STATE OF INDIANA	)	IN THE MARION CIRCUIT COURT
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49C01-2211-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.

DEFENDANT'S REPLY TO OPPOSITION TO MOTION TO STRIKE PLAINTIFFS' NOTICE OF VOLUNTARY DISMISSAL AND TO RECONSIDER AND CORRECT ERROR IN THE COURT'S ORDER OF DECEMBER 2, 2022

Plaintiffs' Opposition ("Opp.") offers no good reason to deny the Attorney General's motion ("Motion") to strike Plaintiffs' notice of voluntary dismissal, much less to deny his request to reconsider and correct the erroneous judicial finding in the December 2, 2022 Order ("Order"). Indeed, Plaintiffs make no effort to defend the finding that the Attorney General violated Indiana Code § 25-1-7-10(a), and barely even try to rebut the various showings in the Motion.

First, Plaintiffs have no answer to the caselaw interpreting Indiana Trial Rule 41(A)(1), which makes clear that Plaintiffs' attempt at voluntary dismissal is improper because it followed on the heels of a preliminary injunction hearing and Order that both went to the merits of the suit. Plaintiffs do not seriously dispute that their unilateral dismissal would prejudice the Attorney

General by denying him the opportunity to challenge the Order's erroneous finding that he violated state law. Instead, Plaintiffs' Opposition urges this Court to disregard the Indiana caselaw limiting the privilege of voluntary dismissal. But that caselaw consists of published decisions from this State's Court of Appeals, which are binding on this Court. And none of Plaintiffs' proffered distinctions between those cases and this one are material.

Second, Plaintiffs are wrong in contending (Opp. at 6–8) that the Attorney General forfeited the right to raise any argument about whether he violated Indiana Code § 25-1-7-10(a) because he did not raise the issue during preliminary injunction proceedings. The issue of whether the Attorney General's *past* public statements violated the statute was not implicated by Plaintiffs' request for a preliminary injunction, which is a form of prospective relief. The Attorney General thus had no notice prior to the preliminary injunction hearing that he needed to brief that issue. Even so, the Attorney General *did* raise this issue at the preliminary injunction hearing. And, even if he had not, the issue would not have been forfeited. It is well settled that a party who fails to raise an issue during preliminary injunction proceedings does not forfeit the right to raise it in subsequent stages of the litigation.

Finally, Plaintiffs' Opposition barely even touches upon the substance of the Attorney General's points regarding the meaning of Indiana Code § 25-1-7-10(a). Instead, Plaintiffs argue (Opp. at 8–10) that this Court heard from witnesses about what transpired in this case and found, based on the evidence, that a violation of that provision had occurred. But the Attorney General's argument is not that this Court's *factual* findings were erroneous. Rather, the Motion argues that none of the public statements the Attorney General made constituted violations of Section 25-1-7-10(a) as a matter of law. Because that showing is essentially uncontested, this Court should strike the notice of voluntary dismissal and correct the erroneous finding of a statutory violation.

ARGUMENT

I. This Court Should Strike Plaintiffs' Notice of Voluntary Dismissal Because it Improperly Came After a Preliminary Injunction Hearing and Order That Went to the Merits.

Plaintiffs do not dispute that, despite Rule 41(A)(1)(a)'s seemingly permissive language, it is settled law in Indiana that in at least *some* circumstances "allowing a voluntary dismissal would violate the purpose of the rule and would result in legal prejudice to [the defendant]." *Rose v. Rose*, 526 N.E.2d 231, 235 (Ind. Ct. App. 1988). Nor do Plaintiffs deny that the Indiana Court of Appeals has explained that one such situation is "[w]here a hearing has been conducted on an issue which goes to the merits of the controversy," in which case "voluntary dismissal is inappropriate." *Finke v. N. Ind. Pub. Serv. Co.*, 862 N.E.2d 266, 272 (Ind. Ct. App. 2006) (quoting *Rose*, 526 N.E.2d at 235). Nor do Plaintiffs deny that the same court has held that, when faced with an improper notice of voluntary dismissal, a court should strike the notice. *See Rose*, 526 N.E.2d at 235 (affirming order "striking [the plaintiff's] notice of voluntary dismissal").

1. Instead, Plaintiffs first contend, brazenly, that these appellate cases interpreting Trial Rule 41(A)(1)(a) simply "should be disregarded." Opp. at 4. But "[t]he decisions of th[e] [C]ourt [of Appeals] are binding upon trial courts," *Heber v. Indianapolis Metro. Police Dep't*, 58 N.E.3d 995, 997 (Ind. Ct. App. 2016), regardless of the appellate district from which those decisions came, *see Lincoln Utils., Inc. v. Off. of Util. Consumer Couns.*, 661 N.E.2d 562, 565 (Ind. Ct. App. 1996); *State v. King*, 413 N.E.2d 1016, 1022 & n.15 (Ind. Ct. App. 1980). Thus, however strongly Plaintiffs insist that holdings in cases like *Finke* and *Rose* are inconsistent with "the plain text of Trial Rule 41(A)(1)(a)," Opp. at 4, those holdings are nonetheless binding on this Court. *See Matter of M.W.*, 130 N.E.3d 114, 116 (Ind. Ct. App. 2019) ("Vertical stare decisis

requires judicial officers to follow this Court's opinions despite their own personal opinions otherwise.").

2. Perhaps realizing that these cases are binding, Plaintiffs' fallback is to argue that both cases are distinguishable and thus do not call into doubt Plaintiffs' attempt at voluntary dismissal. But Plaintiffs identify no meaningful differences between those cases and this one.

Plaintiffs first argue that *Rose* is inapposite because it was a dissolution case, and "responsive pleadings are not required in a dissolution proceeding." Opp. at 4. But that is a distinction without a difference. The *Rose* court explained that, "*despite the fact that no responsive pleading was filed* in [that] case," the trial court had properly held that "the proceedings had progressed to the stage where allowing a voluntary dismissal would violate the purpose of [Trial Rule 41(A)(1)(a)] and would result in legal prejudice to [the non-dismissing party]." *Rose*, 526 N.E.2d at 235 (emphasis added) (footnotes omitted). The court in *Rose* thus considered the lack of a responsive pleading immaterial to the propriety of voluntary dismissal.

Moreover, the *Rose* court never suggested, as Plaintiffs contend, that its holding was limited to cases where there had been a trial court hearing that was "determinative as to the *only* legal issue ... in dispute." Opp. at 5 (emphasis added). Rather, the court announced a general rule that "[w]here a hearing has been conducted on an issue which goes to the merits of the controversy"—or during which the merits were "squarely raised"—"voluntary dismissal is inappropriate." *Rose*, 526 N.E.2d at 235 (citing *Harvey Aluminum, Inc. v. Am. Cyanamid Co.*, 203 F.2d 105, 107–08 (2d Cir. 1953)).

And here, this Court held a hearing on Plaintiffs' motion for a preliminary injunction, a proceeding in which the merits of Plaintiffs' claims were not only "squarely raised," but also

partially decided. Thus, for the reasons set forth in the Motion, *Rose* demonstrates that voluntary dismissal is improper here. *See* Motion at 4–6.

Similarly unpersuasive is Plaintiffs' argument that "*Finke* is … distinguishable" from this case because "[t]here, after the court denied the plaintiffs' preliminary injunction motion, the plaintiffs delayed for two years before seeking voluntary dismissal …." Opp. at 5. But nothing in *Finke* indicated that the time the case had been pending was dispositive. The court simply held that, in the circumstances there, "the proceedings had progressed to a stage where allowing a voluntary dismissal would violate the purpose of the rule," explaining that "at the time the notice of dismissal was filed, the case had been pending for nearly two years and an evidentiary hearing addressing the merits of the controversy had already occurred." *Finke*, 862 N.E.2d at 272. The court neither said nor intimated that it would have reached the opposite conclusion had the case been pending for less time before the attempted voluntary dismissal. Instead, *Finke* described the principle at play by favorably quoting *Rose*'s broad statement that, "[w]here a hearing has been conducted on an issue which goes to the merits of the controversy, voluntary dismissal is inappropriate." *Id.* at 272 (quoting *Rose*, 526 N.E.2d at 235).

Here, as in *Finke* and *Rose*, this Court held a preliminary hearing to address Plaintiffs' request to enjoin a licensing investigation; thus, the preliminary injunction hearing "squarely raised the merits of the controversies." *Finke*, 862 N.E.2d at 272 (quoting *Rose*, 526 N.E.2d at 235). After the hearing, the Court's Order of December 2, 2022, found that the Attorney General violated Section 25-1-7-10 of the Code. Although that subject was not integral to the preliminary injunction hearing, the judge's erroneous finding went directly to the merits of the case. As in *Rose* and *Finke,* Plaintiffs had raised this alleged violation in their Complaint and sought relief based on it. *See* Compl. ¶¶ 105–13.

Moreover, as in those cases, voluntary dismissal would prejudice the defendant—here, the Attorney General who, like the defendants in *Rose* and *Finke* "incurred substantial expense" and "spent considerable time" litigating this action, *Finke*, 862 N.E.2d at 270 (quoting *Rose*, 526 N.E.2d at 234), 272 n.4, and who disputes the erroneous finding that he violated state law. Indeed, Plaintiff Bernard does not dispute that she is relying on that finding and using it against the Attorney General in the separate ongoing proceeding before the Medical Licensing Board of Indiana.

In short, Plaintiffs' attempted voluntary dismissal would prejudice the Attorney General by preventing him from fully contesting the finding that he acted unlawfully, and thus "would violate the purpose of [Trial Rule 41(A)(1)(a)]." *Rose*, 526 N.E.2d at 235. For these reasons, as well as those set forth previously, *see* Motion at 4–9, the Court should strike Plaintiffs' voluntary dismissal notice and permit the Attorney General to challenge the erroneous finding in the Order.

3. Alternatively, for reasons previously explained (Motion at 4–5, 6–7), this Court has the power pursuant to Trial Rules 41(A), 41(F), 52(B), 53.4(A), and 59—as well as inherent judicial authority—to continue the proceedings so as to address the important issue of Indiana Code § 25-1-7-10(a)'s meaning on the basis of full briefing and argument. *See* Motion at 6–9. Plaintiffs do not contest the Attorney General's showing on any of these points. *See* Opp. at 1–5. Accordingly, they provide an ample, powerful alternative basis for granting the Attorney General's motion.

II. Plaintiffs' Forfeiture Argument Fails.

Further, rather than engage with the substance of the Attorney General's legal showing that he did not violate Indiana Code § 25-1-7-10, Plaintiffs argue that the Motion "should be denied because it improperly attempts to introduce … arguments never advanced by Defendants in their

briefing or the preliminary injunction hearings," Opp. at 6, citing a case stating that "[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). But Plaintiffs' forfeiture argument fails for three independent reasons.

1. First, the issue of whether the Attorney General's *past* public statements violated Indiana Code § 25-1-7-10(a) was not implicated by Plaintiffs' motion for a preliminary injunction, which is a request for forward-looking relief. *See Roberts v. Cmty. Hosps. of Ind., Inc.*, 897 N.E.2d 458, 469 (Ind. 2008).[1] The Attorney General's brief in opposition to Plaintiffs' motion for the injunction made this point, *see* Defs.' Br. in Opp. to Pls.' Mot. for Prelim. Inj. at 46–47, and this Court ultimately agreed in its Order denying their motion, *see* Order ¶¶ 144–52. Nevertheless, that Order opted to address the question of whether Indiana Code § 25-1-7-10(a) had been violated by *past* public statements. *See id.* ¶¶ 138–50. But the Attorney General had no notice leading up to the preliminary injunction hearing that he needed to brief that question, given the prospective nature of such an injunction. He therefore has not forfeited the right to argue the issue of Indiana Code § 25-1-7-10(a)'s meaning—because, even if "not precisely presented ..., the issue was nevertheless addressed by the ... court" in its Order. *Dedelow v. Pucalik*, 801 N.E.2d 178, 184–85 (Ind. Ct. App. 2003); *see also Grathwohl v. Garrity*, 871 N.E.2d 297, 302 (Ind. Ct. App. 2007) ("Waiver may be avoided ... if the ... court actually addressed the issue"—even "in the absence of argument by the parties."). Nor is this a situation where Plaintiffs have been "unfairly surprised" by the Attorney General raising this issue. *Dedelow*, 801 N.E.2d at 184. These considerations militate against a finding that that the Attorney General forfeited his arguments in that issue.

[1] In any event, before this Court issued its Order, the question of whether Indiana Code § 25-1-7-10(a) was violated was mooted by the Attorney General's Office's November 30, 2022 referral of the complaints against Plaintiffs to the Medical Licensing Board, since at that point the confidentiality provision no longer applies. *See* Ind. Code § 25-1-7-10(a). *See* Order ¶ 144.

2. What is more, the Attorney General, prior to filing the Motion, *did* raise the issue of the alleged violations of Indiana Code § 25-1-7-10. At the preliminary injunction hearing on November 21, 2022, counsel for the Attorney General argued in closing that, "with respect to the confidentiality issue, Plaintiff started this suit seeking an injunction ... to stop the Attorney General from speaking about the investigation, but that went out the window when she filed this suit publicly. ... The Defendants are entitled to talk about this public proceeding which encompasses the entirety of the investigation." Tr. of Prelim. Inj. Hrg. at 200:12–15, 200:20–21 (Nov. 21, 2022). This line of argument elaborated upon an objection made by the Attorney General's counsel during Plaintiffs' direct examination of Mary Hutchinson, when she was asked about the issue of whether the confidentiality statute was previously violated (which was irrelevant to the prospective relief sought). *See* Tr. of Prelim. Inj. Hrg. at 25:1–27:13 (Nov. 21, 2022). This is substantially the same issue as was raised in the Attorney General's Motion. Motion at 17–25. The fact that his counsel did not cite the same caselaw as was relied on in the Motion does not result in forfeiture of the right to rely on that caselaw. Because Indiana's "procedural rules ... are merely a means for achieving the ultimate end of orderly and speedy justice," *Am. States Ins. Co. v. State ex rel. Jennings*, 283 N.E.2d 529, 531 (Ind. 1972), binding authority holds that, "[w]henever possible," Indiana courts should "prefer to resolve cases on the merits instead of on procedural grounds like waiver," *Cardosi v. State*, 128 N.E.3d 1277, 1285 n.3 (Ind. 2019) (cleaned up).

In *Cardosi*, for instance, the court considered an issue "[d]espite [a litigant's] citing the wrong statute to support his argument." *Id.* Similarly, in this case, the fact that the Attorney General's counsel at the hearing did not *fully* lay out the argument regarding Indiana Code § 25-1-7-10's meaning in precisely the same way that the argument was advanced in the Motion should not preclude this Court's consideration of the issue on the merits, lest "the ultimate end of orderly

and speedy justice" be defeated by overly stringent application of procedural rules. *Am. States Ins. Co.*, 283 N.E.2d at 531. The "waiver rule ... does not mean that parties may not take any new position or that no new arguments may be adduced," *Celadon Trucking Servs., Inc. v. Wilmoth*, 70 N.E.3d 833, 841 (Ind. Ct. App. 2017), nor "does [it] preclude a party from expanding upon arguments made" previously "and presenting additional authorities," *L.H. Controls, Inc. v. Custom Conveyor, Inc.*, 974 N.E.2d 1031, 1042–43 (Ind. Ct. App. 2012). The Attorney General's arguments in the Motion regarding Indiana Code § 25-1-7-10(a)'s meaning are, at most, "merely expansions upon [his] earlier arguments" during the preliminary-injunction proceeding, *see Celadon Trucking*, 70 N.E.3d at 841, and are properly presented for this Court's consideration.

3. Equally important, even if the Attorney General had *not* raised the issue of whether he violated Indiana Code § 25-1-7-10 during the preliminary injunction hearings, that would not be a bar to raising it later in this litigation. The purpose of

> [a] preliminary injunction is ... to preserve the status quo ... pending a full determination on the merits .... In order to make out a successful case for a preliminary injunction, a plaintiff need only show a prima facie case on the merits.... A trial court may grant a preliminary injunction and, upon further consideration, dissolve it and refuse to issue a permanent injunction.

U.S. Land Servs., Inc. v. U.S. Surveyor, Inc., 826 N.E.2d 49, 67 (Ind. Ct. App. 2005) (citations omitted). It is therefore well settled that a party who fails to raise an issue during preliminary injunction proceedings does *not* forfeit the right to raise that issue during subsequent stages of the litigation. *See Tomahawk Vill. Apartments v. Farren*, 571 N.E.2d 1286, 1292–93 (Ind. Ct. App. 1991); *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 586 F. Supp. 3d 893, 921 n.162 (E.D. Ark. 2022) (A party who fails to argue "a merits question" at the injunction stage "ha[s] waived the argument only for purposes of the Motion for a Preliminary Injunction" but "remain[s] free to raise the issue in [an] answer or a motion to dismiss."), *argued*, No. 22-1395 (8th Cir. Jan.

11, 2023). Thus, even after a "court ha[s] entered ... a preliminary injunction," the parties may submit "new evidence or new arguments in future proceedings" in the same case. *See, e.g., Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998); *accord PPG Indus., Inc. v. Guardian Indus. Corp.*, 75 F.3d 1558, 1567 (Fed. Cir. 1996) ("[The defendant] will have an opportunity at the merits stage to ... expand upon the arguments it has made at the preliminary injunction stage, as well as any additional arguments that it chooses to present, and the district court will be able to give those arguments plenary consideration at that time."); *Crumble v. Blumthal*, 549 F.2d 462, 466 (7th Cir. 1977).[2] Courts, including this one, regularly entertain merits arguments that were not raised at the preliminary injunction stage but instead were raised for the first time at later stages of litigation. *See Meredith v. Daniels*, No. 49D07-1107-PL-025402, 2012 WL 2525426 (Marion Super. Ct. Jan. 13, 2012), *aff'd*, 984 N.E.2d 1213 (Ind. 2013); *Beloit Beverage Co. v. Winterbrook Corp.*, 900 F. Supp. 1097, 1104 (E.D. Wis. 1995); *Hous. Study Grp. v. Kemp*, 736 F. Supp. 321, 337 (D.D.C. 1990).

In this case, even if the Attorney General had forfeited arguments regarding the statutory-interpretation issue for purposes of the preliminary injunction (which he did not), that is no bar to raising the issue at a later stage of the case. The Attorney General accordingly urges this Court to reject Plaintiffs' improper attempt at voluntary dismissal so that the question whether he violated Indiana Code § 25-1-7-10 can be addressed on the merits rather than for preliminary injunction purposes.

---

[2] *Accord The Shell Co. (P.R.) Ltd. v. Los Frailes Serv. Station, Inc.*, 605 F.3d 10, 19 n.4 (1st Cir. 2010); *Milwaukee Inner-City Congregations Allied for Hope v. Gottlieb*, 944 F. Supp. 2d 656, 664 (W.D. Wis. 2013); *Hous. Study Grp. v. Kemp*, 736 F. Supp. 321, 337 (D.D.C. 1990); *cf. Metro. Life Ins. Co. v. Bucsek*, 919 F.3d 184, 196 n.4 (2d Cir. 2019).

III. The Attorney General Did Not Violate Indiana Code § 25-1-7-10.

Finally, Plaintiffs' Opposition barely even touches upon the Attorney General's points regarding the meaning of Indiana Code § 25-1-7-10(a). Instead, Plaintiffs miss the mark by arguing that "there is no basis to disturb [this Court's] evaluation of the evidence," tersely observing that the Court heard from witnesses and then found a violation of Section 25-1-7-10(a) had occurred—a finding that, according to Plaintiffs, "was well rooted in the evidence." Opp. at 10. But the Attorney General's point is not that any of this Court's *factual* findings were erroneous. Rather, his Motion shows that, as a matter of *law*, none of the public statements he was found to have made constituted violations of Section 25-1-7-10(a). That issue is in no way dependent on the credibility of witnesses or the weighing of the evidence. And, for the reasons set forth in detail in the January 9 Motion, the Attorney General respectfully submits that the Court's finding that certain of his public statements violated Indiana Code § 25-1-7-10(a) was based on a misinterpretation of that provision. *See* Motion at 10–24.

CONCLUSION

For the foregoing reasons, as well as those stated in the Attorney General's Motion, this Court should grant that Motion, disallow Plaintiffs' strategic attempt to exit this case, and correct the erroneous judicial finding in the December 2, 2022 Order that the Attorney General violated Indiana Code § 25-1-7-10. The Attorney General properly informed the public about his activities in compliance with the statute and his duties as Attorney General, and he did not reveal the existence of any confidential consumer complaints or any information pertaining to such complaints.

Dated: March 17, 2023

Respectfully submitted,

THEODORE E. ROKITA
Indiana Attorney General
Attorney No. 18857-49

By: */s/ Patricia Orloff Erdmann*
Patricia Orloff Erdmann
Chief Counsel for Litigation
Attorney No. 17664-49

OFFICE OF THE INDIANA ATTORNEY GENERAL
Indiana Government Center South, 5th Floor
302 West Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 232-6318
Facsimile: (317) 232-7979
Patricia.Erdmann@atg.in.gov

Gene C. Schaerr*
H. Christopher Bartolomucci*
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 787-1060
Facsimile: (202) 776-0136
gschaerr@schaerr-jaffe.com
cbartolomucci@schaerr-jaffe.com

*Admitted *pro hac vice*

Counsel for Defendant
Attorney General Todd Rokita

CERTIFICATE OF SERVICE

I certify that on March 17, 2023, I electronically filed the foregoing document using the Indiana E-filing system ("IEFS"). I hereby certify that a copy of the foregoing was served on the following persons using the IEFS:

Kathleen A. DeLaney (Bar No. 1860449)
Matthew R. Gutwein (Bar No. 1641449)
Delaney & Delaney LLC
3646 North Washington Blvd.
Indianapolis, IN 46205
(317) 920-0400
kathleen@delaneylaw.net
mgutwein@delaneylaw.net

Paul W. Rodney
(*pro hac*, Bar No. 861895TA)
Arnold & Porter Kaye Scholer LLP
1144 Fifteenth Street, Suite 3100
Denver, CO 80202
(303) 863-1000
paul.rodney@arnoldporter.com

Elissa J. Preheim
(*pro hac,* Bar No. 861995TA)
David J. Weiner
(*pro hac,* Bar No. 862395TA)
Arnold & Porter Kaye Scholer LLP
601 Massachusetts Avenue, NW
Washington, DC 20001
(202) 942-5000
elissa.preheim@arnoldporter.com
david.weiner@arnoldporter.com

Kaitlin Robinson
(*pro hac*, Bar No. 861795TA)
Arnold & Porter Kaye Scholer LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111
(415) 471-3100
kaitlin.robinson@arnoldporter.com

/s/ Patricia Orloff Erdmann
Patricia Orloff Erdmann