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 MEMORANDUM OPPOSING INTERVENOR'S AMENDED MOTION TO RECONSIDER

Intervenor's Amended Motion to Reconsider (Mot.) seeks not only to relitigate the same arguments made in her original motion, but now purports to expand them. The problem is that Intervenor's new "evidence" is of no consequence[1], the "changes in the law" on which she relies consist of citations to inapposite cases, and the seven purported "errors" the Intervenor points to in the Court's prior application of existing law result from Intervenor's mischaracterizations of the Court's ruling; and her new throwaway equal protection challenge widely misses the mark. For all of these reasons as developed below, as well as those previously reflected in the record, the motion should be denied.

I. Background

On June 13, 2022, the Court denied Intervenor's First Amendment Motion to Vacate Orders Denying Access to Hearings and Records in this Proceeding and Declare Unconstitutional 215 ILCS 5/188.1(b)(4,5). *See* June 13, 2022 Order (Merits Order) at 1. The court concluded that the dispute was not moot and addressed Intervenor's constitutional

[1] Intervenor submitted an amended Declaration in support of her Amended Motion that is replete with hearsay statements from unidentified sources (see, e.g., ¶¶ 11, 12 24 – 27), as well as other hearsay (see, e.g., ¶¶ 37-39), and Intervenor has not incorporated fully 10 of the Declaration's 47 paragraphs beyond the four introductory provisions (see, e.g., ¶¶ 5-14). The Declaration also includes exhibits for which Intervenor has failed to provide the requisite foundation (see, e.g., Ex. 8 and 9), as well as summaries of or quotations from written material without foundation (see, e.g., ¶¶ 20-23, 47). Accordingly, none of these provide a basis for any relief. More importantly, at no time has Intervenor provided any competent evidence of what the Court Clerk has said or done, nor what in the court file of this matter has actually been "public" versus "not available to the public," including prior orders of this Court.

arguments on the merits. *Id.* at 3. The court then declined to hold the challenged statute unconstitutional, finding that records from insurance conservation proceedings have not historically been available to the public and that the purpose and function of such proceedings would not be furthered by disclosure. *Id.* at 4. Intervenor asks the Court to reverse that order. Mot. at 1.

II. Legal Standard

"The purpose of a motion to reconsider is to bring to a court's attention: (1) newly discovered evidence; (2) changes in the law; or (3) errors in the court's previous application of existing law." *Liceaga v. Baez*, 2019 IL App (1st) 181170, ¶ 25. A party *may not* use reconsideration motions to raise factual or legal arguments it omitted in its previous briefs. *Id.* Such arguments are subject to waiver.[2] *Id.* ("Trial courts should not allow litigants to stand mute, lose a motion, and then frantically gather new material to show that the court erred in its ruling."). A trial court is "well within its discretion to deny" a motion to reconsider "and ignore its contents when it contains material that was available prior to the hearing at issue but never presented." *Id.* (quoting *In re Estate of Agin*, 2016 IL App (1st) 152362, ¶ 18).

III. Argument

Intervenor simply repackages her elaborations on her original arguments as observations of "clear legal errors" in the Merits Order. *See* Mot. at 1–3, 6, 8–11, 13, 15–16, 18, 23. Though "the purported basis of [Intervenor's] motion was to note" the Court's "alleged errors in its application of existing law," her motion is really "an improper attempt to reargue" her original motion "and to express [her] disagreement with [the Court's] decision." *See People v. Teran*, 376 Ill. App. 3d 1, 5 (2d Dist. 2007). None of Intervenor's arguments warrants reconsideration.

[2] 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.

A. The Court did not err in concluding that Intervenor was required to show a presumption of public access to insurance conservation proceedings.

The first "clear legal error" Intervenor identifies is the Merits Order statement that Intervenor was required to "show that a presumption of access applies to records of conservation proceedings." Mot. at 6; *see* Merits Order at 4. This same "argument" was well-developed, presented, and then fully decided in the Merits Order, and so it is not an appropriate argument for reconsideration. "A motion to reconsider is not an opportunity to simply reargue the case and present the same arguments and authority already considered." *Teran*, 376 Ill. App. 3d at 5. The Court is well within its discretion to ignore this section of Intervenor's brief.[3]

At any rate, the Court's prior statement was correct: The Court followed its statement with citation to binding Illinois Appellate Court authority stating that the presumption of public access to court records applies only to those that have been historically open to the public. Merits Order at 4. The Court then weighed the historical evidence that "NextLevel and the Director set forth in their briefs" to conclude that there was no historical right of public access to insurance conservation proceedings. *Id.* "[T]he trial court is presumed to know the law" and "apply it properly." *People v. Mischke*, 278 Ill. App. 3d 252, 264 (1st Dist. 1995). The Court presumably read the cases that each party cited on the first go-around and found that NextLevel and the Attorney General made the better arguments. The Court has no obligation to read all those cases again and waste scarce judicial resources reanalyzing them.

Intervenor also claims the Court ignored her "common law" arguments. Mot. at 7, 9. But the Court's opinion cited *People v. Kelly*, 397 Ill. App. 3d 232, 256 (1st Dist. 2009), which states that the legal analyses under the First Amendment, common law, and statutory law as to public access to court records are "parallel" and "analyzed . . . together." Again, it can be presumed that

[3] Here, too, Intervenor misstates the record. Contrary to her assertion, the Conservation contains no "finding [that] NextLevel's insolvent." Mot. at 9.

the Court read that part of *Kelly* and that the Court's analysis was intended to address Intervenor's constitutional, common law, and statutory arguments.

The Court also was correct to distinguish the broad rhetoric of the cases Intervenor cited on the basis that they did not address the type of statute at issue here. *See* Merits Order at 3. *Kelly* states the correct legal test to apply to this dispute. The Court cited it and applied its elements accordingly. *Id.* at 4. Intervenor's attempt to argue that the Court misapplied *Skolnick*, *see* Mot. at 7–8, is unavailing. *Kelly* stated it was applying the test from *Skolnick* and then engaged in a historical analysis. *See* 397 Ill. App. 3d at 259–60. Intervenor does not argue that *Kelly* has been overruled or abrogated by subsequent Illinois Supreme Court authority. The Court identified the correct legal test and applied it to the statute at issue. There was no "clear legal error."

The one intervening authority Intervenor cites is the United States Supreme Court's recent decision in *NYSRPA v. Bruen*, 142 S. Ct. 2111 (2022). However, *Bruen* has nothing to do with this case. *Bruen* held that New York's gun licensing scheme violated the Second Amendment. *Id.* at 2156. This dispute is about public access to court records. Intervenor cites dicta from *Bruen* to argue that NextLevel cited inadequate historical evidence to support the Court's finding that there is no historic right of public access to insurance conservation proceedings. Mot. at 8. The truth is that the Merits Order records that the Court *did* analyze the historical evidence that NextLevel and the Director cited in their briefs and found it convincing. Merits Order at 4. *Bruen* does not require the Court to do anything more.

Intervenor also claims the Court "faile[d] to provide a fact-based equitable analysis grounded in the record." Mot. at 9. But Intervenor mounted a *facial challenge* to 215 ILCS 5/188.1(4) and (5). *See* Merits Order at 1. When a party asks a court to declare a law facially unconstitutional, "the specific facts related to the challenging party are irrelevant." *People v.*

Thompson, 2015 IL 118151, ¶ 36. Thus, the Court had no obligation to wade through the morass of factual matter Intervenor raised in her original motion that had no relevance to the constitutional question.

Finally, Intervenor takes the Court to task for not "find[ing] that the statute advances any specific public interest[,] much less one sufficient to overcome the common law presumption that judicial records are open to the public." Mot. at 10. But that argument ignores the relevant legal framework, which the Court correctly applied in its Merits Order. Courts *only* engage in interest balancing *after* finding a presumption of public access to a specific kind of court record. *Kelly*, 397 Ill. App. 3d at 256 ("If the presumption did not apply, our analysis ends there."). In the case *sub judice*, the Court found "no presumption of public access applie[d]" to the records at issue here, Merits Order at 4, and so prudently refrained from continuing its analysis in dicta. Nothing about the Court's reasoning was erroneous or improper.

B. The Court did not err in its historical analysis.

The second "clear legal error" Intervenor cites is that the Court relied on inadequate history. Mot. at 10–11. She again relies on *Bruen* – a wholly inapposite gun rights case whose dicta neither the United States Supreme Court nor any Illinois Appellate Court has applied to the First Amendment – to argue that the Court erred in not considering any founding-era history. *Id.* Thus, Intervenor merely seeks to reargue the points on which she failed to prevail in her original motion, which is not appropriate in a motion to reconsider. *Liceaga*, 2019 IL App (1st) 181170, ¶ 25.

Intervenor apparently missed the fact that NextLevel's original opposition cited two Illinois Appellate Court cases that found a lack of a presumptive access to court records for certain types of records, and neither case cited founding-era history. *See In re Gee*, 2020 IL App (4th) 100275, ¶ 36; *People v. Pelo*, 384 Ill. App. 3d 776, 783–84 (4th Dist. 2008). It

can be assumed that the Court found the historical evidence offered by NextLevel and the Attorney General adequate in light of that or other relevant authority. *See* Merits Order at 4 (noting the Court reviewed the history cited by NextLevel and the Attorney General). The Court committed no "clear legal error" here.

C. The Court did not err by not discussing bankruptcy law.

The third "clear legal error" Intervenor cites is failing to find that "historically the public has had access" to the proceedings covered by 215 ILCS 5/188.1(4) and (5). Mot. at 11–12. In support, Intervenor cites discusses federal bankruptcy cases as well as English bankruptcy cases dating back to the sixteenth century. *See id.* at 12–15. Intervenor's original motion argued that "[t]he records to which the public has a right to review . . . are typically those available to the public in court proceedings, including those involving financial and otherwise private information such as those produced in bankruptcy proceedings." 1st Am. Intervenor Mot. to Vacate Orders Denying Access to Hr'gs & Records in This Proceeding & Decl. Unconstitutional 215 ILCS 5/188.1(b) (4,5) (Merits Mot.) at 27. Assuming Intervenor's argument was not waived (and it was), it can be assumed that the Court considered this argument and found the analogy inapposite. Regardless, Intervenor's bankruptcy analogy does not affect the analysis. Congress declared in 1944 that insurance companies are subject to state regulation, 15 U.S.C. §§ 1011–1015, and this includes receivership. *See* 11 U.S.C.§ 109(b)(2) (insurance companies cannot be bankruptcy debtors). Accordingly, Intervenor's reliance on bankruptcy law is misplaced.[4]

[4] Wholly failing to address the prevailing historical evidence of confidentiality in receivership proceedings at the time Insurance Code section 188.1(b)(4), (5) was adopted, Intervenor relies in her footnote 8 on judicial dicta about bankrupt private individuals who may hide their financial condition, as some kind of countervailing precedent. But Intervenor finds no real support there, because two situations could not be more different: a private, unregulated individual versus a heavily regulated, statutorily created entity that is under the constant pre-receivership supervision of the Illinois Director of Insurance and her Department pursuant to an entire code of detailed regulation, and the abiding supervision of the Attorney General of the

None of the authorities Intervenor cites in support of a "clear legal error" is an intervening authority. Every single case from this section of Intervenor's motion was available to her the first time, and she chose not to cite them. Instead, Intervenor chose to focus the 46 pages of her briefs on other arguments.

D. The Court did not err by not discussing the Illinois Constitution.

The fourth "clear legal error" Intervenor identifies is the Court's purported failure to address Article II, Sec. I of the Illinois Constitution. Mot. at 15–16. But Intervenor's original motion argued that "[a]n order by the legislature to close all proceedings infringes on judicial prerogatives and is in violation of the Illinois Constitution Article II, Section 1." Merits Mot. at 28. As Intervenor points out, she also elaborated on her Article II argument in her reply brief. *See* Mot. at 15. NextLevel fully responded to those arguments in its sur-reply, distinguishing *Kunkel v. Walton*, 179 Ill. 2d 519 (1997), and citing two cases rebutting Intervenor's Article II argument. *See McAlister v. Schick*, 147 Ill. 2d 84, 95 (1992) ("Legislative 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."); *Burger v. Lutheran Gen. Hosp.*, 198 Ill. 2d 21, 48–49 (2001) (rejecting Article II challenge to statute where judiciary retained full discretion afforded under supreme court rules); *see also* 215 ILCS 5/188.1(5) (requiring only that insurance conservations remain confidential until "the court . . . shall decide otherwise" or until "the company requests that the matter be made public"). The Court presumably evaluated each of the parties' arguments and found Intervenor's Article II argument meritless. There is no basis to relitigate it now. *See Liceaga*, 2019 IL App (1st) 181170, ¶ 25.

State of Illinois and this Court throughout this proceeding.

E. The Court did not err in concluding that disclosure would not further the purpose and function of conservation proceedings.

The fifth "clear legal error" Intervenor identifies is the Court's findings on whether the purpose or function of insurance conservations would be furthered by disclosure. Mot. at 16–18. The Court explicitly addressed this issue after considering extensive briefing on it from all parties. Intervenor's basis for reconsidering the Court's findings is simply that Intervenor disagrees with them. That is not an appropriate basis for a motion to reconsider. *See Liceaga*, 2019 IL App (1st) 181170, ¶ 25. And again, Intervenor brought a *facial challenge* to 215 ILCS 5/188.1(4) and (5), so the facts she discusses carry no weight in this stage of the analysis. *See Thompson*, 2015 IL 118151, ¶ 36. None of them makes the slightest bit of difference to Intervenor's vain attempt to assign error now.

F. The Court did not err in keeping documents confidential when administrative errors caused them to be temporarily designated not confidential on the electronic docket.

The sixth "clear legal error" Intervenor identifies is that the Court did not remove the confidentiality protections it previously granted after administrative errors caused those documents to be temporarily publicly viewable on the electronic docket. Mot. at 18–21. As a threshold matter, the broad, general language from the cases Intervenor cites *does not* establish some bright-line rule that any confidential document that inadvertently makes its way onto a court docket loses its confidentiality. To the contrary, trial courts have inherent power to issue orders necessary to control their records, including with respect to confidentiality. *Deere & Co. v. Finley*, 103 Ill. App. 3d 774, 776 (1st Dist. 1981). It is not an abuse of that broad discretion for courts to exercise this power to fairly and sensibly administer their dockets. *Vasa N. Atl. Ins. Co. v. Selcke*, 261 Ill. App. 3d 626, 629 (1st Dist. 1995). Courts frequently wield that power to rectify the inadvertent disclosure of confidential information on a public docket.

For example, the court in *Hearts with Haiti, Inc. v. Kendrick*, 2014 U.S. Dist. LEXIS 36691, at *6–7 (D. Maine Mar. 20, 2014), ordered a defendant in receipt of the plaintiffs' confidential document to "immediately destroy all written and electronic copies" of the document, "inform all individuals and organizations to which he provided any of the information . . . that the information was provided to them in violation of a court order and must be destroyed," "not accept from any other person or organization any document" containing the documents "or any information derived therefrom," and "destroy any such document or communication immediately upon receipt." The plaintiff had inadvertently attached the document to a public filing in unredacted form "such that it was available to the public on the national PACER system." *Id.* at *2. "Unbeknownst to the court or counsel, the Clerk's Office failed to remove the unredacted list from the PACER system." *Id.* The court reasoned that the "plaintiffs had no reason to check PACER" and that "they were entitled to assume that the court had acted in accordance with its own order." *Id.* at *4.

Another example is found in *United States v. Gangi*, 1998 U.S. Dist. LEXIS 6308, at *3 (S.D.N.Y. May 1, 1998), where the court overruled the New York Times's objections to the government's motion to redact portions of a prosecution memorandum in a criminal case. The court rejected the Times's argument that "because the Prosecution Memorandum was publicly filed, albeit inadvertently, and widely distributed, it is entitled to not only view the redacted document, but publish its contents." *Id.* The court reasoned that "the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access." *Id.* at *6–7 (quoting *United States v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995)). The court then found that even if the memorandum *were* a judicial document, there was no common law tradition favoring access to that sort of document and the interests of justice

weighed against further public disclosure. *Id.* at *8–10.

Yet another example is found in *Johnson v. City & Cty. of San Francisco*, 2012 U.S. Dist. LEXIS 3971, at *14–15, 19 (N.D. Cal. Jan. 12, 2012), where the court denied the plaintiffs' request for a finding that certain documents lose their protection under the court's confidentiality order after one of the defendants inadvertently attached them to its publicly filed motion for summary judgment. Based on the defendants "properly act[ing] to have the documents removed from the public filing" after becoming aware of the mistake, the court found that the defendants' actions were "sufficient to reserve the confidentiality of the documents." *Id.* at *14–15.

There is no reason for the Court to have found differently in this case. In the first round of briefing, the Court ordered that "two [Giese declaration] exhibits containing financial information" be kept sealed and that "two [other] references to financial information" in the Conservation Complaint and Order be redacted. Merits Order at 2. At all times material, Intervenor plainly understood that the sequestered information was not public because she intervened to obtain it. Further, during the hearing on July 15, 2022 and in her Motion (at 19-20), Intervenor has relied upon *Smith v. Daily Mail Publishing*, 443 U.S. 97 (1979), to bolster her argument about public disclosure. But *Smith* does not address the issue here because it dealt with a state law categorically banning newspapers from publishing certain information, not case-specific orders regarding confidentiality *See id.* at 98. More to the point, when the Court directly asked Intervenor if she had actively sought materials Intervenor knew the Court had ordered sequestered, Intervenor responded "*Absolutely*." And in her Motion, Intervenor admits that *she filed an unredacted copy* of the Conservation Order. Mot. At 19. Such actions are reason enough to deny Intervenor's request for reconsideration.

Even if the Court overlooks Intervenor's intentional conduct, the cases NextLevel cited above establish that the Court is well within its discretion to issue whatever orders are necessary to maintain the confidentiality of information that the Court *already determined* should remain confidential. Moreover, in each of those cases the party claiming confidentiality was the one who *made* the inadvertent filing. Here, the fact that certain documents became temporarily available on the docket was due to: (1) administrative errors by court employees acting in good faith to manage a confusing docket with a highly unusual procedural posture, *see* Merits Order at 5 ("The Court has been in communication with the Clerk's office with some frequency in an effort to ensure that its orders are properly implemented in this case, and the Court will continue to assist if additional problems are brought to its attention."); and (2) Intervenor herself filed confidential information on the public docket. While NextLevel attributes no malintent to Intervenor, the fact remains that her filings have required NextLevel to alert the Court and the Clerk's office to the existence of improperly filed information. There is no basis for the Court to reconsider its November 29, 2021 confidentiality determinations at this stage.

Finally, Intervenor's equal protection argument is meritless and was also presented at the hearing on July 15, 2022. *See* Mot. at 2. As the Attorney General then pointed out, equal protection requires a showing of dissimilar treatment of persons similarly situated; and a party (here Intervenor) cannot claim they are similarly situated to a non-party (the public). Moreover, equal protection does not prohibit all classifications. *People v. Masterson*, 2011 IL 110072, ¶ 25. It simply keeps the government from "treating differently persons *who are in all relevant respects alike*." *Id.* (emphasis added). Intervenor is an active participant in this case. It is well within the Court's discretion to issue orders that apply to her just as it would with respect to any other litigant.

G. The Court did not err in its discussion of mootness.

The final "clear legal error" Intervenor identifies is the Court's discussion of mootness. Mot. at 21–23. But Intervenor misunderstands the effect of the Court's order. The Court *rejected* arguments by NextLevel and the Attorney General that this dispute was moot, noted that 215 ILCS 5/188.1(4) and (5) *were* the basis for keeping documents confidential and thus "squarely at issue," and went on to address Intervenor's facial challenge. *See* Merits Order at 3. If Intervenor's arguments carried the day, the Court would have held the statute unconstitutional and Intervenor would have been able to avail herself of the effect of that ruling in her future endeavors. Of course, none of that occurred. There was no "clear legal error."

IV. Conclusion

For all of these reasons, and any further reasons provided in the Attorney General's brief, NextLevel respectfully requests that the Court deny Intervenor's motion in its entirety.

Dated: August 22, 2022

Respectfully submitted,

By: /s/ Stephen W. Schwab

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CERTIFICATE OF SERVICE

I certify that on August 22, 2022, I caused the foregoing document to be filed and served on all counsel of record.

/s/ Stephen W. Schwab

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