

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

IN THE MARION SUPERIOR COURT
CAUSE NO. 49D14-1203-MI-012046

ORLY TAITZ, KARL SWIHART,)
EDWARD KESLER, BOB KERN,)
and FRANK WEYL)

Petitioners,)

v.)

INDIANA ELECTION COMMISSION,)
and INDIANA SECRETARY OF)
STATE,)

Respondents.)

RESPONSE IN OPPOSITION TO PETITIONER ORLY TAITZ'S RULE 60 MOTIONS

Respondents, the Indiana Election Commission ("IEC") and the Indiana Secretary of State hereby move this Court to deny Plaintiff Orly Taitz's Rule 60 motions. In support of this opposition, Respondents show the Court as follows:

1. Petitioners filed a "Petition for Emergency Injunctive Relief/Petition for Declaratory Relief" on March 23, 2012.
2. Petitioners filed a Petition challenging the unanimous decision of the Indiana Election Commission to dismiss a challenge filed by Petitioners Karl Swihart, Edward Kesler, and Frank Weyl. It remains unclear what role the other Petitioners Orly Taitz and Bob Kern played in the challenge to President Barack Obama's candidacy. As the Petitioners were attempting to overturn an agency decision, it is governed by the Administrative Orders and Procedures Act ("AOPA"), Indiana Code § 4-21.5 *et seq.*, which establishes the *exclusive* means for judicial review of an agency action. *See* Ind. Code § 4-21.5-5-1.

3. A hearing was held on June 12, 2012 on the Respondents' Motions to Dismiss the claims brought by Petitioners.

4. The Court found that the multiple failings by Petitioners to comply with AOPA required dismissal of their claims and ordered Respondents to prepare a proposed order.

5. Respondents filed a proposed order on June 21, 2012. The Court ordered the case dismissed on June 25, 2012.

6. On June 26, 2012, Petitioner Orly Taitz alone filed a "Motion for Relief From Judgment/Order Under Rule 60 Due to Mistake by the Court." It appears that Petitioner Taitz disputes a docket entry from June 12, 2012 that stated that "Court orders case dismissal for failing to follow requests."

7. Presumably, after receiving the Court's order from June 25, 2012, Petitioner Taitz understood the precise reasons why her Petition was dismissed. While not explicitly withdrawing her June 26, 2012 Rule 60 Motion, it appears that is what in effect she was doing when on July 3, 2012, Petitioner Taitz – again alone – filed a "Rule 60 Motion for Relief From June 25, 2012 Order to Dismiss With Prejudice."

8. Respondents maintain their position that Petitioner Taitz has no standing to bring a judicial review because she has never claimed that she filed an election challenge with the Indiana Election Commission. *See* Respondents' Motion to Dismiss and Memorandum in Support thereof.

9. Further, Petitioner Taitz has made no showing that she is entitled to relief under Trial Rule 60. She has not claimed a clerical mistake under subsection (A). She has not claimed any "mistake, surprise, or excusable neglect;" "any ground for a motion to correct error, including without limitation newly discovered evidence, which by due diligence could not have

been discovered in time to move for a motion to correct errors under Rule 59;" or any of the other grounds for relief under Rule 60(B). While Taitz indiscriminately accused the Respondents and their counsel of "flagrant fraud" and "possible treason," Taitz cites no specific or remotely credible examples of fraud. To succeed on a Rule 60 motion claiming fraud, a "party must establish that an unconscionable plan or scheme was used to improperly influence the court's decision and that such acts prevented the losing party from fully and fairly presenting its case or defense." *Stronger v. Sorrell*, 776 N.E.2d 353, 357 (Ind. 2002). Taitz has not shown any such plan or scheme.

10. Therefore, Respondents assert that, procedurally and legally, Petitioner Taitz has no standing whatsoever to bring her claims, much less a Rule 60 motion.

11. Regardless, Petitioner Taitz's claim under Rule 60 is without merit. She is asking three things from this Court: that her case be dismissed without prejudice, that she be given "leave to amend and supplement record with a certified agency record," and for "a \$500 bond within 30 days from the date of receipt of this order."

12. With respect to Petitioner Taitz's first request, the Petitioners brought a judicial review, and then improperly attempted to add claims including negligence and breach of fiduciary duty. Her judicial review was properly dismissed with prejudice. Respondents are willing to stipulate that her other claims (breach of fiduciary duty, negligence, and fraud) that were never before the Court are not dismissed with prejudice, but reserve all defenses, including those related to the statute of limitations.

13. Second, Petitioner Taitz continues to argue that the defects in the Petition may be remedied and thus also seeks leave to file the agency record and amend the other, numerous defects in the Petition. While Taitz attempted to file an amended Petition, it was not filed in

compliance with Trial Rule 15(a). The rule permits a party to amend his or her pleading once as a matter of course, but such an amendment must be filed prior to any responsive pleading being filed. Because Respondents filed their Motion to Dismiss, Petitioners were required to seek leave of the Court or consent from the adverse party before filing their Amended Petition. Petitioners did neither of those things, and thus the amended petition was never properly before the Court.

14. In addition, as argued repeatedly, the defects in the Petition cannot be cured. AOPA sets statutory deadlines that Petitioners failed to meet and cannot now remedy by amending their Petition. *See* Respondents' Motion to Dismiss and Memorandum in Support thereof.

15. Most notably, Petitioners' failure to file timely the agency record cannot be cured; once the court loses jurisdiction over the petition, it also lacks jurisdiction to grant an extension of time to file the record. *See Indiana Family and Social Services Admin. v. Meyer*, 927 N.E.2d 367, 368 (Ind. 2010); *see also Park v. Medical Licensing Board of Indiana*, 656 N.E.2d 1176, 1179 (Ind. Ct. App. 1996) (trial court lost jurisdiction once the deadline expired; there is no tolling and no provision for excusable neglect in AOPA); *Crowder v. Rockville Training Center*, 631 N.E.2d 947, 948 (Ind. Ct. App. 1994).

16. It is not entirely clear what Petitioner Taitz is asking for with respect to a "\$500 bond within 30 days from the date of receipt of this order." If she is again asking for a stay of agency action under AOPA, there is no basis for this relief because she has no claim under AOPA due to the Petitioners' failure to comply with the statutory requirements.

17. Pursuant to LR49-TR5 203, Respondents are not required to file a proposed order because this is an opposition to the motions brought by Petitioner Taitz. In addition, since it is

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing has been duly served upon all parties and/or counsel of record listed below, by United States mail, first-class postage prepaid, on this 16th day of July 2012:

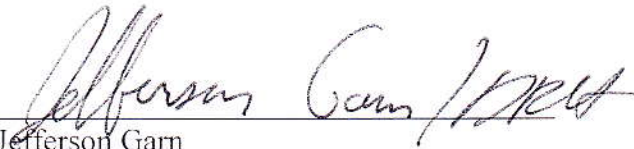
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