No. 23-795

In the United States Court of Appeals for the Second Circuit

GARTH DRABINSKY,

Appellant,

– v. –

ACTORS' EQUITY ASSOCIATION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK
CASE NO: 1:22-CV-08933-LGS
JUDGE LORNA G. SCHOFIELD

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INTRODUCTION

As it did before the district court, AEA substitutes its own factual narrative for the one alleged in the complaint and rewrites the governing caselaw, doubling down on the district court's reversible errors. These attempts should be rejected.

AEA says that the allegations against it involve a traditional withholding of labor and that no facts support Mr. Drabinsky's claim that AEA's intent behind its challenged conduct is pretextual. That ignores much of Mr. Drabinsky's complaint, which alleges that:

- Long before the blacklisting, AEA agitated the cast against Mr. Drabinsky, including blaming him for nonpayment of wages and benefits, despite claiming in a prior litigation that Mr. Drabinsky was not responsible for any wages or benefits withheld. A-17.
- Before the blacklisting, AEA instituted an illegal work stoppage to agitate the cast and protest Mr. Drabinsky for fictitious reasons, including falsely blaming him for unpaid wages and benefits. A-51–54 ¶¶120–31.
- AEA disclaimed responsibility to ensure safe working conditions on *Paradise Square*: "it is the employer's responsibility to provide a

workplace free of harassment, discrimination and bullying." A-44 ¶85. AEA then reversed course and tried to reclaim responsibility for safe working conditions to justify Mr. Drabinsky's ban here.

- AEA continues to urge its narrative that Mr. Drabinsky defaulted on unidentified contractual obligations even though the complaint alleges that Mr. Drabinsky had none. A-73 ¶191.
- AEA broadly blacklisted Mr. Drabinsky from working in any producing capacity indefinitely, purportedly in a same-day response to a letter it says the cast wrote independently. The claimed same-day blacklisting lacked any known investigation or due process.

These allegations are of troublesome union conduct involving much more than a mere strike. AEA fails to address these allegations, other than to say its conduct is run-of-the-mill. That is both false and legally irrelevant at this stage.

In any event, this is not a hypothetical case of "any antitrust plaintiff" overcoming the statutory labor exemption at the pleading stage "merely by making conclusory assertions about animus and speculating about a union's state of mind." AEA Br. at 39. To the contrary, the

complaint provides facts sufficient to show that AEA's chosen narrative—that *Paradise Square* was "Drabinsky's production" and that Mr. Drabinsky is mostly responsible for withheld wages and the Production overall—is false. In other litigation, AEA alleged someone else (Bernard Abrams) was responsible. In the relevant contracts, AEA agreed that the Production was responsible. And in its series of grievances, AEA alleged that the Production was to blame for wages withheld. This is not speculative, particularly when coupled with Mr. Drabinsky's limited role as a creative producer. AEA does not explain its changing story, and its claimed intent should be examined on the merits, on summary judgment or at trial.

AEA also suggests that strikes are *per se* exempted from the antitrust laws and that ***its*** own assurance in its briefing, that its intent was *bona fide*, carries the day. Both assertions are incorrect. Governing cases say:

- Some—but not all—strikes are exempted, and it is the union's burden to prove that strikes that accompany more troublesome union behavior (as here) were necessary because the goals could not be achieved through traditional tactics. Mr. Drabinsky should be

"allow[ed] discovery" on that issue. *USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council*, 31 F.3d 800, 810 (9th Cir. 1994).

- Disputes involving a union's "intent" and who "controlled" *Paradise Square* are factual and thus should not have been resolved on a motion to dismiss.

While AEA may be able to posit an alternative explanation of why Mr. Drabinsky was blacklisted—an explanation that Mr. Drabinsky has alleged is pretextual—that does not matter on a motion to dismiss. AEA will be free to test its alternative narrative on summary judgment (or later). But this was a motion to dismiss, and so all that matters is Mr. Drabinsky's well-pleaded allegations.

At the very least, Mr. Drabinsky should have been given leave to amend—particularly given the new factual arguments AEA raises here, e.g., whether or not Mr. Drabinsky was an "agent" or "joint employer" for purposes of the National Labor Relations Act. AEA Br. at 38.

ARGUMENT

I. MR. DRABINSKY'S ANTITRUST CLAIMS ARE NOT SUBJECT TO THE STATUTORY LABOR EXEMPTION

A. AEA Demonstrates This Case Cannot Be Resolved on the Pleadings

Mr. Drabinsky's opening brief showed that this case should not have been resolved on a motion to dismiss. Specifically, it distinguished the cases relied on by the district court to apply the labor exemption. None of those cases involved fact questions about the union's intent, and nearly all involved a full factual record. *See* Drabinsky Opening Br. at 35–38. But AEA repeats the same mistake as the district court by relying on cases resolving the exemption on the merits.

1. The cases cited by AEA that were resolved on a motion to dismiss have nothing to do with Mr. Drabinsky's antitrust claims.

Only in a footnote does AEA try to support the idea that Mr. Drabinsky's claims can be resolved on the pleadings. *See* AEA Br. at 27 n.6. But none of those cases has anything to do with the facts here: none disposed of a complaint on facts that a union's self-serving characterization of its own intent was pretextual. *Hurley v. Nat'l Basketball Players Ass'n*, No. 22-3038, 2022 U.S. App. LEXIS 35964, at *6–7 (6th Cir. Dec. 30, 2022) (complaint dismissed where, unlike here,

plaintiff challenged "the mere fact that parties entered into a standard collective bargaining agreement"); *Dickey v. NFL*, No. 17-cv-12295-IT, 2018 U.S. Dist. LEXIS 164934, at *16 (D. Mass. Sept. 26, 2018) (complaint challenged a written "Three Year Rule" of general application to all player-agents with no allegation that the union's claimed rationale behind the rule was pretextual); *Roman Restoration, Inc. v. Operative Plasterers' & Cement Masons' Int'l Ass'n*, No. 07-2991 (RBK), 2008 U.S. Dist. LEXIS 49940, at *6 (D.N.J. June 30, 2008) (complaint did not challenge a claimed self-interest as pretextual); *Colfax Corp. v. Ill. State Toll Highway Auth.*, No. 93 C 7463, 1994 U.S. Dist. LEXIS 11503, at *37 (N.D. Ill. Aug. 12, 1994) (same); *Warnick v. Wash. Educ. Ass'n*, 593 F. Supp. 66, 70 (E.D. Wash. 1984) (same and dismissing complaint only after two opportunities to amend); *Tuvia Convalescent Ctr., Inc. v. Nat'l Union of Hosp. & Health Care Emps.*, 553 F. Supp. 303, 307 (S.D.N.Y. 1982). These cases have little to do with the facts at hand.

2. Mr. Drabinsky was not required to allege AEA's specific motive.

Relatedly, any suggestion that Mr. Drabinsky was required to identify AEA's exact motive (whether it be personal dislike or something else) is also incorrect. *See* AFL-CIO Br. at 14. A plaintiff who pleads

specific circumstances that suggest pretext does not need to specifically plead the precise motive of the defendant. Such a heightened pleading requirement would go further than is even required to plead fraud under Rule 9, which does not apply here. Even in such cases, a "complaint is allowed to contain general allegations" as to mental state because "a plaintiff realistically cannot be expected to plead a defendant's state of mind." *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842, 864 (2d Cir. 2021). And there is no such heightened pleading standard here.

3. AEA misstates the breadth of the statutory labor exemption.

Next, AEA significantly overstates the breadth of the statutory labor exemption with its reliance on *Brown v. Pro Football,* 518 U.S. 231 (1996) and *H.A. Artists & Assocs. v. AEA*, 451 U.S. 704 (1981). AEA Br. at 25–27. The cited discussion in *Brown* concerns the ***non***-statutory labor exemption, which, in any event, the Supreme Court did "not interpret" as "broadly as did the Appeals court." *Brown*, 518 U.S. at 235–37. And *H.A. Artists* stands, in part, for the proposition that a union's self-branding of its anticompetitive conduct as having to do with wages or working conditions is inadequate, despite any purported breadth of the exemption. 451 U.S. at 718 n.23 ("The Court did not explicitly

determine . . . whether the union had acted in its 'self-interest.' But given its various findings that the challenged restrictions were designed to cope with job competition and to protect wage scales and working conditions, it clearly did so *sub silentio*.") (citation omitted). Of course, both cases were decided following trial.

4. Courts continue to recognize that antitrust cases typically should not be dismissed on a Rule 12(b)(6) motion.

Finally, long after *Bell Atlantic Corp. v. Twombly*, courts have repeatedly recognized and continue to rely on the Supreme Court's long-established rule that dismissal at the pleadings stage in antitrust cases should be "granted very sparingly," despite discovery costs. 550 U.S. 544, 586–87 (2007); *see also Nastasi & Assocs. v. Bloomberg, L.P.*, No. 20-CV-5428 (JMF), 2022 U.S. Dist. LEXIS 172854, at *16 (S.D.N.Y. Sept. 23, 2022) ("Similarly, in antitrust cases, the Supreme Court has stated that dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.") (cleaned up); *Sanborn Libr. LLC v. Eris Info. Inc.*, No. 19-CV-2049 (LAK) (OTW), 2021 U.S. Dist. LEXIS 165496, at *20 (S.D.N.Y. Aug. 30, 2021) (same); *In re Keurig Green Mt. Singleserve Coffee Antitrust Litig.*, 383 F. Supp. 3d 187, 218 (S.D.N.Y.

2019) (same); *see also Twombly*, 550 U.S. at 556 ("a well-pleaded complaint may proceed even if it appears 'that a recovery is very remote and unlikely'").

Here, Mr. Drabinsky's complaint plausibly suggests a claim for relief that overcomes the statutory labor exemption. Under *Twombly* and the cases that have followed, that is all it needed to do to survive dismissal and proceed to discovery.

B. The Statutory Labor Exemption Does Not Apply Because Mr. Drabinsky Has Pleaded Facts Showing that AEA Did Not Act with a Legitimate Union Interest

Mr. Drabinsky pleaded that AEA lacked a ***legitimate*** union interest in blacklisting him, and that AEA's claimed intent, protecting wages and working conditions, is a pretext. There is no question that a union's intent matters—even in cases involving strikes.

1. Strikes, Group Boycotts, and Blacklisting Are Not Automatically Exempted from the Antitrust Laws

AEA fails to confront the central point of Mr. Drabinsky's appeal: ***unions*** do not decide whether their claimed self-interest is legitimate such that the exemption applies; ***courts*** do, and not by taking a union's word for it in its motion to dismiss brief. Instead, courts examine whether

the challenged conduct "in actuality" protected the wages or working conditions of union members. S*ee Am. Fed'n of Musicians v. Carroll*, 391 U.S. 99, 107–08 (1968).

AEA's response—that its conduct is immunized *per se* because the allegations against it involve a "traditional" withholding of labor—is wrong. ***First***, AEA ignores allegations that involve not ***only*** a strike, but also a pattern of agitating and defamatory behavior that preceded the strike, including an illegal work stoppage. *See, e.g.*, A-51–56 ¶¶121–41. The AFL-CIO makes the same mistake in its *amicus* brief—ignoring the allegations about AEA's conduct that precedes, and involves more than, a traditional withholding of labor.

Second, the cases cited by AEA for the claimed proposition that a "strike" or a "boycott" necessarily escapes antitrust scrutiny do not, in fact, say that. AEA Br. at 29–30. As a matter of common sense, if AEA were correct that "strikes" are exempted *per se* then all the cases that AEA cites—all purportedly involving strikes and boycotts—would have been dismissed on the pleadings. But (save for one) none were.[1] *See Hunt*

1. *United States v. Hutcheson*, 312 U.S. 219, 233 (1941) (dismissing a criminal demurrer but the intent behind the union's strike was not in dispute).

v. Crumboch, 325 U.S. 821, 823–24 (1945) (affirming the union's intent behind the boycott after trial); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 513 (1940) (affirming after trial that the purpose behind the strike was to compel accession to union demands and not to restrain competition); *Clarett v. NFL*, 369 F.3d 124, 130 (2d Cir. 2004) (dealing "only with the non-statutory exemption" and on summary judgment).

The substance of AEA's cases likewise confirms that not all "strikes" are immunized. In *Checker Taxi Co. v. National Production Workers Union*, the court confirmed that the label "boycott" does ***not*** resolve the application of labor exemptions; the relevant question is more "complex;" and unions are ***not*** exempt from the antitrust laws—even with respect to a boycott—if the conduct solely benefited independent contractors in fact (and not union "employees"). 113 F.R.D. 561, 568 (N.D. Ill. 1986).

And in *Republic Productions, Inc. v. American Federation of Musicians*, the court did not rule that "strikes" automatically fall within the statutory labor exemption, but just the opposite: the test is not whether the word "strike" or "boycott" is apt, but whether the conduct is sufficiently related to wages, hours, and working conditions to be exempt.

245 F. Supp. 475, 481–82 (S.D.N.Y. 1965). Indeed, to decide that question, the court examined the purpose motivating the conduct. *Id.* And again, the determination of the union's intent took place after a trial because it is factual. *Id.*

Similarly, AEA argues that, under *USS-POSCO,* any work stoppage is presumed to be in a union's legitimate interest. AEA Br. at 28–29. But *USS-POSCO* cannot be read so broadly. Where, as here, a union's means are "troublesome" because they are alleged to be in "automatic[] protest[]" of an employer or to involve "agitati[on]" to make an example of a particular employer, the union's conduct is not only ***not*** exempt *per se*—it must also be "appropriate," i.e., necessary because the goals could not be achieved through traditional tactics. *USS-POSCO*, 31 F.3d at 809–10. The "burden to show this lies with the unions." *Id.* And in such cases, the plaintiff should be "allow[ed] discovery" on that issue. *Id.* This was the (correct) analysis in *USS-POSCO,* and should have been the analysis here, even though the union's conduct in both situations ***included, but did not consist entirely of, a strike***. *Id.*

AEA got much closer to an accurate representation of the law when it admitted that, to be immunized, "the union's action" must be "intended

to serve the interests of its members." AEA Br. at 28 (citing *Intercontinental Container Transp. Corp. v. N.Y. Shipping Ass'n*, 426 F.2d 884, 887 & n.2 (2d Cir. 1970)). Yet that is the standard the district court failed to apply.

2. Mr. Drabinsky alleged he was not responsible for wages and working conditions, and thus it is plausible AEA's claimed intent is a pretext.

AEA desperately tries to inject new facts and draw inferences against Mr. Drabinsky to argue,[2] among other things, that he was an "employer" who "controlled" the production. This ignores the allegations (and factual reality) that Mr. Drabinsky was simply the creative producer on the production with no control of wages or working conditions. Yet AEA effectively concedes that the question of Mr. Drabinsky's role in the Production, whether an "employer" or not, is a significant factual dispute—arguing, for the first time, that Mr. Drabinsky was either a

2. As an example of AEA's animus towards Mr. Drabinsky and its repeated efforts to improperly insert irrelevant narrative beyond the complaint, AEA spends nearly two pages of its brief discussing Mr. Drabinsky's Canadian conviction. AEA Br. at 11–12. Yet after that discussion in its Statement of the Case, AEA fails to mention the conviction again and does not even try to link it to the substantive merits of this appeal. And for good reason: it is irrelevant and used only to embarrass Mr. Drabinsky and to distract from the merits.

"joint employer" or an "agent" of the employer (the Production) under the National Labor Relations Act. AEA Br. at 38 n.8. That argument only validates Mr. Drabinsky's appeal by highlighting the fact-intensive nature of the inquiry.

i. *Whether Mr. Drabinsky was an employer or otherwise responsible for wages and working conditions are inherently fact-bound questions not to be resolved at this stage*

First, whether Mr. Drabinsky's activities on *Paradise Square* rise to the level of a "joint employer" or an "agent" is an inherently fact bound question and thus impervious to resolution on the pleadings. *See NLRB v. Quinnipiac Coll.*, 256 F.3d 68, 73 (2d Cir. 2001) ("Supervisory status within the meaning of Section 2(11) of the NLRA is a question of fact, and the burden of proving such status rests upon the party asserting it.") (citations omitted); *Brown v. Daikin Am. Inc.*, 756 F.3d 219, 226 (2d Cir. 2014) ("Whether two related entities are sufficiently integrated to be treated as a single employer is generally a question of fact not suitable to resolution on a motion to dismiss."); *Div. 1181 Amalgamated Transit Union v. N.Y.C. Dep't of Educ.*, No. 13-cv-9112 (PKC), 2014 U.S. Dist. LEXIS 123782, at *23 (S.D.N.Y. Aug. 27, 2014) (because the joint employer inquiry under the NLRA is "factual in nature, it is not

amenable to adjudication in a motion to dismiss").[3] These questions should not have been resolved by the district court on a Rule 12(b)(6) motion.

ii. *Mr. Drabinsky did not exert "extensive influence" or control*

Second, AEA's argument highlights that its factual narrative would require the Court to affirm many inferences improper on a motion to dismiss. Even though the complaint alleges that Mr. Drabinsky had no "signing authority on any bank instrument or bank check, nor was he authorized to execute any legal documents on behalf of the various productions of the Musical," A-36–37 ¶56, AEA urges a contradictory inference that Mr. Drabinsky was in financial control.

AEA says that the complaint establishes Mr. Drabinsky's "extensive influence over whether and how much the cast would be paid, and how their job site would be run." AEA Br. at 38. And in support, AEA points to purported allegations that Mr. Drabinsky "controlled" the

3. To support its conclusion that AEA acted in its legitimate self-interest, the district court cited eight decisions. But, as Mr. Drabinsky noted in his opening brief, in none of them was an antitrust claim dismissed on the pleadings based on a union's self-serving assurance that its intent was *bona fide* and nearly all involved a full record on summary judgment or after trial. *See* Drabinsky Opening Br. at 35–36.

making of a cast album and "instructed" and "approved" overtime work. *Id.* In truth, nowhere in the complaint does Mr. Drabinsky allege that he "controlled" anything aside from (arguably) certain creative decisions. The paragraph that AEA cites regarding the cast album merely states that Mr. Drabinsky created opportunities for the cast to earn extracurricular money by making a cast recording. A-63 ¶168 n.11. The inference that Mr. Drabinsky "controlled" the cast or the cast's recording is ***AEA's*** and should not be credited at this stage.

Similarly, the allegations about overtime refer to two isolated instances where Mr. Drabinsky approved overtime—facts hardly consistent with ***AEA's*** much broader inference that Mr. Drabinsky enjoyed "extensive" influence over the Production's finances generally. A-69 ¶¶178, 180.

iii. *Mr. Drabinsky was not party to the CBA or any of AEA's grievances*

AEA also emphasizes the purported fact that it "filed numerous grievances in which [AEA] established that Drabinsky's productions repeatedly violated the CBA." AEA Br. at 32. AEA does not explain what it means by "Drabinsky's productions"—a term it did not use in those

grievances—nor could it given that he was not a signatory to the CBA nor otherwise in control of these productions.

But despite AEA's misleading characterization, the broader point only helps Mr. Drabinsky by highlighting another factual dispute of AEA's own making. While it may be convenient, this time, for AEA to paint Mr. Drabinsky as having complete ownership over the Production, in prior litigations, AEA made judicial admissions that someone else was in charge. And AEA glosses over the fact that none of the grievances was against Mr. Drabinsky and, in all the prior grievances, AEA never asserted that Mr. Drabinsky controlled the purse strings. Indeed, Mr. Drabinsky alleged that he was not involved in any labor dispute at all; if one existed, it was between parties other than him.[4]

Relatedly, the AFL-CIO's assertion that the complaint alleges Mr. Drabinsky "affect[ed] the terms and conditions of employment," AFL-CIO at Br. 10, is misleading. Complaint paragraph 96, for example, merely alleges that Mr. Drabinsky made creative decisions with all other

4. AEA also ignores the allegations about the substantial bond put up ***by the Production***, exceeding $500,000, as security to ensure that wages and benefits would always be covered, which belies any legitimate concerns about wages. *See* A-50 ¶¶111-15.

principal creative constituents about particular roles. AEA did file a grievance ***against the Production*** to decide whether its decision to replace cast members following the nonprofit production at the Berkeley Repertory Theatre in which Berkeley Repertory Theatre was in full control violated ***the Production's*** contractual obligations—but not Mr. Drabinsky's. The other allegations cited by the AFL-CIO simply show that Mr. Drabinsky urged the Production to ***improve*** working conditions in response to cast complaints—which only increases doubt that AEA acted in a legitimate self-interest when it agitated the cast against Mr. Drabinsky.

iv. *AEA's contemporaneous blacklisting was not tied to the cast's letter in any way*

As for ***AEA's*** narrative that the blacklist was a direct response exclusively to the cast's July Letter, AEA now admits that fact is ***not*** alleged but is, instead, a "conclusion" that AEA (and the district court) drew from the complaint. AEA Br. at 35. But all inferences should have been drawn in Mr. Drabinsky's favor, which supports Mr. Drabinsky's allegations that AEA's explanation was pretextual. Indeed, the proper inference to draw from Mr. Drabinsky's allegations at this stage is that

there was no nexus between the cast's letter and AEA's contemporaneous decision to blacklist Mr. Drabinsky.[5]

Nor is AEA's conclusion inevitable given the allegations that AEA formed a campaign against Mr. Drabinsky long before the cast's July Letter complaining about working conditions. A-93. This included AEA instructing the cast not to work, knowing that decision was illegal and would result in widespread negative press against Mr. Drabinsky, aggravating the situation more. A-53–54 ¶¶130, 133. AEA simply ignores these well-pleaded allegations.

In sum, Mr. Drabinsky has alleged that he was a creative producer who was not responsible for wages or working conditions. He specifically lacked the ability to resolve the wages concerns that AEA points to.

v. *AEA's case law does not support concluding on a motion to dismiss that Mr. Drabinsky was responsible for wages and working conditions*

Finally, AEA says that *American Medical Association v. United States*, 317 U.S. 519 (1943), "did not even involve" "terms or conditions of employment." AEA Br. at 43. But that dispute is all about terms or

5. Indeed, the discovery the parties engaged in prior to dismissal would allow Mr. Drabinsky to add additional details about the cast letter.

conditions of employment. The court said: "We hold that the dispute between petitioners and their members, and Group Health and its members, was not one concerning the terms and conditions of employment within the Clayton and Norris-LaGuardia Acts." *AMA*, 317 U.S. at 533. The reason the statutory labor exemption did not apply: after trial, it was determined that the union's desire was not to protect working conditions but to run the plaintiff out of business. *Id.* That is true here too.

Likewise, AEA argues that *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association*, 457 U.S. 702 (1982), overruled *International Longshoremen's Association v. Allied International*, 456 U.S. 212 (1982), holding that a politically-motivated work stoppage may not be protected by the statutory labor exemption. That is wrong because the Supreme Court affirmed *Allied* only two months before deciding *Jacksonville,* and in *Jacksonville*, the Court cites *Allied* with approval.

It is also a superficial reading of both decisions. In *Jacksonville,* the Court said that the "real" dispute ***did*** involve traditional labor issues: the union's breach of the parties' CBA. That is completely different from the dispute raised by Mr. Drabinsky. That politics were part of

Jacksonville did not change the result. Meanwhile, *Allied*'s holding stands—a union's "random political objective," untied to a core labor dispute, cannot sustain the application of the labor exemption. 456 U.S. at 225–26.

AEA's reading of *Hunt*—that a union can violate the antitrust laws based exclusively on unpopularity or dislike of a plaintiff—would eviscerate *Hutcheson*'s requirement that a union act in a ***legitimate*** self-interest. *Hutcheson*, 312 U.S. at 232. AEA's version would enable a union to orchestrate a group boycott to drive any employer out of business, based on dislike or any ulterior reason, even if the employer is willing to deal with the union on its terms and conditions of employment and satisfy all terms of the CBA.[6] That is not what happened in *Hunt* where the employer had a history of refusing to unionize and attempted to continue operations during a strike. The union there acted under its "closed-shop" policy—not bare personal animus. *Hunt*, 325 U.S. at 823.

6. Indeed, the complaint specifically alleges that the boycott applies in perpetuity and even if a future production in which Mr. Drabinsky is involved is willing to deal with AEA on its terms and conditions of employment. A-74 ¶193.

C. AEA Combined with a Non-Labor Group

As described in Mr. Drabinsky's opening brief, *see* Drabinsky Opening Br. at 38–43, AEA combined with a non-labor group—other Broadway producers acting in competition with Mr. Drabinsky—which independently eliminates the protections of the statutory labor exemption. Yet the district court concluded that, as long as the producers are also members of the union, they could not, as a matter of law, constitute a non-labor group. Yet as Mr. Drabinsky explained in his opening brief, that was legally erroneous. *Id*. at 42–43 (discussing *Carroll*, 391 U.S. at 109–10). On this error, AEA's brief is non-responsive to Mr. Drabinsky's opening arguments.

The district court also suggested that producer-members may not even exist in AEA. A-102–03. Now that Mr. Drabinsky has identified, as examples, prominent AEA members who compete with Mr. Drabinsky for limited production opportunities and theater space (among other things), AEA argues something else: that Mr. Drabinsky has not alleged a conspiracy specifically involving those producer-members.

But AEA's purported ignorance about the dual roles of many of its 50,000 members is irrelevant in the face of the complaint's allegations. If

nothing else, AEA's new argument confirms that, at the very least, Mr. Drabinsky should have had an opportunity to amend his complaint to bolster and clarify his allegations about AEA's combination with a non-labor group. This is all the more true because the parties engaged in discovery before the district court dismissed Mr. Drabinsky's allegations—including discovery on AEA's conspiracy with these non-labor actors.

II. MR. DRABINSKY'S STATE LAW CLAIMS DO NOT FAIL

A. Application of *Martin v. Curran*

Mr. Drabinsky does not deny that *Martin v. Curran*, 101 N.E.2d 683 (N.Y. 1951)'s requirement to plead the liability of every single member of a 50,000-plus-member union presents an almost insurmountable burden. But as detailed in Mr. Drabinsky's opening brief the law does not reflect the reality of how modern unions operate and—should there be an intervening legal change to the law by the Legislature or the Court of Appeals—the change ought to apply here.

B. The Negligence Claim is Separate and Distinct from the Intentional Tort and Defamation Claims

AEA concedes that *Martin* generally does not bar claims of negligence but argues that Mr. Drabinsky's negligence claim is barred

because it is "rooted" in intentional conduct. AEA Br. at 52. But here, there is a free-standing negligence claim, and multiple allegations of AEA's reckless behavior and failure to act. Mr. Drabinsky's claims of negligence do not arise merely from AEA's purposeful inclusion of Mr. Drabinsky on the blacklist and AEA's "wrongful campaign of harassment and abuse." *Id*. Rather, the claims stem from the pattern of reckless disregard shown by AEA, such as in acting against Mr. Drabinsky in violation of its own guidelines (an unprecedented placement on the blacklist A-16, A-20–21 ¶13) and its pattern of inaction (with respect to choreographic services A-39–40 ¶69; with respect to racial sensitivity issues A-41–42 ¶¶76–78; with respect to cast housing costs, A-43 ¶81; with respect to sexual harassment allegations against a union member, A-44–45 ¶¶85–90; with respect to condoning an illegal work stoppage A-51–53 ¶¶120–127) all leading to union member hostility against Mr. Drabinsky. All these are encompassed with the "reckless actions and statements" by which AEA conducted itself below the standard of care that an entity of ordinary prudence would have exercised under the same circumstances. A-80 ¶219.

C. The Negligence Claim Should Not be Dismissed on the Current Record

At the very least, AEA has failed to follow its internal procedures in blacklisting Mr. Drabinsky—which may be considered as evidence of the union's negligence. *Pomahac v. TrizecHahn 1065 Ave. of the Ams., LLC*, 884 N.Y.S.2d 402, 405 (1st Dep't 2009) ("defendant's failure to adhere to its own internal guideline or policy may be some evidence of negligence . . ."); *Lesser v. Manhattan & Bronx Surface Transit Operating Auth.*, 556 N.Y.S.2d 274, 276 (1st Dep't 1990), *aff'd sub nom. Fishman v. Manhattan & Bronx Surface Transit Operating Auth.*, 79 N.Y.2d 1031 (1992) ("internal operating rules may provide some evidence of whether reasonable care has been taken and thus some evidence of the defendant's negligence or absence thereof . . ."). At the very least, Mr. Drabinsky should have been granted leave to try to state such a claim, which clearly would not be subject to *Martin*. *See Torres v. Lacey*, 163 N.Y.S.2d 451, 452 (App. Div. 1957) ("*Martin v. Curran* is not applicable to an unincorporated association's unintentional tort . . . . [T]o require membership authorization or even ratification of such an unintentional tort is, in effect, to attempt to transmute a negligent act into a willful wrong. This is an inadmissible result, straining both law and logic.").

Moreover, since AEA is now claiming a new relationship—that Mr. Drabinsky was a "joint employer" or an "agent" of the Production, AEA Br. at 38—it has raised a new factual question whether it owed Mr. Drabinsky a duty in tort. As the court noted in *Alfaro v. Wal-Mart Stores, Inc.*, 210 F.3d 111 (2d Cir. 2000):

> Identifying the scope of an alleged tortfeasor's duty is 'not something derived or discerned from an algebraic formula. Rather, it coalesces from vectored forces including logic, science, weighty competing socioeconomic policies and sometimes contractual assumptions of responsibility.' *Palka [v. Servicemaster Management Services Corp.*, 83 N.Y.2d 579, 585 (1994)]. New York courts 'fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability." *Id.* at 586; *see also Turcotte v. Fell*, 68 N.Y.2d 432, 437, 510 N.Y.S.2d 49, 502 N.E.2d 964 (1986) ('The determination of the existence of a duty and the concomitant scope of that duty involve a consideration not only of the wrongfulness of the defendant's action or inaction, they also necessitate an examination of the plaintiff's reasonable expectations of the care owed him by others.').

Id. at 114–15; *see also Gilson v. Metro. Opera*, 5 N.Y.3d 574, 576 (2005) (by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation

allocation, and public policies affecting the expansion or limitation of new channels of liability) (citing *Matter of N.Y.C. Asbestos Litig.*, 5 N.Y.3d 486, 493 (2005)).

D. Mr. Drabinsky Has Not Forfeited His Arguments About Negligence

Even if the issue of the application of *Martin* to Mr. Drabinsky's negligence claims was insufficiently brought to the fore in the district court proceedings, this Court has discretion to consider a new argument on appeal. AEA Br. at 53. In the very case that AEA cites for the proposition that this Court should not exercise its discretion, *Mhany Management, Inc. v. County of Nassau*, this Court also stated that it can exercise its discretion to entertain new arguments "where necessary to avoid a manifest injustice." 819 F.3d 581, 615 (2d Cir. 2016). Given the pattern of behavior engaged in by AEA towards Mr. Drabinsky, and the grievous and well-nigh irreparable harm that may otherwise go unremedied, the avoidance of a manifest injustice favors allowing such arguments.

E. Mr. Drabinsky's Negligence Claims Are Not Preempted by Federal Labor Law

As briefed at length in the district court, Dkt. 42 at 9–12, Mr. Drabinsky's state law claims, including his negligence claim, are not

preempted by Section 301 of the LMRA nor do they fall under exception to the NLRA set forth in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). The arguments in this regard generally were set forth in full below, and it remains the case that a negligence claim alleging a union's carelessness in investigating (or not investigating at all) would not require any interpretation of the CBA—let alone "substantial analysis" of the CBA. AEA Br. at 59.

CONCLUSION

For these reasons and those stated in Mr. Drabinsky's opening brief, this Court should reverse the district court's order granting AEA's motion to dismiss and dismissal with prejudice.

Respectfully submitted,

Date: August 18, 2023

BONA LAW PC

/s/ Luke Hasskamp
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Counsel for Appellant Garth Drabinsky

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,580 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Word 2016, Century Schoolbook 14-point font.

Date: August 18, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: August 18, 2023

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