IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

NEW MEXICO HEALTH CONNECTIONS, Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendants.	:	No. 1:16-cv-00878-JB/WPL

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO STRIKE THE DECLARATION OF JEFFREY WU OR IN THE ALTERNATIVE, GRANT PLAINTIFF LEAVE TO TAKE DISCOVERY

I. INTRODUCTION AND BACKGROUND

Unhappy with the Court's holding that HHS's[1] decision on one key issue was arbitrary and capricious, HHS seeks reconsideration of the judgment entered by the Court under Federal Rule of Civil Procedure 59(e) ("Rule 59"). Recognizing that it cannot meet the exacting standard of Rule 59 on the existing record, HHS now seeks to introduce a new, self-serving extra-record declaration to support its motion. HHS's belated attempt to introduce this declaration is improper under both Rule 59 and the Administrative Procedures Act ("APA").

The Court vacated HHS's risk adjustment regulations with a remand to reexamine its decision to use the statewide average premium, and if appropriate, to develop through appropriate proceedings a rational explanation for the use of the statewide average premium. *See* Dkt. No. 55, Memorandum Opinion and Order (Feb. 28, 2018) (hereafter, "Opinion"), at 70-71.

[1] In keeping with prior practice, Defendants are collectively referred to as "HHS."

This is the standard relief in an APA action. *See e.g. Southeast Alaska Conserv. Council v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 654 (9th Cir. 2007) ("Under the APA, the normal remedy for an unlawful agency action is to 'set aside' the action.") (citing 5 U.S.C. § 706(2)), *rev'd on other grounds,* 557 U.S. 261 (2009)); *St. Lawrence Seaway Pilots Ass'n v. U.S. Coast Guard*, 85 F. Supp. 3d 197, 208 (D.D.C. 2015) ("The typical remedy for an arbitrary and capricious agency action is to vacate the rule."). The APA specifically provides that the reviewing Court shall "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law …." 5 U.S.C. § 706(2)(A).

In its Rule 59 motion, HHS challenges, *inter alia*, the Court's remedy of vacatur, contending that it is "manifestly unjust" because its consequences are purportedly "tremendously disruptive." Dkt. No. 41, HHS Reply Brief (Aug. 17, 2017), at 24-25. To support this claim, HHS relies not on the administrative record subject to review in this case, but instead attaches to its brief a new declaration of Jeffrey Wu ("Wu Declaration"), Associate Deputy Director for Policy Coordination at the Center for Consumer Information and Insurance Oversight at CMS. The Wu Declaration should be stricken by the Court as inappropriate under Rule 59 because it improperly asserts facts and arguments that were available (and asserted) during briefing on the cross motions for summary judgment. Similarly, it should be stricken as improper extra-record evidence outside of the Court's purview in an APA case.

In the event that the Court does not strike the Wu Declaration, Plaintiff respectfully requests leave to conduct discovery into the allegations contained in the Wu Declaration, including the opportunity to serve document requests and interrogatories to HHS and the opportunity to examine Mr. Wu under oath. Plaintiff should have the right to cross-

examine HHS's witness, and if the Court is going to conduct any new fact-finding on the question of remedy, it should do so on a full record.

II. ARGUMENT

A. The Wu Declaration Should Be Stricken Because It Is Inappropriately Introduced In A Rule 59 Motion

Rule 59 relief is appropriate only when a movant can show "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *United States v. 2002 Pontiac Bonneville SE*, No. 12-0580, 2015 U.S. Dist. LEXIS 164738, *9 (D.N.M. Dec. 7, 2015) (Browning, J.) (quoting *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)). Importantly, Rule 59 motions cannot be used as "vehicles to reargue an issue previously addressed by the court when the motion merely advances new arguments, or supporting facts which were available at the time of the original motion." *Id.* (denying Rule 59 motion). Nor can Rule 59 be used to "advance arguments that *could have been raised* in prior briefing." *C.S. v. Platte Canyon Sch. Dist. No. 1*, No. 12-3358, 2015 U.S. Dist. LEXIS 107998, *2 (D. Colo. Aug. 17, 2015) (emphasis added); *see Syntroleum Corp. v. Fletcher Int'l, Ltd.,* No. 08-384, 2009 U.S. Dist. LEXIS 22312, *4 (N.D. Okla. Mar. 19, 2009) ("arguments that could have been raised in prior briefings are not appropriate grounds for Rule 59(e) motions"). HHS's motion and the Wu Declaration supporting it violate these basic tenets.

Neither HHS's motion, nor Wu's declaration, offers facts or arguments that were not available at the time that summary judgment was briefed and argued. To the contrary, HHS is now doing exactly what it is prohibited from doing: repackaging and expanding on arguments already made. HHS challenged the requested remedy of vacatur in its opening summary judgment brief, arguing that "vacatur should still be denied because vacating the risk adjustment

methodology for all prior years would harm plans that enrolled sicker than average enrollees." *See* Dkt. No. 35, HHS Opening Brief (June 1, 2017), at 43. HHS further argued that "the only equitable remedy . . . would be remand without vacatur" because "the program has already been administered and it would be difficult, if not impossible, to unwind it." *Id.* at 43-44. Similarly, in its reply brief, HHS argued that NMHC's requested relief, that is vacatur, "to the extent it can even be achieved – would be deeply disruptive to other insurance plans." Dkt. No. 41, HHS Reply Brief (Aug. 17, 2017), at 25. That HHS opted not to expound upon its arguments against vacatur at that time does not grant it license to revive its arguments in more detail with newly submitted evidence at the Rule 59 stage. *See e.g., Williams v. HSBC Bank USA, N.A.,* No. 15-9372, 2016 U.S. Dist. LEXIS 99858, *3 (D. Kan. July 29, 2016) ("A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider."), *aff'd,* 681 Fed. Appx. 693 (10th Cir. 2017). The law is clear that Rule 59 cannot be used to "revisit issues already addressed or advance arguments that could have been raised in prior briefing." *The Servants of the Paraclete v. John Does, I-XVI*, 204 F.3d 1005, 1012 (10th Cir. 2000). Accordingly, HHS's attempt to do just that through the Wu Declaration should be rejected and the Declaration should be stricken.

B. The Wu Declaration Should Be Stricken As Outside Of The Scope Of The Administrative Record

Even if the Wu Declaration were appropriately introduced with the Rule 59 motion, the Declaration should nevertheless still be stricken as improper extra record material. The Court's review of the risk adjustment regulations promulgated by HHS is governed by the APA, which limits the Court's scope of review to the administrative record. *See Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739-40 (10th Cir. 1993); *Custer Cnty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1027 n.1 (10th Cir. 2001) ("Judicial review of an agency decision is generally

limited to review of the administrative record."). As the Court explained in its Opinion, "in reviewing agency action under the arbitrary-or-capricious standard, a court considers the administrative record – or at least those portions of the record that the parties provide – and not materials outside of the record." Opinion, at 45. Indeed, the "focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Bar MK Ranches*, 994 F.2d at 739. Consequently, when presented with extra-record materials, courts routinely grant motions to strike these materials as beyond the permissible scope of review. *See e.g.*, *WildEarth Guardians v. Salazar*, 30 F. Supp. 3d 1126, 1132 (D.N.M. 2011) (granting motion to strike extra-record materials as "judicial review of agency action is normally restricted to the administrative record").

As the Wu Declaration is undeniably extra-record evidence beyond the scope of APA review, and HHS has advanced no exception to the general rule limiting the Court to the administrative record, the Court should strike this Declaration.

C. In the Alternative, NMHC Should Be Granted Leave to Conduct Discovery

Should the Court deny Plaintiff's motion to strike the Wu Declaration, Plaintiff respectfully requests leave to conduct discovery related to the allegations set forth in the declaration.

While Courts can deviate from the standard remedy of vacatur in certain circumstances, the decision to do so must balance the seriousness of the agency's errors and the "disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). The Court already considered the appropriate remedy once. To the extent the Court is inclined to balance these competing issues again, it should only do so on a fully developed factual record. With the Wu Declaration, HHS portends that the Court's order will cause great disruption. Neither Plaintiff nor the Court should have to

accept that representation at face value. The Court's evaluation of the level of disruption its order will allegedly cause should not be solely premised on a one-sided, self-serving declaration crafted by HHS's lawyers. Fairness and rights of due process dictate that NMHC should be given the opportunity to conduct discovery into Mr. Wu's statements and examine him under oath so that NMHC has a full and fair opportunity to present opposing arguments. *Cf. Bar MK Ranches*, 994 F.2d at 740 (limited discovery is appropriate when the record may not be complete). Accordingly, NMHC respectfully requests that the Court grant it the opportunity to serve document requests and interrogatories to HHS related to the Wu Declaration and to take Mr. Wu's deposition.

III. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court strike the Wu Declaration. In the alternative, if the Court permits the Wu Declaration to remain in the record, Plaintiff respectfully requests leave to conduct discovery related to the Wu Declaration and to take the deposition of Mr. Wu.

Dated: April 23, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2018, I electronically filed the foregoing Motion to Strike using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

/s/ Nancy R. Long
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