

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock Street Denver, CO 80202</p> <hr/> <p>IMPAIRED PROFESSIONAL DIVERSION PROGRAM D/B/A COLORADO NURSE HEALTH PROGRAM,</p> <p>Plaintiff,</p> <p>v.</p> <p>COLORADO DEPARTMENT OF REGULATORY AGENCIES,</p> <p>Defendant.</p>	<p>EFILED Document CO Denver County District Court 2nd JD Filing Date: Jul 3 2008 3:07PM MDT Filing ID: 20517089 Review Clerk: Yvonne Hall</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>JOHN W. SUTHERS, Attorney General LINDA S. COMER, Senior Litigation Counsel* 1525 Sherman Street, 7th Floor Denver, CO 80203 303-866-5513 Registration Number: 11267 *Counsel of Record</p>	<p>Case No.: 08 CV 4924</p> <p style="text-align: center;">Ctrm.: 2</p>
<p style="text-align: center;">RESPONSE TO PLAINTIFF'S MOTION TO DISMISS AND MOTION TO STRIKE</p>	

Defendant, Colorado Department of Regulatory Agencies (“DORA”), responds to Plaintiff’s Motion to Dismiss and Motion to Strike as follows:

1. Plaintiff’s motions are without merit. Pursuant to Rule 15(a) C.R.C.P., “A party may amend its pleading once as a matter of course at any time before a responsive pleading is filed or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may amend it at any time within twenty days after it is filed.” An answer is a pleading to which a responsive pleading is not permitted. Defendant’s original answer was filed on June 30, 2008 and the amended answer and counterclaim on July 2, 2008, well within the twenty day limit. This matter has not been placed on the trial calendar, so the requirements of Rule 15(a) are met and leave of court is not required.

2. Plaintiff also claims Defendant filed the amended complaint and counterclaim to circumvent the denial of the motion for preliminary injunction and temporary restraining

order in case No. 08 CV 5592. That is not true. The motion for temporary restraining order and preliminary injunction was not denied on the merits. It was apparently denied because Plaintiff was not personally served and the certification required by Rule 65(b) C.R.C.P. was not included. Plaintiff's counsel was notified of the dismissal as soon as Defendant's counsel received the order. Defendant did not receive an electronic copy of the order, only a hard copy. Admittedly the grounds for the denial were not specified in the e-mail to Plaintiff's counsel (an inadvertent oversight), but the fact of the denial was. Plaintiff was not obligated to file an immediate response. Defendant could have re-filed or renewed the motion for temporary restraining order and preliminary injunction in Courtroom 6 and then moved to consolidate it with this case. However, the motion deals directly with the issues in this lawsuit and arises out of the same operative facts, thus it is more appropriately asserted as a counterclaim in this action. The intent was to clear up the procedural irregularities and get the issues before the appropriate court as soon as possible. There was no ulterior motive to harass Plaintiff or circumvent Judge Hood's denial of the motion on procedural grounds. If that were the case, the previous denial and order would not have been openly acknowledged in the counterclaim.

3. DORA is not asking for control of CNHP files or asking CNHP to violate any client confidences. DORA is not asking to have the files released to it unless CNHP has a release from the client directing the release of the records to DORA. What Defendant is seeking in the temporary restraining order is assurance the records will not be destroyed pending the resolution of Plaintiff's appeals.

WHEREFORE, Defendant prays for denial of Plaintiff's Motion to Strike and Motion to Dismiss and any other and further relief deemed appropriate by the Court.

Respectfully submitted, this 3rd day of July, 2008.

JOHN W. SUTHERS
Attorney General

E-filed pursuant to C.R.C.P. 121 1-26. A duly signed original is on file at the Colorado Department of Law.

/s/ Linda S. Comer

LINDA S. COMER, 11267*
Senior Litigation Counsel
Attorneys for Defendant
*Counsel of Record

CERTIFICATE OF SERVICE

I do hereby certify that on the 3rd day of July 2008, a copy of the foregoing **RESPONSE TO PLAINTIFF'S MOTION TO DISMISS AND MOTION TO STRIKE** was mailed, First Class U.S. postage prepaid, as follows:

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E-filed pursuant to C.R.C.P. 121 1-26. A
duly signed original is on file at the Colorado
Department of Law.

/s/ _____