

# LINCOLN BANDLOW LAW

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April 24, 2022

## VIA EMAIL

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**RE: *Building for the Arts NY, Inc. v. Unreported Story Society***

Dear Mr. Feldman:

We are counsel for Unreported Story Society (“USS”). We are responding to your letter, dated April 21, 2022 (“Your Letter”) on behalf of Building for the Arts NY, Inc (“BAN”).<sup>1</sup> In Your Letter, you accused USS of: (1) withholding “material information” from BAN “in a manner constituting fraud”; and (2) “violat[ing] material terms of the [April 6, 2022] executed agreement” (the “Agreement”) between USS and BAN. Your Letter also informed USS that BAN retained “litigation counsel” and issued a preservation notice.

We will not mince words: the **only** false representations of fact were made by you and BAN. The **only** breach of the Agreement was by BAN. The **only** violation of BAN’s mission statement is by BAN itself.

First, let us explain why the allegation of fraudulent concealment in Your Letter is, itself, fraudulent. Basic reading comprehension skills expose your fraud. The first page of the Agreement states in bold and italics that: “**Production (title): *Gosnell.***” If BAN was genuinely concerned about the subject matter of the production, it would have asked what *Gosnell* is about and/or taken one nanosecond to Google “Gosnell”<sup>2</sup> to discover what *Gosnell* is about.

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<sup>1</sup> We choose this definitional term “BAN” intentionally: it is what your client’s censorial policies do to important speech, and any further use in this letter of the words “for the arts” to describe your client would clearly be a false statement.

<sup>2</sup>[https://www.google.com/search?q=gosnell&rlz=1C1ASVC\\_enUS921US921&oq=gosnell&aqs=chrome..69i57j46i433i512j46i175i199i512j46i512i2j0i512j46i175i199i512i2j0i512j46i512.2194j0j7&sourceid=chrome&ie=UTF-8](https://www.google.com/search?q=gosnell&rlz=1C1ASVC_enUS921US921&oq=gosnell&aqs=chrome..69i57j46i433i512j46i175i199i512j46i512i2j0i512j46i175i199i512i2j0i512j46i512.2194j0j7&sourceid=chrome&ie=UTF-8)

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Second, let us explain why BAN's mission statement (which you reference in Your Letter) is also fraudulent. BAN claims its mission is to "expand access to the performing arts by providing **creative space, learning opportunities**, and hubs for **artistic connection**."<sup>3</sup> This is clearly a false representation of fact because you are denying USS "access to the performing arts," a "creative space" and a place to make "artistic connection." We strongly advise BAN to revise its mission to more accurately reflect its true mission because, in its current form, BAN's mission statement is hypocritical (at best) and fraudulent (at worst).

Third, let us explain why Your Letter fraudulently misrepresents the Agreement. In Your Letter, you claim that *Gosnell* violates the Agreement because its "subject matter [is] inappropriate for children." There is no such term in the Agreement. Further, BAN is currently promoting various productions that are inappropriate for children. One example is *H\*tlers' Tasters*, which is based "on true events" about "the ways **girls** navigate sexuality, friendship, patriotism, and poison during the Third Reich" and is "***inappropriate for ages 14 and under***."<sup>4</sup> Another production is *Satan and God*, which is described as "Satan com[ing] back to earth as a movie studio executive and God comes back to earth as a Canadian environmentalist" which is "***inappropriate for ages 11 and under***."<sup>5</sup> Yet another production, *Queens Girl in the World*, is "***only suitable for ages 15 and up***."<sup>6</sup> Clearly, BAN's assertion that USS violated the Agreement because *Gosnell* is "inappropriate for children" is fraudulent because BAN regularly hosts productions that are inappropriate for children.

Fourth, let us explain why Your Letter's claim that BAN "will not be able to exercise reason in granting many, if not all, of the approvals required" is fraudulent. Again, basic reading comprehension skills demonstrate as much. The actual terms of the Agreement (as opposed to the imaginary provisions referenced in Your Letter) provides BAN approvals over:

- Usage over the space beyond the term (§ 2(b));
- The "proposed schedule for [the] production, staffing, technical set-up, rehearsals and work calls" and "changes" to the same (§ 2(d));
- Potential "theater party agents" for purposes of calculating Gross Weekly Box Office Receipts ("GWBOR") (§ 4(a)(i));

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<sup>3</sup> <https://bfany.org/> (original emphasis).

<sup>4</sup> <https://bfany.org/theatre-row/shows/hitlers-tasters/> That is "girls" navigating their sexuality, not "women." But apparently, according to BAN, girls dealing with their sexuality is not "subject matter inappropriate for children" such that BAN would, like it does with USS, breach its contractual obligations and kick the show out on the proverbial eve of its premiere.

<sup>5</sup> <https://bfany.org/theatre-row/shows/satan-and-god/>

<sup>6</sup> <https://bfany.org/theatre-row/shows/queens-girl-in-the-world/>

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- Various “stage electrical equipment, cable and all other equipment necessary for the presentation of the Production” (¶ 5(a)(ii));
- Costs for “overtime and additional services” (¶ 5(b)(i));
- Presenting “more than eight (8) performances in a week” (¶ 6(b)(i));
- For “additional, brush-up rehearsal time(s)” (¶ 6(b)(ii));
- Use of the space on a “dark day” (¶ 6(b)(v));
- USS’ “non-artistic personnel,” including “the house manager, production manager, head carpenter and master electrician” (¶ 8(b));
- All “box office ticket price scales” (¶ 10(c)(i));
- The “method and manner in which any scenery, props, merchandise, heavy furniture or equipment shall be brought in or taken out” of the Theater (¶ 11(b)(ii));
- “Poster, signage, key art and other announcements” in the theater or that includes BAN’s name (¶ 13(d));
- Any “personnel to sell souvenir books, videotapes, published texts and/or any other show related merchandise on the premises” (¶ 18(b)); and
- All “set and lighting design paperwork” (Schedule B, ¶ 1(m)).

We cannot imagine how USS has prevented BAN from exercising any of these approval rights. Rather, Your Letter is asserting an imaginary approval right over the subject matter of *Gosnell*. If BAN wanted such approval rights, it should have included such rights in the Agreement and not imagined such rights after executing (and now breaching) the Agreement.

Fourth, let us explain why Your Letter’s statement that “there are numerous deficiencies, breaches and violations regarding good standing, insurance, and attendant rules” is fraudulent. Contrary to Your Letter’s assertion, these allegations are not made upon “information and belief,” rather it is a transparent, flailing, desperate and cowardly attempt by BAN to find a way to weasel out of the Agreement. We dare you to provide any evidence to back up Your Letter’s claims.

Fifth, let us explain why BAN is the only party that is responsible for breaching the Agreement. Paragraph 24(a) of the Agreement sets forth three scenarios for terminating the agreement: (1) USS “fails to make any payment required” by the Agreement; (2) *Gosnell* “fails to open or present a Production in accordance with the Agreement”; and (3) “any other breach or default” by USS. Further, Paragraph 24(a) provides that BAN must give two days notice of any purported breach and provide USS with an option to cure any such breach. Not only was there no breach of the Agreement by USS whatsoever that would entitle BAN to terminate the Agreement, BAN failed to provide proper notice for USS to cure the non-existent breach. Rather, the only breach here at all is by BAN with the very first term of the Agreement where BAN “grants to [USS] ... the use of the Theatre solely to present the Production during the Term.” Your Letter confirms that BAN is now breaching that obligation.

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Accordingly, USS is now considering any and all legal remedies it has at its disposal to address BAN's unconscionable act of censorship and breach of its contractual commitments, which has damaged my client. At this time, USS will be seeking an alternative venue for its compelling and important production. Although USS is certainly entitled to stage this production at BAN, USS no longer wishes to do so because USS believes in free speech and BAN clearly does not. The artistic community should do the same and have nothing to do with BAN whatsoever. As for BAN's baseless legal threats, USS would strenuously oppose and defeat them, and would easily prevail on counterclaims against BAN for its breach of the Agreement and other claims stemming from the damage done to USS by BAN's trampling of the Agreement and the ideals of free speech.

At bottom, the response to Your Letter and BAN's actions is simple: ***SHAME ON YOU!*** You are not standing up for the arts. You are not standing up for diversity of thought. You are not standing up for free speech. Even worse, to excuse the inexcusable, you falsely and maliciously accuse USS of fraud by making fraudulent statements.

***We are disappointed in you and demand you do better.*** Govern yourself and your client accordingly or face the consequences.

This letter does not constitute a complete statement of all of USS' rights, defenses, contentions, legal theories or the facts in support thereof. Nothing stated herein is intended, nor shall it constitute, a waiver or relinquishment of any of USS' rights, defenses, or remedies, whether legal or equitable, all of which are hereby expressly reserved.

Very truly yours,



Lincoln D. Bandlow