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STATE OF INDIANA) IN THE HAMILTON SUPERIOR COURT
) SS:
COUNTY OF HAMILTON) DOCKET NO. 29D03-1001-TR-0002

DEBORAH J. SIMON,)

Plaintiff)

v.)

BREN SIMON, AS TRUSTEE OF THE MELVIN)
SIMON FAMILY ENTERPRISES TRUST)
AGREEMENT DATED OCTOBER 28, 1990)
(AMENDED AND RESTATED ON DECEMBER)
11, 2003; AND THEN FIRST AMENDED ON)
JULY 2, 2005; AND THE MELVIN SIMON)
FAMILY TRUST AGREEMENT NUMBER ONE)
DATED DECEMBER 11, 2003; AND THE)
MELVIN SIMON FAMILY TRUST)
AGREEMENT NUMBER TWO DATED)
DECEMBER 11, 2003; AND THE MELVIN)
SIMON FAMILY TRUST AGREEMENT)
NUMBER THREE DATED DECEMBER 11, 2003;)
AND THE MELVIN SIMON FAMILY TRUST)
CHARITABLE TRUST AGREEMENT NUMBER)
ONE DATED DECEMBER 11, 2003; AND THE)
MELVIN SIMON FAMILY CHARITABLE)
TRUST AGREEMENT NUMBER TWO DATED)
DECEMBER 11, 2003; AS CONSOLIDATED AND)
AMENDED AND RESTATED IN FULL ON JUNE)
10, 2006, KNOWN AS THE MELVIN SIMON)
RESTATED FAMILY ENTERPRISES TRUST; AS)
FIRST AMENDED ON AUGUST 3, 2006; AND)
SECOND RESTATED ON MAY 7, 2007; AND)
THIRD RESTATED ON JANUARY 19, 2008; AND)
FOURTH RESTATED ON FEBRUARY 13, 2009),)

Defendant.)

HAMILTON COUNTY CLERK
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ANSWER TO COMPLAINT TO CONTEST TRUST

Bren Simon, as Trustee of the Melvin Simon Fourth Restated Family Enterprises Trust (“Bren Simon”) for her Answer to the Complaint to Contest Trust (“Complaint”) states and alleges as follows. With the exception of what is specifically admitted, however, each and every allegation of the Complaint is denied.

RESPONSE TO INTRODUCTION

1. With respect to paragraph 1 of the Complaint, Bren Simon admits that the will and trust were executed on February 13, 2009 but denies the remaining allegations as incomplete, misleading and thus inaccurate. As an initial matter, the “action” that is brought bears a caption that is inaccurate, misleading and should be amended. Here, Deborah Simon is listed as the sole plaintiff when in fact plaintiff’s lawyers represent not only Deborah Simon but David E. Simon and Cynthia A. (Simon) Skjodt as well. This fact is further confirmed by the “Appearance By Attorney in Civil Case” filed by Ice Miller LLP on January 7, 2010, reflecting representation of Deborah and David Simon and Cynthia (Simon) Skjodt. Under Rule 19 of the Indiana Rules of Trial Procedure, their joinder is needed as parties to prevent a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of their claimed interest. Thus the “action” should be revised to reflect the true parties responsible for instituting this proceeding for all purposes of moving forward with discovery, trial and resolution.

In addition, the “action” references The Melvin Simon Family Trust Agreement Number One, The Melvin Simon Family Trust Agreement Number Two and The Melvin Simon Family Trust Agreement Number Three created December 11, 2003, together with The Melvin Simon Family Charitable Trust Agreement Number 1 and 2, dated December 11, 2003. In fact, The Melvin Simon Restated Family Enterprise Trust Agreement dated June 10, 2006 revokes these

five Trusts. Accordingly, the caption description that these Trusts are defendants, and were consolidated and restated in full on June 10, 2006, is false and should be stricken.

2. With respect to paragraph 2 of the Complaint, Bren Simon admits that Melvin Simon had executed previous versions of a will and trust, and that over the years these had been revised from time to time and that others presented him with advice with respect to such planning. Melvin Simon made his own voluntary decisions with respect to such versions of the will and trust and did so with respect to the Will and Trust executed on February 13, 2009, for sound and rational reasons, after again receiving independent advice with respect to such planning. Bren Simon denies the remaining allegations of the Complaint as incomplete, inaccurate and immaterial characterizations of previous wills and trusts.

3. With respect to paragraph 3 of the Complaint, Bren Simon denies each and every allegation as false, incomplete and inaccurate. Melvin Simon voluntarily and of his own free will, with the requisite mental capacity, signed a valid will and trust on February 13, 2009, more than seven months before his death. He was not defrauded, coerced or unduly influenced to do so. There were sound and rational reasons for Melvin Simon to make the changes he made on February 13, 2009.

The will and trust executed on February 13, 2009 was brought about by a number of changed economic and factual circumstances. More specifically, by the end of January 2009 it had already been determined that the size of the Melvin Simon estate, since the time of the previous will and trust, had diminished substantially due principally to a decrease in share price in SPG stock. As such, the value of the estate, and the previous version of what would be left to Bren Simon, represented far less in 2009 than it previously did. In addition, by February 2, 2009, SPG, through David Simon and others, had determined that SPG would substantially

decrease its cash dividends to the Melvin Simon Restated Family Enterprises Trust (of which Melvin and Bren Simon were co-trustees) as a result of SPG's efforts, as described by David Simon, to "hoard and warehouse capital." Since SPG unit ownership represented a large percentage of the Melvin Simon's wealth, a decrease, here by an order of magnitude of annual cash dividends, greatly impacted cash flow received each year by Melvin and Bren Simon. The changes in the Trust and Will thus reflected an effort to compensate for the fact that the income Bren Simon would have received annually under the previous estate plan had been enormously reduced and protection was needed from future events which might similarly restrict cash flow.

In addition, it had become apparent to Melvin Simon that the children might not be fair or equitable to Bren Simon if the children were left with an ability to impact Bren's financial situation or business interests. For example, attempts by Melvin Simon to have Bren Simon appointed as a director on the Board of MSA (a corporation originally founded by Melvin and Herb Simon holding the family interests in SPG units and stock holdings) had been rebuffed by David Simon, a director, and or others. Melvin Simon had seen first hand the stonewalling and piecemeal responses to attempts by Bren Simon and her representatives to gain pertinent documentation regarding the true value and interests of the estate to which she was entitled, including MSA and SPG interests, which David Simon and others influenced or controlled. Melvin Simon repeatedly needed to direct that Bren Simon be provided with such documentation, only to be later stonewalled and piecemealed again with respect to other documentation that was requested. In addition, a review of previous gifting and transfers of wealth to David, Cindy and Deborah and their interests, (individually or otherwise) revealed that sufficiently large amounts had been previously transferred in light of the circumstances. Further, charitable giving would be handled by Bren Simon in her discretion.

In that regard, then, charitable donations were not eliminated (as alleged). Rather, three modifications of charitable gifts occurred as a result of the Will and Trust signed on February 13, 2009. First, the timing of the funding of certain charitable lead annuity trusts was changed to the applicable death of either Melvin or Bren, but with an increase of the share of the funding from one-third to one-half of the estate. This timing of such funding will be confirmed once the scrivener's error is corrected. David, Cindy and Deborah Simon were previously informed of this scrivener's error through their counsel. Second, an amount was provided that would allow Bren to make charitable donations, identified previously by Melvin Simon, discretionary by Bren Simon so as to create the opportunity for associated income tax deductions for such giving. Third, a charitable lead annuity trust was funded at the time of Melvin Simon's death that requires satisfaction of certain existing charitable obligations.

4. With respect to paragraph 4 of the Complaint, Bren Simon admits that Melvin Simon intended that further charitable giving would be handled by Bren Simon in her discretion but otherwise denies the remaining allegations as incomplete and thus inaccurate. In that regard, then, charitable donations were not eliminated (as alleged). Rather, three modifications of charitable gifts occurred as a result of the Will and Trust signed on February 13, 2009. First, the timing of the funding of certain charitable lead annuity trusts was changed to the applicable death of either Melvin or Bren, but with an increase of the share of the funding from one-third to one-half of the estate. This timing of such funding will be confirmed once the scrivener's error is corrected. David, Cindy and Deborah Simon were previously informed of this scrivener's error through their counsel. Second, an amount was provided that would allow Bren to make charitable donations, identified previously by Melvin Simon, discretionary by Bren Simon so as

to create the opportunity for associated income tax deductions for such giving. Third, a charitable lead annuity trust was funded at the time of Melvin Simon's death that requires satisfaction of certain existing charitable obligations. Finally, with respect to the execution of the Will and Trust, Parkinsonian symptoms had affected Melvin Simon's right hand in particular for some time. On February 13, 2009 Melvin Simon expressed a concern about his ability to sign his name. Manterfield explained that if Melvin Simon did not want to sign his name with an "X" he could ask someone to help him sign, which Melvin then requested and which was done.

5. With respect to paragraph 5 of the Complaint, Bren Simon denies the allegations.

RESPONSE TO PARTIES, JURISDICTION, VENUE

6. With respect to paragraph 6 of the Complaint, Bren Simon admits the allegations.

7. With respect to paragraph 7 of the Complaint, Bren Simon admits the allegations.

8. With respect to paragraph 8 of the Complaint, Bren Simon admits that Deborah is a beneficially interested person.

9. With respect to paragraph 9 of the Complaint, Bren Simon admits the allegations.

10. With respect to paragraph 10 of the Complaint, Bren Simon admits the allegations.

RESPONSE TO BACKGROUND FACTS

11. With respect to paragraph 11 of the Complaint, Bren Simon admits the allegations.

12. With respect to paragraph 12 of the Complaint, Bren Simon admits the allegations.

13. With respect to paragraph 13 of the Complaint, Bren Simon denies the allegations.

14. With respect to paragraph 14 of the Complaint, Bren Simon admits the allegations.

15. With respect to paragraph 15 of the Complaint, Bren Simon admits her age, but further states the allegations are immaterial for purposes of this action and therefore neither admits nor denies the remaining allegations.

16. With respect to paragraph 16 of the Complaint, Bren Simon admits they had a son, Max, who predeceased them.

17. With respect to paragraph 17 of the Complaint, Bren Simon admits the allegations but further states that Tamme is properly referred to as Tamme McCauley Simon.

RESPONSE TO REMAINING ALLEGATIONS

18. With respect to paragraph 18 of the Complaint, Bren Simon denies the allegations with respect to and to the extent such vague allegations suggest impairment of mental capacity of Melvin Simon sufficient to execute a Will and Trust on February 13, 2009.

19. With respect to paragraph 19 of the Complaint, Bren Simon denies the allegations with respect to and to the extent such vague allegations suggest impairment of mental capacity of Melvin Simon sufficient to execute a Will and Trust on February 13, 2009.

20. With respect to paragraph 20 of the Complaint, Bren Simon admits that with respect to Melvin Simon, a diagnosis of Lewy Body Dementia was considered as was a diagnosis consistent with Cortico Basal Degeneration with associated Parkinsonian symptoms, although medical commentary suggests that a definitive diagnosis of Cortico Basal Degeneration appears to require an examination of brain tissue after death. Bren Simon denies the allegations with respect to and to the extent such allegations suggest an impairment of mental capacity of Melvin Simon sufficient to execute a Will and Trust on February 13, 2009.

21. With respect to paragraph 21 of the Complaint, Bren Simon denies the allegations with respect to and to the extent such vague allegations suggest impairment of mental capacity of Melvin Simon sufficient to execute a Will and Trust on February 13, 2009.

22. With respect to paragraph 22 of the Complaint, Bren Simon asserts that Melvin Simon had Parkinsonian symptoms which eventually led to in-home assistance for physical care, but denies the allegations with respect to and to the extent such allegations suggest impairment of mental capacity of Melvin Simon sufficient to execute a Will and Trust on February 13, 2009.

23. With respect to paragraph 23 of the Complaint, Bren Simon asserts that Melvin Simon had Parkinsonian symptoms, which eventually led to in-home assistance for physical care, but denies the allegations with respect to and to the extent such allegations suggest impairment of mental capacity of Melvin Simon to conduct his personal financial affairs or otherwise function independently.

24. With respect to paragraph 24 of the Complaint, Bren Simon denies the allegations.

25. With respect to paragraph 25 of the Complaint, Bren Simon denies the allegations as incomplete and inaccurate.

26. With respect to paragraph 26 of the Complaint, Bren Simon admits that she gave loving care to her husband Melvin Simon during his life but denies the allegations with respect to and to the extent such allegations suggest undue influence or impairment of mental capacity of Melvin Simon sufficient to execute a Will and Trust on February 13, 2009 and given the lack of date specificity are immaterial and thus denied.

27. With respect to paragraph 27 of the Complaint, Bren Simon denies the allegations with respect to and to the extent such allegations suggest impairment of mental capacity of Melvin

Simon sufficient to execute a Will and Trust on February 13, 2009 or undue influence and given the lack of date specificity are immaterial and thus denied.

28. With respect to paragraph 28 of the Complaint, Bren Simon admits the allegations.

29. With respect to paragraph 29 of the Complaint, Bren Simon neither admits nor denies the allegations regarding value given the lack of specificity but otherwise denies the allegations.

30. With respect to paragraph 30 of the Complaint, Bren Simon denies the allegations as stated in that The Melvin Simon Family Trust Agreement Number One, The Melvin Simon Family Trust Agreement Number Two and The Melvin Simon Family Trust Agreement Number Three created December 11, 2003, together with The Melvin Simon Family Charitable Trust Agreement Number 1 and 2, dated December 11, 2003 were revoked by and through The Melvin Simon Restated Family Enterprise Trust Agreement dated June 10, 2006. Bren Simon denies the remaining allegations regarding the 2006 Will as immaterial given the referenced footnote which refuses to make an allegation as to whether it was ever operative or valid.

31. With respect to paragraph 31 of the Complaint, Bren Simon denies the allegations regarding the 2008 trust as immaterial given the referenced footnote which refuses to make an allegation as to whether it was ever operative or valid.

32. With respect to paragraph 32 of the Complaint, Bren Simon admits that Melvin Simon over the years had revised his will and trusts from time to time and that others presented him with advice with respect to such planning, although she lacks knowledge as to whom is being referred to in these allegations so as to be able to admit or deny same. However, Melvin Simon made his own voluntary decisions with respect to such versions of the will and trust and did so with respect to the Will and Trust executed on February 13, 2009, after again receiving independent advice with respect to such planning.

33. With respect to paragraph 33 of the Complaint, Bren Simon admits that Melvin Simon over the years had revised his will and trusts from time to time and that others presented him with advice with respect to such planning, although she lacks knowledge as to whom is being referred to in these allegations so as to be able to admit or deny same. However, Melvin Simon made his own voluntary decisions with respect to such versions of the will and trust and did so with respect the Will and Trust executed on February 13, 2009, after again receiving independent advice with respect to such planning.

34. With respect to paragraph 34 of the Complaint, Bren Simon admits the allegations.

35. With respect to paragraph 35 of the Complaint, Bren Simon admits the allegations in terms of the identified attendees and as to Manterfield and Ms. Hellauer's roles at that time but lacks sufficient knowledge to admit or deny Bruce Jacobson's role.

36. With respect to paragraph 36 of the Complaint and its footnote, Bren Simon admits that Exhibit C is a true and accurate copy of the will but denies its characterization as "purportedly" and denies its characterization of the Will as "Altered."

37. With respect to paragraph 37 of the Complaint and its footnote, Bren Simon admits that Exhibit D is a true and accurate copy of the Trust but denies the characterization as "allegedly" and denies its characterization of the Trust as "Altered."

38. With respect to paragraph 38 of the Complaint, Bren Simon lacks information as to what is meant by the term 'subsequent' and therefore denies the allegations.

39. With respect to paragraph 39 of the Complaint, Bren Simon admits the allegations.

40. With respect to paragraph 40 of the Complaint, Bren Simon admits the allegations as to the date and signing of the Will and Trust but denies the characterization as "purportedly" or of the Trust or Will as "Altered."

41. With respect to paragraph 41 of the Complaint, Bren Simon admits the allegations but denies the characterization as “allegedly” or of the Trust or Will as “Altered.” Bren Simon further states that Manterfield represented Melvin Simon before the identified time period as well.

42. With respect to paragraph 42 of the Complaint, Bren Simon admits the allegations but denies the characterization as “allegedly.”

43. With respect to paragraph 43 of the Complaint, Bren Simon denies the allegations as incomplete and thus misleading and inaccurate. Ms. Hellauer met with Melvin Simon in order to review and discuss asset information to assist Ms. Hellauer in her representation of Bren Simon both individually and as a co-trustee of the Melvin Simon Restated Family Enterprises Trust. In addition, Ms. Hellauer discussed with Melvin Simon valuation changes which had occurred in explaining the effect on Bren Simon. Melvin Simon discussed with Ms. Hellauer potential changes to his will and trust and indicated to Ms. Hellauer that he wanted changes made. Melvin Simon asked Ms. Hellauer, for reasons of efficiency, to speak with Mr. Manterfield over a speaker telephone in Melvin Simon’s presence to describe these potential changes, which occurred.

44. With respect to paragraph 44 of the Complaint, Bren Simon denies the allegations as incomplete and thus misleading and inaccurate. Ms. Hellauer met with Melvin Simon in order to review and discuss asset information to assist Ms. Hellauer in her representation of Bren Simon both individually and as a co-trustee of the Melvin Simon Restated Family Enterprises Trust. In addition, Ms. Hellauer discussed with Melvin Simon valuation changes which had occurred in explaining the effect on Bren Simon. Melvin Simon discussed with Ms. Hellauer potential changes to his will and trust and indicated to Ms. Hellauer that he wanted changes made. Melvin

Simon asked Ms. Hellauer, for reasons of efficiency, to speak with Mr. Manterfield over a speaker telephone in Melvin Simon's presence to describe these potential changes, which occurred.

45. With respect to paragraph 45 of the Complaint, Bren Simon denies the allegations as incomplete and thus misleading and inaccurate. Ms. Hellauer met with Melvin Simon in order to review and discuss asset information to assist Ms. Hellauer in her representation of Bren Simon both individually and as a co-trustee of the Melvin Simon Restated Family Enterprises Trust. In addition, Ms. Hellauer discussed with Melvin Simon valuation changes which had occurred in explaining the effect on Bren Simon. Melvin Simon discussed with Ms. Hellauer potential changes to his will and trust and indicated to Ms. Hellauer that he wanted changes made. Melvin Simon asked Ms. Hellauer, for reasons of efficiency, to speak with Mr. Manterfield over a speaker telephone in Melvin Simon's presence to describe these potential changes, which occurred.

46. With respect to paragraph 46 of the Complaint, Bren Simon admits the allegations but further states the telephone call to Manterfield was initiated by Melvin Simon.

47. With respect to paragraph 47 of the Complaint, Bren Simon denies the allegations.

48. With respect to paragraph 48 of the Complaint, Bren Simon admits the allegations.

49. With respect to paragraph 49 of the Complaint, Bren Simon admits that such documents were not provided directly to Melvin Simon during that time by Manterfield.

50. With respect to paragraph 50 of the Complaint, Bren Simon admits the allegations but asserts they are misleading as phrased. On February 13, 2009, Manterfield reviewed changes with Melvin Simon, was informed by Melvin Simon of additional changes, worked with his

office to incorporate such changes and then reviewed the final draft of such changes again with Melvin Simon prior to execution.

51. With respect to paragraph 51 of the Complaint, Bren Simon denies the allegations.

52. With respect to paragraph 52 of the Complaint, Bren Simon denies the allegations insofar as such allegations suggest that Bren Simon and Ms. Hellauer were present during the initial meeting between Melvin Simon and his lawyer to review and draft revisions to the Will and Trust. In fact, Manterfield, Jacobson and Mark Bernstein met extensively with Melvin Simon out of the presence of Bren Simon and Ms. Hellauer, reviewed the draft Will and Trust and made changes to the draft before Bren Simon and Ms. Hellauer were invited into the later meeting.

53. With respect to paragraph 53 of the Complaint, Bren Simon admits that Manterfield and Jacobson, in addition to Mark Bernstein, were present in a meeting with Melvin Simon on February 13, 2009, but deny the suggestion that it was "the" meeting referred to in Paragraph 52. In fact, Manterfield, Jacobson and Mark Bernstein met extensively with Melvin Simon out of the presence of Bren Simon and Ms. Hellauer, reviewed the draft Will and Trust and made changes to the draft before Bren Simon and Ms. Hellauer were invited into the later meeting.

54. With respect to paragraph 54 of the Complaint, Bren Simon admits the allegations but denies the characterization as "allegedly" or of the Trust or Will as "Altered."

55. With respect to paragraph 55 of the Complaint, Bren Simon admits the allegations but denies the characterization of the Trust or Will as "Altered."

56. With respect to paragraph 56 of the Complaint, Bren Simon denies the allegations as an incomplete and thus inaccurate statement of what occurred, in addition to denying the characterization of the Trust or Will as "Altered." Manterfield reviewed changes with Melvin Simon, was informed by Melvin Simon of additional changes, worked with his office to

incorporate such changes and then reviewed the final draft of such changes again with Melvin Simon prior to execution.

57. With respect to paragraph 57 of the Complaint, Bren Simon denies the allegations as an incomplete and thus inaccurate statement of what occurred, in addition to denying the characterization of the Trust or Will as "Altered." For some time, Parkinsonian symptoms had affected Melvin Simon's right hand in particular. On February 13, 2009 Melvin Simon expressed a concern about his ability to sign his name. Manterfield explained that if Melvin Simon did not want to sign his name with an "X" he could ask someone to help him sign, which Melvin then requested and which was done.

58. With respect to paragraph 58 of the Complaint, Bren Simon admits the allegations but denies the characterization of the execution as "purported" or of the Trust or Will as "Altered."

59. With respect to paragraph 59 of the Complaint, Bren Simon denies the allegations as an vague in its use of the 'material' and an incomplete and thus inaccurate statement of what occurred, in addition to denying the characterization of the Trust or Will as "Altered."

60. With respect to paragraph 60 of the Complaint, Bren Simon admits the allegations.

61. With respect to paragraph 61 of the Complaint, Bren Simon admits the allegations.

62. With respect to paragraph 62 of the Complaint, Bren Simon admits the allegations.

63. With respect to paragraph 63 of the Complaint, Bren Simon admits the allegations.

64. With respect to paragraph 64 of the Complaint, Bren Simon admits the Will and Trust are different than previous versions for rational, sound reasons in addition to denying the characterization of the Trust as "Altered."

65. With respect to paragraph 65 of the Complaint, Bren Simon denies the allegations as an incomplete and thus inaccurate statement of the terms of the Trust and Will, in addition to

denying the characterization of the Trust or Will as "Altered." The will and trust executed on February 13, 2009 was brought about by a number of changed economic and factual circumstances. More specifically, by the end of January 2009 it had already been determined that the size of the Melvin Simon estate, since the time of the previous will and trust, had diminished substantially due principally to a decrease in share price in SPG stock. As such, the value of the estate, and the previous version of what would be left to Bren Simon, represented far less in 2009 than it previously did. In addition, by February 2, 2009, SPG, through David Simon and others, had determined that SPG would substantially decrease its cash dividends to the Melvin Simon Restated Family Enterprises Trust (of which Melvin and Bren Simon were co-trustees) as a result of SPG's efforts, as described by David Simon, to "hoard and warehouse capital." Since SPG unit ownership represented a large percentage of the Melvin Simon's wealth, a decrease, here by an order of magnitude of annual cash dividends, greatly impacted cash flow received each year by Melvin and Bren Simon. The changes in the Trust and Will thus reflected an effort to compensate for the fact that the income Bren Simon would have received annually under the previous estate plan had been enormously reduced and protection was needed from future events which might similarly restrict cash flow.

In addition, it had become apparent to Melvin Simon that the children might not be fair or equitable to Bren Simon if the children were left with an ability to impact Bren's financial situation or business interests. For example, attempts by Melvin Simon to have Bren Simon appointed as a director on the Board of MSA (a corporation originally founded by Melvin and Herb Simon holding the family interests in SPG units and stock holdings) had been rebuffed by David Simon, a director, and or others. Melvin Simon had seen first hand the stonewalling and piecemeal responses to attempts by Bren Simon and her representatives to gain pertinent

documentation regarding the true value and interests of the estate to which she was entitled, including MSA and SPG interests, which David Simon and others influenced or controlled. Melvin Simon repeatedly needed to direct that Bren Simon be provided with such documentation, only to be later stonewalled and piecemealed again with respect to other documentation that was requested. In addition, a review of previous gifting and transfers of wealth to David, Cindy and Deborah and their interests, (individually or otherwise) revealed that sufficiently large amounts had been previously transferred in light of the circumstances. Further, charitable giving would be handled by Bren Simon in her discretion.

In that regard, then, charitable donations were not eliminated (as alleged). Rather, three modifications of charitable gifts occurred as a result of the Will and Trust signed on February 13, 2009. First, the timing of the funding of certain charitable lead annuity trusts was changed to the applicable death of either Melvin or Bren, but with an increase of the share of the funding from one-third to one-half of the estate. This timing of such funding will be confirmed once the scrivener's error is corrected. David, Cindy and Deborah Simon were previously informed of this scrivener's error through their counsel. Second, an amount was provided that would allow Bren to make charitable donations, identified previously by Melvin Simon, discretionary by Bren Simon so as to create the opportunity for associated income tax deductions for such giving. Third, a charitable lead annuity trust was funded at the time of Melvin Simon's death that requires satisfaction of certain existing charitable obligations.

66. With respect to paragraph 66 of the Complaint, Bren Simon denies the allegations. The remainder of the trust is funded and distributed directly to trusts for the benefit of the children, and this share of funding represents an increase from one-third to one-half of the estate at the time of funding.

67. With respect to paragraph 67 of the Complaint, Bren Simon denies the allegations in addition to denying the characterization of the Trust or Will as "Altered." The will and trust executed on February 13, 2009 was brought about by a number of changed economic and factual circumstances. More specifically, by the end of January 2009 it had already been determined that the size of the Melvin Simon estate, since the time of the previous will and trust, had diminished substantially due principally to a decrease in share price in SPG stock. As such, the value of the estate, and the previous version of what would be left to Bren Simon, represented far less in 2009 than it previously did. In addition, by February 2, 2009, SPG, through David Simon and others, had determined that SPG would substantially decrease its cash dividends to the Melvin Simon Restated Family Enterprises Trust (of which Melvin and Bren Simon were co-trustees) as a result of SPG's efforts, as described by David Simon, to "hoard and warehouse capital." Since SPG unit ownership represented a large percentage of the Melvin Simon's wealth, a decrease, here by an order of magnitude of annual cash dividends, greatly impacted cash flow received each year by Melvin and Bren Simon. The changes in the Trust and Will thus reflected an effort to compensate for the fact that the income Bren Simon would have received annually under the previous estate plan had been enormously reduced and protection was needed from future events which might similarly restrict cash flow.

In addition, it had become apparent to Melvin Simon that the children might not be fair or equitable to Bren Simon if the children were left with an ability to impact Bren's financial situation or business interests. For example, attempts by Melvin Simon to have Bren Simon appointed as a director on the Board of MSA (a corporation originally founded by Melvin and Herb Simon holding the family interests in SPG units and stock holdings) had been rebuffed by David Simon, a director, and or others. Melvin Simon had seen first hand the stonewalling and

piecemeal responses to attempts by Bren Simon and her representatives to gain pertinent documentation regarding the true value and interests of the estate to which she was entitled, including MSA and SPG interests, which David Simon and others influenced or controlled. Melvin Simon repeatedly needed to direct that Bren Simon be provided with such documentation, only to be later stonewalled and piecemealed again with respect to other documentation that was requested. In addition, a review of previous gifting and transfers of wealth to David, Cindy and Deborah and their interests, (individually or otherwise) revealed that sufficiently large amounts had been previously transferred in light of the circumstances. Further, charitable giving would be handled by Bren Simon in her discretion.

In that regard, then, charitable donations were not eliminated (as alleged). Rather, three modifications of charitable gifts occurred as a result of the Will and Trust signed on February 13, 2009. First, the timing of the funding of certain charitable lead annuity trusts was changed to the applicable death of either Melvin or Bren, but with an increase of the share of the funding from one-third to one-half of the estate. This timing of such funding will be confirmed once the scrivener's error is corrected. David, Cindy and Deborah Simon were previously informed of this scrivener's error through their counsel. Second, an amount was provided that would allow Bren to make charitable donations, identified previously by Melvin Simon, discretionary by Bren Simon so as to create the opportunity for associated income tax deductions for such giving. Third, a charitable lead annuity trust was funded at the time of Melvin Simon's death that requires satisfaction of certain existing charitable obligations.

68. With respect to paragraph 68 of the Complaint, Bren Simon admits that there is not a requirement as to all charitable giving but denies the remaining allegations as to the characterization of the Trust or Will as "Altered." In that regard, then, charitable donations were

not eliminated (as alleged). Rather, three modifications of charitable gifts occurred as a result of the Will and Trust signed on February 13, 2009. First, the timing of the funding of certain charitable lead annuity trusts is the applicable death of either Melvin or Bren, but with an increase of the share of the funding from one-third to one-half of the estate. This timing of such funding will be confirmed once the scrivener's error is corrected. David, Cindy and Deborah Simon were previously informed of this scrivener's error through their counsel. Second, an amount was provided that would allow Bren to make charitable donations, identified previously by Melvin Simon, discretionary by Bren Simon so as to create the opportunity for associated income tax deductions for such giving. Third, a charitable lead annuity trust was funded at the time of Melvin Simon's death that requires satisfaction of certain existing charitable obligations.

69. With respect to paragraph 69 of the Complaint, Bren Simon denies the allegations:

70. With respect to paragraph 70 of the Complaint, Bren Simon denies the allegations.

71. With respect to paragraph 71 of the Complaint, Bren Simon denies the allegations.

72. With respect to paragraph 72 of the Complaint, Bren Simon denies the characterization of a "long standing" estate plan but otherwise admits the allegations.

73. With respect to paragraph 73 of the Complaint, Bren Simon denies the allegations. In addition, the Complaint itself, at paragraph 4, admits Melvin Simon's intent was to fund not at his death but at the later death of Bren ("...nothing going to charity until, at the earliest, her death"). The fact that such funding occurs at the applicable death of either Melvin or Bren was confirmed with David, Cindy and Deborah Simon through their counsel prior to the filing of this Complaint on more than one occasion and will be confirmed once the scrivener's error is corrected.

74. With respect to paragraph 74 of the Complaint, Bren Simon denies the allegations. In addition, the Complaint itself, at paragraph 4, admits Melvin Simon's intent was to fund not at his death but at the later death of Bren ("..nothing going to charity until, at the earliest, her death"). The fact that such funding occurs at the applicable death of either Melvin or Bren was confirmed with David, Cindy and Deborah Simon through their counsel prior to the filing of this Complaint on more than one occasion and will be confirmed once the scrivener's error is corrected.

75. With respect to paragraph 75 of the Complaint, Bren Simon denies the allegations. In addition, the Complaint itself, at paragraph 4, admits Melvin Simon's intent was to fund not at his death but at the later death of Bren ("..nothing going to charity until, at the earliest, her death"). The fact that such funding occurs at the applicable death of either Melvin or Bren was confirmed with David, Cindy and Deborah Simon through their counsel prior to the filing of this Complaint on more than one occasion and will be confirmed once the scrivener's error is corrected.

76. With respect to paragraph 76 of the Complaint, Bren Simon denies the allegations in that such funding occurs at the applicable death of either Melvin or Bren and denies the characterization of the Trust or Will as "Altered" but otherwise admits the allegations.

77. With respect to paragraph 77 of the Complaint, Bren Simon denies the allegations.

78. With respect to paragraph 78 of the Complaint, Bren Simon denies the allegations.

79. With respect to paragraph 79 of the Complaint, Bren Simon denies the allegations.

80. With respect to paragraph 80 of the Complaint, Bren Simon denies the allegations as vague and ambiguous.

81. With respect to paragraph 81 of the Complaint, Bren Simon admits the allegations.

82. With respect to paragraph 82 of the Complaint, Bren Simon admits the allegations.

83. With respect to paragraph 83 of the Complaint, Bren Simon denies the allegations as vague and ambiguous.

84. With respect to paragraph 84 of the Complaint, Bren Simon denies the allegations.

85. With respect to paragraph 85 of the Complaint, Bren Simon denies the allegations.

86. With respect to paragraph 86 of the Complaint, Bren Simon denies the allegations.

87. With respect to paragraph 87 of the Complaint, Bren Simon denies the allegations and states that such allegations are an apparent attempt to ignore Indiana substantive law. In Indiana there is not a presumption of undue influence or burden shifting between spouses even where the surviving spouse held a separate position of trust since such a position is secondary to the position as the spouse.

88. With respect to paragraph 88 of the Complaint, Bren Simon incorporates by reference her response generally and specifically to each of the allegations contained in her Answer.

89. With respect to paragraph 89 of the Complaint, Bren Simon admits that Deborah is an interested party but denies remaining allegations as follows: Deborah Simon is listed as the sole plaintiff when in fact plaintiff's lawyers represent not only Deborah Simon but David E. Simon and Cynthia A. (Simon) Skjodt as well. This fact is further confirmed by the "Appearance By Attorney in Civil Case" filed by Ice Miller LLP on January 7, 2010, reflecting representation of Deborah and David Simon and Cynthia (Simon) Skjodt. Under Rule 19 of the Indiana Rules of Trial Procedure, their joinder is needed as parties to prevent a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of their claimed interest. Thus the matter should be revised to reflect the true parties responsible for instituting this proceeding for all purposes of moving forward with discovery, trial and resolution.

In addition, the “action” references The Melvin Simon Family Trust Agreement Number One, The Melvin Simon Family Trust Agreement Number Two and The Melvin Simon Family Trust Agreement Number Three created December 11, 2003, together with The Melvin Simon Family Charitable Trust Agreement Number 1 and 2, dated December 11, 2003. In fact, The Melvin Simon Restated Family Enterprise Trust Agreement dated June 10, 2006 revokes these five Trusts. Accordingly, the caption description that these Trusts are defendants, and were consolidated and restated in full on June 10, 2006, is false and should be stricken.

90. With respect to paragraph 90 of the Complaint, Bren Simon denies the allegations.

91. With respect to paragraph 91 of the Complaint, Bren Simon denies the allegations.

92. With respect to paragraph 92 of the Complaint, Bren Simon denies the allegations.

93. With respect to paragraph 93 of the Complaint, Bren Simon denies the allegations.

94. With respect to paragraph 94 of the Complaint, Bren Simon denies the allegations.

95. With respect to paragraph 95 of the Complaint, Bren Simon denies the allegations.

First Affirmative Defense

96. Plaintiff’s Complaint fails to state a claim upon which relief can be granted.

Second Affirmative Defense

97. Plaintiff’s allegations of fraud must be stricken since they fail to identify with particularity the required factual predicate to such a claim. Trial Rule 9 (B) applies where fraud is alleged in a will contest. *In re Estate of Parlock*, 486 NE2d 567 (Ind. App 1985), *cited in Lincoln National Bank v Munding*, 528 NE2d 829 (Ind. App 1988). Trial Rule 9 (B) requires particularity, *see for example, Abbott v Bates*, 670 NE 2d 916 (Ind. App 1996) as to time, place, substance of false representation, facts misrepresented and identification of what was procured by fraud. The Complaint fails to do so.

Third Affirmative Defense

98. Plaintiff's Complaint fails under Indiana law to name all necessary parties. Here, Deborah Simon is listed as the sole plaintiff when in fact plaintiff's lawyers represent not only Deborah Simon but David E. Simon and Cynthia A. (Simon) Skjodt as well. This fact is further confirmed by the "Appearance By Attorney in Civil Case" filed by Ice Miller LLP on January 7, 2010, reflecting representation of Deborah and David Simon and Cynthia (Simon) Skjodt. Under Rule 19 of the Indiana Rules of Trial Procedure, their joinder is needed as parties to prevent a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of their claimed interest. Thus the "action" should be revised to reflect the true parties responsible for instituting this proceeding for all purposes of moving forward with discovery, trial and resolution.

Fourth Affirmative Defense

99. Plaintiff's Complaint fails to state a claim upon which relief can be granted in that the Complaint represents an attempt to contravene Indiana substantive law which would allow a testator to disinherit his children without his motive for doing so being called into question. Here, Melvin Simon did not disinherit his children and had rational and sound motives for the Will and Trust which he executed on February 13, 2009 and his intent should be effectuated.

Fifth Affirmative Defense

100. Plaintiff's Complaint is barred by estoppel. The attempt to assert that Melvin Simon was of unsound mind when in fact at pertinent times one or more of the children and their interests were negotiating and dealing with Melvin Simon on financial matters estops them from attempting to assert otherwise.

Sixth Affirmative Defense

101. The Complaint fails to state a claim by attempting to include The Melvin Simon Family Trust Agreement Number One, The Melvin Simon Family Trust Agreement Number Two and The Melvin Simon Family Trust Agreement Number Three) created December 11, 2003, together with The Melvin Simon Family Charitable Trust Agreement Number 1 and 2, dated December 11, 2003. In fact, The Melvin Simon Restated Family Enterprise Trust Agreement dated June 10, 2006 revokes these five Trusts.

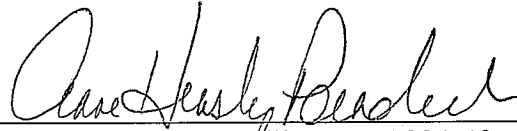
Seventh Affirmative Defense

102. The Complaint fails to state a claim upon which relief can be granted in requesting affirmative relief outside the scope of jurisdiction and scope of role of the named defendant.

WHEREFORE, Bren Simon prays that the Court dismiss the Complaint with prejudice, denying the relief requested in its entirety and awarding fees and costs in defending the matter, in addition to such other and further relief the Court deems appropriate.

Respectfully submitted,

CAMPBELL KYLE PROFFITT LLP

By 

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Attorneys for Defendant

*Of Counsel To Defendant
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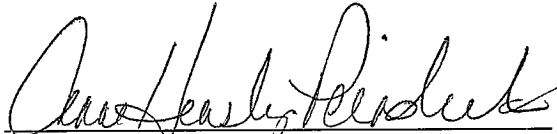
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Certificate of Service

The undersigned hereby certifies that a copy of the foregoing has been served by first class United States mail, postage prepaid, this 19th day of January, 2010, on:

Jack G. Hittle Church Church Hittle & Antrim 938 Conner Street P.O. Box 10 Noblesville, IN 46061 Hittle@cchalaw.com	Richard A. Smikle Andrew N. Vento Ice Miller LLP One American Square, Suite 290 Indianapolis, IN 46282 Richard.smikle@icemiller.com Andrew.vento@icemiller.com



William E. Wendling, Jr.
Anne Hensley Poindexter

IN THE HAMILTON SUPERIOR COURT

DEBORAH J. SIMON,)

v.)

Case Number: 29D03-1001-TR-00002

BREN SIMON,)
as Trustee of the Melvin)
Simon Family Enterprises Trust)
Agreement,)

HAMILTON COUNTY COURTS
2010 JAN 19 PM 3:44
FILED

APPEARANCE BY ATTORNEY IN CIVIL CASE

Party Classification: Initiating:___ Responding: X Intervening:___

1. The undersigned attorney and all attorneys listed on this form now appear in this case for the following party member(s): Bren Simon, Trustee

2. Applicable attorney information for service as required by Trial Rule 5(B)(2) and for case information as required by Trial Rules 3.1 and 77(B) is as follows:

Name:	William E. Wendling, Jr.	Attorney Number:	<u>2004-49</u>
Name:	Anne Hensley Poindexter	Attorney Number:	<u>14051-29</u>
Address:	Campbell Kyle Proffitt LLP	Telephone:	<u>(317) 846-6514</u>
	11595 North Meridian Street, Suite 701	FAX:	<u>(317) 843-8097</u>
	Carmel, Indiana 46032	Computer Address:	<u>wwendling@ckplaw.com</u> <u>apointexter@ckplaw.com</u>

3. There are other party members: Yes:___ No: X

4. The Clerk is requested to assign this case the following Case Type under Administrative Rule 8(b)(3): n/a

5. I will accept service by FAX at the above-noted number: Yes: X No:___

6. This case involves support issues. Yes:___ No: X

7. There are related cases. Yes: X No:___

STATE OF INDIANA) IN THE HAMILTON SUPERIOR COURT
) SS:
COUNTY OF HAMILTON) DOCKET NO. 29D03-1001-TR-0002

2010 JAN 19 PM 3:14
HAMILTON COUNTY CLERK'S OFFICE

DEBORAH J. SIMON,)

Plaintiff)

v.)

BREN SIMON, AS TRUSTEE OF THE MELVIN)
SIMON FAMILY ENTERPRISES TRUST)
AGREEMENT DATED OCTOBER 28, 1990)
(AMENDED AND RESTATED ON DECEMBER)
11, 2003; AND THEN FIRST AMENDED ON)
JULY 2, 2005; AND THE MELVIN SIMON)
FAMILY TRUST AGREEMENT NUMBER ONE)
DATED DECEMBER 11, 2003; AND THE)
MELVIN SIMON FAMILY TRUST)
AGREEMENT NUMBER TWO DATED)
DECEMBER 11, 2003; AND THE MELVIN)
SIMON FAMILY TRUST AGREEMENT)
NUMBER THREE DATED DECEMBER 11, 2003;)
AND THE MELVIN SIMON FAMILY TRUST)
CHARITABLE TRUST AGREEMENT NUMBER)
ONE DATED DECEMBER 11, 2003; AND THE)
MELVIN SIMON FAMILY CHARITABLE)
TRUST AGREEMENT NUMBER TWO DATED)
DECEMBER 11, 2003; AS CONSOLIDATED AND)
AMENDED AND RESTATED IN FULL ON JUNE)
10, 2006, KNOWN AS THE MELVIN SIMON)
RESTATED FAMILY ENTERPRISES TRUST; AS)
FIRST AMENDED ON AUGUST 3, 2006; AND)
SECOND RESTATED ON MAY 7, 2007; AND)
THIRD RESTATED ON JANUARY 19, 2008; AND)
FOURTH RESTATED ON FEBRUARY 13, 2009),)

Defendant.)

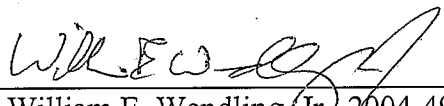
**DEFENDANT'S MOTION TO DISMISS
FRAUD ALLEGATION IN COMPLAINT TO CONTEST TRUST
FOR LACK OF SPECIFICITY**

Pursuant to Rule 9 of the Indiana Rules of Trial Procedure, Bren Simon, as Trustee of the Melvin Simon Fourth Restated Family Enterprises Trust ("Bren Simon"), respectfully submits this motion to dismiss Plaintiff Deborah Simon's allegation of fraud in the Complaint filed in the above-captioned matter for lack of specificity as more specifically set forth in the memorandum in support of this motion being filed contemporaneously herewith.

WHEREFORE, Bren Simon respectfully requests that Plaintiff's fraud claim be ordered dismissed pursuant to Indiana Trial Rule 9(B).

Dated: this 19th day of January, 2010. Respectfully submitted,

CAMPBELL KYLE PROFFITT LLP

By 
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Anne Hensley Poindexter, 14051-29
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Attorneys for Defendants

*Of Counsel To Defendants
(Pro hac in process of application)*

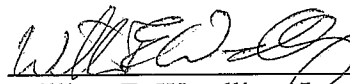
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William E. Wendling, Jr.
Anne Hensley Poindexter

STATE OF INDIANA) IN THE HAMILTON SUPERIOR COURT
) SS:
 COUNTY OF HAMILTON) DOCKET NO. 29D03-1001-TR-0002

DEBORAH J. SIMON,)

Plaintiff)

v.)

BREN SIMON, AS TRUSTEE OF THE MELVIN)
 SIMON FAMILY ENTERPRISES TRUST)
 AGREEMENT DATED OCTOBER 28, 1990)
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 FIRST AMENDED ON AUGUST 3, 2006; AND)
 SECOND RESTATED ON MAY 7, 2007; AND)
 THIRD RESTATED ON JANUARY 19, 2008; AND)
 FOURTH RESTATED ON FEBRUARY 13, 2009),)

Defendant.)

2010 JAN 19 PM 3:44
 HAMILTON COUNTY COURTS

**DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO DISMISS
 FRAUD ALLEGATION IN COMPLAINT TO CONTEST TRUST
 FOR LACK OF SPECIFICITY**

Pursuant to Rule 9 of the Indiana Rules of Trial Procedure, Bren Simon, as Trustee of the Melvin Simon Fourth Restated Family Enterprises Trust (“Bren Simon”), respectfully submits this motion to dismiss Plaintiff Deborah Simon’s allegation of fraud in the Complaint filed in the above-captioned matter because such allegation fails as a matter of law for the reasons set forth in more detail below.

FACTUAL BACKGROUND

Plaintiff Deborah Simon, one of Melvin Simon’s children from his first marriage, has filed with this Court a Verified Complaint to Contest Trust. The Complaint names Bren Simon, Melvin Simon’s surviving widow, in her capacity as Trustee in the Trust Contest Complaint.

Count I of the Complaint includes an allegation that the February 13, 2009 Trust was obtained through “fraud.” Compl. ¶ 91. Bren Simon denies the allegation since Melvin Simon voluntarily and of his own free will, with the requisite mental capacity, signed a valid will and trust on February 13, 2009, more than seven months before his death. He was not defrauded, coerced or unduly influenced to do so. Bren Simon contends that there were sound and rational reasons for Melvin Simon to make the changes he made on February 13, 2009. However, Plaintiff’s contention of fraud, even if it is considered as a proper allegation, which it cannot be, fails because it lacks specificity. Pursuant to Rule 9 of the Indiana Rules of Trial Procedure, fraud must be pled with specificity. This Court should thus dismiss Plaintiff’s claim of fraud.

ARGUMENT

PLAINTIFF’S CLAIM OF FRAUD SHOULD BE DISMISSED BECAUSE IT FAILS TO ALLEGE FRAUD WITH SPECIFICITY.

The Complaint alleges that “[t]he Altered Trust was obtained through fraud, undue influence, duress, and/or other breaches.” Compl. ¶ 91. This allegation is insufficient as a matter of law to establish a fraud claim with respect to Melvin Simon’s trust. To state a claim

for actual fraud under Indiana law, the party asserting the claim must establish the following five elements: (1) a material misrepresentation of past or existing facts by the party to be charged; (2) which was false; (3) which was made with knowledge or reckless ignorance of the falseness; (4) was relied upon by the complaining party; and (5) proximately caused the complaining party injury. *Young v. Thompson*, 794 N.E.2d 446, 448 (Ind. Ct. App. 2003). Indiana further requires that fraud be pled with specificity, including the time, place, substance of the false representations, the facts misrepresented, and an identification of what was procured by fraud. *Beckom v. Quigley*, 824 N.E.2d 420, 428 (Ind. Ct. App. 2005).

Under the Indiana Rules of Trial Procedure, the elements of fraud must be specifically averred. IND. R. TR. P. 9(B).¹ Trial Rule 9(B) serves an important purpose in fraud actions by deterring groundless suits and providing defendants with sufficient information in the complaint to enable them to prepare a defense. *McKinney v. State*, 693 N.E.2d 65, 72 (Ind. 1998) (holding that in action brought under Deceptive Consumer Sales Act the complaint had failed to allege fraud with sufficient particularity because it did not specify which representations were false, in what respect they were false, when they were made, or who made them).

Plaintiff's fraud claim fails because she did not plead the circumstances of fraud with particularity. The Complaint is completely lacking in the specifics of "who, what, when, where, and how" the alleged fraud occurred. *E.J. Rogers, Inc. v. United Parcel Serv., Inc.*, 338 F. Supp. 2d 935, 938 (S.D. Ind. 2004) (denying shipper's motion to dismiss for failure to state a claim in

¹ Where the court has previously said that it is acceptable to make a general allegation of fraud pursuant to simple requirements for notice pleading under Trial Rule 8 (*Pactor v. Pactor*, 391 N.E.2d 1148, 1151-52 (Ind. Ct. App. 1979), that decision was later deemed "incorrect" based on the special pleading requirements of Trial Rule 9(B). *Cunningham v. Assocs. Capital Servs. Corp.*, 421 N.E.2d 681, 683 (Ind. Ct. App. 1981) (finding that in action involving equipment lease contract the lessee's affirmative defense alleging fraud and mistake were not pled with specificity).

action brought under Carmack Amendment to the Interstate Commerce Act and breach of contract, noting that circumstances do not have to be pled with particularity except in cases alleging fraud or mistake). In the case at bar, there is simply nothing that specifies what was represented, what was false, who said it and who relied on it, much less how that resulted in injury. *See Young v. Thompson*, 794 N.E.2d 446, 448 (Ind. Ct. App. 2003). Plaintiff has alleged a “Phone Conversation” about a week before February 13, 2009, a “meeting” on February 13, 2009, and identified individuals who were allegedly present at each event. Compl. ¶¶ 47, 52, 53, 56. But under Indiana law, these allegations are deficient and therefore cannot support a claim for fraud.

Indeed, aside from a single mention of “fraud” without any further specifics, the Complaint fails to state even one specific fraudulent allegation, as required by Indiana law. *Beckom v. Quigley*, 824 N.E.2d at 428. The Indiana Court of Appeals has weighed in on such general allegations of fraud. *Estate of Parlock*, 496 N.E.2d 567, 569 (Ind. Ct. App. 1985). Where a will contestant merely alleged that “said Last Will and Testament was unduly executed and that [testator’s] signature thereto was obtained by fraud and duress,” the court found that this mere reference to fraud was not sufficient to meet the specificity requirement in Rule 9(B). *Id.* The court ultimately held that any argument concerning fraud was therefore waived and not properly before the court. *Id.*

In order to maintain an action based on fraud, a plaintiff must have relied upon misrepresentations made by the defendant. *Loomis v. Ameritech Corp.*, 764 N.E.2d 658, 667, (Ind. Ct. App. 2002) (dismissing fraud claim because complaint did not allege that plaintiffs had in any way relied upon any misrepresentations made by defendants in action involving spoliation of evidence by attorneys in personal injury action). In the instant case, the fraud claim fails to


state the existence of any material misrepresentation of past or existing facts and, moreover, makes no showing of reliance thereon. This Court should dismiss Plaintiff's fraud claim for failure to plead fraud with specificity.

CONCLUSION

For all of the above-stated reasons, Bren Simon respectfully requests that Plaintiff's fraud claim be ordered dismissed pursuant to Indiana Trial Rule 9(B).

Dated: this 19th day of January, 2010. Respectfully submitted,

CAMPBELL KYLE PROFFITT LLP

By 
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Anne Hensley Poindexter, 14051-29
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Attorneys for Defendants

***Of Counsel To Defendants
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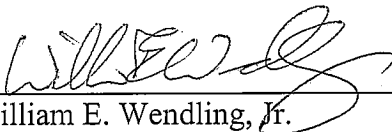
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