

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

HEALTH REPUBLIC INSURANCE	:	
COMPANY,	:	No. 16-259C
	:	
Plaintiff,	:	Judge Davis
	:	
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

**THE UNITED STATES MOTION FOR LEAVE  
TO FILE A RESPONSE TO MOTION TO STRIKE  
INCLUDED IN PLAINTIFF’S REPLY BRIEF**

Pursuant to Rule 7(b), the United States respectfully requests permission to file a brief response to Colorado Health’s motion to strike, as included in its supplemental reply brief. *See* Docket No. 166.

The Court permitted the parties to submit supplemental briefing, with Colorado Health filing an opening brief, the United States filing a response, and Colorado Health filing a reply. Docket Nos. 157, 161, 164, 166. On June 22, 2022, Colorado Health filed its reply supplemental brief and included a motion “to strike pages 2-4 and 8-10” of the United States’ response. Reply at 1. With briefing complete, the United States has no opportunity to respond to this new motion included within Colorado Health’s reply brief.

A copy of the United States’ proposed response is attached as Exhibit 1. The proposed response is approximately 2 pages and will not further burden the Court with additional, unnecessary briefing. In addition, the proposed response is attached to this motion, so no delay will result from granting the United States’ request. Accordingly, the United States requests leave to file the attached response to Colorado Health’s motion to strike.

Dated: June 23, 2022

Respectfully submitted,

BRIAN M. BOYTON  
Principal Deputy Assistant Attorney General  
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RUTH A. HARVEY  
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# **EXHIBIT 1**

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COMPANY,	:	No. 16-259C
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	:	
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

**THE UNITED STATES’ MEMORANDUM IN OPPOSITION  
TO COLORADO HEALTH’S MOTION TO STRIKE**

The Court provided the parties an opportunity to submit supplemental briefing on Colorado Health’s pending motion to dismiss. Docket No. 157. In its reply brief, Colorado Health moves the Court to strike pages 2-4 and 8-10 of the United States’ supplemental brief, Docket No. 164, arguing that those portions of the United States’ brief “ranges far beyond the two cases the Court instructed the parties to discuss, and includes argument regarding Colorado Health’s Motion to Dismiss[.]” Reply at 1. Colorado Health’s request should be denied.

Colorado Health does not identify the legal basis for its motion. To the extent Colorado Health relies on Rule 12(f), that rule provides that the Court “may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” But Colorado Health does not argue that any portion of the United States’ brief contains “an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Moreover, Rule 12(f) is limited to “pleadings,” and the Court’s rules do not provide “occasion for a party to move to strike portions of an opponent’s brief.” *See Dillon v. United States*, 229 Ct. Cl. 631, 636 (1981).

Colorado Health is also wrong that portions of the United States' brief go beyond the Court's instructions. Colorado Health's initial brief included arguments about the scope of and authority provided in 28 U.S.C. §§ 1503 and 2508, as interpreted in *Conway*. On pages 2-4 of our response, we cite precedent interpreting those statutes to demonstrate that Colorado Health's reading of *Conway* is incorrect, as is explained in pages 11-15 of our brief. That portion of the United States' brief requires the Court's jurisdictional statutes to be put into their historical context. As to pages 8-10 of our brief, this analysis is in response to Colorado Health's arguments concerning preemption under *Conway*, and the explanation we provide is intended to address how *Richardson* erred in overreading *Conway*.

Moreover, Colorado Health's counsel invoked the McCarran-Ferguson Act extensively in his discussions of *Conway* and *Richardson* at oral argument. Oral Arg. Tr. at 7:25-8:6 ("the Appellate Court went through a fairly long analysis of whether or not the federal scheme would preempt the state court scheme and, in fact, held that the federal scheme would not and the state - the Colorado State insolvency scheme would reverse preempt under *McCarran-Ferguson*"); 14:12-17 ("So I think that the cases discussed in *Richardson* and *Richardson* itself is the best example -- the best case for why, when you analyze a claim like this one, *McCarran-Ferguson Act* would deny -- deny the Court jurisdiction is the wrong way to say it. I think the proper ruling is that *the McCarran-Ferguson Act* applies . . ."); 15:20-16:1 (stating that *Richardson* "decides that *McCarran-Ferguson* would apply"); 16:22-25 ("So the [*Richardson*] Court essentially said that [31 U.S.C. § 3728] can't be an end run around *the McCarren-Ferguson Act* protection for state liquidation proceedings").

Finally, the United States notes that at argument, the Court stated that Colorado Health's pending motion was "older" and asked if "either party want[s] to request the opportunity for

supplemental briefing on Conway or Richardson or any other sort of updates or developments in the law.” Oral Arg. Tr. at 66:7-13. In these circumstances, we do not believe our brief to be beyond the Court’s instructions. Colorado Health’s motion to strike therefore should be denied.

Respectfully submitted,

Dated: June 23, 2022

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Civil Division

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KIRK T. MANHARDT  
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