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STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT
Case Type - Civil

Sean Neely,

Plaintiff,

vs.

Minnesota Fringe Festival,

Defendant.

Court File No. 27-CV-16-11003
The Honorable Bridget Sullivan

DEFENDANT MINNESOTA FRINGE FESTIVAL'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

Minnesota Fringe Festival ("Minnesota Fringe") is a charitable organization whose mission is to create open, supportive forums for free and diverse artistic expression. For 23 years, Minnesota Fringe has produced a self-titled performing arts festival (the "Minnesota Fringe Festival" or "Festival"). Participation in the Festival is not decided by having staffers comb through applications and selecting which performances should be included. Instead, performers are encouraged to apply to the Festival and participants are then chosen by chance through a lottery. After being selected, Minnesota Fringe works with the performers on producing the show for a live audience during the Festival. Minnesota Fringe concluded its most recent festival on August 14, 2016.

Plaintiff Sean Neely was chosen in the lottery to perform in the 2016 Festival, but was not permitted to perform. In response, he has sued Minnesota Fringe, seeking damages, injunctive relief, and attorneys' fees. Plaintiff's lawsuit—like his proposed Festival

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performance—is an effort to grab headlines and seek attention. Plaintiff's claims are without merit, and should be dismissed.

However, Plaintiff has taken the extraordinary step of filing an offensive motion for judgment on the pleadings, contending that he is entitled to a judgment based solely on the Complaint and Answer submitted in this matter, despite the general and specific denials of his factual allegations and claims for relief (not to mention ten pleaded affirmative defenses). Judgment on the pleadings is plainly not proper, and Plaintiff's motion should be denied.

STATEMENT OF FACTS

Minnesota Fringe produces an eleven-day performing arts festival each year. (Compl. ¶ 15, Ans. ¶ 15). During the Festival, up to 170 performing arts companies are given the opportunity to share their productions with the public. *Id.* Participating performing arts companies pay an entrance fee to be a part of the Festival. (Compl. ¶ 16, Ans. ¶ 16). In return, Minnesota Fringe accommodates those companies by securing performance venues, managing ticket sales, providing operations and administrative personnel, and providing certain marketing materials for individual shows and the Festival as a whole. *Id.* Minnesota Fringe also receives a percentage of revenue from ticket sales. *Id.*

Participants are chosen by a lottery when the number of applicants exceeds the number of available performance slots. (Compl. ¶ 17, Ans. ¶ 17). The selection process is described as "uncurated" and "uncensored" in that "no one selects the participating shows." (Compl. ¶ 18, Ans. ¶ 18). Instead, each applicant is assigned a number which is written on a ping-pong ball and participants are selected by drawing the ping-pong balls from a bingo cage. (Compl. ¶ 19, Ans. ¶ 19). Performers are expected to follow state and local laws, as well as the Festival's policies and procedures. (Compl. ¶ 20, Ans. ¶ 20). The contract that performers sign expressly

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states that the Festival has the right to prohibit the performers from participation in the Festival for any violations. *Id.* Minnesota Fringe reserves the right to prohibit applicants from Festival participation. (Ans. ¶ 20).

Plaintiff has performed at the Minnesota Fringe Festival in the past. (Compl. ¶ 21, Ans. ¶ 21). In 2015, Plaintiff performed a show at the Fringe Festival called "Cancer. Rape. Theatre. Loophole."[1] During the show (advertised at Plaintiff's direction as a "true story" confessional), Plaintiff told the audience he had sexually molested two girls and confessed that crime to his mother on her deathbed. At the end of the show, Plaintiff threatened to rape a woman named "Meredith," an employee of a specified Caribou Coffee store in Roseville, unless someone stopped him. Plaintiff's professed plans to rape "Meredith" were so specific, and alarming, that the Roseville Police Department investigated complaints and issued Plaintiff a Trespass Notice, ordering him to stay away from the Caribou Coffee store for one year.[2] In addition, Plaintiff's performance reportedly traumatized members of the audience who had been victims of sexual violence. As a result of these consequences, following his 2015 show, Plaintiff was specifically told that Minnesota Fringe staff would no longer claim his performances were "true," or assist in misrepresenting his work to the public or the press.

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[1] Although on a motion for judgment on the pleadings, matters outside the pleadings are ordinarily not considered, these facts are offered to provide the Court with additional context for this dispute. Moreover, the facts regarding Plaintiff's history with Minnesota Fringe are referenced and fairly embodied by the allegations in Plaintiff's Complaint and Defendant's Answer, because the allegations center on and quote from Plaintiff and Minnesota Fringe's communications regarding why Plaintiff would not be permitted to participate in the 2016 Festival.

[2] According to a published report, Mr. Neely told police that he was "extremely flattered" that someone had believed his made-up story about wanting to rape "Meredith." http://www.cityofroseville.com/documentcenter/view/18401 (last visited August 30, 2016); *see also* https://wombwithaview.wordpress.com/2015/08/06/annnd-scene/ (posting of actual Trespass Notice Form) (last visited August 30, 2016).

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Plaintiff applied to participate in the 2016 Festival. (Compl. ¶ 22.) The 2016 Festival lottery was held in February 2016 and Plaintiff's number was randomly selected. (Compl. ¶ 23, Ans. ¶ 23). On March 2, 2016, Plaintiff emailed Jeff Larson, the Minnesota Fringe's Executive Director, a description of Plaintiff's proposed show. (Compl. ¶ 24, Ans. ¶ 24). This show was titled "having sex with children in my brain" and included a description of the main character as a convicted pedophile and registered sex offender. *Id.* Plaintiff requested that the Festival describe Plaintiff's "confession" as being true in materials marketing the show. *Id.* According to Plaintiff, he wanted to convince the audience that the stories about having sex with children actually happened, and were not solely intended as a fictional performance. *Id.*

Mr. Larson, having previously specifically advised Plaintiff that Minnesota Fringe staff would not falsely portray his shows as non-fiction, advised Plaintiff that it would not permit him to participate in the 2016 Festival. The decision was not made because of the content of the show (sexual fantasies involving children), but because of Minnesota Fringe's past experience with Plaintiff and because Plaintiff continued to insist on Minnesota Fringe staff lying to audience members, which would have likely again led to police involvement and potential civil liability for Minnesota Fringe.

STATEMENT OF LEGAL STANDARD

Minnesota Rule of Civil Procedure 12.03 permits a party to move for judgment on the pleadings after the pleadings are closed. However, "[a] motion for judgment on the pleadings is not a favored way of testing the sufficiency of a pleading, and will not be sustained if by a liberal construction the pleading can be held sufficient." *Ryan v. Lodermeier*, 387 N.W.2d 652, 653 (Minn. Ct. App. 1986). A Rule 12.03 motion can only be granted when "the pleadings create no fact issues." *Id.* All reasonable inferences must be drawn in favor of the non-moving party.

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Williams v. Bd. of Regents of Univ. of Minnesota, 763 N.W.2d 646, 651 (Minn. Ct. App. 2009). Moreover, "the court must give the benefit of the doubt to the nonmoving party." *Ryan*, 387 N.W.2d at 653.

When a Rule 12.03 motion is brought by a plaintiff, Minnesota courts have long held that judgment on the pleadings cannot be granted so long as material allegations asserted in the complaint are denied by the answer or if the answer alleges affirmative defenses to the plaintiff's claims. *Chilson v. Travelers' Ins. Co.*, 230 N.W. 118, 119 (Minn. 1930); *see also Bank of America, N.A., v. Kent*, No. A12-1748, 2013 WL 3968643, at *2 (Minn. Ct. App. Aug. 5, 2013) ("When the answer denies material allegations in the complaint or material questions of fact exist, judgment on the pleadings should not be granted."). On a plaintiff's motion for judgment on the pleadings, a defendant's answer cannot be attacked for mere indefiniteness or uncertainty. *Stewart v. Erie & Western Transp. Co.*, 171 Minn. 372, 376 (1871). If any findings of fact are necessary to resolve a motion for judgment on the pleadings, the motion cannot be granted. *Chilson*, 230 N.W. at 119 ("There should be no findings of fact when judgment is granted on the pleadings"); *Crispo v. Conboy*, 190 N.W. 541, 542 (Minn. 1922) (holding that on a motion for judgment on the pleadings "findings [of fact] are improper and of no effect"); *Jackson v. Minnetonka Country Club*, 207 N.W. 632, 633 (Minn. 1926) (reversing district court's grant of summary judgment for defendant, because court made findings of fact to resolve pleadings in defendant's favor).

The Court "may consider documents and statements incorporated into the pleadings by reference" without converting a motion for judgment on the pleadings into a summary judgment motion. *Kent*, 2013 WL 3968643, at *2. However, if "matters outside the pleadings are presented to and not excluded by the Court" in a motion for judgment on the pleadings, "the

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motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56." Minn. R. Civ. P. 12.03. Summary judgment is only appropriate when there is no genuine issue of material fact and either party is entitled to judgment as a matter of law based on the pleadings and materials before the Court. *Expose v. Thad Wilderson & Assocs., P.A.*, 863 N.W.2d 95, 101 (Minn. Ct. App. 2015) (citing Minn. R. Civ. P. 56.03).

ARGUMENT

Judgment on the pleadings is inappropriate in this case for numerous reasons. Minnesota Fringe has denied the material allegations of Plaintiff's complaint, and has also pleaded many affirmative defenses to those claims. This alone renders judgment on the pleadings improper. *See Chilson*, 230 N.W. 118 (holding that judgment on the pleadings was improper where defendant denied just one allegation of the complaint and pleaded affirmative defenses). Moreover, even if those denials and affirmative defenses are ignored, judgment on the pleadings is improper because numerous fact issues are still present that Plaintiff must prove to prevail on his claims. These fact issues are not proven by the pleadings. To the contrary, many of the necessary elements of Plaintiff's claims are deficient on the face of the pleadings. Further, to the extent there is any dispute whatsoever regarding Plaintiff's claims, all inferences must be drawn in favor of Minnesota Fringe and it must be given all benefits of doubt.

Plaintiff's motion entirely ignores these basic tenants of Rule 12.03, and seeks to have his claims resolved in one fell swoop. Plaintiff's motion is without merit, and must be denied.

I. PLAINTIFF IS NOT ENTITLED TO JUDGMENT ON THE PLEADINGS ON HIS CONSUMER FRAUD ACT CLAIM

Plaintiff has asserted a claim under Minnesota's Consumer Fraud Act ("CFA"). The CFA prohibits "the act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that

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others rely thereon in connection with the sale of any merchandise." Minn. Stat. § 325F.69, subd. 1. To prevail on this claim, Plaintiff must prove that: (1) there was a misrepresentation of fact; (2) he is a "consumer"; (3) he has been injured; (4) the injury resulted from the sale of "merchandise"; and (5) the lawsuit will benefit the public good. *See* Minn. Stat. § 325F.69; *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 13-14 (Minn. 2001); *Ly v. Nystrom*, 615 N.W.2d 302, 309 (Minn. 2000); *D.A.B. v. Brown*, 570 N.W.2d 168, 172 (Minn. Ct. App. 1997). Additionally, "the fraudulent conduct must not have been committed in a vacuum – it must have been intended to deceive someone." *Ly*, 615 N.W.2d at 310.

Minnesota Fringe has denied that its use of the terms "uncurated" and "uncensored" is false or fraudulent. (Compl. ¶ 36, Ans. ¶ 36, Affirm. Defense no. 4.) Minnesota Fringe has denied that its decision to not permit Plaintiff to participate in the 2016 Festival was curating or censorship. (Compl. ¶ 34-35, Ans. ¶ 34-35.) Minnesota Fringe has denied that it misrepresented the nature of its selection process for participation in its Festival. (Compl. ¶ 45-46, Ans. ¶ 45-46). Minnesota Fringe has denied that its use of the terms "uncurated" and "uncensored" was deceptive or intended to deceive. (Compl. ¶ 43-45, Ans. ¶ 43-45). Minnesota Fringe has denied that Plaintiff and his proposed show was not in violation of Festival policies or laws, and has denied that Plaintiff was "entitled" to a performance slot at the 2016 Festival. (Compl. ¶ 34-36, Ans. ¶ 34-36). Minnesota Fringe has denied that Plaintiff suffered any damages in reliance on Minnesota Fringe's public statements. (Compl. ¶ 39, Ans. ¶ 39). Minnesota Fringe has denied that Plaintiff—a producer and performer transacting with Minnesota Fringe—is a consumer under the CFA. (Ans., Affirm. Defense no. 7). Minnesota Fringe has denied that Plaintiff's action is for the public benefit. (Ans, Aff. Defense no. 7).

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These denials and affirmative defenses alone make judgment on the pleadings entirely improper, and the Court need not proceed any further. However, to the extent the substance of Plaintiff's claims are examined any more closely at this stage of the proceedings (an examination that is not called for under Rule 12.03), it is readily apparent that fact issues exist with respect to Plaintiff's allegations. Because fact issues cannot be resolved on a motion for judgment on the pleadings, Plaintiff's motion must be denied.

A. The Minnesota Fringe Did Not Make Any Misrepresentations of Fact.

Plaintiff argues that because he was not permitted to perform at the 2016 Fringe Festival, Minnesota Fringe's use of the terms "uncurated" and "uncensored" must, as a matter of law, be "misrepresentations." But there are at least three reasons why that argument has no merit.

First, excluding Plaintiff from the 2016 Fringe Festival was not a curatorial decision. Plaintiff states that use of the term "uncurated" means that Minnesota Fringe must allow *any* performer to participate in the Festival once selected. (Pl. Mem. at 12). However, this interpretation is not in line with the term's common use. The verb "curate" means "to pull together, sift through, and select for presentation."[3] Another dictionary defines "curate" as meaning "to select and present information."[4] Yet another states that "to curate" means "to select items from among a large number of possibilities for other people to consume and enjoy."[5] The commonly understood meaning of the term "curate" therefore implies that a "curated" Festival would mean that Minnesota Fringe reviewed all applications individually and actively

[3] "curate." Dictionary.com. 2016. http://www.dictionary.com/browse/curate (Sept. 2, 2016).
[4] "curate." Oxford Learners Dictionary. http://www.oxfordlearnersdictionaries.com/us/definition/english/curate2 (Sept. 2, 2016).
[5] "curate." Macmillan Dictionary. 2016. http://www.macmillandictionary.com/us/dictionary/american/curate_2 (Sept. 2, 2016).

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selected which applicants would be allowed to perform at the Fringe Festival. Both parties agree that does not happen. (Compl. ¶ 17, Ans. ¶ 17.)

Thus, "uncurated" simply means that Minnesota Fringe's selection process is unjuried, in that a selection panel does not sift through applicants to hand pick which performing arts companies to include in the event. An uncurated selection process does not mean that Minnesota Fringe cedes all power to later reject an applicant or performance that was selected through the random, unjuried and uncurated selection process. More importantly, use of the term does not mean that Minnesota Fringe is making a misrepresentation of fact.

Minnesota Fringe held a public lottery through which participants were selected at random. (Compl. ¶ 23, Ans. ¶ 23). Plaintiff was selected through that public lottery. *Id.* It was not until Plaintiff shared his plan to put on a show titled "Having Sex with Children in My Brain"—coupled with Plaintiff's past history with the show and his desire to market his performance as a "true confessional"—that Minnesota Fringe informed Plaintiff that he would not be permitted in the 2016 Festival. (Compl. ¶ 25, Ans. ¶ 25). This was not a curatorial decision; rather, this action was taken by Minnesota Fringe to avoid subjecting a paying audience to a recitation of child pornography advertised (by Minnesota Fringe) as being real.

Second, the term "uncensored" is commonly understood to mean "not censored ([i.e.] having had parts removed that are not considered suitable for the public)."[6] Censoring is when one acts "to remove parts of something, such as a book, movie, or letter, that you do not want someone to see or hear."[7] In this case, Minnesota Fringe did not try to pick and choose which

[6] "uncensored." Oxford Learners Dictionary. 2016. http://www.oxfordlearnersdictionaries.com/us/definition/english/uncensored (Sept. 2, 2016).
[7] "censor." Cambridge Dictionary. 2016. http://dictionary.cambridge.org/us/dictionary/english/censor (Sept. 2, 2016).

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part of Plaintiff's proposed show could be performed. In fact, Plaintiff makes no allegations that Minnesota Fringe removes any part of any participant's show prior to performance. Minnesota Fringe did not and does not censor performances. But use of the term "uncensored" does not mean that Minnesota Fringe is deprived of all power to deny a producer's participation in the Festival when it feels either the producer or the production is in violation of Festival rules or could subject the Festival to legal liability.

Third, Minnesota Fringe's decision to not permit Plaintiff's participation in the 2016 Festival was not made based on the content of plaintiff's show (pedophilia), but due to the context in which Plaintiff desired to produce it and his history with the Festival. Missing in Plaintiff's recitation of the "undisputed facts" is any mention of the show he performed in the 2015 Fringe Festival. Plaintiff's 2015 show was based on the false premise that he was confessing to sexual assaults and planned to sexually assault a seemingly real person working in a local coffee shop. When he was selected in 2016, Plaintiff brought an idea that demanded the same misrepresentation of his work to the audience—that his "confessional" was real. Minnesota Fringe, having previously specifically advised Plaintiff that it would not allow a situation similar to Plaintiff's 2015 performance, advised Plaintiff that it would not permit him to present his show in the 2016 Festival.

Minnesota Fringe has produced the Fringe Festival for 23 years, promoting thousands of performers who might otherwise not have had a platform to perform their art. Plaintiff's performance in 2015 placed the Festival at risk because Plaintiff's show was advertised as "true"—with his threat to rape another human being portrayed as authentic and real. This not only caused reported trauma to audience members, but was serious enough to warrant a police investigation and trespass order. Attendees (or Caribou Coffee) may have had cause to believe

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that Minnesota Fringe had planned or endorsed Plaintiff's threats, and sought to hold Minnesota Fringe civilly liable. Litigation expenses and damages from such a lawsuit could have threatened the Minnesota Fringe's continued existence. To prevent being subject to such liability again, following his performance (and before applying to the 2016 Festival), Plaintiff was told that Minnesota Fringe would not advertise his fiction as truth.

Plaintiff not only ignored that admonition, he decided to double-down. For his 2016 show, instead of merely confessing to being a rapist, Plaintiff wanted to create the misconception that he was confessing to being a *child* rapist. To do so, Plaintiff wanted Minnesota Fringe to tell its audience members and the public that Plaintiff was truly a registered sex offender and pedophile. In his show, Plaintiff wanted to describe the wrong his "character" had done, and describe to the audience the sexual "images" in his brain that he used to satisfy his ongoing urges. Quite reasonably, given the consequences of Plaintiff's threatened rape of "Meredith" in 2015, Mr. Larson rejected the show, telling Plaintiff, "I can't afford the lawyers and insurance to protect the festival from liability and keep you out of jail." (Comp. ¶ 25.)

Since Minnesota Fringe did not curate the selection process for its Festival and did not censor any performances, there has been no false or fraudulent misrepresentation of fact in using the terms "uncurated" and "uncensored," and Plaintiff is unable to establish a claim under the CFA. At the very least, the fact that Minnesota Fringe and Plaintiff have different interpretations of the terms "uncurated" and "uncensored" requires factual findings as to the meaning of these terms, which precludes judgment on the pleadings.

B. There are no Allegations that Minnesota Fringe Intended to Deceive.

Under Minnesota law, "the circumstances constituting fraud or mistake shall be stated with particularity." Minn. R. Civ. P. 9.02. Intent may be stated generally. *Id.* A plaintiff bringing a claim under the CFA must show that the defendant "intentionally made a

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misrepresentation regarding the sale of the service contract and that [he] suffered damages caused by the misrepresentation." *Baker v. Best Buy Stores, LP*, 812 N.W.2d 177, 182 (Minn. Ct. App. 2012). When the "claim is devoid of any allegation that [defendant] intended to deceive anyone, the claim is not stated with the requisite particularity." *Id.* at 183.

Here, Plaintiff has not alleged that Minnesota Fringe intended to deceive applicants or the public. At most, Plaintiff has established that there was a difference in understanding between Plaintiff and Minnesota Fringe as to what the terms "uncurated" and "uncensored" meant. Minnesota Fringe has also pleaded in its defenses that it acted in good faith, without malice. (Ans., Affirmative Def. no. 9). If Plaintiff misconstrued the words "uncurated" and "uncensored" to mean that Minnesota Fringe was powerless to stop a performance once an applicant is selected through the lottery drawing, this was Plaintiff's mistake and not an intentional act of deception by Minnesota Fringe. Since the complaint "is devoid of any allegation that" the Minnesota Fringe "intended to deceive anyone, the claim is not stated with the requisite particularity." *Id.* Plaintiff's claim could be dismissed on this basis for failure to state a claim. As such, Plaintiff's motion for judgment on the pleadings should be denied.

C. Plaintiff is Not a Consumer.

In order to have standing to bring claims under the CFA, Plaintiff must be a "consumer." In analyzing claims brought under the CFA, the Minnesota Supreme Court has drawn "a sharp distinction between commercial parties and consumers." *Marvin Lumber and Cedar Co. v. PPG Indus., Inc.*, 223 F.3d 873, 887 (8th Cir. 2000). Where a party is acting as a commercial party rather than a consumer, no standing exists to pursue an action under the CFA. *See Gass Aggregation Services, Inc. v. Howard Avista Energy*, LLC, 319 F.3d 1060 (8th Cir. 2003) (holding that transactions between sophisticated gas traders were not consumer transactions subject to the CFA); *Kovatovich v. K-Mart Corp.*, 88 F. sup. 2d 975 (D. Minn. 1999) (holding

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that plaintiff, who brought action against her former employer for alleged false dissemination of information to customers, was not acting as a consumer and therefore had no standing to bring claim under CFA).

In *Cooperman v. R.G. Barry Corp.*, 775 F. Supp. 1211 (D. Minn. 1991), for example, the court rejected CFA claims brought by the plaintiff, a manufacturer's sales representative, against a manufacturer related to fraudulent statements allegedly made with respect to their sales relationship. The court noted that "[w]hile the transaction between the seller and its representative is part of a sequence of events leading to a sale of merchandise, it is not itself a sale of merchandise." *Id.* at 1213. The court concluded that the plaintiff sought to invoke the statute "not to protect itself as a consumer, but to protect its business relationship with defendant" and therefore dismissed the CFA claims. *Id.* at 1214.

Here, even assuming that the Fringe Festival's performances are considered "merchandise" under the CFA, Plaintiff is not bringing this action as a consumer of the Fringe Festival's merchandise (*i.e.*, performances). Plaintiff is not an audience member or ticket purchaser—the parties who might have standing as consumers under the statute. Instead, Plaintiff is a producer/performer, and a provider of the same services offered by Minnesota Fringe. Performers are in a commercial relationship with Minnesota Fringe. They receive and share box office receipts with Minnesota Fringe, and engage in joint marketing efforts with Minnesota Fringe to promote their shows.[8] Plaintiff's claims derive from this relationship with Minnesota Fringe as a (would-be) producer and performer, not as a member of the consuming

[8] Plaintiff, in fact, requested that the Fringe Festival promote and market his "Having Sex with Children" performance as a true confessional. Plaintiff no doubt would have done the same in his own marketing. Under Plaintiff's own theory, he himself could be subject to liability for making false statements in the advertising of his "merchandise" under the statute.

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public. Plaintiff's application and subsequent rejection was not a consumer transaction, and he was not acting as a consumer of "merchandise" or "services" in that role. Instead, he was contracting with Minnesota Fringe as a producer who has performed at the Fringe Festival for many years, and wished to once again be included in the Festival in order to offer his services to the consuming public and receive a percentage of box office receipts. Plaintiff is therefore acting as a fellow merchant, not a consumer.

Plaintiff's own claimed damages confirm that his lawsuit is not brought as a consumer. He does not allege that he has been deceived as a member of the consuming public who purchased a ticket to the Fringe Festival under fraudulent circumstances and suffered damages in the form of money paid for that ticket. Instead, Plaintiff contends that he "has lost his rightful opportunity to be part of the Festival" and suffered monetary losses as a producer and performer because he cannot "recoup his expenses" incurred in producing his show. (*See* Pl. Mem. at 14-15.) These are not consumer damages, but alleged damages of a producer engaging in a commercial relationship with Minnesota Fringe.

In short, as a producer/performer and fellow seller of his performances to the public, Plaintiff cannot be considered a consumer under the statute, and therefore has no standing to pursue these claims. His complaints arise out of his commercial relationship with Minnesota Fringe. The CFA was not intended to provide a remedy for the sorts of complaints Plaintiff makes in this lawsuit. This issue could be decided in Minnesota Fringe's favor under a motion to dismiss or summary judgment standard. It certainly cannot be decided in Plaintiff's favor under the applicable judgment-on-the-pleadings standard, with all inferences drawn in Minnesota Fringe's favor.

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D. Plaintiff's Lawsuit Will Not Benefit the Public Good.

Plaintiff seeks to invoke the Private Attorney General Statute in order to recover costs and attorney's fees. (Compl. ¶ 46); Minn. Stat. § 8.31, subd. 3a. The Minnesota Supreme Court has held "that the Private AG Statute applies only to those claimants who demonstrate that their cause of action benefits the public." *Ly*, 615 N.W.2d at 314. When "a successful prosecution of [the plaintiff's] fraud claim does not advance state interests and enforcement has no public benefit," the plaintiff cannot invoke the statute. *Id.* The burden is on the plaintiff to show that his cause of action benefits the public. *Buetow v. A.L.S. Enterprises, Inc.*, 888 F. Supp. 2d 956, 959 (D. Minn. 2012). "Public benefit is a necessary element of a plaintiff's cause of action under the Private AG statute." *Id.*

In addressing the public benefit issue, courts "do not focus solely (or even substantially) on the size of the audience receiving the alleged misrepresentation, but hone in on 'the relief sought by' the plaintiff." *Id.* at 961 (citing *Overen v. Hasbro, Inc.*, No. 07-1430n 2007 WL 2695792, at *3 (D. Minn. Sept. 12, 2007)). A public benefit is more likely to be found "when the plaintiff seeks relief primarily aimed at altering the defendant's conduct [...] rather than seeking remedies for past wrongs." *Buetow*, 888 F. Supp. 2d at 961. Thus, if a plaintiff is seeking a valid injunction to change a defendant's conduct towards the public as a whole, a public benefit might be found.

Here, Plaintiff is seeking an injunction requiring Minnesota Fringe to stop using the terms "uncurated" and "uncensored" in its marketing and advertisement of the Fringe Festival. (Compl. ¶ 38). In addition, Plaintiff has requested "actual damages." (Compl. ¶ 39). These purported damages relate to costs Plaintiff allegedly incurred as a result of believing that he would be able to perform at the Festival. *Id.*

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Plaintiff's request for injunctive relief, however, is moot. The 2016 Festival has concluded, and there is no evidence that Minnesota Fringe intends to exclude Plaintiff from participating in the 2017 Festival. Plaintiff did not seek a temporary restraining order or other injunctive relief prior to the start of the 2016 Festival. Moreover, the disputed terms "uncurated" and "uncensored" have not been used by the Fringe Festival for some time, though not in response to Plaintiff's lawsuit.[9] In similar cases where a claim for injunctive relief is no longer viable, courts have found no public benefit exists. *See, e.g.*, *Beutow*, 888 F. Supp. 2d at 962 (concluding that "whatever public benefit may have existed when this case was first filed, it no longer exists" given that injunctive relief was not granted and only claim for damages remained).

Moreover, the alleged damages suffered by Plaintiff are of no concern to the public as a whole. As an example of damages that do not meet the public benefit requirement, the *Buetow* court cited the situation where a plaintiff buys an advertised product and then sues the manufacturer for the difference between the purchase price and the product's actual worth had it not been falsely advertised. *Id.* at 961. As that court said, "it is difficult to conceive how such an action would benefit the public, despite the manufacturer's advertisement being broadly disseminated." *Id.* The reason is that "individual damages, generally speaking merely enrich (or reimburse) the plaintiff to the defendant's detriment; they do not advance a public interest." *Id.*

Here, Plaintiff does not even seek to recover damages of this sort (which would also not meet the public benefit requirement), because he does not allege damages that have any nexus to the public or any alleged harm suffered by the public. Plaintiff does not seek damages based on

[9] Minnesota Fringe has, in the past, used the terms "uncurated' and "uncensored" to describe its festival. However, these terms are not currently part of any formal marketing used by the Festival. Plaintiff focuses solely on these terms—to the exclusion of many other descriptions the Festival uses to promote and market itself—presumably because he believes they provide the best fodder to further his action against Minnesota Fringe.

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the diminution in value of a ticket to the Fringe Festival due to the alleged false advertisement of the "uncurated" nature of the Festival. Instead, Plaintiff's damages claim seeks solely to recoup his own alleged expenses in preparing for his performance. These damages are personal to Plaintiff. No other member of the public has incurred these damages, and no member of the public would be benefited if Plaintiff is successful in recovering these damages. "Where recovery is sought for the exclusive benefit of the plaintiff, there is no public benefit." *Zutz v. Case Corp.*, No. 02-1776, 2003 WL 22848943, at *4 (D. Minn. Nov. 21, 2003). The only remaining claim for relief in this case is Plaintiff's request for damages for his exclusive benefit.

Since this lawsuit does not have a public benefit, Minn. Stat. § 8.31, subd. 3a, has no application. Again, this issue could be resolved in Minnesota Fringe's favor either on the pleadings or on summary judgment. Judgment on the pleadings would be wholly inappropriate.

E. Plaintiff Did Not Incur Any Damages.

"One element of fraud is damages." *Seafirst Commercial Corp. v. Speakman*, 384 N.W.2d 895, 899 (Minn. Ct. App. 1986). To correctly plead a cause of action for fraud, the complaint must allege damages with specificity. *DQ Wind-up, Inc. Trust ex rel. ACI Telecentrics, Inc. v. Kohler*, No. A11-1933, 2012 WL 1658929, at *4 (Minn. Ct. App. May 14, 2012). Moreover, particular facts regarding "what was given up or obtained" from fraud is necessary to meet the pleading requirement. *Id.* (quoting *Murr Plumbing, Inc. v. Scherer Bros. Fin. Servs. Co.*, 48 F.3d 1066, 1069 (8th Cir. 1995)).

In his complaint, Plaintiff states that he "has suffered actual damages" and incurred "past and present loss and obligations, monetary and otherwise, related to his continuing participation in the Festival that he would not have incurred otherwise" if the Fringe Festival had not used the terms "uncurated" and "uncensored." (Compl. ¶¶ 39, 48). However, Plaintiff does not state what those damages are anywhere in the complaint. As such, Plaintiff has failed to plead

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damages with the requisite particularity in order to state a cause of action. Plaintiff's claim cannot even survive the pleading standard, much less be granted judgment solely on the pleadings.

Even if the Court finds that Plaintiff's broad allegation that he suffered damages is sufficient to state a claim, there are numerous facts issues that would preclude Plaintiff's motion for judgment on the pleadings. Plaintiff alleges that he incurred certain expenses to prepare his show after his number was drawn in the lottery under the assumption that he would be able to recoup these expenses through his performance. (Pl. Mem. at 14-15). What those expenses are, and whether Plaintiff's "Having Sex with Children" performance would have generated box office receipts sufficient to cover his expenses is entirely unknown and speculative. Because "the assessment of damages is in the peculiar province of the jury," judgment on the pleadings simply cannot be granted. *Ellingson v. Kratz*, No. C4-04-422, 2001 WL 1700715, at *3 (Minn. Ct. App. Jan. 15, 2002). Plaintiff also claims that he will have to return a grant he allegedly received from the Minnesota Association for the Treatment of Sexual Abusers. (Pl. Mem. at 16). Plaintiff's complaint, however, contains no allegations regarding this grant. Instead, Plaintiff makes this unsupported assertion solely in his Motion papers, which is improper in a Rule 12.03 motion.

Moreover, it is readily apparent that substantial questions exist regarding Plaintiff's claimed damages—including whether he has been damaged at all—which by itself precludes judgment on the pleadings. Plaintiff's number was drawn in the lottery on February 29, 2016. (Compl. ¶ 23, Ans. ¶ 23). Two days later, on March 2, 2016, Plaintiff sent a description of the show he intended to perform to Mr. Larson at the Festival. (Compl. ¶ 24, Ans. ¶ 24). There is nothing in Plaintiff's complaint or the record establishing that Plaintiff had done anything more

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in these two days besides prepare a brief rough draft description of his performance. The following day, Minnesota Fringe responded to Plaintiff informing him that he was no longer welcome to participate in the 2016 Fringe Festival. (Compl. ¶ 25, Ans. ¶ 25). Minnesota Fringe promptly refunded Plaintiff's application fee. Given this short time sequence, Plaintiff's allegation that he incurred costs and expenses in reliance on the fact that he thought he would be able to perform at the Festival rings entirely hollow.

Numerous questions of fact are present on the issue of damages, including whether Plaintiff has suffered any damages at all—and, even assuming he has—when the damages were incurred, whether Plaintiff took reasonable steps to mitigate the damages, and whether any expenses incurred were reasonable. The answers to these questions are not present in the pleadings. As such, judgment on the pleadings is inappropriate.

II. PLAINTIFF IS NOT ENTITLED TO JUDGMENT ON THE PLEADINGS ON HIS DECEPTIVE TRADE PRACTICES ACT CLAIM

Plaintiff also seeks judgment on the pleadings on his claim for violation of Minnesota's Deceptive Trade Practices Act ("DTPA"). The DTPA states that "a person engages in a deceptive trade practice when, in the course of business, vocation, or occupation, the person [...] represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have." Minn. Stat. § 325D.44, subd. 1(5). To bring a successful claim under this Act, Plaintiff must prove that (1) the Festival made a false statement of fact in a commercial advertisement; (2) the statement "actually deceived or has the tendency to deceive a substantial segment of its audience;" (3) the deception was "material, in that it is likely to influence the purchasing decision;" and (4) Plaintiff was injured as a result of that statement. *Insignia Sys., Inc. v. News Am. Mktg. In-Store, Inc.*, 661 F. Supp. 2d 1039, 1066 (D. Minn. 2009). While Plaintiff does not have to prove actual confusion or misunderstanding under

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the DTPA, he "must show there is a likelihood of confusion." *McClure v. Am. Family Mut. Ins. Co.*, 29 F. Supp. 2d 1046, 1065 (D. Minn. 1998); Minn. Stat. § 325D.44, subd. 2.

For all of the same (and additional) reasons that judgment on the pleadings cannot be granted on Plaintiff's Consumer Fraud Act claim, judgment likewise cannot be granted to Plaintiff on his DTPA claim.

A. Minnesota Fringe Did Not Make a False Statement of Fact with Intent to Deceive.

As explained above, Minnesota Fringe did not make any false statements of fact about the selection process for the 2016 Fringe Festival. The terms "uncurated" and "uncensored" were used in accordance with their common meaning to communicate that the Festival would not be actively reviewing applications to choose who would be offered a slot, and that the Festival would not tell participants to cut out parts of their shows. Participants were selected at random, consistent with an unjuried or uncurated selection process. The Festival has not asked any participants to change their shows or omit parts. The only shows that were rejected were those that were not consistent with the Festival's policies. The Festival reserves the right to make those types of rejections. (Compl. ¶ 20). Thus, there was no false statement of fact made by Minnesota Fringe. At a minimum, Plaintiff cannot show that there are no remaining facts to be proven to establish that these statements were false, or that there are no other possible constructions of these terms or conclusions that could be drawn with respect to their meaning. This alone precludes judgment on the pleadings.

B. Plaintiff Has Not Proven That the Terms were Material.

A plaintiff asserting a cause of action under the DTPA must establish that "the deception is material in that it is likely to influence the purchasing decision." *Insignia Sys.*, 661 F. Supp. 2d at 1066. Generally, "a plaintiff seeking injunctive relief need not establish reliance, but

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merely a 'legal nexus' between the act and injury." *Thompson v. Am. Tobacco Co., Inc.*, 189 F.R.D. 544, 553 (D. Minn. 1999) (quoting *LeSage v. Northwest Bank Calhoun-Isles*, 409 N.W.2d 536, 539-41 (Minn. Ct. App. 1987)). However, "a plaintiff seeking damages must establish actual reliance upon the fraudulent conduct of the defendant." *Thompson*, 189 F.R.D. at 553. Such reliance on a defendant's misrepresentation must also be reasonable. *Parkhill v. Minnesota Mut. Life Ins. Co.*, 174 F. Supp. 2d 951, 962 (D. Minn. 2000).

In *Parkhill v. Minnesota Mut. Life Ins. Co.*, the District Court for the District of Minnesota held that even if a plaintiff relied on oral statements or written materials from the defendant, "a jury would still have to examine each plaintiff's case individually to determine whether oral or written disclosures were made and whether such statements were actually at odds with other disclosures or defendant's actions." 188 F.R.D. 332, 345 (D. Minn. 1999). In other words, even when reliance is not at issue, there is a question of fact for the jury as to whether that reliance was reasonable given the context and other statements by the defendant. In a later proceeding, the court held that it was not reasonable for the plaintiffs to rely on a representation about an insurance policy because "neither the policy nor the written materials associated with the policies provide a guarantee that the policies will sustain themselves." *Parkhill*, 174 F. Supp. 2d at 960.

Similarly, nothing in Plaintiff's application to the Minnesota Fringe Festival guaranteed that he would receive a slot to participate in the Festival, nor was there any guarantee that the right to participate was irrevocable once Plaintiff's number was drawn. In fact, Plaintiff's complaint acknowledges that the contract applicants signed explicitly stated that Minnesota Fringe "reserves the right to remove the [participant] from festival participation" for violations of its policies. (Compl. ¶ 20). Plaintiff could not have reasonably relied on the terms "uncurated"

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and "uncensored" to mean that he was guaranteed the unequivocal right to perform "Having Sex With Children" notwithstanding any objection by the Festival. The mere fact that Plaintiff sent a rough draft summary of his show to Minnesota Fringe's executive director for approval demonstrates that Plaintiff himself did not believe that the Festival had no say in whether his show would be permitted.

CONCLUSION

For all the foregoing reasons, judgment on the pleadings is not appropriate in this case. Plaintiff's motion should be denied.

Dated: September 2, 2016

NILAN JOHNSON LEWIS PA

By: s/ Benjamin C. Johnson
Zachary J. Crain (#0350321)
Benjamin C. Johnson (#0391482)
120 South Sixth Street, Suite 400
Minneapolis, MN 55402-4501
Telephone: 612.305.7500
Facsimile: 612.305.7501
Email: zcrain@nilanjohnson.com
bcjohnson@nilanjohnson.com

Attorneys for Defendant Minnesota Fringe Festival

ACKNOWLEDGMENT

Defendant Minnesota Fringe Festival, by and through its undersigned counsel, hereby acknowledges that costs, disbursements, reasonable attorneys' fees and witness fees may be awarded to the opposing party or parties pursuant to Minn. Stat. § 549.211 if the statute is violated.

s/ Benjamin C. Johnson
Benjamin C. Johnson