentation of gender to the other.

had the deceased lived. See Shu-Tao Lin v. McDonnell Douglas Corp., 742 F.2d 45, 51 (2d Cir. 1984), Woodward v. Pancio, 65 A.D.2d 923, 924, 410 N.Y.S.2d 454, 456 (4th Dep't 1978). In addition, like the tort law generally, the wrongful death statute is intended to punish tortfeasors and, specifically in the medical malpractice context, deter conduct that falls below the accepted standards of medical care. See Kogan v. Dreifuss, 174 A.D.2d 607, 609-610, 571 N.Y.S.2d 314, 316 (2d Dep't 1991) (evidence sufficient to support conclusion that physician departed from accepted standards of care); see also Raum v. Restaurant Assocs., Inc., 252 A.D.2d 369, 374, 675 N.Y.S.2d 343, 347 (1st Dep't 1998) ("The goals of the wrongful-death statute are to compensate the victim's dependents, to punish and deter tortfeasors and to reduce welfare dependency by providing for the families of those who have lost their means of support.") (Rosenberger, dissenting). Excluding same-sex spouses would not advance any of these purposes; indeed, it would undermine all of them, while giving a windfall to a tortfeasor.

Moreover, excluding same-sex spouses from wrongful death recovery would violate New York's well-established public policy against sexual orientation discrimination. The exclusion would impose all these harms while failing to promote any legitimate state or societal interest.

"New York, a national leader in protecting individual rights, is a prime example of a state that has been moving forward in its recognition of equal rights for gay men and lesbians and their families." Prof. Pamela S. Katz, The Case For Legal Recognition of Same-Sex Marriage, 8 J.L. & Pol'y 61, 70 (1999). New York State's courts have been among the nation's leaders in an evolving public policy that increasingly recognizes the civil rights of lesbian and gay people, supports legal recognition of their relationships, and opposes sexual orientation discrimination. Indeed, in the past two decades, four Court of Appeals' decisions affecting lesbian and gay rights

support the proposition that same-sex couples, especially those in long-term committed relationships, are entitled to legal recognition and protections that are similar or equivalent to those extended to married couples. To give full effect to the underlying purpose of state laws, to ensure fairness and justice for lesbian and gay couples and families, and to avoid discrimination against them, New York's courts often have construed statutes quite broadly. See Levin v. Yeshiva Univ., 96 N.Y.2d 484, 754 N.E.2d 1099, 730 N.Y.S.2d 15 (2001) (denying university's motion to dismiss challenge under New York City law to marriage-based housing policy that was facially neutral but had the effect of excluding all lesbian and gay couples from university's family housing); In re Jacob, 86 N.Y.2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 716 (1995) (validating second-parent adoptions by unmarried same-sex and different-sex couples); Braschi v. Stahl Assocs. Co., 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989) (extending to gay survivor succession rights in rent-controlled apartment); People v. Onofre, 51 N.Y.2d 476, 485, 415 N.E.2d 936, 938-39, 434 N.Y.S.2d 947, 949 (1980) (striking down State's sodomy law with respect to private, consensual acts), cert. denied, 451 U.S. 987, 101 S. Ct. 2323 (1981). Indeed, it has been nearly thirty years since the Court of Appeals first rejected the notion that recognition of the civil rights of lesbian and gay people is contrary to New York public policy. See Gay Activists Alliance v. Lomenzo, 31 N.Y.2d 965, 293 N.E.2d 255, 341 N.Y.S.2d 108 (1973) (compelling acceptance of Gay Activists Alliance's certificate of incorporation for filing, despite Secretary of State's attempt to label organization's purposes "violative of 'public policy'").

New York's courts have not been the only branches of New York government to affirm the equal rights of the State's gay and lesbian citizens. Just last month, New York became the thirteenth state in the nation to pass state-wide legislation barring discrimination on the basis of

sexual orientation, the Sexual Orientation Non-Discrimination Act ("SONDA"). A.B. 1971, 225th Gen. Assem., 1st Spec. Sess. (N.Y. 2002) (enacted Dec. 17, 2002). SONDA is comprehensive, barring discrimination in employment, education, housing, commercial occupancy, trade, credit, public accommodations, and numerous other areas. Id. at §§ 2, 5, 7-13. Further, the law bars, among others, New York State, its agencies, and its subdivisions from discriminating on the basis of sexual orientation with regard to, inter alia, "civil rights." Id. at § 15. This important and sweeping new law takes effect on January 16, 2003. Id. at § 18.

The statement of legislative intent, set forth in the preamble to SONDA, makes clear that current New York public policy stands firmly opposed to discrimination on the basis of sexual orientation:

> The legislature reaffirms that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life, and that the failure to provide such equal opportunity . . . not only threatens the rights and proper privileges of its inhabitants, but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.

Id. at § 1. Significantly, editorials in newspapers across the State expressed strong support for SONDA, indicating that it is indeed a reflection of the state's public policy. See, e.g., Newsday, page A40, Dec. 19, 2002 ("Wherever a person falls on the continuum of human sexuality, no one should discriminate against him or her on that basis."); Albany Times Union, page A14, Dec. 19, 2002 ("By the low standards of Albany, it was a sight to behold. State lawmakers were . . . representing their constituents in the best interest of all New Yorkers."); see also Reaction to SONDA From Around the State, New York Blade, Dec. 27, 2002, page 5, col. 4 ("Not upstate, downstate, Republican, Democrat, black, white, straight, gay: We are one New

York, and I think passage of this bill is another important step in the confirmation of that."–Gov. George Pataki).

Long before passage of SONDA, moreover, New York State public policy strongly supported the civil rights of lesbian and gay people. See generally Ass'n of the Bar of the City of N.Y., Committee on Civil Rights et al., Marriage Rights for Same-Sex Couples in New York, 56 The Record 170 (Spring 2001); Katz, The Case For Legal Recognition of Same-Sex Marriage, 8 J.L. & Pol'y at 66-72 (1999). In November 1983, then-Governor Mario Cuomo issued an Executive Order barring sexual orientation discrimination by all state agencies and departments in employment and "in the provision of any services or benefits." See 9 N.Y.C.R.R. § 4.28. In that Executive Order, the Governor "announce[d] freedom from [sexual orientation] discrimination as the policy, not just of the Department of State but of this entire State government." Id.; see also 9 N.Y.C.R.R. § 4.90 (February 1987 Cuomo Executive Order establishing a Governor's Task Force on Bias-Related Violence to investigate, inter alia, violence motivated by anti-gay sentiment). In extending the Cuomo Executive Orders barring sexual orientation discrimination by the state as employer, Governor Pataki took the statement of policy one step further to declare not only that state government opposes sexual orientation discrimination, but also that "it has been, and remains, the policy of this state not to discriminate on the basis of sexual orientation." 9 N.YC.R.R. § 5.33 (Executive Order No. 33, issued April 9, 1996) (emphasis added); see also 9 N.Y.C.R.R. §§ 5.10, 5.12 (Pataki Executive Orders, issued April 1995, barring sexual orientation discrimination in screening of candidates to becomes judges, district attorneys, and sheriffs). Further the state has promulgated regulations to implement housing and adoption laws recognizing lesbian and gay relationships and to prohibit adoption agencies from rejecting

petitions solely on the basis of sexual orientation. See 9 N.YC.R.R. §§ 2104.6, 2204.6, 2500.2, 2503.5, 2520.6 (succession rights of unmarried life partners); 18 N.Y.C.R.R. § 421.16(h)(2) (regulating adoption). On June 23, 2000, the state Senate passed a hate crimes law that enhanced penalties for bias-motivated crimes, including those motivated by anti-gay bias, 11 years after the state Assembly had first approved the bill. See N.Y. Penal Law § 485.05 (hate crimes provision).

The benefits and protections extended to lesbian and gay people who lost life partners in the terrorist attacks on September 11, 2001, is further proof of New York's public policy in favor of recognizing such relationships. In an Executive Order following the September 11 tragedy, Governor Pataki concluded that the State Crime Victims Board ("SCVB") should extend the benefits of a "spouse" to domestic partners, a change that the SCVB reportedly then made permanent. See Aronson Aff., Exhibit 6 (State of New York Executive Order No. 113.30); www.prideagenda.org/pressreleases/pr-10-17-02.html (NY State Crime Victims Board Extends Equal Benefits to Surviving Domestic Partners of Homicide Victims).

Furthermore, on August 20, 2002, the state legislature extended the Workers' Compensation "spousal death benefit" to the domestic partners (including the lesbian and gay domestic partners) of the victims of the September 11 attacks. N.Y. Workers' Comp. Law § 4 (2002) (domestic partner of employee killed in 9/11 terrorist attacks "shall . . . be deemed to be the surviving spouse of such employee for the purposes of any [Workers' Compensation] death benefit . . . .") (emphasis added).

3. Contrary To Defendant's Suggestion, The Defense Of Marriage Act Permits States To Allow And Recognize Same-Sex Marriages And Spousal Bonds, In No Way Forbids Such Recognition, And Otherwise Has No Bearing On This Case.

The so-called federal "Defense of Marriage Act" ("DOMA"), upon which defendant relies heavily in its memorandum, see Def. Mem at 1, 9-10, 14, in no way undermines the argument for New York's recognition of John and Conrad's spousal union. While DOMA purports to *permit* individual states to refuse to recognize same-sex *marriages* performed in any other state, see 28 U.S.C. § 1738C (2002), it by no means prohibits states from recognizing such marriages.[10] Indeed, the House Majority Report explaining DOMA states that the law does not "either prevent a State on its own from recognizing same-sex 'marriages,' or from choosing to give binding legal effect to same-sex 'marriage' licenses issued by another State." 1996 U.S. Code Congressional & Admin. News 2905, 2929.

Significantly, in contrast to most other states, see www.hrc.org/issues/marriage/background/statelaws.asp (listing states with anti-marriage laws targeting same-sex couples), New York has declined to adopt any statutory language that would create any obstacle to either the creation or the recognition of same-sex marriages or spousal bonds in New York. The absence of any statute that would present obstacles to recognition, when DOMA expressly purports to permit the states to create them, and when a majority have done so, evidences the New York

[10]While DOMA purports to authorize states to refuse to recognize same-sex marriages performed in sister states, it says nothing about other legal entities, such as domestic partnerships or civil unions. Thus, this Court could end the inquiry by simply noting that DOMA has nothing to say at all with regard to civil unions, and therefore has no bearing on this case. For the sake of refuting defendant's argument in its entirety, however, plaintiff's analysis above assumes that DOMA implicitly authorizes states to refuse recognition of a "spousal" status created by sister states even when no marriage is involved, as is the case with Vermont civil unions.

legislature's intent not to hinder this state's recognition of spousal bonds that same-sex couples legally create in sister or foreign jurisdictions.[11] The additional New York principle that recognition should be broadly extended to any spousal relationship legally created between two parties in a sister jurisdiction and not in gross violation of New York public policy supports full recognition of same-sex spousal bonds created through Vermont civil unions.[12]

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[11]Equally misguided is defendant's reliance on old New York cases describing the institution of marriage, see, e.g., Fearon v. Treanor, 272 N.Y. 268 (1936) (cited in Def. Mem. at 14) and other inapposite caselaw. For example, In re Adoption of Robert Paul P., 63 N.Y.2d 233, 471 N.E.2d 424, 481 N.Y.S.2d 652 (1984), in which the Court of Appeals recognized the unremarkable principle, irrelevant to the pending case, that the adoption statutes were designed to create a legal bond between parent and child, not between two adults in a committed life partnership. While defendant quotes extensively from Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841 (1986), moreover, to argue that recognition of same-sex relationships would violate New York public policy, see Def. Mem. at 12-14, the Court of Appeals has made abundantly clear that Hardwick's decision on federal constitutional privacy grounds does not represent New York public policy. See People v. Scott, 79 N.Y.2d 474, 487, 593 N.E.2d 1328, 1335-1336, 583 N.Y.S.2d 920, 927-928 (1992) (citing dissenting opinions in Hardwick as expressing New York citizens' rights); In re Jacob, 86 N.Y.2d at 24 (there is no "governmental policy disapproving of homosexuality" justifying discrimination against children of same-sex couples); cf. People v. Onofre, 51 N.Y.2d 476, 485, 415 N.E.2d 936, 938-939, 434 N.Y.S.2d 947, 949 (1980) (holding that provision of penal law criminalizing consensual sodomy violates right of privacy and equal protection), cert. denied, 451 U.S. 987, 101 S. Ct. 2323 (1981).

[12]New York courts have always resolved cases regarding New York's recognition of spousal bonds created in sister or foreign jurisdictions by relying on state-law based principles of comity, generally without resort to the federal Constitution's Full Faith and Credit Clause. In arguing that Full Faith and Credit does not require this Court to recognize John as a "surviving spouse," defendant has once again missed the point. State-law comity principles require New York's recognition of John and Conrad's spousal relationship, regardless whether Full Faith and Credit would also require such recognition. Because comity resolves the issue, this Court need not (and should not) delve into federal constitutional Full Faith and Credit concerns.

POINT III

NEW YORK LAW REQUIRES THAT THE COURT RESPECT THE REALITY OF JOHN AND CONRAD'S LENGTHY, COMMITTED SPOUSAL RELATIONSHIP

Even if this Court were to conclude that the Vermont civil union by itself does not make John a surviving "spouse" entitled to distribution under New York's wrongful death statute, the Court of Appeals' decision in Braschi v. Stahl Assocs. Co., 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989), and judicial developments arising out of Braschi, support recognition of John and Conrad as spouses based on the totality of their more than 15-year committed, loving and mutually supportive relationship. The Court of Appeals' decision in Braschi provides a viable framework for determining whether same-sex couples should be entitled to the legal benefits and protections that married couples receive, and one that New York's courts have been implementing in the over 13 years since Braschi was decided.

Although the specific holding in Braschi was that the same-sex life partner of the deceased tenant in a rent-controlled apartment was a "family member" entitled to succession rights, at least three New York courts have applied Braschi's principles to recognize same-sex couples as *spouses* under New York law. See Gay Teachers Ass'n v. Bd. of Educ., N.Y.L.J., Aug. 23, 1991, at 22, col. 3 (Sup. Ct. N.Y. County) (denying City's motion to dismiss because health insurance benefits for "husband" and "wife" could also extend to same-sex domestic partners under Braschi), aff'd, 183 A.D.2d 478, 585 N.Y.S.2d 1016 (1st Dep't 1992); Mandell v. Cummins, N.Y.L.J., July 25, 2001, at 18, col. 4 (Civ. Ct. N.Y. County) (statutory prohibitions against eviction where tenant or "spouse" is disabled "apply equally to a tenant's disabled gay life partner."); Knafo v. Ching, N.Y.L.J., Dec. 6, 2000, at 28, col. 2 (Civ. Ct. N.Y. County) (same).

In Knafo, the court recognized that the gay life partners were "not just a family but nontraditional spouses. . . . All that separates them from traditional spouses is the fact that they are of the same sex and therefore cannot legally marry." Id. [13]

The guidelines that the Court of Appeals set forth in Braschi are applicable in this context as well for determining whether a same-sex couple is in a relationship that warrants legal protection. Relevant factors include "the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services." 74 N.Y.2d at 212-13, 543 N.E.2d at 55, 544 N.Y.S.2d at 790. "These

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[13] In re Cooper, 187 A.D.2d 128, 592 N.Y.S.2d 797 (2d Dep't 1993), which rejected the application of Braschi to determine whether the survivor of a same-sex relationship had a right of spousal election against the decedent's will pursuant to N.Y. Est. Powers & Trusts Law, is entirely distinguishable from the present circumstances. In Cooper, the decedent's will left over 80% of the value of the estate to someone other than the petitioner. Id. at 129, 592 N.Y.S.2d at 797. The petitioner sought a court order to contravene the clearly expressed intent of the decedent in his will. In stark contrast, Conrad left 100% of his Estate to John. See Langan Aff. at ¶ 41, Exhibit L. John seeks to recover for his spouse's wrongful death for purposes entirely consistent with the wrongful death statute – including compensation for the financial losses that he is suffering and will continue to suffer as a result of Conrad's wrongful death, and deterrence of future malpractice by defendant. In Cooper, the petitioner and the decedent had been living together for 3-1/2 years before the decedent's death – far less than the more than 15 years that John and Conrad were together. Id. at 129, 592 N.Y.S.2d at 797. In Cooper, there was no evidence that the petitioner and decedent had formalized or legalized their relationship in any way, or had a wedding ceremony. In the pending case, it is undisputed that John and Conrad entered into a civil union in Vermont, and held a wedding ceremony with scores of their friends and relatives. Raum, which is not binding on this Court, can be distinguished on similar grounds. Moreover, Justice Rosenberger's well-reasoned dissent in Raum correctly pointed out that "[i]t makes sense to construe the intestacy statute's definition of 'surviving spouse' narrowly when the opposing parties are innocent heirs, and broadly when they are tortfeasors." 252 A.D.2d 369, 372, 675 N.Y.S.2d 343, 346 (Rosenberger, dissenting). The dissent also noted that the exclusion of same-sex life partners from the class entitled to bring wrongful death actions "lacks a rational basis because it is neither rationally related to the interests served by the statute, nor to the state's policy against same-sex marriage, nor even to administrative convenience." Id. at 374, 675 N.Y.S.2d at 347. See also supra, Point II(B).

factors are most helpful, although it should be emphasized that the presence or absence of one or more of them is not dispositive since it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control." Id. at 213, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.

Far more than obtaining a Vermont civil union, John and Conrad took every step available to them under the law, with their employers, with their family and friends and in society generally to legalize, formalize and protect their relationship and to have recognized precisely what plaintiff asks this Court to recognize: that John and Conrad were spouses in a long-term committed relationship. Thus, in the pending case, John and Conrad's relationship easily satisfies all of the relevant factors that entitle John, as survivor, to legal protection and benefits under a Braschi-type standard. The couple lived together in an exclusive relationship for 15 years. Langan Aff. ¶ 2. They loved one another more deeply than either had ever loved anyone else. Id.; see also supporting affidavits of sixteen family members, friends, and colleagues. The couple held joint leases that demonstrated their financial interdependence. Id. at ¶ 45, Exhibit O. They financially relied on each other to assist with day-to-day household expenses. Id. at ¶ 45. They held themselves out to society, including employers, work colleagues, family and friends, as a couple in a life partnership. See generally Langan Aff.; supporting affidavits of sixteen family members, friends, and colleagues. They even had a wedding ceremony, to which they invited scores of family members and friends, to formalize their civil union. Id. at ¶¶ 4-13, Exhibits B & C. They assisted one another when they were ill – indeed, John spent an enormous amount of time in the hospital with Conrad in his final days, even though neither John nor anyone else had any reason to

believe or was ever told that Conrad's life was remotely in danger. Id. at ¶¶ 53-71. They relied on each other for daily family services, large and small. Id. at ¶ 16-42, 45-68.

John and Conrad legally formalized their relationship in almost every way possible, not only by becoming spouses through a formal legal civil union in Vermont, but by executing wills, designating one another sole Beneficiary and sole Executor of the other's estate, health care proxies, life insurance policies, and joint listings on their leases. Id. at ¶¶ 37-45, Exhibits B, G through O. The couple's "dedication, caring and self-sacrifice" was evident to the day of Conrad's death and beyond. See Braschi, 74 N.Y.2d at 213, 543 N.E.2d at 55, 544 N.Y.S.2d at 790.

If ever there was a case where Braschi's equitable principles should be applied to permit same-sex partners to be recognized as "spouses," this is the case. Despite their youth and their health, John and Conrad availed themselves of every available opportunity to cloak their relationship and each other with legal protection and recognition, and they solemnized their relationship in the sole U.S. jurisdiction that expressly invites same-sex couples to become spouses. It is well settled in New York that courts have the equitable power to grant a person the powers, protections, benefits and privileges of a close family members, including a "spouse," even where no formal legal instrument or necessary biological relationship otherwise existed to create the protected relations. See Braschi; Matter of Mazzeo, 95 A.D.2d 91, 466 N.Y.S.2d 759 (3d Dep't 1983) (creating "equitable adoption" so that person who had no formal legal relationship to decedent as child could nonetheless be legally treated as decedent's child); Rodriguez v. Morris, 136 Misc. 2d 103, 519 N.Y.S.2d 451 (1987) (Surr. Ct. Suffolk County 1987) (same); Matter of Riggs, 109 Misc. 2d 644, 440 N.Y.S.2d 450 (Surr. Ct. N.Y. County 1981) (same).

Yet in contrast to the parties in all these cases, to whom courts accorded full legal recognition as next of kin, John and Conrad did have a formal legal instrument – their civil union – that legally made them spouses, and makes John Conrad's surviving spouse. Where an "equitable and economic understanding of the real relationship" between the parties has been sufficient to extend full legal protections, see Note, Equitable Adoption, 58 Va. Law Review 727, 730, 738-39; cases cited supra, it would be particularly irrational and unjust to deny John recognition of his formal, legal status as Conrad's civilly united spouse.

To the extent that defendant suggests that the error in John's probate petition collaterally estops him from asserting his spousal status under the wrongful death law, such an argument would have no merit. Collateral estoppel does not apply unless an issue was "material" in a prior proceeding, and was "actually litigated," neither of which factors apply to Conrad's spousal status in the probate proceeding. See Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 456-457, 482 N.E.2d 63, 68, 492 N.Y.S.2d 584, 589 (1985); Triboro Fastener & Chem. Products Corp. v. Lee, 236 A.D.2d 603, 604, 653 N.Y.S.2d 960, 961-962 (2d Dep't 1997) (collateral estoppel only where prior full and fair opportunity to litigate issue and where "a different judgment in the second [action] would destroy or impair rights or interests established by the first"); New York Site Development Corp. v. New York State Dep't of Environmental Conservation, 217 A.D.2d 699, 630 N.Y.S.2d 335 (2d Dep't 1995) (no estoppel where issue not material in prior proceeding). John's spousal status was irrelevant to the probate proceeding because John was named sole Executor and sole Beneficiary in an uncontested Will, and spousal status was certainly not fully litigated in that proceeding. See Burns Aff. at ¶¶ 6, 10-12. In any event, the legal procedures for dissolving a civil union are identical to those for divorce, and thus elaborate, complex, and

involved. See Vt. St. Ann. tit. 15, § 1206 ("The dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage.") (Aronson Aff., Exhibit 2). An inadvertent error on a form cannot operate to undo the spousal relationship of a civil union any more than it could operate as a divorce.

POINT IV

TO PRECLUDE JOHN FROM SEEKING RECOVERY FOR CONRAD'S WRONGFUL DEATH WOULD VIOLATE JOHN'S RIGHTS TO EQUAL PROTECTION UNDER THE NEW YORK STATE CONSTITUTION

As discussed above, John is entitled to recognition as a "surviving spouse" under a literal and correct reading of New York's wrongful death law, N.Y. Est. Powers & Trusts Law §§ §§ 4-1.1 and 5-4.4, and well settled principles of state-law comity, and application of a functional definition of the term "spouse" under state law and relevant precedent. However, if this Court were to reject this well-established authority and precedent and conclude that plaintiff is not a "surviving spouse" under N.Y. Est. Powers & Trusts Law §§ 4-1.1 and 5-4.4, plaintiff nonetheless must be afforded all the benefits and protections of a spouse (including the right to recovery under this wrongful death suit) based on his right to equal protection under the laws pursuant to New York State's Constitution. N.Y. Const. art. I, § 11.[14]

The State Constitution's Equal Protection Clause was approved at the Constitutional Convention of 1938. See 2 Rev. Record N.Y. State Constitutional Convention 1065 (1938)

[14]Because plaintiff is raising a constitutional issue, plaintiff respectfully brings to the Court's attention C.P.L.R. § 1012(b) and N.Y. Executive Law § 71, requiring the Court to issue an order directing plaintiff to serve notice on the State Attorney General. See also Carter v. Carter, 58 A.D.2d 438, 397 N.Y.S.2d 88 (2d Dep't 1977) (indicating that court has no power to dispense with notification to the Attorney General).

(citing N.Y. Const. art. I, § 11). That convention was committed to "positive liberalism" and to a "belief that the state had the obligation to promote the welfare and protect the rights of as many people as possible." Peter J. Galie, The New York State Constitution, A Reference Guide 27 (1991).[15]

Defendant's interpretation of Est. Powers & Trusts Law §§ 4-1.1 and 5-4.4 would limit recovery to persons in married different-sex relationships. Despite the apparent neutrality of defendant's proposed reliance on marriage to limit wrongful death recovery, the reality is that, to date, no same-sex couple has obtained a marriage license in New York. Thus, the limitation proposed by defendant would have a severely discriminatory effect on lesbian and gay people. If adopted by this Court, it would mean that all lesbian and gay couples, including John and Conrad in this case, are presently excluded from any possibility of protection under New York's wrongful death statute, even if (as John and Conrad did) they took every step legally available to them to formalize and protect their relationship and each other.

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[15]New York's Court of Appeals has interpreted both fundamental rights and equal protection as being more expansive under New York's State Constitution than under the federal Constitution. New York courts therefore have extended certain constitutional protections that federal courts have declined to find under federal constitutional law. See, e.g., People v. Scott, 79 N.Y.2d 474, 489, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992) (State Constitution provides stronger privacy protections than federal Fourth Amendment); People v. Kern, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990) (rejecting federal standard and using more stringent state constitutional standard to find that peremptory challenges to exclude jurors of particular race violate Equal Protection Clause of State Constitution); People ex rel. Arcara v. Cloud Books, 68 N.Y.2d 553, 555-56, 557, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986) (holding that greater protections are afforded to bookseller under the State Constitution's guarantee of freedom of expression than under federal Constitution's First Amendment); Cooper v. Morin, 49 N.Y.2d 69, 79-82, 399 N.E.2d 1188, 1193- 1195, 424 N.Y.S.2d 168, 174-176 (1979) (though federal Constitution does not require that female pretrial detainees receive visitation privileges, State Constitution's due process clause does).

That defendant's interpretation of the statute would also exclude unmarried different-sex couples does not save it from constitutional infirmity. Unmarried different-sex couples have the ability to marry, but have chosen not to do so. In stark contrast, to date, no same-sex couple has succeeded in obtaining a marriage in New York. Thus, if defendant's view were to prevail, partners in same-sex couples would face an insurmountable barrier to protection under the wrongful death statute not faced by partners in different-sex couples. "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." Jenness v. Fortson, 403 U.S. 431, 442, 91 S. Ct. 1970, 1976 (1971). Under this principle, courts have struck down laws that, while ostensibly neutral on their face, result in *de facto* discrimination by failing to take into account the differing circumstances of particular groups. See Anderson v. Celebrezze, 460 U.S. 780, 801, 103 S. Ct. 1564, 1576-1578 (1983); Council of Alternative Political Parties v. Hooks, 121 F.3d 876, 882-883 (3d Cir. 1997).

John and Conrad did everything possible, going to great lengths to secure all the protections, benefits and responsibilities of being legal spouses. In light of this fundamental difference, any contention that John and Conrad are treated equally to different-sex unmarried couples glosses over the basic legal disability that places the two groups into two entirely different situations and renders any purported equation of the disingenuous at best. See Levin v. Yeshiva Univ., 96 N.Y.2d 484, 754 N.E.2d 1099, 730 N.Y.S.2d 15 (2001) (2001) (holding that unmarried same-sex couples are not similarly situated to unmarried heterosexual couples); Tanner v. Oregon Health Sciences Univ., 157 Or. App. 502, 516-517, 971 P.2d 435, 443 (Or. 1998) (same); Foray v. Bell Atlantic, 56 F. Supp. 2d 327 (S.D.N.Y. 1999) (same).

Indeed, in a case extremely similar to the pending one, a California trial court recently held that equal protection principles required that the survivor of a long-term, committed same-sex relationship be permitted to sue for wrongful death. In Smith v. Knoller, No. 319532 (Calif. Super. Ct., S.F. County, Aug. 9, 2001), Slip Op. (attached to Aronson Aff. as Exhibit 3), the couple had not entered into a civil union and hence, unlike John and Conrad, were not already formal, legal spouses pursuant to an express state law. The court nonetheless concluded that the "insurmountable barrier" that marriages presented to lesbian or gay persons bringing an action for wrongful death "is not reasonably related to any legitimate public purpose." Id. at 3-4.

In New York, if marriage were made a prerequisite to recovery under a wrongful death action, it would (as in California) present an unconstitutional "insurmountable barrier" to recovery. See Labine v. Vincent, 401 U.S. 532, 539, 91 S. Ct. 1017, 1021 (1971). Moreover, the U.S. Supreme Court subsequently held that an equal protection violation could be established even without meeting Labine's "insurmountable barrier" test. See Trimble v. Gordon, 430 U.S. 762, 773-774, 97 S. Ct. 1459, 1466-1468 (1977). Here, the classification urged by defendant unquestionably would violate equal protection because the denial of marriage licenses to all same-sex couples to date means that making marriage a prerequisite to wrongful death recovery satisfies even the most stringent insurmountable barrier test.

In Levy v. Louisiana, 391 U.S. 68, 88 S. Ct. 1509 (1968), the U.S. Supreme Court struck down laws discriminating against children born out-of-wedlock in actions to recover upon a relative's death. See also Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172, 92 S. Ct. 1400, 1405 (1972); Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73, 75, 88 S. Ct. 1515, 1516-1517 (1968). In striking down the exclusion of out-of-wedlock children, the Court

articulated several rationales that are directly applicable here. First, out-of-wedlock children (like John) shared an "intimate, familial relationship" with the deceased. Levy, 391 U.S. at 71, 88 S. Ct. at 1511. Second, each "suffered wrong in the sense that any dependent would." Id. at 72, 88 S. Ct. at 1511. Third, in each case, the plaintiff would be denied important rights based on a status that is beyond the individual's control. Id. at 71, 88 S. Ct. at 1511. Finally, in each case, denying standing to the plaintiff would provide a windfall that would unjustly allow the "tortfeasors [to] go free." Id. As a result, in each case, the classification "has no relation to the nature of the wrong allegedly inflicted on the [deceased]." Id. at 72, 88 S. Ct. at 1511.

Applying these standards to the California wrongful death law, the Smith court noted:

> The purpose behind the wrongful death statute is to provide compensation for the loss of companionship and other losses resulting from decedent's death . . . . Here, plaintiff's sexuality has no relation to the nature of the wrong allegedly inflicted upon her and denying recovery would be a windfall for the tortfeasor.

Smith, at 3-4. Likewise, no legitimate state or government interest would be promoted here by denying same-sex couples the right to access the law's wrongful death remedies and protections, and incalculable harm would be imposed on same-sex couples. Based on this harm/benefit analysis, if defendant's construction of the wrongful death law is accepted, the law should be held to violate John's right to equal protection under the state constitution, and he would be entitled to recovery as if he were a surviving spouse under New York law in order to preserve those superseding rights. See People v. Kern, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990).[16]

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[16]The sole U.S. Supreme Court case on which defendant relies as a purported basis to defeat plaintiff's constitutional rights, Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841 (continued...)

CONCLUSION

For the foregoing reasons, plaintiff John Langan respectfully requests that this Court convert defendant St. Vincent Hospital of New York's partial motion to dismiss into one for partial summary judgment, deny that motion, and grant plaintiff's motion for partial summary judgment as decedent Neal Conrad Spicehandler's surviving spouse, entitled to recovery under New York's wrongful death law.

Dated: New York, New York
January 9, 2003

Respectfully submitted,

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[16](...continued)
(1986), addressed only whether there is a fundamental right to engage in sodomy, and was by its own terms irrelevant to the issue of equal protection under the laws. Id. at 196 n.8, 106 S. Ct. at 2847 n.8 (noting that the Court did not reach Equal Protection because the arguments were not raised). As discussed above, New York's Constitution is more protective than the federal Constitution of both equal protection and fundamental rights. See supra, notes 11, 15. More recent Supreme Court precedent, moreover, establishes that Hardwick cannot be read to strip lesbian and gay people of their right to equal protection. See Romer v. Evans, 517 U.S. 620, 633-638, 116 S. Ct. 1620, 1628-29 (1996). In addition, the Supreme Court has recently granted *certiorari* on the question whether to overrule its decision in Hardwick. See Lawrence v. Texas, cert. granted, 71 U.S.L.W. 3116, 71 U.S.L.W. 3379, 71 U.S.L.W. 3387, 123 S. Ct. 661 (U.S. Dec. 2, 2002) (No. 02-102). In any event, Hardwick offers no basis to deny plaintiff his rights to equal protection under the State Constitution nor, for that matter, any rights whatsoever under state law.

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