STATE OF INDIANA	)	**IN THE MARION SUPERIOR COURT**
	) SS:	
COUNTY OF MARION	)	**CAUSE NO. 49D14-1203-MI-012046**

DR. ORLY TAITZ, ESQ, KARL SWIHART, EDWARD KESLER, BOB KERN, FRANK WEYL, and VALERIA RIPLEY

Plaintiffs,

v.

ELECTION COMMISSION, SECRETARY OF STATE OF INDIANA, DEPUTY ATTORNEY GENERAL JEFFERSON GARN, ASSISTANT ATTORNEY GENERAL KATE SHELBY, 1310 RADIO/WTLC AMOS BROWN, IN HIS CAPACITY OF THE TALK SHOW HOST OF THE 1310 RADIO/WTLC

Defendants.

MEMORANDUM IN SUPPORT OF STATE DEFENDANTS' MOTION TO DISMISS SECOND AMENDED COMPLAINT

Defendants the Indiana Election Commission ("IEC"), the Indiana Secretary of State ("Secretary"), Deputy Attorney General Jefferson Garn ("Garn") and Deputy Attorney General Kate Shelby ("Shelby") (collectively, the "State Defendants"), by counsel, hereby submit this Memorandum in Support of their Motion to Dismiss Plaintiffs' Second Amended Complaint. For any of the following reasons, the claims presented in Plaintiffs' Second Amended Complaint are fundamentally flawed and, therefore, the Second Amended Complaint must be dismissed, with prejudice, pursuant to Indiana Rules of Trial Procedure 12(B)(1), 12(B)(2), 12(B)(4), 12(B)(5), and 12(B)(6).

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

For more than six months, Plaintiffs have repeatedly attempted to bring the same claims to this Court. Their failure to follow the Trial Rules, despite numerous admonishments by this Court, as well as their meritless arguments in support of their claims and their failure to overcome elementary jurisdictional issues, have led to dismissals and denials by this Court. Plaintiffs' Second Amended Complaint is no different and should be dismissed.

The IEC is a bi-partisan Commission that "[a]dminister[s] Indiana election laws" and governs election procedures and campaign finance. Ind. Code § 3-6-4.1-14. In a public meeting on February 24, 2012, the IEC heard challenges to the candidacy of various individuals for offices up for election this year. That day, the IEC unanimously denied challenges to President Barack Obama's candidacy. A podcast of that meeting is available on the Indiana Secretary of State's website.

Plaintiffs[1] Weyl, Swihart, and Kesler initially pursued this quixotic quest by filing a challenge with the IEC, arguing that President Obama does not meet the qualifications for the national office of President of the United States and that President Obama should not be placed on the Indiana ballot. Along with the challenge, Plaintiffs Weyl, Swihart, and Kesler submitted the information that they have repeatedly filed with this Court - hundreds of pages which include, among other documents, dozens of illegible and indecipherable documents, unsigned affidavits, and pages from President Obama's memoir *Dreams of My Father* – claiming that the documents submitted prove that President Obama is not a natural born United States citizen. The IEC unanimously rejected the challenges of Weyl, Swihart, and Kesler on February 24, 2012.

[1] To be clear, Taitz was not a party to the challenge before the IEC nor could she be since she is not a resident of Indiana. As is evident in the publicly-available podcast of the IEC's administrative proceeding on Plaintiffs Weyl, Swihart, and Kesler's challenges, Taitz participated in the hearing as a self-proclaimed expert witness – not as a party who filed a challenge under Indiana law. Plaintiffs Kern and Ripley also were not parties to the challenge before the IEC, although Kern appeared at the hearing and was removed by security for causing a disturbance.

The appeal and judicial review of decisions made by the IEC is governed by the Indiana Administrative Orders and Procedures Act, Indiana Code § 4-21.5-5 *et seq.* ("AOPA"). Instead of following the procedures set forth in AOPA for requesting judicial review of the IEC's unanimous decision to deny Weyl, Swihart, and Kesler's challenges, on March 23, 2012, Plaintiffs Taitz, Kern, Weyl, Swihart, and Kesler filed a Petition for Emergency Injunctive Relief/Petition for Declaratory Relief ("Petition") against the IEC and the Secretary. The Petition requested "a declaratory relief pronouncing candidate Obama not eligible for the position on the ballot as a candidate for the US Presidency . . . ." (Petition, Prayer for Relief ¶ 1.) Plaintiffs also requested "an emergency injunctive relief in the form of a Writ of Mandamus directing the Election[] Commission and the Secretary of State to remove Obama from the ballot." (Petition, Prayer for Relief ¶ 2.) The case was assigned to Judge Shaheed in Marion Superior Court, Civil Division 1.

On April 9, 2012, Plaintiffs filed a Motion to Recuse Judge Shaheed, arguing that Judge Shaheed was biased because he is the father-in-law of Andre Carson. Thereafter, Judge Shaheed assigned this Court and the Honorable S.K. Reid, to serve as Special Judge in this matter.

On April 16, 2012, the IEC and the Secretary moved to dismiss Plaintiffs Taitz, Kern, Weyl, Kesler, and Swihart's Petition, arguing that Plaintiffs failed to follow the requirements of the Trial Rules and AOPA, that injunctive relief is not available under AOPA, and that Plaintiffs Taitz and Kern did not have standing to file suit. The IEC and Secretary also argued that Plaintiffs did not meet the requirements for a stay of agency action as set forth in AOPA, Indiana Code § 4-21.5-5-9.

On May 7, 2012, Plaintiffs Taitz, Kern, Weyl, Kesler, and Swihart filed a "First Amended Complaint Injunctive Relief, Petition For Emergency Stay Under AOPA, Petition for

Declaratory Relief, Complaint for Fraud, Negligence, Breach of Fiduciary Duty" ("First Amended Complaint"). It appears that those Plaintiffs attempted to amend their initial Petition by filing the First Amended Complaint, which requested injunctive and declaratory relief to require the IEC and Secretary to remove President Obama from the Indiana ballot and various alleged torts including fraud, negligence, and breach of fiduciary duty against the IEC and Secretary. The IEC and Secretary responded in opposition on May 21, 2012, arguing that those Plaintiffs failed to comply with the Trial Rules, that amendment of Plaintiffs' claims was futile, and that any intelligible claims for judicial review had to be dismissed because Plaintiffs failed to timely file the certified agency record or to seek an extension of time in which to do so pursuant to AOPA, Indiana Code § 4-21.5-5-13.

At a hearing on June 12, 2012, the Court heard oral argument Plaintiffs' Petition and First Amended Complaint, as well as the IEC and Secretary's Motion and Response. The Court decided that Plaintiffs failed to comply with the Trial Rules and AOPA and dismissed all of Plaintiffs' claims with prejudice on June 25, 2012. (Order dated June 25, 2012.) The next day, on June 26, 2012, Plaintiff Taitz filed a "Motion for Relief From Judgment/Order Under Rule 60 Due to Mistake by the Court," disputing the Court's Order of dismissal. Again, on July 3, 2012, Plaintiff Taitz filed another "Rule 60 Motion for Relief From June 25, 2012, Order to Dismiss With Prejudice." Taitz asked the Court to change its Order to dismissal without prejudice and to grant Plaintiffs leave to file the certified agency record pursuant to Indiana Code § 4-21.5-5-13 and a $500 bond pursuant to Indiana Code § 4-21.5-5-9. Then, on July 26, 2012, Plaintiff Taitz filed a "Petition for a Leave of Court for a Relator Status for Plaintifffs, State of Indiana Ex Relator v Election[] Commission, Secretary of State of Indiana and to Proceed as Relators With a Writ of Mandamus/Write of Prohibition/Quo Warranto Decertifying Elections Win in 2012

Presidential Primary Election by Candidate Barack Hussein Obama, II Due to Flagrant Violation of Indiana Elections Code IC-3-5-7; Request to Hear Petition for a Writ of Mandamus to be Heard During August 8, 2012 Hearing of Taitz et al v Election[] Commission et al With the Same Plaintiffs and Defendants," an unintelligible motion. On August 8, 2012, Plaintiff Taitz filed a Motion to Intervene on behalf of Valeria Ripley.

On August 8, 2012, the Court heard oral argument on pending matters. The Court denied Taitz's Rule 60 Motions and Ripley's Motion to Intervene. Specifically, the Court's Order made it clear that the Petition seeking review of the IEC's decision rejecting Plaintiffs' challenge to President Obama's qualifications and his placement on the Indiana ballot had been dismissed, with prejudice. (Order dated August 17, 2012, ¶ 8 (crossing out Plaintiffs' proposed language that the "agency appeal was not heard on the merits")). The Court reaffirmed its prior dismissal of the review of the IEC's decision regarding Plaintiffs' challenge to the qualifications to President Obama and his placement on the Indiana ballot, but allowed Plaintiffs Taitz, Kern, Weyl, Kesler, and Swihart leave to file a Second Amended Complaint with "causes of action of Fraud, Breach of Fiduciary Duty and Negligence." *Id.*

In August and September of this year, Plaintiffs made many filings without serving Defendants, including a request by Plaintiff Taitz for admission *pro hac vice*, a request for preliminary injunction to remove President Obama from the Indiana ballot, and a Second Amended Complaint. All of those filings were made by Plaintiffs Taitz, Kern, Weyl, Swihart, Kesler, and by Valeria Ripley – a person the Court refused to allow to intervene in this matter. (Order dated August 27, 2012 (denying Ripley's Motion to Intervene for failure to follow the Trial Rules)). The Defendants listed in those filings are "Election[] Commission; Secretary of State of Indiana; Deputy Attorney General Jefferson Garn; Assistant Attorney General Kate

Shelby; 1310 Radio/WTLC; Amos Brown, in his capacity of the talk show host of the 1310 Radio/WTLC." (Second Am. Compl., p. 1.) Deputy Attorney General Kate Shelby did not receive those filings until September 11, 2012, when she was finally served with a copy of some of the filings and requested a copy of the Second Amended Complaint from the Court. Deputy Attorneys General Garn and Shelby were never served with summonses.

Despite the fact that this Court only granted Plaintiffs Taitz, Kern, Weyl, and Swihart leave to file an amended complaint as to breach of fiduciary duty, fraud, and negligency, Plaintiffs' (including Ripley) Second Amended Complaint includes claims for defamation of character, violations of the Fourteenth Amendment to the United States Constitution, injunctive relief, declaratory relief, violations of the National Voters Registration Act, claims for res ipsa loquitur, violations of the First Amendment to the United States Constitution, and what appears to be violations of an alleged constitutional right to "redress of grievances." (Second Am. Compl.) On September 26, 2012, this Court held a hearing on Plaintiffs' request for a preliminary injunction to remove President Obama from the Indiana ballot and denied the same for multiple reasons, including the fact that Plaintiffs cannot circumvent the requirements of AOPA in order to attempt to obtain injunctive relief.

The State Defendants were granted an extension of time until October 19, 2012, to respond to Plaintiffs' Second Amended Complaint. On October 10, 2012, the Court set a trial on Plaintiffs' claims for permanent injunction and declaratory relief for 10:00 a.m. on October 22, 2012.

The State Defendants now respectfully move this Court to dismiss Plaintiffs' Second Amended Complaint, with prejudice, and to close this matter. Plaintiffs' Second Amended Complaint is really nothing more than a repackaging of their already rejected position that

President Obama is not qualified for the national office of President of the United States, and that he must be removed from the Indiana ballot. Valeria Ripley was not granted leave to file claims in this matter and should be dismissed from this case. In addition, Plaintiff Taitz is not a registered Indiana voter and does not have standing to pursue any claims regarding Indiana voter rights or the Indiana election ballot. Plaintiffs failed to serve Garn and Shelby with summonses, leaving this Court without personal jurisdiction over Garn and Shelby. The remaining Plaintiffs were not granted leave to file an amended complaint for any claims other than fraud, breach of fiduciary duty, and negligence against the IEC and the Secretary. Thus, much of Plaintiffs' Second Amended Complaint is impermissible, is violative of the Trial Rules, and should be dismissed. Plaintiffs' claims are further barred by the doctrines of collateral estoppel and *res judicata* because this Court has already decided this matter and other courts around the country have refused to entertain Plaintiff Taitz's protestations about an alleged government conspiracy.[2] Plaintiffs have failed to state a claim for relief in this action because of their failure to follow Trial Rules, AOPA, tort claims notice requirements, notice pleading requirements, and other Indiana laws. Defendants are further immune from Plaintiffs' claims. Finally, as a matter of law, Plaintiffs are not entitled to the relief they seek.

[2] *See, e.g., Taitz v. Obama*, 707 F. Supp. 2d 1 reconsideration denied, 754 F. Supp. 2d 57 (D.D.C. 2010) ("This is one of several such suits filed by Ms. Taitz in her quixotic attempt to prove that President Obama is not a natural born citizen as required by Constitution. *See* U.S. Const. art. II, § 1. This Court is not willing to go tilting at windmills with her."); *Taitz v. Ruemmler*, CIV.A. 11-1421 RCL, 2011 WL 4916936 (D.D.C. Oct. 17, 2011); *Rhodes v. MacDonald*, 4:09-CV-106 (CDL), 2009 WL 3111834 (M.D. Ga. Sept. 18, 2009) ("She supports her claims with subjective belief, speculation and conjecture, which have never been sufficient to maintain a legal cause of action.")

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III. STANDARD OF REVIEW

A. Courts Must Have Subject Matter Jurisdiction Over the Issues and Personal Jurisdiction Over the Parties

In Indiana, trial courts possess two types of jurisdiction - subject matter jurisdiction and personal jurisdiction. *See Stewart v. Vulliet,* 867 N.E. 2d 226, 230 (Ind. Ct. App. 2007) (*citing K.S. v. State.* 849 N.E.2d 538, 540 (Ind. 2006)). "The former is conferred by the Constitution or statutes, but the latter is conferred by instituting an action in a lawful and proper manner." *Carpenter v. State*, 360 N.E.2d 839, 840 (Ind. 1977)(quoting *Pease v. State*, 129 N.E. 337, 338 (Ind. 1921)). As a prerequisite for the court to have the authority to hear a case and render a decision, the trial court must possess both forms of jurisdiction. *See Indiana State Board of Health Facility Administrators, v. Werner,* 841 N.E.2d 1196, 1205 (Ind. Ct. App. 2006) *trans. denied,* 860 N.E.2d 594 (Ind. 2006)(Table). *See also Buckalew v. Buckelew,* 754 N.E. 2d 896, 898 (Ind. 2001).

Subject matter jurisdiction is the power of a court to hear a particular type of case, and is not dependent upon the details of the pleadings or the correctness of the court's decision. *See Werner,* 841 N.E.2d at 1205. "Resolution of the subject matter jurisdiction issue involves determining whether the claim advanced falls within the general scope of authority conferred upon the court by constitution or statute." *Id.* (*quoting Blanck v. Ind. Dep't of Corr.,* 829 N.E.2d 505, 508 (Ind. 2005)). Subject matter jurisdiction cannot be waived, and may be raised any time by the court or the parties. *See Madison Center, Inc. v. R. R. K.,* 853 N.E.2d 1286, 1288 (Ind. Ct. App. 2006).

A motion to dismiss for lack of subject matter jurisdiction is properly filed pursuant to Indiana Rule of Trial Procedure 12(B)(1). When a trial court is confronted with a motion to dismiss pursuant to Ind. T.R. 12(B)(1), the court is required to determine whether it has the

power to adjudicate the action. *Doe by Roe v. Madison Ctr. Hosp.*, 652 N.E.2d 101, 103 (Ind. Ct. App. 1995). In ruling on a motion to dismiss for lack of subject matter jurisdiction, this Court may consider not only the complaint and motion, but also any affidavits or evidence submitted in support. *Ind. Dep't of Highways v. Dixon*, 541 N.E.2d 877, 884 (Ind. 1989). "Included within subject matter jurisdiction is whether a claim is ripe for review." *Thomas ex rel. Thomas v. Murphy*, 918 N.E.2d 656, 663 (Ind. Ct. App. 2009). Also included within subject matter jurisdiction is the issue of standing. *See Midwest Psychological Center, Inc. v. Indiana Department of Administration*, 959 N.E.2d 896, 902-03 (Ind. Ct. App. 2011).

Personal jurisdiction, on the other hand, is the power of the court to bring a person into its adjudicative process and render a valid judgment over him or her. *See In re Estate of Baker*, 837 N.E.2d 603, 608 (Ind. Ct. App. 2005). Lack of personal jurisdiction must be timely raised or it is waived. *See State v. Omega Painting, Inc.*, 463 N.E.2d 287, 290-91 (Ind. Ct. App. 1984), *rehearing denied.* Except as otherwise provided, the Indiana Rules of Trial Procedure govern the process and practice of civil suits conducted before Indiana courts. *See* Ind. R. Trial P. 1. Indiana Rule of Trial Procedure 4 states, "The court acquires jurisdiction over a party or person who under these rules commences or joins in the action, is served with summons or enters an appearance, or who is subjected to the power of the court under any other law." *See also Hardy v. Maldonado*, 632 N.E.2d 381, 383 (Ind. Ct. App. 1994). A motion to dismiss for lack of personal jurisdiction is properly filed pursuant to Indiana Rule of Trial Procedure 12(B)(2), 12(B)(4), and/or 12(B)(5).

B. Plaintiffs Must State a Valid Claim for Relief

Pursuant to Ind. T.R. 12(B)(6), a complaint may be dismissed where it fails to state a claim on which relief may be granted. When faced with a motion to dismiss, this Court must

assess the sufficiency of the pleading and must determine whether the allegations establish any set of circumstances under which a plaintiff would be entitled to relief. *See Trail v. Boys & Girls Clubs of Northwest Indiana*, 845 N.E.2d 130, 134 (Ind. 2006). While this Court should accept, as true, the facts pled it "need not accept as true 'allegations that are contradicted by other allegations or exhibits attached to or incorporated in the pleading.'" *Id.* at 134-35 (quoting *Morgan Asset Holding Corp. v. CoBank ACB*, 736 N.E.2d 1268, 1271 (Ind. Ct. App. 2000)). Additionally, this Court "need not accept as true conclusory, nonfactual assertions or legal conclusions." *McCalment v. Eli Lilly & Co.*, 860 N.E.2d 884, 890 (Ind. Ct. App. 2007) (citing *Richards & O'Neil, LLP v. Conk*, 774 N.E.2d 540, 547 (Ind. Ct. App. 2002)).

IV. PLAINTIFFS RIPLEY AND TAITZ MUST BE DISMISSED

Plaintiffs Ripley and Taitz cannot proceed in this action. Ripley's claim of Plaintiff status in this matter constitutes a violation of this Court's August 25th Order. Taitz is not a registered Indiana voter and, therefore, does not have any argument for standing to pursue her claims.

Plaintiff Ripley, through Taitz, requested permission to intervene in this cause, and that request was denied on August 25, 2012. By claiming Plaintiff status in this matter, Ripley is in contempt of this Court's Order denying her the right to intervene. Ripley must be dismissed.

Furthermore, Plaintiff Taitz does not have standing to bring her claims. "Standing is a key component in maintaining our state constitutional scheme of separation of powers." *Pence v. State*, 652 N.E.2d 486, 488 (Ind. 1995) (citing Ind. Const. Art. III, § 1). Standing requirements limit a court's jurisdiction and "restrains the judiciary to resolving real controversies in which the complaining party has a demonstrable injury." *Id.* at 488 (citing *Schloss v. City of Indianapolis*, 553 N.E.2d 1204, 1206 (Ind. 1990)). Taitz is not an Indiana citizen or a registered voter in

Indiana. Thus, President Obama's appearance on the Indiana ballot does not present any cognizable injury to her as a citizen of California. Because Taitz is not a registered Indiana voter and because Taitz seeks to have President Obama removed from the Indiana ballot, Taitz does not have standing or the statutory authority to bring her claims. *See, e.g., Pence* 652 N.E.2d at 488. Taitz must be dismissed from this action, as well.

V. DEFENDANTS GARN AND SHELBY MUST BE DISMISSED

In the Second Amended Complaint, Plaintiffs have sued Garn and Shelby. Setting aside for the moment the fact that Plaintiffs were not granted leave to file any claims against Garn and Shelby, Plaintiffs' failure to serve summonses on Garn and Shelby leaves this Court without personal jurisdiction over Garn and Shelby as Defendants. Indiana Rule of Trial Procedure 3 establishes the three actions that a plaintiff must take in order to initiate a civil suit: (1) a plaintiff must file "a complaint or such equivalent pleading or document as may be specified by statute;" (2) a plaintiff must submit the filing fee or order waiving filing fee; and (3) a plaintiff must give, "where service of process is required, . . . as many copies of the complaint and summons as are necessary" to the trial court. Trial Rule 4 governs process and grants a court personal jurisdiction over a party who is served with a summons, files an appearance, or joins a matter. Plaintiffs have not submitted summonses for Garn and Shelby to this Court for service on Garn and Shelby, nor have Plaintiffs submitted summonses directly to Garn and Shelby. Garn and Shelby were notified of Plaintiffs' Second Amended Complaint when they checked the Court's docket for this case and noticed that Plaintiffs had made multiple filings without serving Defendants. Garn and Shelby have not joined this action in any way, and Garn and Shelby's appearance in this matter has been and continues to be in their capacity as counsel for the IEC and the Secretary. Plaintiffs were required to properly serve process on Garn and Shelby through

the use of summonses. *See* Ind. R. Trial P. 3-5. Because Plaintiffs to this day have failed to properly initiate their claims against Garn and Shelby pursuant to Trial Rules 3 and 4, Garn and Shelby should be dismissed pursuant to Trial Rules 12(B)(2), 12(B)(4), and 12(B)(5).

VI. THE SECOND AMENDED COMPLAINT MUST BE DISMISSED

This Court should dismiss the entirety of Plaintiffs' Second Amended Complaint. Plaintiffs have failed to comply with the rules and orders of this Court. Plaintiffs cannot circumvent AOPA in order to obtain relief or retry issues that have already been decided by this Court. Plaintiffs failed to follow tort claims notice procedures for any of their causes of action. Plaintiffs have failed to state an intelligible or remotely plausible claim for relief. The State Defendants are immune from Plaintiffs' claims. Plaintiffs cannot receive the relief they request for the causes of action they appear to allege.

A. Plaintiffs' Second Amended Complaint Must Be Dismissed Because Plaintiffs Fail to Abide By the Trial Rules, Local Rules, and This Court's Orders

Initially, this Court made clear at the September 26, 2012, hearing that any further failure by Plaintiffs (or their counsel) to follow the Indiana Trial Rules, the Marion County Local Rules, or Orders of this court would not be tolerated and would be grounds for dismissing the Second Amended Complaint. Since September 26, 2012, at least the following violations have occurred.

First, Deputy Attorney General Kenneth Joel entered his appearance before the September 26, 2012 hearing; however, since the Entry of Appearance was filed, DAG Joel has not been served with any filing by Plaintiffs.

Second, this Court made clear -- in its August 17, 2012, Order -- that Plaintiffs Weyl, Swihart, Taitz, Kern, and Kesler were being granted leave to file a Second Amended Complaint alleging causes for fraud, breach of fiduciary duty and negligence against the IEC and the Secretary. The Second Amended Complaint, however, includes a new Plaintiff, several new

Defendants, and a litany of claims – all of which runs far afield and in direct contravention of this Court's August 17th Order. Valeria Ripley was denied permission to intervene in this matter and is now in contempt of this Court's August 25th Order by appearing in the Second Amended Complaint as a Plaintiff. Plaintiffs were not granted permission to add additional Defendants to this matter, yet they sued Garn, Shelby, a radio station, and a radio talk show host, and they are now in contempt of this Court's August 17th Order by including Garn, Shelby, 1310 Radio, and Amos Brown in this action. Finally, Plaintiffs were not granted leave to file any claims other than their allegations of breach of fiduciary, fraud, and negligence by the IEC and the Secretary and Plaintiffs are in contempt of this Court's August 17th Order by adding constitutional, criminal, and other tort claims. For these reasons alone, all of Plaintiffs' claims should be dismissed or, at a minimum, Plaintiffs' claims other than breach of fiduciary duty, fraud, and negligence against the IEC and the Secretary should be dismissed.

Third, at the close of the September 26, 2012, hearing, this Court issued its findings and conclusions and directed Plaintiffs to provide an Order to effectuate those findings and conclusions. In direct violation of this Court's direction, Plaintiffs submitted a multi-page document that is little more than the ramblings of Plaintiffs. Plaintiffs were admonished during a telephonic attorney conference on October 12, 2012, to rewrite their proposed order to confirm with the Court's determinations and to file that immediately.

Fourth, as is explained above, Defendants Garn and Shelby have not received any summonses in this matter, which constitutes a violation of the rules of this Court.

In addition, Plaintiffs include, in their Second Amended Complaint, exhibits with an unredacted Social Security number at least three times, claiming it is President Barack Obama's number. *E.g.*, Plaintiff's Ex. 7. Indiana has strict rules for protecting the confidential

information of individuals. Indiana Trial Rule 5(G) provides that when "only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] . . ." Indiana Administrative Rule 9(G)(1)(d) lists a complete Social Security Numbers of living persons as information excluded from public access. The unredacted inclusion of the numbers is a flagrant violation of the Indiana Trial and Administrative Rules.[3]

Because Plaintiffs continue to violate the rules and orders of this Court, Plaintiffs' Second Amended Complaint should be dismissed, with prejudice.

B. Plaintiffs' Challenge to the Qualifications of a Sitting United States President Appearing on the Indiana Ballot in a Race for the National Office of President of the United States Is Not Properly Before This Court

Unquestionably, Plaintiffs' ultimate desire is to have this Court declare that President Obama is not qualified for the national office of President of the United States and to order the State Defendants to remove him from the Indiana ballot. Because that issue was decided by the IEC, whose decisions and any appeals thereon are governed by AOPA, and because this Court has already ruled on Plaintiffs claims to that effect in this cause number just a few short months ago, Plaintiffs' claims are barred by AOPA and the doctrines of collateral estoppel and *res judicata.*

Plaintiffs cannot circumvent AOPA. Plaintiffs do not dispute that Kesler, Weyl, and Swihart filed challenges with the IEC seeking to have President Obama removed from the Indiana ballot for the national office of United States President. Plaintiffs also do not dispute

[3] This is not the first time Plaintiff Taitz has done this, nor is she unaware that this is improper. *Taitz v. Astrue*, CIV.A. 11-402 RCL, 2011 WL 3039167 (D.D.C. July 25, 2011) ("Defendant's motion to strike plaintiff's opposition to defendant's summary judgment motion, and attached exhibits, was promptly granted due to plaintiff's failure to comply with Federal Rule of Civil Procedure 5.2(a)(1), which requires that only the last four digits of a social security number are to be filed with the Court. The Court will not tolerate plaintiff's repeated violations of this Rule.")

that Plaintiff Taitz appeared at the hearing on those challenges as a self-named expert witness and that Plaintiff Kern appeared at the hearing and was removed by security for causing a disturbance.[4] At the hearing on February 24, 2012, the IEC unanimously denied Plaintiffs' challenges. Because the IEC's decisions are governed by AOPA, Plaintiffs' only remedy was to file a petition for judicial review in accordance with Indiana Code § 4-21.5-5 *et seq.* *See also* I.C. § 4-21.5-5-1 (AOPA "establishes the exclusive means for judicial review of an agency action"); *Indiana State Board of Health Facility Admn'rs v. Werner*, 841 N.E.2d 1196, 1205 (Ind. Ct. App. 2006) (strict compliance with the mandates of AOPA is required); *Burke v. Board of Directors of Monroe County Public Library*, 709 N.E.2d 1036, 1041 (Ind. Ct. App. 1999) ("the failure to adhere to the statutory prerequisites for judicial review of administrative action is fatal in that it deprives the trial court of" authority to entertain the petition). Injunctive and declaratory relief and claims for damages were not and are not available to Plaintiffs because AOPA does not allow a court sitting in judicial review to grant such relief. Because Plaintiffs failed to comply with AOPA, this Court dismissed, with prejudice, Plaintiffs' Petition and granted Plaintiffs leave to file only their claims for breach of fiduciary duty, fraud, and negligence against the IEC and the Secretary.

Plaintiffs could have appealed this Court's dismissal to the Indiana Court of Appeals. Instead, Plaintiffs violated this Court's Order and Indiana law by filing their Second Amended Complaint, which attempts to circumvent AOPA and this Court's unfavorable decision on Plaintiffs' claims in the hopes of having President Obama removed from the Indiana ballot. Plaintiffs' Second Amended Complaint does not make the IEC's and this Court's adverse decisions suddenly vanish and does not mask the fact that Plaintiffs failed to exhaust the appellate procedures available to them instead of repeatedly seeking the same relief in this

[4] The podcast of the hearing is publicly available at www.in.gov/sos and speaks for itself.

Court.[5] The doctrines of collateral estoppel and *res judicata* apply to bar re-litigation of President Obama's qualifications for national office and appearance on the Indiana ballot because those issues were necessarily adjudicated in a former suit and the same issue is presented again here. *See Adams v. Marion County Office of Family and Children*, 659 N.E.2d 202, 205 (Ind. Ct. App. 1995) (citing *Sullivan v. American Casualty Co.*, 605 N.E.2d 134, 137 (Ind. 1992)); *see also S. Bend Fed'n of Teachers and Nat'l Ed. Ass'n-S. Bend*, 389 N.E.2d 23, 35 (1979) ("[t]he principles of *res judicata* seek to guard parties against vexatious and repetitious litigation of issues which have been determined in a judicial or quasi-judicial proceeding"). Plaintiffs are not entitled to file their claims over and over until some court gives them the relief they want. Plaintiffs have lost directly on this matter twice already. Plaintiffs cannot receive a third bite at the apple. This Court should dismiss Plaintiffs' claims as an attempted end-run around the requirements of AOPA, as barred by the doctrines of *res judicata* and collateral estoppel, and as repetitive and vexatious litigation.

C. Plaintiffs Failed to File a Tort Claims Notice; Thus, Plaintiffs Claims Are Barred

Plaintiffs' claims are also barred by the terms of the Indiana Tort Claims Act ("ITCA"). Plaintiffs claim violations of their constitutional rights, fraud, and other tortious acts.

The ITCA, Indiana Code § 34-13-3 *et seq.*, governs tort actions filed against state employees and provides for the immunity of the state and its employees in the conduct of state

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[5] Plaintiffs have argued that the administrative remedies are not necessary to bring an election challenge, citing *State Election Bd. v. Bayh*, 521 N.E.2d 1313, 1314 (Ind. 1988) in support. This case is inapposite. First, unlike here, the proceedings before the IEC had not run their course in *Bayh*. *Id.* Second, the Governor of Indiana and Secretary of State both sought to resolve an important question regarding *state* residency requirements, waiving any administrative exhaustion requirements, and the IEC deferred to the court's decision regarding expediting review of the case prior to the IEC's final determination. But here, the IEC already made its decision, the judicial review process ran its course, and the "claims" raised by Plaintiffs are not important questions for the public, but merely scurrilous attacks on federal and state officers.

business. "[The ITCA] allows government employees acting in the scope of their employment the freedom to carry out their duties without fear of litigation." *Bushlong v. Williamson*, 790 N.E.2d 467, 472 (Ind. 2003). The ITCA, thus, bars litigation of tort claims against individual state employees acting in the broad scope of the governmental entity's employment. *See id.* (holding that to the extent a plaintiff specifically alleges negligence or that the acts were within the scope of the governmental employee's employment a 'personal capacity' claim is barred on its face.) *See also Miner v. Southwest School Corp.*, 755 N.E.2d 1110, 1115 (Ind. Ct. App. 2001).

The relevant provisions of the ITCA provide as follows:

> A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from the following:
>
> . . .
>
> (6) The initiation of a judicial or an administrative proceeding.
>
> (7) The performance of a discretionary function . . .
>
> (8) The adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations), unless the act of enforcement constitutes false arrest or false imprisonment.
>
> (9) An act or omission performed in good faith and without malice under the apparent authority of a statute which is invalid if the employee would not have been liable had the statute been valid.
>
> (10) The act or omission of anyone other than the governmental entity or the governmental entity's employee.
>
> (11) The issuance, denial, suspension, or revocation of, or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization, where the authority is discretionary under law.
>
> . . .
>
> (14) Misrepresentation if unintentional.

Ind. Code § 34-14-3-3.

All of Plaintiffs' allegations against the State Defendants give rise to immunity under the ITCA. Each State Defendant was acting within his or her scope of employment with regard to Plaintiffs' challenges and subsequent lawsuit. No misrepresentations were made by the State

Defendants and the State Defendants acted in accordance with Indiana law. Plaintiffs are not entitled to sue the State Defendants under a theory of tort for judicial, prosecutorial, law enforcement, or discretionary/administrative actions about which they are unhappy. The ITCA provides that the State Defendants are not liable for any harm arising out of the initiation of or failure to initiate a judicial proceeding, the enforcement of or failure to enforce a law, actions taken in good faith pursuant to authority under a statute, the acts of any other Defendant, the issuance of an order or authorization, or an unintentional misrepresentation. *See* Ind. Code § 34-14-3-3. Consequently, the State Defendants are immune from Plaintiffs' claims and dismissal is warranted pursuant to Indiana Rule of Trial Procedure 12(B)(6), with prejudice.

Furthermore, even if Plaintiffs had set forth allegations containing the language within Indiana Code § 34-13-3-5(c) and a "reasonable factual basis," there is no evidence that the State Defendants have been malicious or that their actions were outside the scope of her employment or constituted anything other than decisions in accordance with the law and the best interest of the State. As a result, the Indiana Tort Claims Act bars Plaintiffs from proceeding against the State Defendant on the tort claims contained within the Second Amended Complaint.

In addition, Plaintiffs have failed to prove that they have notified the State or this Court of their claims by tort claim notice. The ITCA serves to protect both governmental entities and individual employees alike. It requires that a claim against the state, its agencies, or offices—including judicial offices—is barred unless notice is filed, with the Attorney General or the agency involved, within 270 days after the loss occurs. *See* Ind. Code § 34-13-3-6 (a). Questions of compliance with the ITCA are "not a question of fact, but rather a procedural precedent which the plaintiff must prove and which the trial court must determine prior to trial." *VanValkenburg v. Warner*, 602 N.E.2d 1046, 1048 (Ind. Ct. App. 1992); *Meury v. Eagle-Union*

Community SchoolCorp., 714 N.E.2d 233, 241 (Ind. Ct. App. 1999)(citations omitted). Because the ITCA is an abrogation of the common law, it is strictly construed. *See Gregor v. Szarmach*, 706 N.E.2d 240, 241 (Ind. Ct. App. 1999).

Here, Plaintiffs failed to file the tort claims notice required by the ITCA, and more than 270 days have elapsed since the date of any alleged conduct by the State Defendants. Therefore, Plaintiffs' claims against the State Defendants should be dismissed in accordance with Indiana Rule of Trial Procedure 12(B)(6), with prejudice.

E. The State Defendants Are Immune From Plaintiffs' Claims

The State Defendants are further immune from Plaintiffs' claims that they should have allowed Plaintiffs' claims against them to proceed unchallenged, that Garn and Shelby should not have fulfilled their duties as Deputy Attorneys General in defending the IEC and Secretary, and that one or more State Defendants should have prosecuted one or more individuals. Additionally, the IEC enjoys judicial immunity in acting as the adjudicator of candidate challenges in Indiana.

Plaintiffs claim damages "of having to go through the litigation." (Second Am. Compl., ¶ 54.) The State Defendants' decision to invoke their legal right to defend themselves against Plaintiffs' claims, Garn and Shelby's decision to fulfill their statutory mandate to defend the IEC and the Secretary, and any State Defendant's decision not to prosecute one or more individuals each fall squarely within the realm of immunity. *See Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 608 (7th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986) (Indiana Attorney General enjoys absolute immunity when acting as representative of the State); *Mangiafico v. Blumenthal*, 47`1 F.3d 391 (2d Cir. 2006) (same); *Gonzalez-Droz v. Gonzalez-Colon*, 717 F. Supp. 2d 196, 208 (D. P.R. 2010) (prosecutorial functions including decisions to initiate

administrative proceedings aimed to legal sanctions are entitled to absolute immunity); *S. v. Webb*, 602 F. Supp. 2d 374 (D. Conn. 2009) (immunity for Attorney General and Assistant Attorneys General); *Goncalves v. Reynolds*, 198 F. Supp. 2d 278 (W.D. N.Y. 2001) (decision to file criminal complaint and seek arrest warrant entitled to absolute immunity); *Keller v. U.S.*, 667 F. Supp. 1351, 1359 (S.D. Cal. 1987) (investigator entitled to immunity for acts done pursuant to the prosecution of a case). No defendant in any case is required to waive a white flag of surrender just because a plaintiff thinks that he or she has presented incontrovertible evidence in support of his/her position, and no private citizen may dictate how a law enforcement officer uses her prosecutorial discretion. Plaintiffs' claims must be dismissed.

Moreover, while it is unclear whether Plaintiffs have actually sued any individuals from the IEC, the fact is that the IEC's role was to adjudicate Plaintiffs' administrative challenge. As adjudicators, they are entitled to absolute judicial immunity. *See Dawson v. Newman*, 419 F.3d 656, 660-62 (7th Cir. 2005) (holding that absolute judicial immunity bars suit against those acting in a "judicial" capacity including those who are dealt with as judges and whose acts or decisions involve the exercise of discretion or judgment and are normally made by judges and that persons who are not technically "judges" are entitled to absolute judicial immunity when their role is "judicial" in nature). Put another way, if "a judge errs 'through inadvertence or otherwise, a party's remedy is through appellate process.'" *Dawson*, 419 F.3d at 661 (quoting *Lowe v. Letsinger*, 772 F.2d 308, 311 (7th Cir. 1985)). Absolute judicial immunity "'is not limited to government officials with the title of ... judge; officials performing "functionally comparable" acts in other contexts, such as administrative agencies, are also accorded absolute immunity.'" *Dawson*, 419 F.3d at 662 (quoting *Wilson v. Kelkhoff*, 86 F.3d 1438, 1443 (7th Cir. 1996) (quoting, in turn, *Butz v. Economou*, 438 U.S. 478, 512 (1978))).

D. Plaintiffs Cannot Enforce the Indiana Criminal Code

Plaintiffs appear to seek redress for alleged violations of the Indiana criminal code, Indiana Code § 35. In multiple places in the Second Amended Complaint, Plaintiffs accuse the State Defendants of "turning a blind eye to" or "aiding and abetting" alleged criminal activity by the President of the United States. (*E.g.,* Second Am. Compl., ¶ 101.) The entirety of Plaintiffs' Second Amended Complaint also appears to allege some sort of orchestrated conspiracy by the IEC, the Secretary, Amos Brown, 1310 Radio, Garn, and Shelby to create "an impression that Attorney Taitz was crazy, incompetent and was bringing frivolous challenges and created a false impression that Citizen of Indonesia and possibly Kenya and Great Britain, Obama, was actually a natural born U.S. citizen, who has valid identification papers." (Second Am. Compl., ¶ 98.) Plaintiffs do not have standing to enforce the Indiana criminal code or to prosecute alleged criminal activity in this Court. Only the executive branch of the Indiana state government can initiate proceedings pursuant to the Indiana criminal code. *See* Indiana State Constitution, Art. V. Thus, this Court should dismiss all of Plaintiffs' criminal claims in the Second Amended Complaint pursuant to Indiana Rules of Trial Procedure 12(B)(1) and (6).

F. Plaintiffs' Constitutional Claims Fail On Their Face

In Count V, Plaintiffs mention a variety of constitutional theories including equal protection, due process, free speech, and redress of grievances. Count V is alleged against the State Defendants – the IEC, the Secretary, Garn, and Shelby. It bears repeating that Plaintiffs' raising these claims is in direct contravention to this Court's Order of August 17, 2012, which granted leave for filing a new complaint with causes of action of fraud, breach of fiduciary duty and negligence. The basic theory of Plaintiffs' constitutional claims seems to be that, despite holding a hearing on the challenge to President Obama's qualifications to be President of the

United States, the State Defendants violated Plaintiffs' constitutional rights because the State Defendants did not adopt Plaintiffs' position that President Obama is not constitutionally qualified for the national office of President of the United States. For several reasons, Plaintiffs' constitutional claims must be dismissed pursuant to Trial Rules 12(B)(1) and (6).

First, the Eleventh Amendment bars all constitutional claims (regardless of the relief sought) against IEC and the office of the Secretary of State (as they are arms of the State of Indiana), as well as claims for monetary damages against individual state actors acting in their official capacities. *See Kentucky v. Graham*, 473 U.S. 159, 167 (1985); *Hans v. Louisiana*, 134 U.S. 1, 10 (1890); *Brokaw v. Mercer County*, 235 F.3d 1000, 1009 (7th Cir. 2000); *Meadows v. State of Indiana*, 854 F.2d 1068, 1069 (7th Cir. 1988) (holding that Indiana has not waived its Eleventh Amendment immunity).[6] Further, the IEC, the office of the Secretary of State, and official capacity individuals are not "persons" for purposes of 42 U.S.C. § 1983. *Will v. Michigan Department of State Police*, 491 U.S. 58, 66 (1989); *Small v. Chao*, 398 F.3d 894, 898 (7th Cir. 2005); *Omosegbon v. Wells*, 335 F.3d 668, 672-73 (7th Cir. 2003); *Higgins v. Mississippi*, 217 F.3d 951, 953 (7th Cir. 2000). Thus, Plaintiffs' constitutional claims against the IEC and the Secretary must be dismissed and Plaintiffs' constitutional claims against Garn and Shelby for damages must be dismissed, as well.

Second, while the Second Amended Complaint is less than clear, Plaintiffs fail to mention 42 U.S.C. § 1983. Case law holds that direct claims under the U.S. Constitution cannot be brought against state actors. *See Universal Outdoor, Inc. v. Elk Grove Village*, 969 F. Supp. 1124 (N.D. Ill. 1997) (holding that while the Complaint referred to "provisions of the United

[6] The caption does not include any other individuals and no summons was served on such individuals; however, the State Defendants note that certain members of the IEC are included in ¶ 8. Conversely, while Ms. Lawson was included in the summons, there are no facts alleged against her; thus, the claims clearly are against the Secretary of State *qua* Secretary of State.

States Constitution, no such direct action under the Constitution itself...exists against state actors"); *Ellis v. Secretary of State of Illinois*, 883 F. Supp. 291 (N.D. Ill. 1995) (same). Thus, to the extent that Plaintiffs are trying to assert their constitutional claims directly, the Second Amended Complaint must be dismissed, with prejudice.

If Plaintiffs are seeking to bring their constitutional claims through 42 U.S.C. § 1983, they have failed. It is well-settled that § 1983 is not itself a source of substantive rights; rather, it acts as an instrument for vindicating federal rights conferred elsewhere. *See Spiegel v. Rabinovitz*, 121 F.3d 251, 254 (7th Cir), *cert. denied*, 522 U.S. 998 (1997). Relief under § 1983, therefore, requires a plaintiff to allege (and ultimately prove) that a person acted under color of state law to deprive him/her of rights, privileges or immunities secured by the U.S. Constitution or federal law. *See Larsen v. City of Beloit*, 130 F.3d 1278, 1282 (7th Cir. 1997). Plaintiffs have failed to do so.

Beyond those fundamental flaws, Plaintiffs' constitutional claims fail for any of the following reasons. First, the crux of any equal protection claim is the assertion that a person was treated differently than similarly situated persons for impermissible reasons. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (explaining that the "purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents") (further quotations and citations omitted). Here, Plaintiffs offer absolutely no allegation that they were treated differently than similarly situated Hoosiers (as it relates to the submission of complaints to the IEC). In fact, Plaintiffs filed their challenge with the IEC and were heard on the issues raised. Plaintiffs offer no specifics as to how challenges filed with the IEC by others fared. And, the

fact that State Defendants found there to be no merit to Plaintiffs' assertions does not mean that Plaintiffs have stated a claim for equal protection.

Next, the fact is that Plaintiffs were afforded due process. Plaintiffs filed a challenge and submitted materials that they believe support their position. A hearing was held and a decision was rendered. Plaintiffs filed a Petition to have the decision of the IEC reviewed; however, that Petition was dismissed and Plaintiffs have taken no appeal. In short, it is clear that Plaintiffs were afforded their full panoply of due process rights. *Riley v. Friend*, No. 1:09-cv-711, 2010 WL 2071985, *3 (S.D. Ind. May 21, 2010).

And, third, while not actually alleged, to the extent that Plaintiff seeks to allege a "substantive due process" claim, it, too, must be dismissed. As the Seventh Circuit has noted, "[t]his invented doctrine does not authorize courts to expand constitutional clauses at will." *LeRoy v. Illinois Racing Bd.*, 39 F.3d 711, 715 (7th Cir. 1994) (citing *Albright v. Oliver*, 510 U.S. 266 (1994); *Graham v. Connor*, 490 U.S. 386, 395 (1989)). *See also Lee v. City of Chicago*, 330 F.3d 456, 467 (7th Cir. 2003) (recognizing the limited scope of the substantive due process doctrine and that "substantive due process is not 'a blanket protection against unjustifiable interferences with property") (citing and quoting *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Dunn v. Fairfield Cmty. High Sch. Dist. No. 225*, 158 F.3d 962, 965 (7th Cir. 1998); *Schroeder v. City of Chicago*, 927 F.2d 957, 961 (7th Cir. 1991)).

Indeed, unless a "governmental practice encroaches on a fundamental right, substantive due process requires only that the practice be rationally related to a legitimate government interest, or alternatively phrased, that the practice be neither arbitrary nor irrational." *Lee*, 330 F.3d at 467. And, significantly, when a substantive due process challenge "involves only the deprivation of a property interest, a plaintiff must show 'either the inadequacy of state law

remedies or an independent constitutional violation' before the court will even engage in this deferential rational-basis review." *Id.* at 467 (quoting *Doherty v. City of Chicago*, 75 F.3d 318, 323-26 (7th Cir. 1996). *See also Wudtke v. Davel*, 128 F.3d 1057, 1062 (7th Cir. 1997) ("in cases where the plaintiff complains that he has been unreasonably deprived of a state-created property interest, without alleging a violation of some other substantive constitutional right or that available state remedies are inadequate, the plaintiff has not state a substantive due process claim").

G. Plaintiffs Have Failed to Sufficiently Allege Multiple Torts

Plaintiffs' claims are baseless,[7] and Plaintiffs have failed to sufficiently allege multiple claims in their Second Amended Complaint. Because the Second Amended Complaint fails to put the State Defendants on notice of Plaintiffs' claims, their Complaint must be dismissed.

Underlying all of Plaintiffs' tort claims, there appears to be a vague implication of some general duty State Defendants owe Plaintiffs which provides Plaintiffs a cause of action. This is not the law, and Plaintiffs do not have private causes of action for their tort claims. Even assuming some general duty owed the public pursuant to statutory authority conferred on State Defendants, Plaintiffs have not demonstrated that they have a private cause of action. Specifically, "where a legislative body does not explicitly provide a private right of action to enforce the provisions of a particular statute, courts are frequently asked to find that the Legislature intended that a private right of action be implied." *Blanck v. Ind. Dep't of Corr.*, 829 N.E.2d 505, 509 (Ind. 2005) (citations omitted). The general formulation used by courts to determine whether a particular cause of action exists, is "that a private cause of action generally

[7] By way of the example, Plaintiffs in their Motion for Preliminary Injunction repeat their argument that candidates for the U.S. President must be born to citizen parents. This argument is a complete waste of the Court's time as the Indiana Court of Appeals concluded "that persons born within the borders of the United States are 'natural born Citizens' for Article II, Section 1 purposes, regardless of the citizenship of their parents." *Ankeny v. Governor of State of Indiana*, 916 N.E.2d 678, 688 (Ind. Ct. App. 2009).

will be inferred where a statute imposes a duty for a particular individual's benefit but will not be where the Legislature imposes a duty for the public's benefit." *Id., citing Americanos v. State,* 728 N.E.2d 895 (Ind.Ct.App.2000), *transfer denied,* 741 N.E.2d 1254. Plaintiffs have not, and are unable, to point to any statute that provides any sort of private cause of action related to what they claim in any of their complaints.[8] Thus, their tort claims should be dismissed.

Further, Plaintiffs' claims must adhere to the notice pleading rule – Indiana Rule of Trial Procedure 8(A). *See* Ind. R. Trial P. 8(A); *Butler ex. rel. Estate of Butler v. Kokomo Rehab. Hosp., Inc.*, 744 N.E.2d 1041, 1047 (Ind. Ct. App. 2001). Although the notice pleading rule does not require a party to articulate in detail its theory of its case, it does require that the party state the operative facts upon which its claim or defense is grounded. *See* Ind. T.R. 8(A) ("To state a claim for relief . . . a pleading must contain: (1) a short and plain statement of the claim showing that the pleader is entitled to relief."); Ind. T.R. 8(B) (A defensive pleading "shall state in short and plain terms the pleader's defenses to each claim asserted."); Ind. T.R. 8(C) ("A responsive pleading shall set forth affirmatively and carry the burden of proving [the party's affirmative defenses]."); *Butler*, 744 N.E.2d at 1047 ("[O]ur . . . rules are based on so-called notice pleading standard in which a plaintiff essentially need only plead the operative facts involved in the litigation." (citations omitted)). In *Noblesville Redevelopment Com'n v. Noblesville Associates Ltd. Partnership*, 674 N.E.2d 558, 563 (Ind. 1996), the Indiana Supreme Court stated that under a system of notice pleading where precise legal theories need not be set forth, a plaintiff is required to plead operative facts:

> [Indiana's system of notice pleading] requires pleading the operative facts so as to place the defendant on notice as to the evidence to be presented at trial. . . .Under notice pleading the issue of whether a complaint sufficiently pleads a certain

[8] In addition to the problems related to Plaintiffs failure to properly allege any legally cognizable tort claim, Plaintiffs' lack of any real "injury" distinguishable from the general public also defeats Plaintiffs claim to standing in this case.

> claim turns on 'whether the opposing party has been sufficiently notified concerning the claim ... so as to be able to prepare to meet it'.

Noblesville Redevelopment Com'n, supra, 674 N.E. 2d 558, 563-64 (citing 1 William Harvey, Indiana Practice § 8.3, at 373 (1988)); also citing *State v. Rankin*, 260 Ind. 228, 230-31, 294 N.E.2d 604, 606 (1973). Under Indiana's concept of notice pleading, the "procedural scheme is simple, direct, and on the whole, expeditious. A complaint's allegations are sufficient if they put a reasonable person on notice as to why plaintiff sues." *Capitol Neon Signs, Inc., et al v. Indiana National Bank*, 501 N.E.2d 1082, 1085 (Ind. Ct. App. 1986).

Specifically, Plaintiffs' claims fail to put the State Defendants on notice of how or why they are liable for a "breach of fiduciary duty." "A claim for breach of fiduciary duty requires proof of three elements: (1) the existence of a fiduciary relationship; (2) a breach of the duty owed by the fiduciary to the beneficiary; and (3) harm to the beneficiary." *York v. Fredrick*, 947 N.E.2d 969, 978 (Ind. Ct. App. 2011), *citing Farmers Elevator Co. of Oakville, Inc. v. Hamilton,* 926 N.E.2d 68, 79 (Ind.Ct.App.2010). Plaintiffs fail to state, much less properly plead, a tort of breach of fiduciary duty. Indeed, "breach of fiduciary duty is a tort claim for injury to personal property." *Id.* Plaintiffs fail to state what personal property of Plaintiffs the Defendants held in trust, and State Defendants cannot imagine what Plaintiffs are contemplating here. State Defendants simply owe Plaintiffs no fiduciary duty.

Plaintiffs do not provide a single statutory citation or law mandating a duty on the State Defendants to do whatever it is Plaintiffs claim the State Defendants should have done. Plaintiffs do not state how, why, or where the State Defendants violated the alleged fiduciary duty. The same faults are true of Plaintiffs' claims of negligence. "The tort of negligence consists of three elements: (1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty by the defendant; and (3) injury to the plaintiff proximately caused by that breach." *Hayden*

v. Paragon Steakhouse, 731 N.E.2d 456, 458 (Ind. Ct. App. 2000), *citing Bloemker v. Detroit Diesel Corp.,* 720 N.E.2d 753, 756 (Ind.Ct.App.1999). Again, Plaintiffs provide no notice whatsoever with respect to the claim of negligence. Likewise, Plaintiffs have not pointed to any law requiring the State Defendants to accept Plaintiffs' submission of unintelligible evidence as true and to act on said evidence immediately to stop whatever injustice Plaintiffs claim is taking place. In this respect, Plaintiffs' claims for breach of fiduciary duty and negligence are unintelligible, non-compliant with Trial Rule 8, and should be dismissed pursuant to Trial Rule 12(B)(6).

Furthermore, Plaintiffs have failed to sufficiently allege a claim for fraud against the State Defendants. The crux of Plaintiffs' fraud claim appears to be that "Lawson continued defrauding 6,516,922 citizens of the State of Indiana by staying silent and creating an impression that Attorney Taitz was crazy, incompetent and was bringing frivolous challenges . . ." and that the State Defendants are "aiding and abetting" President Obama in his use of "forged IDs." (Second Am. Compl., p. 33-34.) A party must prove five elements to sustain an action of actual fraud: "1) that there was a material misrepresentation of past or existing fact; 2) that the representation was false; 3) that the representation was made with knowledge or reckless ignorance of its falsity; 4) that the complaining party relied on the representation; and 5) that the representation proximately caused the complaining party's injury. *Wells v. Stone City Bank*, 691 N.E.2d 1246, 1250 (Ind. Ct. App. 1998), citing *Rice v. Strunk,* 670 N.E.2d 1280, 1289 (Ind.1996). The elements of constructive fraud are: "1) a duty existing by virtue of the relationship between the parties; 2) representations or omissions made in violation of that duty; 3) reliance thereon by the complaining party; 4) injury to the complaining party as a proximate result thereof; and 5) the gaining of an advantage by the party to be charged at the expense of the

complaining party. *Id.* at 1250-51. With respect to the fraud claim, Plaintiffs have the additional burden of specifically averring the circumstances constituting fraud pursuant to Indiana T.R. 9(B), stating "the time, the place, the substance of the false representations, the facts misrepresented, and the identification of what was procured by the fraud." Cunningham v. Associates Capital Services Corp., 421 N.E.2d 681, 683 (Ind. Ct. App. 1981). Plaintiffs do not provide notice of a claim of fraud or state with particularity any facts relevant to a claim of fraud. In fact, it is difficult to see any relation at all between the actual elements of fraud and what Plaintiffs allege in their Second Amended Complaint.

First, Plaintiff Taitz is not an Indiana citizen and, by her own pleading, was not defrauded by the Secretary. In addition, the remaining Plaintiffs have not sought to represent all citizens of Indiana in pursuing a claim against the Secretary for her alleged fraud. And Plaintiff Taitz's allegations that the Secretary made Taitz appear "crazy" and "incompetent" by not responding to Taitz's comments on a radio show does not in any way fit the definition of a fraud on the citizens of the State of Indiana. Finally, Plaintiffs have not alleged how or when the State Defendants allegedly aided and abetted President Obama in his use of "forged IDs," what those forged IDs were, or how doing so could amount to fraud under Indiana law. Plaintiffs' fraud claim is preposterous and should be dismissed pursuant to Trial Rule 12(B)(6).

Similarly, Plaintiffs' claims that one or more members of the IEC defamed one or more of the Plaintiffs are unclear and fail to meet the notice pleading standard. A defamatory communication is defined as one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Doe v. Methodist Hospital,* 690 N.E.2d 681, 686 (Ind. 1997) (quoting Restatement (Second) of Torts § 559 (1977)). *See also Near East Side Community Org. v. Hair,* 555 N.E.2d

1324, 1330 (Ind. Ct. App. 1990); *Cochran v. Indianapolis Newspapers, Inc.*, 372 N.E.2d 1211, 1217 (Ind. Ct. App. 1978). Plaintiffs' allegations that Commissioner Dumezich "was rude and insulting to Taitz" and that "[a]t one point Dumezich told Taitz 'I will throw your butt out of here'" cannot be linked to any harm to any Plaintiff's reputation. (Second Am. Compl., ¶ 112.) In addition, Plaintiffs' claim that the actions of Dumezich made the public believe that Taitz is "somebody who was bringing frivolous legal actions" does not support a claim for defamation, as Plaintiffs have failed to prove that the present action is nothing more than a frivolous waste of state and judicial resources. *See Journal-Gazette Co., Inc. v. Bandido's, Inc.*, 712 N.E.2d 446, 451 (Ind. 1999)(holding that a cause of action for defamation requires a false statement). Plaintiffs' defamation claim should be dismissed pursuant to Trial Rule 12(B)(6).

Oddly, Plaintiffs insert into their Second Amended Complaint a claim related to the National Voter Registration Act. 42 U.S.C. Sec. 1973gg et seq. It appears to have been literally inserted as it is a direct copy of a much of a complaint filed in a federal lawsuit brought by Judicial Watch and True the Vote in the Southern District of Indiana, 1:12-cv-800-WTL-TAB.

Plaintiffs' claim should be summarily dismissed because Plaintiffs here did not provide notice of a violation, a step required prior to filing a lawsuit under the NVRA by a private party. Prior to bringing a lawsuit, a private party who wishes to bring a lawsuit must "provide written notice of the violation to the chief election official of the State involved." 42 U.S.C. § 1973gg-9(b)(1) (emphasis added). The purpose of the notice requirement is to "provide states in violation of the Act an opportunity to attempt compliance before facing litigation." *Assoc. of Community Orgs. for Reform Now v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997). Indeed, it does not appear that Plaintiffs are even aware of the notice requirement, and it is difficult to comprehend the basis for this claim but for the simple purpose of harassment. Thus, because

Plaintiffs failed to provide the State of Indiana with any sort of notice of any violation under the NVRA, this claim should be summarily dismissed.

Finally, Plaintiffs' Request for "a Writ of Mandamus directing the Secretary of State of Indiana to conduct citizenship verification through production of U.S. Passports or Naturalization certificates or birth certificates in order to prevent non-citizen voting, which is highly likely in the aftermath of the 'Dream Act'" is incomprehensible. The State Defendants do not understand what Plaintiffs are asking for with respect to their request for this Court to order the Secretary of State to conduct "citizenship verification." It appears that this issue is unrelated to anything in the Second Amended Complaint itself, but is merely some sort of policy Plaintiffs hope to implement by judicial fiat. Defendants speculate that this is related to the questions related to Proposition 200 in Arizona, which was enjoined by the 9th Circuit, a decision which was recently granted certiorari by the United States Supreme Court. *Gonzalez v. Arizona*, 677 F.3d 383, 388 (9th Cir. 2012) *cert. granted*, 12-71, 2012 WL 2921874 (U.S. Oct. 15, 2012). Because Plaintiffs make no claim whatsoever with respect to this relief sought, this relief should be summarily denied.

H. This Court Is Without Subject Matter Jurisdiction to Determine the Qualifications of a Sitting President for the National Office of the United States President

Respectfully, this Court does not have jurisdiction to rule on the qualification of those running for President of the United States. Article I, § 3 of the United States Constitution reserves to the United States Senate the power and authority to determine the qualifications of the President of the United States in that "The Senate shall have the sole power to try all impeachments." Furthermore, the Twelfth Amendment prescribes the manner by which the electors who are appointed by the states elect the President. The United States Code provides further guidance to Congress as to how to count electoral votes in Congress, as well as

mechanisms for challenging a candidate for president. *See* 3 U.S.C. § 15. As other courts have found:

> [i]ssues regarding qualifications for president are quintessentially suited for the foregoing process. Arguments concerning qualifications or lack thereof can be laid before the voting public before the election and, once the election is over, can be raised as objections as the electoral votes are counted in Congress. The members of the Senate and the House of Representatives are well qualified to adjudicate any objections to ballots for allegedly unqualified candidates.

Robinson v. Bowen, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008). In other words, Plaintiffs are trying -- through the Second Amended Complaint -- to challenge the constitutional qualifications of President Obama and, as such, they raise a nonjusticiable controversy before this Court that must be dismissed pursuant to Trial Rule 12(B)(1).

Moreover, it is important to note that the analysis above proves that the IEC's decision to unanimously deny Plaintiffs Weyl, Kesler, and Swihart's challenges was correct. Plaintiffs argue that President Obama does not meet the qualifications for United States President that are set forth in Article II, § 1, Cl. 4 of the United States Constitution. (Pet., p. 3.) Recognizing the Twelfth Amendment, Article II, § 1, and Article I, § 3 of the United States Constitution, the Indiana Legislature did not provide any mechanism for challenging the qualifications of a candidate for United States President before the IEC. Indiana Code § 3-8-8-1 *et seq.* provides the procedure by which the IEC may entertain challenges to a candidate for political office in Indiana and remove those candidates from ballots. Indiana Code § 3-8-8-1 excepts the national office of United States President from the IEC's authority. *See* Ind. Code § 3-8-8-1 (mandating that the "chapter applies only to a candidate for election to" a state legislative office and "a state office other than a judicial office"). Because the process for determining the qualifications for the national office of United States President is constitutionally placed with Congress and the

Electoral College, the IEC properly denied Plaintiffs' challenges. Plaintiffs have not and cannot show how they were harmed by the State Defendants' adherence to the law in this respect.

I. Plaintiffs Have Requested Relief That the State Defendants and This Court Cannot Provide

Plaintiffs "are seeking an emergency injunctive relief in the form of a Writ of Mandamus directing the Election[] Commission and the Secretary of State to remove Obama from the ballot." Second Amended Complaint. Plaintiffs sued Deputy Attorneys General Jefferson Garn and Kate Shelby, a radio station and its host, the Secretary of State and the Indiana Election Commission. None of these Defendants are able to provide the relief Plaintiffs seek. Moreover, this Court has twice denied Plaintiffs injunctive relief. It should not entertain Plaintiffs' third request for an injunction.

1. Plaintiffs cannot receive the relief requested from the State Defendants.

First, it is unclear why Plaintiffs are seeking relief against Deputy Attorneys General Garn and Shelby, as neither the Attorney General himself nor undersigned counsel have the ability to perform any election process or function. The authority of the Indiana Attorney General is delineated by Indiana Code § 4-6-2-1. Nothing in the Indiana Code gives the Attorney General or his deputies the authority to carry out election duties. It is again difficult to contemplate what Plaintiffs' motivates are in naming Garn and Shelby as Defendants but for the purpose of harassment. Garn and Shelby do not have the power to provide Plaintiffs the relief they seek. Thus, Plaintiffs have failed to state a claim for relief against Garn and Shelby.

Moreover, Plaintiffs' claims are too late. The ballots for the November 6th election are already certified and are being printed. It is simply too late to "remove Obama from the ballot." Second Amended Complaint, Prayer for Relief 1. Pursuant to Indiana law, on September 7, 2012 – before any State Defendant was notified of Plaintiffs' preliminary injunction request or

amended complaint – the Co-Directors of the Indiana Election Division certified to each county election board the names of the nominees for President and Vice President of the United States certified to the Election Division under Indiana Code 3-10-4-5(c). (Ex. 1). In other words, the Election Division has already certified Barack Obama as the Democratic candidate for President of the United States to the local election boards. Indeed, in-person absentee voting began on October 9, 2012, and the *deadline* for *returning* ballot absentee ballots is the quickly approaching October 29th. *See* http://www.in.gov/sos/elections/2402.htm. The State Defendants have no authority to remove President Obama from the ballots and, thus, Plaintiffs belatedly ask for President Obama to be prevented from being named on the ballot. At this point, Plaintiffs have simply sued the wrong party. Plaintiffs have asked for relief that cannot be granted by the parties they sued, and thus their Second Amended Complaint should be dismissed on that basis, as well.

2. Plaintiffs cannot meet the requirements for a permanent injunction.

Furthermore, Plaintiffs seek mandatory injunctive relief -- commanding the removal of President Obama from the Indiana ballot -- from the IEC, the Secretary, Garn, and Shelby. In fact, Plaintiffs appear to be treating these as a separate causes of action. *See* "Motion of Plaintiffs to Schedule Separate Trial of Expedition, etc." ("plaintiffs ask expedited trail against Secretary of State and Election[] commission **only**, as to **only** two legal causes of action: declaratory relief & permanent injunction") (emphasis in original). Equitable relief – here declarative or injunctive relief – is just that, relief. *See, e.g., Noah v. Enesco Corp.*, 911 F. Supp. 305, 307 (N.D. Ill. 1995) ("By its very name, it is apparent that injunctive relief is a remedy;" "An injunction is a remedy, not a cause of action"); *Washel v. Bryant*, 770 N.E.2d 902, 904 (Ind. Ct. App. 2002) ("An injunction is an extraordinary equitable *remedy*") (emphasis added). Plaintiffs make no connection between the remedy sought, and the claims they tried to plead.

Instead, Plaintiffs appear to argue that the remedy exists as an independent cause of action. While the argument is necessarily dizzying, Plaintiffs' fail to state a claim upon which relief may be granted because they are asking for a remedy based on their claim for relief; thus, their request for injunctive and declarative relief should be denied.

Notwithstanding this lack of nexus between the remedy – which Plaintiffs attempt to frame as a cause of action – and their causes of action, Plaintiffs fail to meet the requirements for being granted equitable relief. Mandatory injunction "is an extraordinary equitable remedy which should be granted with caution. The plaintiff carries the burden of demonstrating injury which is certain and irreparable if the injunction is denied." *Crossman Communities, Inc. v. Dean*, 767 N.E.2d 1035, 1040 (Ind. Ct. App. 2002) (citing *Dible v. City of Lafayette*, 713 N.E.2d 269, 272 (Ind. 1999)). And, as with any case, a "fundamental, threshold, constitutional issue that must be addressed by this, or any, court to determine if it should exercise jurisdiction in the particular case before it" is whether State Defendants are the "proper part[ies] from whom to seek redress." *Alexander v. PSB Lending Corp.*, 800 N.E.2d 984, 989 (Ind. Ct. App. 2003).

> Generally, the trial court considers four factors when determining whether to grant injunctive relief: (1) whether plaintiff's remedies at law are inadequate; (2) whether the plaintiff can demonstrate a reasonable likelihood of success on the merits; (3) whether the threatened injury to the plaintiff outweighs the threatened harm a grant of relief would occasion upon the defendant; and (4) whether the public interest would be disserved by granting relief.

Ferrell v. Dunescape Beach Club Condos., 751 N.E.2d 702, 712 (Ind. Ct. App. 2001). Indiana courts have specified that "permanent injunctions are limited to prohibiting injurious interference with rights and must be narrowly tailored so that its scope is not more extensive than is reasonably necessary to protect the interests of the party in whose favor it is granted." *Plaza Group Properties, LLC v. Spencer County Plan Comm'n*, 877 N.E.2d 877, 896 (Ind. Ct. App.

2007).

A. Plaintiffs have no likelihood of success on the merits

Despite the near impossibility of deciphering Plaintiffs' claims in their Second Amended Complaint, it is relatively clear that Plaintiffs' primary claim and relief sought relate to the placement of President Obama on the Indiana ballots. Plaintiffs' other arguments, including claims against Amos Brown and claims related to the National Voter Registration Act, have no connection whatsoever to the injunctive and declaratory relief sought.

For the reasons stated above, Plaintiffs have no chance of success on the merits.

B. The harm to the public greatly outweighs any alleged injury to the Plaintiffs

Plaintiffs argue that removing the sitting President of the United States from the Indiana ballots "cannot possibly cause any harm to the defendants," and that it is in the public interest to remove him from the Indiana ballots. Motion for Preliminary Injunction, p. 10-11. Plaintiffs' argument is without merit or any apparent recognition of the radical nature of what they are asking this Court to do.

Plaintiffs seek relief now 20 days before Election Day. If Plaintiffs had a legitimate claim, which they do not, and if this were anything other than a simple reformulation of their failed judicial review, they could have brought this motion at a much earlier date. Plaintiffs are asking this Court to remove Barack Obama from the ballots in Indiana, a request that would place an immeasurable burden on State officials, and would saddle the taxpayers of Indiana with impermissible costs for a futile and meaningless exercise.

The Indiana Secretary of State is the State's chief election office. Ind. Code 3-6-3.7-1. Pursuant to the Indiana Code, the Indiana Election Commission administers Indiana election laws and adopts administrative rules to "govern the fair, legal, and orderly conduction of

election." Ind. Code 3-6-4.1-14. These Defendants are responsible for the orderly conduct of elections in Indiana, a responsibility that goes directly to why there are clear administrative processes available to Indiana residents to bring orderly and timely challenges to candidates. If Plaintiffs were permitted to circumvent the Indiana Code and administrative processes, it would be hard to overstate the harm that would be caused Defendants given their express duty to assist in the governance of an orderly election in Indiana.

Again, Barack Obama is the duly elected Democratic Party candidate and was certified as such by the Indiana Election Division. (Ex. 1). A preliminary injunction would have the effect of disenfranchising the primary voters. The Indiana Supreme Court "long held that the law favors the franchise and enfranchisement," and that the "purpose of election law and the efforts of the court are to secure to the elector an opportunity to freely and fairly cast his ballot, and to uphold the will of the electorate and prevent disenfranchisement." *Wyatt v. Wheeler*, 936 N.E.2d 232, 239 (Ind. Ct. App. 2010) (further quotations omitted). The disservice to the public that would result in the disenfranchisement of the Indiana voters would be sufficient and independent reason to deny Plaintiffs' Motion for Preliminary Injunction.

Indeed, the public, both in Indiana and nationwide, has already been harmed by Plaintiffs' actions. This is already Plaintiffs' third attempt to have Barack Obama removed from the ballots in Indiana. Their argument was heard by the IEC and denied. Plaintiffs had an opportunity to have that decision reviewed and that was dismissed, as well. Plaintiff Taitz's actions in Indiana are part of a "pattern that advance[s] frivolous arguments and disrespectful personal attacks on the parties and the Court" that have earned her at least one sanction in federal court totaling $20,000. *Rhodes v. MacDonald*, 670 F.Supp.2d 1363, 1380 (M.D. Ga. 2009). Plaintiffs' suit and the actions of Plaintiff Orly Taitz in particular are a waste of judicial and

governmental resources. Plaintiffs are precluded from receiving the relief requested, and their Second Amended Complaint should be dismissed.

VII. CONCLUSION

The Second Amended Complaint must be dismissed pursuant to Indiana Rules of Trial Procedure 12(B)(1), (2), (4), (5), and (6). Plaintiff Ripley was not granted permission to intervene in this cause. Plaintiff Taitz does not have standing to pursue her claims. This Court does not have personal jurisdiction over State Defendants Garn and Shelby because Plaintiffs did not properly initiate their action against those Defendants by serving them with summonses. Plaintiffs' claims are violative of this Court's August 17th Order, are an attempt to circumvent the requirements of AOPA, and are barred by the doctrines of collateral estoppel and *res judicata.* Plaintiffs' claims are barred by the Indiana Tort Claims Act, and the State Defendants are immune from Plaintiffs's claims. Plaintiffs cannot enforce the Indiana Criminal Code and failed to properly allege constitutional claims. Plaintiffs have presented a non-justiciable controversy to this Court, over which this Court does not have subject matter jurisdiction. Plaintiffs have failed to sufficiently allege multiple claims. The State Defendants cannot provide Plaintiffs with the relief they seek, and Plaintiffs are not entitled to the relief they request.

WHEREFORE, the State Defendants respectfully request that this Court dismiss Plaintiffs' Second Amended Complaint, with prejudice, and all other just and proper relief.

Respectfully submitted,

By: _____

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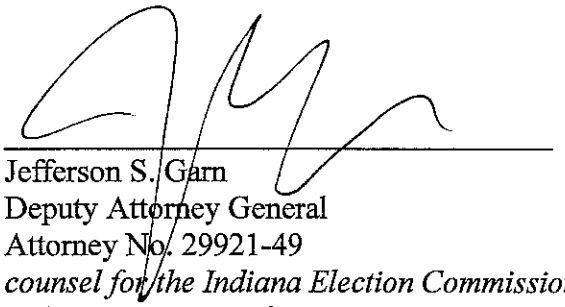
By: 

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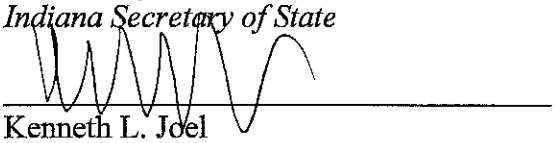
By: 

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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 October 18, 2012.

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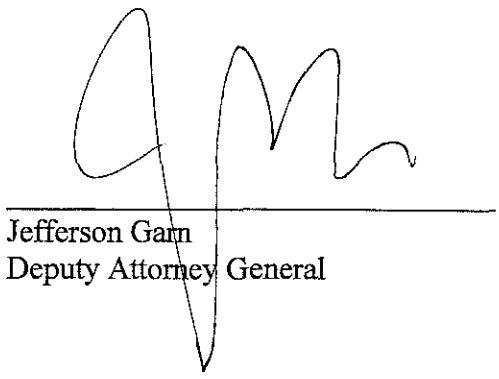

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