IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

IN THE MATTER OF THE CONSERVATION OF NEXTLEVEL HEALTH PARTNERS, INC.	**)** **)** **)**	**No. 2020 CH 4431**

NEXTLEVEL HEALTH PARTNERS, INC.'S SUR-REPLY IN OPPOSITION TO INTERVENOR'S FIRST AMENDED INTERVENOR MOTION

Intervenor's constitutional challenge to the Sequestration Statute is moot because the Court previously lifted the Sequestration Order. Intervenor's reply brief fails to overcome that mootness and, instead, largely just repeats incendiary allegations about NextLevel, *see* Reply at 1–2, that are both false and utterly irrelevant to the legal issues raised in her motion. The Court should deny Intervenor's motion without reaching the moot constitutional issues. In any event and in the alternative, the Sequestration Statute is constitutional and should not be struck down. Intervenor mangles the law by wrongly assuming that the Sequestration Statute violates a presumption of public access to court records and should be reviewed with strict scrutiny. *See* Reply at 7–15. As NextLevel explained in its response, *see* Resp. at 9–14, no such presumption applies to insurance conservation proceedings, but even if it did the Statute would survive such review. The Court should deny Intervenor's motion in its entirety.

I. Argument

A. The Court should deny Intervenor's motion based on the Court's prior Seal Order without reaching the constitutional question, which is moot after the Lift Order .

Courts may not adjudicate hypothetical or moot questions, nor may they issue advisory opinions. *People v. Mosley*, 2015 IL 115872, ¶ 11. Because the Lift Order removed any protection granted by the Sequestration Statute in this case, this case does not present any justiciable question regarding the constitutionality of the Sequestration Statute. *See* Resp. at 5–6. In the Lift Order, the Court ordered the few remaining materials redacted or sealed under its

inherent power to control its docket without relying on the Sequestration Statute. Intervenor cannot and does not dispute this point. Rather, Intervenor makes four meritless arguments to support her contention that the court should "reject[]" mootness. *See* Reply at 4.

First, without any citation to law and contrary to the facts, Intervenor argues that the Court should nonetheless delve into these constitutional issues because it did not consider the "public access equities". *See* Reply at 4–6. The Court *in fact* weighed "the public access equities" when it issued the Seal Order. The Lift Order lifted the statutory sequestration, and the Seal Order found that NextLevel's confidentiality interests still outweighed public access interests as to the narrow, limited set of documents that are still sealed or slightly redacted despite that lift and pursuant only to the Court's inherent jurisdiction (which Intervenor does not challenge). *See* Schwab Decl. Ex. 7. The Court's December 6, 2021 order invited Intervenor to make new constitutional arguments but pointedly left open the question of "whether the Court should reach those arguments" and directed Intervenor to "address the issue of the extent to which the matter is now moot." *See* Schwab. Decl. Ex. 9. Indeed, the Court will recall that NextLevel objected to the inflammatory and irrelevant purple prose in Intervenor's motion at the February 7, 2022 hearing. Accordingly, the Court specifically noted this fact in the preamble to the Court's order entered that date, and determined that (i) "the Court does not believe any discovery is necessary to determine the legal issues involved," and (ii) "[t]he Parties should be mindful of the purpose for which Stevens' petition for leave to intervene was granted." *See* Schwab Reply Decl. Ex. 1.

But neither Intervenor's moving brief nor her reply gives any reason why the Lift Order—which has made virtually all of this case public—has not redressed her problem. Moreover, neither brief mentions the specific documents that remain under seal or redacted or

why revealing that information is important to Intervenor or to the public. Thus, Intervenor failed to present any relevant "equities," *see* Reply at 4, for the court to weigh that the Court has not already weighed and Intervenor failed to give any reason why "the court should reach" her constitutional claim, *see* Schwab Decl. Ex. 9. Indeed, because that claim is moot, it would be improper for the Court to address it.[1]

Intervenor's second and third arguments, based on her desire to potentially obtain records in "related" cases or other cases "going forward," *see* Reply at 4–5, fail to create a justiciable controversy *in this case*. The "capable of repetition yet evading review" exception to the mootness doctrine, *see id.* at 5, does not apply here. It only applies where there is a "reasonable expectation that the same complaining party would be subject to the same action again" and the action is "of such short duration that it cannot be fully litigated prior to its cessation." *In re J.T.*, 222 Ill. 2d 338, 350 (2006). This exception is "construed narrowly" and the burden falls on the litigant invoking it to "demonstrate[e] . . . each criterion to bring the case within its terms." *GlidePath Dev. LLC v. Ill. Commerce Comm'n*, 2019 IL App (1st) 180893, ¶ 29.

As to the first criterion, Intervenor cannot reasonably expect that the Court would place this case under sequestration a second time. The Court issued an order more than two months ago establishing a proof of claim procedure that will result in the windup of NextLevel's business and the end of this conservation. Any hypothetical future sequestration order—and it must be purely theoretical because NextLevel will be gone after dissolution—would be the result of some "new factual development" in the case; more appropriate for judicial review at that time when the Court could consider those facts (if any, and there will be none). *See In re Merrilee M.*,

[1] Intervenor's reply did not even address NextLevel's argument that relitigating the Seal Order is improper under the law of the case doctrine. *See* Resp. at 6–7. Although the Court may still consider the merits of that argument, it should consider Intervenor's failure to respond to it as a concession.

409 Ill. App. 3d 377, 378 (2d Dist. 2011) (noting that the "capable-of-repetition" exception is especially inappropriate as applied to fact-based controversies). And even if the Court for whatever reason *did* issue a second order under the Sequestration Statute, Intervenor could obtain review by moving to vacate *that* order. *See Edwardsville School Serv. Personnel Ass'n, IEA-NEA v. Ill. Educ. Labor Relations Bd.*, 235 Ill. App. 3d 954, 959 (4th Dist. 1992) (refusing to apply the exception where "[i]f the same situation occurred again but this time" it were resolved against the party invoking the exception then that party "could then seek meaningful review of those issues"). There is no justiciable controversy here.

As to Intervenor's fourth argument, NextLevel does not oppose Intervenor's request for an accurate electronic docket, whatever the merits are of this request. *See* Reply at 6. However, housekeeping concerns about errors in the electronic docket do not create a live controversy regarding the separate matter of whether a Statute is constitutional. This request is a court administrative matter rather than one appropriate for judicial relief.

B. In the alternative, if the Court finds that the Sequestration Statute is necessary to keep the Seal Order in effect or that the case is otherwise justiciable, the Court should not strike down the Sequestration Statute as unconstitutional.

Intervenor's reply improperly seeks to apply strict scrutiny to the Sequestration Statute based on a presumption of public access to court records, *see* Reply at 8, 12, 14–15, skipping important steps in the analysis. The Supreme Court of Illinois has been clear that this presumption applies only to court records that have "historically been open to the public"[2] and

[2] Intervenor attempts to read the "historically open" prong out of the standard by citing to a case that had nothing to do with the First Amendment or access to court records, *Tumey v. Ohio*, 273 U.S. 510 (1927); *see* Reply at 10–11. In *Tumey*, the Supreme Court found it violated due process for a village to operate a "mayor's court" where the mayor presided over certain criminal trials and received a monetary payment for every defendant who was convicted in his court but received nothing where defendants were acquitted. 273 U.S. at 532. *Tumey* does not abrogate any precedents from the Supreme Court of Illinois holding that a presumption of access

where "disclosure . . . would further the court proceeding at issue." *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 232 (2000). Intervenor failed to show that insurance conservation actions fit within that presumption.

There simply is no historical public right of access to insurance conservation records. NextLevel provided examples from multiple states with confidentiality statutes for insurance conservations (or analogous proceedings in those states) similar to the Sequestration Statute in Illinois, all of which have existed for decades.[3] *See* Resp. at 9–12. Illinois's statute in particular has roots in the Insurance Code dating back to the Great Depression almost 90 years ago. *See id.* at 10.[4] Illinois is absolutely not an outlier in its use of confidentiality in insurance conservations.

Intervenor's criticism that NextLevel and the Attorney General did not cite cases *upholding* such laws, *see* Reply at 8, falls flat. Nowhere in that criticism does Intervenor cite a case *invalidating* one of these laws, and the fact that no litigant has ever felt it necessary to bring a First Amendment challenge to one of them does not render them all suspect.

Intervenor is also flat wrong in her suggestion that courts never uphold statutes requiring other kinds of civil proceedings to be kept confidential. *See, e.g.*, *In re Roger B.*, 84 Ill. 2d 323, 335–36 (1981) (rejecting First Amendment challenge to statute placing adoption case records

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to court records applies only to proceedings that historically have been open to the public.

[3] Intervenor's claim that New York lacks a confidentiality provision, *see* Reply at 13, misleads. Under New York's Insurance Law, insolvency and surplus inadequacy are grounds for receivership. N.Y. Ins. Law § 1309(a); *id.* § 7402(a), (c). These conditions are determined by confidential examinations. *Id.* § 1504(c). Moreover, reviews of insurers' risk-based capital—part of the redacted information Intervenor seeks—are confidential, *id.* § 1322(i), and also may lead to receivership, *id.* § 1324(g)(2)(A). Hearings regarding risk-based capital reports and plans are confidential. *Id.* § 1324(h)(2), (i).

[4] Despite Intervenor's claims that NextLevel and the Attorney General have exhibited a "stunning legal confusion" in referencing this historical material, *see* Reply at 3, NextLevel cited it merely to show the concern by the drafters of the Insurance Code for confidentiality in certain insurance regulatory matters and conservations. As to Intervenor's concerns about the distinction between "administrative" and "court" matters, the precise statute at issue here has been on the books since 1967. *See* Resp. at 9.

under seal); *In re Estate of dePont*, 2 A.3d 516, 517 (Pa. 2010) (rejecting First Amendment challenge to statute sealing incapacity and guardianship records).[5]

Furthermore, the function and purpose of insurance conservation proceedings would not be served by public disclosure, which explains the lack of a historical public right of access to them. *See* Resp. at 13–14. Contrary to Intervenor's assertions, the threat of a "run on the bank" *does* support the Sequestration Statute. Conservation is one of many tools for the Director to "ascertain the condition and situation of the company." 215 ILCS 5/188.1(2).[6] If it is successful, the statute is designed to have the Director return control to the company without damaging it. National Association of Insurance Commissioners Receiver's Handbook for Insurance Company Insolvencies (April 2021 edition), https://content.naic.org/sites/default/files/publication-rec-bu-receivershandbook-insolvencies.pdf. Making the proceeding public would irreparably damage the company, even if the Director were able to cure the condition motivating the conservation or even if the conservation were initiated in error. *Id.* On the other hand, if the conservation were unsuccessful, the proceeding would become a rehabilitation or liquidation, both of which are public proceedings. *See* 215 ILCS 5/188; 215 ILCS 5/194. Thus, if a conservation is successful

[5] Intervenor's reference to *Globe Newspaper Co. v. Super. Ct. for Norfolk Cty.*, 457 U.S. 596 (1982), *see* Reply at 8 n.5, does not help her on this point. That case applied strict scrutiny based on a previously recognized presumption of public access *to criminal trials*. *Globe Newspaper Co.*, 457 U.S. at 604 (emphasis added). The Supreme Court emphasized that a "right of access to *criminal trials* in particular is properly afforded protection by the First Amendment" because "the criminal trial historically has been open to the press and general public" and "[p]ublic scrutiny . . . enhances the quality and safeguards the integrity of the factfinding process." *Id.* at 605–06. The Supreme Court's strict scrutiny analysis from *Globe Newspaper* does not apply here because there is no recognized public right of access to insurance conservation proceedings as there is for criminal trials. As NextLevel previously explained, *see* Resp. at 8–14, there is no historical right of access and disclosure would harm rather than assist the function of an insurance conservation.

[6] Intervenor's references to the insurance laws of New York and Missouri, *see* Reply at 12–13 are irrelevant here. This action was filed in Illinois state court, and the sequestration was ordered under Illinois law. Moreover, NextLevel is headquartered in Illinois, not Missouri.

then disclosure will undermine the proceeding, and if the conservation is unsuccessful then the other provisions of the Insurance Code provide for disclosure anyway. There is no "tautology" here.

As for Intervenor's charge that the parties have not produced "evidence" substantiating the "run on the bank concerns" explained in the NAIC Receiver's Handbook, courts are not required to take evidence to uphold a legislative judgment against a constitutional attack. When the rationale for legislation is "fairly debatable," courts "will not interfere with the legislative judgment and will not substitute their judgment for that of the legislative department." *Thillens, Inc. v. Morey*, 11 Ill. 2d 579, 591 (1957). In such constitutional challenges, courts have "no power to judge in accordance with [their] judgment on conflicting evidence" and should only "decide whether the question is fairly debatable." *Id.* If so, the court "should not investigate further." *Id.* The Court's orders allowing a "limited purpose" intervention, *see* Schwab Decl. Ex. 9, and disallowing discovery since only "legal issues [were] presented," *see* Schwab Reply Decl. Ex. 1, was not an invitation to wade into such technical and factual issues; but even if it were (and it was not) then the burden of proof would be on *Intervenor* to "negative every basis which might support the law because it should be upheld if there is any reasonably conceivable set of facts" supporting it. *AFSCME v. Dep't of Central Mgmt. Servs.*, 2015 IL App (1st) 133454, ¶ 32.

Even if there were a presumption of public access to the records Intervenor seeks, the presumption would be overcome in this case. As the Court already found when it decided to lift the sequestration as to all but a narrow set of documents in this case, NextLevel's confidentiality interests weigh in favor of keeping those documents sealed or redacted. *See* Resp. at 14. NextLevel's response pointed out that Intervenor's moving brief failed to even reference those

documents, *see id.*, and in her reply, Intervenor declined another opportunity to address them. There is no reason for the Court to deviate from how it applied its discretion in issuing the Seal Order.

C. Intervenor's remaining constitutional arguments are meritless.

Intervenor's belated attempt to give teeth to her separation of powers argument, based on a single throwaway sentence with no case law support in her moving brief, *see* Mot. ¶ 100, is improper. Per the Court's Standing Order, it is "improper to withhold case law support from an initial memorandum to present the case law for the first time in a reply brief." Principles of waiver and forfeiture apply equally to pro se litigants. *Shakari v. Ill Dep't of Fin. & Prof. Reg.*, 2018 IL App (1st) 170285, ¶ 34.

Regardless, the Sequestration Statute does not violate separation of powers. Under Article II of the Illinois Constitution, "[l]egislative enactments may regulate the court's practice so long as they do not dictate to the court how it must adjudicate and apply the law or conflict with the court's right to control its procedures." *McAlister v. Schick*, 147 Ill. 2d 84, 95 (1992). The case Intervenor cites in her reply, *Kunkel v. Walton*, 179 Ill. 2d 519 (1997), invalidated a statute requiring personal injury plaintiffs to either consent to the release of their medical records or have their complaints dismissed with prejudice because that statute explicitly conflicted with trial courts' powers to control discovery under Illinois Supreme Court Rule 201. The Sequestration Statute at issue here does not conflict with any court rule; instead it explicitly preserves judicial discretion.[7] It requires only that the proceeding remain confidential until "the court . . . shall decide otherwise" or until "the company requests that the matter be made public." 215 ILCS 5/188.1(5); *see Burger v. Lutheran Gen. Hosp.*, 198 Ill. 2d 21, 48–49 (2001) (rejecting

[7] The fact that the statute preserves judicial discretion should alleviate Intervenor's concerns "that the Illinois Insurance Code is mightier than the constitutions of the United States or Illinois," *see* Reply at 15, despite Intervenor's overblown rhetoric.

Article II challenge to statute where the judiciary retain[ed] the full discretion afforded to it under the supreme court rules"). Intervenor's attempt to compare the statute here to the one in *Kunkel* both comes too late and draws a poor analogy.[8]

II. Conclusion

NextLevel respectfully requests that the Court deny Intervenor's motion in its entirety.

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Respectfully submitted,

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[8] Intervenor includes a footnote at the end of her brief, *see* Reply at 15 n.17, that makes a passing reference to *Milwaukee Safeguard Ins. Co. v. Selcke*, 179 Ill. 2d 94 (1997), which invalidated an unrelated provision of the Insurance Code as a non-uniform tax under Article IX of the Illinois Constitution. Aside from the unremarkable point that courts may declare provisions of the Insurance Code unconstitutional, that case is completely irrelevant to this dispute.

CERTIFICATE OF SERVICE

I certify that on April 26, 2022, I caused the foregoing document to be filed and served on all counsel of record.

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