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PALMER, J., concurring. I agree with and join the majority opinion except insofar as the majority concludes therein that the plaintiffs¹ failed to brief adequately their contention that the trial court improperly had rendered judgment for the defendant, Dress Barn, Inc. (Dress Barn), on the plaintiffs' claim that Dress Barn had violated its duty to negotiate in good faith under New York law. See footnote 37 of the majority opinion. Although the plaintiffs did not extensively brief that claim, I believe that it is adequate for our review.² Upon consideration of the merits of the claim, however, I agree with the trial court that Dress Barn was entitled to judgment as a matter of law on that claim.

The plaintiffs' claim of a breach of the duty to negotiate in good faith is predicated primarily on paragraph eight of the parties' letter of intent, which provides: "[Dress Barn] anticipates being able to conduct the necessary 'due diligence' investigation and negotiating and executing definitive agreements by June 30, 1997. During this period, Bedford Fair [Industries (Bedford Fair)] shall provide [Dress Barn] and its accounting, legal and other representatives, with reasonable access to Bedford Fair's and the [c]ompanies' books and records, and other information regarding their business and their properties, facilities, accountants and management level employees." In granting Dress Barn's motion for summary judgment on the plaintiffs' claim that Dress Barn had violated the duty to negotiate in good faith, the trial court concluded that "[t]his paragraph reveals that the parties anticipated that [Dress Barn] would negotiate, but it does not obligate [Dress Barn] to do so." The trial court further concluded that the only provisions of the letter of intent, including paragraph eight, that were legally binding on the parties, "deal primarily with obligations imposed on the plaintiffs to cooperate with [Dress Barn] during the latter's due diligence investigation of the former, and do not address the claimed duty to negotiate an acquisition agreement. In fact, the letter nowhere obligates the parties either to enter an acquisition agreement or even to negotiate an acquisition agreement."

I agree generally with the trial court's analysis of paragraph eight of the letter of intent. I note further that the first sentence of paragraph eight—the language relied on by the plaintiffs in support of their claim of a breach of the duty to negotiate in good faith—merely was prefatory language to the only duty actually imposed under the paragraph, namely, the duty of the *plaintiffs* to provide Dress Barn and its representatives with reasonable access to the plaintiffs' books and records so that Dress Barn could conduct its due diligence investigation. Nothing in paragraph eight of the

letter of intent suggests the existence of any binding agreement to negotiate, and no such agreement may be found elsewhere in the letter of intent. I therefore would affirm the trial court's judgment in favor of Dress Barn with respect to the plaintiffs' claim alleging a violation of the duty to negotiate in good faith.

¹ The plaintiffs include Alan M. Glazer, GLZR Acquisition Corporation and BFI Liquidating Limited.

² In particular, I do not agree with the majority that the plaintiffs inadequately briefed that claim merely because they failed to cite or to apply in their brief the multipart test prescribed under New York law for determining whether a preliminary agreement is legally binding. That test is not necessarily implicated when, as in the present case, the parties' preliminary agreement expressly provides that it is binding on the parties. See, e.g., *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 72 (2d Cir. 1989) (when parties expressly agree to be bound by terms of preliminary agreement, court need look no farther than language of agreement). In the present case, the plaintiffs rely on paragraph eight of the parties' letter of intent in support of their claim of a binding agreement. That letter provides in relevant part: "It is understood that this letter merely constitutes a statement of mutual current intentions with respect to the transactions contemplated herein, does not contain a resolution of all matters upon which agreement must be reached for the consummation of those transactions, and does not constitute a binding agreement with respect thereto. A binding agreement with respect to the [t]ransaction will result only from the execution of the definitive agreements referred to in Section 4 [of this letter]. *Notwithstanding the two preceding sentences, upon execution and delivery of this letter by both parties, Sections 5, 6, 8, 9, 10 and 11 of this letter shall be legally binding upon and enforceable against the parties. . . .*" (Emphasis added.)
