IN THE UNITED STATES COURT OF FEDERAL CLAIMS

LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY,	:	Judge Lettow
Plaintiff,	:	Case No. 16-744C
v.	:	
THE UNITED STATES OF AMERICA,	:	
Defendant.	:	

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE PLAINTIFF'S CROSS-MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD ON COUNTS II-V

The United States' Motion to Strike, Docket No. 31, should be granted. If the Court is inclined to retain its current scheduling order as Land of Lincoln requests (Pl. Opp'n at 4), then Land of Lincoln should be required to comply with that scheduling order. Specifically, the Court should strike Land of Lincoln's request for judgment on the administrative record on Counts II-V and, consistent with the scheduling order Land of Lincoln requested, treat Land of Lincoln's October 12 filing as an opposition to the United States' Motion to Dismiss and for Judgment on the Administrative Record as to Count I.

As the Court noted, Docket No. 26, Land of Lincoln did not advance any argument on its implied contract theory in its Motion for Judgment on the Administrative Record, Docket No. 20. Indeed, Land of Lincoln advanced *no* argument in support of counts II through V in its motion. Land of Lincoln's argument section does not include the word "contract" except in quoting *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012), and "taking" appears nowhere in the motion.

See Docket No. 20 at 8-14. Moreover, Land of Lincoln's own "Statement of the Questions Presented" refers only to the statute and regulations, *i.e.*, to Count I. *Id.* at 2.

Land of Lincoln relies on RCFC 54(c) for the proposition that it was not required to pose any arguments in support of its contract or takings claims. But RCFC 54(c) governs how the Court should grant relief when entering judgment; it has no bearing on what a *party* must show to be entitled to judgment. Indeed, RCFC 52.1(c)(1) requires a party to identify "the portions of the administrative record that bear on the issues presented to the court." In any event, "[j]udges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). Likewise, Land of Lincoln bears the burden to establish the elements of its claims, and the United States, in its opposition to Land of Lincoln's motion for judgment on the administrative record, is not required to rebut every conceivable argument Land of Lincoln chose not to make. That would turn a plaintiff's burden on its head.

Land of Lincoln asserts that because the United States moved to dismiss counts II through V, Land of Lincoln's opposition to that motion somehow entitles it to move for judgment on the merits. Pl. Opp'n at 2-3. That assertion has no basis in the rules or the law. First, a cross-motion is not the same as an opposition to an opponent's motion. *See* RCFC 5.4. Second, the standard for considering a motion to dismiss for failure to state a claim under RCFC 12(b)(6) is different from the standard for considering a motion for judgment on the administrative record under RCFC 52.1(c). *Compare Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009) (To survive a motion to dismiss under RCFC 12(b)(6),the complaint must "plead factual allegations that support a facially 'plausible' claim to relief.") *with Adams & Assocs., Inc. v. United States*, 741 F.3d 102, 105–06 (Fed. Cir. 2014) (Under RCFC 52.1(c), the Court must "not disturb the agency's

decision . . . unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'") (citing 5 U.S.C. § 706(2)).

Finally, there is no prejudice to Land of Lincoln if the motion to strike is granted. The United States' and Land of Lincoln's respective dispositive motions can be fully briefed and argued as scheduled. Should any of counts II through V survive the United States' motion to dismiss and the Court not otherwise enter a final order after the October 25 hearing, then the case will go forward, and Land of Lincoln can seek judgment on its remaining counts at the appropriate time.

The United States is prepared to file a timely reply to Land of Lincoln's opposition to our motion to dismiss on October 19. But to the extent Land of Lincoln seeks to deviate from the scheduling order it requested by filing an untimely, dispositive cross-motion, it is not the United States that is interposing delay.

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Dated: October 17, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October 2016, a copy of the foregoing, *Defendant's Reply in Support of Its Motion to Strike Plaintiff's Cross-Motion for Judgment on the Administrative Record on Counts II-V*, was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing with be sent to all parties by operation of the Court's ECF system.

/s/ Terrance A. Mebane
TERRANCE A. MEBANE
United States Department of Justice