STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49D13-2211-MI-038101

CAITLIN BERNARD, M.D., on her own behalf and on behalf of her patients; AMY CALDWELL, M.D., on her own behalf and on behalf of her patients,

Plaintiffs,

v.

TODD ROKITA, in his official capacity as Attorney General of the State of Indiana; SCOTT BARNHART, in his official capacity as Chief Counsel and Director of the Consumer Protection Division of the Office of the Attorney General of the State of Indiana,

Defendants.

PLAINTIFFS' OPPOSITION TO ATTORNEY GENERAL TODD ROKITA'S MOTION TO STRIKE PLAINTIFFS' NOTICE OF VOLUNTARY DISMISSAL AND TO RECONSIDER AND CORRECT ERROR IN THE COURT'S ORDER OF DECEMBER 2, 2022

Plaintiffs Dr. Caitlin Bernard and Dr. Amy Caldwell (collectively, "Plaintiffs"), by and through counsel, respectfully submit their Opposition to Defendant Attorney General Todd Rokita's Motion to Strike Plaintiffs' Notice of Voluntary Dismissal and to Reconsider and Correct Error In The Court's Order of December 2, 2022 (the "Motion").

I. INTRODUCTION

This case is closed, the Court no longer has jurisdiction, and all relevant deadlines have expired. Nonetheless, the Attorney General has improperly filed a meritless Motion seeking to reopen the case and relitigate a single issue. The Attorney General's motion is both procedurally and substantively improper and should be denied.

Plaintiffs moved for a preliminary injunction on November 9, 2022, based on Defendants' noncompliance with the Indiana laws governing investigations of consumer complaints against certain licensed professionals, including physicians. After multiple evidentiary hearings and filings, Defendants notified the Court that they had ended their investigation of Plaintiff Dr. Caldwell and that, on November 30, 2022, they referred their investigation of Plaintiff Dr. Bernard to the Medical Licensing Board, effectively mooting Plaintiffs' motion and requested relief, and depriving this court of jurisdiction over multiple issues in the case. Accordingly, on December 2, 2022, the Court denied the preliminary injunction motion. Recognizing the case was now moot and the Court lacked jurisdiction to provide any relief, on December 8, 2022, Plaintiffs filed a Notice of Voluntary Dismissal (the "Notice") and, on December 12, 2022, the Court dismissed the case.

Despite having successfully mooted this case, the Attorney General has retained new counsel and now seeks to re-open it to "correct" one conclusion the Court made in its order denying the injunction—that the Attorney General "violate[d] the licensing statute's confidentiality provision by discussing the statutorily confidential investigation in statements to the media." Order at 42-43.

The Attorney General's Motion is improper for both procedural and substantive reasons. It is improper and untimely because this Court has already entered its final order and closed the case. It is also improper because, under the guise of a motion to reconsider, it improperly seeks to introduce new arguments that could have been but were never raised in the proceeding. And even if the Motion were not procedurally barred, it fails on the merits: the evidence presented in the preliminary injunction proceeding supported the Court's finding and it should not be disturbed. The Attorney General's Motion should be denied.

II. ARGUMENT

A. The Motion to Strike Is Procedurally Improper

A Court retains jurisdiction over a matter only "until there is a final disposition of the matter or proceeding before it." *State ex rel. Kelley v. Marion Cnty. Criminal Court, Division Three*, 378 N.E.2d 833, 834 (Ind. 1978). Here, the Court lost jurisdiction when it entered the dismissal and closed this case. The Attorney General contends that the Court should strike Plaintiffs' Notice because it "was filed after a preliminary injunction hearing and Order that went to the merits of the controversy." Mot. at 4. This argument is contrary to Indiana Trial Rule 41(A)(1)(a) and based on a criticized interpretation of procedural rules.

Indiana Trial Rule 41(A)(1)(a) states "[s]ubject to contrary provisions of these rules or of any statute, an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs." Here, Plaintiffs' Notice of Dismissal was filed before Defendants served their answer or a motion for summary judgment. In fact, Defendants never filed either pleading. Plaintiffs' compliance with Trial Rule 41(A)(1)(a) dictates the outcome here.

Nevertheless, the Attorney General asserts that there is a non-textual exception to Trial Rule 41(A)(1)(a) that makes voluntary dismissal inappropriate where a hearing has been conducted on an issue that goes to the merits of the controversy. *See* Mot. at 4 (citing *Rose v. Rose*, 526 N.E.2d 231, 235 (Ind. Ct. App. 1988) (citing *Harvey Aluminum, Inc. v. Am. Cyanamid Co.*, 203 F.2d 105, 107–08 (2d Cir. 1953)) and *Finke v. Northern Indiana Public Service Co.*, 862 N.E.2d 266 (Ind. Ct. App. 2006)). The purported exception, however, is not based on the Indiana Trial Rule but instead is derived from the federal Second Circuit Court of Appeals' attempt to reinforce

the purpose of Federal Rule of Civil Procedure 41(a)(1)(A)(i).[1] *See Harvey*, 203 F.2d at 107–08.[2] Subsequent cases have broadly criticized and rejected the reasoning of *Harvey*, finding that it is contrary to the bright-line test established in Federal Rule 41(a)(1)(A)(i). *See, e.g.*, *Thorp v. Scarne*, 599 F.2d 1169, 1176 (2d Cir. 1979) (noting that *Harvey* was an extreme case and expressing concern that Federal Rule 41(a)(1)(A)(i) "will no longer be self-executing, as intended" if courts can intervene and override a plaintiff's right to unilaterally dismiss an action); *Pilot Freight Carriers, Inc. v. Int'l Bhd. of Teamsters*, 506 F.2d 914, 916–17 (5th Cir. 1975) (describing *Harvey*'s view as requiring "no less than a flat amendment" of the rule and preventing plaintiffs who seek preliminary injunctive relief from ever voluntarily dismissing an action because the court must always consider the merits when deciding the motion); *see also Winterland Concessions Co. v. Smith*, 706 F.2d 793, 795 (7th Cir. 1983). Given this criticism of the reasoning in *Harvey*, Defendants' reliance on it, and the Indiana cases that rely on it, should be disregarded, and the plain text of Trial Rule 41(A)(1)(a) should control.

The Attorney General's reliance on *Rose* and *Finke* is also misplaced because those cases are inapposite. In *Rose*, the court upheld the striking of a wife's voluntary dismissal of her dissolution proceedings after several preliminary hearings. 526 N.E.2d at 233. But *Rose*'s status as a dissolution case makes it irrelevant here for several reasons. First, responsive pleadings are not required in a dissolution proceeding and thus the rules provide no clear guidance as to when voluntary dismissal, even without a court order, is allowed. *Id.* at 235 n.2. Second, in *Rose* the

[1] Indiana courts refer to interpretations of Federal Rule 41(a) for guidance in interpreting Indiana Trial Rule 41(A). *See Levin & Sons, Inc. v. Mathys*, 409 N.E.2d 1195, 1198 (Ind. Ct. App. 1980).

[2] In *Harvey*, the plaintiff filed its notice of dismissal after a preliminary injunction hearing and a finding that the plaintiff had only a "remote, if not completely nil" chance of success on the merits. 203 F.2d at 107. The Second Circuit concluded that the plaintiff could not voluntarily dismiss the action without court order, despite the plaintiff's compliance with Federal Rule 41(a)(1)(A)(i), because allowing dismissal at such an advanced stage of the litigation would be inconsistent with the purpose of the rule. *Id.* at 107–08. That purpose was to facilitate voluntary dismissals early in the litigation before defendants invested substantial time and effort into defending against the action. *Id.* at 107. The court determined these concerns justified disregarding the clear text of the rule. *Id.* at 108.

court's preliminary injunction rulings were determinative as to the only legal issue that remained in dispute. *Id.* at 233–35. In contrast, in this case the Court's preliminary injunction Order determined that Plaintiffs had not established a likelihood of success on the merits and that further determinations are "properly within the jurisdiction of the Medical Licensing Board at this time." *See* Order ¶¶ 167–68. Moreover, unlike in *Rose*, where the court's decision directly impacted the relief afforded to the parties (division of the marital estate), here the sole finding that the Attorney General seeks to "correct" with newly retained counsel was not associated with any remedy or damages awarded to any party.[3]

Finke is likewise distinguishable. 862 N.E.2d 266. There, after the court denied the plaintiffs' preliminary injunction motion, the plaintiffs delayed for two years before seeking voluntary dismissal, and the court held the plaintiffs could not voluntarily dismiss after failing to prosecute for so long. *Id.* at 272. Here, in contrast, Plaintiffs filed their Notice just six days after the court concluded that it no longer had jurisdiction regarding the substantive issues in the case and the Court entered its order denying the motion for preliminary injunction.[4]

In short, neither *Rose* nor *Finke* provides a reason to diverge from the clear language of Indiana Trial Rule 41(A)(1)(a). Here, the complaint was dismissed, the case is closed, and the Court no longer has jurisdiction. For these reasons, the merits of the Attorney General's Motion need not be considered and the Motion should be denied.

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[3] The Attorney General complains that Dr. Bernard referred to the preliminary injunction order in a submission to the Medical Licensing Board. But the relevance of the Order in that proceeding is for the Board to determine, not this Court. The Board is the proper forum – and the forum that the Attorney General selected while Plaintiffs' Motion was pending in this Court, *see* Order ¶ 49 - to determine the remaining issues in dispute between Dr. Bernard and the Attorney General.

[4] Defendant's suggestion that this Court somehow retains jurisdiction is belied by other aspects of their litigation conduct. For example, the time to file an Answer to Plaintiffs' complaint has long passed, and Defendants would be in default if this matter were active.

B. The Motion to Reconsider and Correct Error Improperly Relies On New Arguments

Even if the Motion were not procedurally barred by the prior dismissal and order, it should be denied because it improperly attempts to introduce new evidence and arguments never advanced by Defendants in their briefing or the preliminary injunction hearings. The Attorney General argues that his public statements did not violate Indiana Code § 25-1-7-10(a) "because none of those statements revealed the existence or contents of any complaints received by his office concerning a state licensee" and instead "[t]he information shared by the Attorney General with the citizenry was merely that his office was investigating suspected violations of Indiana law based on facts known to the public." Mot. at 2. Not only is this unsupported by the facts, but it is an entirely new argument that the Attorney General did not assert in the preliminary injunction briefing.

"A party may not raise an issue for the first time in a motion to correct error." *Troxel v. Troxel*, 737 N.E.2d 745, 752 (Ind. 2000); *Miller Brewing Co. v. Indiana Dept. of State Revenue*, 836 N.E.2d 498, 499 (Ind. Tax Ct. 2005) (recognizing this as "a longstanding rule" and collecting cases). The Attorney General seeks to avoid that principle by asserting that Rule 52 allows the Court to "amend or make new findings of fact." Mot. at 7. But the Attorney General omits the critical portion of that rule, which limits such amendment to "issues raised by the pleadings or evidence," and seeks to set aside a conclusion of law. Ind. Trial Rule 52(B)(2); *see also Stephens v. Irvin*, 730 N.E.2d 1271, 1278 (Ind. Ct. App. 2000) (citing principle that reconsideration motion must be "supported by the designated materials" and relying on existing record evidence in evaluating motion). The Attorney General does not and cannot cite any authority to support the notion that the Rule provides a vehicle for parties to introduce new evidence and legal arguments not presented in the original proceeding in an attempt to modify the Court's order.

Here, the Attorney General seeks to contest the Court's finding by going well outside the record and prior briefing submitted to the Court. In their Opposition to Plaintiffs' Motion for Preliminary Injunction, Defendants argued that Dr. Bernard could not establish irreparable harm with respect to her claim that the Attorney General violated the law's confidentiality provision because "[t]he existence of the investigation ha[d] already been disclosed, including by Dr. Bernard herself" and that "any purported violation of the temporary confidentiality window [did] not undermine or invalidate the investigation itself." Opp. at 46-47; *but see* Order ¶ 127. The Opposition did *not* dispute that the Attorney General violated the statute by disclosing confidential information about the investigations into Dr. Bernard because he did not discuss particular details of consumer complaints, as the Attorney General argues now. Nor did Defendants make that argument or present related evidence at the hearing. Indeed, the Attorney General concedes as much, acknowledging that his office "*offered no evidence* regarding any public statements about the pending investigation into Dr. Bernard…" and that his public statements "were not addressed by the Attorney General's office at the hearing…." Mot. at 3 (emphasis added). Nonetheless, the Attorney General now for the first time seeks to raise new arguments and proffer affidavit testimony, even though he could have but elected not to offer testimony at the preliminary injunction hearing.

It is too late to introduce evidence and argument on that issue for the first time now, after the Court denied the motion for preliminary injunction and the case was dismissed. Even in *Rose*, upon which the Attorney General relies, the Court denied a motion to reconsider that relied on evidence that could have been offered earlier. *Rose*, 526 N.E.2d at 237; *accord Hawkins v. Cannon,* 826 N.E.2d 658, 664 (Ind. Ct. App. 2005) (no error in denial of motion to correct error when evidence could have been discovered and produced at trial with due diligence), *trans. denied*.

See also Porter v. Bankers Tr. Co. of California, 773 N.E.2d 901, 904 n.4 (Ind. Ct. App. 2002) (declining to consider evidence submitted "after the fact which otherwise could have been presented at trial" and after plaintiff obtained new counsel). The Attorney General cannot endlessly relitigate issues after dismissal of the case because he has retained new counsel and would like to make new arguments and offer new evidence.

During the preliminary injunction proceedings, Plaintiffs challenged the Attorney General's compliance with his confidentiality obligations in Plaintiffs' briefing, through testimony, and through other evidence submitted to the Court. The Attorney General's failure to address these confidentiality issues either in the Attorney General's briefing or at the hearing prevents the office from taking a second bite at the apple.

C. The Court's Finding Is Supported By The Evidence and Arguments In the Record

Even if the Court were to reach the merits of the Motion (which it should not, for the reasons set forth above), the Motion should still be denied. Indiana Code § 25-1-7-10(a) specifies that "all complaints and information pertaining to the complaints shall be held in strict confidence until the attorney general files notice with the board of the attorney general's intent to prosecute the licensee." Only a person who is a party to the complaint is allowed to disclose information, unless subject to certain exceptions that are not applicable here. *Id*. § 25-1-7-10(b). The record was replete with evidence confirming that the Attorney General repeatedly disregarded these statutory confidentiality requirements. Thus, there is little question that the Court's finding that the Attorney General violated the statute was well supported in the record.

Specifically, in pleadings supported by affidavits and in testimony presented at the preliminary injunction hearing, Plaintiffs introduced evidence demonstrating within days of receiving consumer complaints and opening investigations against Dr. Bernard, the Attorney

General publicly disclosed the existence and nature of the investigations. Defendants sent several consumer complaints to Dr. Bernard on July 12, 2022, requesting her written response within 20 days. *See* Ex. 6 to Plaintiffs' Proposed Findings of Fact and Conclusions of Law. The very next day, on July 13, 2022, the Attorney General disclosed the investigations against Dr. Bernard on a national television network. Order ¶¶ 30-31. He stated: "And then we have this abortion activist acting as a doctor with a history of failing to report. So we're gathering the information. We're gathering the evidence as we speak, and we're going to fight this to the end, including looking at her licensure. If she failed to report it in Indiana, it's a crime for – to not report, to intentionally not report." *Id.* ¶ 31 (emphasis added).[5] That same day, the Attorney General also made public a letter he sent to Governor Holcomb that repeatedly referenced Dr. Bernard's name and the allegations he made on national television. *See id.* ¶ 32 (citing Letter from Todd Rokita, Ind. Att'y Gen., to Eric Holcomb, Ind. Governor (July 13, 2022)).[6]

Then, on July 14, 2022, the Attorney General issued a press release that likewise referenced Dr. Bernard by name and expressly stated she was the subject of an investigation that could "affect her licensure." *See* Order ¶ 33 (citing Bernard Decl. ¶ 9, Ex. I).The Attorney General made additional public statements about the investigations in online and print interviews. *See id.* ¶ 42 (citing Bernard Decl. ¶ 10, Ex. J (Facebook Live broadcast on September 1, 2022)); *id*. ¶ 43 & n.3 (citing Johnny Magdaleno, INDIANAPOLIS STAR (September 14, 2022, interview, stating the investigation of Dr. Bernard was "ongoing" and making other comments about the investigation));

[5] *Available at* Media Matters for America, *After discrediting a report on a 10-year old Ohio girl needing an abortion, Fox's Jesse Watters now targets the girl's Indiana doctor* (July 13, 2022), https://www.mediamatters.org/fox-news/after-discrediting-report-10-year-old-ohio-girl-needing-abortion-foxs-jesse-watters-now (including a video and transcript of Attorney General Rokita on Jesse Watters Primetime's July 13, 2022 program).
[6] *Available at* https://interactive.wthr.com/pdfs/Governor-Eric-Holcomb_Bernard-OH-Minor-Abortion-Case.pdf.

id. ¶ 44 (citing Eskow, FOX59 (September 15, 2022, interview, discussing the investigation into Dr. Bernard)).

The Court concluded that the Attorney General violated the statute by making these public disclosures about the investigations, and was in the best position to "judge witness credibility," evaluate the evidence that the parties presented, and "enter[] findings and conclusions" based on its evaluation of that evidence. *Bruder v. Seneca Mortgage Sers., LLC*, 188 N.E.3d 469, 471 (Ind. 2022). The Court, however, did not enter a remedial order or award any form of relief associated with the conclusion. *See* Order at 42. In the Motion, the Attorney General twists to avoid the Court's conclusion, alleging that while his public disclosures may have involved "'the factual basis for [the] complaints,'" that the code "does not bar the public dissemination of information about investigations that are not consumer complaint investigations." Mot. at 13. But at no point in the preliminary injunction proceeding (or otherwise) did the Attorney General argue that his public statements did not violate the confidentiality statute because his office was undertaking a separate investigation of Dr. Bernard, unrelated to the consumer complaints at issue in the case. The Court's conclusion was well rooted in the evidence and there is no basis to disturb its evaluation of the evidence.

III. CONCLUSION

For the reasons stated herein, the Court should deny the Motion.

Dated: February 23, 2023

Respectfully submitted,

/s/ Kathleen A. DeLaney
Kathleen A. DeLaney (Bar No. 18604-49)
Matthew R. Gutwein (Bar No. 16414-49)
DELANEY & DELANEY LLC
3646 North Washington Blvd.
Indianapolis, IN 46205
(317) 920-0400

kathleen@delaneylaw.net
mgutwein@delaneylaw.net

Elissa J. Preheim (*pro hac,* Bar No. 8619-95-TA)
David J. Weiner (*pro hac,* Bar No. 8623-TA)
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
(202) 942-5000
elissa.preheim@arnoldporter.com
david.weiner@arnoldporter.com

Paul W. Rodney (*pro hac,* Bar No. 8618-95-TA)
ARNOLD & PORTER KAYE SCHOLER LLP
1144 Fifteenth Street, Suite 3100
Denver, CO 80202
(303) 863-1000
paul.rodney@arnoldporter.com

Kaitlin Robinson (*pro hac,* Bar No. 8617-95-TA)
ARNOLD & PORTER KAYE SCHOLER LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111
(415) 471-3100
kaitlin.robinson@arnoldporter.com

CERTIFICATE OF SERVICE

I certify that on February 23, 2023, I electronically filed the foregoing document using the Indiana E-Filing system and served the document through IEFS upon the following counsel:

Patricia Orloff Erdmann
Jefferson S. Garn
Aaron T. Craft
Caryn N. Szyper
OFFICE OF INDIANA ATTORNEY GENERAL
Patricia.Erdmann@atg.in.gov
Jefferson.Garn@atg.in.gov
Aaron.Craft@atg.in.gov
Caryn.Szyper@atg.in.gov

H. Christopher Bartolomucci
Gene C. Schaerr
SCHAERR JAFFE LLP
cbartolomucci@schaerr-jaffe.com
gschaerr@schaerr-jaffe.com

/s/ Kathleen A. DeLaney
Kathleen A. DeLaney