UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

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 October, two thousand twenty-six.

PRESENT:

JOSÉ A. CABRANES,
GERARD E. LYNCH,
JOSEPH F. BIANCO,
Circuit Judges.

KARGO CAPITAL INC., KARGO HOLDINGS, LLC, KARGO GLOBAL LLC,

Plaintiffs-Appellants,

v. 26-509

BOAZ COHEN, DAVID DONNELLY, DANIEL KING,

Defendants-Appellees,

NICOLA WALSH,

Defendant.

FOR PLAINTIFFS-APPELLANTS:	WILLIAM E. REYNOLDS, Nixon Peabody LLP, Albany, New York.
FOR DEFENDANTS-APPELLEES:	DAVID G. BURCH (Jennifer J. Hopkins, *on the brief*), Barclay Damon LLP, Syracuse, New York.

Appeal from a judgment of the United States District Court for the Northern District of New York (Anthony J. Brindisi, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court, entered on February 24, 2026, is **VACATED** and the case is **REMANDED** for further proceedings consistent with this order.

Plaintiff-Appellants Kargo Capital Inc., Kargo Holdings, LLC, and Kargo Global LLC (collectively, "Kargo") appeal from the district court's judgment dismissing, under Federal Rule of Civil Procedure 12(b)(6), their complaint alleging breach of contract against Defendants-Appellees Boaz Cohen, David Donnelly, and Daniel King, and seeking a declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. § 2201, among other forms of relief.[1] The lawsuit arises out of Kargo's acquisition of Betapond, an Irish company that provides digital marketing solutions—Defendants are former shareholders and directors of Betapond. In particular, after non-payment of monies owed to Defendants under the Contingent Notes executed by the parties as part of the acquisition, Defendants brought an arbitration proceeding in Ireland seeking to recover those unpaid amounts. The complaint alleges that the initiation of that arbitration in Ireland violated the forum selection clause contained in the parties' Subrogation Agreements,

[1] Kargo filed a notice of voluntary dismissal of the claims against Defendant Nicola Walsh on April 14, 2025, and Walsh is not a party to this appeal.

which were also executed as part of the acquisition and that, according to Kargo, required Defendants' claims to be brought in Albany County, New York. The district court dismissed the complaint, concluding that Kargo failed to allege a plausible breach of contract claim. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision.

BACKGROUND[2]

On October 15, 2021, in connection with Kargo's acquisition of Betapond, Kargo and Defendants entered into three agreements, which are attached to the complaint: a Stock Purchase Agreement ("SPA"), providing for the sale of each of Defendants' Betapond shares to Kargo; Contingent Notes, providing that Kargo would pay each Defendant the value of their respective shares on October 15, 2023; and Subordination Agreements, providing that the Notes are subordinate to Kargo's debt to a senior lender, BankUnited, N.A. ("BankUnited").[3]

The Notes explicitly state that "the indebtedness evidenced by th[e] . . . Note[s] is and shall be subordinated pursuant to the terms of th[e] . . . Subordination Agreement[s]." App'x at 241. The Notes also incorporate several provisions of the SPA, *id.* at 242, including that the Notes "shall . . . be governed by and construed in accordance with the laws of [Ireland]," *id.* at 82, 89; and "any dispute which is not expressly assigned under [the SPA] and/or the Transaction Documents to be otherwise resolved shall be resolved by means of arbitration carried out in Dublin, Ireland under

[2] The following facts are drawn from Kargo's complaint and are assumed to be true for the purposes of this appeal. *Moreira v. Société Générale, S.A.*, 125 F.4th 371, 387 (2d Cir. 2025).

[3] Technically, there is a separate Contingent Note agreement and a separate Subordination Agreement for each Defendant. The agreements relevant to each Defendant are functionally identical, however, so we discuss the Contingent Notes and Subordination Agreements without differentiating among the agreements applicable to each Defendant.

the law of Ireland," *id.* at 82. The Transaction Documents are defined as "[the SPA], the executed forms of each of the Exhibits to [the SPA], the Contingent Notes, the Promissory Notes, the EI Guarantee and all other agreements and instruments executed and delivered by any Party in connection herewith." *Id.* at 102.

The Subordination Agreements provide that Defendants may not sue or pursue Kargo for their Note amounts until 180 days after Defendants send a "Subordinated Debt Default Notice" to BankUnited, informing it of Kargo's nonpayment, unless BankUnited provides written consent or Kargo's senior debt to BankUnited is paid in full. The Subordination Agreements further provide that Kargo, Defendants, and BankUnited "consent to the jurisdiction of any state or federal court located within the county of Albany, State of New York and irrevocably agree[] that all actions or proceedings arising out of or relating to this agreement shall be litigated in such courts." *Id.* at 203 (all caps removed). The Subordination Agreements also state that, "[i]n the event of any conflict between any term, covenant or condition of this Agreement and any term, covenant or condition of any of the Subordinated Debt Documents, the provisions of this Agreement shall control and govern." *Id.* at 202. The "Subordinated Debt Documents" are defined to include the Contingent Notes. *Id.* at 195.

Kargo was unable to make the required payments upon the maturation of the Notes on October 15, 2023. Defendants sent Subordinated Debt Default Notices pursuant to the Subordination Agreements and, in October 2024, initiated an arbitration in Dublin, Ireland.

While the arbitration was ongoing, in March 2025, Kargo commenced the instant action in federal court in the Northern District of New York, alleging breach of contract, and seeking declaratory and other relief based on Defendants' alleged breach of the forum selection clause in the Subrogation Agreements by initiating the arbitration in Ireland, rather than bringing the claims

in Albany County, New York. Defendants moved to dismiss and, in February 2026, the district court granted the motion. *See generally Kargo Cap. Inc. v. Cohen*, No. 25-CV-308, 2026 WL 508000 (N.D.N.Y. Feb. 24, 2026). This appeal followed.[4]

DISCUSSION

"We review *de novo* a district court's grant of a motion to dismiss." *MSP Recovery Claims, Series LLC v. Hereford Ins. Co.*, 66 F.4th 77, 84 (2d Cir. 2023). To avoid dismissal under Rule 12(b)(6), "a complaint must contain 'enough facts to state a claim to relief that is plausible on its face.'" *Biro v. Condé Nast*, 807 F.3d 541, 544 (2d Cir. 2015) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In reviewing the dismissal of a complaint for failure to state a claim, we "accept[] as true the factual allegations in the complaint and draw[] all inferences in the plaintiff's favor." *Id.* Moreover, "[i]t is well established that a pleading is deemed to include any written instrument that is attached to it as an exhibit, or is incorporated in it by reference." *Lynch v. City of New York*, 952 F.3d 67, 79 (2d Cir. 2020) (internal quotation marks and citations omitted).

Under New York law,[5] to plead breach of contract, "the proponent must allege the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and

[4] While this appeal was pending, Kargo advised the Court in a Rule 28(j) letter that the arbitrator in Ireland issued a determination wherein he concluded that he had no jurisdiction with respect to the dispute "about the relevance and[/]or role of the Subordination Agreements in any action taken by [Defendants] in seeking payment of the deferred consideration." Kargo's July 30, 2026 R. 28(j) Ltr. at 14. Defendants filed a letter in response, noting that they "respectfully disagree with [the arbitrator's] decision and intend to pursue an appeal through the Irish courts." Defendants' July 30, 2026 R. 28(j) Ltr. at 1. In any event, that determination by the arbitrator does not affect our analysis in this appeal.

[5] Like the district court, the parties' briefs assume New York law applies in this case, so the Court applies New York law. *See Krumme v. WestPoint Stevens Inc.*, 238 F.3d 133, 138 (2d Cir. 2000) ("The parties' briefs assume that New York law controls, and such implied consent . . . is sufficient to establish choice of law." (internal quotation marks and citation omitted)).

resulting damages." *Second Source Funding, LLC v. Yellowstone Cap., LLC*, 144 A.D.3d 445, 445–46 (1st Dep't 2016). Here, the district court held that Kargo failed to plead a plausible breach of contract claim because its allegations amounted to "mere[] conjecture about a future breach by [D]efendants," and failed to "provide[] [any] factual basis" for the assertion that Defendants "are *currently* in breach of the Subordination Agreements." *Kargo Cap.*, 2026 WL 508000, at *4 (emphasis in original). We disagree.

The complaint alleges that "the [D]efendants agreed to bring any action or proceeding 'arising out of or relating to' [the Subordination Agreements] in a state or federal court located within Albany County, New York," and that, "[b]y commencing the Arbitration in Ireland, a forum over 3,000 miles from Albany County, seeking an order requiring Kargo to make cash payments that would violate the Subordination Agreements, [D]efendants have breached the Subordination Agreements." App'x at 13.

The district court read these allegations too narrowly; Kargo does not complain of a "future breach," *Kargo Cap.*, 2026 WL 508000, at *4, but rather asserts that the initiation of arbitration itself is a *current* breach. In other words, regardless of the ultimate outcome of the arbitration in Ireland, the complaint alleges that forcing Kargo to litigate the parties' dispute in the wrong forum is the breach, and that the breach has already caused harm including, but not limited to, "the costs and expenses of retaining counsel in Ireland and otherwise responding to the Arbitration." App'x at 14. Although the district court held that Kargo had provided no factual basis for a current breach, we conclude that the above-referenced factual allegations are sufficient to state a plausible claim for breach of contract.[6] *See, e.g.*, *Bayerische Landesbank, N.Y. Branch v. Aladdin Cap.*

[6] Indeed, in their motion to dismiss, Defendants did not even argue to the district court that the allegations in support of the breach of contract claim were too conclusory or speculative to state a claim; instead, they asserted that the claim should be dismissed because the contractual dispute at issue was governed not by

Mgmt. LLC, 692 F.3d 42, 64 (2d Cir. 2012) ("[B]reach of contract claims fall under [Federal Rule of Civil Procedure] 8(a), and thus require only a 'short and plain statement of the claim,' so long as the facts alleged and any reasonable inferences that can be drawn in [the plaintiff's] favor give rise to a plausible claim for relief." (quoting Fed. R. Civ. P. 8(a))).[7]

In reaching this conclusion, we have considered Defendants' arguments to the contrary and find them unpersuasive. For example, Defendants suggest that "Kargo's theory [of breach] depends on a contingent chain of events: that arbitration might result in an award requiring payment, and that such payment might conflict with Kargo's obligations under the Subordination Agreements," and therefore, "that is not a present breach, it is speculation about what might occur in the future." Appellees' Br. at 10. However, as noted above, the complaint alleges that the initiation of the arbitration in Ireland is a breach, because it is the wrong forum, even if Kargo ultimately prevails in that arbitration.

Defendants also contend that "Kargo's breach theory fails at the threshold because it identifies no provision of the Subordination Agreements that prohibits Defendants from initiating arbitration." *Id.* at 11. We disagree. The complaint clearly identifies paragraphs 14 and 16 of the Subordination Agreements, with paragraph 16 containing the forum selection clause, as the provisions that have been breached by the initiation of the arbitration in Ireland:

> Paragraphs 14 and 16 of the Subordination Agreements provide that the agreements shall be governed by and construed in accordance with the laws of the State of New

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the forum selection clause in the Subordination Agreement, but rather by the SPA's dispute resolution provision requiring that the dispute be resolved by arbitration in Ireland. *See* App'x at 376 ("Plaintiffs have filed suit in this Court and now seek to avoid arbitration by relying on a separate Subordination Agreement that does not displace the SPA's dispute resolution provision. Plaintiffs' attempt to circumvent their contractual obligation to arbitrate is improper. Accordingly, this action should be dismissed in favor of arbitration.").

[7] The district court also erred in dismissing the request for declaratory relief on the same ground.

> York, and that any action or proceeding "arising out of or relating to" the Subordination Agreements shall be brought in any state or federal court located within Albany County, New York, and that the parties irrevocably consent to the jurisdiction and venue of such courts.

App'x at 10; *see also id.* at 13 (alleging breach of paragraphs 14 and 16).

To be sure, Defendants also continue to maintain that "this dispute arises from Kargo's failure to satisfy its payment obligations under the SPA and Contingent Notes, therefore, the Subordination Agreements' forum clause is never triggered." Appellees' Br. at 12; *see also id.* at 3 ("[T]he dispute is governed by the SPA and Contingent Notes, which require arbitration in Ireland."). However, as discussed *supra*, that was not the basis for the district court's dismissal of the complaint; it never addressed whether the SPA and Contingent Notes, which call for arbitration in Ireland, or the Subordination Agreements, which call for litigation in the state or federal court in Albany County, govern this contractual dispute. Instead, the district court narrowly held that Kargo's allegations in the complaint were too conclusory and speculative to set forth a plausible claim for breach of the forum selection clause in the Subordination Agreements, which we conclude was erroneous. To the extent that Defendants seek to have this Court nevertheless reach their alternative argument that the claim should be dismissed because the Subordination Agreements do not govern this dispute, we decline to do so.[8] Instead, we remand the matter to the district court to consider any such argument in the first instance. *See Dardana*

[8] Our refusal to determine which agreement governs the dispute should not be construed as a finding that the Subordination Agreement is implicated by Defendants' initiation of arbitration in Ireland. *See Wisnouse v. Telsey*, 367 F. Supp. 855, 858 (S.D.N.Y. 1973) (recognizing that subordination does not "deprive" a litigant of the "right of recovery" because the ability "to enforce a judgment is irrelevant to [the] right to a judgment"). While we agree that the district court "missed the factual basis of Kargo's Complaint," Appellants' Br. at 11, we recognize, as did Kargo, that an agreement's application is an issue distinct from whether breach was a temporal inevitability, *see id.* at 15 ("[D]efendants never contested that their bringing of an arbitration in Ireland *would* constitute a breach of the Subordination Agreement forum selection clause if that clause governs the dispute here. (Instead, they argued that the Subordination Agreement clause did not apply.)" (emphasis in original) (citation omitted)).

Ltd. v. Yuganskneftegaz, 317 F.3d 202, 208 (2d Cir. 2003) ("It is this Court's usual practice to allow the district court to address arguments in the first instance.").

* * *

Accordingly, we **VACATE** the judgment of the district court and **REMAND** for further proceedings consistent with this order.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court