

The Neely Complaint and the Fringe's response, made readable

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Changes Made:

In its original form, the Minnesota Fringe Festival's response to Sean Neely's lawsuit is difficult to follow because it's mostly a list of "We agree with paragraph X but we disagree with paragraph Y," so you have to cross-reference it with the complaint to make any sense of it.

Therefore, I have spliced the two documents together in a readable format, where each paragraph of the response immediately follows the corresponding paragraph of the complaint.

The initial complaint (dated March 16, 2016) is in black, while the Fringe's answer (dated April 19, 2016) is in [blue](#).

I have omitted nothing from the main texts except legal definitions of the parties involved and repetitive legalese statements as explained below.

All omissions are paraphrased in [brackets], sometimes with *[italics]*. Some examples that occur frequently:

- "[Defendant denies the allegations contained in paragraph \[#\] of the Complaint](#)" will now read "[\[Fringe denies.\]](#)"
- "[Defendant admits the allegations contained in paragraph \[#\] of the Complaint](#)" will now read "[\[Fringe admits.\]](#)"
- "[\[ibid\]](#)" = same response as for previous paragraph

Several sections seemed overly lengthy, jargony, and irrelevant for casual, non-legal system readers, but in the interests of transparency I did not want to delete them, so instead I kept them in but put them in a smaller font.

There may also be some weird typos resulting from me running text recognition software and not catching the mistakes.

(compiled by Katherine Glover, August 23, 2016)

INTRODUCTION

1. Defendant Minnesota Fringe Festival produces an annual performing arts festival. ("Festival") [\[Fringe admits.\]](#)
2. Various independent performing arts companies submit applications to be part of the Festival, and Defendant selects which companies will participate each year by lottery. [\[Fringe admits the first sentence of this paragraph.\]](#) Defendant regularly markets the Festival as "uncensored" and "uncurated" and claims that whichever companies are selected by lottery, those are the companies that will be in the Festival. The only condition placed on companies is that they must comport with all laws and Festival policies. [\[Fringe denies.\]](#)
3. Plaintiff Sean Neely submitted an application to the 2016 Festival. During the lottery, his show was drawn for inclusion in the 2016 Festival. [\[Fringe admits.\]](#)
4. Mr. Neely submitted a summary of his intended show to Defendant. Soon thereafter, Defendant informed Mr. Neely that it was removing his show from the Festival. Mr. Neely responded that he was willing to do a different show. However, Defendant was unwilling consider any other proposals from Mr. Neely.

[4. In response to paragraph 4 of the Complaint, Defendant admits that it rejected Plaintiff's proposed show, titled "having sex with children my brain," and admits that it was not willing to consider other proposals from Plaintiff.](#)
5. Mr. Neely has, and continues to, follow all laws and Festival policies with his performances and conduct Defendant has never indicated what, if any, specific law or policy that it believes Mr. Neely has violated. [\[Fringe denies.\]](#)
6. Mr. Neely has met all preconditions to participate in the 2016 Festival as his show was drawn in the lottery, and he is not in violation of any law or Festival policy. Because there is no contractual or legal right or obligation for Defendant to exclude Mr. Neely from the 2016 Festival, the decision to exclude Mr. Neely is a subjective one. [\[Fringe denies.\]](#)
7. Therefore, Defendant's decision to exclude Mr. Neely's show is a curatorial decision as to what sort of content will be allowed in the Festival. And Defendant's refusal to allow Mr. Neely to perform in the Festival with a different show (the content of which Defendant has not seen nor requested) where there is no contractual or legal basis for such exclusion is a decision to censor Mr. Neely from the 2016 Festival. [\[Fringe denies.\]](#)
8. Because Defendant is curating content and censoring performers from the 2016 Festival, Defendant's public statements that it is "uncensored" and "uncurated" are false and misleading. Defendant's statements constitute violations of the Minnesota Prevention of Consumer Fraud Act and the Minnesota Uniform Deceptive Trade Practices Act, and has misled the public and performing arts companies. [\[Fringe denies.\]](#)

PARTIES

[9. and 10. just identify Sean Neely and the Minnesota Fringe festival.]

JURISDICTION AND VENUE

11. The jurisdiction of this Court is invoked as violations occurred in the State of Minnesota and involve state law.

11. Defendant admits that Plaintiff seeks to invoke this Court's jurisdiction.

12. This Court has subject matter over this action pursuant to Minn. Stat. §§ 8.01 and 8.31.

12. The allegations contained in paragraph 12 of the Complaint state a legal conclusion to which no response is required.

13. This Court has personal jurisdiction over Defendant because it resides and conducts business in Minnesota and has committed acts in Minnesota causing injury to Plaintiff.

[ibid]

14. Venue in Hennepin county is proper under Minn. Stat. § 542.09 because the cause of action arose, in part, in Hennepin County.

[ibid]

FACTUAL BACKGROUND

15. Defendant Minnesota Fringe Festival produces an annual performing arts festival ("Festival") wherein over the span of eleven days, 170 different performing arts companies present performances to the public. [Fringe admits.]

16. Defendant organizes the Festival by, in part, securing the performance venues, managing ticket sales, providing personnel including light and sound operators, box office agents, and ushers, and providing certain marketing material for both the Festival and for individual shows. In return for organizing the Festival. Defendant requires that participating performing arts companies pay an entrance fee to Defendant. Defendant also retains a percentage of all ticket sales. [Fringe admits.]

17. Defendant also manages the selection of which performing arts companies will be part of the Festival. When the number of performing arts companies that wish to be part of the Festival exceeds the number of available performance slots, Defendant holds a lottery to determine which companies will be included in the Festival. [Fringe admits.]

18. Defendant regularly markets its selection process as "uncensored" and "uncurated". At the time of the filing of this Complaint, the very first message on Defendant's website begins "Uncensored. Uncurated." To the press, Defendant states "No one selects the participating shows. Instead, a lottery determines which of over 500 applicants win production slots in the festival."

18. In response to paragraph 18 of the Complaint, Defendant admits that it has used the words "uncensored" and "uncurated" to describe the Minnesota Fringe Festival. Defendant admits that the last sentence of paragraph 19 contains an accurate quotation. Defendant denies the allegations contained in paragraph 19 to the extent these allegations imply that Defendant's use of the words "uncensored" or "uncurated" deprives Defendant of authority to not permit an applicant's performance at the Festival.

19. In press releases, Defendant regularly states "When a group applies for the Fringe, their application is given a number, which goes on a ping-pong ball, the ping-pong ball goes into a bingo cage, and the rest is left to chance."

19. Defendant admits that paragraph 19 of the Complaint contains an accurate quotation.

20. Defendant requires all performing arts companies that wish to apply to the Festival to agree to a terms and conditions contract. That contract states that "[t]he Company agrees to adhere to the laws of Minnesota, the ordinances of the City in which its performances are presented, and the policies and procedures of the Fringe." The contract also provides that Defendant "reserves the right to remove the Company from festival participation if it is in violation of any terms of this agreement [...]."

20. In response to paragraph 20 of the Complaint, Defendant states that the Minnesota Fringe Festival terms and conditions speak for themselves, and denies the allegations of paragraph 20 to the extent they add to, alter, or misstate those terms and conditions. Defendant admits that it reserves the right to prohibit applicants from Festival participation.

21. Plaintiff Sean Neely, through his performing arts company, has regularly participated in the Festival from 2011 through 2015. [Fringe admits.]

22. On January 14, 2016, Plaintiff Sean Neely applied to participate in 2016 Festival. [Fringe admits except that it says the date was January 13.]

24. On March 2, 2016, Mr. Neely emailed a description of the show he intended to present during the 2016 Festival to Mr. Jeff D. Larson, the Executive Director of the Minnesota Fringe Festival. Mr. Neely's description of his show included the description of the main character as a convicted pedophile and registered sex offender. The character recognizes that what he did was wrong, and he states that he has no desire, intention, or plan to reoffend. Mr. Neely indicated that the show is scripted and entirely fictional, although Mr. Neely would like to describe his show in marketing material as true. Mr. Neely stated in his email to Mr. Larson that the show intends to be "a complicated piece that pushes against the liberal mindscape of sexual acceptance and humanizes real members in each our societies."

24. In response to paragraph 24 of the Complaint, Defendant admits that Plaintiff emailed a description of his proposed show, titled "having sex with children in my brain," to Mr. Jeff Larson on March 2, 2016. Defendant states that the communication speaks for itself, and denies the allegations of paragraph 24 to the extent they add to, alter, or misstate that communication.

25. Within hours of Mr. Neely's email to Mr. Larson. Mr. Larson responded, informing Mr. Neely that the Minnesota Fringe Festival was removing Mr. Neely's show from the 2016 Festival based on the content of his show. Mr. Larson stated this was "because descriptions of sexual fantasies involving children (and anything else you have in mind relating to that) are, depending on the situation, either illegal or enough in a grey area that I can't afford the lawyers

and insurance to protect the festival from liability and keep you out of jail."

25. In response to paragraph 25 of the Complaint, Defendant admits that Mr. Jeff Larson responded to Plaintiff on March 3, 2016. Defendant states that the communication speaks for itself, and denies the allegations of paragraph 25 to the extent they add to, alter, or misstate that communication.

26. Mr. Neely immediately responded, stating "dont kick me out of the festival ill just do another show." After numerous attempts by Mr. Neely to discuss the content of the planned show, or whether new ideas would alleviate Mr. Larson's concerns, Mr. Larson's only response, in its entirety, was "It's done, Sean. There's nothing more to discuss."

26. In response to paragraph 26 of the Complaint, Defendant admits that it engaged in the referenced communications with Plaintiff, and stood by its decision to not permit Plaintiff's participation in the 2016 Minnesota Fringe Festival. Defendant states that the referenced communications speak for themselves, and denies the allegations of paragraph 26 to the extent they add to, alter, or misstate those communications.

27. Defendant and Mr. Larson have thus far refused to provide Mr. Neely with any specificity as to what exact laws and/or Festival policies they believe Mr. Neely has or will violate. They have also refused to explain how the content of a new and different show, content which they have never seen or heard of, would automatically violate any specific laws and/or Festival policies. Nor have they ever alleged that Mr. Neely's conduct was or will be in violation of any specific laws and/or Festival policies. Instead, Mr. Larson and Defendant have only stated that despite being legitimately selected in the lottery, they will not allow Mr. Neely to perform or participate in the 2016 Festival.

27. Defendant denies the allegations contained in paragraph 27 of the complaint.

FIRST CAUSE OF ACTION

Prevention of Consumer Fraud Act - Violations of Minn. Stat. § 325F.69

28. Plaintiff incorporates by reference and realleges all allegations set forth in the proceeding paragraphs.

28. Defendant incorporates and realleges paragraphs 1 through 27 of this Answer.

29. Minnesota Statue § 325F.69, subd. 1 makes it unlawful for any person by use of "any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby." [Fringe admits.]

30. The products and services provided by Defendant are subject to the Minnesota Consumer Fraud Act. The Act defines "merchandise" as, among other things, "any ... wares, goods, ... intangibles, ... or services." Minn. Stat. § 325F.68. The Festival is a ware, good, intangible, or service provided by Defendant to the public and Plaintiff.

30. The allegations contained in paragraph 30 of the Complaint state a legal conclusion to which no response is required. To the extent a response is required, Defendant denies these allegations.

31. Defendant holds itself out as presenting a performing arts festival that is "uncensored" and "uncurated." Defendant intends that both performing arts companies and the public at large believe that the Festival is uncensored and uncurated. Defendant regularly markets its Festival as such to encourage performing arts companies to apply to participate in the Festival (which includes paying Defendant the entrance fee and a percentage of all ticket sales) and to encourage the public to attend performances (which includes paying Defendant for tickets to the shows.) On August 23, 2012 the Festival Director publicly stated:

Our lottery system means that the longtime Fringe favorite has the same odds of getting in as a person who's never done a show before but has always wanted to try; furthermore, once those two companies come into the festival, they both have access to the same level of support - each company gets the same allocation of performance times, they play in the same venues and get equal space in our program and on our website. **We're the only place in the region that offers equal access to fully-staged productions like this, and we're mighty proud of that. Being uncurated is a huge part of what this Fringe is, and I don't see that changing anytime soon.** [NOTE: bold is part of original complaint]

31. In response to paragraph 31 of the Complaint. Defendant admits that it has used the words "uncensored" and "uncurated" to describe the Minnesota Fringe Festival. Defendant also admits that it seeks to encourage participation and attendance for the Minnesota Fringe Festival. Defendant also admits that paragraph 31 accurately quotes from a portion of an August 23, 2012 article. Defendant denies the allegations contained in paragraph 31 of the Complaint to the extent these allegations imply that Defendant's use of the words "uncensored" and "uncurated" deprives Defendant of authority to not permit an applicant's performance at the Festival.

32. The only condition that Defendant places on participation in the Festival is that all participating performing arts companies must comport with all laws and Festival policies. No other conditions are publicly disclosed to Festival applicants, to the public, or to the press.

32. Defendant denies the allegations contained in paragraph 32 of the Complaint.

33. Mr. Neely's performing arts company was selected in the lottery for the 2016 Festival to be a participating performing arts company. Defendant is refusing to allow Mr. Neely to perform, either his intended show, or any other show, in the 2016 Festival. Defendant has refused to state or provide any specific law or Festival policy that Defendant believes Mr. Neely has violated. Defendant has only stated that it is uncomfortable with the subject matter of Mr. Neely's initial show description.

33. In response to paragraph 33 of the Complaint, Defendant admits that Plaintiff was selected in 2016 Minnesota Fringe Festival lottery, and admits that it has decided to not permit Mr. Neely to perform in the 2016 Minnesota Fringe Festival. Defendant denies the allegations contained in the third and fourth sentences of paragraph 33.

34. Mr. Neely is not in violation of any law or Festival policy. In the absence of legitimate grounds to remove Mr. Neely from the Festival, Defendant has simply removed Mr. Neely from the 2016 Festival because it does not want him to be part of the 2016 Festival. Defendant is therefore curating which shows will be part of the 2016 Festival, even when those shows meet all conditions to be entitled a performance slot. [\[Fringe denies.\]](#)

35. Because Defendant has stated that it is unwilling to consider any alternative show proposals from Mr. Neely, Defendant is censoring Mr. Neely from participating in the 2016 Festival, despite the fact that Mr. Neely has met all conditions to be entitled a performance slot. [\[Fringe denies.\]](#)

36. Because the Festival is, in fact, curated, and artists who have been selected in the lottery, and who are in full compliance with laws and Festival policies, are being excluded from the Festival, Defendant's public statements that it is "uncensored" and "uncurated" are demonstrably fraudulent statements. [\[Fringe denies.\]](#)

37. Where, as here, Plaintiff's claims inure to the public benefit as Defendant has misrepresented the nature of its selection process for participation in the Festival, Minnesota's private-attorney general statute, Minn. Stat. § 8.31, subd. 3a, allows individuals who have been injured through a violation of these consumer-protection statutes to bring a civil action and recover damages, together with costs and disbursements, including reasonable attorneys' fees.

[37. The allegations contained in paragraph 37 of the Complaint state a legal conclusion to which no response is required. To the extent a response is required, Defendant denies these allegations.](#)

38. Plaintiff seeks injunctive relief requiring Defendant to cease and desist from making all fraudulent, deceptive, misleading, and false statements, including Defendant's use of the terms "uncensored," "uncurated," or any such like term, in any material intended to market, advertise, or promote the Festival. [\[ibid\]](#)

39. As a result of Defendant's false promises, misrepresentations, or misleading statements, Plaintiff has suffered actual damages because Plaintiff relied on Defendant's fraudulent statements in incurring past and present loss and obligations, monetary and otherwise, related to his continuing participation in the Festival that he would have not incurred otherwise if he knew the Festival to be curated and censored. [\[Fringe denies.\]](#)

40. As a direct, proximate, and foreseeable result of Defendant's violations of the statute, Plaintiff sustained damages. [\[Fringe denies.\]](#)

41. Therefore, Plaintiff prays for relief as set forth below.

[41. Defendant denies that Plaintiff is entitled to relief, as alleged in paragraph 41 of the Complaint.](#)

SECOND CAUSE OF ACTION

Deceptive Trade Practices Act - Violations of Minn. Stat. § 325D.44

42. Plaintiff incorporates by reference and realleges all allegations set forth in the preceding paragraphs.

[42. Defendant incorporates and realleges paragraphs 1 through 41 of this Answer.](#)

43. Minnesota Statutes § 325D.44 subd. 1 provides in part:

A person engages in a deceptive trade practice when, in the course of business, vocation, or occupation, the person: ...

(5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have

43. Defendant admits that paragraph 43 quotes language from Minn. Stat. § 3250.44.

44. By engaging in the conduct described above, Defendant violated and continues to violate Minn. Stat. § 325D.44. [Fringe denies.]

45. Defendant's deceptive trade practices include describing the Festival with the qualities and characteristics "uncensored" and "uncurated." Through the conduct and actions described above, Defendant uses curatorial discretion and censorship when determining which shows and performers will be allowed to participate in the Festival. Such curation and censorship is not contractually provided for nor legally required. As such, the curation and censorship is subjectively applied. [Fringe denies.]

46. Where, as here, Plaintiff's claims inure to the public benefit as Defendant has misrepresented the nature of its selection process for participation in the Festival, Minnesota's private-attorney general statute, Minn. Stat. § 8.31, subd. 3a, allows individuals who have been injured through a violation of these consumer-protection statutes to bring a civil action and recover damages, together with costs and disbursements, including reasonable attorneys' fees. [Fringe denies.]

47. Plaintiff seeks injunctive relief requiring Defendant to cease and desist from making all fraudulent, deceptive, misleading, and false statements, including Defendant's use of the terms "uncensored," "uncurated," or any such like term, in any material intended to market, advertise, or promote the Festival.

47. Defendant denies that Plaintiff is entitled to relief, as alleged in paragraph 47 of the Complaint.

48. As a result of Defendant's false promises, misrepresentations, or misleading statements, Plaintiff has suffered actual damages because Plaintiff relied on Defendant's fraudulent statements in incurring past and present loss and obligations, monetary and otherwise, related to his continuing participation in the Festival that he would have not incurred otherwise if he knew the Festival to be curated and censored. [Fringe denies.]

49. As a direct, proximate, and foreseeable result of Defendant's violations of the statute, Plaintiff sustained damages, and is entitled to recover his actual damages, costs and disbursements, including costs of investigation and reasonable attorneys' fees, as well as injunctive relief and other equitable relief, including restitution, as determined by the Court, pursuant to Minnesota law, including Minn. Stat. § 8.31, subd. 1 and 3a and 325D.45. [Fringe denies.]

50. Therefore, Plaintiff prays for relief as set forth below.

50. Defendant denies that Plaintiff is entitled to relief, as alleged in paragraph 50 of the Complaint.

51. Defendant denies each and every allegation of the Complaint not specifically admitted herein.

PRAYER FOR RELIEF

Wherefore, Plaintiff prays for judgment as requested above against Defendant Minnesota Fringe Festival and further prays for:

1. Actual damages;
2. An order granting injunctive relief requiring Defendant

Minnesota Fringe Festival to cease and desist from making all fraudulent, deceptive, misleading, and false statements, including using the terms "**uncensored/**" "**uncurated,**" or **any other such similar term;**

- c. Reasonable attorneys' fees and the costs of this action;
- d. Other legal and equitable relief under the causes of action stated herein;
- e. Such other relief as this Court may deem just and proper.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted.
2. Plaintiffs claims are barred for failure to plead actual injury or damage.
3. Plaintiff has failed to plead his claims with sufficient particularity.
4. Defendant has made no false or misleading representation of fact.
5. Plaintiff did not reasonably rely on any purported false or misleading representation of fact.
6. Defendant's statements, if any, were commercial speech that is protected under the First Amendment to the United States Constitution.
7. Plaintiff is not a "consumer" within the meaning of the Consumer Fraud Act.
8. Plaintiff's claims seek to provide a remedy for Plaintiff individually, and do not provide a public benefit.
9. Plaintiffs damages, if any, are barred in whole or in part by Plaintiff's failure to mitigate such damages.
10. Defendant's acts were at all times done in good faith and without malice.