No. 24-

IN THE

Supreme Court of the United States

GARTH DRABINSKY,

Petitioner,

v.

ACTORS' EQUITY ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The "statutory labor exemption" to federal antitrust laws immunizes from liability labor organizations that are "lawfully carrying out the[ir] legitimate object[ives]." 15 U.S.C. § 17; *see also* 29 U.S.C. § 52. But the statutory labor exemption applies only "so long as a union acts in its self-interest." *United States v. Hutcheson*, 312 U.S. 219, 229–33 (1941). And it is not enough for a union to merely act in its self-interest; it must, instead, act in its "legitimate interests." *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704 (1981).

The question presented here is:

- Does the statutory labor exemption—which requires that unions act pursuant to a legitimate self-interest—provide unions with blanket immunity from the antitrust laws such that they can avoid a factual inquiry into their actions, and thereby deprive the plaintiff of both due process and his livelihood in perpetuity, through a Rule 12(b)(6) dismissal, when the justification given by the union for its conduct was pled to be false?

PARTIES TO THE PROCEEDINGS

Petitioner, plaintiff-appellant in the court below, is Garth Drabinsky, a celebrated theatrical producer.

Respondent, defendant-appellee in the court below, is the Actors' Equity Association, a labor union that represents Broadway performers and stage managers.

Because Petitioner is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- United States Court of Appeals (2d Cir.): *Garth Drabinsky v. Actors Equity Ass'n*, No. 23-795 (July 2, 2024) (denied).

- United States District Court (S.D.N.Y.): *Garth Drabinsky v. Actors Equity Ass'n*, No. 1:22-cv-08933-LGS (April 14, 2023).

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The opinion and judgment of the District Court for the Southern District of New York is unreported but available at 2023 WL 2955294 and reproduced at 23a-41a.

JURISDICTION

The Second Circuit issued its opinion and judgment on July 2, 2024, and later denied a petition for rehearing on August 8, 2024, and the mandate issued a week later. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 2 of the Sherman Act, 15 U.S.C. § 2, states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."

Section 6 of the Clayton Act, 15 U.S.C. § 17, states: "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

Section 20 of the Clayton Act, 29 U.S.C. § 52, states: "That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place

where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

INTRODUCTION

This petition for a writ of certiorari asks the Court to rein in yet another instance of labor union overreach enabled by lower courts that failed to adhere to long-standing legal principles intended to provide a check on union power—this time in the context of federal antitrust laws and the statutory labor exemption. Rather than balancing legitimate union interests with fundamental values of free enterprise and economic competition embodied in the antitrust laws, the Second Circuit shielded the union from any inquiry into the conduct that the union insists was taken to protect a traditional labor concern, despite well-pleaded allegations to the contrary.

Petitioner Garth Drabinsky is a celebrated theatrical producer who was blacklisted by Respondent Actors' Equity Association ("Equity"), the labor union that

represents more than 50,000 Broadway performers and stage managers. Equity's unjustified blacklisting, together with reciprocal agreements with the unions representing the other performing arts, amounts to a concerted group boycott and bars Drabinsky from working in any producing capacity in theater, film, television, and concerts ***in perpetuity***.

Equity took this unprecedented action even though Drabinsky was not a signatory to the union's collective bargaining agreement ("CBA") nor responsible for wages and working conditions on the production. And because Drabinsky was not a party to the CBA (nor could he be because he was not a member of the Broadway League), he could not avail himself of the CBA grievance remedies, including mediation, available to challenge this placement on the "Do Not Work" list or other union conduct. Facing this lifetime ban, Drabinsky sued, alleging an unlawful group boycott and conspiracy to monopolize in violation of federal antitrust laws, as well as defamation under state law.

Seeking to avoid inquiry into the actual reasons for its conduct, Equity invoked the statutory labor exemption in its motion to dismiss. But that exemption applies only if the labor union's conduct ***in actuality*** protects a legitimate self-interest. As alleged, the sole justification offered by Equity when it blacklisted Drabinsky was that he had breached the union's CBA. But this statement was necessarily false because Drabinsky was not a signatory to the CBA and thus, by definition, could not have committed any such breach. Further, any facts improperly injected by Equity were negated by Drabinsky's allegations explaining they were both false and pretextual.

When a union's only justification for its actions is premised on an objectively false claim, this negates the union's suggestion that it was acting pursuant to a legitimate interest. And when a plaintiff has alleged facts calling into question the reasons for the union's actions, further development of the factual record was required before the district court, as a matter of law, could resolve whether Equity's conduct was in actuality serving a legitimate interest.

Yet the Second Circuit affirmed the district court and Equity's objectively false explanation for its conduct. Indeed, the Second Circuit built its decision ***solely*** on it: "[Equity] explained that Drabinsky was added to the list ***because he had breached the union contract***. For these reasons, we think the complaint itself shows that Equity pursued its legitimate self-interest in placing him on the list." 11a-12a (emphasis added).

In so concluding, the Second Circuit issued a decision that contradicts this Court's precedent requiring that the labor union in actuality act pursuant to a legitimate interest to avail itself of the antitrust exemption. Yet under the Second Circuit's articulation, so long as a labor union offers some justification—even a pretextual one that is both objectively false and factually impossible—the statutory labor exemption applies to bar a plaintiff 's antitrust claim. That is neither the proper nor a workable standard. It extends the scope of the exemption far beyond its intent and gives labor unions virtually free rein to violate federal antitrust laws without factual inquiry into its conduct, as long as the union's motion to dismiss brief insists that its interest was "legitimate." The antitrust laws should not be defeated so easily by a fabricated,

pretextual "reason" offered by a union. This also is not the appropriate outcome. Instead, it represents another egregious overreach by a labor union seeking to wield its substantial power well beyond union membership and the terms of its CBA.

STATEMENT OF THE CASE

Drabinsky sued Equity for an unlawful boycott and a conspiracy to monopolize in violation of federal antitrust laws, and defamation, intentional tort, and negligence under New York law. The district court granted Equity's Rule 12(b)(6) motion and dismissed Drabinsky's claims with prejudice and without leave to amend. The district court concluded that the statutory labor exemption barred Drabinsky's antitrust claims based on "facts" beyond the four corners of the complaint, and that Drabinsky's state law claims, including negligence, were precluded under the oft-criticized rule first pronounced in *Martin v. Curran*, 303 N.Y. 276 (1951).

The Parties

Before Equity's boycott, Drabinsky was the creative power behind many landmark, Tony-winning productions, including *Kiss of the Spider Woman*, Hal Prince's restoration of *Show Boat*, *Ragtime*, *Parade*, *Fosse*, and most recently, *Paradise Square*—a musical that "brings to the forefront the racial conflict in the Five Points neighborhood of New York City in the 1860s." 43a, 76a ¶54, 88a-89a ¶91.

Equity is the labor union that represents performers and stage managers working in live theater. Virtually

all actors and stage managers working on Broadway or in other professional live theater productions are Equity members. 52a-53a ¶2. Equity's membership exceeds 50,000 individuals.

A relationship with Equity is necessary to work on Broadway. To produce a play or musical on Broadway, a producer or production entity must contract with Equity by signing a security agreement that binds the producer or production entity to the CBA between Equity and the Broadway League (a multi-employer bargaining association of which Drabinsky is not a member). 54a-55a ¶8.

Drabinsky was neither the producer nor a principal, partner, or shareholder of the production entity that contracted with Equity on *Paradise Square*. Even so, in July 2022, Equity placed Drabinsky on its "blacklist" (called the "Do Not Work" list), with no known investigation or other due process for Drabinsky.

The "Do Not Work" list prohibits Equity members from working on any live theater production if Drabinsky is associated as a producer. The blacklist also prevents Drabinsky from working, as a producer or in any producing capacity, with members of Equity's sister unions: AGMA, AGVA, GIAA and SAG-AFTRA, collectively known as the Associated Actors and Artists of America, or the "4A's."

In its briefs, Equity assured the district court that its boycott was legitimately based on concerns about wages and working conditions on *Paradise Square*, even though Drabinsky was not responsible for those in his role as a creative producer and even though the complaint plausibly alleges those concerns are pretextual.

Drabinsky also was not a member of the Broadway League. This matters because membership in the Broadway League was a prerequisite to becoming a party to the CBA. This fact further confirms that Drabinsky was not a signatory to the CBA and thus could not have breached it by definition.

Drabinsky Is Not an Employer and Had No Contractual Obligations to Equity or the Cast for Wages

Drabinsky did not employ the *Paradise Square* cast. Paradise Square Broadway Limited Partnership and Paradise Square Production Services Inc. ("Production" or "PSPSI") employed the cast and bore sole responsibility for its wages (and was a signatory to the CBA). Although Drabinsky served as key creative producer for the show's Chicago and Broadway runs, he was not a principal, partner or shareholder of the Production and he was not the employer for purposes of the CBA. 77a ¶56, 125a ¶191.

Consistent with that, the complaint alleges that Drabinsky was not responsible for pay. He neither paid wages, nor withheld them, because he 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." 77a ¶56.

These allegations reflect separate litigation relating to *Paradise Square*, in which Equity sought recovery for withheld dues and benefits in arbitration from the Production—not Drabinsky. There, Equity alleged the Production had breached the CBA; due to the Covid pandemic, the Production failed to pay the cast weekly health, pension and 401(k) contributions; and the

Production failed to remit dues owed to Equity. *See Ass'n v. Paradise Square Prod. Servs., Inc.*, AEA's Petition to Confirm Arbitration Award, No. 22-CV-7325 (PAE), (S.D.N.Y. Aug. 30, 2022) Dkt. No. 4 at 4–5.

Equity Blacklists Drabinsky from Creative Production for Life

Only after it was announced that *Paradise Square* was to close on July 14, 2022, largely because of a prolonged shutdown due to Covid, did Equity announce publicly it was blacklisting Drabinsky from working as a producer or in any producing capacity on any project that employs unionized stage actors. 124a-125a ¶190.

The blacklist is a strict prohibition. Union members who accept theatrical employment with individuals on the "Do Not Work" list risk severe consequences. Beyond its threatening severity to members, the scope of Equity's boycott is broad: It extends past the stage—to film, television, and concerts—because Equity's sister "4A" unions—representing all performers in "television, radio, concerts and film"—honor Equity's "Do Not Work" list. 127a ¶194.

Equity's boycott is vast in space, but infinite in time. Ultimately, it prevents Drabinsky from making a living as a producer in perpetuity.

The District Court Erroneously Dismissed Drabinsky's Complaint

Drabinsky sued Equity on October 20, 2022, initially alleging three causes of action under New York law:

defamation, intentional tort, and negligence. 42a-146a. After an initial round of letters to the district court, Drabinsky amended his complaint to add two federal antitrust claims: (i) an unlawful boycott in violation of Section 1 of the Sherman Act; and (ii) an unlawful conspiracy to monopolize in violation of Section 2 of the Sherman Act. *See id.*

Equity moved to dismiss the complaint on the grounds that: (i) the statutory labor exemption bars the antitrust claims; (ii) the non-statutory labor exemption bars the antitrust claims; (iii) Drabinsky has not alleged antitrust injury; (iv) the state law claims are precluded under the doctrine articulated in *Martin v. Curran*; (v) the state law claims are preempted; and (vi) the state law claims duplicate one another or otherwise fail as a matter of law.

The district court did not hold oral argument but, in a 14-page opinion, granted Equity's motion as to grounds (i) and (iv), without reaching the remaining issues, and dismissed Drabinsky's 80-page five-count complaint in its entirety, without leave to amend and with prejudice.

The Second Circuit Erroneously Affirms the Dismissal of Drabinsky's Complaint

Drabinsky appealed to the Second Circuit, arguing that the district court erred in resolving the factual dispute central to the exemption's application: whether Equity's placement of Drabinsky on the Do Not Work list was, in fact, intended to serve a ***legitimate*** self-interest. Drabinsky had alleged that he was not a party to the CBA. Equity's explanation for Drabinsky's placement on the "Do Not Work" list was that he had breached the

union contract. This was false on its face. Drabinsky further argued that it was an error for the district court to apply the statutory labor exemption, despite Drabinsky's allegation that Equity had combined with a non-labor group. The appeal further argued that the district court had erred in dismissing Drabinsky's state law claims.

As for the Sherman Act claims, the Second Circuit briefly reviewed the history of federal court jurisprudence about the statutory labor exemption, noting that the federal courts "mediated the friction between national antitrust and labor policies" largely by "expanding" rather than contracting the labor exemption citing *Conn. Ironworkers Emps. Ass'n v. New England Reg'l Council of Carpenters*, 869 F.3d 92, 101 (2d Cir. 2017)). 7a. The Second Circuit nevertheless acknowledged that the statutory exemption contained two important limits: "The test of whether labor union action is or is not within the prohibitions of the Sherman Act is (1) whether the action is in the union's self-interest in an area which is a proper subject of union concern and (2) whether the union is acting in combination with a group of employers." *id.* (citing *Intercont'l Container Transp. Corp. v. N.Y. Shipping Ass'n, Inc.*, 426 F.2d 884, 887 (2d Cir. 1970)).

In analyzing whether Equity's placement of Drabinsky on the Do Not Work list was entitled to the exemption, the Second Circuit first concluded, on an issue of first impression, that it was the plaintiff 's burden to show that the union's conduct was not covered by the exemption. It noted that the "burden of proving exceptions to the antitrust laws typically lands on defendants, not plaintiffs" 8a (citing *USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Const. Trades Council*, 31 F.3d 800, 805 n.3 (9th Cir.

1994)), and that "[p]lacing the burden on the plaintiff rather than the union protects the union's conduct from antitrust scrutiny." 9a. Despite making these statements, the Second Circuit ignored those underlying concerns and in fact placed the burden on Drabinsky when it concluded that, because Equity's boycott was a presumptively protected activity, Drabinsky would need to make a strong showing that Equity was not acting in its self-interest to deprive it of the exemption.

With this as a background and its decision to place this burden on Drabinsky, the Second Circuit repeated the district court's errors in evaluating Drabinsky's complaint and failed to credit Drabinsky's specific allegations that Equity had, in fact, ***not*** acted in its legitimate self-interest. The complaint quoted the statements made by the cast and Equity but explicitly alleged that the statements were false and misleading. Rather than credit Drabinsky's allegations, the Second Circuit took the substance of the statements of both the cast and Equity—which Drabinsky alleged were untrue, offering detailed explanations—as supportive of Equity. For example, the Second Circuit accepted Equity's demonstrably false statement that Drabinsky was blacklisted because he had breached the union contract. Drabinsky was not a signatory to the CBA, and thus, by definition, could not have committed such breach. These factual inconsistencies were unexplored by the district court and unquestioned by the Second Circuit, yet they are the foundation of the union's purported "legitimate" self-interest. The court, as a matter of law, could not resolve whether Equity's conduct was in actuality serving a legitimate interest, and this error was fatal to Drabinsky's claims. Yet the Second Circuit accepted Equity's false statement: "[Equity] explained that Drabinsky was added to the list because

he had breached the union contract. For these reasons, we think the Complaint itself shows that Equity pursued its legitimate self-interest in placing him on the list." 11a-12a. This was the Second Circuit's critical error.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's Decision Conflicts with This Court's Long-Standing Precedent

The Second Circuit's decision directly conflicts with this Court's holdings on the statutory labor exemption, which have long required that a union act pursuant to a legitimate self-interest to invoke the exemption. And the Second Circuit's decision also disregards this Court's recent decisions involving labor disputes, which have curtailed the trend of applying less stringent standards in union matters.

A. This Court's Long-Established Articulation of the Statutory Labor Exemption

This Court has repeatedly articulated the standard that courts must apply in considering the statutory labor exemption to the antitrust laws, including in *H. A. Artists* and *American Federation of Musicians*. Those decisions made clear decades ago that a labor union can invoke the statutory labor exemption ***only*** if it was actually acting to protect a legitimate self-interest when it engaged in the challenged conduct. And that determination is customarily made on a complete factual record, usually after trial.

In *H.A. Artists*, the Court addressed another dispute involving Equity, with theatrical agents who had brought

antitrust claims challenging a licensing system imposed on the agents by the union. 451 U.S. at 706. The union's members were allowed to work "only with those agents who obtained Equity licenses and thereby agreed to meet the conditions of representation imposed by Equity." *Id.* at 707. Among other regulations, agents were required to pay franchise fees every year to remain licensed by Equity. *Id.* at 710.

The Court concluded that the franchise fees were impermissible. The Court determined that "Equity's justification for these fees [was] inadequate" to invoke the labor exemption. *Id.* at 722. The Court explained:

> Equity suggests, only in the most general terms, that the fees are somehow related to the basic purposes of its regulations: elimination of wage competition, upholding of the union wage scale, and promotion of fair access to jobs. But even assuming that the fees no more than cover the costs of administering the regulatory system, this is simply another way of saying that without the fees, the union's regulatory efforts would not be subsidized—and that the dues of Equity's members would perhaps have to be increased to offset the loss of a general revenue source. If Equity did not impose these franchise fees upon the agents, there is no reason to believe that any of its legitimate interests would be affected.

Id.

In sum, Equity's challenged conduct could not meet the statutory labor exemption's standard because its reason was nothing more than generally related to the union's interest, even though of course raising money would always serve the union.

The Second Circuit's decision also conflicts with this Court's decision in *American Federation of Musicians*. There, the Court assessed the legality of several union regulations, including "price floors" for union musicians, as well as union licensing requirements. *Am. Fed'n of Musicians v. Carroll*, 391 U.S. 99, 107–08 (1968). The union argued that the regulations were necessary to protect legitimate interests by ensuring that the union wage scale was not undercut. *Id.*

In deciding whether the labor exemption should apply, the Court said that the "critical inquiry is whether the [union's conduct] ***in actuality*** operate[s] to protect" legitimate union interests. *Id.* at 108 (emphasis added). There, the Court concluded that the price floors were a legitimate "means for coping with job and wage competition." *Id.* at 109. But the Court made that assessment, not on the pleadings, but on a record developed following a five-week trial, concluding that there was ample evidence to support its findings. *Id.* at 101, 110–11.

Again, the Court reiterated that a labor union's latitude under the statutory labor exemption is not unlimited. Instead, where called into question in the pleadings, the union must show that its conduct actually does affect a legitimate union interest. Equity's effort to expand the exemption available under the antitrust laws

mirrors similar efforts by labor unions to do the same under other federal statutes—efforts that this Court has recently curtailed.

B. Statutory Exemptions for Labor Unions Are Not Absolute and Depend on Factual Inquiry

This Court has recently curtailed union attempts to broaden their ability to flout federal law. For example, in *Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174*, 598 U.S. 771 (2023), the Court rejected a labor union's efforts to broadly expand the preemption under the National Labor Relations Act ("NLRA"). That preemption, known as *Garmon* preemption, exempts unions from tort suits arising from labor disputes so long as the union takes reasonable precautions to avoid foreseeable and imminent danger to the property.

There, Glacier Northwest, a concrete company, relied on union truck drivers to deliver concrete to customers in a timely manner. *Id.* at 774. But the relationship broke down, and the drivers went on strike. *Id.* The drivers' union "allegedly designed the strike with the intent to sabotage Glacier's property," specifically by timing the strike to ensure that concrete went to waste and to cause damage to Glacier's trucks and equipment. *Id.* at 774–75. Glacier sued the union under tort law for destroying its property, but the trial court dismissed its claims under *Garmon* preemption. *Id.* at 776.

"Under *Garmon*, States cannot regulate conduct 'that the NLRA protects, prohibits, or arguably protects or prohibits.'" *Id.* (quoting *Wis. Dep't of Indus. v. Gould Inc.*,

475 U.S. 282, 286 (1986)). The union argued that *Garmon* preemption broadly barred the state torts brought against it. But the Court rejected that expansive reading. Instead, the Court recognized that "[t]hough broad, this standard has teeth." *Id.* The doctrine "requires more than 'a conclusory assertion" that the NLRA arguably protects or prohibits conduct.'" *Id.* (quoting *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 394 (1986)). Thus, the mere fact that the drivers engaged in a concerted work stoppage to support their economic demands did not end the analysis. Instead, courts still must assess whether the strike exceeded the statute's limits. *Id.* at 782–84.

As with the union in *Glacier*, Equity did not deny the basic standard that governed the application of the relevant doctrine. But it persuaded the lower courts to dismiss the complaint on the basis of Equity's objectively false statement in a motion to dismiss brief, without factual-record development. The Second Circuit itself recognized that "[p]lacing the burden on the plaintiff rather than the union protects the union's conduct from antitrust scrutiny." 10a. But, as this Court recognized in *Glacier*, even union conduct that falls within the general scope of an exemption must still meet the requirements of that exemption. Dismissing the case at the pleading stage, based on Equity's false statement, when the complaint has alleged facts disputing Equity's reasons for its conduct, allowed the union to avoid the "critical inquiry [of] whether the [union's conduct] in actuality operate[s] to protect" legitimate union interests. *Am. Fed'n*, 391 U.S. at 108.

Here, the Second Circuit failed to recognize that the statutory labor exemption still has "teeth" and has not

swallowed the federal antitrust laws in their entirety. The mere assertion by Equity that it had authorized a boycott of Drabinsky to protect members' working conditions should not have ended the analysis. Instead, the Court should have permitted factual development through discovery on whether the union's boycott protects a legitimate union interest. This outcome eviscerates the substance of the union-exemption-to-antitrust standard by invoking it for claims that are logical impossibilities—here, claiming that Drabinsky breached the CBA when he was not a party. The decision also creates for those suing unions a more stringent pleading burden than that set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). This result breaks from the Court's recent antitrust decisions involving labor, including *Glacier*, that recognize that federal courts have swung too far—in the words of the Second Circuit in "mediat[ing] the friction between national antitrust and labor policies" largely by "expanding" rather than contracting the labor exemption. 7a (citing *Conn. Ironworkers*, 869 F.3d at 101).

C. Labor Disputes Are Subject to "Traditional" Standards

This Court has also recently confirmed that disputes involving labor unions are still subject to traditional legal standards and principles and rejected lower court decisions that had accepted union arguments that less stringent standards should apply.

For instance, *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570 (2024), is a recent labor-dispute case in which this Court held that courts must adhere to traditional

standards rather than tip the scales for unions. There, this Court assessed whether the National Labor Relations Board's ("NLRB") request for a preliminary injunction under §10(j) of the National Labor Relations Act, 29 U.S.C. §160(j), was subject to the "traditional" four-part test articulated in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), or whether the NLRB was entitled to a preliminary injunction if it could meet a less stringent two-part test adopted by the Sixth Circuit.

The Court rejected the less stringent standard, which "substantively lower[ed] the bar for securing a preliminary injunction by requiring courts to yield to the Board's preliminary view of the facts, law, and equities." *Id.* And the Court rejected the idea that a district court needed to defer to the NLRB, finding nothing in the context of the statute that would require a court to apply any different, lesser, standards in determining whether the NRLB was entitled to equitable relief. *Id.* Thus, to obtain a preliminary injunction from the district court the NLRB had to satisfy all of the requirements of the traditional four-part test. The NLRB was not entitled to favorable treatment or a more lenient standard simply because of its role in protecting against unfair labor practices.

Similarly, here, there is no reason to deviate from the traditional standards applicable to the granting of a motion to dismiss, even in the context of antitrust allegations against a union. While the statutory labor exemption does exempt certain activities by labor unions, when they are "lawfully carrying out the[ir] legitimate object[ives]," 15 U.S.C. § 17; *see also* 29 U.S.C. § 52, it does so only when it acts in its "legitimate interests." *H.A.*

Artists, 451 U.S. at 722. Nothing in the text supports a reading that any action brought against a union faces a higher pleading burden under Rule 12(b)(6) to defeat a motion to dismiss. Even if the Second Circuit is correct that it is the plaintiff 's burden to plead the elements necessary to overcome the exemption—an issue of first impression it decided without briefing from the parties—that does not support the Second Circuit's deviation from traditional standard requiring labor unions in actuality acting pursuant to a legitimate interest to invoke the statutory labor exemption.

Similarly, in *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 585 U.S. 878 (2018), this Court gave no special preference to union interests when determining what standard to apply to First Amendment rights. Indeed, it ended decades of union overreach and overruled longstanding precedent on a public union's ability to collect "agency fees"—which are a percentage of full union dues—from employees who were not union members, but nevertheless are represented by the union purpose of negotiations with employers.

Under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), it was permissible for the union to collect this fee for expenditures related to the union's collective-bargaining activities, which are chargeable to the non-member, but was not to be used for the union's political and ideological projects, which are not chargeable. Janus was an Illinois state employee who refused to join the union because he opposed many of its positions, including those taken in collective bargaining. Illinois' governor also opposed many of the union's positions and filed suit challenging the constitutionality of the state law authorizing agency fees.

On certiorari, the Court held that forcing public employees to subsidize a union they had chosen not to join, where they strongly objected to positions taken by the union in collective bargaining and related activities, violated the free speech rights of non-members. 431 U.S. at 232–33. In deciding to overturn a 40-year-old precedent, the Court considered the standard that should be used in judging the constitutionality of agency fees. *Id.* Due to the importance of the Constitutional rights at issue, the Court determined that the agency fees must be judged using a standard higher than a mere rational basis. The Court was not willing to accept arguments based on the importance of agency fees to the functioning of public unions in the face of the overriding importance of the non-members' First Amendment rights. *Id.*

The Court here should similarly weigh the policy goals to be advanced by the antitrust laws against the effects of the Second Circuit's ruling. By allowing the union to escape any factual inquiry into whether it had legitimate reasons to place Drabinsky on the Do Not Work list, especially where the union's stated reasons for so doing were clearly false, the Second Circuit gave undue weight to the purpose of the statutory labor exemption at the expense of the antitrust laws. Rather than serving to protect legitimate union activities, the lower court's ruling acts as an absolute shield against not only liability–but even inquiry–into any action that the union represents was taken to protect a traditional labor concern.

II. The Decision Below Is Wrong

The Second Circuit erred in concluding that Equity acted pursuant to a legitimate self-interest when the

sole reason it gave for blacklisting Drabinsky was his "breaches" of the union's CBA. But because Drabinsky was not a signatory to the CBA, he could not breach the agreement. Plus, Drabinsky explained that he was not otherwise responsible for wages or working conditions on the production. This meant, as a matter of law, that the court could not resolve on a Rule 12(b)(6) motion whether the union in fact acted pursuant to a legitimate self-interest. At best, the Second Circuit (and district court) could not determine why Equity took the action that it did, and thus it should not have resolved whether the statutory labor exemption applied at this stage.

It was undisputed that Drabinsky was never a signatory to any union contract. 124a-125a ¶¶190-91. Thus, by definition, he could never have breached that agreement. Yet when Equity announced its lifetime ban, it said it was doing so because he breached the CBA. 147a. This fact was corroborated by Drabinsky's other allegations explaining that he was not responsible for wages and working conditions on the *Paradise Square* production and confirmed that Equity's decision had nothing to do with any CBA breaches. *Id.*

But because Equity's explanation is both objectively false and factually impossible, the Second Circuit (and the district court) could not have resolved on the pleadings whether Equity's conduct was in actuality serving a legitimate self-interest. Yet the Second Circuit did exactly that, and its decision expressly turned on its acceptance of the union's false statement. The Second Circuit reasoned: "[Equity] explained that Drabinsky was added to the list because he had breached the union contract. For these reasons, we think the complaint itself shows that Equity

pursued its legitimate self-interest in placing him on the list." 11a–12a.

It explicitly concluded that Equity acted to protect its legitimate self-interest by blacklisting Drabinsky for "breach[ing] the union contract." This conclusion is clearly erroneous—Drabinsky was not a signatory to the CBA. And the key legal error—that Equity acted pursuant to a legitimate self-interest in banning him—flows directly from it. *Id.*

As in *H.A. Artists*, "Equity's justification for [its conduct] is inadequate." 451 U.S. at 722. Equity did nothing but suggest in basic and general terms that it was acting to protect the union. Indeed, its justification is both completely inadequate and factually baseless. And given there is no reason to believe that any legitimate interests would be affected in preventing Drabinsky from breaching the CBA—because he ***could not*** breach it—Equity's justification is insufficient to invoke the labor exemption at the pleading stage.

Here, the Second Circuit affirmed the district court's premature resolution of key factual questions, including Drabinsky's allegations that he did not breach the CBA, which should have been accepted. And the decision failed to apply *American Federation of Musicians*, which held that a union's conduct must ***in actuality*** protect the union's stated interest. Because Equity's justification was based on a misrepresentation, one cannot say that its conduct in actuality protected its legitimate interests—because, of course, banning a non-signatory to a contract will in no way prevent future breaches of that agreement. Instead, development of the factual record, like in *H. A. Artists* and

American Federation of Musicians, is necessary before resolving whether Equity acted in its legitimate interests.

III. The Issue Is Exceptionally Important and Squarely Presented

This case bears all the hallmarks of a matter that should be heard by this Court.

The question involves the interpretation of an important federal statute and carries wide-ranging implications. The Court has long recognized the critical role that federal antitrust laws play in ensuring vigorous competition in the marketplace. *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 504 (2015) ("Given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state-action immunity is disfavored, much as are repeals by implication.'") (quoting *FTC v. Phoebe Putney Health Sys, Inc.*, 568 U.S. 216, 225 (2013)); *see also Nat'l Collegiate Athletic Ass'n v. Alston*, 594 U.S. 69, 96 (2021) ("But until Congress says otherwise, the only law it has asked us to enforce is the Sherman Act, and that law is predicated on one assumption alone—competition is the best method of allocating resources in the Nation's economy."). And this Court has long recognized the key role private litigants play in enforcing federal antitrust laws. *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("Without doubt, the private cause of action plays a central role in enforcing this regime."); C*alifornia v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) (describing private enforcement as "an integral part of the congressional plan for protecting competition"); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977) (recognizing "the longstanding policy of

encouraging vigorous private enforcement of the antitrust laws"). The Second Circuit's decision cavalierly discards these important principles with almost no consideration.

Further, the issue of the breadth of the statutory labor exemption—which exempts labor unions from federal antitrust laws for some conduct—is squarely presented. In fact, it was the sole basis used by the Second Circuit to affirm the dismissal of Drabinsky's antitrust claims with prejudice. And Equity never argued that Drabinsky's antitrust claims were otherwise insufficiently pleaded. Nor could it. Drabinsky alleged a clear-cut conspiracy to restrain trade—an agreement by Equity and others to boycott Drabinsky and his services. That is a "classic" restraint of trade in violation of Section 1. *See FTC v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 422 (1990). And because the Second Circuit resolved the preemption issue on a motion to dismiss, it presents the clean legal question of whether the facts alleged justify invoking the statutory labor exemption.

And this case involves exceptionally important issues, including how easily a labor union can evade antitrust liability by invoking a statutory exemption intended to be limited in scope. Indeed, this matter decides whether a party who has been blacklisted for life by a labor union can even state a claim for relief that could survive a motion to dismiss. Under the Second Circuit's articulation, it is difficult to envision a scenario in which such a party could ever state an antitrust claim against a labor union, so long as the labor union offered ***any*** excuse for its conduct, even one that was both objectively false and an impossibility. Such an outcome does not reflect the stringent standard that this Court has articulated over the years.

In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, the factor that "led [the Court] to grant certiorari" was the "obvious importance" of the question "whether, or under what circumstances, a state court has power to enforce local trespass laws against a union's peaceful picketing" under the *Garmon* framework. 436 U.S. 180, 184 (1978). In this case, the question is even more obviously important because the permanent destruction of an individual's livelihood, through a blacklist without limit for both scope and time, is an even greater intrusion on a party's interests. Unlike trespassing, which involves only a temporary interference with property, an act of destruction of an individual's livelihood permanently deprives him of his ability to secure employment in the field of his recognized expertise.

If the Court does not grant review here, it will signal to Equity—and to labor unions across the country—that there is no antitrust violation too obvious or too harmful. Equity will continue to exploit its improperly expanded exemption to the antitrust laws to the detriment of Drabinsky and the rest of society.

CONCLUSION

For these reasons, Petitioner Garth Drabinsky respectfully requests that the Court grant his petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JULY 2, 2024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 23-795-cv

GARTH DRABINSKY,

Plaintiff-Appellant,

v.

ACTORS' EQUITY ASSOCIATION,

Defendant-Appellee.

Argued: December 5, 2023
Decided: July 2, 2024

OPINION

Before: SACK, LOHIER, and KAHN, *Circuit Judges*.

Broadway producer Garth Drabinsky alleges that the union representing theater actors and state managers unlawfully boycotted, defamed, and harassed him during his production of the musical *Paradise Square*. Drabinsky brought antitrust claims and New York state tort claims against the union. The United States District Court for the Southern District of New York (Schofield, *J.*) held that

Appendix A

Drabinsky's antitrust claims were barred by the statutory labor exemption derived from the Clayton Antitrust Act of 1914 and the Norris-LaGuardia Act of 1932, and that his tort claims were barred under *Martin v. Curran*, 303 N.Y. 276 (1951). We **AFFIRM**.

LOHIER, *Circuit Judge.*

The Sherman Antitrust Act of 1890 prohibits contracts, combinations, and conspiracies "in restraint of trade," as well as monopolies over trade. 15 U.S.C. §§ 1, 2. In the years following the Act's passage, the Supreme Court repeatedly enjoined union activity as an unlawful restraint of trade. *See*, *e.g.*, *Loewe v. Lawlor*, 208 U.S. 274, 304-05, 28 S.Ct. 301, 52 L.Ed. 488 (1908); *see also Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 484-85, 41 S.Ct. 172, 65 L.Ed. 349 (1921) (Brandeis, *J.*, dissenting). Prompted by labor unions to respond, Congress enacted the Clayton Antitrust Act in 1914 and the Norris-LaGuardia Act in 1932 "to immunize labor unions and labor disputes from challenge under the Sherman Act" and exempt them from sure ruin under the guise of antitrust law enforcement. *H.A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 713, 101 S.Ct. 2102, 68 L.Ed.2d 558 (1981). The principal and until now unresolved question in this appeal is whether an antitrust plaintiff suing a union bears the burden of proving that the statutory labor exemption does not apply, or whether the union must raise the exemption as an affirmative defense. We conclude that the plaintiff bears the burden of proving (and therefore must plead) that the exemption does not apply.

Appendix A

The union in this case, Actors' Equity Association ("Equity"), represents over 50,000 theater actors and stage managers. The plaintiff, Broadway producer Garth Drabinsky, alleges that Equity organized an illegal boycott that ousted him from the business of producing live shows. Drabinsky claims that Equity violated the Sherman Act and various state laws, including defamation. The United States District Court for the Southern District of New York (Schofield, *J.*) dismissed Drabinsky's complaint (the "Complaint") under Federal Rule of Civil Procedure 12(b)(6). As most relevant to this appeal, it held that Equity's conduct was exempt from antitrust liability under the Sherman Act. We agree and therefore affirm.

BACKGROUND[1]

Paradise Square, a Broadway musical, explores racial conflict and the calamitous 1863 Civil War race riots in New York City. The show, originally conceived a decade ago, was produced by Drabinsky, a Tony Award-winning producer whose previous hits include *Ragtime* and a 1994 revival of *Show Boat.* From the start, Drabinsky's *Paradise Square* production was marred by conflict. Cast members complained bitterly about Drabinsky's management, his repeated displays of racial insensitivity, unpaid wages, and safety concerns on the set. Equity, which represents the cast members, responded by spreading rumors about

1. The following facts are drawn from the Complaint and assumed to be true for purposes of our *de novo* review of the District Court's judgment dismissing the Complaint for failure to state a claim upon which relief can be granted. *Schlosser v. Kwak*, 16 F.4th 1078, 1080 (2d Cir. 2021).

Drabinsky to its members and to the Broadway League, the trade association for theater producers. Equity also instituted a one-day work stoppage, exposing Drabinsky to even more negative attention and press. Equity ultimately placed Drabinsky on its "Do Not Work" list in order to discourage Equity's members and members of its four "sister" unions (representing television, radio, concert, and film performers) from working with him.

Drabinsky originally sued Equity in federal court under state law based on diversity jurisdiction, claiming that the union engaged in an unlawful campaign of defamation and harassment. Equity countered that the District Court lacked subject-matter jurisdiction over the case under 28 U.S.C. § 1332 because complete diversity between the parties was lacking. Drabinsky amended his complaint to add federal antitrust claims, which he now acknowledges were intended to invoke the District Court's federal-question jurisdiction. Equity moved to dismiss the amended complaint for failure to state a claim. The District Court granted the motion with prejudice, holding that Equity's conduct was exempt from antitrust liability under the statutory labor exemption derived from the Clayton and Norris-LaGuardia Acts. And Drabinsky's state claims, the District Court determined, were barred under New York law because he failed to allege that Equity's members had individually ratified Equity's allegedly unlawful conduct.

This appeal followed. The American Federation of Labor and Congress of Industrial Organizations (popularly known as the "AFL-CIO") filed an amicus brief

in support of Equity, urging affirmance of the District Court's holding that the statutory labor exemption bars Drabinsky's antitrust claims.

DISCUSSION

I. Federal Antitrust Claims

The Sherman Antitrust Act declares illegal "[e]very contract, combination . . . , or conspiracy, in restraint of trade." 15 U.S.C. § 1. It also penalizes those who "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of . . . trade." 15 U.S.C. § 2. The Act "was largely directed at business monopolies and trade restraints, but it was almost immediately invoked against unions." *Conn. Ironworkers Emps. Ass'n v. New Eng. Reg'l Council of Carpenters*, 869 F.3d 92, 100 (2d Cir. 2017). "Indeed, in the early 1900s, the federal courts" routinely relied on the Act to enjoin union activity and "held unions liable for antitrust violations to nearly the same extent as manufacturers." *Id.*

We have elsewhere described the extended history of Congress's response to the proliferation of injunctions against labor unions, *id.* at 100-02, and see no need to repeat it here. Suffice it to say that

> [t]he basic sources of organized labor's exemption from federal antitrust laws are §§ 6 and 20 of the Clayton Act, [ ] 15 U.S.C. § 17 and 29 U.S.C. § 52, and the Norris-LaGuardia Act, [ ] 29 U.S.C. §§ 104, 105, and 113. These statutes

> declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws. [ ] They do not exempt concerted action or agreements between unions and nonlabor parties.

Connell Constr. Co. v. Plumbers & Steamfitters Loc. Union No. 100, 421 U.S. 616, 621-22, 95 S.Ct. 1830 (1975) (citing *United States v. Hutcheson*, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 (1941), and *Mine Workers v. Pennington*, 381 U.S. 657, 662, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965)).

Congress adopted the Clayton Act in 1914 and "created the first so-called labor exemption to antitrust scrutiny," *Conn. Ironworkers*, 869 F.3d at 101, "protect[ing] peaceful labor activities from the reach of antitrust laws and limit[ing] the issuance of judicial injunctions in labor disputes," *id.* at 100. Section 6 of the Clayton Act establishes that "[t]he labor of a human being is not a commodity or article of commerce" and exempts from antitrust liability employees who "lawfully carry[ ] out the legitimate object[ives]" of their union. 15 U.S.C. § 17. Section 20 of the Clayton Act prohibits "injunctions against identified types of union activity," such as strikes and boycotts. *Conn. Ironworkers*, 869 F.3d at 101 (citing 29 U.S.C. § 52); *see also H.A. Artists*, 451 U.S. at 714, 101 S.Ct. 2102 (same); *Jou-Jou Designs, Inc. v. Int'l Ladies Garment Workers Union*, 643 F.2d 905, 910 (2d Cir. 1981) ("Picketing to obtain a [labor agreement] is protected by the statutory exemption from the anti-trust laws in the Clayton Act. . . .").

When the Supreme Court "narrowly interpreted the anti-injunction provisions in Section 20 of the Clayton Act," Congress reacted by enacting the Norris-LaGuardia Act in 1932, which "clos[ed] the judicially-recognized gaps in the Clayton Act," *Conn. Ironworkers*, 869 F.3d at 101; *see Deering*, 254 U.S. at 473-74, 41 S.Ct. 172; *Hutcheson*, 312 U.S. at 230-31, 61 S.Ct. 463, and "reaffirmed . . . [Congress's] intent to exempt most labor activity from the anti-trust laws," *Jou-Jou Designs*, 643 F.2d at 910. The federal courts have since "mediat[ed] the friction between national antitrust and labor policies" largely by "expand[ing]" rather than contracting the labor exemption.[2] *Conn. Ironworkers*, 869 F.3d at 101.

The statutory exemption has two important limits. "The test of whether labor union action is or is not within the prohibitions of the Sherman Act is (1) whether the action is in the union's self-interest in an area which is a proper subject of union concern and (2) whether the union is acting in combination with a group of employers." *Intercont'l Container Transp. Corp. v. N.Y. Shipping Ass'n*, 426 F.2d 884, 887 (2d Cir. 1970); *see Hutcheson*, 312 U.S. at 232, 61 S.Ct. 463; *Conn. Ironworkers*, 869 F.3d at 102.

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2. Justice Frankfurter memorably described the Norris-LaGuardia Act as "remov[ing] the fetters upon trade union activities, which according to judicial construction § 20 of the Clayton Act had left untouched, by still further narrowing the circumstances under which the federal courts could grant injunctions in labor disputes." *Hutcheson*, 312 U.S. at 231, 61 S.Ct. 463; *see* 29 U.S.C. §§ 101, 104, 105.

With those limits in mind, we turn to the present appeal. Drabinsky claims that Equity violated Sections 1 and 2 of the Sherman Act by placing him on its "Do Not Work" list and effectively barring him from theater production. Relying on the statutory labor exemption derived from Sections 6 and 20 of the Clayton Act and the Norris-LaGuardia Act, Equity responds that its union activity is broadly immune from suit under the Sherman Act.

We have never specifically addressed which party bears the burden of proof with respect to the statutory labor exemption.[3] Does the plaintiff bear the burden of showing that the union's conduct is not covered by the exemption, or is it up to the union to establish that the exemption applies? In answering that question, we bear in mind that "[m]ost immunities are affirmative defenses," *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 134, 151 (2d Cir. 2003), and that the burden of proving exceptions to the antitrust laws typically lands on defendants, not plaintiffs, *see USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Const. Trades Council*, 31 F.3d 800, 805 n.3 (9th Cir. 1994).

But because the statutory labor exemption presumptively protects union activity from the reach of the Sherman Act, *see id.* at 809, we are persuaded that the exemption is not an affirmative defense. Instead, the

3. We have, however, implied that a different type of immunity, the nonstatutory labor exemption, is an affirmative defense for which the union bears the burden of proof. *See Conn. Ironworkers*, 869 F.3d at 98, 106.

plaintiff bears the burden of proving that the exemption does not apply. Put another way, a plaintiff must plead at least one of the two limitations to the exemption as an *element* of any claim that the union violated the antitrust laws. *See USS-POSCO Indus.*, 31 F.3d at 805 n.3; *Jou-Jou Designs*, 643 F.2d at 910 (dismissing antitrust complaint that failed to allege that the union conspired with a non-labor group); *see also* 15 U.S.C. § 17 (labor unions and their members presumptively are not "illegal combinations or conspiracies in restraint of trade, under the antitrust laws"). Placing the burden on the plaintiff rather than the union protects the union's conduct from antitrust scrutiny.

In assigning to the plaintiff the burden of proving that the statutory labor exemption does not apply to a union's conduct, we join the Sixth, Seventh, and Ninth Circuits. *See USS-POSCO Indus.*, 31 F.3d at 805 n.3; *Mid-Am. Reg'l Bargaining Ass'n v. Will Cnty. Carpenters Dist. Council*, 675 F.2d 881, 886, 890 n.22 (7th Cir. 1982); *James R. Snyder Co. v. Assoc. Gen. Contractors of Am., Detroit Chapter, Inc.*, 677 F.2d 1111, 1118-19, 1121 (6th Cir. 1982). We acknowledge that another sister circuit, the First Circuit, is an outlier on this issue, but this is for understandable reasons. In *American Steel Erectors, Inc. v. Local Union No. 7, International Association of Bridge, Structural, Ornamental & Reinforcing Iron Workers*, 536 F.3d 68 (1st Cir. 2008), the First Circuit appears to have accepted the union's odd concession that the labor exemption constituted an "affirmative defense[ ] against [the] Plaintiffs' Sherman Act claims." *Id.* at 75. For this reason, it is not at all clear to us that the First Circuit actually addressed the issue before us head on. And if it did, we respectfully decline to follow its lead.

We therefore turn to whether Drabinsky has adequately pleaded that the statutory labor exemption does not apply to Equity's conduct by alleging that Equity was not acting in its self-interest or that Equity combined with non-labor groups. *H.A. Artists*, 451 U.S. at 714, 101 S.Ct. 2102. We agree with the District Court that he has failed to do so.

A. Equity Acted in Its Legitimate Self-Interest

A union acts in its self-interest when its conduct is reasonably related to legitimate union goals such as protecting members' wages and working conditions. *Id.* at 718 n.23, 101 S.Ct. 2102; *see also Intercont'l Container Transp. Corp.*, 426 F.2d at 887-88 ("Union activity having as its object the preservation of jobs for union members is not violative of the anti-trust laws."); *Allied Int'l, Inc. v. Int'l Longshoremen's Ass'n*, 640 F.2d 1368, 1380 (1st Cir. 1981) ("[T]he labor exemption has been applied when the union acts to protect the wages, hours of employment, or other working conditions of its member-employees, objectives that are at the heart of national labor policy."), *aff'd*, 456 U.S. 212, 102 S.Ct. 1656, 72 L.Ed.2d 21 (1982). Congress has made it easier for us to assess the legitimacy of the union's interest by specifying that certain labor actions, including strikes and boycotts, are presumptively protected from antitrust liability. 29 U.S.C. §§ 52, 104; *see USS-POSCO Indus.*, 31 F.3d at 808-09. More generally, so long as the union's conduct promotes *legitimate* labor goals, it retains the benefit of the labor exemption and remains impervious to antitrust liability based on "any judgment regarding the wisdom or unwisdom, the

rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." *Hutcheson*, 312 U.S. at 232, 61 S.Ct. 463.

The immunity lifts and the labor exemption is lost as soon as the union stops acting in pursuit of its legitimate self-interest and thus "cease[s] to act as [a] labor group[ ]." *USS-POSCO Indus.*, 31 F.3d at 808 (quoting *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 714, 102 S.Ct. 2672, 73 L.Ed.2d 327 (1982)). We agree with the Ninth Circuit that "[w]hether the interest in question is legitimate depends on whether the ends to be achieved are among the traditional objectives of labor organizations." *Id.* An obvious example is "if a union is involved in illegal activities unrelated to its mission, such as dealing drugs or gambling, those would not be objectives falling within the union's legitimate interest." *Id.*

Because Drabinsky challenges Equity's labor boycott—a presumptively protected labor activity—he must make "a very strong showing" that Equity was not acting in its self-interest and so is not entitled to the statutory labor exemption. *Id.* But Drabinsky's Complaint suggests the opposite. Even reading the allegations in the light most favorable to him, Equity engaged in the boycott precisely to protect its members' wages and working conditions. The Complaint alleges, for example, that *Paradise Square* cast members objected to unsafe conditions on set, a racially hostile work environment, and unpaid wages. Equity placed Drabinsky on its "Do Not Work" list only after it heard from its members. It

explained that Drabinsky was added to the list because he had breached the union contract. For these reasons, we think the Complaint itself shows that Equity pursued its legitimate self-interest in placing him on the list.

Drabinsky makes a few arguments in response. First, he describes the cast members' complaints about working conditions and wages as pretextual. But no allegation supports that description. Second, he says that Equity was motivated by personal animus against him. But the Complaint has no factual, non-conclusory allegations that Equity was motivated by an illegitimate purpose in the way that Drabinsky suggests. In any event, a plausible allegation that Equity's actions were prompted by "personal antagonism," without more, is not enough to expose Equity's boycott to antitrust scrutiny. *See Hunt v. Crumboch*, 325 U.S. 821, 824, 65 S.Ct. 1545, 89 L.Ed. 1954 (1945) (holding that a union did not incur antitrust liability when it refused to work with the petitioner "due to personal antagonism").

Third, Drabinsky contends that even if Equity's "ends are legitimate," we should "also scrutinize whether the means used to achieve them are necessary" because "[t]he means employed by the union bear on the degree of scrutiny we will cast on the legitimacy of the union's interest." Appellant's Br. 31-32 (quoting *USS-POSCO Indus.*, 31 F.3d at 808-09). Here, Drabinsky asks us to consider whether a lifelong boycott that discourages five unions, not just Equity, from working with him genuinely serves Equity's interest. He suggests that the scope of the boycott casts doubt on Equity's claimed objective

of protecting the wages and working conditions of the *Paradise Square* cast members. We are not persuaded. The statutory labor exemption contemplates and protects not only a boycott (of whatever duration), but one specifically undertaken in combination with other related unions. *See Hutcheson*, 312 U.S. at 233, 61 S.Ct. 463. For example, the Norris-LaGuardia Act establishes that a "labor dispute" triggering the statutory labor exemption "involves persons who are engaged in the same industry, trade, craft, or occupation; . . . or who are members of the same or an affiliated organization of . . . employees." 29 U.S.C. § 113(a). The alleged scope of Equity's boycott in this case says nothing about Equity's motivations for instituting it and does not itself establish that the boycott is subject to the antitrust laws.

Finally, Drabinsky contends that the boycott does not further Equity's self-interest because he was never the employer for the *Paradise Square* production and thus lacked control over the wages and working conditions of the cast members. We reject this argument for three reasons. As an initial matter, the Complaint, which alleges that Drabinsky controlled various aspects of the production, including hiring, firing, and pay, itself contradicts Drabinsky's argument. Second, Drabinsky's argument asks us to probe the effectiveness rather than the intent of the union's action. But "[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." *Intercont'l Container Transp. Corp.*, 426 F.2d at 887 n.2. And third, the plain text of the statutory labor exemption makes clear

that Drabinsky does not need to serve as the employer of Equity members for Equity's boycott to qualify as protected labor activity. *See* 29 U.S.C. § 113(c).

For these reasons, we conclude that the Complaint fails to allege that Equity was not acting in its legitimate self-interest when it placed Drabinsky on the "Do Not Work" list.

B. Equity Did Not Combine with Non-Labor Groups

As explained, a union that combines with a non-labor group to act in restraint of trade forfeits the protection of the statutory labor exemption even when it acts in its legitimate self-interest. *H.A. Artists*, 451 U.S. at 715, 101 S.Ct. 2102; *Intercont'l Container Transp. Corp.*, 426 F.2d at 887. This limitation ensures that workers and employers do not conspire to monopolize a market and suppress competition. *See Allen Bradley Co. v. Loc. Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 809-10, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945). Here, Drabinsky claims that non-labor groups participated in the boycott, pointing out that some members of Equity and its sister unions are also producers with whom he directly competes. We are not convinced that these are non-labor groups as defined by statute to overcome the statutory labor exemption.

To bring the union outside the statutory labor exemption, Drabinsky must allege that Equity acted in combination with its producer-members *to boycott Drabinsky. See Hunt*, 325 U.S. at 824, 65 S.Ct. 1545

(explaining that if "business competitors conspired and combined *to suppress petitioner's business*," they would be liable under the Sherman Act (emphasis added)). But Drabinsky fails to allege that any producer-members of Equity were involved in placing him on the "Do Not Work" list. At most, Drabinsky alleges that Equity's membership includes unnamed producers who compete with him for work generally. Having failed to allege a more direct connection between Equity's producer-members and the boycott, Drabinsky has inadequately pleaded that the statutory labor exemption does not apply to Equity's conduct in this case. *Cf. Allen Bradley*, 325 U.S. at 799-800, 65 S.Ct. 1533 (holding that the defendants were not protected by the statutory labor exemption because the union had combined with contractors and manufacturers *in order to* boycott the plaintiffs' business).

We have another reason to reject Drabinsky's argument. "[A] challenged combination includ[ing] independent contractors or entrepreneurs . . . may come within the statutory exemption if the non-employee parties to the combination are in job or wage competition with the employee parties, or in some other economic interrelationship that substantially affects the legitimate interests of the employees." *Home Box Off., Inc. v. Dirs. Guild of Am., Inc.*, 531 F. Supp. 578, 589 (S.D.N.Y. 1982), *aff'd*, 708 F.2d 95 (2d Cir. 1983) (per curiam); *see Am. Fed. of Musicians of U.S. & Canada v. Carroll*, 391 U.S. 99, 105-07, 88 S.Ct. 1562, 20 L.Ed.2d 460 (1968) (holding that orchestra leaders, who were "deemed to be employers and independent contractors" were in a labor group with orchestra employees because the leaders were in job and

wage competition with employees). Here, the producer-members form part of the same "labor group" as the rest of Equity's members because they are also actors or stage managers in wage and job competition with the other members of the union.[4]

In sum, even the most charitable reading of the Complaint leads us to conclude that the producer-members of Equity constitute part of the "labor group." We accordingly reject Drabinsky's argument that Equity is not entitled to the labor exemption because it combined with a non-labor group.[5]

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4. The Supreme Court in *H.A. Artists* stated that theatrical producers "are plainly a 'non-labor group'" where the labor group is Equity. 451 U.S. at 717 n.21, 101 S.Ct. 2102. But the Court recognized that there is an exception "when the employer himself is in job competition with his employees." *Id.* The relationship between Equity's producer-members and its other members fits within this exception because every Equity member is in job and wage competition with other members of Equity.

5. In his reply brief, for the first time, Drabinsky requested leave to amend his Complaint to add allegations about Equity's combination with a non-labor group and to clarify that Drabinsky was never the employer for *Paradise Square*. Drabinsky abandoned this argument by not raising it in his opening brief, *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005), and he forfeited this argument by not raising it with the District Court, *Green v. Dep't of Educ.*, 16 F.4th 1070, 1078 (2d Cir. 2021).

II. State-Law Claims

Lastly, we turn to Drabinsky's three state-law tort claims charging Equity with defamation, "intentional tort," and negligence. We agree with the District Court that these claims are barred by *Martin v. Curran*, 303 N.Y. 276, 101 N.E.2d 683 (1951), which requires that a plaintiff seeking to hold a union liable "for tortious wrongs" allege "the individual liability of every single member." *Id.* at 281-82, 101 N.E.2d 683; *see also Palladino v. CNY Centro, Inc.*, 23 N.Y.3d 140, 148-51, 989 N.Y.S.2d 438, 12 N.E.3d 436 (2014) (holding that the *Martin* rule remains good law).

To satisfy *Martin*, Drabinsky must allege the "participation, authorization or ratification" of the challenged conduct by *every* Equity member. *Morrissey v. Nat'l Mar. Union of Am.*, 544 F.2d 19, 33 (2d Cir. 1976). Drabinsky has failed to meet the *Martin* requirement. The Complaint does not allege that all 50,000-plus Equity members participated in, authorized, or ratified either Equity's boycott or its false statements about Drabinsky. Drabinsky asks us to excuse his failure by pointing out that Equity's members delegated decision-making authority to certain small councils and committees that in turn impliedly authorized Equity's actions. But not even the delegated actions of committees and councils can be attributed to all of Equity's members under *Martin*. 303 N.Y. at 279-80, 101 N.E.2d 683; *see Palladino*, 23 N.Y.3d at 148, 989 N.Y.S.2d 438, 12 N.E.3d 436. As a final matter, we note that although *Martin* applies only to intentional torts, *see Torres v. Lacey*, 3 A.D.2d 998, 163 N.Y.S.2d 451

(1st Dep't 1957); *Piniewski v. Panepinto*, 267 A.D.2d 1087, 701 N.Y.S.2d 215 (4th Dep't 1999), Drabinsky's negligence claim in substance simply parrots his intentional tort claims. As a result, that claim is also barred by *Martin*. *See Salemeh v. Toussaint ex rel. Loc. 100 Transp. Workers Union*, 25 A.D.3d 411, 810 N.Y.S.2d 1 (1st Dep't 2006).

CONCLUSION

For the foregoing reasons, the judgment of the District Court is **AFFIRMED**.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 8, 2024

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket No: 23-795

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of August, two thousand twenty-four.

GARTH DRABINSKY,

Plaintiff-Appellant,

v.

ACTORS' EQUITY ASSOCIATION,

Defendant-Appellee.

ORDER

Appellant, Garth Drabinsky, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

Appendix B

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED AUGUST 15, 2024

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket No: 23-795

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of July, two thousand twenty-four.

Before: Robert D. Sack,
Raymond J. Lohier, Jr.,
Maria Araújo Kahn
Circuit Judges.

GARTH DRABINSKY,

Plaintiff-Appellant,

v.

ACTORS' EQUITY ASSOCIATION,

Defendant-Appellee.

JUDGMENT

The appeal in the above captioned case from a judgment of the United States District Court for the

Southern District of New York was argued on the district court's record and the parties' briefs.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is AFFIRMED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

/s/ Catherine O'Hagan Wolfe

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED APRIL 14, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

22 Civ. 8933 (LGS)

GARTH DRABINSKY,

Plaintiff,

-against-

ACTORS' EQUITY ASSOCIATION,

Defendant.

OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge:

Plaintiff Garth Drabinsky brings this action against Defendant Actors' Equity Association ("AEA") alleging defamation, intentional tort, negligence and violations of Sections 1 and 2 of the Sherman Antitrust Act. AEA moves to dismiss the First Amended Complaint (the "FAC") in its entirety. For the reasons stated below, the motion is granted.

Appendix D

I. BACKGROUND

The following facts are taken from the FAC and assumed to be true for purposes of this motion. *See Francis v. Kings Park Manor, Inc.*, 992 F.3d 67, 72 (2d Cir. 2021).

Drabinsky is an award-winning producer of live theater, who has made many and varied contributions to his field over several decades. In particular, Drabinsky has endeavored to use his work to confront and combat racial injustice, in the theater world and in society broadly. Several of Drabinsky's productions have involved the use of racial slurs, including the "n-word." The choices to include those slurs have been controversial, though Drabinsky and others argue that using such language is an important part of confronting historical racism. In 2009, Drabinsky was convicted of accounting fraud in Canada and sentenced to a term of incarceration that ended in 2013. Related charges brought in this District ultimately were dismissed.

AEA is a labor union that represents more than 50,000 professional theater actors and stage managers. AEA has contracts with many theaters throughout the United States, and it enters into contracts with producers. AEA does not permit its members to work in productions that do not contract with the union, nor does it permit the producers with whom it contracts to hire non-AEA actors or stage managers. AEA has "a special bond" with other unions representing professionals in related fields, including American Guild of Musical Artists, American

Guild of Variety Artists, Guild of Italian American Actors and Screen Actors Guild—American Federation of Television and Radio Artists. Collectively, AEA and the related unions are known as the Associated Actors and Artists of America ("4A"). AEA also maintains a "Do Not Work List," which Drabinsky refers to as a "Blacklist." The Do Not Work List includes producers and productions with which AEA members are prohibited from working. In AEA's words, the "Do Not Work List is an additional tool to alert members of [AEA] or our 4A's sister unions as to the non-union status of certain employers."

Beginning in 2013, Drabinsky produced *Paradise Square*. As Drabinsky puts it, the musical "brings to the forefront the racial conflict in the Five Points neighborhood of New York City in the 1860's." After *Paradise Square*'s initial run in Berkeley, California, in late 2018 and early 2019, the live theater industry shut down due to the COVID-19 pandemic in March 2020. In 2021, Drabinsky negotiated deals to stage further runs of *Paradise Square* in Chicago and on Broadway, once live theatergoing was possible again.

The Chicago production of *Paradise Square* was troubled in several ways, including with labor disputes and work stoppages. Drabinsky believed that the cast was struggling with the issues of racism and prejudice raised by the musical. At a meeting on October 2, 2021, Drabinsky related to the cast his experience producing a prior show called *Show Boat*. A song in that musical, originally written in 1927, contained the "n-word." After much reflection, Drabinsky had decided not to change that

element of the show, and he had been harassed for that decision. Drabinsky hoped to inspire the cast to wrestle with the difficult material in *Paradise Square*. Weeks later, AEA sent the General Manager ("GM") of *Paradise Square* a letter accusing Drabinsky of creating a hostile work environment by using racial slurs during rehearsal.

Other issues with the Chicago production included a dispute over housing costs and allegations of sexual misconduct against a cast member. In each case, Drabinsky attempted to resolve the issues to protect and benefit the cast, and AEA did not assist. AEA also accused Drabinsky of violating his agreement to abide by AEA's collective bargaining agreement, by failing to keep some actors from the Berkeley production on in Chicago. After the Chicago production closed, AEA delayed in refunding the production's bond, which was posted as security against default on the production's obligations under the AEA Collective Bargaining Agreement with the Broadway League ("CBA").

When *Paradise Square* transferred to Broadway, the musical's troubles continued. The production was delayed and hindered by a resurgence of COVID-19. AEA asserted a grievance against Drabinsky for failing to provide cast members with proper contracts and then instructed its members not to show up for a day of work. When the cast was docked pay for the day of missed work, AEA filed another grievance. The work stoppage and ensuing dispute resulted in negative press coverage of the production and of Drabinsky. Drabinsky called another meeting with the Cast to attempt to bring them together, but several

members did not embrace Drabinsky's message and responded to him disrespectfully. AEA again was present at the meeting and did not intervene.

After *Paradise Square* finally opened, it almost immediately had to shut down for ten days due to a COVID outbreak among the cast. The outbreak may have been caused by an opening night party and certain cast members' failure to comply with vaccination requirements. Nonetheless, the musical ultimately resumed and was nominated for and won several awards. During the musical's run, Drabinsky navigated several other conflicts with cast members, including (1) a staffing issue with the professionals responsible for cast members' wigs, (2) an attempt by one professional to quit the production without notice due to a claimed hostile work environment, (3) an attempt by two choreographers to extort payment to which they claimed an entitlement and (4) ongoing difficulties with a stage manager who clashed with Drabinsky and gave critical statements to the press, which Drabinsky claims are false. Drabinsky attributes much of the cast and crew's dissatisfaction to AEA's false statements and grievances creating an environment of negativity around the production.

After *Paradise Square* closed, the cast sent a letter to AEA, asserting that Drabinsky controlled the production, withheld benefits and payment and created an unsafe and hostile work environment. AEA then placed Drabinsky on its Do Not Work List. Throughout its Chicago and Broadway runs, the production entities responsible for *Paradise Square* had been signatories to the relevant CBA with AEA.

II. STANDARD

On a motion to dismiss, a court accepts as true all well-pleaded factual allegations and draws all reasonable inferences in favor of the non-moving party but does not consider "conclusory allegations or legal conclusions couched as factual allegations." *Dixon v. von Blanckensee*, 994 F.3d 95, 101 (2d Cir. 2021) (internal quotation marks omitted). To withstand a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Kaplan v. Lebanese Canadian Bank, SAL*, 999 F.3d 842, 854 (2d Cir. 2021) (internal quotation marks omitted) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678; *accord Dane v. UnitedHealthcare Ins. Co.*, 974 F.3d 183, 189 (2d Cir. 2020). It is not enough for a complaint to allege facts that are consistent with liability; it must "nudge[]" claims "across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *accord Bensch v. Est. of Umar*, 2 F.4th 70, 80 (2d Cir. 2021). To survive dismissal, "plaintiffs must provide the grounds upon which [their] claim rests through factual allegations sufficient to raise a right to relief above the speculative level." *Rich v. Fox News Network, LLC*, 939 F.3d 112, 121 (2d Cir. 2019) (alteration in original) (internal quotation marks omitted).

III. DISCUSSION

A. New York State Law Tort Claims

New York law applies to the tort claims in the FAC because the parties assume it does. *See In re Snyder*, 939 F.3d 92, 100 n.2 (2d Cir. 2019) ("[I]mplied consent is . . . sufficient to establish the applicable choice of law. . . ." (internal quotation marks omitted)).

Each of the FAC's tort claims—for defamation, intentional tort and negligence—is barred by New York's *Martin v. Curran* doctrine. In *Martin v. Curran*, 303 N.Y. 276, 101 N.E.2d 683, 686 (N.Y. 1951), the Court of Appeals held that lawsuits could be maintained against unincorporated associations only if "the individual liability of every single member can be alleged and proven," meaning each member must have "expressly or impliedly with full knowledge authorize[d] or ratif[ied] the specific acts in question." *Id.* at 686. The tort claims are dismissed because the FAC does not sufficiently allege authorization and ratification by each of AEA's 50,000 plus members. *See*, *e.g.*, *Moleon v. Alston*, No. 21 Civ. 1398, 2021 U.S. Dist. LEXIS 232345, 2021 WL 5772439, at *11 (S.D.N.Y. Dec. 3, 2021) (dismissing claims on this basis and collecting federal cases doing the same); *Performing Arts Ctr. of Suffolk Cnty. v. Actor's Equity Ass'n*, No. 20 Civ. 2531, 2022 U.S. Dist. LEXIS 153627, 2022 WL 16755284, at *5 (E.D.N.Y. Aug. 25, 2022) (same and collecting New York state cases), *R. & R. adopted*, 2022 U.S. Dist. LEXIS 181588, 2022 WL 4977112 (E.D.N.Y. Sept. 30, 2022).

The holding in *Martin* has long been criticized because it "imposes an onerous and almost insurmountable burden on individuals seeking to impose liability on labor unions." *Modeste v. Local 1199, Drug, Hosp. & Health Care Emps. Union, RWDSU, AFL-CIO*, 850 F. Supp. 1156, 1168 (S.D.N.Y. 1994), *aff'd*, 38 F.3d 626 (2d Cir. 1994). For that reason, the Second Circuit has held that *Martin* does not apply to, for example, actions under 42 U.S.C. § 1983, because such broad immunity conflicted with the policies underlying federal civil rights law. *Jund v. Town of Hempstead*, 941 F.2d 1271, 1281 (2d Cir. 1991); *accord Solow v. Delit*, No. 90 Civ. 2273, 1992 U.S. Dist. LEXIS 14232, 1992 WL 249954, at *3 (S.D.N.Y. Sept. 21, 1992). However, the New York Court of Appeals reaffirmed *Martin* as applied to New York state law claims, even while "question[ing] the continued utility or wisdom of the *Martin* rule." *Palladino v. CNY Centro, Inc.*, 23 N.Y.3d 140, 989 N.Y.S.2d 438, 12 N.E.3d 436, 438-42 (N.Y. 2014); *see K.D. Hercules, Inc. v. Laborers Local 78 of Laborer's Int'l Union of N. Am.*, No. 20 Civ. 4829, 2022 U.S. Dist. LEXIS 13640, 2022 WL 204216, at *5 (S.D.N.Y. Jan. 24, 2022) (recognizing that *Jund* applies only to federal claims and that, after *Palladino, Martin* still applies to New York state law claims in federal court). Drabinsky's arguments that *Martin* either has already been abrogated or should be, for public policy reasons, therefore are unpersuasive.

Contrary to Drabinsky's arguments, the FAC does not sufficiently allege authorization or ratification by alleging the "silent acquiescence" of AEA's members without alleging that they had full knowledge of AEA's actions. In the case on which Drabinsky relies, the plaintiff

alleged, in non-conclusory terms, that every member of the defendant union had attended certain meetings and been briefed about the union's actions against the plaintiff at those meetings. *Metro. Opera Ass'n, Inc. v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union*, No. 00 Civ. 3613, 2004 U.S. Dist. LEXIS 17093, 2004 WL 1943099, at *16-17 (S.D.N.Y. Aug. 27, 2004). That is distinguishable from Drabinsky's claim that the members of AEA ratified the actions at issue here simply because the Do Not Work List on which Drabinsky appears is available on AEA's website. Even if the FAC contained a conclusory allegation that each of AEA's tens of thousands of members had full knowledge of AEA's actions that allegedly harmed Drabinsky, the FAC contains no factual allegations to render that conclusion plausible.

Drabinsky's request for leave to amend his pleadings to add such allegations is denied. Drabinsky filed the FAC after AEA had filed a pre-motion letter asserting that *Martin v. Curran* barred the state law claims in the original Complaint. After AEA filed a second pre-motion letter asserting that *Martin* still barred the state law claims in the FAC, Drabinsky did not seek leave to amend and elected to stand on the allegations of the FAC. Pursuant to the Court's Individual Rule III.C.2, Drabinsky was on notice that his pre-motion letter was to "unambiguously state any intention to seek leave to amend" and that his "response will be taken into account in deciding whether further leave to amend will be granted in the event the motion to dismiss is granted." Drabinsky's proposed amendment also would be futile. The deficiency in the FAC is not so "petty" as failing to recite "each

and every" before each reference to AEA's members. *Cf. Metro. Opera*, 2004 U.S. Dist. LEXIS 17093, 2004 WL 1943099, at *18. Rather, none of the facts alleged or alluded to in the FAC plausibly support a claim that every one of AEA's more than 50,000 members had knowledge of AEA's actions against Drabinsky.

Drabinsky's argument that *Martin* does not apply because AEA's actions occurred outside the context of a labor dispute is irrelevant. *Martin* applies to unincorporated voluntary associations generally, not only labor unions, and not only in particular kinds of disputes. *See*, *e.g.*, *Bidnick v. Grand Lodge of Free & Accepted Masons of State of N.Y.*, 159 A.D.3d 787, 72 N.Y.S.3d 547, 550 (2d Dep't 2018) (applying the *Martin* rule to dismiss claims against a non-union voluntary association in a non-labor dispute).

Because the FAC's tort claims are barred by *Martin v. Curran*, it is unnecessary to consider whether those claims also are preempted by federal labor law.

B. Federal Antitrust Claims

The FAC's antitrust claims are barred by the statutory exemption from the federal antitrust laws enjoyed by labor unions. "[L]abor unions acting in their self-interest and not in combination with nonlabor groups enjoy a statutory exemption from Sherman Act liability." *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 714, 101 S. Ct. 2102, 68 L. Ed. 2d 558 (1981) (citing *United States v. Hutcheson*, 312 U.S. 219, 232, 61 S. Ct. 463, 85 L. Ed. 788 (1941)).

Appendix D

Drabinsky's claims under both Sections 1 and 2 of the Sherman Act are based on the alleged group boycott, by members of AEA and the other 4A unions, of productions in which Drabinsky is involved and the resulting exclusion of Drabinsky from the market that AEA allegedly monopolizes. That boycott was allegedly in response to a letter from the *Paradise Square* cast to AEA. Cast members complained to their union about a hostile and unsafe work environment and unpaid wages and benefits, and asserted that Drabinsky controlled relevant aspects of the production. Based on the allegations in the FAC, AEA acted in its self-interest by barring its members from working for a producer who had defaulted on his obligations to the union, and AEA did so without combining with non-labor entities. *See Home Box Off., Inc. v. Dirs. Guild of Am., Inc.*, 531 F. Supp. 578, 583-84, 583 n.3 (S.D.N.Y. 1982) (applying statutory exemption to a letter from a union to its members stating that they were forbidden from working for a company that had not signed collective bargaining agreements). AEA's actions therefore are exempt from scrutiny under the antitrust laws.

In general, a union acts in its "self-interest" when it acts "to cope with job competition and to protect wage scales and working conditions." *H.A. Artists*, 451 U.S. at 718 n.23; *see Allied Int'l, Inc. v. Int'l Longshoremen's Ass'n, AFL-CIO*, 640 F.2d 1368, 1380 (1st Cir. 1981) (stating that "activities are in the self-interest of a labor organization 'if they bear a reasonable relationship to a legitimate union interest,'" and "protect[ing] the wages, hours of employment, or other working conditions of its

member-employees . . . are at the heart of national labor policy"), *aff'd*, 456 U.S. 212, 102 S. Ct. 1656, 72 L. Ed. 2d 21 (1982). On the face of the Complaint, AEA "serve[d] the interests of its members" when it responded to the grievances of some of its members—about wages, benefits and working conditions—by barring other actors and artists from working with Drabinsky. *Intercontinental Container Transp. Corp. v. N.Y. Shipping Ass'n*, 426 F.2d 884, 887 n.2 (2d Cir. 1970). Acting to uphold standards for wages, benefits and working conditions is among the "'legitimate objects' of organized labor." *Republic Prods., Inc. v. Am. Fed'n of Musicians of U.S. & Can.*, 245 F. Supp. 475, 481 (S.D.N.Y. 1965) (quoting 15 U.S.C. § 17). Barring members from working for those who do not uphold those standards is a "traditional union activity" to achieve "traditional union ends." *USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, AFL-CIO*, 31 F.3d 800, 809 (9th Cir. 1994); *see*, *e.g.*, *Hunt v. Cromboch*, 325 U.S. 821, 823-24 (1945) (applying exemption to employer boycott); *Home Box Office*, 531 F. Supp. at 583-84 & n.3 (applying statutory exemption to, effectively, a Do Not Work List).

Contrary to Drabinsky's argument, the fact that the boycott extends to hypothetical future productions in which Drabinsky is involved, which might otherwise comply with AEA's CBA, does not place AEA's actions outside the statutory exemption. In essence, Drabinsky argues that his punishment does not fit his purported misconduct, or sweeps too broadly and impacts other productions that have done nothing wrong besides hiring him. That argument is unsuccessful because the

force of the statutory exemption is such that, if a union acts in its self-interest and that of its members, "it is no proper concern of the courts whether the action is that best adapted to suit its purpose." *Intercontinental Container*, 426 F.2d at 887 n.2 ("So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness, the selfishness or unselfishness of the end of which the particular union activities are the means." (quoting *Hutcheson*, 312 U.S. at 232) (cleaned up)).

Drabinsky argues that AEA's punitive actions lack a requisite connection to an active "labor dispute." Even assuming that some link to a bona fide labor dispute is required, the exemption is not as limited as Drabinsky suggests. The Supreme Court has held that union members collectively choosing not to sell their labor to a particular employer—boycotting that employer—does not violate the antitrust laws, even where their "refusal to accept employment was due to personal antagonism" arising from a *prior* labor dispute. *Hunt*, 325 U.S. at 823-24; *accord Republic Prods.*, 245 F. Supp. at 482 (citing *Hunt* for the rule that it is irrelevant "how outrageous the union's conduct was from a moral point of view," even where a union acted "purely out of personal spite and vindictiveness"); *Perry v. Int'l Transp. Workers' Fed'n*, 750 F. Supp. 1189, 1197 (S.D.N.Y. 1990) (citing *Hunt* for the proposition that "[e]ven if a union's actions are intended to put a company out of business the union's actions may be exempt from antitrust liability."). In responding to a labor dispute, unions can take actions that are intended to

advance their goals beyond that specific dispute without violating the antitrust laws. *See USS-POSCO*, 31 F.3d at 809 ("That these activities were not undertaken to unionize this particular employer but in order to eliminate non-union shops altogether by making an example of [plaintiff] does not matter.").

If unions' ability to impose costs on an employer were so limited in time and scope, no matter how serious the breach of workers' rights, the antitrust laws would seriously hamstring unions' ability to enforce the rights for which they collectively bargain. Congress evidently intended otherwise when it granted unions the statutory exemption. *See* 15 U.S.C. § 17 ("The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.").

It is not for Drabinsky or a court to say that AEA's actions are not in its self-interest because, in its efforts to impose consequences on Drabinsky for violating workers' rights, AEA might boycott a production that would have complied with the CBA. Such tradeoffs concern "the wisdom or unwisdom" of AEA's actions and are outside the purview of the antitrust law. *Intercontinental Container*, 426 F.2d at 887 n.2. The only binding case Drabinsky

cites in which a court circumscribed the scope of unions' "legitimate self-interest" is distinguishable. In *H.A. Artists*, 451 U.S. at 722, the Supreme Court addressed an earlier AEA program that (1) regulated artists' agents and (2) collected fees from those agents. *Id.* at 722. The former was held to fall within the statutory exemption, but not the latter. *Id.* The Supreme Court held that the union could not necessarily subsidize itself by extracting fees from other market participants without any antitrust scrutiny. *Id.* While it is theoretically always in a union's interest to raise money by any legal means, the Court in *H.A. Artists* found collecting fees from agents too tangentially connected to the union's traditional goals of labor organizing to warrant complete antitrust immunity. *Id.* ("If Equity did not impose these franchise fees upon the agents, there is no reason to believe that any of its legitimate interests would be affected."). In contrast, AEA's actions here are directly linked to the union's core goals of maintaining wages and working conditions. In *Paradise Square*, AEA's members were supposed to be protected by the CBA, but Drabinsky purportedly withheld their pay and created a hostile work environment anyway. AEA reasonably could conclude that, even if a future production signed on to the CBA, its members would be at risk if Drabinsky were involved.

Drabinsky also argues that AEA's actions are not exempt from the antitrust laws because the other 4A unions joined AEA's "boycott." Drabinsky asserts that the other 4As' involvement shows that AEA's actions exceeded the bounds of a "labor dispute," thereby forfeiting antitrust immunity. This argument is unavailing because the FAC

specifically alleges that the members of AEA and the 4As "are in direct horizontal competition with one another for roles as actors and positions as stage managers in the entertainment industry." The other unions are thus not only "labor groups"—defeating any argument that AEA acts in combination with a "nonlabor group"—they are "parties to a labor dispute" between AEA and Drabinsky. *H.A. Artists*, 451 U.S. at 717 (internal quotation marks omitted). The coordinated "boycott" by AEA and the other 4A unions seeks to "arrange terms or conditions of employment," for the unions' members by discouraging involvement in productions of which Drabinsky is a part. *H.A. Artists*, 451 U.S. at 721 (quoting 29 U.S.C. § 113(c)); *Hutcheson*, 312 U.S. at 234 ("[U]nder § 13(b) [of the Norris-Laguardia Act, 29 U.S.C. § 113(b)] a person is 'participating or interested in a labor dispute' if he 'is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation'."). AEA's dispute with Drabinsky is a "labor dispute" even if, as Drabinsky claims, as a "creative producer" he did not exercise certain prerogatives of an "employer." 29 U.S.C. § 113(c) ("The term 'labor dispute' includes any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee."); *see Confederación Hípica de Puerto Rico v. Confederación de Jinetes Puertorriqueños, Inc.*, 30 F.4th 306, 314 (1st Cir. 2022). AEA's coordination with the other 4A unions therefore does not preclude antitrust immunity

on the grounds that AEA either combines with nonlabor groups or with entities not party to a labor dispute.

Lastly, Drabinsky suggests that AEA *might* have combined with non-labor entities, "[t]o the extent that . . . producers were involved in the decision to blacklist Drabinsky." The FAC alleges, "[u]pon information and belief, some members of [the 4As] also work as producers . . . in direct competition with Drabinsky." The FAC also alleges that, to the extent those producers exist, they "are also actors or at least members of unions representing actors." On the basis of those allegations, any members of the 4As who might also work as producers still constitute a "labor group" for purposes of the statutory exemption, because they compete with the 4A members who are only actors or stage managers. *See Am. Fed'n of Musicians of U.S. & Can. v. Carroll*, 391 U.S. 99, 109-10 (1968) (applying statutory exemption to actions by the musicians union that encompass "musicians on the occasions they are [band] leaders and play a role as employers"); *accord Horror Inc. v. Miller*, 335 F. Supp. 3d 273, 299 (D. Conn. 2018) (noting that the test announced in *Carroll* asks whether "there is 'job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members'" and the purported non-labor group). Thus, even assuming the truth of the FAC's conclusory allegations and Drabinsky's speculation about the role of producers in AEA's actions, the statutory exemption still applies.

Because the statutory exemption applies, it is unnecessary to decide whether the non-statutory antitrust

exemption also applies and whether FAC sufficiently alleges antitrust injury.

IV. CONCLUSION

For the foregoing reasons, AEA's motion to dismiss is GRANTED, and the FAC is dismissed with prejudice.

The Clerk of Court is respectfully directed to close the motion at Docket Number 38 and close the case.

Dated: April 14, 2023
New York, New York

/s/ Lorna G. Schofield
Lorna G. Schofield
United States District Judge

APPENDIX E — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED APRIL 14, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

22 CIVIL 8933 (LGS)

GARTH DRABINSKY,

Plaintiff,

-against-

ACTORS' EQUITY ASSOCIATION,

Defendant.

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion and Order dated April 14, 2023, Defendant Actors' Equity Association's motion to dismiss is GRANTED and the FAC is dismissed with prejudice; accordingly, the case is closed.

Dated: New York, New York
April 14, 2023

RUBY J. KRAJICK
Clerk of Court

BY: /s/
Deputy Clerk

APPENDIX F — FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED DECEMBER 13, 2022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No: 1:22-cv-08933 (LGS)

GARTH DRABINSKY,

Plaintiff,

vs.

ACTORS' EQUITY ASSOCIATION,

Defendant.

FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, Garth Drabinsky ("Drabinsky"), by his attorneys, The Roth Law Firm, PLLC and Lodestar Law and Economics PLLC, as and for his Complaint against Defendant, Actors' Equity Association ("AEA" or "Defendant"), alleges as follows:

PRELIMINARY STATEMENT

This is an action by Drabinsky for defamation, intentional tort, negligence, and violation of the federal antitrust laws against AEA.

Appendix F

Drabinsky, more than any other producer in recent musical theatre history, has tackled the insidious issues of racism, prejudice and bigotry in America through the musicals he has produced for Broadway. Throughout, Drabinsky has been supported with, and encouraged by, a vast array of prominent writers, composers, directors and other theatrical talents. Drabinsky, as much as any other producer, has always produced with transparency and respect for all artists and those associated with his productions and his audiences. In so doing, he has consistently stood in solidarity with those who march against the evil of racial injustice. Indeed, as set forth below, since 1992, many of the theatrical productions for which he has been the lead creative producer, including the landmark shows *Kiss of the Spider Woman*, *ShowBoat, Ragtime, Parade*[1] and most recently *Paradise Square* (the "Musical" or "*Paradise Square*" which deals with issues of race, immigration, nationalism, and diversity), involved prioritizing and giving voice to disenfranchised groups and confronting the history of systemic oppression, injustice, and racism in America.

AEA, however, has turned Drabinsky's remarkable record of achievements on its head by accusing Drabinsky of being a racist and creating a hostile and unsafe work environment stemming from the production of *Paradise Square*. Without any prior investigation or evidentiary investigation involving Drabinsky to disprove the malicious and false accusations against him, AEA went one step

1. Drabinsky was lead creative producer until his departure from Livent Inc. in August, 1998.

further by publicly branding Drabinsky with its Scarlet Letter and placing Drabinsky on its self-proclaimed "blacklist." AEA's conduct as particularized below has been reckless, callous, outrageous and deplorable.

In acting as it did, AEA consciously ignored the extensive measures which Drabinsky took to improve the financial and working conditions of members of the cast and stage management of *Paradise Square* (the "Cast") who, between March 12, 2020 and August 22, 2021, had been unemployed for prolonged periods as a result of the COVID-19 pandemic ("COVID")[2]. Indeed, for the benefit of the Cast, Drabinsky caused Paradise Square Broadway Limited Partnership (the "Broadway Partnership") to vary the minimum terms of the AEA Collective Bargaining Agreement with the Broadway League (the "CBA"), including but not limited to the following:

i. Despite the fact that the Musical was designated a Chicago point of origin production, Drabinsky strongly implored the Broadway Partnership to offer members of the Cast who needed financial support with respect to housing in Chicago, interest-free loans against their first month's rent and/or security deposits. Many members of the Cast took advantage of the resulting generosity of the Broadway Partnership;

2. Almost from the inception of rehearsals in Chicago in September 2021, there was a resentment from members of the Cast, a bitterness about being unemployed for such long periods during COVID. There also appeared to be a deep disappointment in the dysfunctional identity driven leadership of Actors Equity that had failed its membership during COVID.

ii. Contrary to the common practice of paying in arrears, Drabinsky encouraged the Broadway Partnership to pay the Cast weekly in advance, instead of paying a week in arrears, which was permitted by the CBA. The Cast was, thus, paid weekly on the Thursday of the current week of work during the entire run of the Musical in both Chicago and on Broadway. As a result, the Broadway Partnership advanced salaries to the Cast before they were fully earned;

iii. At least three times over the production history of the Musical, between the March 12, 2020 COVID shutdown of Broadway theatres and the closing of the Musical on July 17, 2022, Drabinsky provided the Cast with opportunities to earn incremental fees for their services, including: a) the audio/video recording of musical selections from Paradise Square in August 2021; b) the five camera filming of the Chicago production of the Musical for promotional purposes, in October 2021; and c) the original Broadway Cast Recording of Paradise Square in April 2022;

iv. Drabinsky spent significant time intervening in issues and conflicts that affected the Cast, including dealing with harassment and sexual harassment allegations by four members of the Cast and one member of the creative team against an AEA member of the Cast, J. H., which AEA refused to address. These serious allegations arose in part in Berkeley, California, subsequent

to Berkeley and before the Cast began rehearsals in Chicago. Drabinsky acted to protect the health, safety, and well-being of the Cast and caused the Broadway Partnership to terminate the contract of J.H. before the Broadway engagement, even though this decision caused the Broadway Partnership to incur additional casting, rehearsal, and costume costs;

v. Despite members of the Cast signing binding contracts during the months of April and May of 2021 for both the Chicago and Broadway engagements of the Musical, Drabinsky, without having any obligation to do so, successfully urged the Broadway Partnership to accommodate most of the material amendments initiated by members of the Cast during the hiatus between Chicago and Broadway, with respect to the financial terms of their Broadway engagement;

vi. In spite of the enormous losses incurred by the Musical because of two extended COVID shutdowns, Drabinsky graciously acquiesced to the Cast's request to have more than half of the Cast perform at the June 12th, 2022 Tony Awards telecast, costing the Broadway Partnership nearly $200,000, a substantial portion of which was incurred for the benefit of the Cast. Originally, Drabinsky was prepared to only consent to a solo performance by Joaquina Kalukango, the Tony Award winner for Best Actress in a Leading Role in a Musical, at a cost to the Broadway Partnership of $30,000; and

vii. The Irish Step Dance specialty choreographers and members of the Cast, J.O. and G.C., as was the case with the Cast, had signed binding contracts in May 2021 for both the Chicago and Broadway engagements of the Musical that contained the terms for their services as both actors and as choreographers. Despite this, during the first two weeks of rehearsals in Chicago, with the knowledge of AEA, they demanded revisions to the existing financial terms of their contracts governing their choreographic services. Furthermore, in breach of their existing contracts and with the knowledge of AEA, J.O. and G.C. refused to provide their choreographic services until these financial demands were agreed to by the Broadway Partnership. Without the obligation to do so, and in the face of continuing rehearsal work stoppages caused by J.O. and G.C., Drabinsky was compelled to recommend that the Broadway Partnership accede to their demands to minimize further disruptions and alleviate disharmony amongst the Cast.

AEA acted in apparent ignorance of the fact that the Musical was being produced in the wake of a national cultural reckoning with racial inequality and racial injustice following the widely publicized murder of George Floyd in May 2020, the myriad other wrongful murders of innocent Black Americans, also in 2020, and other racially charged events affecting Black Americans, resulting in nationwide protests in many forms in support of the Black Lives Matter movement. The heavy weight of racism, prejudice, and "white privilege" heightened the emotional

challenges and tensions amongst the diverse members of the Cast during the initial weeks of rehearsal in Chicago in September 2021 (and later in New York City in February and March 2022).

As a result of both the aforementioned conduct of J.O. and G.C. and the impact on the Cast of the George Floyd murder, and other racially charged events, Drabinsky, as the Lead Creative Producer for the Musical, realized it was incumbent on him during the initial weeks of rehearsal in Chicago, to call a meeting with the Cast and creative team. Drabinsky had an overriding concern that the Cast had become burdened by, and mired in, the complex issues addressed in the Musical. Drabinsky witnessed daily that the rehearsal process was stymied and rapidly falling into disarray as a result of these issues. Drabinsky also appreciated that one-half of the Cast was new. They had not been through the early reading, workshop, and rehearsal development of the Musical and therefore only recently were coming to fully grasp the social issues raised in the Musical.

At the Chicago meeting held on October 2, 2021, which was attended by AEA, Drabinsky explained to the Cast that he was extremely sensitive to the issues raised in the Musical because he had confronted similar issues in his prior productions including the 1993 restoration by legendary producer and director Hal Prince ("Prince") of the Kern and Hammerstein II watershed musical, *ShowBoat*, a work that sharply denounced racism more strongly than any other American musical in the early history of American theatre. *ShowBoat* was in fact conceived by Kern and Hammerstein II as a discourse on the American musical and social history.

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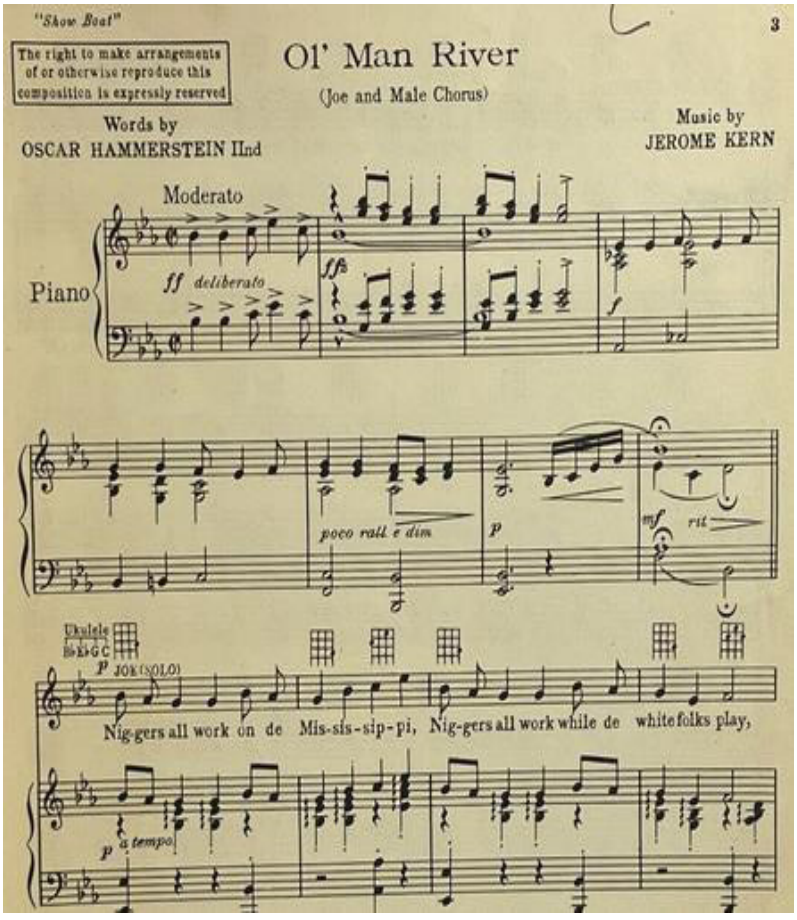
Drabinsky explained to the meeting attendees that during pre-production of *ShowBoat*, he, in collaboration with Prince, decided to keep the following original opening bitter refrain of Ol' Man River in order to protect the integrity of Hammerstein II's intention to shock audiences to fully understand the harsh reality of the Black experience in America and in connection therewith, the sins of American society:



Drabinsky further explained in the presence of AEA how conflicted he was on whether to retain those harsh lyrics, and that his decision to produce *ShowBoat* had also led Drabinsky to become the subject of anti-Semitic catcalling from the Black Caribbean community in Toronto for almost nine months prior to the press opening in Toronto. He went on to explain how he and Prince engaged in an ongoing, strenuous debate of deciding whether such horrific words should be retained in the restored musical as they were in the original 1927 production. Drabinsky related this difficult experience so that everyone present would understand that the racial issues of *Paradise Square*, while challenging and sometimes overwhelming, had to be emphatically confronted. Drabinsky believed that the story of his history with *ShowBoat* would help reinforce the spirit within the Cast and strengthen their resolve to collectively and powerfully convey the Musical's messages to audiences and in so doing, further honor the influence of Black American culture through music and dance.

Rather than receiving praise from AEA for his sensitivities and his intentions to bring harmony and resolve tensions amongst the Cast (which in fact was followed by three weeks of productive rehearsals), AEA maliciously and recklessly issued a false and defamatory letter to the Musical's general manager, Jeffrey Chrzczon (the "GM"), 23 days following the meeting without any prior investigation or evidentiary investigation involving Drabinsky. The letter identifies Drabinsky as a racist and calls for "the immediate removal of Garth Drabinsky from the workplace for the safety of our members."

Remarkably, the letter is devoid of any specific detail supporting the allegations. AEA's letter, which was copied to Mary McColl, Executive Director, AEA; Calandra Hackney, Assistant Executive Director, AEA; Terry Schnuck, Producer; Alison Corinotis, Broadway League, is reprinted in its entirety here:

October 25, 2021

Jeff Chrzczon
General Manager
Theatrics Park LLC

via e-mail

re: PARADISE SQUARE/Production Contract (Chicago)

Dear Jeff:

We have been made aware that Garth Drabinsky used inappropriate and unwanted racial slurs during rehearsals for PARADISE SQUARE, creating a hostile work environment and violating the "Broadway League-Actors' Equity Return to Work Memorandum of Agreement – Broadway and Sit-Downs" provisions regarding "Returning to a Workplace Free of Discrimination, Harassment and Bullying" in reference to Production Contract Rule 43.

Equity's position for appropriate remedy is the immediate removal of Garth Drabinsky from the workplace for the safety of our members.

Sincerely,
ACTORS' EQUITY ASSOCIATION

Dana Gal
Senior Business Representative

Other than in the meeting, and only in the context of quoting Hammerstein II's lyrics, for the reasons stated, at no time did Drabinsky utter any racial slurs during rehearsals that followed the meeting. AEA acted wrongfully in condemning Drabinsky – a producer

who throughout the previous three decades had boldly championed the cause of confronting America's racist history through the art form of musical theatre, which was also his purpose in producing *Paradise Square*.

This letter was the first step in AEA's engagement in an egregious pattern of conduct to maliciously defame and harm Drabinsky, which ultimately included placing him on its "blacklist."

Drabinsky particularizes herein the numerous actions and decisions by AEA, including the actions by members of the Cast that were carried out with the knowledge and consent of AEA. These actions, including the false statements particularized by AEA above and below, constitute defamation *per se* under the laws of the State of New York.

As a consequence of AEA's actions, Drabinsky has sustained and continues to sustain serious damages. His reputation and his professional character have been decimated as he has been effectively blacklisted from working in theatre, television, film and concerts. Therefore, Drabinsky has initiated these proceedings seeking damages for AEA's wrongful conduct.

THE PARTIES

1. Drabinsky is a natural person who resides in Toronto Ontario, Canada, and is a citizen of Canada.

2. AEA is a U.S. labor union which, upon information and belief, is headquartered at 165 West 46th Street

New York, NY 10036. AEA was founded in 1913 and represents over 50,000 professional theater actors and stage managers nationwide. AEA maintains its principal place of business in New York and, upon information and belief, is a voluntary association incorporated under the laws of the State of New York.

3. AEA maintains and publishes a "Do Not Work" list which is available to its members and the public. It utilizes this powerful list as a "blacklist" to successfully alert and dissuade its members and sister unions and members of the public from working or engaging professionally with a person or entity on the list.

4. In spite of Drabinsky's illustrious career, AEA placed Drabinsky on this list and published to the world that "Garth Drabinsky – including any production where he is acting in *any* producing capacity," has been placed on its "Do Not Work." list.[3]

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action pursuant to 15 U.S.C. § 4 which vests United States district courts "with jurisdiction to prevent and restrain violations" of the antitrust laws of the United States.

6. The Venue is proper in this judicial district because AEA maintains its headquarters in New York, New York. In addition, many of the facts underlying this claim for defamation occurred in this judicial district.

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3. https://www.actorsequity.org/resources/DoNotWork/

Appendix F

FACTUAL BACKGROUND

AEA Maintains a Stranglehold on the Professional Theater Industry

7. AEA is a behemoth. According to AEA's 2018-2019 annual report—the last pre-pandemic report—AEA had 51,938 members. In comparison, only a small subset of these AEA members, who are the most talented and elite actors and stage managers, perform or work in Broadway shows each year ("BWY Members"). BWY Members compete with each other for the opportunity to perform or work on Broadway or other professional theatrical productions ("Professional Productions"). AEA's total earnings exceeded $479 million in the 2018-2019 theater season. Though the latest annual report has yet to be published, AEA's website currently boasts more than 51,000 members. AEA employs 180 staff to manage the needs of its membership, which includes contract negotiations, improving working conditions, providing a wide range of benefits including health and pension plans, and bonding for compensation and benefit security. AEA negotiates and promulgates agreements for Production (Broadway and touring), LORT (League of Resident Theatres), Stock, Small Professional Theatre (SPT), Western Civic Light Opera (WCLO), Dinner Theatre, Theatre for Young Audiences, Live Corporate Communications, Off-Broadway, Chicago and Hollywood Area Theatres, and numerous agreements for developing not-for-profit theatres.

8. In order to perform or work on Broadway, actors and stage managers must be members of AEA. In order

to produce a play or musical on Broadway, a producer or production entity must contract with AEA by signing a Security Agreement which binds the producer or production entity to the CBA. AEA maintains its chokehold on Professional Productions through a series of exclusionary agreements designed to limit competition.

9. In the case of all members of AEA, "Rule number one" on their AEA card prevents them from performing in Professional Productions without an AEA contract, in other words, in any non-Equity production. AEA mandates to all of its members that "[u]nder no circumstances may you rehearse or perform in any company without a properly executed and signed Equity contract. You may face union discipline and risk losing your membership for any violation of this membership rule."

10. AEA also has secured for the past eight decades an exclusive agreement with the Broadway League, which includes as its members all Broadway theater owners and operators, other North American theater owners and operators, leading producers and presenters, general managers and selected vendors. Under the CBA, producers cannot require AEA's members to work in any theater or other venue presenting Professional Productions in which non-Equity productions regularly appear, without the express consent of AEA.

11. The CBA also requires producers to only employ actors and stage managers who are, or will become (within 31 days), members of AEA and remain members in good standing as a condition of employment. As a result,

Broadway shows do not hold open calls for non-Equity actors but rather only hold exclusive AEA auditions for AEA members, and only if time permits, may non-Equity actors audition.

12. Moreover, upon information and belief, AEA has exclusive contracts encompassing every Broadway theater and most other major theaters in cities throughout the United States. The exclusive contracts prevent all such theaters from presenting Professional Productions employing non-Equity actors and stage managers. Thus, if an actor or stage manager is not a member of AEA, and if a producer of a Professional Production wants to hire such non-Equity actor or stage manager, the producer cannot do so because of the exclusive agreements that AEA has with the theaters, unless the producer and non-Equity actor or stage manager agree to abide by the terms of the relevant AEA contract.

13. Furthermore, AEA abuses its unlimited power and reach by utilizing a "Do Not Work" list ("Blacklist") as a way to punish producers and other live theater industry participants. Placement on the Blacklist is not for a temporary or probationary term. Rather, the Blacklist imposes a permanent ban, unless subsequently rescinded by AEA, and is customarily effectuated without any due process. Being placed on the Blacklist is a boycott of and the death knell for a producer of Professional Productions—no AEA members can ever work with blacklisted producers again, unless rescinded by AEA. The current Blacklist includes more than 60 producers and 10 productions. Not only does the Blacklist prevent those

on this list from competing on Broadway or throughout the United States, its very existence has a chilling effect that impacts the entire live theater industry because the public punishment of blacklisted producers serves as a clarion call to all other producers that they must adhere to even the unreasonable demands of AEA, regardless of the nature of those demands.

14. The effect of the Blacklist or boycott is further compounded because AEA has entered into horizontal agreements with other unions that also represent actors. AEA's website states:

"[W]e share a special bond with AGMA, AGVA, GIAA and SAG-AFTRA. Together, we are collectively known as the Associated Actors and Artists of America (aka the 4A's). We recognize each other's efforts to organize and negotiate fair and equitable contracts across the entertainment industry and stand in solidarity with one another."

The 4As itself is a federation of these five unions, serving competing actors and artists, which coordinates the efforts of these five unions, including AEA's "Do Not Work" list. With respect to the Blacklist, the website says that the "Do Not Work list is an additional tool to alert members of Equity or our 4A's sister unions to the non-union status of certain employers." Thus, when AEA blacklists a producer, for any reason, the 4A's "stand in solidarity" with that decision, blacklisting the producer from not only the live theater industry, but also from the television, film and concert industries.

15. AEA effectively holds the keys to Broadway and can boycott anyone, for any reason, at any time—permanently. Through its agreement with the other unions in the entertainment industry, it also ensures that any adversary of AEA can be eliminated from the entertainment industry. This severe act of boycott inhibits producing in the entertainment industry and functions as a sinister warning to all those who aspire to produce.

Drabinsky Has Devoted His Entire Career to the Entertainment Industry

16. Drabinsky began his career as an entertainment lawyer in 1975 at the age of 25.

17. Drabinsky is the only Canadian to have achieved international success in each of motion picture production, distribution and exhibition, live theatre, television, music recordings, and the presentation of both classical and popular music.

18. Over the span of approximately 50 years, Drabinsky established long and enduring relationships with some of the most prominent names in entertainment (some of whom are now deceased). Each of those individuals, who are or were at the pinnacle of their craft, are or were inordinately demanding, expecting the individuals with whom they work to be diligent, professional and maintain the level of work ethic and integrity required to create and produce first-class and socially responsible artistic work. Those luminaries include, Donald Sutherland, Elliott Gould, Christopher Plummer, George C. Scott, Melvin Douglas,

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Jack Lemmon, Lee Remick, Tom Cruise, Shelley Long, Shirley MacLaine, Paul Newman, Joanne Woodward, John Malkovich, Robert Redford, Martin Scorsese, Glenda Jackson, Andrew Lloyd Webber, Betty Buckley, Kathleen Marshall, Robin Philips, Donny Osmond, Diahann Carroll, Colm Wilkinson, Harold Prince, Gillian Lynne, Trevor Nunn, John Kani, Susan Stroman, Terrence McNally, Ted Chapin, John Kander, Fred Ebb, Joel Grey, E.L. Doctorow, Frank Galati, Lynn Ahrens, Stephen Flaherty, Marvin Hamlisch, Craig Carnelia, John Guare, Alfred Uhry, Jason Robert Brown, Richard Maltby, David Shire, Ann Reinking, Ben Heppner, Karen Kain, James Taylor, Placido Domingo, Diana Krall, Tony Bennett, Helen Mirren, Jeremy Irons, Adrian Noble, Lebo M., Lorin Maazel, Barry Manilow, The London Symphony Orchestra, Chita Rivera, Rob Marshall, Yo Yo Ma, Valarie Pettiford, LaChanze, Robert Morse, Elaine Stritch, Graciela Daniele, Taylor Hackford, Santo Loquasto, John Patrick Shanley, Francis Ford Coppola, Carmine Coppola, Brent Carver, John McMartin, Rebecca Luker, Sergio Trujilo, Adrian Noble, Wynton Marsalis, Daniel Barenboim, Andy Blankenbuehler, Desmond Richardson, Alex Sanchez, Victoria Clark, Montego Glover, Merle Dandridge, Heather Headley, Lonette McKee, Marilyn McCoo, Brian Stokes Mitchell, Audra McDonald, Mark Jacoby, Judy Kaye, Marin Mazzie, Peter Friedman, Whoopi Goldberg, Jules Fisher, Thulani Davis, Bill T. Jones, and Moises Kaufman. Not only has Drabinsky worked arduously for these individuals, but, as is true with the production of every one of his films, television shows, theatrical presentations and concerts, he has worked side-by-side with each of them. During the years, Drabinsky

has received hundreds of written expressions of heartfelt love and gratitude for his collaborative efforts.

19. Throughout the course of his career, Drabinsky has provided actors and creators the environment to bring their artistry and passion to their work. He has allowed actors and creators to express their individuality. He has always been receptive to their opinions and artistic contributions. Drabinsky has allowed all voices to be heard in an open and honest exchange of ideas and has always deferred to the best expression of an idea. Drabinsky has never engaged in any acts of physical intimidation or physical abuse against anyone.[4] In a June 2, 1997 *New Yorker Magazine* article by the preeminent writer and critic, John Lahr, the acclaimed playwright Terrance McNally says of Drabinsky, "Garth is creating life where there was none" and "creating the conditions to let collaboration happen". In the same article, Hal Prince says of Drabinsky, "I know what a producer should be, and Garth's it . . . Garth reasons accurately that the wheel has to be reinvented before it's too late. Things have been done a certain way for so long, and that way won't work anymore, because the ground rules have changed.

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4. From Donny Osmond's autobiography "Life Is Just What You Make It", Osmond recalls his time working with Drabinsky on *Joseph and the Amazing Technicolor Dreamcoat*, citing "My six years with that show brought me to a place of artistic and emotional fulfillment . . . I enjoyed the sense of family and camaraderie everyone working on the show shared . . . Everyone in the show was wonderful to work with . . . Besides being a wonderful creative experience for me, *Joseph* was the most secure job I'd had in nearly two decades."

Audiences have changed . . . One of the keys to a good creative producer is knowing when to say no and when to say yes. And a balance sheet is not the decision-maker. The decision-maker is: How will it impact artistically on the show?". **Exhibit 1**

20. In 1978, Drabinsky co-founded Cineplex Odeon Corporation, a chain of cinemas which ultimately grew to 1,800 screens across North America.

21. From 1993 to 1998, Drabinsky was Chairman and Chief Executive Officer of Livent, Inc. ("Livent"). Under Drabinsky's leadership, Livent's Broadway productions were nominated for 61 Tony Awards and collectively won 19 Tony Awards, including Best Musical for *Kiss of the Spider Woman* (1993) and *Fosse* (1999), as well as Best Musical Revival for *ShowBoat* (1995).

22. Drabinsky's work as a creative producer has been honored with numerous Outer Critics' Circle Awards, New York Drama Critics Circle Awards, New York Drama Desk Awards, and the London Evening Standard Award.

23. Drabinsky's other award-winning productions include *Candide*, *Barrymore*, and the internationally acclaimed *Ragtime*, a production that was nominated for 13 Tony Awards including Best Musical, Best Performance by a Leading Actor in a Musical (Brian Stokes Mitchell and Peter Friedman) and Best Performance by a Leading Actress in a Musical (Marin Mazzie). It won Tony Awards for Best Book of a Musical, Best Original Score, Best Orchestrations and Best Performance by a Featured Actress in a Musical (Audra McDonald). **Exhibit 1A**

24. Drabinsky was also responsible for the Toronto production of Andrew Lloyd Weber's *Phantom of the Opera*, which remains the longest running musical in Canadian history (ten consecutive years beginning in October 1989), as well as the North American production of *Joseph and the Amazing Technicolor Dreamcoat*, starring Donny Osmond.

25. Other musical works initially developed by Drabinsky and staged on Broadway subsequent to his departure from Livent include: *Parade*, which opened at Lincoln Center in December 1998, directed by Harold Prince with a score by composer Jason Robert Brown and book by Alfred Uhry;[5] *Seussical*, a musical inspired by the works of Theodor Geisel, with music by Stephen Flaherty, lyrics by Lynn Ahrens, and book by Lynn Ahrens and Stephen Flaherty, which opened on Broadway in November, 2000; and the adaptation of the breakthrough film noir drama, *The Sweet Smell of Success* directed by Nicholas Hytner, with a book by John Guare, music composed by Marvin Hamlisch, lyrics by Craig Carnelia and starring John Lithgow, Brian d'Arcy James and Kelli O'Hara, which opened on Broadway in March 2002.

26. Throughout his career, Drabinsky has made it his priority to engage Black American artists in principal roles and major creative positions in his productions. Many of these artists had not yet received widespread public

5. *Parade* received nine Tony Award nominations and won two Tony Awards as well as the 1998 Drama Desk Award for Best Musical, and the New York Drama Critics Circle Award for Best Musical

recognition. Nevertheless Drabinsky, in connection with their engagement with him, vigorously promoted their achievements. Many have gone on to receive critical acclaim and prestigious awards for their work. They include: a.) Vanessa Williams in her Broadway debut in *Kiss of the Spider Woman;* b.) Diahann Carroll in the lead role of "Norma Desmond" in the Canadian production of *Sunset Boulevard*; c.) Gretha Boston in the role of "Queenie" in the Broadway production of *ShowBoat*, for which she won a Tony Award for Best Performance by an Actress in a Featured Role in a Musical; d.) Michel Bell as "Joe" in the Broadway production of *ShowBoat*, Tony Award nominee for Best Performance by an Actor in a Featured Role in a Musical; e.) Brian Stokes Mitchell as "Coalhouse Walker, Jr." in the Broadway production of *Ragtime*, Tony Award nominee for Best Performance by an Actor in a Leading Role of a Musical; f.) Audra McDonald as "Sarah" in the Broadway production of *Ragtime*, winner of the Tony Award for Best Performance by an Actress in a Featured Role in a Musical; g.) Desmond Richardson in *Fosse*, Tony Award nominee for Best Performance by an Actor in a Featured Role in a Musical; h.) Valarie Pettiford in *Fosse*, Tony Award nominee for Best Performance by an Actress in a Featured Role in a Musical; i.) Joaquina Kalukango in the role of "Nelly" in the Broadway production of *Paradise Square*, winner of the Tony Award for Best Performance by an Actress in a Leading Role in a Musical; j.) Sidney DuPont in the role of "Washington Henry" in the Broadway production of *Paradise Square*, Tony Award nominee for Best Performance by an Actor in a Featured Role in a Musical; k.) Bill T. Jones as Choreographer for the musical *Paradise Square*, Tony Award nominee for

Best Choreography; l.) Toni-Leslie James as Costume Designer of the musical *Paradise Square*, Tony Award nominee for Best Costume Design of a Musical; m.) Masi Asare as Lyricist for the musical *Paradise Square*, Tony Award nominee for Best Original Score Written for the Theatre; and n.) countless other less prominent Black Americans who were vital contributors to the artistic and commercial success of his productions.

27. At one point in 1997, Drabinsky employed in his various musicals more than 250 Black American members of AEA, a milestone not shared with any other of his contemporary Broadway producers.

28. In addition to developing and constructing new state of the art legitimate theatres in Toronto and Vancouver, Drabinsky was responsible for and has been devoted to the restoration and preservation of several of North America's most acclaimed theaters, including the Pantages in Toronto, the Lyric and Apollo Theaters in New York, and the Oriental Theater in Chicago. His theaters have received many restoration and/or architectural conservancy awards.

29. Drabinsky is the recipient of two honorary Doctorate Degrees, is an ardent spokesman regarding individual liberty and, throughout his career, has confronted and continues to confront the highly charged issues of race, prejudice and hostility. **Exhibit 1B.**

30. On May 7, 1989, Drabinsky became the first Canadian to be awarded the B'nai B'rith International Distinguished Service Award. The award has also been presented to President Dwight D. Eisenhower and Israeli Prime Minister Golda Meir, among many others. Upon accepting the award, Drabinsky announced his plan to establish and fund (with the over $1,000,000 US raised at a dinner in New York City in his honor) a lecture series and bureau to combat the universal human afflictions of prejudice and racism, and help to develop a greater mutual understanding and cooperation amongst people. The first speakers in the series were Nobel Laureate Elie Wiesel, Harvard Chairman of African American Studies and Research and W.E.B Du Bois Professor of Humanities Henry Louis (Skip) Gates, Jr., Former President of The Federal Republic of Germany Richard von Wiezsacker, William F. Buckley Jr., His Royal Highness Crown Prince El Hassan Bin Talal of the Hashemite Kingdom of Jordan, Judge Richard Goldstone, former Justice International Criminal Tribunal for Yugoslavia and Rwanda, and E. L. Doctorow. **Exhibit 1C**

31. Drabinsky's autobiography, *Closer to the Sun*, which he co-authored with Governor General's Award finalist, Marq de Villiers, with an introduction by Christopher Plummer, was published by McClelland & Stewart in 1995. It became an immediate best seller, appearing on the Hardcover Non-Fiction lists of prominent national newspapers, including, *The Toronto Star*, *The Montreal Gazette*, *The Ottowa Citizen*, *The Vancouver Sun*, *The Winnipeg Free Press*, *The Calgary Herald*, *The Edmonton Journal*, and *Maclean's* magazine.

Appendix F

Drabinsky's Innovations Have Changed the Professional Theater Industry

32. Drabinsky has been an innovator in the live theatre industry for more than 30 years. He has contributed to improving the quality and quantity of Professional Productions available to audiences throughout North American and beyond. From the early 1990s, Drabinsky began to reinvent the paradigm of producing Professional Productions. Rather than a vertically bifurcated process used by others, Drabinsky created a vertically integrated company that controlled and managed all aspects of every Drabinsky-produced Professional Production from inception, including the development of the work (writing, readings, and workshops), casting, costume building, scenic construction, lighting and sound supply, through to marketing, presentation, and monitoring the creative integrity of each performance. Drabinsky further innovated, as stated above, by developing and constructing or restoring new state-of-the-art legitimate theatres which helped to guarantee a venue for each Drabinsky-produced production rather than depending solely upon the availability of theaters owned and operated by other theatre organizations. Drabinsky also abandoned The Broadway League and negotiated a separate collective bargaining agreement with AEA, which included terms that prevented chorus members from leaving a production with only two-weeks' notice. This created greater stability within each production and reduced replacement casting, rehearsal, and costuming costs, while elevating artistic integrity. In a revolutionary way, he also created a structure for increased compensation for writers,

which thereby increased the available pool of writers for Professional Productions from different mediums of the entertainment industry. In particular, Drabinsky changed the compensation model so that a writer would be paid a substantial sum up front and reducing their back-end royalty entitlement, which avoided them having to wait to be paid on the back end by way of a higher royalty. He also utilized a new method of selecting a composing team for one of his musical productions by creating a competition amongst composers. Without Drabinsky, the producing of Professional Productions may not have measurably improved, and the pace of industry innovation would have been stunted.

Drabinsky Pioneered Educational Programs for Students

33. Consistent with Drabinsky being an innovator in the live theatre industry, commencing in 1989, when *Phantom of the Opera* opened in Toronto, Drabinsky launched a pioneer program titled The Phantom Educational Program (the "Program") for teachers and students ages 12 through 18 living within a 250-mile radius of the City of Toronto. The Program was designed as a centerpiece for an outreach campaign to those individuals who were rarely targeted and usually underserved by the Toronto live theater industry.

34. The Program leveraged production-inspired lesson plans and engaged students though enriched interaction with artists and experts in the live theater industry. It also prioritized the arts as a cornerstone for social

emotional learning. The Program included field trips to performances of *Phantom of the Opera.*

35. From 1989 forward, Drabinsky has been a strong proponent of live theater educational programs for many of his productions. As such, he has been a catalyst for hundreds of thousands of students being introduced to the innerworkings of musical theater.

36. In connection with the Musical, Drabinsky, with others, prepared an Educational Guide that reveals a seldom disclosed historical truth, provides context to the social, political, and cultural content of the present and illuminates new ways of thinking about the future of America. **Exhibit 2.** The goal was to inspire further exploration of the myriad subjects set forth in the Educational Guide and their relationship to the Musical's themes. In so doing, an array of lesson extensions was designed to prepare students for the experience of seeing the Musical. In turn, classrooms would be enlivened, and student discussion, collaboration and discovery would be nurtured.

37. The Educational Guide evidences the antithesis of Drabinsky being labeled a racist and culturally indifferent. Indeed, it is another example of how Drabinsky is at the forefront of confronting sensitive and highly controversial issues through musical theater – a man who challenges prejudice and bigotry, and who is intolerant of a hostile work environment. All of this was undermined when AEA, in sweeping fashion, falsely labeled him a racist.

Appendix F

Criminal Proceeding Against Drabinsky Dismissed in the United States. A Conviction in Canada

38. Drabinsky's remarkable record of achievement in American musical theater was, unfortunately, put on a nearly fifteen-year pause commencing with Drabinsky's abrupt termination from Livent in August 1998. In January of the following year, the United States Attorney's Office for the Southern District of New York filed a multi-count indictment against Drabinsky charging an alleged accounting fraud scheme involving Drabinsky's theatrical entertainment company, Livent.

39. Between 1999 and 2011, Drabinsky remained actively involved in Canada developing and producing feature films, a television talent competition show, a series of live concerts, and a remount of his Tony Award winning production of *Barrymore*, once again starring Christopher Plummer.

40. Though the charges generated substantial publicity in both the United States and Canada, Drabinsky, a resident and citizen of Canada, was never subjected to extradition proceedings. In the aftermath of his indictment, the U.S. federal government never presented in court any evidence of Drabinsky's involvement in the charged misconduct, or otherwise pursued his prosecution. The charges remained dormant for many years, but they persisted as an impediment to Drabinsky being able to travel to the United States.

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41. Beginning in the summer of 2016 and continuing for the next two years, Drabinsky, through legal counsel in New York, engaged in discussions and correspondence with the federal authorities. The submissions of Drabinsky's counsel, backed by supporting letters, records, and other documentation, were all made to satisfy the United States government that given many factors, any prosecution and punishment of Drabinsky would not serve the interests of justice.

42. Drabinsky's efforts were successful. On June 25, 2018, the United States federal prosecutor primarily responsible for Drabinsky's case, with the concurrence of the highest-ranking authority in her office, formally asked a United States federal judge to dismiss all charges against Drabinsky. The judge granted the government's application the very next day, permanently dismissing all charges against Drabinsky with prejudice and without the imposition of any penalties. With the saga finally at an end and the cloud that had hung over Drabinsky's head for so long lifted, he was, at last, free to return to the United States and to the musical theater he had nurtured and loved for decades. He was granted an O-1 visa almost immediately for this purpose.

43. While the United States dropped all charges with prejudice in 2018, in 2009 Drabinsky (together with others) was convicted in Canada for fraud in relation to the financial statements of Livent, Inc. between 1995 – 1998.

44. Drabinsky completed his 17 months of incarceration in Canada in early 2013, and all parole conditions have

expired. All civil claims against Drabinsky arising out of the Livent matter have been resolved satisfactorily and no amounts were owing prior to the events involving AEA set out herein. As of the date hereof, it is anticipated that Drabinsky will receive a full pardon in Canada regarding the matter, in the near future.

45. Drabinsky could have been effectively foreclosed from returning to the United States, but his passion for cultivating and producing musical theater never wavered. In his quest to return to the United States, Drabinsky received the unflagging support and encouragement of numerous well-respected writers, composers, directors, and other live theatrical talents, many of whom had written letters to the U.S. prosecutor, as a testament to Drabinsky' s indispensable gifts and high regard in the industry. They were allies in Drabinsky's efforts to have the criminal charges dropped to enable him to return to the United States and once again contribute to the production of live musical theater, and the causes he advanced.

Drabinsky Attacks America's History of Racism in His Productions, Winning Multiple Tony Awards

46. In the early 1990's, Drabinsky was the lead creative producer of *ShowBoat*, which opened on Broadway in October 1994. *ShowBoat* ran for 947 performances and grossed $89,171,712.

47. In 1927, Jerome Kern and Oscar Hammerstein II opened a theatrical discussion about race relations in the

United States with their breakthrough musical *ShowBoat.* The musical is about love of theatre and love of family; it honors the continuity of generations. *ShowBoat* follows the lives of Captain Andy, his wife Parthy, daughter Magnolia, and the performers, stagehands and dock workers on the Cotton Blossom, a Mississippi River show boat, over a span of 40 years from 1887 to 1927. Its themes consist of racial prejudice, interracial marriage (miscegenation), and bigotry. The Black American experience in both its triumph and its tragedy is at the heart of the show's perception of America.

48. From the inception of the project in Toronto in 1992, the musical was met with aggressive political and social discourse – much of it negative, including 100 people per evening picketing in front of the theater prior to the first Toronto previews.

49. The aforementioned John Lahr, in *New Yorker Magazine*, noted:

> . . . the Coalition to Stop Show Boat, a collection mostly of Toronto's black community, has been trying to run 'Show Boat' aground. The Coalition has been hard at it, lobbying Ontario's Human Rights Commission and, even before previews began, mounting weekly demonstrations of as many as a hundred people outside the theatre. At the preview I saw, there was a whiff of Weimer and autumn in the air. About forty armed police, some helmeted and mounted, stood behind police

> barricades outside the building while inside, plainclothesmen, stationed at every exit of the massive eighteen-hundred-and-fifty-seat Main Stage Theatre, watched the audience.

Exhibit 3, p. 124.

50. Upon the Toronto press opening in October 1993, Lahr praised the production: "[D]escribing racism doesn't make 'S*howBoat*' racist. The production is meticulous in honoring the influence of black culture not just in the making of the nation's wealth but, through music, in the making of its modern spirit." **Exhibit 3**, p. 125. He concludes: "In bringing together good and bad, optimism and outrage, celebration, and resignation, 'S*howBoat*' demanded a new maturity from musical theatre and from its audience. 'S*howBoat*' insists – and Prince's expert production makes the point irresistible – that the past must be remembered for its sins as well as for its triumphs . . . [t]he show chronicles slavery not to condone it but to deplore it." **Exhibit 3**, p. 126. Lahr's statement reflected Drabinsky's sole intent in producing Prince's restoration.

51. Drabinsky took on another formidable work when he produced *Ragtime*, which ran on Broadway beginning December 1997 for 834 performances and grossed $77,694,537. *Ragtime*, an adaptation of Edgar Doctorow's multi-award-winning novel[6] is an exuberant historical fantasia, a tapestry of fiction and fact. It also

6. Doctorow is considered by many to be one of America's most formidable and lauded authors in the last half of the 20th century.

deals with America's violent emergence as an industrial giant, a turbulent time when the United States and its people were undergoing seismic social, political and economic transformation. *Ragtime* depicts, at the turn of the 20th century, the lives of a wealthy white Anglo-Saxon Protestant family, a father and daughter (both Jewish immigrants) and a Black American ragtime musician in Harlem and his love for a strong-willed and passionately idealistic Black American woman. The production, once again, brought the pernicious issue of racism front-and-center, with the script written by the much-heralded Terrence McNally, containing racial slurs in several instances, including the "N-word". **Exhibit 4.**

52. The use of the "N-word" in *Ragtime* still elicits controversy, even in high school productions. For example, in January 2017, a local branch of the NAACP intervened and condemned Cherry Hill High School East's (in New Jersey) decision to present a production of *Ragtime* that included the racial slurs contained in McNally's script. **Exhibit 5.** The school responded to the NAACP's condemnation by announcing it would "remove the offensive language from the enacted script." *Id.* On January 24, 2017, the district school board met to discuss the school's decision. *Id.* At the school board meeting, students involved in the production made passionate pleas to keep the censored language, arguing that the musical is a medium through which racism can be understood, tackled and overcome. *Id.* On January 27, 2017, the superintendent of schools in Cherry Hill reversed the decision of the school to remove the offensive language and permitted *Ragtime* to be presented by the students

as originally written by McNally. **Exhibit 6**.

53. Most significantly, the decision was supported by The Dramatists' Guild of America and the Arts Integrity Initiative, which submitted a letter to the Cherry Hill school board on January 24, 2017, the day of the school board meeting, that stated:

> *Ragtime*'s use of racial slurs is an historically accurate and necessary aspect of a play that explores race relations in the early 1900s. *Ragtime* helps minors understand the brutalities of racism and the anger that has historically accumulated, partly through the use of racially offensive language. In contrast, censorship of such language ignores historical reality and presents a falsified, whitewashed view of race relations. Censoring the play will only perpetuate ignorance of our past.
>
> While we empathize with concerns about the emotionally disturbing effects of hearing or uttering racial slurs, we believe such concerns are to be resolved through educational means, not by censoring a renowned text. In our experience, similar concerns (around productions of *To Kill a Mockingbird* or *Of Mice and Men*, for instance) have best been confronted through dialogue rather than censorship.

Exhibit 5.

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The Production of *Paradise Square*

54. Prepared to take on his next meaningful production, in 2013, Drabinsky chose to develop and produce *Paradise Square*, a musical that brings to the forefront the racial conflict in the Five Points neighborhood of New York City in the 1860's when an accidental society of Black and Irish Americans lived side by side. While the Civil War raged on, the two downtrodden and scorned communities found and loved each other and embraced each other's cultures. The deadly New York draft riots which exploded over 5 days in the summer of 1863 targeted Black Americans and interracial couples and became the largest civil insurrection in U.S. history. Once again, Drabinsky was instrumental in nurturing a musical which created leading and other significant roles for Black American performers, which is still a rare occurrence in an industry that continues to struggle to highlight diverse talent.

55. As is typical of musical productions intended for Broadway, *Paradise Square's* production, in addition to the numerous readings and workshops, evolved over three phases, each phase being produced in a different city. The first theatrical phase of the Musical was mounted at the prestigious non-profit League Of Resident Theaters Association ("LORT") facility,[7] Berkeley Repertory Theater in Berkeley, California ("BRT"). BRT was the producer of the first phase and credited as sole producer. The second phase was mounted at the James

7. LORT administers the primary national not-for-profit collective bargaining agreements with Actors Equity.

M. Nederlander Theater in Chicago, Illinois. The final incarnation of the Musical was mounted at the Ethel Barrymore Theater on Broadway. Both the second and third phases were produced by The Broadway Partnership.

56. Drabinsky was the credited lead creative producer of the Musical ***only*** for phase two and phase three. At no time during any of the three phases of the *Paradise Square* productions was Drabinsky a partner or member of BRT or the Broadway Partnership or any other of the Musical's legal entities, nor did he have 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. As such, Drabinsky was not responsible for the payment of the salary or benefits of any actors, creative individuals, or anyone else associated with the various productions, nor was he responsible for the payment of any invoices for the productions.

The BRT Production (Phase 1)

57. *Paradise Square* previewed in Berkeley, California on December 27, 2018, with a press opening at BRT on January 10, 2019.

58. As the San *Jose Mercury News* reported: **Exhibit 7.**

> "The stirring new Berkely Rep musical captures improbable racial utopia in Civil War-era New York . . . It boasts a particularly impressive creative team . . . Bill T. Jones' choreography is

well worth the price of admission . . . stunning dynamic, evocative and unconventional."

The COVID Pandemic and George Floyd

59. One year following the performances at BRT, cataclysmic events shook the foundations of America and arguably altered the landscape of the theatre industry forever.

60. Specifically, on or about March 12, 2020, because of the COVID pandemic, theaters across North America began to shut down. On Broadway, facing government restrictions on audience size and concern from actors and audiences about severe health risks from the COVID outbreak, the theater industry shuttered. Broadway did not reopen until August 22, 2021.

61. On the evening of May 25, 2020, white Minneapolis police officer Derek Chauvin killed George Floyd, a Black American, by kneeling on his neck for almost 10 minutes. Floyd's death, as video recorded by bystanders and broadcast unceasingly on worldwide television, touched off what may have been the largest series of racial protests in United States history and a nationwide reckoning on the issue of race and policing.

62. Those two events profoundly affected the second and third phases of the Musical. First, there was a thirty-month hiatus between BRT and the second phase of the Musical, and second, the George Floyd incident brought to the forefront the racial issues that continued and continue

to plague America long after the events depicted in the Musical.

63. In the summer 2020, in the depth of the lockdowns, Drabinsky proposed a way to temporarily employ the Cast. A promotional 6 ½ minute audio/video recording of *Paradise Square* consisting of a hybrid of music selections from the Musical as of that date, was produced by Drabinsky featuring actors from BRT, augmented by selected other actors from a workshop of the Musical staged in New York City during August 2019. Drabinsky included the following statement, written by Drabinsky, at the outset of the video: "The artists and producer involved in the creation of this video stand in solidarity with all those who march against the evil of racial injustice. Black Stories Matter . . . Black Lives Matter."

64. In January 2021, Drabinsky arranged for the music video, including his statement, to be launched on the CBS Sunday Morning website where it has been seen by tens of thousands of people around the world.

65. The successful BRT production (extended twice by audience demand) led Drabinsky to commence negotiations with the Nederlander family, who own and operate the Nederlander Theatre in Chicago, a theatre restored under Drabinsky's guidance between 1995 and 1998 at a cost of $30 million and which has received several restoration awards. Drabinsky reasoned that Chicago would be the bridge to Broadway.

66. On March 11, 2021, the Nederlander organization and the Broadway Partnership entered into an agreement for a five-week run of *Paradise Square* in Chicago in the fall of 2021, representing the second theatrical phase of the evolution of the Musical. On July 20, 2021, the Broadway Partnership entered into an agreement with the Shubert Organization for an open-ended run of *Paradise Square* on Broadway, at the Barrymore Theatre, to commence in the late winter of 2022.

The Chicago Production (Phase 2)

67. Notwithstanding the eighteen-month COVID-induced shutdown that decimated the theater industry, Drabinsky forged ahead with the Musical. For the Chicago production, Drabinsky assembled a 36-member cast, including 18 Black Americans, many of whom had never performed on Broadway. *Paradise Square* became the first large scale new Musical to be produced in America since the inception of COVID.

68. Rehearsals commenced in Chicago on September 13, 2021. The first preview performance occurred on November 2, 2021, with a press opening on November 17, 2021. During the months of September through December 2021, notwithstanding the widespread Delta variant outbreak of COVID in Chicago, there was not a single case of COVID amongst the Cast, creative team, crew or musicians because of the protective measures initiated by Drabinsky and the GM.

Appendix F

The Conduct of the Cast in Chicago is Ignored by AEA

69. During Phase 2, AEA was either unable or unwilling to control the conduct of the Cast. As outlined above, despite signing binding contracts for both the Chicago and Broadway engagements of the Musical, the Irish Step Dance specialty choreographers and members of the Cast, J.O., and G.C., during the first two weeks of rehearsals, demanded revisions to the existing terms of their contracts. In breach of their contracts, **Exhibit 8,** J.O. and G.C. refused to provide their choreographic services until revisions were agreed to by the Broadway Partnership. Further, J.O. and G.C. misrepresented to the Cast that their contracts did not include payment for their choreographic services. In doing so, J.O. and G.C. poisoned the morale of early Cast rehearsals. Without the obligation to do so, and in the face of ongoing rehearsal work stoppages caused by the egregious conduct of J.O. and G.C., Drabinsky recommended that the Broadway Partnership accommodate their illegal demands to alleviate further disruptions and disharmony amongst the Cast. Drabinsky understood that at all times AEA was fully apprised, including by the Musical's production stage manager K.M., of the inappropriate and illegal demands of J.O. and G.C.

The October 2, 2021 Meeting in Chicago

70. Drabinsky appreciated that the Cast, during rehearsals, continued to wrestle with the exceedingly difficult issues of race and prejudice raised in the Musical, in addition to the unforeseen distractions caused by J.O.

and G.C. As a result, to help unify the Cast and creative team, Drabinsky called a meeting on October 2, 2021. An open discussion was held with Drabinsky's understanding that AEA was present at the meeting.

71. At the October 2nd meeting, Drabinsky seized the opportunity to explain to the Cast that he was extremely aware of the painful issues raised in the Musical as he had faced similar issues in his prior productions including the 1993 production of *ShowBoat*, a musical that sharply denounced racism more strongly than any other American musical in the early history of American theatre. The book of *ShowBoat* was written by the acclaimed lyricist Oscar Hammerstein II.

72. During the development of the restoration of *ShowBoat*, Drabinsky (in collaboration with director Hal Prince, who was also responsible for writing the revisions to the 1927 Hammerstein II script), decided to retain the original opening bitter refrain of Ol' Man River in order to protect the integrity of Hammerstein II's intention to shock audiences into fully understanding the harsh reality of the Black experience in America and in connection therewith, the sins of American society.[8]

73. Drabinsky explained to the Cast how his decision to produce *ShowBoat* in Toronto led to ongoing protests by Toronto's Black Caribbean community. As the weeks

8. As Lahr wrote: The "shocking, bitter refrain [in Ol' Man River] was truer to the outraged spirit of the slaves and to the metre of the song, whose fury, even in its bowdlerized form is clear for those who have ears to hear." P. 124.

dragged on, the vile rhetoric spread rampantly. Drabinsky became the subject of scurrilous, hysterical anti-Semitic catcalling from this community for almost nine months prior to the first public performance. He went on to discuss how he and Prince engaged in an ongoing, strenuous debate of whether the horrific words in the first lyrics of Ol' Man River should remain in the musical, as they were originally written for the 1927 production.

74. Drabinsky consulted widely inside Canada and out with such high profile and respected Black leaders as entertainer Harry Belafonte and Vernon Jordan, who led President Clinton's transition team when he assumed office. Both men encouraged Drabinsky to use the original lyrics, because they reflected the history and social condition of Post-Reconstruction America.

75. Drabinsky related his painful experience to the Cast so they would better understand that these racial issues, while always complex and sometimes overwhelming had to be strongly confronted. Drabinsky believed that the story of his history with *ShowBoat* would help strengthen the Cast's resolve to join hands in rehearsal and performance and powerfully convey the Musical's messages to audiences and in so doing, further honor the influence of Black American culture through music and dance.

76. Without any prior notice, on October 25, 2021, AEA sent a remarkably harsh, damaging, disparaging, and defamatory letter addressed to the GM in which AEA falsely and wrongfully accused Drabinsky of

using "inappropriate and unwanted racial slurs during rehearsals, creating a hostile work environment and violating the 'Broadway League-Actors' Return to Work Memorandum of Agreement – Broadway and Sit-Downs' provisions regarding "Returning to Workplace Free of Discrimination, Harassment and Bullying." **Exhibit 9.** The letter was copied to Mary McColl, Executive Director, AEA; Calandra Hackney, Assistant Executive Director, AEA; Terry Schnuck, Producer; Alison Corinotis, Broadway League. In the same letter, AEA recklessly demanded "the immediate removal of Garth Drabinsky from the workplace for the safety of our members."

77. As the entire purpose of the October 2nd meeting and the discussion which ensued was to bring to the forefront the serious racial issues that Drabinsky boldly and unhesitatingly addressed in a number of his productions decades ago, AEA's conduct in publishing the letter was malicious.

78. AEA knowingly or, in the alternative, negligently, created an intentionally fictitious basis upon which to viciously attack Drabinsky and fan the flames of discontent on the part of certain members of the Cast against Drabinsky.

Chicago Point of Origin

79. Under the CBA, Chicago was designated a "point of origin" for the Musical, meaning that the Cast of the Chicago production contractually agreed to participate in all rehearsals and performances of the Musical without

being reimbursed for housing or *per diem* living expenses. In other words, the Broadway Partnership was under no obligation to pay for any living arrangements in Chicago for the Cast. The minimum weekly salary of $2,381.08 was paid to each member of the Cast during rehearsal and this amount varied upwards during performances.

80. The designation of Chicago as a "point of origin" was crucial to the Musical. It saved the Broadway Partnership production expenses of $500,000 over the rehearsal and performance period in Chicago. The production did not have the benefit of any insurance policy that would cover the horrendous cost of the Musical being shut down due to COVID. This form of insurance coverage was not available to any musical which opened in the United States following the COVID shutdown on March 12, 2020. **Exhibit 10**. The risk of a COVID shutdown in Chicago was real and significant. As such, the Broadway Partnership had to be extraordinarily prudent in scrutinizing all expenses of the Musical in order to financially withstand any anticipated cancellation of performances because of a COVID outbreak. In short, producing theatre in the time of COVID was not only unchartered territory, but precarious.

81. At the October 2nd meeting, complaints from the Cast emerged about the payment for housing while in Chicago. Drabinsky reminded the Cast that in April and May 2021, notwithstanding that there was no obligation to do so and as an accommodation to the Cast, he successfully urged the Broadway Partnership to loan, without interest, any member of the Cast who made a request, the funds required to cover initial rent deposits while in Chicago.

82. Numerous members of the Cast took advantage of Drabinsky and the Broadway Partnership's generosity and received interest free loans including, J.C.D. ($2,120), C.C. ($1,000), S.D. ($1,825), S.E. ($7,519), G.C. ($1,770), J.O. ($1,770), E.S. ($7,329), A.W. ($1,700) and H.K.W. ($1,575).

In Violation of the CBA, AEA Refuses to Pursue Sexual Harassment Claims By Its Own Members

83. During the Chicago rehearsals, the GM received formal complaints from certain members of the Cast and creative team of both harassment and sexual harassment by another member of the Cast, J.H., that purportedly had occurred in Berkeley, subsequent to Berkeley, and during Chicago rehearsals. Further, unbeknownst to Drabinsky (who always had minimal contact with J.H.), during contractual negotiations for Chicago, J.H. had induced certain members of the Cast and creative team into having sexual relations with him by falsely claiming that because of close administrative ties with Drabinsky, J.H. could assist these members in securing more favorable contractual terms in their negotiations with the Broadway Partnership. The allegations against J.H. were extremely alarming, and Drabinsky and the GM dealt with them decisively.

84. Initially, the Broadway Partnership attempted to resolve the complaints against J.H. internally by insisting J.H. attend a meeting with the GM to address the complaints. **Exhibit 11.**

85. After the meeting but on the same day, the GM contacted AEA and made it aware of the allegations by

its members against J.H. Shockingly, AEA refused to intervene. Its only response was to send one dismissive e-mail to the GM informing him "it is the employer's responsibility to provide a workplace free of harassment, discrimination and bullying," and "requesting that you inform us of the steps you are taking to address these concerns." **Exhibit 12**. This deflective response constituted either an intentional or, at the very least, negligent lack of concern by AEA to protect its members which is contrary to the very essence of its existence and contrary to the CBA.

86. AEA refused to acknowledge and support Drabinsky's incisive intervention, compounding its previous wrongful labelling of Drabinsky as having created a "hostile work environment" despite his efforts to the contrary.

87. Moreover, AEA violated its ***own*** rules when it failed to deal with the allegations of harassment and sexual harassment reported to it by its members and the GM and failed to inform its members of the appropriate procedures under the CBA.

88. Specifically, the CBA provides, at Section 43(B), that "[s]exual harassment [and bullying] constitute unlawful discrimination . . . " **Exhibit 13.** The CBA goes on to state "harassment and bullying are strictly prohibited whether committed by supervisory or non-supervisory personnel, management, employees, or third parties." Id. at Section 43(C).

89. The CBA further provides a detailed procedure for members of AEA to deal with allegations of harassment and bullying:

> The Actor or applicant shall submit to Equity any claimed violation of these provisions within 28 days of the time when the claim arose or when the Actor became aware of the alleged discrimination, whichever is later. Equity shall send written notice of the claim to the League and the Producer, in accordance with Rule 4(A)(2) within five business days thereafter. Any claim for which timely notice is not given shall be barred unless unusual circumstances can be shown for such delay. The Grievance Committee shall meet to consider the claim immediately thereafter.

Id. at 42(F).

90. Instead of sending a notice of the claims to the Broadway League and the Broadway Partnership several weeks earlier, and subsequently convening a grievance committee meeting immediately thereafter, as required by the CBA, AEA did nothing and left these critical issues to Drabinsky and the GM to resolve, in an environment where it had tarnished Drabinsky's reputation.

91. On November 27, 2021, the GM, at Drabinsky's direction, engaged a New York based Human Resources ("HR") consulting firm, K&K Reset, LLC, ("K&K") to assist *Paradise Square* with resolving the allegations

against J.H., as well as to participate in other equity, diversity, and inclusion matters. **Exhibit 14**.

92. On December 16, 2021, Karen Robinson, CEO and Co-Founder of K&K wrote to the GM after interviewing all of the individuals involved in the allegations " . . . we feel that you already have the details needed to make the appropriate decision for the cast and the company." On December 27, 2021, the GM summarily terminated J.H.'s employment based on the results of the K&K investigation. **Exhibit 15**.

The Musical Receives Acclaim in Chicago

93. With Drabinsky as lead creative producer, the Chicago production was an artistic success, receiving numerous published rave reviews and enthusiastic widespread social media commentary. As the *Chicago Tribune* critic Chris Jones proclaimed, "to pull a project of this scope and scale together at all in this incredibly challenging COVID era must have been a herculean task."

94. The review continued: "[t]his is an honorable, serious, talent-stacked show wrestling with issues of race and American history . . . produced by Garth Drabinsky."

95. Catey Sullivan of the Chicago Sun-Times raved "Visually lush, emotionally intricate storytelling. A production that deserves an audience that will cheer for it, loudly. It's a rich, relevant world inside an outlier bar in the eye of a maelstrom." **Exhibit 16.**

Appendix F

AEA Manufactures A "LORT" Employment Grievance Against the Broadway Partnership

96. In early 2021, Drabinsky and the creative team, on behalf of the Broadway Partnership, decided that 11 actors and 3 stage managers employed by BRT in the BRT production would not be employed by the Broadway Partnership for the Chicago and Broadway productions. There were several reasons. Substantial changes to the script, music and lyrics were made subsequent to the BRT production and subsequent to the ensuing New York workshop in August 2019. The changes were so substantial that less than 1,000 words of the BRT script written by Marcus Gardley remained, and certain characters in the Musical were eliminated prior to commencement of rehearsals in Chicago. The creative team felt that a number of the BRT cast could not adequately meet the artistic demands of their roles and that all the BRT stage management lacked the ability or experience required for Chicago and Broadway.

97. In another gross act of improper conduct on December 22, 2021, AEA accused the Broadway Partnership of a "LORT employee transfer violation" pursuant to Paragraph 71 of the CBA that, generally, requires a production company or producer to reemploy all the actors engaged in a LORT facility production when it transfers to a "production contract" under the CBA. AEA specifically and falsely accused the Broadway Partnership of violating the CBA because, as alleged, certain BRT actors and stage management were not employed by the Broadway Partnership for the Chicago

production. The LORT production never transferred to a "production contract," as BRT and ***not*** the Broadway Partnership was the sole producer of the BRT production and employer of the BRT cast. In addition, the Broadway Partnership never used the BRT production in lieu of a "rehearsal" or an "out-of-town tryout" under the CBA. The rehearsal process under the sole auspices of the Broadway Partnership took place during both a two-week workshop in August 2019 in New York and during the first seven weeks in Chicago. The out-of-town tryout of the Musical was clearly the Chicago (Phase 2) production.

98. Notwithstanding that the Broadway Partnership was under no obligation to hire the cast or stage management from the BRT production for Chicago or Broadway, Drabinsky, as lead creative producer, took every measure to encourage the Broadway Partnership to employ all appropriate members of the BRT production.

99. In connection therewith, seven actors (T.A.C., D.H., E.L., C.M.R., M.T., M.U. and B.W.) were not employed by the Broadway Partnership. **Exhibit 17**.

100. Further, three stage managers (C.M., B.N. and C.W.) were not employed because they had no experience with a first-class, large scale musical production, most importantly, interfacing with stage crew members from the major unions in Chicago and New York. **Exhibit 17**.

101. Further, prior to the BRT production, two members of the BRT cast (actors B.R. and C.S.) who were not employed by the Broadway Partnership, had

already negotiated and agreed to a buyout if they were not employed for Broadway or any other earlier first-class or large-scale production. **Exhibit 17**.

102. Further, a member of the deck crew (K.S.) was not within AEA jurisdiction as she was a non-member of AEA. **Exhibit 17**.

103. Further, a member of the BRT cast (B.W.), was offered a contract for Chicago and Broadway but he refused the offer as he joined the Broadway production of *Ain't Too Proud*, which reopened earlier than the scheduled Broadway opening of the Musical. After *Ain't Too Proud* prematurely closed, the Broadway Partnership, at Drabinsky's urging, immediately asked B.W. to become a member of the Cast for Broadway. On February 9, 2022, B.W. concluded an agreement with the Broadway Partnership. **Exhibit 17**.

104. Finally, a member of the BRT cast (C.R.), stated he would be leaving the Musical after the BRT production because of his artistic differences with the creative team. Thus, he had no intention of ever continuing with the Musical wherever or whenever it was produced. **Exhibit 17**.

105. In furtherance of its fabricated claim, on January 28, 2022, AEA submitted a grievance demanding "Confirmation of offers/buyouts to the applicable actors and stage managers from the Berkeley Rep LORT production."

Appendix F

AEA Refuses to Release The Chicago Bond

106. On or about August 24, 2021, prior to the first rehearsal in Chicago, AEA entered into a security agreement ("Security Agreement") with the Broadway Partnership wherein the Broadway Partnership posted a bond in favor of AEA in the amount of $270,667.00 as security (the "Chicago Bond") to be liquidated by AEA in whole or in part, in the event of a breach by the Broadway Partnership of any material term of the CBA or any other relevant agreement governing members of AEA engaged by the Broadway Partnership for the Chicago (Phase 2) production. **Exhibit 18**.

107. The Bond represented two weeks of salary, plus benefits, for all AEA members engaged by the Broadway Partnership.

108. After the completion of all Chicago performances, AEA wrongfully refused to return the Chicago Bond to the Broadway Partnership on a timely basis. AEA's refusal to return the Chicago Bond strained the available working capital of the Musical.

109. Further, AEA, in breach of its contractual and fiduciary duties, egregiously refused to release any portion of the Chicago Bond to the Broadway Partnership months after the completion of the Chicago engagement and notwithstanding that the value of any legitimate default claimed by AEA was far less than the amount of the Chicago Bond.

110. With the second phase of the Musical complete, the Cast and creative team made final preproduction preparations to debut on Broadway with the first preview of the Musical scheduled for February 22, 2022.

Paradise Square Production Services Inc. ("PSPSI") Provides a New Bond For Broadway

111. Independent of the Chicago Bond, pursuant to paragraph 65 of the CBA, the Musical was obligated to provide a bond in connection with the Broadway production (the "New York Bond").

112. On or about February 3, 2022, without the Broadway Partnership having received the return of the Chicago Bond, AEA entered into a second security agreement, this time with PSPSI. PSPSI provided a new bond of $299,711 to be liquidated by AEA in whole or in part, in the event of a breach by PSPSI of any material term of the CBA or any other relevant agreement governing members of AEA engaged by the PSPSI. **Exhibit 19**.

113. The amount of the New York Bond consisted of two weeks salary plus benefits for all AEA members involved in the production of Paradise Square on Broadway. In total, AEA held bonds totaling $570,378 as of the commencement of rehearsals of the Cast for Broadway.

114. On March 8, 2022, the GM requested from AEA the return of the Chicago Bond citing "the inappropriate request of Equity for additional payments for certain

actors and stage management participating in the Berkeley production . . . in lieu of being offered the opportunity to participate in the Chicago or Broadway productions." **Exhibit 17**.

115. To date, in further breach of its contractual and fiduciary duties, AEA has refused to release all or any portion of the New York Bond and the balance due the Broadway Partnership under the Chicago Bond.

The New York Production (Phase 3)

116. Notwithstanding the continuing production difficulties posed by COVID and the ongoing wrongful conduct of AEA as aforesaid, the Musical forged ahead with preproduction activities and rehearsals for Broadway, undertaking strict safety measures with its entire final Chicago cast intact (with the exception of J.H.).

117. The Musical was originally scheduled to commence previews at the Barrymore Theatre on February 22, 2022. In the weeks leading up to that date, the country continued to experience a dramatic surge in COVID cases as a result of the ubiquitous Omicron variant. On January 21, 2022, the New York Times reported 720,000 new cases a day nationally. **Exhibit 20** ("Especially after this wave, the level of exhaustion in New York City cannot be exaggerated, and the level of numbness is quite significant," said Mark D. Levine, Manhattan's borough president."); ("more Americans with the virus are hospitalized than at any other point of the pandemic").

118. Out of concern for the safety of the Cast, creative team, crew and musicians, Drabinsky in conjunction with the GM and the approval of the Shubert Organization (the landlord of the Barrymore Theatre), delayed the Musical's rehearsals and tech schedule. The commencement of previews was moved from February 22, 2022, to March 15, 2022. The press opening was moved from March 20, 2022, to April 3, 2022.

119. As a result of the rescheduling, approximately $500,000 of advance ticket sales were refunded, and significant additional pre-productions costs were incurred.

AEA Orders an Illegal Work Stoppage for the Cast

120. Remarkably, in the face of these developments, AEA once again attempted to derail the Musical when it caused an illegal work stoppage, within the first two weeks of Broadway rehearsals. Its actions, which were either intentional or negligent, demoralized the Cast and resulted in the publication of widespread negative press coverage.

121. On February 20, 2022, AEA knowingly submitted a spurious claim to the Broadway League against PSPSI, informing it of various alleged grievances including that the Cast had not received "contracts in whole, or contracts reflecting terms and conditions different than agreed to,[9] as well as [AEA] not having received the employer's

9. It is not uncommon because of various exigencies, including the delay or availability of agents and/or actors to review new

anti-harassment and antidiscrimination policy" for the Musical. **Exhibit 21**.

122. The February 20th letter of AEA was unquestionably sent in the utmost bad faith. First, the Cast had been under binding contracts with the Broadway Partnership since April and May of the prior year and the Cast was being paid pursuant to those contracts. Thus, the claim that the Cast never received contracts or were operating under different terms was baseless.

123. Any delay identified in the February 20th letter was caused by certain members of the Cast attempting to renegotiate their existing binding contracts with the Broadway Partnership. While the Broadway Partnership had no obligation to do so, Drabinsky and the GM were prepared to gratuitously assist in the alleged needs of the Cast. They urged the Broadway Partnership to agree to most of the revisions requested by certain members of the Cast without any additional consideration. By 11:30pm on the evening of February 20, 2022, all Broadway contracts for the Cast were distributed to the Cast or their agents.

124. Further, an anti-harassment policy established by the Broadway Partnership was provided to AEA on September 13, 2021, in Chicago. **Exhibit 22**. Only an update of the contact information for the new HR individual and other administrative staff engaged for Broadway was

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documents containing the wording of revised engagement terms, for actors to commence rehearsals or even performances of a Broadway musical without final binding Equity agreements being executed with all members of the cast.

required to be made to the policy distributed in Chicago. A revised anti-harassment policy for Broadway was, in fact, provided to AEA on February 20, 2022.

125. Based on the false pretext that PSPSI engaged in "flagrant and willful violations" of AEA's Rules, AEA instructed its members to stop working effective the following day, February 21, 2022 **Exhibit 21**, notwithstanding that the Cast was only at the end of the first week of rehearsals and had an absolute contractual obligation to attend rehearsals on February 21, 2022.

126. AEA ordered the Cast to meet with it "to determine how to move forward" instead of attending rehearsals on February 21, 2022. **Exhibit 21**. The Broadway League immediately notified AEA that its members "do not have the right to refuse to work." **Exhibit 23**.

127. Notwithstanding the contractual obligations of the Cast to PSPSI and the Broadway League's sternly written notification to AEA, the Cast, at the wrongful direction of AEA, did not attend rehearsal on February 21, 2022.

128. Enraged with AEA's mandate to its members, the Broadway League, on February 22, 2022, notified AEA that the Cast would not be paid for the day as a result of the illegal work stoppage on February 21, 2022, as condoned and declared by AEA. **Exhibit 24**.

129. In its efforts to continuously undermine the Musical and Drabinsky, and stir up further discontent amongst the Cast, on February 24, 2022, AEA filed a new grievance for non-payment of the Cast during the February 21, 2022, work stoppage ***that AEA had illegally ordered***. **Exhibit 25** (Feb. 24, 2022, email from D. Gal at AEA to J. Lacks at the League).

130. AEA's unquestionable bad faith in demanding an illegal work stoppage and further, demanding payment for the Cast for the work stoppage it ordered, was all revealed in a tweet by L.S., a member of the Cast, subsequent to the closing of the Musical:

> Ooooh shit, also forgot... there was a day during rehearsals where @actorsequity told us all NOT to report to work.... So we didn't. We were then docked pay for that missed day, unbeknownst to us.... Because @broadwayleague reminded them that our contracts have a "NO STRIKE" clause and we breached our contract. 4 months later Equity finally repaid us the money we'd been deducted by PSquare.

131. AEA has never disclosed to either the Broadway Partnership or PSPSI the source of the funds used to pay the Cast for the work stoppage. It is well expected that those monies wrongfully came from the balance of the two bonds that AEA continues to hold and refuses to release to the Broadway Partnership and PSPSI.

Appendix F

The Fallout From AEA's Work Stoppage Causes Severely Harmful Press Coverage for Drabinsky

132. On February 25, 2022, the Broadway League filed its grievance against AEA for ordering the Cast to refuse to rehearse in violation of the "No Lockout" provision (par. 42) and the "Duties of Actors" provisions (par. 25) of the CBA. **Exhibit 26**.

133. AEA's earlier decision that week to instruct the Cast to stop working, as AEA had every reason to expect, resulted in widespread negative press and detrimental social media commentary against Drabinsky, including a blistering article published in *The New York Post* on February 24, 2022, titled "Broadway's '*Paradise Square*' is a 'nightmare' behind the scenes. **Exhibit 27.**

134. In the article, The *New* York *Post* reported that "[t]he cast of the new Broadway musical '*Paradise Square*' was instructed by their union, [AEA], not to show up to rehearsal on Monday" (i.e., on February 21, 2022) and that as a result, "[t]he cast members were freaked out," so much so that "a bunch of them started calling their agents asking what to do." **Exhibit 27**.

135. The article stated: a.) "Garth is working overtime to make sure this does not get to the media"; b.) "Sounds about right. Drabinsky is Broadway's real-life Max Bialystock"; c.) "The Canadian crook was only allowed to cross the border into the United States again in 2019 after charges here were dismissed with prejudice because he served time in Canada"; d.) "*Paradise* was set to be

the jailbird's big return after 20 years away, but the new musical at the Ethel Barrymore Theatre is riddled with backstage drama and hemorrhaging money"; e.) "With Garth," a source said, "it's always an ocean of red ink"; f.) "Ticket-buyers there (Chicago) were cooler to the show than Lake Michigan in December"; g.) "Drabinsky, a quick-tempered bully"; h.) "The source added the experience has been "a nightmare" for the company"; i). "Still, it's Drabinsky and his team who have made "Paradise" a living hell."

136. The *New York Post* article caused havoc for the Musical and Drabinsky. The article was reprinted by The Broadway Briefing and republished on myriad internet and social media outlets. It gravely impacted morale among the Cast and creative team, which was still three weeks from the first preview. Drabinsky received a barrage of communications from his co-producers querying the legitimacy of the issues raised in the article. As a direct result of AEA's conduct reflected in the New York Post article, creditors and suppliers of services began to question the adequacy of the capitalization of the Musical and trade terms with vendors became more onerous. All of this reporting had its sole genesis in the illegal work stoppage ordered by AEA, which AEA knew or ought to have known would have resulted from its illegal activity and ongoing disparagement of Drabinsky.

Drabinsky Attempts to Unify the Cast Once More and is Accused of Manipulation

137. On March 1, 2022, Drabinsky called another meeting to unify and help ease the emotional stress of the

Cast, and to introduce the Musical's new Equity, Diversity and Inclusion ("EDI") representative for Broadway, N.S.

138. Despite never being precluded from attending rehearsals or Cast meetings, AEA was invited to specifically attend both the March 1st rehearsal and the meeting of the Cast called by Drabinsky.

139. At the March 1st meeting, Drabinsky once more reaffirmed to the Cast and creative team his unequivocal commitment to the Musical and that his dedication to the Musical, the Cast, and the creative team was steadfast. He explained how he had endured serious health setbacks during the early development of the Musical. In particular, in March 2015 he had been diagnosed with Stage 4 melanoma prior to one of the workshops for the Musical. Drabinsky began immunotherapy sessions in May 2015 and shortly thereafter suffered the side effects of severe colitis that brought him close to death. Drabinsky was declared to be in full remission by the summer of 2016.

140. Drabinsky received overwhelming support in writing from several of the Cast and creative team including one of the principals of the Cast and a highly respected Broadway veteran, C.K., who in response to the meeting wrote:

> Hi Garth, I wanted to say thank you for the other day. I can see the huge amount of care and passion you have for this beautiful show, our industry and our company. You've put in so many hours and so much work through very

difficult circumstances. I just wanted to tell you that.

Exhibit 28.

141. However, shockingly, during the meeting, the feedback from certain members of the Cast, arising directly from AEA's actions to disparage Drabinsky, proved to be sharply different. In the wake of AEA's previous disparaging statement of Drabinsky and its call for the work stoppage and widespread negative press resulting therefrom, certain members of the Cast surprisingly accused Drabinsky of trying to manipulate them, while others abruptly changed the subject of the earnest discussion to focus on their own selfish needs. AEA remained inexplicably and dismissively silent during the meeting, refusing to intercede in support of the good faith intentions of Drabinsky. Their silence sent a message of tacit approval to the Cast of the unprofessional and disrespectful behavior from these individuals.

Paradise Square Opens on April 3 and Immediately Shuts Down Because of COVID

142. *Paradise Square's* press opening at the Barrymore Theatre was on April 3, 2022.

143. In the three preview weeks prior to the press opening, the Musical received thousands of positive social media commentaries. Weekly box office sales continued to build. The Musical was poised for sustained box office growth.

144. Prior to the press opening, there had been only one case of COVID amongst the Cast despite its rampant presence in New York City at the time. The absence of cases amongst the Cast, creative team, crew and musicians is further evidence of the rigorous measures Drabinsky took to protect them. Drabinsky had insisted on imposing more stringent COVID testing protocols than required by the CDC or AEA. However, on April 7, 2022, Drabinsky and the GM learned that several company members were in breach of their contracts by not being "fully vaccinated" as that term is defined in their contracts, i.e., "Fully vaccinated includes boosters and applicable additional boosters if available". Those members of the Cast in breach of this contractual provision at the time, included S.D. and H.K.W.

145. In advance of the press opening night, Drabinsky and the GM received myriad requests from the Cast, creative team, crew, musicians, key investors and co-producers for a traditional Broadway opening night party. Drabinsky, fearing a COVID outbreak amongst the Cast, was never in favor of a large gathering to celebrate the press opening night. However, because of the pressure exerted upon him by the February 21st work stoppage and the ensuing negative press and discontent, especially amongst the Cast, Drabinsky acquiesced to an opening night party at Bond 45 in Manhattan, attended by approximately 400 guests.

146. Several days following opening night, 35 members of the Cast, crew and musicians tested positive for COVID. The Musical was forced to shut down for

thirteen consecutive performances beginning April 7, 2022, through April 17, 2022, resulting in a dramatic loss of revenues and marketing momentum. **Exhibit 29**.

147. As a result of the necessity of the COVID shutdown, the production incurred in the last three weeks of April operating losses of $1,250,000. During the closure, the salaries of the Cast as well as the crew and musicians were obligated to be paid. In addition, PSPSI had to again refund advance ticket sales, this time between $500,000 – $650,000. All sales momentum from opening night was completely lost. Drabinsky was hearing that Broadway theater goers believed the Musical would never reopen.

148. The Musical reopened on April 19, 2022. However, the financial damage to the Musical that had occurred, was potentially fatal.

Drabinsky Guides the Musical Through the Awards Season

149. The awards season for Broadway each year, customarily, are the months of May and June. Drabinsky believed, based on his experience in the live theatre industry, that Tony Award nominations, Tony Award wins and a memorable Tony Award televised performance would salvage the Musical by propelling ticket sales. In mid-April 2022, Drabinsky recommended to the Musical's lead investors that it would be propitious to increase the maximum capitalization in the Broadway Partnership from $13.5 million to $15 million or lend funds to the Broadway Partnership to sustain the Musical

during the weeks following the 13 consecutive cancelled performances.

150. Despite insurmountable odds and the multiple issues confronting the Musical, *Paradise Square* was nominated for ten Tony Awards namely, Best Musical, Best Book of a Musical, Best Original Score Written for the Theatre, Best Performance by an Actress in a Leading Role in a Musical (Joaquina Kalukango), Best Performance by an Actor in a Featured Role in a Musical (both A.J. Shively and Sidney DuPont), Best Choreographer (Bill T. Jones), Best Scenic Design of a Musical (Allen Moyer), Best Costume Design of a Musical (Toni-Leslie James), and Best Lighting Design of Musical (Donald Holder).

151. The Musical was also nominated for: a.) 7 Outer Critics Circle Awards, including Outstanding New Broadway Musical and won for Outstanding Orchestrations; b.) 4 Drama Desk Awards and won for Outstanding Actress in a Musical and Outstanding Choreography; c.) 4 Chita Rivera Awards and won for Outstanding Choreography in a Broadway Show; and d.) 7 Antonyo Awards, including Best Musical.

152. Ms. Kalukango received a thunderous standing ovation from 6,000 audience members after her performance during the Tony Award Ceremony, which was to many of the invited throng, the highlight of the evening. In accepting her Tony Award for Best Actress in a Musical, Ms. Kalukango personally thanked Drabinsky.[10]

10. See https://www.youtube.com/watch?v=s586sHWaedw.

153. Immediately following the Tony Awards broadcast, which included Ms. Kalukango's indelible performance of the song *Let it Burn*, the Musical experienced a significant surge in ticket sales, but for only two days.

The Wig Dilemma Highlights the Poisoned Environment that AEA Created and Perpetuated

154. *Paradise Square* employed B.G., an experienced hair supervisor, to oversee the various wigs each actor wore during a performance.

155. During the afternoon of June 23, 2022, prior to the evening's performance, B.G. notified the GM that her assistant was out sick, and the "swing" and her sub-swing, either one of whom should have been routinely available, had both taken on other work that night with B.G.'s approval and unbeknownst to the GM. B.G. failed to ensure that either her assistant's swing or sub-swing were available for the June 23rd performance. B.G., at the GM's insistence immediately posted the job opportunity on her union's social media pages but was unable to secure any replacement. As a result, the performance on June 23rd was short-staffed, with no possibility to cover all the required wig changes with the reduced staff.

156. Drabinsky, as the lead creative producer, had no day-to-day responsibility or oversight of the hair department.

157. Still, on June 23rd, prior to that evening's performance, B.G. offered the GM a solution to modify the

Musical's hair/wig requirements for June 23rd by keeping the Cast in one wig for the entire performance. **Exhibit 30**.

158. The GM informed the Cast on a timely basis during that day of B.G.'s recommendation:

> Due to the lack of available personnel in the Hair Department for tonight's show, we have to limit our wigs to only the 'top of show' wigs for each performer. With limited staff, we are unable to accomplish any of the internal wig changes during the show. We understand that this is far from ideal and appreciate your patience as we get through this evening's performance. Thank you for understanding.

Exhibit 31.

159. J.D., a member of the Cast, immediately complained to the GM, "this is unheard of." The GM made it clear to J.D. that "if there are better solutions, I'm sure [B.G.] and Stage Management welcome them with open arms." **Exhibit 32**. There were no other solutions suggested by any member of the Cast.

160. That afternoon, H.K.W., a member of the Cast, two hours before the curtain, called the GM and indicated her refusal to perform on stage, or in fact even show up at the theatre, because there was no one to change her wig during the performance. The GM reached out to Drabinsky to see if someone with his knowledge and experience could help resolve the dilemma.

161. Drabinsky, out of complete frustration and aware that there was no viable alternative plan, called H.K.W. and informed her that her refusal to perform was a breach of her contract and implored her to do the right thing. However, H.K.W. remained adamant and refused to report to work. Once again, AEA, fully aware of the dilemma caused by one of its members, refused to intercede. Further, AEA failed to inform its member H.K.W. that she had the unfettered right to effect her own hair and wig changes, provided no one outside the Hair Department assisted her.

162. Two days later, H.K.W. e-mailed the GM stating:

> Hello, Thursday was another very disappointing time with this *Paradise Square* experience. The gross oversight and lack of sensitivity were a slap in the face to the black women that received an email at the top of this project from Matt and Jennifer [the Hair Designer for the Musical and his assistant], stating it was going to do better and be proactive in caring for black women's hair. Being understaffed is nuanced and not what was expected. I can understand that. However, the lack of contingency plans created by anyone on our behalf is causing me a great deal of pain. I felt supremely unsupported and not thought about. Mostly, I felt a true lack of understanding of the impact it would have on us given the subject matter of this show . . . I am requesting some deep thought goes into having solutions for the black women in the show who

> have to simulate plantation work as SLAVES if we are understaffed in the near future . . . and understand why wearing the top of the show wigs is simply not an option for us. Do better.

Exhibit 33.

163. B.G. and the Hair and Makeup Union repeatedly failed in their attempts at finding a suitable person of color to interface with the Cast.

164. In a further response to the wig department dilemma and in another decisive act in support of the needs of the Black American members of the Cast, Drabinsky and the GM promptly hired a new, highly skilled Black American Hair Supervisor, G.B.

Drabinsky Navigates Extortion and Other Breaches by Members of the Cast

165. AEA, by disseminating that Drabinsky created a hostile work environment, caused such a contaminated atmosphere amongst the Cast that Drabinsky and the GM were continuously putting out fires caused by AEA. The negative and false branding of Drabinsky by AEA provided members of the Cast with an escape hatch to illegally avoid their contractual obligations to PSPSI and the Broadway Partnership without any consequence from AEA.

166. First, K.B.W., a swing and assistant dance captain, had a one-year agreement that allowed her

to leave the Musical only if she was offered a role in a "qualifying" production. **Exhibit 34**. Notwithstanding the specific language of her agreement, on June 22, 2022, K.B.W. informed PSPSI that she was quitting the production on four days' notice without being offered a role in a "qualifying" production. In her termination notice, K.B.W. specifically cited the allegations perpetuated by AEA that Drabinsky was "unsafe" to work with and the "hostile work environment" as the reasons for her quitting. K.B.W. also stated: "in addition to the hostile work environment . . . the lead producer's behavior has caused me trauma." **Exhibit 35.**

167. K.B.W.'s cited reasons were completely fabricated. Six days earlier, K.B.W. stated the following in an email to Drabinsky:

> Congratulations on the win on Sunday night! Paradise Square certainly won the night, no matter how many trophies were won.
>
> This show is incredibly special, as you know, and it is an honor to be part of it. Your dedication to making it happen is apparent, and I thank you for the opportunity.

Exhibit 36. Clearly, there was no 'hostile work environment" or "trauma" revealed by K.B.W. She then went on to state:

> I would like to offer a trade. If you grant me this leave of absence, I will drop the issue of payment for the breach of contract and ask

> AEA to also drop the grievance they have filed on my behalf."

K.B.W then suggested that Drabinsky consider hiring her friend:

> . . . A friend and 'Broadway Baby,' [S.M.], has actually approached me asking if we are looking for vacation swings, and she would be perfect.

Exhibit 36.

168. K.B.W.'s claim of a contractual breach was wrong because all members of the Cast were not asked to perform at the Tony Awards, the only case when PSPSI was obligated to also ask K.B.W. to perform. The suggestion that she was subjected to a hostile work environment and "trauma" at the hands of Drabinsky was disingenuous given her statement that her "friend and 'Broadway Baby' . . . would be perfect" to replace K.B.W. in the cast.[11] She

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11. From the date of the load-in of the Musical into the Barrymore Theatre (on or about February 6, 2022) until the Musical's closing on July 17, 2022, Drabinsky never attended the backstage of the Barrymore Theatre at any time, nor appeared on the stage of the Barrymore Theatre, to interface with any Cast member.

Subsequent to the final dress rehearsal of the Musical on March 14, 2022 through the next four months, Drabinsky had very limited interaction with the Cast. Between March 15, 2022 and April 3, 2022 Drabinsky never attended rehearsals of the Musical other than to view and comment on any newly written music (including orchestrations) or book alteration, or any new staging, choreography, or lighting modification. Subsequent to April 17, 2022 (the end of the 13-performance COVID hiatus), Drabinsky never attended a

was only using AEA's deplorable defamatory accusations as a basis to pressure Drabinsky and circumvent her own contractual obligations.

169. In another instance during the same time period, R.V., the production stage manager, for reasons attributable to failures in his performance, left the Musical without providing the requisite four-week notice required under his contract. In another stunning display of unprofessionalism, R.V. left the Musical literally between a matinee and evening performance on Wednesday, June 29, 2022. **Exhibit 37**.

170. R.V., like K.B.W., cited AEA's malicious allegations against Drabinsky that he was "unsafe" for the workplace. Id. ("I understand that I have not given the contractually obligated 4 weeks' notice for resignation but I have done so because I have been under extreme duress. The show is and has been unethically under resourced. I was promised stage time and work calls after the Tony's and received neither. I could not even rehearse [our] understudies in a rehearsal studio last week due to lack of funds. I have been treated abusively by Garth Drabinsky for situations beyond my control."). R.V.'s employment with

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rehearsal of the Cast other than 3 or 4 Tony Award staging rehearsals at the Barrymore or rehearsal hall. Drabinsky also attended the recording of the cast album, when he was essentially segregated from the Cast in the soundproof mixing studio.

During the entire period of September 13, 2021 through July 17, 2022, Drabinsky never socialized alone with any member of the Cast, other than one lunch and one dinner with the Musical's leading actress J.K.

the Musical began on March 15, 2022, initially as assistant stage manager. Subsequently, on May 24, 2022, R.V. was appointed production stage manager by the GM with Drabinsky's approval. During his time as production stage manager, R.V. was responsible for issuing over 40 stage management performance reports. Consistently, these reports only glowed about the Musical without a single element of derision referenced against the Musical or Drabinsky. **Exhibit 38**. Furthermore, most of the understudies had been substantially rehearsed in Chicago. Understudy rehearsals in New York were typically held during a 4-hour call on Thursday and Friday afternoons each week. These rehearsal windows were also used for Tony Award staging rehearsals of the Tony Award performance selection during the month of May and early June. Beginning the week of the Tony Award Nominations, understudy rehearsals were held on Thursday, May 12 and Friday, May 13, as well as Thursday, May 19. Tony Award staging rehearsals were held on Friday, May 20, Tuesday, May 24, and Thursday, May 26. No rehearsals were scheduled for Friday, May 27, as the weekly limit of rehearsal hours had been reached. Tony Award staging rehearsals continued on Thursday, June 2 and Friday, June 3, as well as Thursday, June 9 and Friday, June 10. No rehearsals were scheduled for the week following the Tony Awards telecast to prevent any possible overtaxing the Cast or endangering their health and safety. On Tuesday, June 21 a work call was scheduled for nearly 9 hours involving many of the stage crew in order to maintain the safe working conditions of the set. No rehearsal was scheduled for Thursday, June 23, the day of the wig debacle referred to herein, and because the male

principal lead in the Musical called in sick one-half hour before the call time of the performance, necessitating an emergency put-in rehearsal for his alternate understudy. The director's designated understudy was unavailable due to illness. No rehearsal was scheduled for Friday, June 24 to protect against further spread of illness amongst the Cast. On Wednesday, June 29, R.V. quit the company. A full schedule of understudy rehearsals recommenced on Friday, July 1 and continued until the close of the Musical.

171. In another display of unethical and illegal conduct, G.C. and J.O. sought to extort from the GM $11,200 on account of past due royalties before the Friday night performance of the closing weekend of the Musical. On July 15, 2022, at 4:00 pm, G.C. arrived unannounced at the GM's office and asserted that if he and J.O. did not immediately receive a wire initiated by the GM in the amount of $11,200, the Cast would not perform the choreography of G.C. and J.O. for the closing weekend's four, nearly sold-out performances. **Exhibit 39** ("being held hostage by G. C. demanding payment or his choreography being pulled from show tonight . . . Help. I can't call Garth with G.C. here, don't know what to do. Show may get cancelled."). The GM was compelled to write G.C. and J.O. checks totaling $10,575. Id. ("I [am] shaken by this hostile interaction, as I've never before experienced such blatant extortion and reckless disregard for union and legal protocols.").[12]

12. The nearly 2-year COVID pandemic caused immeasurable strain on the supply of goods and services throughout North America, in particular manufactured goods emanating from Europe and the Far East. One of the critical components of the costuming of

172. AEA member K.M. was engaged by the Broadway Partnership in June 2021 as the Musical's Production Stage Manager for the Chicago engagement and initially for Broadway. Her principal responsibilities were to facilitate the rehearsal and tech process of the Musical in accordance with the approval of Drabinsky, the director, and the GM, and commencing with the first performance in each city, to call the cues of each show, maintain the artistic integrity of the Musical as established by the director, and rehearse understudies, swings and actor replacements. At no time did the GM or Drabinsky insist that K.M. violate any CBA provision.

173. Prior to K.M. being hired as production stage manager, she was initially interviewed on a Zoom call

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the Musical was the shoes worn by each actor to accommodate the demanding dynamics of the choreography. More particularly, the shoes worn by the male Irish step dancers required customized metal plates and arch support for the tap dance sequences. To furnish replacements for this specialized costume requirement, Nadine Hettel (Wardrobe Supervisor) and Michael Magaraci (Associate Costume Designer) sought out numerous possible suppliers throughout North America. On December 28, 2021, the GM and Drabinsky were informed that a cobbler in Chatsworth, California could make shoes not only for the Irish step dancers, but for the rest of the Cast if necessary, for a cost of between $500-$800 per pair. After confirming that the Musical's customary suppliers were still unable to satisfy its requirements, an approval was given by the GM for Hettel to immediately contract with the new California-based supplier. Repeatedly, the GM was informed by Hettel that G.C. was aggressively abusive towards her and the cobblers/suppliers, who are artisans in the theatrical industry and who provided invaluable solutions amidst the difficult circumstance that the Musical as well as the industry, found itself in 2021 and 2022.

which included the GM, the Musical's Associate Producer and Resident Director, Anne Allan, and Drabinsky. Ms. Allan had become a close and cherished colleague of Drabinsky beginning in 1988 with his Toronto production of Phantom of the Opera. Subsequent to K.M.'s engagement, Allan continued to reach out to K.M. in an effort to pass along her creative and working notes, but K.M. repeatedly refused to be briefed by Allan. K.M. was a loner and was determined to set up her own fiefdom of control—her own power base—selectively choosing with whom she would collaborate. From the first days of rehearsal in New York City in mid-February 2022, K.M. often obnoxiously and irrationally criticized the choice of rehearsal room and its layout (notwithstanding that the Musical was fortunate to secure any midtown rehearsal space because of the surge in demand for rehearsal space created by the numerous plays and musicals either opening or reopening on Broadway and rehearsing at the same time). K.M. also inappropriately and on a misinformed basis questioned the payment schedule for suppliers, especially since her involvement in financial matters was extremely limited and outside the scope of her responsibilities. Both in Chicago and New York, K.M. questioned Allan and the GM and other members of the creative team why Drabinsky, the lead creative producer, was in the rehearsal room daily, and even why a "white man" was critiquing choreography featuring the Black American members of the Cast (oblivious to the fact that Drabinsky was the same "white man" that produced the Tony Award Best Musical, *Fosse*). K.M. was obsessed and continued to manifest an uncomfortable level of apparent paranoia about the creative control and ostensible creative authority of Drabinsky.

K.M. continued to exemplify an uncomfortable level of paranoia in the estimation of Drabinsky. As a result, Drabinsky instructed Allan and the GM to seek out other possibilities for production stage manager and to begin the interview process. One individual interviewed was the highly recommended Broadway veteran stage manager Matt Stern. Just prior to the final preview performance of the Musical in New York, Drabinsky, Allan and the GM met privately with Stern at Drabinsky's hotel café with the intention of considering Stern as a possible future replacement for K.M. or to serve as production stage manager for one of the future tours or international productions of the Musical. Subsequently, K.M. learned of the Stern meeting, and in front of the creative team and crew members, after a preview performance, exploded disrespectfully uttering harsh criticism against Drabinsky and the GM for participating in the Stern meeting, without her prior notice and approval. Under no circumstances was there any obligation on the part of Drabinsky as lead creative producer or the GM to inform K.M. of the Stern meeting, or any private meeting concerning the staffing of the Musical.

174. On the July 19, 2022, K.M. provided an oral statement to Variety which was published. The statement is yet another example of the poisoned environment established and perpetuated by AEA. It also exemplifies K.M.'s reckless, callous and fabricated conduct. K.M. stated the following:

> The show was never correctly budgeted . . . In my opinion, Garth felt by cutting back on labor,

> he could do the show more cheaply. But all that did was put more pressure on everyone else to make up for his failings. In my opinion, we had to do things in a speed and manner that were not healthy or safe.

175. K.M.'s responsibilities ***never*** included her participation in any material financial element of the production, including the preparation of preproduction and weekly operating budgets and salary negotiations.

176. At no time was K.M. consulted by the GM in the preparation of the load-in or tech budgets for Chicago or Broadway, nor did Drabinsky request or insist that the GM consult with her. K.M. was only consulted on scheduling issues regarding rehearsals and tech, but the final scheduling decisions always remained within the jurisdiction of the GM, with Drabinsky's approval. All schedules were established in accordance with rigorous budget parameters set by the GM.

177. K.M.'s Variety statement went on to declare publicly:

> Sometimes people get behind, but [when that happens], it's not because the producer decided not to pay any overtime for the show. [Garth] wouldn't allow anybody to work past 40 hours in the initial production period because, in my opinion, there were financial concerns, so he kept cutting back on labor.

178. During the load-in and tech periods for both Chicago and Broadway, Drabinsky instructed the GM that the Musical incur as little overtime expense as possible, in order to preserve contingency funds in the case of a COVID shutdown. Nevertheless, substantial overtime, authorized by the GM and approved by Drabinsky, was incurred in Chicago by virtually all departments including music, carpentry, lighting, sound, and projections, in order to maintain the tech schedule.

179. The initial Broadway rehearsal and tech schedule established by the GM was structured having regard to the Musical's seven-week rehearsal and tech period plus five weeks of performances in Chicago. It called for one week of rehearsal (to accommodate any script, music, and choreographic modifications from Chicago) and two weeks of tech. Drabinsky unilaterally decided to extend the rehearsal and tech schedule by one additional week for the health and safety of the Cast.

180. Significantly, in the two weeks of tech in advance of the first preview performance on Broadway, Drabinsky approved the GM's request for over 1,500 hours of overtime for the crew and musicians, the financial equivalent of 20 men and women working 3 additional 40-hour weeks at straight time.

181. A fully costumed dress rehearsal was scheduled for the evening of March 14, 2022. The dress rehearsal was performed to such an exceptional level that a second costumed dress rehearsal scheduled for Tuesday afternoon, March 15th, was cancelled and that time was

used only for polishing certain scenes and transitions prior to the first preview performance. The social media comments after that performance were extraordinary.

182. K.M.'s deleterious statements to Variety are also incongruent with the fact that subsequent to her April 19, 2022 resignation letter from the Musical (with no reasons cited) she voluntarily agreed to return to the production as a substitute stage manager for four performances, in late June 2022.

183. In stark contrast to K.M.'s fabricated statement, K.M.'s first assistant stage manager, L.M., during his contract extension negotiations with the GM recounted his Chicago experience in a February 23, 2022 email to the GM as follows: "I have truly enjoyed my time at Paradise Square and am grateful for the opportunity to work on this terrific show, especially after this pandemic."

184. In summary, AEA's disparaging conduct became a pretext which its members took as a license to repeatedly and conveniently breach their agreements with the Broadway Partnership and PSPSI.

185. On Thursday, June 30, 2022, at 6:00pm at the Barrymore Theatre, the GM called a voluntary meeting of the Cast, hair and wardrobe crew. The meeting also included invited co-producers Sherry Wright and Craig Haffner. Uninvited, but also in attendance, were representatives of the Shubert Organization, house crew, and crew members under Pink contracts. Drabinsky had suggested to the GM to call this meeting in order to

correct the widespread misinformation amongst the Cast being disseminated backstage regarding recent Cast and crew departures, the mishandling of communications, and mismanagement of certain department labor substitutions. Drabinsky was unable to attend as he had already returned to his home in Toronto, earlier that day. The GM also wanted to temporarily quash any rumor regarding the imminent closing of the Musical. At the meeting, the uninvited house head electrician publicly and aggressively questioned the GM as to why supplies had not been promptly delivered to the theatre to safely maintain the production. The GM responded that he had not heard of any safety concerns prior to this meeting, and that it was the crew heads' responsibility to promptly alert the GM of any safety concerns. In fact, no concerns were ever raised in any of the daily performance reports, referred to herein, provided by stage management. The GM went on to state that three days prior to this meeting, Drabinsky had lengthy conversations with the principal officer of PRG (the Musical's major lighting, automation, and scenic supplier) who had unequivocally pledged his commitment to Drabinsky to continue to support the show provided that any new invoice was paid on a timely basis. Moreover, when J.K. directly questioned the house head electrician as to the safety conditions on stage, there was no evidence provided by the house head electrician of any known safety concern. As the meeting was about to conclude, a temporary stage manager reminded the Cast that "they are all part of a union". The Cast left the meeting scoffing at the idea of AEA being of any help to them.

186. During a time when the Musical was faced with financial challenges because of the COVID pandemic, rather than work in concert with Drabinsky and the GM, AEA engaged in cruel, extreme and deleterious conduct to harm the Musical and Drabinsky. AEA's malicious actions toward Drabinsky seriously damaged a leader in the musical theater industry, significantly disabling his future ability to continue to creatively produce the Musical and musical theatre in general, on Broadway and throughout the world.

187. As a result of AEA's conduct which it perpetuated including at a time when the Musical was otherwise being impacted by COVID, the Musical was forced to close on July 17, 2022.

AEA Continues Its Defamation of Drabinsky

188. On its website, AEA describes the "Do Not Work" blacklist as "an additional tool to alert members of Equity or our 4A's sister unions [American Guild of Musical Artists, American Guild of Variety Artists, The Guild of Italian American Actors, and The Screen Actors Guild-American Federation of Television and Radio Artists] to the non-union status of certain employers."[13] It goes on to state: "Unfortunately, there are times when good-faith negotiations between Actors' Equity and employers do not result in an agreement acceptable for union members. Other producers may refuse to negotiate altogether or default on the terms of their agreement."

13. https://www.actorsequity.org/resources/DoNotWork/.

189. Within days of the Musical announcing its closing, in a letter to the Members of Actors' Equity National Council, written on or about July 14, 2022, the Cast recklessly and maliciously alleged numerous untrue, outrageous, and egregious claims against Drabinsky and adopted by AEA. These offensive and falsified claims included:

> "there was one person making all executive decisions surrounding the production"; "it is well known that they are in full control and therefore no action can be taken against them"; "they have withheld benefits and pay . . . and have created an unsafe, toxic, and frequently hostile work environment"; "this person has been dismissive"; "we did not receive our final payment in the form of direct deposit"; "with this person's history of dereliction of payments, this is a massive concern"; "a continued pattern of abuse and neglect that created an unsafe and toxic work environment". **Exhibit 39A**

190. On or about July 14, 2022, AEA placed Drabinsky in first position as a producer on its AEA website's "Do Not Work" page, blacklisting Drabinsky, "including any production where he is acting in *any* producing capacity". **Exhibit 40**. Drabinsky was provided with no prior notice of the issuance of the posting, which was devoid of any specific detail and/or substance supporting the blacklisting. Drabinsky learned of the issuance of the blacklisting by way of an article in The Hollywood Reporter on July 14, 2022, containing the letter referred

to above. AEA did not boycott Drabinsky for failing to agree with the key terms of labor negotiations, such as wages, working hours, or other working conditions; the production company for *Paradise Square*, Paradise Square Broadway Limited Partnership, in fact contracted with AEA pursuant to the terms of the CBA on August 24, 2021. Further, the decision to blacklist Drabinsky had nothing to do with Drabinsky purporting to breach the AEA contract, nor was it because Drabinsky tried to pay members of AEA less than their collectively bargained wages and/or reneged on any other terms in the relevant CBA.

191. AEA's blacklist was not only unjustified, it ***could not*** be applicable to Drabinsky. In connection with the Musical, he was never the employer of any member of AEA nor a party to any contract with them. He was not a member of the Broadway League. Further, as set forth above, Drabinsky was never a principal or partner (or shareholder) of either the Broadway Partnership or PSPSI. In connection with the Musical, he never defaulted on any term of agreement with AEA and has never refused to negotiate with AEA. He was never in charge of the finances for the Musical. Rather, in his sole position as lead creative producer of the Musical, he was regularly consulted by the co-producers and investors.

192. AEA's inclusion of Drabinsky on the "Do Not Work" blacklist is not only unsupportable, but it is contrary to AEA's own terms not to maintain such a "blacklist" at all. AEA's agreement with the Broadway League states:

> The League and Equity both pledge themselves to use their best efforts to prevent blacklisting in the theatre. The opposition to blacklisting is not a controversial issue between the League and Equity. The term "blacklisting" shall be deemed to mean the submission by a Producer to pressure groups and/or the use of private lists published or unpublished of persons not to be employed in theatrical productions. To that end, Equity and the League shall jointly investigate and deal with all complaints of blacklisting in the theatre and take any and all lawful means to correct, remedy and actively resist each and every instance of blacklisting as and when it arises. If a joint investigation is warranted, representatives of the respective parties will meet and adopt rules and regulations which will govern said investigation.

Exhibit 13, p. 16, ¶ 9.

AEA's Blacklist Boycott Harms Competitive Conditions in the Live Theater Industry

193. Blacklisting in the entertainment industry has an appalling and loathsome history in the United States—it has decimated careers, polarized sectors of creative talent, and diminished the output of quality productions. The history is so bleak that AEA's agreement with the Broadway League contains a pledge, as quoted at length above, that they will "use their best efforts to prevent blacklisting in the theatre." Consistent with the effects

of blacklists of the past, when AEA placed Drabinsky on the Blacklist, it severed him from all forms of producing involvement in Professional Productions for the remainder of his life. The Blacklist boycott of Drabinsky goes well beyond a dispute over collectively bargained wages. Under the Blacklist boycott, even if Drabinsky is willing to pay the collectively bargained wages and other terms demanded by AEA in future Professional Productions, he still cannot serve as a producer of any Professional Productions in any capacity, credited or uncredited. The absolute terms of the boycott have effectively driven the price (i.e., wages) Drabinsky must pay for BWY Members to be engaged in a Drabinsky-produced Broadway musical or play to infinity. The same result could occur for any one of more than 60 other producers that AEA has blacklisted. None of them is able to employ or contract any BWY Member nor is able to produce Broadway or other Professional Productions.

194. This harm is exacerbated by AEA's decision to expand and extend its conspiracy to blacklist Drabinsky and other producers from not only working with BWY Members, but also with any member of AEA, AGMA, AGVA, GIAA, and SAG-AFTRA. Thus, the Blacklist extends beyond Professional Productions to include productions in television, radio, concerts, and film, further eliminating any reasonable opportunity for these individuals to produce in any sector of the entertainment industry again with any members of the aforementioned unions.

195. Eliminating producers through a blacklist boycott severely harms the competitive process. Fewer producers means fewer Professional Productions will be created—hence a decrease in output. Further, fewer producers of Professional Productions means less competition between producers, resulting in fewer constraints on price increases affecting ticket buyers and less incentive for producers to achieve higher artistic quality of productions or to innovate, all to the detriment of, and harm to, consumers.

196. Eliminating Drabinsky is particularly harmful to the competitive process because he has been, as discussed above, a leading innovator and catalyst to positive change in the live theater industry. Drabinsky has served as a competitive constraint on other live theater producers and the live theater production process generally, including vertically integrating all phases of live theater production, renovating, restoring and operating state-of-the-art theaters, and restructuring compensation packages for the benefit of BWY Members and other creative talent in the live theater industry. These innovations have been a threat to AEA's stranglehold.

197. Upon information and belief, some members of AEA, and some members of AGMA, AGVA, GIAA, and SAG-AFTRA, are also producers. These producers (who are also actors or at least members of unions representing actors) specifically benefit from the coordinated agreement to blacklist other producers, including Drabinsky, because it eliminates certain competitors they face when they serve as producers of Professional Productions. This

results in less competition for access to Broadway theaters and other live theater venues, less competition for writers, composers, and other creative talent involved in Professional Productions and results in less competition when they are setting ticket prices for their Professional Productions.

198. Neither AEA nor AGMA, AGVA, GIAA, and SAG-AFTRA have any procompetitive justification for blacklisting Drabinsky and other producers. Eliminating live theater producers decreases the quantity of Professional Productions and the decision to continue to blacklist producers of Professional Productions will continue to decrease the quantity of future Professional Productions. The decision to blacklist Drabinsky and other producers harms the competitive process and reduces the quantity of Professional Productions to the detriment of consumers.

Relevant Markets

199. The market for BWY Members is a relevant service market under the antitrust laws. In the event that a hypothetical monopolist who controls all actors and stage managers on Broadway demands a small but significant increase in the wages paid to actors and stage managers participating in Broadway productions, actors and stage managers who are not controlled by the monopolist could not replace the monopolist-controlled actors and stage managers on Broadway to render the wage increase unprofitable. A hypothetical monopolist over the relevant service market could profitably impose the wage increase,

and therefore the market is a relevant service market under the antitrust laws.

200. Broadway productions are those that are produced at 41 specific theaters in New York City, as specified in the Rules and Regulations of the American Theatre Wing's Tony Awards, which may subsequently tour throughout 200 cities across the United States and Canada. Broadway productions are arguably the most prestigious Professional Productions in the world. Broadway productions are: the most publicized; the most sought out by national and international tourists to New York City; comprise the most attractive season ticket packages at non-Broadway theatres throughout North America; and are regularly adapted into other forms of filmed entertainment. All writers, actors, composers, directors, choreographers, scenic, lighting, and sound designers engaged in a Broadway production are typically selected from the most elite of their respective talent pools. No other Professional Productions have greater prominence or perceived quality. Broadway productions also generate the highest ticket prices and revenues.

201. As explained above, Broadway productions can only utilize members of AEA because of the contractual agreements AEA has with The Broadway League, individual theaters, and producers or productions. Thus, if wages for BWY Members were increased, producers bound to the CBA cannot hire non-Equity actors or stage managers to offset the effect of the wage increase. Even if they could hire non-Equity actors or stage managers, there would not likely be a sufficient number of non-Equity

elite actors and stage managers to profitably fill the void left by the BWY Members, whether from film, from non-Equity theater productions, or from other entertainment mediums.

202. North America is the relevant geographic market for BWY Members under the antitrust laws. As stated above, Broadway productions also tour throughout 200 cities in the United States and Canada. Actors and stage managers from all across North America who are also members of AEA travel to New York City to pursue acting and stage management job opportunities for Broadway productions. Subsequently, they may travel extensively across North America with the touring version of the Broadway production.

203. AEA possesses market and monopoly power in both the relevant service market and relevant geographic market. Together, they are the relevant antitrust market. AEA possesses approximately 100% of the relevant antitrust market. Today, approximately 100% of actors and stage managers engaged in Professional Productions on Broadway are members of AEA or are subject to the CBA.

FIRST CAUSE OF ACTION
(Defamation)

204. Drabinsky repeats and realleges each of the preceding paragraphs in the Complaint as if fully set forth herein.

205. The statements by AEA alleged herein constitute defamation, *per se*, as each are false statements made to third parties, causing Drabinsky significant damages.

206. AEA engaged in an intentional campaign of harassment and abuse, publishing numerous untruthful statements about Drabinsky that represented such major misrepresentations of Drabinsky's character, history, activities or beliefs that serious offense may reasonably be expected to be taken by reasonable persons in their position.

207. Further, AEA had knowledge that its statements were false, or acted with reckless disregard as to the falsity of their statements and the false light in which Drabinsky would be placed.

208. These false publications have caused and continue to cause Drabinsky actual and substantial damages.

209. AEA's malicious lies have not only caused Drabinsky economic damages and emotional distress, but have also severely harmed Drabinsky's reputation and image, causing substantial damages.

210. As a result of the foregoing, Drabinsky has been damaged in an amount that exceeds $50,000,000 exclusive of statutory interest, costs, and legal fees.

211. Drabinsky further seeks, and is entitled to, punitive damages, attorneys fees, interest and costs, as a result of AEA's misconduct.

Appendix F

SECOND CAUSE OF ACTION
(Intentional Tort)

212. Drabinsky repeats and realleges each of the preceding paragraphs in the Complaint as if fully set forth herein.

213. AEA, by its outrageous, cruel and extreme conduct, intentionally engaged in a pattern to cause harm to Drabinsky.

214. The intentional misconduct consisted of: a) an intentional campaign of harassment and abuse, publishing untruthful statements about Drabinsky and causing him to sustain serious damages; and b) AEA's posting of Drabinsky on its "Do Not Work" Blacklist, without any prior notice to or request for input from Drabinsky, or any proper evidentiary investigation being made prior to the issuance of the posting, for the purpose of causing him to sustain further serious damages.

215. As a result of the foregoing, Drabinsky has been damaged in an amount that exceeds $50,000,000 exclusive of statutory interest, costs, and legal fees.

216. Drabinsky further seeks, and is entitled to, punitive damages, attorneys fees, interest and costs, as a result of AEA's misconduct.

Appendix F

THIRD CAUSE OF ACTION
(Negligence)

217. Drabinsky repeats and realleges each of the preceding paragraphs in the Complaint as if fully set forth herein.

218. AEA owed Drabinsky, as lead creative producer of the Musical (the production entity of which had contracted with AEA pursuant to the CBA), a duty of care not to denigrate and defame Drabinsky throughout all periods of preproduction in Chicago and Broadway, and throughout the Chicago and Broadway runs of the Musical, as well as its future exploitation. AEA's conduct fell below the standard of care that AEA owed to Drabinsky. AEA knew, or ought to have known, that injury to Drabinsky would result from his inclusion on the Blacklist.

219. AEA, by its reckless actions and statements, conducted itself below the standard of care that an entity of ordinary prudence would have exercised under the same circumstances.

220. Such conduct also consisted of a wrongful campaign of harassment and abuse, publishing untruthful statements about Drabinsky and causing him to sustain serious damages as aforesaid.

221. As a result of the foregoing, Drabinsky has been damaged and continues to be damaged in an amount that exceeds $50,000,000 exclusive of statutory interest, costs, and legal fees.

Appendix F

FOURTH CAUSE OF ACTION
(Violation of Section 1 of the Sherman Act)

222. Drabinsky repeats and realleges each of the preceding paragraphs in the Complaint as if fully set forth herein.

223. AEA's conduct as alleged herein constitutes an unlawful restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

224. Members of AEA are actors and stage managers who are in direct horizontal competition with one another respectively for acting roles and stage management positions in the live theater industry. Members of AEA and actors and performers who are members of other unions, such as AGMA, AGVA, GIAA, and SAG-AFTRA are in direct horizontal competition with one another for roles as actors and positions as stage managers in the entertainment industry.

225. Upon information and belief, some members of AEA also work as producers of Professional Productions, in direct competition with Drabinsky and other producers of Professional Productions.

226. As alleged in this Complaint, AEA and members of AEA dominate and have substantial market power in the relevant antitrust market. This substantial market power in the relevant antitrust market is established by way of contractual agreements amongst AEA and its members, as well as a contractual agreement between

AEA and the Broadway League, individual theatres, producers, and production entities as set forth in the CBA. All producers of Professional Productions on Broadway must engage members of AEA in their productions. These Broadway producers (the customers in this market), including Drabinsky, cannot mount their productions on Broadway without members of AEA being engaged in those productions. Broadway producers (the customers of this market), including Drabinsky, have no alternative other than to engage or cause to engage members of AEA in order to produce a Broadway musical or play.

227. AEA, members of AEA, and unions that represent actors, such as AGMA, AGVA, GIAA, and SAG-AFTRA, and their members, have entered into an unlawful horizontal agreement in the form of a "Do Not Work" Blacklist to boycott Drabinsky. This unlawful horizontal group boycott is evidenced by AEA's "Do Not Work" list which blacklists Drabinsky first on the list, and explicitly mandates members of AEA—as well as the members of AGMA, AGVA, GIAA, and SAG-AFTRA—not to work with Drabinsky, "including any production where he is acting in *any* producing capacity." (emphasis in original).

228. This horizontal boycott agreement to boycott Drabinsky applies to all Professional Productions and productions in television, film and concerts in which Drabinsky is acting in any producing capacity—including all *future* productions. This horizontal agreement among AEA, members of AEA, AGMA, AGVA, GIAA, and SAG-AFTRA and their members (the competitors in this industry) to boycott Drabinsky productions that are

not yet ready to be mounted (and indeed may not yet exist) cannot relate to a labor dispute over the terms and conditions associated with a specific production, as there cannot be an active labor dispute related to a production that does not yet exist.

229. Upon information and belief, if, in a future live theater production, Drabinsky were to operate in any producing capacity, and the wage, hour, and terms of employment offered to members of AEA for that production were in accordance with either the CBA or other applicable collective bargaining agreement, then the "Do Not Work" list would *still* prevent members of AEA, or members of AGMA, AGVA, GIAA, and SAG-AFTRA from working with Drabinsky.

230. Upon information and belief, if, in a future production in the television, film, and concert industries that employs actors or stage managers, Drabinsky were to operate in any producing capacity, and the wage, hour, and terms of employment offered to members of AEA or members of AGMA, AGVA, GIAA, or SAG-AFTRA for that production were in accordance with the CBA or other applicable collective bargaining agreement, then the "Do Not Work" list would *still* prevent those members of AEA, AGMA, AGVA, GIAA, and SAG-AFTRA from working with Drabinsky.

231. The blacklist boycott of Drabinsky occurred subsequent to the July 17, 2022 closing of the Broadway production of *Paradise Square*, which featured only members of AEA in the Cast. However, as set out in this

Complaint, members of *other* unions representing actors, such as AGMA, AGVA, GIAA, and SAG-AFTRA, have by agreement joined the group boycott of Drabinsky. The agreement of the unions outside AEA to boycott Drabinsky cannot be related to an active labor dispute, as Drabinsky was involved only in a single Professional Production on Broadway at the time, and not actively involved in the production of television, film or concerts.

232. This horizontal group boycott is a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

233. This illegal horizontal group boycott effectively prohibits Drabinsky from serving in any producing capacity on any Professional Production or productions in television, film, and concerts that employs members of AEA, or members of AGMA, AGVA, GIAA, and SAG-AFTRA. The blacklist boycott prevents Drabinsky from engaging members of AEA, AGMA, AGVA, GIAA, and SAG-AFTRA *on any terms*. The blacklist boycott therefore harms Drabinsky as a producer who seeks to engage BWY Members in the relevant antitrust market.

234. The boycott also eliminates Drabinsky as a competing producer of productions that employ actors and stage managers, inside and outside the live theater industry including productions in television, film and concerts. The elimination of Drabinsky therefore reduces competition among producers inside and outside the live theater industry, harming audiences (i.e., consumers) of those Professional Productions or other productions in television, film and concerts. The elimination of Drabinsky

as a competing producer is significant given, as alleged herein, that Drabinsky is an innovator in the live theater industry, and the blacklist boycott will prevent audiences from enjoying the benefits of Drabinsky's innovations in the future.

235. As stated above, there are more than 60 producers, in addition to Drabinsky, listed on AEA's blacklist. As with the illegal horizontal group boycott of Drabinsky, AEA has also effectively prohibited these other producers from producing Professional Productions or other productions in television, film and concerts that employ members of AEA, AGMA, AGVA, GIAA, and SAG-AFTRA. AEA's boycott therefore eliminates these other producers as competing producers of Professional Productions or productions in television, film and concerts. The elimination of these other producers therefore reduces competition among producers inside and outside the live theater industry, harming would-be audiences of those productions.

236. If not *per se* unlawful, then the agreement amongst unions representing actors and stage managers to boycott and blacklist Drabinsky unreasonably restrains competition under the rule of reason in violation of Section 1 of the Sherman Act, 15 U.S.C. §1. As alleged in this Complaint, AEA and members of AEA have market power in the relevant antitrust market. As alleged in this Complaint, AEA, members of AEA, and AGMA, AGVA, GIAA, and SAG-AFTRA and their members have agreed with one another in perpetuity to boycott and refuse to work with Drabinsky as a producer of Professional Productions

and productions in television, film and concerts, in any capacity. This unlawful agreement unreasonably uses AEA's and the BWY Members' collective market power to harm Drabinsky as a producer in engaging BWY Members because their boycott prevents Drabinsky from engaging BWY Members *on any terms*, including terms that are equal to or superior to (from the perspective of the BWY Members) the terms collectively bargained for by AEA and The Broadway League and individual theaters, producers and production entities as set forth in the CBA. In addition, this unlawful agreement between the aforementioned unions unreasonably eliminates Drabinsky and other blacklisted producers as competing producers of Professional Productions or productions in television, film and concerts that employ actors and stage managers. The unreasonable elimination of Drabinsky and other blacklisted producers therefore reduces competition among producers inside and outside the live theater industry, reducing output and harming would-be audiences of those productions.

237. AEA's conduct produces no output-enhancing procompetitive benefits. The effect of the boycott, by its terms, is to reduce the number of producers of Professional Productions and productions in television, film and concerts, which places downward pressure on the number of productions available to audiences. Any alleged claim that this horizontal group boycott of Drabinsky and others promotes competition among producers of such productions, is an improper or pretextual justification for their group boycott. AEA had no basis to boycott Drabinsky. Regardless of AEA's purpose for boycotting

Drabinsky, AEA failed to adopt an alternative measure, one less restrictive of competition, compared to the one it chose to implement—a perpetual boycott of all productions (present and future, inside or outside the live theater industry) in which Drabinsky operates as producer.

238. AEA and members of AEA and other related unions' unlawful boycott of Drabinsky as aforesaid occurred within the flow of and substantially affects interstate commerce.

239. As a direct and proximate result of the illegal group boycott, Drabinsky has been injured in his business and property by reason of AEA's violation of Section 1 of the Sherman Act, within the meaning of Section 4 of the Clayton Act, 15 U.S.C. §15. AEA's conduct has irreparably damaged Drabinsky in the form of lost profits, royalties, and fees, and damaged his reputation. Drabinsky is entitled to treble damages, appropriate injunctive relief, including preventing AEA from its ongoing use of the Blacklist against Drabinsky and other similarly situated and exclusionary rules, and attorneys' fees for the violation of Section 1 of the Sherman Act alleged herein.

240. Drabinsky's injuries are of the type that the antitrust laws were designed to prevent and redress, and are a direct result of the unlawful horizontal group boycott as alleged herein.

Appendix F

FIFTH CAUSE OF ACTION
(Violation of Section 2 of the Sherman Act)

241. Drabinsky repeats and realleges each of the preceding paragraphs in the Complaint as if fully set forth herein.

242. AEA's conduct as alleged herein constitutes an unlawful conspiracy to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

243. As alleged in this Complaint, AEA and members of AEA dominate and have monopoly power in the market for BWY Members. Upon information and belief, the collective market share of AEA and its members in the relevant antitrust market approximates 100%. This monopoly power in the relevant antitrust market is established by way of contractual agreements between AEA and its members, as well as between AEA and LORT (League of Resident Theatres), Stock, Small Professional Theatre (SPT), Western Civic Light Opera (WCLO), Dinner Theatre, Theatre for Young Audiences, Live Corporate Communications, Off-Broadway, Chicago and Hollywood Area Theatres, and numerous agreements for developing not-for-profit theatres, and between AEA and the Broadway League, and individual producers and production entities. All producers and production entities of Professional Productions on Broadway must use members of AEA in their Professional Productions on Broadway. They cannot mount their Professional Productions on Broadway or in theaters in most major North American cities without members of AEA

participating in those productions. Producers, like Drabinsky, have no reasonable alternative other than to hire BWY Members for Professional Productions on Broadway.

244. As alleged in this Complaint, AEA, members of AEA, and AGMA, AGVA, GIAA, and SAG-AFTRA and their members have engaged in a conspiracy to boycott Drabinsky and other individuals on its "Do Not Work" Blacklist in perpetuity.

245. Upon information and belief, AEA and members of AEA have acted and continue to act with the specific intent to monopolize the market for BWY Members.

246. AEA's placement of Drabinsky's name on the "Do Not Work" Blacklist and its publication of the "Do Not Work" Blacklist are acts in furtherance of the conspiracy to monopolize and harm Drabinsky as alleged herein.

247. As alleged in this Complaint, AEA, members of AEA, and members of AGMA, AGVA, GIAA, and SAG-AFTRA have agreed with one another in perpetuity to boycott and refuse to work with Drabinsky as a producer of Professional Productions and as a producer of television, film and concerts, in any capacity. This unlawful conspiracy constitutes anticompetitive conduct in violation of Section 2 of the Sherman Act, 15 U.S.C. §2. The unlawful conspiracy uses AEA's members' collective monopoly power to severely harm Drabinsky as a producer (customer in the market) involving BWY Members because the Blacklist boycott prevents Drabinsky from engaging

BWY Members *on any terms*, including terms that are equal to or superior to (from the perspective of the BWY Members) the terms collectively bargained between AEA and LORT (League of Resident Theatres), Stock, Small Professional Theatre (SPT), Western Civic Light Opera (WCLO), Dinner Theatre, Theatre for Young Audiences, Live Corporate Communications, Off-Broadway, Chicago and Hollywood Area Theatres, and numerous agreements for developing not-for-profit theatres, and AEA and The Broadway League, producers and production entities as set forth in the CBA. In addition, this unlawful conspiracy eliminates Drabinsky and other blacklisted producers as competing producers of Professional Productions and productions in television, film and concerts that employ actors and stage managers. This conspiracy to exclude Drabinsky and other blacklisted producers therefore reduces competition among producers inside and outside the live theater industry, by reducing output and harming would-be audiences (consumers) of those productions.

248. The unlawful conspiracy of AEA and members of AEA and other unions representing actors and stage managers and their members to boycott Drabinsky occurred within the flow of and substantially affects interstate commerce.

249. As a direct and proximate result of the illegal conspiracy to monopolize the market for BWY Members, Drabinsky has been injured in his business and property by reason of AEA's violation of Section 2 of the Sherman Act, within the meaning of Section 4 of the Clayton Act, 15 U.S.C. §15. AEA's conduct has irreparably damaged

Drabinsky in the form of lost profits, royalties and fees, and damaged his reputation. Drabinsky is entitled to treble damages, appropriate injunctive relief, including preventing AEA from its ongoing use of its blacklist against Drabinsky and other similarly situated and exclusionary rules, and attorneys' fees for the violation of Section 2 of the Sherman Act alleged herein.

250. Drabinsky's injuries are of the type that antitrust laws were designed to prevent and redress, and are a direct result of the unlawful conspiracy to boycott Drabinsky alleged herein.

WHEREFORE, Drabinsky respectfully requests the relief sought herein, together with any other relief that the Court deems just and proper.

December 13, 2022

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Appendix F

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APPENDIX G — HOLLYWOOD REPORTER ARTICLE

THE *Hollywood* REPORTER

Actors' Equity to Add Producer Garth Drabinsky to "Do Not Work" List After 'Paradise Square' Cast Speaks Out (Exclusive)

Broadway castmembers requested this action after reports of owed payments and benefits, including as recently as Thursday.

BY CAITLIN HUSTON JULY 14, 2022 2:19PM

* * *

"The company of *Paradise Square* has expressed their commitment to this show and want to continue to tell this story through its planned closing on July 17. However, Garth Drabinsky has made it clear that he is unable to uphold the terms of a union contract, so Equity intends to add him to our Do Not Work list immediately afterward," a spokesperson for Actors' Equity tells *THR*.

* * *

Company members were previously told to report to the theater Thursday evening to receive physical checks, in lieu of the direct deposit, sources tell *THR*, but members were concerned about the checks bouncing. The actors and stage managers met with the union Thursday afternoon to decide on next steps before the show's scheduled closure July 17.

Appendix G

Money was then wired to Actors' Equity members Thursday evening and the cast was poised to go on as scheduled. Other members of the production still planned to receive paper checks.

General manager Jeffrey Chrzczon tells *THR* that the production thought it could use the Actors' Equity bond (money the union makes the production set aside in case it defaults its obligations to Equity members) to pay the week's salary, but was not allowed by Equity. Instead, the production had to get funding from one of the co-producers Thursday, Chrzczon says, which caused the delay in payment.

As previously reported, Actors' Equity is taking *Paradise Square* to court to enforce payment of $189,877 in previously unpaid union dues and benefit fund contributions and interest. The union filed a complaint after the production failed to keep up with a payment schedule set up as part of a settlement agreement reached in May, according to court filings.

As detailed in the letter and in the lawsuit, while Drabinsky is listed as the lead producer on the production, he is not the principal of the limited liability company that handles the finances of the show. Drabinsky was convicted of fraud in Canada in 2009 for misstating finances as head of a publicly traded theater company. In 2014, he received full parole in Canada, with the promise that he not be in charge of finances for his projects, according to the *Globe and Mail*.

However, the company members are specifically asking for Drabinsky's placement on the list, saying, "There has been one person making all executive decisions surrounding the production."

This is the second time in recent history that Equity members have advocated for a producer to be added to the list. In summer 2021, about 300 members of the Broadway community marched in New York City to protest producer Scott Rudin and advocate for the union to take further steps against him, following the *THR* exposé detailing allegations of bullying and harassment by the producer. Shortly after the article was published, Rudin said he was stepping away from Broadway producing.

At the time, Equity said it could not add an active member of the Broadway League, which has collective bargaining agreements with the union, to the "Do Not Work" list. The list is primarily used to warn members about nonunion productions, according to the union. Rudin later stepped down from the Broadway League. His name is still not on the list, nor is he currently producing on Broadway.

On the website, Equity describes the "Do Not Work" list as "an additional tool to alert members of Equity or our 4A's sister unions to the non-union status of certain employers." It goes on to say: "Unfortunately, there are times when good-faith negotiations between Actors' Equity and employers do not result in an agreement acceptable for union members. Other producers may refuse to negotiate altogether or default on the terms of their agreement."

Appendix G

According to the court complaint, filed by Equity in early July, *Paradise Square* has paid $224,900 out of an owed $412,807 and now Equity is seeking to enforce payment of the rest.

This follows an incident on Feb. 21, wherein the union had told its members not to report to rehearsal for *Paradise Square* due to a contract dispute with the production. Members returned to work the next day.

United Scenic Artists, Local USA 829, which represents designers on the show, is separately taking the production to court to enforce an arbitration agreement for more than $150,000 in unpaid wages and benefits.

In an email about the show's closing, sent by Drabinsky to the company Wednesday, and confirmed to *THR* by several members who received it, the producer stood by his actions.

"The art of producing is filled with endless choices, the appropriate decision made for the greater good. Compromise is a tool that often must be part of the process. Every producing decision made on *Paradise Square* was to protect the show and to achieve as long a run as possible for all of you to benefit," the email reads.

* * *

Drabinsky's email adds: "I fought the entire time for the company and the production I believed in. I was your champion in the arena, valiantly fighting the fight to

garner the admiration of all those who love musical theater and for all those who care about the sacred institution of Broadway."

The full letter to Actors' Equity from the Paradise Square company is below:

Members of Actors' Equity National Council,

Since work on "Paradise Square" began in Chicago in the fall of 2021, there has been one person making all executive decisions surrounding the production. This person is not the producer of record, but it is well known that they are in full control and therefore no action can be taken against them. They have withheld benefits and pay from many company members, and have created an unsafe, toxic, and frequently hostile work environment. When presented with these concerns from the company, this person has continually been dismissive, defensive, and often abusive.

As has been said about this person, "every day there is a new way to disrespect someone," and today is no different. We did not receive our final payment in the form of direct deposit, and with this producer's history of dereliction of payments, this is a massive concern.

Therefore, due to outstanding payments and benefits, and a continued pattern of abuse and neglect that created an unsafe and toxic work environment, the company of "Paradise Square" call for Garth H. Drabinsky to be placed on the Actors' Equity Do Not Work list, effective July 18th, 2022.

APPENDIX H — RELEVANT STATUTORY PROVISIONS

15 U.S.C. §1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. §2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. §17. Antitrust laws not applicable to labor organizations

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall

be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

29 U.S.C. §52. Statutory restriction of injunctive relief

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place

where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.