STATE OF INDIANA	)	IN THE [redacted]
	) SS:	
COUNTY OF [redacted]	)	CAUSE NO: [redacted]
STATE OF INDIANA, Plaintiff, v. [redacted] , individually and as member and manager of [redacted] individually and as member or authorized agent of [redacted] a Nevada LLC; [redacted] an Oklahoma [redacted] individually and as member, manager, or authorized agent of [redacted], and Defendants.	)	**DEFENDANTS' MEMORANDUM IN SUPPORT OF RULE 12/21(A) COMBINED MOTION**

I. INTRODUCTION

Representing the Plaintiff, the Indiana Attorney General's Office ("AG's Office" or "AG Office's"), perhaps sensing easy political points in claiming Indiana homeowners were fraudulently tricked out of rightful satisfaction (and issuing a timely press release aligned to that unproven claim),[1] initiated this case on [redacted] against the Defendants ("Complaint"). Aside from the ethical propriety of the AG's Office extrajudicial comments within twenty-four

1 *See* [redacted]

hours after the initiation of the action,[2] Plaintiff's Complaint, which seeks injunctive relief, investigative costs, restitution, and civil penalties, alleges the Defendants – acting individually and as members of legitimately formed foreign LLCs – violated the Indiana Deceptive Consumer Sales Act, Ind. Code § 24-5-0.5, *et seq.* ("DCSA"), as well as the Indiana Home Loan Practices Act, Ind. Code § 24-9, *et seq.* ("HLPA"), by engaging in conduct described as a "Tax-Sale & Real Estate Fraud Scheme." (Complaint, p. 6).

Unfortunately, the AG Office's rush to claim and publish allegations of fraud precluded a deeper examination of the Complaint's merits under the statutory definitions of the Plaintiff's chosen weaponry. As a result, Plaintiff is essentially requiring the Court to turn a blind eye to plain statutory meanings and common law interpretations in order to hold the Defendants harshly accountable as nothing more than proper deed buyers.

II. Summary of the Argument

As a preliminary matter, Plaintiff lacked the requisite standing to initiate the present action. While the DCSA and HLPA confer express standing to the AG's Office to enforce these two statutes on behalf of the State of Indiana, the use of that power must be appropriately tailored to its express statutory confines. Here the statutes were used by the AG's Office with little thought given to their actual terms and limits. For instance, the Complaint alleges the Defendants are all suppliers under the traditional meaning of the DCSA, yet in each of the listed transactions Plaintiff alludes to involves the Defendants purchasing quitclaim deeds from Indiana homeowners. Even assuming, without conceding, these purchases can be viewed as "consumer transactions," the express purpose of the DCSA is to protect consumers from deceptive

2 Which raises material questions under Rule 3.6 of the *Indiana Rules of Professional Conduct*. To wit: "a lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

suppliers. As simple as this may seem, in each of the transactions used by the Plaintiff, it is the Defendants who were the consumers if the DCSA were to actually apply to this controversy. The Defendants, after all, acquired the quitclaim deeds from the homeowners for decent value given.[3]

Such is the logical absurdity of the Plaintiff's Complaint that it requires definitions to be turned on their selves. Even worse, allowing the Plaintiff to maintain this action under the DCSA would be the effective end of limiting principles altogether. In essence, Plaintiff seeks to use the DCSA and HLPA to establish that A isn't just A, but A is also B, and C, and D.

In addition, by alleging fraudulent misrepresentation Plaintiff was required to plead specifics under Rule 9 of the Indiana Rules of Trial Procedure. A failure to plead specifics when alleging fraud is remedied by dismissal of the action since it easily arises to a Rule 12(b)(6) violation in Indiana. Besides simply using the words "misrepresentation," or "fraud," or "concealment," Plaintiff has failed to allege any particular incidences of fraud by the Defendants against the citizens of Indiana.[4]

Lastly, Plaintiff has failed to allege or state, specifically, why the corporate form should be ignored to the point of holding individuals behind the corporate form personally liable. Again, the AG's Office favors words like "fraud," or "misrepresentation," but it hasn't specifically pleaded why the corporate entities' veil should be pierced in order to attach individual liability on the above listed individuals. As a result, Plaintiff's Complaint amounts to either an improper joinder of parties or a situation where the Court's exercise of personal jurisdiction over the individual defendants is impermissible.

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3 As an interesting point to note, in the alleged transactions the Indiana homeowners were granting their interest in property through a quitclaim deed. As a rule, a quitclaim deed provides no guarantees or warranties and is essentially a conveyance of property as is.

4 See, e.g., Plaintiff Complaint, ¶ 46 ("46. *It is believed* and averred that Defendants employed or independently contracted with individuals to locate, negotiate, deceive, misrepresent, conceal and/or omit material information in the "purchase" of the real property from the Indiana homeowners") (emphasis added). An allegation of fraud cannot be supported by a belief and Plaintiff's counsel, the AG's Office, should have known better.

III. STANDARDS

Rule 12(B)(6)/Rule 9(B)

A Rule 12(B)(6) motion is used "to test the legal sufficiency of a complaint; or, stated differently, to test the law of the claim, not the facts that support it." Musgrave v. State Bd. Of Tax Comm'rs, 658 N.E.2d 135, 140 (Ind. Tax 1995), *see also* City of East Chi., Ind. V. East Chi. Second Century, Inc. 908 N.E.2d 611, 61 (Ind. 2009). The trial court's grant of a dismissal motion is proper if it is apparent that the facts alleged in the complaint are incapable of supporting relief under any set of circumstances. *See* Godby v. Whitehead, 837 N.E.2d 149, 149 (Ind. Ct. App. 2005). In determining whether any facts will support the claim, "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on a Rule 12(B)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007); *see also* Davids ex rel. Davis v. Ford Motor Co., 747 N.E.2d 1146. Similarly, "the issue of standing is properly raised via a 12(B)(6) motion, for a party's lack of standing will deprive a court of jurisdiction over a particular case." Musgrave, at 138-139.

Read within 12(B)(6), Rule 9(B) also states that all averments of fraud must be pled with specificity as to the "circumstances constituting fraud." In order to meet this burden, "the party alleging fraud must specifically allege the elements of fraud, the time, place, and substance of false reports, and any facts that were misrepresented, as well as the identity of what was procured by fraud. Continental Basketball Association, Inc. v. Ellenstein Enterprises, 669 N.E.2d134, 138 (Ind.1996). Failure to comply with the rule's specificity requirements constitutes a failure to state

a claim upon which relief may be granted[.]" Payday Today, Inc. v. Hamilton, 911 N.E.2d 26, 34 (Ind. Ct. App. 2009).

Rule 12(b)(2)/Rule 21

Indiana Rule 12(b)(2) also tests the courts authority to exercise personal jurisdiction over the defending party. Since "[i]t is axiomatic that an Indiana court must have personal jurisdiction over a defendant in order to render a valid personal judgment against that defendant (Ryan v. Chayes Virginia (1990), Ind. App., 553 N.E.2d 1237, 1239, *trans. denied*), a party challenging the court's personal jurisdiction must prove its challenge by a preponderance of the evidence unless lack of jurisdiction is apparent on the face of the complaint. Mid-States Aircraft Engines v. Mize Co. (1984), Ind. App., 467 N.E.2d 1242, 1247." Freemond v. Somma, 611 N.E.2d 684 (Ind. Ct. App. 1993). Further, "[t]he decision to grant a motion to dismiss or lack of personal jurisdiction under T.R. 12(B)(2) lies within the discretion of the trial court." Torborg v. Fort Wayne Cardiology, Inc., 671 N.E.2d 947 (1996) (citing Lee v. Goshen Rubber Co., Inc., 635 N.E.2d 214, 215 (Ind. Ct. App. 1994). "When in personam jurisdiction is challenged by a motion to dismiss, the burden is with the plaintiff to show the court a basis for the assertion of long-arm jurisdiction." Oddi v. Mariner-Denver, Inc., 461 F.Supp. 306, 310 (S.D.Ind.1978)." Torborg, at 949.

Alternatively, while Indiana Rule 21 is not grounds for dismissing an action, upon motion the trial court "may order parties dropped or added at any state of the action and on such terms as are just and will avoid delay." (T.R. 21(A)). Under 21(A), the movant is required to make a timely invocation of misjoinder subject to the trial court's discretion to add or drop parties or claims. See Mitchell v. Stevenson, 677 N.E.2d 551, 557 (Ind. Ct. App. 1997).

Rule 12(E)/Rule 12(F)

Indiana Rule 12(E) is a procedural tool used when a court determines a pleading "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." Upon a showing of "defects complained of and the details desired," the court may order the pleading be properly complemented. Id.

Indiana Rule 12(F) is also a procedural tool whereby "the court may order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent, or scandalous matter." If the "motion to strike attacks the legal sufficiency of the complaint, the trial court should apply the same standards for granting the relief as it would have employed had the motion been brought under T.R.12(B)(6)." Anderson v. Anderson, 399 N.E.2d 391, 407-408 (Ind. Ct. App. 1979). Beyond that, "[a] motion to strike is proper for purposes of stripping a pleading of immaterial, impertinent, redundant matter or to strike out a sham pleading. Finney v. L.S. Ayres & Co. (1965) 137 Ind. App. 430, 207 N.E.2d 642." Smith v. Beasley, 504 N.E.2d 1028, 1030 (Ind. Ct. App. 1987).

IV. ARGUMENT

A. The Plaintiff did not have standing to initiate the present action under the DCSA

Plaintiff's Complaint alleges the Defendants engaged in a fraudulent scheme contrary to the provisions of the DCSA. Even treating as true Plaintiff's entire Complaint, and giving those allegations all reasonable inferences, the alleged conduct still does not fall under the scope and definitions of the DCSA. As a result, Plaintiff, acting through the AG's Office, lacked standing to bring the action.

The AG's Office is a "creature of statue and has only those powers delegated to it by the General Assembly." State of Indiana v. Rankin, 282 N.E.2d 852, 852 (Ind. Ct. App. 1972). "It is further true that the Attorney General has no duties or powers attaching to his office by reason of

the common law[.] Therefore, it is incumbent upon the Attorney General to show explicit legal authority giving him the right to initiate [a] cause at bar." Id.

In the present, Plaintiff uses the DCSA and HLPA to invoke this explicit legal authority. Yet treating the four-corners of the complaint as true, and granting each allegation every reasonable inference, the Plaintiff has established this action – if there's an action to be had – can only be maintained under common law principles.

A1. For example, the Plaintiff can't show any of the Defendants are Suppliers

The purpose of the DCSA is to "protect consumers from suppliers who commit deceptive and unconscionable sales acts" and to "encourage the development of fair consumer sales practices." IC § 24-5-0.5-1(b). In furtherance of this purpose, the DCSA defines a supplier as "[a] seller, lessor, assignor, or other person who regularly engages in or solicits consumer transactions, including soliciting a consumer transaction by using a telephone facsimile machine to transmit an unsolicited advertisement. The term includes a manufacturer, wholesaler, or retailer, whether or not the person deals directly with the consumer." IC § 24-5-0.5-3(A). To round it out, the DCSA defines a consumer transaction, in relevant part, as "a sale, lease, assignment, award by chance, or other disposition of an item of personal property, real property, a service, or an intangible[...] to a person *for purposes that are primarily personal, familial, charitable, agricultural, or household*, or a solicitation to supply any of these things." IC § 24-5-0.5-2(a)(1)(emphasis added).

The issue in the present case starts with the Plaintiff's allegation at ¶ 27 of the Complaint that the Defendants are suppliers as defined by the DCSA. While Plaintiff would have the Court

believe by making the assertion the Defendants are suppliers this then automatically proves the same, reality and reasonable inferences parries such an efforts at fantasy pleading.

In nearly every case the DCSA has been used and without fail, it involves one party, the supplier-seller, being sued by another party, the consumer-buyer. For instance, in Lawson v. Hale, 902 NE 2d 267 (2009), the Indiana Court of Appeals reversed the trial court and held a supplier of lawn mowers may be considered a supplier of other machines if the consumer transactions in question are "indirectly connected with the ordinary and usual course of the person's business, vocation, or occupation." Id, p. 272.

The key central to Lawson, and central to nearly every case involving the DCSA, is that a sale or advertisement has occurred and the party doing the selling/advertising is deemed the supplier (see also Kesling v. Hubler Nissan, Inc., 997 NE 2d 327 (Ind. 2013) (where the Indiana Supreme Court ruled in favor of the supplier – an automobile seller – on accusations of deception which were deemed mere puffery for purposes of the DCSA)).

In this action, one which may be of first impression, Plaintiff is switching the definitions of the DCSA contrary to the statute's own purpose. In its wonderland codification:

- The buyer of a quitclaim deed is actually a supplier (of what, it's unclear) equivalent to a manufacturer, wholesaler, or retailer; and
- The seller of these deeds – the homeowner – is actually a consumer; with
- The acquisition of these quitclaim deeds, typically governed by the law of contracts and real property, constitutes a consumer transaction; but
- It still remains unclear how foreign LLCs acquiring a multitude of quitclaim deeds is for a purpose [to them?] that is personal, familial, charitable, agricultural, or for some other household aim.

(This is the absurdity peaking its head once again: the DCSA is designed to protect a typical consumer who buys consumer products for some familial or personal purpose. For Plaintiff to invoke it against the Defendants, this express provision has to be ignored completely or reversed to contemplate a homeowner acquiring money as the personal interest at stake. Even then, however, cash proceeds or commercial paper are not personal property, real property, a service, or an intangible item).

If this all seems like an odd formulation to present to the Court, it's because it is. In short, the Plaintiff's claim is contrary to the breadth of law found in the terms of the DCSA and the court actions applying it. By misusing the statute to create injury-in-fact and redressibility, the AG's Office disguised the Plaintiff's standing to initiate this action against the Defendants.

A2. Secondly, none of the transactions listed by the Plaintiff are consumer transactions, nor are the homeowners consumers

Even if, somehow, the Plaintiff were granted a judicial pass as to what constitutes a supplier under the DCSA, the allegations contained in the Complaint still fail to allege a proper consumer transaction. For similar reasons as stated above, without consumer transactions at play in the proceeding the grant of standing to the Plaintiff initiating this action under the DCSA is improper and the case should be dismissed.

A consumer transaction under the DCSA involves, in relevant part, "a sale, lease, assignment, award by chance, or other disposition of an item of personal property, real property, a service, or an intangible[...] to a person for purposes that are primarily personal, familial, charitable, agricultural, or household, or a solicitation to supply any of these things." IC § 24-5-0.5-2(a)(1). One need not go very far to divine what this definition means since the plain meaning of the statute is evident enough. Even so the Indiana Court of Appeals provided some illumination in its decision of State of Indiana v. Classic Pool & Patio Inc., 777 NE 2d 1162 (2002). In Classic Pool, the court found a consumer transaction can occur when a consumer is solicited for a sale or when the actual sale takes place (worth noting, once again, the supplier was

the seller of a service and the buyer was the consumer (as is consistent with most DCSA cases)). "Given the plain language of the Act," the Court of Appeals found, "we conclude that a consumer who is solicited, and the solicitation results in a sale, can sue on either transaction, or both [under the DCSA]." Id, at p. 1166.

While this holding was meant to examine the statute of limitations under the DCSA, the reasonable inference is clear: the DCSA was meant to protect consumers in the course of purchasing an item or service from a seller, not the bizarro world the Plaintiff hopes to create with its Complaint where a purchaser is the same as a seller is the same as a supplier. But even if the present court were persuaded the Defendants are suppliers *and* the Plaintiff has shown viable consumer transactions implicating the DCSA, the uncomfortable fact remains that the homeowners granting the quitclaim deeds at issue are not consumers contemplated by the purpose and provision of the DCSA requiring protection. For lack of a better word, they are in essence the sellers in the Plaintiff's listed "Transactions" (which is very much conceded by the Plaintiff as well (Complaint, at ¶ 45: "… convinced the Indiana homeowner *to sell* his/her property to FLRC.") (emphasis added))

In nearly every DCSA case, a buyer of goods or services is deceived by a supplier of the same goods or services. This can be actionable misrepresentation, solicitation of a consumer to purchase, or advertisement beyond mere puffery (see Kesling, supra). In the present action, the Plaintiff is arguing Indiana homeowners were misled to sell their interest in real property to the Defendants. But from both common sense and the clear meaning of the DCSA, a homeowner selling their interest in a quitclaim deed is not a consumer for purposes of the DCSA.

A3. Since the Defendants are neither suppliers, nor did they enter into consumer transactions, nor are the aggrieved

homeowners consumers, Plaintiff lacked standing to bring an action under the DCSA

In Indiana, standing focuses "on whether the complaining party is the proper person to invoke the court's power." Hauer v. BRDD of Ind., Inc., 654 N.E.2d 316, 317 (Ind. Ct. App. 1995). "It is similar to, though not identical with, the real party in interest requirement of Trial Rule 17. Both are threshold requirements intended to insure that the party before the court has the substantive right to enforce the claim being asserted." Id. Moreover, standing can also be conferred on a party through the "public standing doctrine." This arises where a public, rather than a private, right is at issue. In such situations, standing standards are relaxed to eliminate the "requirement that the relator have an interest in the outcome of the litigation different from that of the general public." State ex rel. Steinke v. Coriden, 831 N.E.2d 751, 755 (Ind. Ct. App. 2005) (quoting Embry v. O'Bannon, 798 N.E.2d 157 (Ind. 2003)).

Plaintiff fails to satisfy the traditional standard of standing, and it fails to satisfy the public doctrine exception as well (assuming the DCSA and HLPA are being used to vindicate the public rights of Indiana homeowners vis-a-vis the State of Indiana). As a statutory creature, the AG's Office can only proceed on behalf of the Plaintiff when expressly authorized. While the DCSA and HLPA do grant this authority for cases properly pled, the actual use of both statutes in the present amounts to nothing more than a buffet approach to litigation. In essence, the Plaintiff is taking a definition here, an application there, and then determining what's palatable. As a result of misusing its statutory authority, the Plaintiff actually has to butcher the express definitions of the DCSA in order to box the Defendants as suppliers, the quitclaim transfers as consumer transactions, and the homeowners that literally sold these quitclaim deeds as consumers.

Even treating the Plaintiff's Complaint as true, such assertions require dismissal on the basis this is an improper exercise of the Plaintiff's power under the DCSA and, as a result, Plaintiff's standing to sue is illusory.

B. Plaintiff engages in the same murky legal gymnastics in order to invoke the HLPA, but once again fails to meet standing thresholds

The Plaintiff also cites to the HLPA in order to gain standing to initiate and maintain the present action against the Defendants. For reasons similar to the ones stated above, and even treating Plaintiff's Complaint as true and bestowing upon it all reasonable inferences, the AG Office's authority to proceed on behalf of the Plaintiff under the HLPA is once again illusory at best. As such, dismissal is warranted in favor of the Defendants.

B1. As a preliminary matter, Defendants are not "brokers" as defined by Ind. Code § 25-34.1-3-2

This is an example of the kind of buffet litigation the AG's Office is currently pursuing on behalf of the Plaintiff. Simply put, Plaintiff alleges the Defendants are "brokers" under Indiana Code and, by buying quitclaim deeds from the Indiana homeowners (listed in ¶ 74 of Plaintiff's Complaint), the Defendants-as-unlicensed-brokers violated Ind. Code § 25-34.1-3-2(a), the Real Estate Licensing Act (which is also a reciprocal violation of the HLPA).

One can only marvel at this suggestion and the belief it could be deemed anything but frivolous. In Indiana, "the purpose of the Real Estate Licensing Act is to protect citizens from possible loss at the hands of incompetent or unscrupulous persons acting as brokers." First Fed. Sav. v. Galvin, 616 N.E.2d 1048, 1052 (Ind.Ct.App. 1993), As such, a broker is defined as "a person who, for consideration, sells, buys, trades, exchanges, options, leases, rents, manages, lists, or appraises real estate or negotiates or offers to perform any of those acts." IC § 25-34.1-1-2(4). In a common broker situation, where this statutory definition would apply in conjunction

with the purpose of the Real Estate Licensing Act, one party would be paid a sum to act in concert with another party in order to either sell or buy real property. Typically this sum would come as a commission after the sale or purchase.

The bulk of cases decided that deal with brokers under IC § 25-34.1-1-2(4) generally turned to whether the payment of a commission to an unlicensed broker is proper or required (see, e.g., GDC Environment Services, Inc. v. Ransbottom Landfill, No. 43A04-0004-CV-157 (2000) (where the Court of Appeals of Indiana was requested to determine whether claimant was entitled to a commission based on a signed agreement, undercut by his lack of a broker license to deal with such a sale). Overlooking the fact that in the Plaintiff's rendering almost anyone who transacts to buy or sell an interest in property is apparently a broker, the Complaint and the reasonable inferences afforded the Complaint do not sufficiently show any viable allegation the Defendants accepted consideration from Indiana homeowners in order to broker the purchase of real estate. The allegations do, however, sufficiently show the same Indiana homeowners were selling their interest in quitclaim deeds to the Defendants directly. That seems plainly, if not obviously, outside the ambit of the licensing act and its purpose.

Since the Defendants were not brokers for the subject homeowners, or of other parties that paid consideration for services rendered, the pressing issue turns to whether the allegations under the HLPA grant the Plaintiff the requisite standing to initiate and maintain the present action.

B2. The Defendants are also not lenders under the HLPA, nor does the HLPA's definition of "deceptive act" apply to the allegations contained in Plaintiff's Complaint

The HLPA is a relatively fresh statute in Indiana that "prohibits certain lending practices and places additional restrictions on "high cost home loans."" Sonnenberg v. A.N. Real Estate

Services, Inc., et al. No.29A04-1005-PL-381 (Ct. of. App. 2011). While the HLPA grants the AG's Office authority to pursue enforcement of its terms, it's unclear how such authority could apply to the present case where foreign LLCs acquired quitclaim deeds from willing Indiana homeowners.

For starters, the Plaintiff doesn't allege the Defendants are lenders or that the underlying "Transactions," as they are labeled at ¶ 30 of the Complaint, are of a nature comparable to a loan. The closest the Plaintiff comes is to allege the Defendants purchased quitclaim deeds from a list of Indiana homeowners for $450.00 (Complaint, ¶ 48). As a result, half of the express provisions of the HLPA are inapplicable to these transactions since neither the Defendants nor the alleged, aggrieved homeowners were engaged in the lending or taking out of a loan.

That leaves random, isolated elements of the HLPA – taken out of context and removed from the governing purpose of the Act itself – for the AG's Office to use on behalf of the Plaintiff. For example, it's alleged the Defendants engaged in "deceptive acts" as defined by the HLPA (and not the DCSA) at IC § 24-9-2-7(a)(1). This definition applies to "mortgage transactions" and "real estate transactions" and forbids a person at the time of these transactions from knowingly or intentionally making a material misrepresentation, or concealing material information regarding the terms and conditions of either transaction. See Id.

Read on its face together with the Plaintiff's allegations, the Court may be persuaded the Plaintiff has made a semblance of a *prima facie* showing under the HLPA and, therefore, has authority to survive a motion to dismiss. But because the "deceptive act" under the HLPA requires the subject of the transaction be either a mortgage transaction or a real estate transaction, the Plaintiff's allegations – even if treated as true – do not actually fall under the HLPA.

B2(i). Mortgage Transaction under HLPA 24-9-3-7(a)

According to the plain meaning of Ind. Code § 24-9-2-7(a)(1), a deceptive act can only be found in a mortgage transaction or real estate transaction. Helpfully, the HLPA defines what a "mortgage transaction" is at §§ 24-9-3-7(a)(1) through (a)(7). Without belaboring those definitions, each of those found at 24-9-3-7(a) are rooted in loan or lending transactions, the creation of some first lien mortgage interest, a consumer loan, or a consumer credit sale. In other words, kinds of transactions the Home Loan Practices Act was implemented to actually apply to instead of what the Plaintiff hopes it applies to.

Accepting the Plaintiff's allegations as true, and giving them every reasonable inference, no rational person could find the Defendants were engaged in mortgage transactions as defined by the HLPA at § 24-9-3-7(a)(1) through (a)(7) since there's no suggestion or allegation the Defendant offered anything but a flat price for acquisition of a homeowner's quitclaim interest in real property.

B2(ii). Real Estate Transaction under HLPA 24-9-3-7(b)

Similarly, the same subsection defines "real estate transactions" for purposes of what constitutes a deceptive act under the HLPA. Ind. Code §§ 24-9-3-7(b)(1) through (b)(3) provides:

> As used in this section, "real estate transaction" means the sale or lease of any legal or equitable interest in real estate:
>
> (1) that is located in Indiana;
>
> (2) upon which there is constructed or intended to be constructed a dwelling; and
>
> (3) that is classified as residential for property tax purposes.

It's tempting to assume the transactions used in the Plaintiff's Complaint fall under this definition since the Defendants were alleged to have gained a property interest by virtue of purchasing quitclaim deeds. However, after a decent examination of the actual words of the

statute it's evident the HLPA was not meant to apply to the purchasers of these interests. As proof of the somewhat obvious, the HLPA qualifies a real estate transaction as meaning either a sale **or** *lease* of a legal/equitable interest in real estate. § 24-9-3-7(b)(1) (emphasis added).

The Defendants were alleged to have acquired, as purchasers, quitclaim deeds. Treating this as true, they did not sell or lease an interest in property to Indiana homeowners. Rather, they acquired or bought one. Given the title, purpose, and intent of the HLPA, the transactions alleged in the Plaintiff's Complaint were not "real estate transactions" as defined by the HLPA.

B3. Since the HLPA applies mostly to loans, and because the allegations of the Complaint – even treated as true – do not meet the statutory definitions of the HLPA, the Plaintiff lacked standing to initiate the present action under the HLPA

It's a similar argument to the one made with the DCSA and appears just as simple. Despite forcing the Defendants into the definitions provided by the HLPA, and then going on about the knowing or intentional misrepresentations made in violation of the same, the Plaintiff did not have standing to initiate, nor does the Plaintiff have standing to maintain, this action under the HLPA since the HLPA cannot facially apply to the underlying facts of this case.

The Defendants were not alleged to be lenders, nor did Plaintiff allege a loan was made. Beyond that, since the nature of the alleged transactions involved the Defendants buying a quitclaim deed from Indiana property owners, none of the definitions required for there to be a "deceptive act" under the HLPA apply. The AG's Office should have known that and/or should have pled more particularly in order to invoke the express authority of the HLPA.[5]

5 For an example of what appears to be a properly pled HLPA Complaint, see State of Indiana v. Countrywide Financial Corporation, et al., 76C01-0808-PL-0652 (Steuben Circuit Ct (2008), available at http://www.indianaconsumer.com/pub/CountrywideFileStamped.pdf. It's alarming how specifically pled that complaint was in 2008 compared to the Plaintiff's 2016 version.

Because they didn't, Plaintiff does not have standing to sue the Defendants using the HLPA.

C. The Plaintiff's Complaint also relies on conclusory allegations of fraud instead of specific averments

Indiana Rule 9(B) states that all averments of fraud must be pled with specificity as to the "circumstances constituting fraud." In order to meet this burden, "the party alleging fraud must specifically allege the elements of fraud, the time, place, and substance of false reports, and any facts that were misrepresented, as well as the identity of what was procured by fraud. Continental Basketball Association, Inc. v. Ellenstein Enterprises, 669 N.E.2d134, 138 (Ind. 1996). Failure to comply with the rule's specificity requirements constitutes a failure to state a claim upon which relief may be granted[.]" Payday Today, Inc. v. Hamilton, 911 N.E.2d 26, 34 (Ind. Ct. App. 2009). More, the requirements of Rule 9(B) apply to actions brought under the DCSA and in actions generally "grounded in fraud." See McKinney v. State, 693 N.E.2d 65 (Ind. 1998) (when the state alleged deceptive acts to be incurable, the state is implicitly alleging intent and asserts a right to civil penalties. As such Rule 9(B) applied).

In McKinney, the Indiana Supreme Court was tasked to determine whether Rule 9(B) applied to allegations of deceptive acts brought by the State of Indiana under the DCSA. Since the State in McKinney failed to distinguish between deceptive acts and incurable deceptive acts (where the latter requires intent; the former does not), the Indiana Supreme Court held the entire complaint was subject to a Rule 9(B) dismissal. Moreover, McKinney distinguished actionable deceptive acts: those that are "uncured" and those "incurable." Id, at p.68. Those in the former are acts "with respect to which a consumer who has been damaged by such act has given notice to the supplier," but the supplier either fails to offer to cure within thirty days or does offer to cure but fails to[.]" Id. With distinction, an incurable deceptive act is a deceptive act "done by a

supplier as part of a scheme, artifice, or device with intent to defraud or mislead" with "intent to defraud or mislead" - a clear element for incurable deceptive acts. Id. In scenarios where allegations are being made, and remedies sought, on the basis of incurable deceptive acts, "the specificity requirements of Rule 9(B) must be met"; particularly where "the State seeks civil penalties" for knowing violations of the DCSA. *See* Id., p 71. In McKinney, the State failed to meet the requirements of 9(B) in its complaint since the allegations were alleged in conclusory terms that certain acts were "false and misleading and constitute deceptive acts and incurable deceptive acts" without asserting specifics as to the nature, time, circumstance, and statements of fraud. Id.

The Plaintiff in the present is using almost the same set of conclusory terms. A review of the Complaint shows 141 separate paragraphs relating to the conduct of the Defendants. Not a single one of these paragraphs is devoted to a specific time, place, or substance of a false statement to an Indiana homeowner other than at ¶ 74 which merely lists Indiana homeowners, the parcel number of their respective properties, the county where those properties reside, the tax sale date, the quitclaim date, the sale price of the quitclaim, and the tax surplus created at the tax sale. But none of those details evince fraud. Beyond that, nothing more is listed with respect to these Indiana homeowners. Every additional allegation is supported either by reference to an inapplicable statutory definition or a vague statement a misrepresentation took place.

For example, consider ¶ 31 of the Plaintiff's Complaint. In it, Plaintiff alleges the Defendants actively, knowingly, and/or intentionally materially misrepresented themselves and that, absent these misrepresentations, "no rational or reasonable human being would knowingly, willingly, or intentionally accept Defendants' offer to engage in a Transaction." This paragraph is supposed to infer fraud, unequal bargaining position, and that the Defendants essentially forced

the hands of Indiana homeowners to quitclaim their property interest. But it has no actual support other than this conclusory nature and the inference meant to be created.

Consider also ¶ 45. Plaintiff alleges "Defendants, through a series of misrepresentations, concealments of material information, and/or omissions of material information, convinced the Indiana homeowners to sell and/or quitclaim his/her property to FLRC." Again, this is nothing more than a bald assertion of fraud creating the inference of unequal duress and compulsion. It has no specifics relating to the misrepresentations, the concealments, the omissions of material information or what duty – as a buyer of a quitclaim deed – the Defendants had to the sellers of the same deeds. It just states an allegation of fraud in lieu of describing one.

Such is the kind of pleading Rule 9(B) was meant to forbid. Given the remedies sought by the AG's Office – civil penalties which could aggregate to the millions – Plaintiff was required to do better and didn't. As such, dismissal under Rule 9(B) is warranted and sanctions against the AG's Office should be considered.

[**Remainder of Argument Intentionally Removed**]

V. Conclusion

It is a common maxim one should not entertain a fool lest they be proven a fool as well. With respect given to the State of Indiana, the AG Office's Complaint is nothing more than a foolish overreach of specifically prescribed statutory authority. As was earlier stated, for the Plaintiff to succeed in the present matter the Court will have to invert express statutes that normally apply to A in order to entertain the AG Office's suggestion they're actually supposed to apply to B, C, or D as well. In effect, what the Defendants request now in their combined motion is for the Court to simply observe a fundamental law of logic: that A is only A.

In that way, a supplier is a seller of consumer goods or services (not a buyer of a deeds); a fraud requires actual specifics (not conclusive allegations); and the HLPA was intended for improper home loans (not quitclaim purchases). These are easily digested legal concepts that the Plaintiff seems to overlook in order to, in the words of the Attorney General himself, "use every legal tool available to halt this fraud, hold the defendants accountable and assist the victims."[6]

While a worthy sound-bite for public dissemination, but perhaps somewhat unethical, the tools of the AG's Office are not plenary. In other words, the Attorney General, on behalf of the Plaintiff, cannot use statutory authority where it doesn't apply. As such, the Plaintiff lacks standing to pursue this matter against the Defendants under the HLPA and the DSCA.

That isn't to say Indiana Homeowners may not have viable causes of actions against the Defendants, or that the underlying transactions aren't improper; only that the Plaintiff in this matter cannot assert those causes of actions under the statutes cited since the AG's Office is not a proper party to carry out those causes.

Beyond that, even assuming the court will allow the Plaintiff to survive a 12(b)(2) and 12(B(6) Motion to Dismiss, the utter lack of particulars relating to the alleged fraud requires more definitive particulars and/or the court to strike the offensive allegations of the Plaintiff's Complaint.

Respectfully submitted,

By:_____

6 See supra, at fn. 1