UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

GARTH DRABINSKY,

Plaintiff,

vs.

ACTORS' EQUITY ASSOCIATION,

Defendant.

No. 22-CV-8933 (LGS)

MEMORANDUM OF LAW OF DEFENDANT ACTORS' EQUITY ASSOCIATION IN SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendant Actors' Equity Association ("Equity") respectfully submits this memorandum of law in support of its motion to dismiss the First Amended Complaint ("Complaint"), Docket No. 16, filed by Plaintiff Garth Drabinsky.

PRELIMINARY STATEMENT

Defendant Actors' Equity Association is the labor union that represents approximately 50,000 actors and stage managers who perform in the live theater industry, including on Broadway. Plaintiff Garth Drabinsky served as the "lead creative producer" of *Paradise Square* and effectively controlled the terms and conditions of employment for the actors and stage managers working on the production. *Infra* pp.3-5.

Notwithstanding its characterization in the Complaint, this case involves a classic labor dispute between a labor union and an employer. As discussed below, *Paradise Square* repeatedly breached its obligations under the collective bargaining agreement with Equity and failed to pay nearly $500,000 in wages and health and retirement benefit contributions owed to the actors and stage managers. Equity initiated multiple grievances, arbitrations, and lawsuits in an attempt to collect the monies owed under the collective bargaining agreement. As a result of Drabinsky's ongoing and escalating failure to pay the actors and stage managers, on July 14, 2022, the *Paradise Square* cast requested that their union, Equity, place Drabinsky on its Do Not Work List. Compl. ¶189 & Ex. 39A; *infra* pp.8-9. Equity responded to its members' concern and placed Plaintiff on the list.

Drabinsky now asserts three state law claims and two federal antitrust claims, all of which are grounded in and arise from the labor dispute involving *Paradise Square*. As discussed below, these claims are all barred by bedrock principles of labor law.

The state law claims are not only precluded under *Martin v. Curran*, 303 N.Y. 276 (1951), which requires that Plaintiff plead and prove that *each* of Equity's 50,000 members authorized the allegedly wrongful conduct, but are also preempted by Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* As discussed below, the claims are both "inextricably intertwined" with the collective bargaining agreement between the parties and are also "arguably protected" by the NLRA. *Infra* pp.14-16. Moreover, the intentional tort and negligence claims are entirely duplicative of the defamation claim, and the negligence claim fails to allege a cognizable legal duty that Equity owed Drabinsky. *Infra* pp.16-17.

Similarly, Drabinsky's attempt to turn a traditional labor dispute into an antitrust case is nothing more than a frontal attack on Equity's authority under federal labor laws. Congress enacted the Clayton Act, 15 U.S.C. § 17, and the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, to create a "statutory labor exemption" to the antitrust laws precisely to protect unions from such claims. *H. A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 714 (1981). So long as Equity was acting in its legitimate self-interest and not in combination with a non-labor group—elements that are clear from the face of the Complaint—then Equity is completely immune from the Sherman Act claims that Drabinsky asserts. And the so-called "non-statutory labor exemption" affords Equity yet another layer of antitrust immunity that Drabinsky cannot plausibly overcome. Even apart from the exemptions, the antitrust claims fail on the pleadings because Drabinsky—a single producer who (due to his criminal conviction, *see infra* pp.5-6) has worked on one production during the past fifteen years—complains merely about harm to himself, not harm to market competition. *Infra* pp.23-25.

Equity is continuing to arbitrate and litigate its claims resulting from *Paradise Square*'s breach of the collective bargaining agreement. *See infra* pp.6-8. Its attempts to fulfill its statutory mandate under the NLRA to represent its members should not be stymied by a defaulting producer seeking to avoid his contractual obligations by filing a baseless lawsuit. For the reasons discussed below, all claims should be dismissed with prejudice.

STATEMENT OF FACTS[1]

Background

Equity is a national labor union that represents more than 50,000 actors and stage managers who perform in the live theater industry. Compl. ¶2.[2] Between the Fall of 2021 and the Summer of 2022, non-parties Paradise Square Broadway Limited Partnership (the "Broadway Partnership") and Paradise Square Production Services, Inc. ("PSPSI") (at times referred to as the "productions") produced a live theatrical show entitled *Paradise Square* in Chicago and New York, respectively. *See id.* ¶¶55, 106, 112, 187. The terms and conditions for actors and stage managers in both Chicago and New York were set forth in a collective bargaining agreement ("CBA") between Equity and the Broadway League, a multi-employer bargaining association. *Id.* p.2 & ¶10; *see also id.* Ex. 13 (attaching the CBA).

Garth Drabinsky was the "lead creative producer" for the Chicago and Broadway productions of *Paradise Square*. Compl. ¶56; *id.* ¶54. Although, likely due to a prior criminal conviction discussed *infra* at pp.5-6, Drabinsky did not serve as the technical "employer of record" for purposes of the CBA, *see* Compl. ¶56, his allegations make clear that he controlled

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[1] Equity assumes that the Complaint's allegations are true solely for purposes of this motion.

[2] Although the Complaint alleges upon "information and belief" that Equity is a "voluntary association" that is "incorporated," Compl. ¶2, it is not incorporated. It is an unincorporated voluntary association that may be dissolved by its National Council and membership. *See infra* pp.10-11.

all aspects of both the Broadway and Chicago productions. *Id.* pp.2-4 & ¶¶54, 65-68, 81-82, 90-91, 96, 118, 123, 145, 161, 176, 178-80, 193, 196.[3]

With respect to the Broadway production, the Complaint alleges that "Drabinsky took" "extensive measures" to "improve the financial and working conditions of members of the cast and stage management of *Paradise Square*" and "caused" the producer of record to "vary the minimum terms" of Equity's CBA. *See* Compl. pp.2-3. Among other things, Drabinsky "provided the cast with opportunities to earn incremental fees" by recording a cast album, "acquiesced" to the cast's request to perform at the Tony Awards, costing "nearly $200,000," and "successfully urged" the production to amend the financial terms of the cast's individual employment contracts. *Id.* p.3. He also had final control over rehearsal schedules, *id.* ¶¶118, 176, 179 (Drabinsky "unilaterally decided" to extend the rehearsal schedule for the "safety of the Cast"), which is a key term of actors' and stage managers' employment; managed and approved the cast's overtime requests, *id.* ¶¶178, 180 ("Drabinsky instructed" the general manager to incur "as little overtime . . . as possible"); hired a new hair supervisor, *id.* ¶164; and intervened when he believed that an actor had breached her contract. *Id.* ¶¶160-61. These are the functions of a controlling—not merely creative—producer.

Similarly, Drabinsky played the key role in the Chicago production. In addition to "assembl[ing]" the 36-member cast, Compl. ¶67, Drabinsky directed the production to engage a consulting firm to investigate sexual harassment allegations and otherwise purported to oversee the cast's safety. *Id.* ¶91; *see also id.* ¶¶68, 86, 90. He also decided "on behalf of" the

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[3] Drabinsky specifically alleges in fact that he is a "producer who seeks to engage" Broadway actors and stage managers and competes with producers "of productions that employ actors and stage managers." Compl. ¶¶233-34. He also alleges that he negotiated CBAs with Equity: "Drabinsky also abandoned The Broadway League and negotiated a separate collective bargaining agreement with [Equity]." *Id.* ¶32.

Broadway Partnership which cast members from an earlier production in Berkeley, California would be employed in Chicago, *id.* ¶96, "commence[d] negotiations with the Nederlander family" to secure a venue for the show, *id.* ¶65, and "successfully urged" the production to provide the cast with interest-free loans. *Id.* ¶81.

Plaintiff's Criminal Conviction

On January 14, 1999, the United States Attorney's Office for the Southern District of New York indicted Drabinsky. Compl. ¶38; *see United States v. Drabinsky*, No. 99-CR-17 (S.D.N.Y.);[4] *see also S.E.C. v. Drabinsky*, No. 99-CV-239 (S.D.N.Y.).[5] The indictment charged Drabinsky with sixteen counts arising from his "mastermind[ing]" of an accounting fraud scheme involving a theatrical entertainment company for which Drabinsky was the chairman and CEO. Docket No. 5 ¶2 in 99 Cr. 17; *In re Livent*, 355 F. Supp. 2d at 725. Those charges included, *inter alia*, fraud, falsifying books and records, falsifying federal filings, circumventing accounting controls, and lying to auditors. Docket No. 5 ¶3 in 99 Cr. 17. The charges were originally not "resolved, in part due to" Drabinsky's "fugitive status" because he refused to "voluntarily . . . [return] to the United States to face the criminal charges" against him. *Livent, Inc.*, 355 F. Supp. 2d at 725 & n.6; *id.* at 723, 739 (summary judgment in accounting fraud class action entering $23 million judgment against Drabinsky).[6]

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[4] This Court may take judicial notice of the court records involving Plaintiff's conviction. *See Medcalf v. Thompson Hine LLP*, 84 F. Supp. 3d. 313, 321 (S.D.N.Y. 2015); *Teichmann v. N.Y.C. Emps. Ret. Sys.*, No. 21-CV-5082 (LGS), 2022 WL 4237110, at *1 (S.D.N.Y. Sept. 14, 2022).

[5] The SEC alleged "a multifaceted and pervasive accounting fraud spanning eight years from 1990 throughout the first quarter of 1998" and sought "to bar permanently Drabinsky" from serving as an officer or director of a public company. *In re Livent, Inc. Sec. Litig.*, 78 F. Supp. 2d 194, 201 (S.D.N.Y. 1999). The scheme also led to a "constellation of related litigation" against Drabinsky involving securities fraud and other fraud claims. *In re Livent, Inc., Noteholders Sec. Litig.*, 355 F. Supp. 2d 722, 724 & n.4 (S.D.N.Y. 2005) (listing cases).

[6] In settling related SEC claims, the SEC described Drabinsky (and his partner) as the "architects of a fraud which included: a multi-million dollar kick-back scheme designed to misappropriate funds for their own use; the improper shifting of preproduction costs . . . and the improper recording of revenue for transactions that contained side agreements purposefully concealed from Livent's independent auditors." *In re Livent, Inc.*,

On July 31, 2006, Canadian authorities charged Drabinsky with crimes arising out of the same underlying fraudulent scheme. Docket No. 5 ¶3 in 99 Cr. 17. On March 25, 2009, after a 65-day trial, a Canadian court found him guilty and later sentenced him to seven years' imprisonment, which was reduced to five years on appeal. *Id.* ¶¶4-5; Compl. ¶¶43-44; *see also* R. v. Drabinsky, No. P592-06, 2009 CanLII 12802 (ON SC Mar. 25, 2009) (trial court decision), *available at* https://canlii.ca/t/22w97; 2011 ONCA 582 (CanLII) (Sept. 13, 2011) (appellate decision), *available at* https://canlii.ca/t/fn2mg.[7]

On June 15, 2017, the Ontario Securities Commission permanently banned Drabinsky "from acting in a position of trust and authority for entities that may participate in the capital markets," including acting as an officer or director, and rejected Drabinsky's proposed "carve-outs" for a "creative services exception" that would have permitted a broader role because "Drabinsky could, in reality, take all the restricted financial actions and then have them rubber-stamped by others." *In re Drabinsky*, 2017 ONSEC 22 (CanLII) (June 15, 2017), ¶¶61-62, 75, available at https://canlii.ca/t/h4wz7. Drabinsky's nominal "lead *creative* producer" status on *Paradise Square*—despite extensive financial and executive control—is in tension with the restrictions imposed upon him by the Canadian authorities.

Plaintiff's Disregard of the CBA and Failure to Pay the Actors' and Stage Managers' Wages and Benefits during the Broadway Production

In the months leading up to Plaintiff's placement on the Do Not Work List (*see infra* pp.8-9), it is undisputed that the Broadway production failed to pay the cast, the health and

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Securities Act of 1933 Release No. 7627, Section III.B, available at https://www.sec.gov/litigation/admin/34-40937.htm.

[7] In light of the conviction and service of time for the same underlying conduct, the United States charges were dismissed on June 26, 2018. Docket No. 5 ¶7 in 99 Cr. 17.

retirement funds, and Equity nearly $500,000 that the production owed under the CBA. For *eleven* weeks, between February 27 and May 15, 2022, the production: (a) failed to remit the actors' and stage managers' required weekly health, pension, and 401(k) contributions; and (b) withheld union dues from the cast's salaries but failed to remit them to Equity. After Equity initiated an arbitration to collect these monies and the production admitted that it violated the CBA, the arbitrator issued an award in Equity's favor for the full amount due, $224,900. *See Actors' Equity Association v. Paradise Square Production Services, Inc.*, No. 22-CV-7325 (PAE) (S.D.N.Y.) ("*Actors' Equity*"), Docket No. 16-6 at p.2 ¶¶1-2 (May 2022 arbitration award and settlement agreement).[8] Full payment was not made until June 3, 2022, *see id.* ¶3, months after the health and retirement contributions and dues payments were due.

The production's failure to pay the actors and stage managers, however, persisted. On July 13th, one day before Equity placed Drabinsky on the Do Not Work List, the production confirmed in writing—in response to another five grievances and another arbitration—that it owed an additional $242,708. *See Actors' Equity*, Docket No. 16-7 (grievance letter); Docket No. 17-2 (email to PSPSI with proposed joint submission on damages); Docket No. 17-3 at 1 (PSPSI general manager confirming that "[t]he numbers all check out" and "approv[ing]" the joint submission). Accordingly, on July 29th, an arbitrator concluded that the production violated the CBA and awarded Equity $242,708. *Id.*, Docket No. 17-4 at 3-5 (arbitration award). The undisputed grievances concerned, among other things, the production's failure to compensate the actors and stage managers for their work in creating the cast album, its continued failure to make health, pension, and 401(k) contributions for the actors and stage managers, and

[8] In *Actors' Equity*, Equity filed a petition to confirm a separate arbitration award from July 29, 2022, discussed *infra*.

its ongoing failure to remit union dues to Equity after deducting them from the actors' and stage managers' checks. *Id.* As of the date that Equity placed Drabinsky on the Do Not Work List and continuing to date, the production has refused to abide by the arbitrator's award and has not made payment of this amount.[9] *Id.*, Docket No. 16, ¶18.[10]

Plaintiff is Placed on the Do Not Work List

Equity maintains an internal membership rule that precludes its members from working as an actor or stage manager for an employer that is not bound to a CBA or for an employer that "default[s] on the terms of their agreement" with Equity. Compl. ¶9; Ex. 40 at 1. The "Do Not Work List" alerts Equity's members to the non-union or defaulting status of certain employers. Compl. Ex. 40 at 1. All five performer unions in the entertainment industry, including Equity, collectively known as the "Associated Actors and Artists of America," or the "4A's," *id.* ¶14, have a policy of respecting each other's do-not-work-lists.

On July 14, 2022, in light of the New York production's repeated failures to comply with the CBA, the cast of *Paradise Square* asked Equity to place Plaintiff on the Do Not Work List. *See* Compl. ¶189 & Ex. 39A at 5 (online article quoting the cast's letter to Equity in full). The cast stated that Drabinsky made "all executive decisions surrounding the production" and that, "due to outstanding payments and benefits, and a continued pattern of abuse and

[9] In addition, as a result of the New York production's continued failure to remit dues and benefits as required by the CBA, the production defaulted under the parties' May 2022 settlement agreement and incurred an additional $191,838 in liability as liquidated damages. *Actors' Equity Association v. Paradise Square Production Services, Inc.*, Index No. 156769, Docket No. 8 (N.Y. Sup. Ct. Aug. 11, 2022) (issuing judgment for that amount).

[10] Both the Chicago and New York productions have also failed to pay the musical's other unionized employees, including the scenic designers, directors, choreographers, and musicians. *See United Scenic Artists v. Paradise Square Broadway Limited Partnership, et al.*, No. 22-CV-05704 (VEC) (S.D.N.Y.), Docket No. 1, ¶¶10, 17; *Stage Directors & Choreographers Society v. Paradise Square Broadway Limited Partnership*, No. 22-CV-06252 (PAE) (S.D.N.Y.), Docket No. 18 at 2-3; *Local 802 Musicians Health Fund v. Paradise Square Broadway Limited Partnership, et al.*, No. 22-CV-09407 (VSB) (S.D.N.Y.), Docket No. 1, ¶¶18, 25.

neglect," Drabinsky should be placed on the list. *Id.* Ex. 39A at 5. Responding to its members' concerns, and because Plaintiff had "made it clear that he [was] unable to uphold the terms of a union contract," *id.* at 2, Equity placed him on the Do Not Work List. *Id.* Ex. 40 at 1.

<u>The Alleged Campaign Against Plaintiff</u>

Plaintiff alleges that Equity engaged in a "pattern of conduct to maliciously defame and harm [him]." Compl. p.8. In support of this allegation, he points primarily to an October 25, 2021 grievance that Equity filed regarding the Chicago production of *Paradise Square*, *id.* ¶76 & Ex. 9, which stated that Drabinsky used "inappropriate and unwanted racial slurs during rehearsals" and created a "hostile work environment." *Id.*

Plaintiff moreover alleges that Equity breached its obligations under the collective bargaining agreement and allowed its members to do the same and/or make other defamatory comments. He claims, for example, that Equity violated Rule 43 of the CBA when it allegedly refused to pursue allegations that a cast member had engaged in sexual harassment. Compl. p.34 & ¶¶85, 90; *see also id.* ¶¶120, 125, 132. He similarly alleges that, by submitting the hostile work environment grievance, Equity provided an "escape hatch" for the cast to breach their individual employment agreements and "contaminated" the show's atmosphere. *Id.* ¶¶165-66.

<u>Procedural History</u>

Plaintiff filed his original complaint on October 20, 2022, and the First Amended Complaint on December 13. Equity now moves to dismiss the Complaint with prejudice.

ARGUMENT

I. PLAINTIFF'S STATE LAW CLAIMS MUST BE DISMISSED

A. Plaintiff's State Law Claims are Barred by *Martin v. Curran*

For more than seventy years, it has been settled law in New York that a plaintiff cannot assert a claim against an unincorporated voluntary association for "breaches of agreement or . . . tortious wrongs" unless they can prove the "individual liability of every single member [of the association]." *Martin*, 303 N.Y. at 282. Indeed, just eight years ago, the New York Court of Appeals reaffirmed *Martin*, holding that, to bring a tort claim against a union that is a voluntary association, the plaintiff must "plead and prove that each member of the union authorized or ratified the alleged wrongful conduct." *Palladino v. CNY Centro*, 23 N.Y.3d 140, 147, 150-51 (2014).

Martin imposes an "onerous and almost insurmountable burden on individuals seeking to impose liability on labor unions." *Modeste v. Local 1199*, 850 F. Supp. 1156, 1168 (S.D.N.Y. 1994) (Sotomayor, J.), *aff'd*, 38 F.3d 626 (2d Cir. 1994). As a result, federal courts in New York regularly dismiss state law claims against labor organizations where the plaintiff fails to allege that every union member authorized or ratified the challenged conduct. *See, e.g.*, *Performing Arts Ctr. of Suffolk Cnty. v. Actors' Equity Ass'n*, No. 20-CV-2531 (JS) (AYS), 2022 WL 16755284, at *5-6 (E.D.N.Y. Aug. 25, 2022) (dismissing fraud and unjust enrichment claims against Equity under *Martin*), *adopted by*, 2022 WL 4977112 at *4 (Sept. 30, 2022); *Moleon v. Alston*, No. 21-CV-1398 (PAE), 2021 WL 5772439, at *11 (S.D.N.Y. Dec. 3, 2021); *Martin. Goodman v. Port Auth. of N.Y. & N.J.*, No. 10-CV-8352, 2011 WL 3423800, at *10 (S.D.N.Y. Aug. 4, 2011).

Here, because Equity is a voluntary unincorporated association, the same result is required. *See Performing Arts Ctr.*, 2022 WL 16755284, at *5-6; *Cruz v. UAW, Local 2300*, No.

18-CV-0048 (GTS) (ML), 2019 WL 3239843, at *16-17 (N.D.N.Y. July 18, 2019). Article 1 of Equity's Constitution expressly provides that Equity "is and shall be a voluntary Association" and that, unlike a corporate entity, Equity "shall endure until dissolved by action of its National Council and its members."[11] Further, as Plaintiff admits, Equity is a "voluntary association," Compl. ¶2, and its official name, "Actors' Equity Association," *id.* p.1 & Caption, does not include any signifier such as "Inc." or "Corp.," as is required for a corporation under New York law. *See* N.Y. Bus. Corp. § 301(a)(1).

In his Complaint, Plaintiff alleges "upon information and belief" that Equity is "incorporated" in New York. Compl. ¶2. A plaintiff may plead allegations "upon information and belief" only when "the facts are peculiarly within the possession and control of the defendant" or "the belief is based on factual information that makes the inference of culpability plausible." *Citizens United v. Schneiderman*, 882 F.3d 374, 384-85 (2d Cir. 2018). Neither situation is present here. Plaintiff does not (and cannot) allege any facts to support his belief that Equity is incorporated, and the information demonstrating that Equity is an unincorporated association is not peculiarly within Equity's control. *See May Flower Int'l, Inc. v. Tristar Food Wholesale Co.*, No. 21-CV-02891 (RPK) (KPK), 2022 WL 4539577, at *5 (E.D.N.Y. Sept. 28, 2022). In addition, the allegation "contradict[s] matters properly subject to judicial notice" in

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[11] Under Fed. R. Evid. 201(c)(2), the Court may take judicial notice of Equity's Constitution and By-Laws, which are publicly available not only on Equity's website (https://cdn.actorsequity.org/docs/Equity_Constitution_and_By-Laws.pdf), but also on the United States Department of Labor's website (https://olmsapps.dol.gov/olpdr/?_ga=2.83357461.2088344584.1672775854-1962420074.1642803684 (in first column, under "File #," enter Equity's filing number, "006-029"; scroll to bottom of page and click "Equity's Constitution and By-laws 2022," received June 28, 2022)) as unions are required to publicly file their constitutions with the Department of Labor. *See Corns v. Laborers Int'l Union*, 709 F.3d 901, 904 n.1 (9th Cir. 2013) (taking judicial notice of union constitution); *Hollie v. Smith*, 813 F. Supp. 2d 214, 219 n.6 (D.D.C. 2011) (same); *OSO Grp., Ltd. v. Bullock & Assocs., Inc.,* 2009 WL 2422285, at *2 & n.3 (N.D. Cal. Aug. 6, 2009).

Equity's Constitution. *See Zeta Glob. Corp. v. Maropost Mktg. Cloud, Inc.*, No. 20-CV-3951 (LGS), 2022 WL 2533182, at *5 (S.D.N.Y. July 7, 2022).

Plaintiff must therefore allege facts that would plausibly prove the "individual liability" of "every single" Equity member. *Martin*, 303 N.Y. at 282. He has failed to do so. In Count I, Plaintiff alleges that Equity defamed him by submitting the October 25 grievance and placing him on the Do Not Work List. Compl. ¶¶76, 188, 190. Because Plaintiff alleges that Equity sent the October 25 grievance to only five people, *see id.* Ex. 9, it is not plausible that each of Equity's 50,000 members even knew about the grievance, let alone authorized or ratified its filing. *See A. Terzi Prods., Inc. v. Theatrical Protective Union*, 2 F. Supp. 2d 485, 492 (S.D.N.Y. 1998) (dismissing claims where plaintiff failed to allege that "each and every" union member had "full knowledge" of defamatory statements). Similarly, although Plaintiff asserts that the cast of *Paradise Square* asked Equity to place him on the Do Not Work List, *see id.* Ex. 39A at 5, Plaintiff does not (and cannot) allege that the other 50,000 Equity members even knew about, let alone authorized, Equity's decision to place him on the list. *See Bldg. Indus. Fund v. Local Union No. 3*, 992 F. Supp. 192, 195 (E.D.N.Y. 1996) (union campaign with "broad support" does not constitute authorization or ratification), *aff'd* 141 F.3d 1151 (2d Cir. 1998).

The fact that the Do Not Work List is published on Equity's website does not require a different conclusion. *See, e.g.*, *Duane Reade Inc v. Local 338 Retail, Wholesale, Dep't Store Union*, 791 N.Y.S.2d 288, 289-91 (N.Y. Sup. Ct. 2004) (dismissing defamation claim under *Martin* where the plaintiff alleged that the union posted defamatory statements on its website). As the Court held in *Martin*, widely publishing defamatory statements throughout a union "fall[s] far short of asserting that the union members themselves authorized or ratified the particular libels." 303 N.Y. at 279-80. The defamation claim must therefore be dismissed. *See*

Sullivan v. N. Babylon Union Free Sch. Dist., No. 15-CV-0834 (JS) (SIL), 2016 WL 11673810, at *7 (E.D.N.Y. Mar. 21, 2016) (claims dismissed under *Martin* where the plaintiff failed to allege that the union "voted or took similar action" regarding the challenged conduct).

Plaintiff's intentional tort and negligence claims are similarly barred by *Martin*. With respect to Count II, Plaintiff alleges that Equity's "intentional misconduct" consisted of "publishing untruthful statements about Drabinsky" and "posting . . . Drabinsky" on the Do Not Work List. Compl. ¶214. Because this Count is based on the same alleged misconduct as Count I, it is barred by *Martin* for the reasons discussed above. And, to the extent the intentional tort claim includes other disputed actions alleged in the Complaint, *see, e.g.*, Compl. ¶¶83-90 & 120-132 (alleging Equity breached the CBA in specific ways); ¶¶161, 165 (alleging Equity "refused to intercede" when a cast member did not appear for work), those allegations are narrow, specific challenges related to the Chicago and Broadway productions, and there is similarly nothing to suggest that Equity's 50,000 members authorized or ratified these actions.

Finally, Count III, although styled as a negligence claim, alleges that Equity owes Plaintiff a "duty of care not to denigrate and defame [him]," Compl. ¶218, and claims that Equity engaged in a "campaign of harassment and abuse" by "publishing untruthful statements about [him]." *Id.* ¶220; *see, e.g.*, ¶78. Tort claims, including those for negligence, are construed as defamation claims where they "seek damages only for injury to reputation" or where "the entire injury complained of by plaintiff flows from the effect on his reputation." *Kesner v. Dow Jones & Co.*, 515 F. Supp. 3d 149, 189-90 (S.D.N.Y. 2021).[12] Thus, as Plaintiff's negligence claim is

[12] Although Plaintiff did not describe his damages in any detail, the negligence claim in Count III seeks damages in the identical amount ($50,000,000) as the defamation claim, *see* Compl. ¶¶210, 221, which expressly asserts that the allegedly false statements "harmed Drabinsky's reputation" and thereby "caused Drabinsky economic damages and emotional distress." *Id.* ¶209.

essentially a disguised defamation claim, it too should be dismissed under *Martin*. *See Salemeh v. Toussaint ex rel. Local 100 Transp. Workers Union*, 810 N.Y.S.2d 1, 2 (1st Dep't 2006) (although "labeled as sounding in negligence," state law claims were barred by *Martin* because their "essence" was an intentional tort); *Kreutzer v. East Islip Union Free School Dist.*, 2015 WL 9254522, at *3 (N.Y. Sup. Ct. Dec. 2, 2015) (negligence claim dismissed under *Martin* where it was "clearly rooted" in breach of contract claim); *see also Symmetra Pty Ltd. v. Hum. Facets, LLC*, No. 12-CV-8857 (SAS), 2013 WL 2896876, at *6 (S.D.N.Y. June 13, 2013) (plaintiffs "may not escape the special rules applicable to" defamation claims "through artful pleading").

B. Plaintiff's State Law Claims are Preempted by Section 301 of the LMRA and the NLRA

Plaintiff's state law claims also must be dismissed because they are preempted both by Section 301 of the LMRA and by the NLRA.

LMRA Preemption. Section 301 "governs claims founded directly on rights created by collective-bargaining agreements, and also claims substantially dependent on analysis of a collective-bargaining agreement." *Whitehurst v. 1199 SEIU United Healthcare Workers E.*, 928 F.3d 201, 206 (2d Cir. 2019). Thus, when resolution of a state-law claim is "substantially dependent upon" or "inextricably intertwined with" analysis of the terms of a CBA, the state-law claim "must either be treated as a § 301 claim or dismissed as pre-empted by federal labor-contract law." *Id.*

Such is the case here. Plaintiff alleges Equity acted either intentionally or negligently when it: (1) refused to pursue allegations that a cast member engaged in sexual harassment, *see* Compl. ¶85; and (2) ordered the cast not to appear for rehearsal on February 21, 2022. *Id.* ¶120, 125. In both instances, the underlying basis for Plaintiff's claim is that Equity violated a specific provision of the CBA. *Id.* p.34 & ¶¶87-90 (alleging that, "[i]n violation of

[Rule 43 of] the CBA," Equity refused to pursue sexual harassment claims); ¶¶125, 132 (alleging that the cast "had an absolute contractual obligation" under Rules 25 and 42 to attend rehearsal). These allegations are not only "substantially dependent upon" the CBA, but are based solely upon an alleged violation of the CBA and are therefore preempted by Section 301. *See Dougherty v. Am. Tel. & Tel. Co.*, 902 F.2d 201, 204 (2d Cir. 1990) (negligent misrepresentation claim was preempted because the "gravamen of plaintiffs' complaint" was "inextricably intertwined" with the CBA).

Plaintiff also alleges that Equity defamed him by submitting the October 25 grievance and by placing him on the Do Not Work List. Compl. ¶¶76, 188, 190. Because the October 25 grievance states that Plaintiff's use of "unwanted racial slurs" violated the "Return to Work" agreement between Equity and the Broadway League, *see id.* Ex. 9, this claim is also "inextricably intertwined" with the collective bargaining agreement and is thus preempted. *See Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988). The same is true with respect to Plaintiff's allegation that placing him on the Do Not Work List was defamatory because it implied that he "default[ed] on the terms of [his] agreement." *See* Compl. ¶188. A resolution of this issue turns on whether Plaintiff defaulted on his obligations under the CBA, a question that can be answered only under § 301.

NLRA Preemption. Furthermore, Plaintiff's state law claims are preempted by the NLRA. What has come to be known as *Garmon* preemption, *see San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), "can be stated quite elegantly: States may not regulate activity that the NLRA . . . arguably protects or prohibits." *Healthcare Ass'n of N.Y.S., Inc. v. Pataki*, 471 F.3d 87, 95 (2d Cir. 2006). Here, because the principal conduct underlying the state law claims—placing Plaintiff on the Do Not Work List and filing the October 25 grievance—is

(at a minimum) "arguably" protected by the NLRA, any state law challenge to such conduct is preempted under *Garmon*.

The National Labor Relations Board has made clear that, under the proviso to Section 8(b)(1)(A) of the Act,[13] unions may "lawfully maintain and enforce rules prohibiting members from working" for nonunion employers. *Steven Stripling*, 316 NLRB 710, 711 (1995); *see also Millwright & Mach. Erectors*, 287 NLRB 545, 546 (1987). Because the Do Not Work List merely alerts members to the non-union or defaulting status of certain producers triggering Equity's membership rule, its use is permissible under the NLRA. *E.g.*, *Home Box Off., Inc. v. Dirs. Guild of Am., Inc.*, 531 F. Supp. 578, 603-04 (S.D.N.Y. 1982) ("*HBO*") (citing Supreme Court cases interpreting NLRA), *aff'd*, 708 F.2d 95 (2d Cir. 1983). It is similarly well-established that filing a grievance is protected concerted activity under the NLRA. *E.g.*, *N.L.R.B. v. City Disposal Sys. Inc.*, 465 U.S. 822, 836 (1984); *Roadmaster Corp. v. N.L.R.B.*, 874 F.2d 448, 452 (7th Cir. 1989).

C. The Negligence and Intentional Tort Claims Should be Dismissed as Duplicative of the Defamation Claim, and In Any Event, the Negligence Claim Fails as a Matter of Law

To prevent plaintiffs from "plead[ing] around constitutional and statutory defamation defenses," *Kesner*, 515 F. Supp. 3d at 190, New York courts keep a "watchful eye for claims sounding in defamation that have been disguised as other causes of action." *Pusey v. Bank of Am., N.A.*, No. 14-CV-04979 (FB) (LB), 2015 WL 4257251, at *4 (E.D.N.Y. July 14, 2015). As a result, federal courts regularly dismiss tort claims where they are duplicative of defamation claims. *See, e.g.*, *Kesner*, 515 F. Supp. 3d at 190; *Pusey*, 2015 WL 4257251, at *4.

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[13] The proviso to Section 8(b)(1)(A) states that a union has the right "to prescribe its own rules with respect to the acquisition or retention of membership therein." 29 U.S.C. § 158(b)(1)(A).

Accord Cummings v. City of New York, No. 19-CV-7723 (CM) (OTW), 2020 WL 882335, at *27 (S.D.N.Y. Feb. 24, 2020). As discussed, both the intentional tort and negligence claims are based on identical conduct and seek the identical damages as the defamation claim. *See* Compl. ¶¶214-215; *see also supra* p.13 & n.12. Accordingly, Counts II and III are duplicative of Plaintiff's defamation claim and should be dismissed for this independent reason.

Moreover, regardless of how Plaintiff frames his negligence claim, it still must be dismissed because Equity does not owe him a duty of care. Because the "existence of a duty is . . . a *sine qua non* of a negligence claim," as a matter of law, "no liability can ensue" in the absence of a duty. *Alfaro v. Wal-Mart Stores, Inc.*, 210 F.3d 111, 114 (2d Cir. 2000). Here, Plaintiff alleges that Equity owed him a duty of care because Equity contracted with the Broadway Partnership, the producing entity for the Chicago production of *Paradise Square*, and Plaintiff was the "lead creative producer" for the musical. Compl. ¶218. Under New York law, however, a "contractual obligation, standing alone," will not give rise to tort liability for a third party absent limited exceptions not applicable here. *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 138 (2002). Plaintiff's claim that Equity owed him a duty of care based on Equity's contractual relationship with the Broadway Partnership is thus insufficient as a matter of law. *See Blackhawk Dev., LLC v. Krusinski Constr. Co.*, No. 19-CV-5590 (NSR), 2021 WL 1225917, at *4 (S.D.N.Y. Mar. 31, 2021) (dismissing negligence claim where the plaintiff's "cursory allegations" failed to allege "any duty beyond a contractual obligation" to a non-party).

II. THE ANTITRUST CLAIMS MUST BE DISMISSED

Drabinsky's antitrust claims should be dismissed for three reasons: the Complaint lays bare that Drabinsky cannot plausibly overcome Equity's (i) statutory or (ii) non-statutory labor exemptions to the antitrust laws, and (iii) Drabinsky does not and cannot plead antitrust

injury because the Sherman Act protects competition—not a single, disgruntled plaintiff whose inability to work with Equity members could not plausibly impact market competition.

A. <u>The Statutory Labor Exemption Bars the Antitrust Claims</u>

Federal labor and antitrust law inherently conflict. Congress ultimately chose to protect the former over the latter in most cases by adopting Sections 6 and 20 of the Clayton Act (15 U.S.C. §17, 29 U.S.C. §52), and later, the Norris-LaGuardia Act (29 U.S.C. §101 *et seq*.). This "statutory labor exemption" broadly protects union activity from any antitrust claim so long as the union is (i) acting in its legitimate self-interest and (ii) not conspiring with non-labor groups. *H. A. Artists*, 451 U.S. at 714; *HBO*, 531 F. Supp. at 600.

Because overcoming the statutory exemption is "an element of any claim that unions violated the antitrust laws," any plaintiff asserting an antitrust claim against a union has the burden to plead facts plausibly showing that the statutory exemption does not apply. *USS-POSCO Indus. v. Contra Costa Cty. Bldg. & Constr. Trades Council*, 31 F.3d 800, 805 n.3 (9th Cir. 1994); *Mid-Am. Reg'l Bargaining Ass'n v. Will Cnty. Carpenters Dist. Council*, 675 F.2d 881, 890 (7th Cir. 1982) (plaintiff "failed to properly allege a conspiracy between the defendants . . . that would remove the complained of acts from the scope of the statutory labor exemption").

Here, Drabinsky does not allege any facts that a non-labor group participated in the decision or action to put him on the Do Not Work List.[14] Instead, his Complaint and pre-motion conference letter contend that Equity's unilateral decision to do so was contrary to its legitimate self-interest—but this contention misapprehends the relevant inquiry. "The 'self-

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[14] Drabinsky alleges that Equity is a labor union (Compl. ¶2), and that the other alleged co-conspirators are also theatrical labor unions (*id.* ¶14). *See Afran Transp. Co. v. Nat'l Mar. Union*, 169 F. Supp. 416, 423 (S.D.N.Y. 1958) ("A union may act in restraint of trade if it does so in furtherance of a legitimate labor purpose either alone or in combination with other unions."); *see also Perry v. Int'l Transp. Workers' Fed'n*, 750 F. Supp. 1189, 1196 (S.D.N.Y. 1990).

interest' of a union and its members has been treated as synonymous with 'the legitimate objects' of organized labor." *Republic Prods., Inc. v. Am. Fed'n of Musicians of U. S. & Canada*, 245 F. Supp. 475, 481 (S.D.N.Y. 1965). Activities are in the self-interest of a labor organization "if they bear a reasonable relationship to a legitimate union interest." *Allied Int'l, Inc. v. Int'l Longshoremen's Ass'n, AFL-CIO*, 640 F.2d 1368, 1380 (1st Cir. 1981), *aff'd,* 456 U.S. 212 (1982). When considering whether a union is pursuing a legitimate union interest, courts assess whether the activity at issue is a "traditional union activity," that is related to "traditional union ends." *USS-POSCO*, 31 F.3d at 808-09, 812.

Here, there can be no reasonable dispute that the conduct challenged by Plaintiff—a union responding to the complaints of its members about a producer who repeatedly violates the CBA by putting him on the Do Not Work List—is a traditional union activity that is directly related to the labor objective of CBA enforcement. When a union, operating within traditional means, acts to achieve a union objective, the exemption applies regardless of "the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." *United States v. Hutcheson*, 312 U.S. 219, 232 (1941). As this Circuit has held, "[a]s long as the union's action is intended to serve the interests of its members it is no proper concern of the courts whether the action is that best adapted to suit its purpose." *Intercontinental Container Transp. Corp. v. New York Shipping Ass'n*, 426 F.2d 884, 887 n.2 (2d Cir. 1970).

Here, Drabinsky concedes that Equity's "action" in placing Drabinsky on the Do Not Work List "[wa]s intended to serve the interests of its members." *Id.* Drabinsky specifically alleges that Equity's "boycott" was a response to its members' complaints about the production's work environment and failure to pay wages and benefits required by the CBA. Compl. ¶189 &

Ex. 39A. Nor can there be any plausible dispute that Equity was pursuing legitimate labor objectives, as demonstrated by the numerous grievances pursued by Equity in which it succeeded in establishing that the productions controlled by Drabinsky repeatedly violated the CBA. *Supra* pp.6-8.

Putting individuals or businesses on do-not-work-lists is a quintessential example of a traditional union activity. *See*, *e.g.*, *United Bhd. of Carpenters & Joiners of Am., Dist. Council of Kansas City, Mo., & Vicinity, A.F. of L. v. Sperry, for & on Behalf of N.L.R.B.*, 170 F.2d 863, 868 (10th Cir. 1948) (promulgation and circulation of a blacklist is protected union speech where the blacklist is confined to name of employer involved in the controversy); *HBO*, 531 F. Supp. at 582-83, 603 (holding union had "legitimate interest in preventing" its members from working for producer who was placed on do-not-work-list equivalent); *Elliott v. Amalgamated Meat Cutters & Butcher Workmen of N. Am., A. F. of L.*, 91 F. Supp. 690, 697 (W.D. Mo. 1950) ("an 'Unfair List' is a protected activity of a labor organization."). Because such conduct is a traditional union activity, the statutory labor exemption should be summarily applied because it is "no proper concern of the courts whether the action" that Equity took "is that best adapted to suit its purpose." *Intercontinental Container Transp. Corp.*, 426 F.2d at 887 n.2.

Indeed, as Drabinsky's allegations demonstrate, Equity placed him on the Do Not Work List to achieve a classic union goal: upholding the wages and working conditions of its members. *See H.A. Artists*, 451 U.S. at 720-21 (holding that "regulation of agents developed in response to abuses by employment agents who occupy a critical role in the relevant labor market," were "clearly designed to promote the union's legitimate self-interest"); *Checker Taxi Co. v. Nat'l Prod. Workers Union*, 113 F.R.D. 561, 566 (N.D. Ill. 1986) (unions acting for the

purpose of improving wages and working conditions of their members is "the paradigmatic example" of when the statutory exemption applies).

Because a union putting a producer whose production repeatedly violated the CBA on a do-not-work-list is conduct undeniably protected under the statutory labor exemption, Drabinsky argues that Equity putting *him* on the Do Not Work List was for some other allegedly illegitimate purpose because he was only the "creative" producer. *E.g.*, Compl. ¶190 (alleging that Equity's decision "had nothing to do with Drabinsky purporting to breach the [Equity] contract, nor was it because Drabinsky tried to pay members of [Equity] less than their collectively bargained wages and/or reneged on any other terms in the relevant CBA"); *see also id.* ¶¶191-92. But the question under the statutory labor exemption is *not* about "the wisdom or unwisdom, the rightness or wrongness" of Equity putting Drabinsky on the Do Not Work List. *Hutcheson*, 312 U.S. at 232; *Intercontinental Container Transp. Corp.*, 426 F.2d at 887 n.2. Instead, the question is simply whether Equity pursued a legitimate union goal through a traditional union tactic and, on the face of the Complaint, the clear answer is that Equity did so.[15] Drabinsky's antitrust claims are thus foreclosed by the statutory labor exemption and must be dismissed. *See e.g.*, *Tuvia Convalescent Ctr., Inc. v. Nat'l Union of Hosp. & Health Care Emps., a Div. of RWDSU, AFL-CIO*, 553 F. Supp. 303, 307 (S.D.N.Y. 1982) (dismissing antitrust claims where "the labor exemption [wa]s fully applicable to agreements" at issue), *aff'd,* 717 F.2d 726 (2d Cir. 1983).[16]

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[15] Drabinsky's allegation that his placement on the Do Not Work List was improper because he was only the lead creative producer is, in any event, entitled to no weight because it contradicts all of Drabinsky's other allegations about his extensive control over the production, *supra* pp.3-5. *See BYD Co. Ltd. v. VICE Media LLC*, 531 F. Supp. 3d 810, 817 (S.D.N.Y. 2021).

[16] In his pre-motion letter, Drabinsky argues that the "boycott of Drabinsky occurred outside the context of an active labor dispute." Docket No. 33, at 2-3. Although not an element of the two-prong test for determining the application of the statutory exemption, as discussed *supra*, this case plainly involves a "labor dispute," which is broadly defined in the Norris-LaGuardia Act to include "any controversy concerning terms or

B. The Non-Statutory Labor Exemption Would Also Bar the Antitrust Claims

Even if Drabinsky had alleged facts that could plausibly overcome Equity's statutory labor exemption, the non-statutory labor exemption would still bar his antitrust claims on the face of the Complaint. Under the non-statutory labor exemption, agreements between a union and a non-labor group are exempt from antitrust scrutiny if they (i) "further goals that are protected by national labor law and that are within the scope of traditionally mandatory subjects of collective bargaining," and (ii) do "not impose a direct restraint on the business market [that] has substantial anticompetitive effects . . . that would not follow naturally from the elimination of competition over wages and working conditions[.]" *Loc. 210, Laborers' Int'l Union of N. Am. v. Lab. Rels. Div. Associated Gen. Contractors of Am., N.Y.S. Chapter, Inc.*, 844 F.2d 69, 79-80 (2d Cir. 1988) (internal quotation marks omitted).

As set forth above, it is undisputed on the face of the Complaint that Equity's conduct was in response to member complaints about CBA violations with respect to wages and working conditions. And there is not a single allegation that Equity acted at the behest, or for the benefit, of any non-labor group (rather, it was at the behest of the union members on *Paradise Square*). Moreover, there can be no plausible allegation that Equity's actions in placing Drabinsky on the Do Not Work List were overly broad and designed to restrain competition in business markets. On the contrary, the restriction was surgically tailored to place a single producer on the Do Not Work List, whose inability to work with Equity members will have no discernable effect on business competition (*infra*, p.23). Accordingly, the non-statutory labor exemption also bars Drabinsky's antitrust claims. *See Sage Realty Corp. v. ISS Cleaning Servs.*

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conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113(c).

Grp., Inc., 936 F. Supp. 130, 137-38 (S.D.N.Y. 1996) (dismissing complaint where conduct "f[ell] squarely within the non-statutory labor exemption" and noting that exemption applies "to agreements among employee groups, such as unions").

C. Drabinsky Fails to Plead Antitrust Injury

Independent of Equity's two labor exemption defenses, the Court should dismiss the antitrust claims because Drabinsky fails to plead any facts plausibly showing antitrust injury. A plaintiff must allege an "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.,* 429 U.S. 477, 489 (1977). This requirement stems from the principle that the antitrust laws "were enacted for 'the protection of *competition,* not *competitors.*'" *Id.* at 488. Here, the challenged placement of Drabinsky on the Do Not Work List will have no plausible impact on competition in any market. Drabinsky alleges a boycott directed at him alone, as opposed to a boycott against any class or group of producers whose absence would materially reduce competition in any market. Indeed, the alleged boycott concerns a *single* producer who, before *Paradise Square*, had not worked on Broadway for more than fifteen years due to criminal behavior. *Supra* pp.5-6. Put differently, Drabinsky's Complaint does *not* allege any facts plausibly showing harm to competition for theater productions. It merely alleges harm to him and him alone.

The Second Circuit employs a three-step process to determine whether a plaintiff sufficiently alleges antitrust injury: (i) first, the plaintiff must "identify[ ] the practice complained of and the reasons such a practice is or might be anticompetitive"; (ii) second, the court identifies the "actual injury the plaintiff alleges"; and (iii) finally, the court compares the "anticompetitive effect of the specific practice at issue" to "the actual injury the plaintiff

alleges." *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 76 (2d Cir. 2013) (internal quotations and citations omitted). Courts in the Second Circuit construe the *Gatt* test to require allegations "of market-wide harm, or in other words, an injury to competition" at either the first or second step. *Singh v. Am. Racing-Tioga Downs Inc.,* No. 21-CV-0947 (LEK) (ML), 2021 WL 6125432, at *7 & n.6 (N.D.N.Y. Dec. 28, 2021) (collecting cases). And the third step requires that a plaintiff demonstrate that its injury "stems from a competition-*reducing* aspect or effect of the [alleged] behavior." *In re Credit Default Swaps Antitrust Litig.*, No. 13-CV-2476 (DLC), 2014 WL 4379112, at *7 (S.D.N.Y. Sept. 4, 2014).

Drabinsky fails to allege any facts plausibly showing injury to *competition* to satisfy the *Gatt* test. In his Section 1 claim, Drabinsky alleges only a conspiracy to boycott him—a single creative producer who was absent from the market for over 15 years and whose presence is of no competitive significance. And in his Section 2 claim, the exclusionary conduct that Drabinsky alleges again concerns only *his* exclusion from the alleged relevant market. Every which way, the only plausibly alleged harm is to Drabinsky as an individual producer. *See*, *e.g.*, Compl. ¶¶233-34 ("The blacklist boycott therefore harms Drabinsky as a producer. . ."); *id.* ¶247 ("This unlawful conspiracy uses AEA's members' collective monopoly power to severely harm Drabinsky as a producer . . ."). But such allegations of harm to "individual business prospects," without more, "do[] not suffice to plead anticompetitive harm." *Sell It Soc., LLC v. Acumen Brands, Inc.*, No. 14-CV-3491 (RMB), 2015 WL 1345927, at *5 (S.D.N.Y. Mar. 20, 2015); *Arcesium, LLC v. Advent Software, Inc.*, No. 20-CV-04389 (MKV), 2021 WL 1225446, at *7 (S.D.N.Y. Mar. 31, 2021) ("This case cannot be maintained because there are no plausible allegations of market-wide harm, as opposed to harm only to Plaintiff.").

Recognizing this fatal flaw, Drabinsky makes the conclusory assertion that eliminating him from the market was "particularly harmful to the competitive process," because he is an "innovator in the live theater industry." Compl. ¶¶196, 234. But this empty averment does not plausibly show any non-*de minimis* injury to competition. Again, Drabinsky is just one producer, and one who had not produced (creatively or otherwise) a show for *fifteen years* before the *Paradise Square* debacle. *Id.* ¶38. Indeed, there is no claim that even a single production that would otherwise make it to Broadway will not be produced because Drabinsky is on the Do Not Work List.

Drabinsky's other gambit is to try to sweep in *other* "blacklisted producers" on the Do Not Work List and claim that their *collective* elimination "reduces competition . . . and output and harm[s] would-be audiences of those productions." Compl. ¶¶195, 198, 236-37. But these other producers on the Do Not Work List have nothing to do with the alleged group boycott (under Sherman Act Section 1) or exclusionary conduct (under Section 2) challenged in the Complaint: an alleged boycott specifically targeted to prevent *Drabinsky* from working with Equity members. Whatever the facts are concerning the other producers included on the Do Not Work List—the Complaint does not allege any, and the other producers are not even identified—they have nothing to do with the only conduct challenged as an antitrust violation in the Complaint, *i.e.*, an alleged boycott aimed at Drabinsky alone, which cannot support a claim of antitrust injury.

CONCLUSION

For the foregoing reasons, Equity's motion to dismiss should be granted, and the First Amended Complaint should be dismissed with prejudice.

January 10, 2023

Respectfully submitted,

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