

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

UNITED STATES’ RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITY

On May 17, 2021, the United States Court of Appeals for the Federal Circuit issued an opinion in *Conway v. United States*, 997 F. 3d 1198 (Fed. Cir. 2021), and on June 7, 2021, Colorado Health and Meritus filed a Notice of Supplemental Authority (“Notice”), Docket No. 125.¹ In the Notice, Colorado Health and Meritus misapprehend the issues before the Court (and the Federal Circuit in *Conway*) by arguing incorrectly that *Conway* resolves the claims before this Court.

Colorado Health and Meritus seek to recover amounts from the United States under section 1342 of the Affordable Care Act (“ACA”), and the United States assert counterclaims for debts Colorado Health and Meritus owe under other statutory sections of the ACA, *see* Counterclaim, Docket No. 101. The jurisdictional bases for the United States’ counterclaims are 28 U.S.C. §§ 1503 and 2508. Counterclaim ¶ 4. Section 1503 provides that the Court “shall have jurisdiction to render judgment upon any set-off or demand by the United States,” and section 2508 provides that the Court “shall hear and determine” any “setoff, counterclaim, claim for damages, or other demand . . . of the United States.” Colorado Health and Meritus moved to dismiss, arguing, *inter*

¹ The Court ordered the United States to respond to the Notice within 14 days of the mandate issuing in *Conway*, Docket No. 127, and the mandate issued on August 27, 2021.

alia, that the Court’s jurisdictional statutes are reverse preempted by state law under the McCarran-Ferguson Act, 15 U.S.C. § 1012, and that Colorado law prohibits the Department of Health and Human Services (“HHS”) from effectuating administrative offset of Colorado Health’s debts. *See* Docket No. 103.²

In *Conway*, Colorado Health challenged HHS’s past administrative offset of ACA payments and debts during Colorado Health’s insolvency proceedings. Those administrative offsets were taken pursuant to HHS’s netting regulation, 45 C.F.R. § 156.1215, and Colorado Health subsequently sued, asserting that Colorado state law prohibited HHS from effectuating non-contractual administrative offsets. The Federal Circuit agreed, holding that “the federal scheme does not evidence a ‘clear and manifest’ intent to preempt Colorado law fixing creditors’ [offset] rights during insolvency.” *Conway*, 997 F. 3d at 1214. Thus, as to Colorado Health, *Conway* precludes HHS from administratively offsetting Colorado Health’s ACA debts during its liquidation proceeding.

But the Federal Circuit’s decision on that discrete offset issue does not resolve the merits of the United States’ counterclaims or suggest that the Court lacks jurisdiction over those claims. Federal law provides the United States with a right to assert counterclaims and demands when sued in this Court, and nothing in *Conway* abolishes that right. Federal law also provides the Court’s jurisdiction to entertain those counterclaims, and nothing in *Conway* holds otherwise. In short, nothing in *Conway* precludes the United States from seeking and obtaining judgment in its favor on its counterclaims.

² Colorado Health and Meritus also argue that that the United States is not entitled to interest on unpaid ACA debts and that Meritus preemptively paid its ACA debts years ago using the amounts it seeks in this case, but nothing in *Conway* even remotely addresses those issues.

Dated: September 10, 2021

Respectfully submitted,

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