IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASSOCIATION FOR COMMUNITY AFFILIATED PLANS, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF TREASURY, *et al.*, Defendants.	Civil Action No. 18-2133 (RJL)

DEFENDANTS' MOTION TO STRIKE OR, IN THE ALTERNATIVE, UNOPPOSED MOTION FOR LEAVE TO SUBMIT THE RESPONSIVE PORTION OF THIS FILING AS A SUR-REPLY IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendants respectfully move to strike from the record the Declaration of Heather J. Foster, ECF No. 48-2 ("Foster Decl."). Plaintiffs submitted the declaration on March 22, 2019, along with their reply in support of their motion for summary judgment, after Defendants had repeatedly identified Plaintiffs' failure to establish their standing. The Foster Declaration purports to provide data on 2018 and 2019 enrollment for Plaintiff ACAP's members that offer an ACA Marketplace health plan. The submission is improper. As the D.C. Circuit has explained, litigants must provide evidence of standing at the first appropriate point in the proceeding. But here, Plaintiffs waited until the last possible moment to submit the purported evidence, depriving the Departments of an opportunity to address it in their reply brief. The Court should strike the Foster Declaration for that reason alone, even if the declaration were to meet the requirements of Rule 56(c)(4), which, as explained below, it does not.

Should this Court decide not to strike the Foster Declaration, Defendants respectfully ask, in the alternative, that the Court treat the responsive portion of this filing as a sur-reply in support

of Defendants' Opposition to Plaintiffs' Summary Judgment Motion. Defendants should have the opportunity to address Plaintiffs' newly submitted evidence—indeed, the only specific evidence concerning Plaintiffs' members submitted during briefing on the parties' cross motions for summary judgment. And, as explained below, the Foster Declaration does not support Plaintiffs' arguments that they have standing to bring suit. Counsel for Defendants has contacted counsel for Plaintiffs, and Plaintiffs do not oppose Defendants' request to file a sur-reply.

DISCUSSION

I. THE COURT SHOULD NOT CONSIDER THE FOSTER DECLARATION AND SHOULD STRIKE IT FROM THE RECORD.

A. The Timing of Plaintiffs' Submission Is Improper and Prejudices Defendants.

The Court should strike the Foster Declaration from the record because it was not filed in a timely manner that would allow for a full airing of Plaintiffs' standing arguments. Rule 6(c)(2) of the Federal Rules of Civil Procedure provides that "[a]ny affidavit supporting a motion must be *served with the motion*." Fed. R. Civ. P. 6(c)(2) (emphasis added). This requirement is particularly stringent when the affidavit serves to meet a plaintiff's burden to establish standing. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (plaintiff "bears the burden of showing that he has standing for each type of relief sought"). In *Sierra Club v. EPA*, 292 F.3d 895 (D.C. Cir. 2002), the D.C. Circuit held that a plaintiff whose standing is not self-evident "should establish its standing by the submission of its arguments and any affidavits or other evidence appurtenant thereto *at the first appropriate point* in the review proceeding." *Id.* at 900 (emphasis added). This common-sense rule is designed to allow for a full airing of arguments on the question of standing because, as the D.C. Circuit reasoned, "experience teaches that the full development of arguments for and against standing requires the same tried and true adversarial procedure we use for the presentation of arguments on the merits."

Here, Plaintiffs did not submit the Foster declaration—the only evidence accompanying their motion for summary judgment—until their reply brief. In so doing, Plaintiffs prevented Defendants from addressing the full scope of Plaintiffs' arguments during the briefing schedule

established by the Court. *See Grant v. United States Air Force*, 197 F.3d 539, 543 n.6 (D.C. Cir. 1999) ("[O]ur caselaw makes clear that an argument first made in a reply brief comes too late." (citing *Fraternal Order of Police v. United States*, 173 F.3d 898, 903-03 (D.C. Cir. 1999)). The delay thus violates both the federal rules and the D.C. Circuit's teaching.

The delay is particularly glaring because Plaintiffs were clearly on notice of the need to establish their standing. At the hearing on Plaintiffs' now-withdrawn preliminary injunction motion, Plaintiffs' counsel represented that ACAP's members would lose customers. *See* Prelim. Inj. Hr'g Tr. (Oct. 26, 2018) at 32:24-33:2. The Court asked Plaintiffs to demonstrate that assertion with data. *Id.* at 21:12-15. Yet, Plaintiffs provided no such data with their opening brief. Nor did they submit the affidavit in opposition to Defendants' motion for summary judgment, even though Defendants devoted a significant portion of their motion to establishing Plaintiffs' lack of standing. *See* Defs.' Mot. at 12-26, ECF No. 40-1. The delay is inexcusable.

B. Ms. Foster Has Not Established Personal Knowledge of the Facts Averred In Her Declaration.

The Court should strike the Foster Declaration for the additional reason that Plaintiffs have not satisfied the requirements of Rule 56 of the Federal Rules of Civil Procedure. Under that rule, any affidavit submitted in support or opposition of a summary judgment motion must "be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). The Foster Declaration does not meet these basic requirements.

First, the declaration does not establish that the data Ms. Foster provides is based on her personal knowledge. Although Ms. Foster describes her position as the "Vice President for Marketplace Policy" at ACAP, Foster Decl. ¶ 2, she does not explain how she has personal knowledge of the data, beyond stating that she is "familiar with ACAP's operations" and that "ACAP regularly collects data from its members regarding the enrollment in their insurance plans." *Id.* ¶¶ 2-3. That sparse explanation does not provide enough information for the Court to determine whether Ms. Foster has personal knowledge of the ACAP's members' enrollment data

or to assess how Ms. Foster went about ensuring that the data was collected pursuant to a process that reliably allows her to rely on it without any personal knowledge of the data. Nor does Ms. Foster state that she reviewed the submitted data or otherwise relied on individuals who are familiar with ACAP's member's submissions. In short, Plaintiffs do not establish whether or how Ms. Foster is personally knowledgeable of the information about which she testifies. For this additional reason, the Court should strike the Foster Declaration from the record.

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For the reasons above, Defendants respectfully submit that the Foster Declaration should be stricken, and that the Court should not consider it when deciding the parties' cross-motions for summary judgment.

II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT LEAVE AND TREAT THE BELOW RESPONSE AS A SUR REPLY.

If the Court does not strike the Foster Declaration, Defendants respectfully request that the Court accept the below response as a sur-reply to address the new evidence introduced by Plaintiffs along with their reply brief. Plaintiffs do not oppose Defendants' request for leave to file a sur-reply.

The Foster Declaration does not support Plaintiffs' standing claim for member insurers. Most fundamentally, Ms. Foster does not aver that there is a causal relationship between the availability of STLDI plans and the enrollment decreases experienced by *some* (but not all) of the ACAP members. *See* Foster Decl. ¶¶ 3-5. The very significant enrollment change disparity among the 12 ACAP members whose data Ms. Foster provides[1]—*i.e.*, anywhere from a *decrease* of 49.10 percent to an *increase* of 25.64 percent—by itself refutes any reasonable inference that the differences are the result of the STLDI Rule. Nor did or could Ms. Foster aver that there is a causal relationship between the STLDI Rule and the increased enrollment for those ACAP members in states that impose substantial restrictions on 364-day plans; the prior rule that limited STLDI plans

[1] Ms. Foster included a thirteenth member, Virginia Premier, in her declaration, but, because it is a new plan, there is not 2018 enrollment data.

to less than three months had been in effect since 2017, and there is no reason to think that states' continued adherence to the same or similar restriction would now cause enrollment to rise in 2019.

That the Foster Declaration does not address causation is not surprising because, as Defendants have established, there are myriad explanations for changes to an insurer's enrollment. In addition to those reasons that Defendants have already discussed elsewhere—including increased employment, Congress's reduction of the individual mandate tax penalty to $0, and escalating premiums, *see, e.g.*, Defs.' Mot. at 17-20—increased insurer competition in 2019 may also explain why some of ACAP's members saw decreased enrollment in some states, *see, e.g.*, Kaiser Family Foundation, Insurance Participation on ACA Marketplaces, 2014-2019 (Nov. 14, 2018) (showing increased insurer participation on ACA marketplaces in 2019 over 2018), https://www.kff.org/health-reform/issue-brief/insurer-participation-on-aca-marketplaces-2014-2019/; Pennsylvania Insurance Department, *Strengthening Our Health Care System: Legislation to Reverse ACA Sabotage and Ensure Pre-Existing Protections*, Testimony Before the House Energy and Commerce Committee on Health at 3 (Feb. 13, 2018) (explaining that a new insurer entered Pennsylvania in 2019), https://www.insurance.pa.gov/Documents/Press%20and%20Communications/Testimonies%2c%20Remarks%2c%20Speeches/2019/Testimony-Altman-ACA%20Leg%20Hearing-021319.pdf.

Moreover, enrollment in ACA-compliant plans has been declining overall for years, particularly with respect to off-Exchange plans where insureds do not receive subsidies, and the enrollment data Ms. Foster provided included off-Exchange plans. *See* Kaiser Family Foundation, Data Note: Changes in Enrollment in the Individual Health Insurance Market (explaining that off-Exchange enrollment dropped by 38 percent from 2017 to 2018), https://www.kff.org/health-reform/issue-brief/data-note-changes-in-enrollment-in-the-individual-health-insurance-market/. And States that have limited the term of STLDI plans are more likely to be supportive of ACA plans in general and to take steps to encourage participation in those plans, which could explain why enrollment in those states has increased. Or, any number of other circumstances related to the plans Plaintiffs identify or the market conditions in the specific regions could be driving the

change in enrollment. The Foster Declaration, therefore, does not advance Plaintiffs' standing theory on behalf of insurers. Because Plaintiffs have submitted no evidence in support of their consumer or provider members' standing, insisting that they only need one plaintiff to have standing, they have failed to meet their burden of establishing standing.

CONCLUSION

For the foregoing reasons, the Departments Motion to Strike should be granted. In the alternative, the Court should treat the responsive portion of this filing as a sur-reply in opposition to Plaintiffs' motion for summary judgment.

Dated: March 29, 2019

Respectfully Submitted,

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[PROPOSED] ORDER

Upon consideration of Defendants' motion to strike or, in the alternative, unopposed motion for leave to submit the responsive portion of its filing as a sur-reply in opposition to Plaintiffs' motion for summary judgment; Plaintiffs' opposition; Defendants reply, and the entire record herein, it is hereby ORDERED that Defendants' motion is GRANTED.

Dated: _____

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Richard J. Leon
United States District Court Judge