IN THE UNITED STATES DISTRICT COURT
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/JHR

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE OR FOR DISCOVERY

Defendants (collectively "HHS") have moved to alter or amend the Court's judgment pursuant to Federal Rule of Civil Procedure 59(e). ECF No. 57. In that motion, HHS has explained that relief from the judgment is necessary because, among other things, the error that this Court identified in the agency's rulemakings—the agency's asserted failure to explain its use of a budget-neutral methodology in setting risk adjustment payments and charges—is easily curable on remand, but that the effect of a vacatur in the meantime would be manifestly unjust. *Id.* at 24–27. It would preclude HHS from calculating, collecting, or paying risk adjustment transfers for the 2017 and 2018 benefit years, thereby preventing issuers that have factored the expectation of those payments into their budgeting and rate setting from timely receiving billions of dollars of expected payments. *Id.* HHS submitted a declaration with the motion from Jeffrey Wu, Associate Deputy Director for Policy Coordination at the Center for Consumer Information and Insurance Oversight of the Centers for Medicare & Medicaid Services. *See* ECF No. 57-1. HHS did not provide this

declaration to inform the Court's decision on the merits of the case. Instead, HHS provided this declaration solely to inform the Court's exercise of its equitable discretion in setting a remedy if the Court concludes that the agency erred in its explanation of its use of a budget neutral approach.

Plaintiff New Mexico Health Connections asks the Court to strike this declaration. *See* Pl.'s Mem. of Law in Support of Mot. to Strike the Decl. of Jeffrey Wu or in the Alternative, Grant Pl. Leave to Take Discovery, ECF No. 62 ("Mot."). But motions to strike are disfavored in this Court and should be granted only in the narrow circumstance of striking pleadings, not declarations. NMHC accordingly has presented no basis to strike Mr. Wu's declaration, an exhibit to a Rule 59(e) motion. The fact that review of agency action under the Administrative Procedure Act is generally limited to the administrative record also provides no basis to strike the declaration. That bar on extra-record evidence concerns judicial review of the merits of agency action, not the evidence a court may consider in determining how to exercise its equitable discretion in fashioning a remedy. Mr. Wu's declaration has only been offered for the latter narrow purpose. Its submission is appropriate and it should be considered by the Court in determining whether to alter or amend the judgment as a matter of equitable discretion.

NMHC also makes the extraordinary request that, in the alternative, it be permitted post-judgment discovery with regard to Mr. Wu's declaration. NMHC seeks not only to depose Mr. Wu, but to serve requests for production and interrogatories on HHS. NMHC cites no legal authority for why it should be granted such post-judgment discovery, and it has said nothing about what facts it hopes to discover or what role they would play in the Court's evaluation of the remedial issues to which Mr. Wu's declaration was directed. All that NMHC offers are vague

attacks on Mr. Wu's credibility, showing that it simply seeks a fishing expedition. As an exercise of its broad discretion to control discovery, the Court should deny NMHC's request for discovery.

I. NMHC Raises No Basis to Strike the Wu Declaration and This Court Has Repeatedly Refused to Strike Any Document Not Classified as a Pleading.

NMHC first seeks to strike Mr. Wu's declaration by arguing that HHS's Rule 59(e) motion should be denied for failure to meet that rule's standard. This argument provides no basis for striking Mr. Wu's declaration and, indeed, NMHC cites no authority stating that evidence attached to a motion should be stricken on the basis of a motion's asserted lack of merit.[1] And that is no surprise because this Court has repeatedly held that motions to strike are disfavored and will only be granted where the motion concerns a pleading or a document prohibited by the Court's local rules. Mr. Wu's declaration falls into neither category, and the motion to strike should be denied.

This Court has recognized that a motion to strike arises under Fed. R. Civ. P. 12(f), which permits a court to strike "from a pleading" "any redundant, immaterial, impertinent, or scandalous matter." *Estate of Anderson v. Denny's Inc.*, 291 F.R.D. 622, 634 (D.N.M. 2013) (Browning, J.) (quoting Fed. R. Civ. P. 12(f)). This Court has accordingly held that "[o]nly material included in a 'pleading' may be the subject of a motion to strike, and courts have been unwilling to construe the term broadly." *Id.* (citation omitted). Pleadings do not encompass "[m]otions, briefs or memoranda, objections, or affidavits" and these types of filings "may not be attacked by the motion to strike." *Id.* (citation omitted). In short, the Court has "refused to strike matters that are not pleadings." *Id.* Even where a motion to strike is permissible, such a motion is still "generally

[1] Of course, HHS disagrees with NMHC's contention that HHS's Rule 59(e) motion should be denied. Rather than indulge NMHC's attempt to collaterally attack that motion, however, HHS here limits itself to a discussion of the motion to strike and reserves its arguments in support of the Rule 59(e) motion for its upcoming reply brief.

disfavored" because it seeks a "drastic remedy." *Id.* at 631, 634. The only exception to the rule that motions to strike are reserved for pleadings is that a "Court may choose to strike a filing that is not allowed by local rule, such as a surreply filed without leave of court." *Ysais v. N.M. Judicial Standard Comm'n*, 616 F. Supp. 2d 1176, 1184 (D.N.M. 2009) (citation omitted) (Browning, J.).

On the basis of these standards, this Court has repeatedly rejected motions to strike various filings. In *Ysais*, for example, the plaintiff argued that defendants' motion to dismiss should be stricken, like here, on the basis of plaintiff's assessment of the motion's merits. *Id.* at 1190 (noting that plaintiff argued the motion was "frivolous and baseless"). The Court denied the motion, stating that the motion "complies with the local rules" and was "not a 'pleading' subject to a motion to strike made pursuant to Fed. R. Civ. P. 12(f)." *Id.* at 1191. In *Great American Insurance Co. v. Crabtree*, No. CIV 11-1129 JB/KBM, 2012 WL 3656500 (D.N.M. Aug. 23, 2012) (Browning, J.), the plaintiff moved to strike exhibits attached to a motion to dismiss on the basis that the court should not consider such evidence in deciding a motion to dismiss—similar to NMHC's argument that Mr. Wu's declaration should not be considered on a Rule 59(e) motion. *See id.* at *5. There too, the Court rejected the argument, denying the motion to strike because, *inter alia*, the exhibits were not "pleadings" and also because the "Court cannot say that the materials are insufficient, redundant, immaterial, impertinent, or scandalous." *Id.* at *18. This Court has denied numerous other motions to strike on similar grounds. *See, e.g., United States v. Garcia*, 221 F. Supp. 3d 1275, 1287–88 (D.N.M. 2016) (Browning, J.) (citing cases and denying motion to strike).

Mr. Wu's declaration is not a "pleading" and NMHC cannot attack it by the vehicle of a motion to strike. NMHC also points to no local rule that the declaration violates. NMHC's

assessment of the merits of the Rule 59(e) motion or the value of the declaration in supporting that motion are irrelevant to the question of whether the declaration may or should be stricken.

NMHC also contends that the Court should strike Mr. Wu's declaration because of the general rule in Administrative Procedure Act cases that judicial review of agency action is limited to the administrative record before the agency at the time of the action under review. Mot. at 4–5 (citing *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993)). This is, of course, the general rule on APA review (albeit one that is subject to exceptions in certain circumstances).[2] But this rule concerns review of *the merits* of an agency action, not the question of remedy after a court has already concluded that the agency has acted unlawfully. *See Bar MK Ranches*, 994 F.2d at 739 (explaining that the administrative record is the basis of the court's review of the agency decision under the arbitrary and capricious standard). HHS has not introduced Mr. Wu's declaration for the purpose of informing the Court's review of the merits of HHS's risk adjustment-related rules under review; HHS has submitted the declaration instead for the purpose of explaining the consequences of vacatur of the various rules at issue. ECF No. 57 at 25–27 (citing Mr. Wu's declaration in explaining why vacatur is manifestly unjust).

The bar against extra-record materials makes little sense as applied in this context, since the administrative record constitutes the "documents and materials directly or indirectly considered by the agency" at the time of the action challenged and Mr. Wu's declaration does not concern these past events and does not seek to justify the risk adjustment rules under APA standards of

[2] For example, "there is nothing improper in receiving declarations that merely illuminate[] reasons obscured but implicit in the administrative record." *Univ. of Colo. Health at Mem'l Hosp. v. Burwell*, 164 F. Supp. 3d 56, 65 (D.D.C. 2016) (citing *Clifford v. Pena*, 77 F.3d 1414, 1418 (D.C. Cir. 1996)).

review. *See Bar MK Ranches*, 994 F.2d at 739. Indeed, it would serve no purpose to adopt a rule that would require an agency to discuss in its rulemaking the range of consequences that might arise from a potential judicial order that would vacate the rule in whole or in part. And of course, the balance of the equities that would inform the Court's judgment in crafting a remedy would depend on the facts as they exist at the time of the judicial order.[3]

The Court should instead use Mr. Wu's declaration for the appropriate purpose for which it was submitted: to inform the Court's "considerable discretion in fashioning equitable remedies." *Boutwell v. Keating*, 399 F.3d 1203, 1207 n.1 (10th Cir. 2005) (citation omitted). HHS is not asking the Court to find facts on the basis of Mr. Wu's declaration but instead is offering it to assist the Court in evaluating whether vacatur of the 2014-2018 Rules' use of the statewide average premium is appropriate. As part of that inquiry, the Court should evaluate, *inter alia*, "the disruptive consequences of an interim change that may itself be changed." ECF No. 57 at 22 (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)).

II. The Court Should Exercise Its Ample Discretion to Deny NMHC's Requested Discovery, For Which NMHC Has Asserted No Basis.

In a two paragraph argument at the end of its motion, NMHC asks in the alternative that it be permitted to engage in broad discovery as to Mr. Wu's declaration, seeking to depose him and

[3] NMHC has not abided by the rule it claims must be followed in deciding the Rule 59(e) motion. In opposing that motion, NMHC has attached a declaration of its own. *See* ECF No. 63-1. This declaration appears primarily directed to attacking the substance of the risk adjustment rules and defending the quality of NMHC's business model. *See id.* ¶¶ 15–21; *see also* ECF No. 63 at 22 (stating that NMHC's declaration explains the purported unpredictability of the risk adjustment formula and the "unfair[]" results caused by it). It thus represents the kind of extra-record evidence regarding the legality of agency action that NMHC argues strenuously is so improper as to require striking.

to serve requests for production and interrogatories on HHS. Mot. at 5–6. In support of this extraordinary request for post-judgment discovery, NMHC once again cites no authority, only invoking vague notions of "[f]airness and rights of due process." *Id.* at 6.

NMHC has presented no legitimate basis to engage in the discovery requested. Federal courts have "wide discretion" in managing the discovery process. *Benavidez v. Sandia Nat'l Labs.*, 319 F.R.D. 696, 713 (D.N.M. 2017) (Browning, J.). One aspect of this discretion is that they are not "required to permit plaintiff to engage in a fishing expedition in the hope of supporting his claim." *Id.* (citation omitted).

NMHC can here only speculate that the discovery it seeks will have any bearing on the Court's evaluation of the remedial issue to which the declaration is directed. And NMHC does not refer to any particular piece of information it hopes to unearth through the discovery process, or what value that information would have. It appears that NMHC's argument is premised, not on a concrete demonstration of a need to develop more evidence, but instead on its baseless attacks on Mr. Wu's declaration as "self-serving" and as raising mere "allegations." This rhetoric provides no basis to seek discovery and, indeed, the broader presumption of regularity that attaches to the actions of public officers fatally undermines NMHC's speculation that Mr. Wu has been anything but truthful in his testimony to the Court. *See Riggs Nat'l Corp. & Subsidiaries v. C.I.R.*, 295 F.3d 16, 21 (D.C. Cir. 2002) ("in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties"); *cf. Bar MK Ranches*, 994 F.2d at 740 (holding that because established administrative procedures are "entitled to a presumption of administrative regularity," courts "assume[] the agency properly designated the Administrative Record absent clear evidence to the contrary").

CONCLUSION

For the foregoing reasons, Defendants respectfully request the Court deny Plaintiff's Motion to Strike or for Discovery, ECF No. 61.

Dated: May 7, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2018, I caused the foregoing document to be served on counsel for plaintiff by filing with the court's electronic case filing system.

/s/ James Powers
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