IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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ALIGNMENT HEALTHCARE INC.,

Plaintiff,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,

Defendants.

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CA No: 1:25-cv-00074-CRC

Washington, D.C.
Tuesday, June 3, 2025
11:04 a.m.

TRANSCRIPT OF MOTION HEARING
HELD BEFORE THE HONORABLE CHRISTOPHER R. COOPER
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

THE COURTROOM DEPUTY: This is Civil Matter 25-74, *Alignment Healthcare, Inc. v. U.S. Department of Health and Human Services, et al.*

Starting with plaintiff's counsel, please approach the podium and identify yourselves for the record.

MR. KIMBERLY: Good morning, Your Honor; Michael Kimberly for Alignment Healthcare.

THE COURT: Good morning. Good to see you.

MS. MUNDY: Good morning, Your Honor; Kara Wilcox Mundy on behalf of the defendants, and I'm joined at counsel table by Jared Littman.

THE COURT: Okay. Good morning, folks. Thanks.

All right. Quite a bit to cover. I have a hard stop at about 12:15. Given the discrete and sort of separate issues, I think it might make more sense just to handle these in order from counsel table, and we'll hear from the plaintiffs and then from the government on each issue in order.

Just as a prefatory matter, you know, I understand, Mr. Kimberly, that your clients are, you know -- take these issues seriously, and that there may be a lot of money at stake going forward, and I've tried to accommodate your requested decision schedule to the extent that I can, but I must say that, you know, it seems as if -- and correct

me if I'm wrong -- that, you know, you folks waited to bring this case at least three or four months after the Star Rating, and some of the adjudicatory decisions may have been challengeable even prior to that.

You gave me a bunch of briefs in March raising seven discrete issues, and you asked for a ruling in two weeks. You know, again, I'm happy to accommodate that, but as you may have heard, we get a lot of PIs and TROs in this court, and this strikes me as maybe not an end run but, you know, somewhat inconsistent with the -- you know, the PI rules in this court. And I'm not sure whether you would have qualified for a PI based on irreparable harm, and, you know, you're putting this case in queue ahead of a lot of others also with important issues being raised.

But that said, I -- you know, I appreciate your client's interest in a prompt resolution and the implications going forward, and we've tried to accommodate you as best we can. All right?

All right. With that, you should feel free to raise any of the issues that you would like.

Just to put my cards on the table, I'm probably most interested in the oversampling issue and the first erroneous appeal issue related to the alleged late referral to CMS. But that said, start wherever you'd like.

MR. KIMBERLY: Thank you, Your Honor.

THE COURT: Sure.

MR. KIMBERLY: I'd be happy, too, to address the timing question --

THE COURT: Sure.

MR. KIMBERLY: -- if that's at all relevant.

THE COURT: Sure.

MR. KIMBERLY: First, we, of course, appreciate the Court's consideration of our request in the timetable that we gave. There was a fair amount of waiting for the administrative record. One reason we didn't seek preliminary relief is we believed we needed the administrative record to prove up our claims, and that was a 60-day delay.

Having said that, I think in the current posture, if there is a decision from the Court really any time in the first half of June, maybe even into the third week, that should be sufficient to allow the parties, including CMS, to recalculate the Star Ratings as maybe necessary in light of the grant of any actual relief.

THE COURT: Okay. Well, what my plan is -- I've read all the papers. We've tried to digest the issues as best we can. Based on what we hear today, our plan would be to try to reach a ruling expeditiously. It may not be a full dressed memorandum opinion, but it will be enough to explain our reasoning and why we've come out the way that we

have. I'm not going to give you a particular date, but it will be sooner rather than later.

MR. KIMBERLY: Sure.

THE COURT: Okay.

MR. KIMBERLY: Very good. Thank you very much, Your Honor.

So I guess, if I may, I'll start with oversampling, Your Honor, since you put that on the table. I would also like an opportunity especially to stress the Spanish language survey administration problem.

THE COURT: Sure.

MR. KIMBERLY: But I understand you want to go one at a time so I'll address sampling first.

THE COURT: Okay.

MR. KIMBERLY: So as the Court knows, there is a significance testing component to the Star Ratings calculations. The Star Ratings calculations take account really of three general inputs. The first is the raw score on any particular measure; and the second is the reliability score, which is based on the quality of the data that is used to calculate the raw score; and the third is significance testing.

Through significance testing a contract can receive a higher overall Star Rating even when it has, compared to another plan, a lower raw score and an

equivalent reliability score, and this is particularly likely to be the case, as it has been, as we demonstrated, with Contract 3815, when other contracts engage in the practice of oversampling.

As a baseline matter --

THE COURT: If I could ask a clarification question --

MR. KIMBERLY: Sure.

THE COURT: -- just more generally. I should have started with this.

How many plans does Alignment offer roughly?

MR. KIMBERLY: Your Honor, I had that question this morning, and I don't know the answer to it.

MR. JOYCE: Numerous H contracts or plans?

MR. KIMBERLY: Yes.

MR. JOYCE: I think we have six contracts.

THE COURT: And three are at issue in this case, as I understand it.

MR. KIMBERLY: That is correct. Yes, Your Honor.

THE COURT: And what is an H contract?

MR. KIMBERLY: H is healthcare as opposed to drugs.

THE COURT: Okay. Got it.

MR. KIMBERLY: And the oversampling claim is relevant with respect to Contract H3815, which is the

California HMO.

THE COURT: Okay.

MR. KIMBERLY: So oversampling concerns the CAHPS survey. The CAHPS survey requires CMS to sample a minimum of 800 individual participants within any given contract unless the plan elects to oversample.

Oversampling is a possibility only when the contract actually has more than 800 individuals and when the plan is willing to pay for it. The survey that surveys 8,000 people costs roughly ten times what a survey that costs 800 people will cost.

THE COURT: So Alignment had the opportunity to oversample. It just chose not to.

MR. KIMBERLY: That's correct, Your Honor.

THE COURT: Okay.

MR. KIMBERLY: And most plans do not oversample.

So those plans --

THE COURT: Well, if, as I take your argument to be, oversampling can only lead to an enhancement of the score based on increased statistical validity, then why would a large plan not choose to sample?

MR. KIMBERLY: Well, it's a fair question, Your Honor. I think it's one concerning general cost-benefit analysis. I think the scenarios that you've -- that we demonstrated with respect to 3815 in the briefing are

generally unusual where you see a plan that has oversampled that, in fact, has a lower raw score achieving a higher Star Rating. So I wouldn't say it's a circumstance in which oversampling all the time produces higher Star Ratings. It's really got to be right near a cut point.

THE COURT: Can it produce a lower Star Rating, as the government suggests?

MR. KIMBERLY: I think in theory it could, Your Honor.

THE COURT: Okay.

MR. KIMBERLY: If you were in a -- if there was an especially low performing plan, and nothing in our claim turns on the fact that oversampling always produces an advantage. I think as a practical matter only larger plans that are well-performing plans are ones that would engage strategically in oversampling. So even if not as a logical matter, as a practical matter it always confers an advantage.

But whether it confers an advantage or disadvantage, the point is oversampling is not reflective of plan performance and plan quality. The Star Ratings are intended to allow plan participants to compare plans and make a determination whether one plan offered by one Medicare Advantage organization is higher quality than another. And the use of oversampling means that some plans

will achieve higher Star Ratings giving perspective plan participants the impression that that plan is higher quality not because it actually has higher quality, not because it has actually performed better, but for the entirely analytically irrelevant reason that it has engaged in oversampling.

So --

THE COURT: But if a -- you know, if a baseball player gets a .350 batting average with a thousand at-bats, shouldn't I bet on that guy over the guy who gets a .350 average over 200 at-bats?

MR. KIMBERLY: I wouldn't -- I guess the question is --

THE COURT: In other words, doesn't the validity that comes from a greater sample tell you something about the quality of the measure?

MR. KIMBERLY: Your Honor, respectfully, I think all it tells you is I think that there is more data to draw from.

THE COURT: Isn't that a good thing?

MR. KIMBERLY: It may be a good thing from a statistical point of view. If you're a number-cruncher working at CMS producing Star Ratings, it isn't necessarily a good thing, and I think anybody would look at it as irrelevant.

THE COURT: But if I'm betting on that guy to get a hit or not, I'm going to bet on the guy with the thousand data points as opposed to 200 data points, aren't I?

MR. KIMBERLY: Your Honor, I think that doesn't necessarily follow. That presumes that the contract that didn't oversample or, for that matter, did oversample but didn't oversample by as much is, in fact, performing -- is likely to perform at a lower level than one that does oversample. And especially when the raw scores are such that the one that doesn't oversample has a better raw score, there is not a reasoned basis that the agency has given for granting the oversampling contract to higher Star Ratings.

THE COURT: Okay. So if a plan had a poor raw score from the initial 800 sample, could oversampling confirm that poor score?

MR. KIMBERLY: I don't think oversampling could confirm it one way or the other. I think the idea is CMS has determined that 800 -- a sample of 800 is sufficient to derive Star Ratings, and any plan that meets that threshold is entitled to have the CAHPS scores included within its Star Rating calculations.

THE COURT: Okay.

MR. KIMBERLY: And at bottom, Your Honor, I would offer additionally that these really are not any of the rationales that the agency has given. The agency has just

asserted that oversampling is something that was available to Alignment; and, therefore, it sort of made its bed and now it must lie in it. It doesn't explain -- it doesn't offer a rational explanation as to how oversampling affects quality such that a plan with a lower raw score that oversamples should be effectively advertised to the consuming public as a higher quality plan than one that doesn't oversample and has a higher raw score.

THE COURT: Okay. Ms. Mundy, let me hear from you.

Thanks.

MS. MUNDY: I want to start with one point that Mr. Kimberly made, which is that they did a cost-benefit analysis here. Those were his words; i.e., Alignment made a decision that it would not want to sample --

THE COURT: I understand that, but why should that matter? If there is no relationship between or if he's right that oversampling does not tell me whether a plan is more reliable or not, or if a plan is performing better or not, then why does it matter that Alignment didn't see fit to spend however much money it would require to undertake the oversampling?

MS. MUNDY: Because reliability is important. I think we -- in the remaining parts and the issues that Mr. Kimberly raises regarding reliability of different

metrics, it is important to know -- and the Star Ratings do take into account -- whether or not the measure is more reliable or less reliable.

But oversampling is not a guarantee to higher scores, as Mr. Kimberly agreed; that it's possible to -- that if a plan is low-performing on a particular measure, to have that -- if that reliability is greater, to have that low measure score baked in at a greater degree.

The Medicare Advantage and the Star Ratings plans generally are covering all Medicare Advantage plans across the country. I mean, this is a complicated endeavor by the agency codified in rule-making subject to many, you know, public inputs on how best to implement Congress's request for these Star Ratings. And so CMS was tasked with figuring out what is the floor. What is the statistical floor of what is needed for there to be enough reliable information in most circumstances for most measures, and that's where the number 800 came up.

THE COURT: Okay. Understood. But is a plus factor assigned for statistical significance above 800 regardless of what the raw score is?

In other words, does CMS say because we have a greater sample, we are going to, you know, enhance the raw score regardless of what the starting point is?

MS. MUNDY: If --

THE COURT: Is there an independent benefit to a larger sample size beyond 800?

MS. MUNDY: Well, the reason that CMS gives this option -- and it is just CMS electing to give this option -- is because plans themselves, when they have these large -- you know, a large amount of beneficiaries on it, might want for their own benefit -- I mean, they are paying for this survey. They're doing this work. This is -- you know, they're getting these inputs from their beneficiaries on their plan performance.

And so that data is then reported to them. They can use those inputs and the answers to how they're doing on their survey. And if, for some reason, the plan would like more information, would elect -- believes that the sample size should be larger, they're entitled to do that.

And like I said, this is just an option CMS gives plans. It's not a requirement. And to the extent that it increases the reliability of a certain measure because of the way that they do significance testing, that can be a benefit and it can be a detriment.

THE COURT: Well, I guess my question is, so let's say one plan -- one large plan chooses not to sample, so there are 800 data points that CMS is averaging, right?

Another large plan, Plan B, decides to sample, so CMS now has, say, 2000 data points.

MS. MUNDY: Uh-huh.

THE COURT: Okay. Are the averages of those two set data sets just -- they are what they are, or is the plan that has 2000 points given a plus -- given an independent benefit because the sample size is larger?

MS. MUNDY: So the Star Ratings -- and this is on Page 17 of our reply, and it cites the administrative record, Pages 200 to 201. Star Ratings for these measures do take into account the distribution of where the scores fall just, you know, like the raw data points --

THE COURT: Right.

MS. MUNDY: -- the reliability of that score, and then there's a component about the significance -- whether the score is significantly different. So that's not significance testing but whether the score is significantly different from others.

THE COURT: Okay.

MS. MUNDY: And so that reliability metric, if you have more people who answer a certain question, can be enhanced as a result.

THE COURT: Okay. So the answer is yes.

MS. MUNDY: Yes.

THE COURT: There is an independent benefit or at least there could be an independent benefit to the --

MS. MUNDY: Oversampling can increase the

reliability, but that's not a guarantee that it increases the Star Rating score as a result.

THE COURT: Okay.

MS. MUNDY: I want to raise one other point with regards to oversampling, and that's going back to Alignment's initial complaint as well as their opening motion for summary judgment, and I'm looking at Count 3 of their complaint, Paragraphs 152 to 155.

In their complaint Alignment contended that they were unable to oversample, and their complaint was that oversampling is irrationally biased against smaller plans with fewer enrollees. They're seeking to invalidate H3815, a contract with over 91,000 enrollees.

Their complaint was about a bias against smaller plans, but this contract is anything but small. And as their complaint stands originally, their complaint was that CMS is acting arbitrarily and capriciously against small plans, and so our internal response to their brief was this contract is not small.

Alignment has many contracts, including some that receive five stars under the Star -- including one that received five stars this past year, one of the very few plans, Medicare Advantage plans, that did. That contract is far smaller.

THE COURT: So what's the legal significance of

that observation? That Alignment has not stated a claim? Is it a 12(b)(6) issue?

MS. MUNDY: The issue here is that what Alignment alleged was arbitrary and capricious in their complaint was that this unfairly disadvantages smaller plans. At this point now they're alleging that oversampling in any way, when you elect not to use it, is problematic, but that is not what their complaint --

THE COURT: So you're saying it's an improper amendment --

MS. MUNDY: Yes.

THE COURT: -- to the complaint by a brief.

MS. MUNDY: Yes.

So they pivoted in their opposition that now Alignment chose not to oversample and that CMS should disregard that choice, but CMS's methodology has always been to accurately reflect true performance. And there, as we've already discussed, are reasons why CMS has set the minimum sample size for 800.

And under the arbitrary and capricious standard CMS has shown -- has explained and provided a rationale for its belief about, when you're seeing all the Medicare Advantage plans in the country, the necessity to come up with a standard that's generally applicable to all plans. CMS has elected for plans who are, yes, paying for

oversampling; that if they want that data for themselves, if they feel that there's a perceived benefit to oversampling, including for them to get more information, that they have that benefit available to them.

High performers may benefit -- and we talk about this in our motion at 34 to 37 -- but low performers may not. CMS views the methodology as neutral because of the impact it may have enforcing those low Star Ratings.

Alignment's complaint is purely results oriented, and I think it shows in the fact that they're not asking you to disregard or to remove significance testing to any of the other contracts they're challenging today. They're only asking with regards to this one contract, and they have more than just the three that are at issue in this litigation.

But even amongst the litigation, they're only asking for this one to remove significance testing. In essence, they're asking you to carve out, to change the regulatory framework, for one contract that was unhappy with that cost-benefit analysis it did and decided that it did not want to pursue oversampling, and it alleged that it was harmed by the size of the plan, not the size of the sample, and is now pivoting to say that it shouldn't be held to account for its own cost-benefit analysis in figuring out how to conduct its sample.

Thank you.

THE COURT: Okay. Mr. Kimberly, why don't you address the amendment by pleading or amendment by brief issue first. And then, if you're right that the oversampling rules are arbitrary and capricious, why shouldn't that apply to all of your plans?

MR. KIMBERLY: So first the question about amendment by brief. I mean, our position all along, I think, has just been that oversampling confers an advantage, and some do it and some don't. And those that do who obtain the advantage obtain the advantage on the basis of something having nothing to do with plan quality.

So I point the Court, for example, to Paragraph 53 where we allege, for example, the larger number of respondents a survey receives -- that's a question about the size of the survey, not the size of the plan -- the greater the significance CMS will assign to the contract's measure level mean score. In this way the allowance of oversampling confers substantial advantage on larger contracts.

That's a true statement. It's consistent with the theory that we have briefed, which confirms -- which very expressly states that what oversampling does is confer advantages on plans that are able and choose to engage in oversampling. There's, to my understanding, no notice -- lack of notice on what the theory of our arbitrary and capricious claim on oversampling is.

THE COURT: Okay.

MR. KIMBERLY: I would say on the scope of relief, Your Honor, we have identified only one contract as to which this made a difference, and that's Contract 3815. We have no objection -- in our view, we don't have standing to require CMS to recalculate without observance of oversampling as to contracts that are not Alignment's or as to contracts that are not injured by oversampling, so we've focused on 38 --

THE COURT: Isn't the remedy to an arbitrary and capricious rule the vacatur of that rule?

MR. KIMBERLY: Well, I --

THE COURT: And wouldn't the vacatur apply across the board?

MR. KIMBERLY: It could, Your Honor, although I -- my understanding, and certainly the way that we've intended to bring this claim, is as a challenge to the Star Rating itself. The Star Rating is a final agency action, and it's an applied example of this oversampling methodology.

THE COURT: Okay.

MR. KIMBERLY: So I think -- and this is the way we've seen the other Star Ratings cases go.

THE COURT: So it's an adjudication in a sense.

MR. KIMBERLY: That's one way to think of it, yes, I think so. And it's obviously --

THE COURT: I know there are a lot of these cases floating around. I have another one where the briefing has just been -- has just gotten ripe, and this is the only one that I've encountered. So I know that there are others, but this is my first rodeo.

MR. KIMBERLY: Well, in these other cases, I can represent to you, Your Honor, that the Courts have generally been vacating the Star Ratings and remanding to the agency for recalculation in a manner consistent with the illegality that the Court holds.

THE COURT: Got it.

All right. Why don't we move to the Erroneous Appeal No. 1.

MR. KIMBERLY: Okay, sure.

So, Your Honor, this is the mishandling of appeal case number ending in 2526 by Maximus, which is, as you know, a private for-profit entity to which the agency has delegated decision-making authority.

THE COURT: Right.

MR. KIMBERLY: Underlying this particular issue, Alignment dismissed a plan level request for reconsideration because it didn't include what's called a waiver of liability. And that's --

THE COURT: So if it had not been a dismissal, if it had been an affirmance of the denial --

MR. KIMBERLY: On the merits, correct.

THE COURT: -- you would agree, I take it, that the referral was late. But your position is because it was a dismissal, there was no obligation to refer the dismissal to CMS; so, therefore, there was no deadline in place, and, therefore, it could not have been late.

MR. KIMBERLY: I think that's right, Your Honor.

There are two relevant deadlines within this regulatory scheme. The first is the deadline for an aggrieved party to file a request for reconsideration. And the second is the deadline for the plan, independent of such a request, automatically to forward the matter to Maximus.

THE COURT: Yes.

MR. KIMBERLY: Here, because it was a dismissal, this is not a case covered by 422.590(b)(2). Rather, it's governed by 422.590(i). And so this is not a circumstance in which the -- in which Alignment was required to forward, without awaiting a request for reconsideration, the matter to Maximus. The fact that it did so anyway doesn't excuse Maximus's failure to deal with the case appropriately according to the applicable regulations.

So if I can just walk through those regulations, I think it would be helpful.

THE COURT: Sure.

MR. KIMBERLY: 422.592(d)(2) requires Maximus to

dismiss when it determines, quote, the party failed to make out a valid request for a reconsideration in writing by the appointed deadline. Here no party made a request for reconsideration at all. Requests for reviews of dismissals, as I mentioned, are covered by 422.590(i).

Now, CMS's position is that Maximus was correct to treat the appeal as if it were an affirmance on the merits, which would have required automatic forwarding under 590(b)(2) because Maximus just did, as a matter of fact, forward it without awaiting a reconsideration request.

But the fact that Alignment forwarded it does not change the nature of the case. The case was a dismissal. It's covered by 590(i) and not 590(b)(2), and therefore it was a dismissal subject to review, if at all, only by election of the provider or the independent beneficiary under 422.582(i). And because there was no such request, there was no obligation to forward it. Because there was no obligation to forward it, the forwarding could not have been untimely under a provision that simply does not apply.

THE COURT: Okay. Ms. Mundy.

MS. MUNDY: When Alignment decided to forward the case to Maximus, it did so putting it into the posture that it was not a dismissal, because if it was a notice of dismissal, it would not have -- it would have sent the notice back to the complaining party and not to Maximus. So

Maximus --

THE COURT: But, in fact, it was a dismissal. Do you disagree with that?

MS. MUNDY: I do not disagree with that.

THE COURT: Okay. So --

MS. MUNDY: But the posture in which -- that Alignment sent it to Maximus, Maximus treated it as a decision on the merits, affirmed --

THE COURT: But it was erroneously forwarded as an affirmance on the merits --

MS. MUNDY: Right, it was forwarded --

THE COURT: -- when, in fact, it was something else.

MS. MUNDY: It was forwarded as an affirmance on the merits. So that is how Maximus adjudged it. It agreed with Alignment's decision, but the ding that Alignment got, the mark, was because of the timing. So Maximus looked at the file, agreed that Maximus was not required to -- you know, to pay that amount of money, but it held Alignment to account because Alignment believed it was supposed to have forwarded the file. It forwarded it because it would only forward something that you're receiving -- that -- a decision on the merits, and so that is how Maximus reviewed it.

THE COURT: But it erroneously agreed or

erroneously determined that it needed to forward the file as an affirmance on the merits when, in fact, it was a dismissal. So if -- you know, let's put substance over form. If the purpose of the Star Ratings is to assess, you know, plan performance and reliability, et cetera, at the end of the day this was a dismissal that did not require a referral.

MS. MUNDY: Sure. But if Align --

THE COURT: Why should -- you know, I understand how CMS treated it, but why should the plan be dinged for a deadline that really wasn't operative?

MS. MUNDY: Because Alignment had put itself into the posture of believing that this was something that needed to be forwarded, and this measure --

THE COURT: But the mistake that it made was misclassifying what was being forwarded, not really the timing of the forwarding. Isn't that fair?

MS. MUNDY: I think that the issue, as CMS sees it, and the reason that it impacts its Star Ratings is because Alignment, maybe for erroneous reasons, believed it was required to forward this file, but then if it believed it was required to file -- forward the file, then what -- it's supposed to have done so within a certain amount of time. And so this measure is saying whether Alignment provides the information in a timely manner to Maximus.

And so Maximus reviewed this as a decision on the merits. Maximus did not review this as a decision of a dismissal because that's not something that Maximus would review in this instance and in this posture.

THE COURT: Okay. But if I'm -- if I believe that I'm required to file a tax return by April 15th, and I fail to do so, I can't be held liable for missing that deadline if, in fact, I was not required to file that return by April 15th.

MS. MUNDY: Well, I think if you believed you were required to file a D.C. tax return and instead you were supposed to file a Maryland one, but in that D.C. tax return you certified to something that was untrue or you did something, then there could still be consequences that attach to an erroneous filing.

THE COURT: Okay.

MS. MUNDY: You know, if you -- I mean, this is in this hypothetical. You certified something. You certified an income, and they later found that you had misrepresented that, then you -- you know, that would carry with it some weight.

So here the thing that they're getting in trouble for is the timing issue. They put it in that posture before the independent review entity.

THE COURT: Okay.

Mr. Kimberly.

MR. KIMBERLY: Thank you, Your Honor.

My friend on the other side asserted that Alignment believed that this was a merits decision and had to be filed. I mean, it's also possible there was just a mistake. You know, mistakes happen. And the fact is, when a procedural error like this is made, it doesn't convert the underlying substance of the matter from dismissal into a merits decision.

THE COURT: Okay. I've heard enough on that one.

MR. KIMBERLY: Okay, great.

THE COURT: Where do you want to go from here?

MR. KIMBERLY: If you wouldn't mind, Your Honor, I'd like to touch on the Spanish language administration error.

THE COURT: Sure.

MR. KIMBERLY: And I'll note, Your Honor, that this has some overlap with the oversampling claim as a question of remedy. We have raised -- it appears in the dicta deduced by CMA that the over -- excuse me, that the Spanish language administration error impacted contracts H3443 and H3815. Our position is that if the Court were to rule in our favor on this point, the appropriate remedy would be a remand without consideration of the CAHPS survey data that's affected by this administration error, and if

the Court granted that relief, then it would subsume relief on the oversampling claim as well --

THE COURT: Okay.

MR. KIMBERLY: -- which concerns Contract H3815.

So the Spanish language administration error concerns the provision of the CAHPS surveys to the CMS selected samples of respondents in the language indicated by Alignment in the data that it provided to the CMS survey administrator.

On Page JA203 -- this is Administrative Record Page 172 -- the agency directs administrators, these third-party administrators of the CAHPS surveys, to make foreign language survey materials available to respondents in the manner requested by the plan. There's no debate here that Alignment requested the provision of only Spanish language surveys to it was 200 designated Spanish speakers.

THE COURT: 10 percent.

MR. KIMBERLY: 10 percent for 3815, 15 percent for 3443.

THE COURT: Okay.

MR. KIMBERLY: Each contract had roughly 200 designated Spanish speakers.

THE COURT: Okay.

MR. KIMBERLY: And what the data show, Your Honor, is that this has a negative impact on the CAHPS survey

results. We know this for three reasons.

One, CMS itself directs plans to consider the impact that providing surveys affirmatively in the language of the recipient has on survey responses, and it acknowledges that survey responses go up. And it makes sense. If you send Spanish language materials to Spanish speakers, the response rates will go up.

THE COURT: Okay. But in the English survey -- English language surveys that some of the participants received, there was an instruction saying if you would like a Spanish survey, you can request one, right?

MR. KIMBERLY: So, Your Honor, I guess I didn't see that in the --

THE COURT: Okay.

MR. KIMBERLY: That's an option. That's one of the options that the survey vendor can execute to satisfy the requirements of the protocol. But, again, when the -- that is a breach of the protocol. That is a breach of CMS's rules for the vendor to send an English language survey with a Spanish survey prompt to request a Spanish language survey, if they want --

THE COURT: Okay. I guess the bottom line here is, you know, admittedly it was -- it was Alignment's mistake or miscommunication with its survey provider or perhaps the survey provider's mistake, but once CMS became

aware of it, what else were they supposed to do besides, you know, assess whether the provision of the survey complied with their regulations, which they say that it did?

You know, what regulation or authority is there for your position, as I take it, that they should have thrown out those surveys even though it was not their fault that the surveys were sent in English rather than Spanish?

MR. KIMBERLY: Yes, so I don't think it's a question of fault one way or the other, and I certainly would say that it wasn't Alignment's fault. The data provided under the Court's protective order confirms that Alignment indicated who was to receive Spanish language surveys. It was DataStat, the survey administrator, who failed to provide Spanish language surveys to those total of 49 individuals.

THE COURT: But it's the provider -- it's the plan's responsibility to select the survey administrator and to then direct the survey administrator as to what language the survey should be in regardless of whose mistake it was. That's not -- CMS is not involved in that process. Fair enough?

MR. KIMBERLY: Well, CMS used to be involved in this process. They used to administer the survey up until 2010. In 2011 they outsourced it.

But they have a list of CMS-approved survey

vendors who contract with CMS and agree to follow CMS's protocols.

THE COURT: Okay. So that's my question. Is there a CMS protocol or rule that otherwise would require CMS to throw out those surveys once an error was detected?

MR. KIMBERLY: So I think -- I think the question there is just the APA.

THE COURT: Okay.

MR. KIMBERLY: So you've got a set of rules for how this survey is supposed to be administered. When the survey is not -- and across the board for, you know, the great majority of plans the survey is administered consistent with those stated protocols and requirements.

THE COURT: Okay. So the claim is an arbitrary and capricious claim. It's not a contrary to regulation or contrary to law claim.

MR. KIMBERLY: Well, right, because the protocols are subregulatory --

THE COURT: Okay.

MR. KIMBERLY: -- so that the issue is that the agency is treating -- through its third-party administrator is treating Alignment differently by not enforcing these protocols for administration of the CAHPS surveys for these two contracts.

THE COURT: Well, but, again, what protocol did

failure to throw out the erroneously dispatched English surveys --

MR. KIMBERLY: Right.

THE COURT: What protocol did that violate and how?

MR. KIMBERLY: So the protocol that was violated is the instructions concerning administration of survey and other languages on JA203. And our position is that -- I don't -- you know, I'll be interested to hear what my friend on the other side has to say about this, but I don't take their brief actually ever to deny that the survey was not administered consistent with this protocol. I understand them to come up with some explanations why it may have happened, but, again, it's not a process question.

The why doesn't matter. The point is the survey was not administered consistent with the protocol.

CMS all the time calculates Star Ratings for contracts without consideration of the CAHPS surveys. If the CAHPS survey doesn't reach a sufficient number of enrollees, they will not require a CAHPS survey. If there are other systemic problems with the CAHPS survey, they will disqualify it and not count it in the Star Ratings.

So the agency has a practice, when it is warranted, of not counting the CAHPS measures when there are problems with -- systemic problems with the CAHPS survey

that make its conclusion in a plan's Star Ratings inappropriate.

THE COURT: And I want to ask your colleague about this, but the government says that it did at least some degree of work to validate that.

MR. KIMBERLY: Right.

THE COURT: The responses were appropriate or valid, in other words. Why didn't the agency's validation procedures, whatever they were, why weren't those sufficient?

MR. KIMBERLY: So there are two answers to this.

THE COURT: Okay.

MR. KIMBERLY: The first, and I think most direct, is, again, this is not a procedural claim. We're not saying that CMS dropped the ball on procedure here. We're saying, look, we've seen the data now. Alignment's not allowed to see this data.

THE COURT: Okay.

MR. KIMBERLY: CMS and the survey vendor have and see the data, and they alone can confirm whether or not the concern about this error had taken place.

THE COURT: Okay.

MR. KIMBERLY: So all Alignment could do is raise it to CMS --

THE COURT: Okay.

MR. KIMBERLY: -- and wait for CMS to confirm whether or not its concern was true.

The question here is simply, now that we have shown that the concern was true, what's the remedy? If CMS had confirmed using the survey response --

THE COURT: I'm a little confused. Is the concern that CMS addressed the fact that 10 percent of the surveys were erroneously sent out in English, or was the concern that CMS addressed that the survey responses were valid or invalid because of the language barriers?

MR. KIMBERLY: No.

THE COURT: Did they look at the surveys and say -- the survey responses and say, no, you know, these look fine to us?

MR. KIMBERLY: So my understanding is they reached out to DataStat and they said, "Hey, did you follow the rules?"

THE COURT: Right.

MR. KIMBERLY: And DataStat said, "Yeah, we followed the rules."

THE COURT: Okay.

MR. KIMBERLY: And then they looked at the results at a general level and said, "These results fall generally within the range of results that we would expect. They don't look too whacky to us."

THE COURT: Okay.

MR. KIMBERLY: "So we are not doing any further investigation. We find your concern unfounded, and we shall, therefore, count the CAHPS survey for these two contracts."

THE COURT: Okay. You know, under the APA why isn't that a sufficient -- whether you agree or disagree --

MR. KIMBERLY: Right.

THE COURT: -- with their conclusions, why isn't that a sufficiently, you know, hard look at the issue?

MR. KIMBERLY: Because, again, this is not a procedural claim. This is a claim that the Star Ratings are based on CAHPS survey results that are obtained inconsistent with the protocols that were supposed to be followed.

I mean, you can imagine --

THE COURT: But that's true of the, you know, responses to many of these survey questions whether they're in Spanish or English. You know, the CMS looks at them and says these are valid or not. They're reliable or not. And there are different considerations that go into making those determinations.

Why isn't it the same here?

MR. KIMBERLY: Well, Your Honor, I think the point is that the only way, meaningfully, to confirm whether or not this concern was true was to look at what's called the

survey response data file, and this is referenced at JA198 to 199. This is the file that Alignment is forbidden from reviewing.

Our point fundamentally is that it's not an answer to a substantive administration error that Alignment brought to the agency's attention for the agency to take a look but not take -- but not actually confirm whether or not the error actually took place.

Essentially what they did is they looked at it and they said -- this isn't the language they used but in substance it's what they said: It's unlikely that this actually happened. We looked at the data, and it's unlikely that this happened, so we're not going to look any further at this.

But the fact is the error did happen, and, if the agency had uncovered the error in the plan preview period, it would not have counted the CAHPS survey.

THE COURT: Okay.

MR. KIMBERLY: Thank you.

THE COURT: Ms. Mundy.

MS. MUNDY: There's quite a few things I'd like to address from my colleague.

The first is I'd like to talk about what the guidelines actually require, CMS's guidelines, and this is the cited page of the Administrative Record 174 or the Joint

Appendix 205. I'm sorry. That's 172, Joint Appendix 203.

The requirement for Spanish language questionnaires is this. Spanish language questionnaires must be made available to all Spanish-speaking enrollees in web, mail, and telephone administration. That's the requirement. They must be made available.

Alignment has not and cannot show that the Spanish language questionnaires were not made available, and that is because there are multiple ways for an individual even if the DataStat messed up, even if there was a perfect ability to match Alignment's data that it provided to DataStat to the survey sample. And let's say they got these 20 ones wrong -- which we're not agreeing they did, but just engaging in this hypothetical -- CMS only requires that the Spanish language questionnaires are made available. There is no evidence in the record that they were not made available to those individuals.

THE COURT: All right.

MS. MUNDY: Then there was a --

THE COURT: Okay. Let's stop there. There is evidence in the record that Alignment informed CMS that its vendor mistakenly sent English language surveys to folks who should have received Spanish language surveys. That's in the record.

MS. MUNDY: No, it's they're -- what's in the

record is their belief it happened. And the reason that's important is because when CMS corresponded with DataStat to understand -- and this was talked about in the brief.

CMS pulls the survey sample. They send it to the vendor. Alignment is not entitled to know who that sample is.

So what Alignment can do, if it wants to use its own files about who might be a Spanish speaker -- or there's other optional languages, but obviously for this purpose it's Spanish -- what they can do is they can provide a data file to the survey vendor. The vendor then must endeavor to match the records.

This is imperfect, and DataStat explains -- and the administrative record at AR1194 to '95 explains DataStat's process. If there's an address issue, if a name is incorrect, if there's a reason that DataStat believes it can't make a perfect match, it then can go back to the default as if this was a person designated as an English speaker.

And this is important also because what happens when there is this prenotification letter? Even if the contract has requested the use of any of the optional questionnaire translations -- and I'm reading from Page 173 -- the vendors must mail a prenotification letter to all sampled enrollees in any of the 50 U.S. states or the

District of Columbia that is printed with English on one side and Spanish on the other side. That is to say that it is not as if even though Alignment provided this data, that there wasn't a notification of -- the prenotification letter didn't also get printed in Spanish.

And that the fact that this was in contention was raised in plaintiff's motion for a hearing in which we -- it contained substantive arguments that we did not get a chance to respond to, and so I've printed out, because I don't believe this is part of the Joint Appendix, the Administrative Record beginning at 403 to 450. And I have three copies here, which is the sample appendices from that guide about what the prenotification letter looks like to show that there's an English translation.

And even on the English side there's a line in Spanish about how to request it. But then, again, that prenotification letter must be also in Spanish even if one of those optional translations is -- or those optional methods.

And I say "optional" and am emphasizing "optional" because there is no word "must" for using these optional procedures. There's nothing in the technical guidance that suggests that there is a clear error if DataStat does not -- or the survey vendor, whoever they may be; here, DataStat -- does not do what Alignment asks them to do. It says survey

vendors may do any of the following at the request of the contract.

The only "must" in this whole section of technical guidance with regard to the Spanish language questionnaires is that they must be made available.

THE COURT: Okay. You can hand that up, if you'd like.

MS. MUNDY: So CMS --

THE COURT: Hand it to her, okay.

MS. MUNDY: And the explanation as to how they are used is on AR0173, which is that Joint Appendix. There's a section called "Mailing the Prenotification Letter." There's a section about whether -- what you do when they've not requested any of the optional methods, and then there's a section "if the contract has requested," which is the part I read from.

In addition, there's other ways that they get contacted about the survey, not just -- you know, there's the web. If they don't complete it, they get a telephone call. In each of those instances a beneficiary's able to select the Spanish translation.

So let's say they don't respond to the English. Maybe there's a -- you know, the person doesn't see the Spanish translation at the bottom or doesn't flip the page and see the Spanish translation on the back. When they get

that email link, it will have that language there, too. When they click the URL, it will go to the Spanish translation.

THE COURT: Okay. Okay. That was all in your briefs.

Let me ask you this. When Alignment raised the concern or the possibility that the vendor, you know, sent out surveys in the wrong language, what did CMS do in response to those to alleviate those concerns or to address those concerns?

MS. MUNDY: Sure.

THE COURT: Okay. Did it just investigate whether the vendor followed CMS's protocols for administering the survey, or did it go beyond that and somehow look at the data sets or the survey results that were returned by that cohort of people to assess the reliability and validity of those results?

MS. MUNDY: I think that they went beyond that.

THE COURT: Okay.

MS. MUNDY: So first they confirmed --

THE COURT: Did they do both of those things; and if so, how did they do the second? That's what I'm most concerned about.

MS. MUNDY: Sure. So the first thing they did is they discussed the issue with DataStat, and DataStat

confirmed. And I think the idea that -- we're talking about a group of 200; 188 people from the one contract, and then I know it's out of 201 for the other. Those individuals received the Spanish survey at Alignment's request. So CMS and even Alignment agrees that there is -- that there's clear evidence that Alignment used the data file. Alignment -- when CMS discussed the issue with DataStat, DataStat explained the matching process.

THE COURT: When you say "used the data file," what exactly does that mean?

MS. MUNDY: Sorry. So there's three kinds of things that are happening at the same time.

THE COURT: Okay.

MS. MUNDY: CMS selects the sample. It sends it to DataStat.

If DataStat --

THE COURT: The sample of participants.

MS. MUNDY: Yes, so the 800 enrollees here.

THE COURT: Got it.

MS. MUNDY: So once they select those 800 enrollees, that gets sent to DataStat. Alignment is not entitled to know who this sample is, so they send a file to DataStat of all -- and let's say it's for H3815 -- 91,000 individuals, and they have, you know, their name, their address, some -- whatever the identifiable information is

that they need to provide.

THE COURT: Right.

MS. MUNDY: And they will have it marked. You know, we'd like this person to get the Spanish materials at first -- without the English, just the Spanish only, if that's their request. DataStat then is required to do a process of matching.

So CMS also has its own Spanish flags. It's usually not as robust as a plan who interacts with an individual on a more frequent basis. So they have the CMS data. They have Alignment's data. Then they're attempting to do that match.

If there's a reason that they can't do the match, the survey vendor is entitled to say we can send this in English knowing that there's the options all along for the optional surveys.

THE COURT: Understood, okay.

MS. MUNDY: So CMS reached out to DataStat to understand did you actually use the preferences that the plan provided for you. Yes, they confirmed they did.

They did an independent statistical analysis of the sampling to make sure that the sample CMS pulled was a sample that represented the likely Spanish speakers to make sure that that was a valid component. They confirmed it did. Then they evaluated separately the response patterns.

THE COURT: Okay.

MS. MUNDY: That's the information CMS has access to. CMS does not have -- they're not part of that contractual relationship between Alignment --

THE COURT: So in plain English, what does it mean to evaluate the response patterns?

MS. MUNDY: So they're looking at how many people responded using the Spanish survey, how many people responded -- some people who even are marked as Spanish speaking still respond in English. They might be a bilingual household. They might elect to respond in English. And they evaluated whether the patterns fall within the normal range of what they would expect for Spanish speakers.

Remember what their requirement is; that the Spanish surveys must be made available. So while --

THE COURT: Okay. Let me -- so that I understand it, you did not say that CMS actually looked at the responses from the enrollees who Alignment said received the wrong language survey. Do they go to -- do they go to the response level and say, "Do these make sense?"

MS. MUNDY: On what basis would CMS adjudge whether someone filled out the survey or didn't fill out the survey? People elect not to do surveys all the time.

THE COURT: Understood. But when they fill out

the survey, they ask questions. They ask questions about, you know, customer service.

MS. MUNDY: Uh-huh.

THE COURT: They ask questions about how easy it was to make an appointment.

MS. MUNDY: Right.

THE COURT: And if someone is responding to a survey in a -- you know, in a second language, one might wonder whether the survey responses make sense. Did they check the boxes? Did they write a narrative?

I don't know. I don't have a survey. I don't know what it looks like.

MS. MUNDY: Well, the surveys are like did you receive care in the last six months and the amount of time -- you know, when you requested an appointment, did you get the appointment in a reasonable amount of time? Yes or no.

THE COURT: Okay.

MS. MUNDY: So I'm not sure how CMS would go behind that and say that this person was incorrect in saying that they did receive care in the right amount of time, or no, it was too long of a wait or something like that.

THE COURT: Okay.

MS. MUNDY: And I think that's also whether someone responded to the survey and also whether they chose to respond in English or Spanish even if Spanish were

presented, because that's still an option for them. I don't think it's CMS's place or I don't think CMS has the ability to then say this person should have responded in Spanish because they're a Spanish speaking household.

THE COURT: Yes, okay.

MS. MUNDY: I just -- they did verify that the Spanish language surveys were available and administered to protocol.

And I know that Alignment says that they use words like the concern was true, but CMS does not agree that the surveys were not made available. CMS doesn't even assert, if 20 people received the survey initially in English despite the request, that that was an error because there are issues with matching.

But even assuming that DataStat made that error, even assuming that DataStat had enough information to do the match and that it wasn't just part of the normal process of reconciling the files, that doesn't mean that the surveys weren't made available to them. It means that they weren't sent a Spanish survey initially.

THE COURT: Got it.

MS. MUNDY: They would have received that double-sided letter.

THE COURT: Okay.

MS. MUNDY: CMS engaged with Alignment throughout.

And I know that at this time they're saying this wasn't a process-based complaint, but I think that their briefing and their complaint speak to CMS inaction.

CMS is administering these surveys on a tight time frame for any Medicare Advantage plan in this country. They do this plan preview process, and I think that the administrative record on all of the issues show that Alignment -- I mean, that CMS has taken Alignment's concerns, run them to the appropriate people that need to weigh in on this, getting answers, providing those answers in email to each one of Alignment's concerns, explaining the steps it took, explaining the conclusions that it drew. And I understand that Alignment disagrees with the conclusions that CMS made, but under the Administrative Procedure Act that's not enough.

The question in these cases of tremendous complexity with the Medicare statute is when we give deference to the Secretary's decision -- and that's *District Hospital Partners v. Burwell* -- the relevant question is not whether the agency's policy is the best or the only solution, but whether it is a reasonable one. And that's *Petal Gas Storage L.L.C. v. FERC*, a D.C. Circuit case from 2007.

Under the *Motor Vehicle* standard where the agency must examine the relevant data and articulate the

satisfactory explanation, including that rational connection between the facts found and the choices made, to me there's no doubt that CMS heard these concerns, conducted its own investigation about whether the data should be included, and determined in this case it should.

And I think Mr. Kimberly's right, that CMS has this authority, has the ability to oversee these Star Ratings, and it does make changes to the Star Ratings based on the feedback that it gets in this plan preview process. It encourages this back-and-forth because it wants to get it right. And, in fact, in the administrative record you see multiple references of "Thank you for bringing this to our attention. We want to look at this again. We want to make sure it's right during the second plan preview."

THE COURT: Okay.

MS. MUNDY: And CMS did so here.

THE COURT: Okay. Thank you. I'm going to move things along.

Next issue, Mr. Kimberly.

MR. KIMBERLY: Thank you, Your Honor. If I may just very briefly note that the nature of our claim --

THE COURT: It's your own time that you're taking up.

MR. KIMBERLY: So I'll make this super quick.

THE COURT: I'll leave it to you to prioritize.

MR. KIMBERLY: The nature of our claim is look at this letter that's supposed to have the Spanish language at the bottom, and now imagine that the survey administrator just didn't include the Spanish language prompt at the bottom. Just didn't follow the protocol, didn't follow the rules. In that scenario, the survey vendor would not have done his job, and the survey data resulting would be affected by a protocol error.

THE COURT: Okay. Is there any evidence in the record that the actual survey results, the surveys that were returned, are not accurate because of the language issue?

MR. KIMBERLY: Well --

THE COURT: You have no way to know that, right?

MR. KIMBERLY: Well, I think what it shows is that -- what the data shows is unequivocally enrollees who were supposed to receive Spanish language didn't receive Spanish language. They received English language. And therefore their response rates went way down, and they responded less favorably. That's what Alignment's data shows and its comments to CMS suggested.

THE COURT: Okay.

MR. KIMBERLY: Your Honor, if I may, I'll touch briefly, I think, on, you know, one of the bigger issues in this case, which is the nondelegation issue.

THE COURT: Yes.

MR. KIMBERLY: I'll note that the Eastern District of Texas in the *United Healthcare* case under a closely related scenario recently found that the agency violated the nondelegation doctrine.

Here the scenario's a little different because we have Congress directing CMS to involve an independent review entity. Now, I think right away the trick here is that adjective "independent." It tells you that this is not an entity that is subject to review and supervision by the agency. This is 1395w-22(g)(4).

Now, the D.C. Circuit just last year held in *Alpine Securities* that, quote, for a delegation of government authority to a private entity to be constitutional, the private entity must act only as an aid to an accountable government agency that retains ultimate authority to approve, disapprove, or modify the private entity's actions and decisions.

THE COURT: Okay. So you're telling me that CMS does not have the authority to modify a finding by Maximus.

MR. KIMBERLY: That's correct, at both levels. At both the level of a decision where the claim is at issue and at the level where the plan is challenging a Maximus decision during the plan preview period under the Star Rating system. And we know this from 1395w-22(g)(5) and 42 CFR 422.592(i). Both say decisions by the independent

review entity are final and binding, and they are not subject to review under Section 405B of the Social Security Act. They are not otherwise subject to reconsideration by the agency.

There is no supervision at all. It is a disavowal of supervision, in fact.

THE COURT: Well, there is email correspondence in the record where you are writing to CMS challenging Maximus's findings --

MR. KIMBERLY: Right.

THE COURT: -- in several respects, so what was the purpose of that correspondence if not to encourage or request that the CMS take action with respect to Maximus?

MR. KIMBERLY: Well, and that is certainly what Alignment did, but I think what JA12 and JA3 both show is that all CMS did was, in its word, send on the objection to Maximus, and all Maximus did was look at it and say, "No, we got it right the first time," and CMS did not exercise any supervision over that decision. It just reported it back to Alignment.

THE COURT: Whether it exercised supervision or not, did it have the authority to exercise supervision? Is there -- could it have done anything? You were ask -- you were writing it for a reason obviously.

MR. KIMBERLY: Well, right, because we think it

was wrongly decided. So I don't think you can fault an entity that's been wronged by Maximus to try to persuade CMS to override it, but I think in 13 --

THE COURT: Well, if you're trying to persuade CMS to override it, that presumes that CMS has the authority to override it, doesn't it?

MR. KIMBERLY: Well, but again, I don't think Alignment's position in the plan preview period changes the nature of the statutory and regulatory scheme which make very clear that CMS, in fact, cannot -- lacks all authority to override the determination of -- again, it's in the title -- an independent review --

THE COURT: So you were just whistling in the wind then.

MR. KIMBERLY: You might say that, Your Honor. I mean, truly I think that's what the *United Healthcare* decision in the Eastern District of Texas held, that this is just a rubber stamp process.

THE COURT: Okay. Ms. Mundy.

MR. KIMBERLY: Thank you.

MS. MUNDY: I think ultimately, like so many of Alignment's claims, this comes down to dissatisfaction that in this particular instance CMS did not agree with Alignment. I think the record is --

THE COURT: Well, let's assume that CMS did agree

with Alignment.

MS. MUNDY: They could have altered the Star --

THE COURT: What could it have done and under what authority could it have done it?

MS. MUNDY: So as part of the Star Ratings the plan preview process is codified into regulation. That preview process is that ability for CMS to modify the underlying data that forms the basis of Star Ratings.

THE COURT: Okay.

MS. MUNDY: I think it's clear from the record that CMS believed it had that final authority. I think it's clear from the record where CMS --

THE COURT: But I understand that there's a give-and-take during that preview process where CMS can assess comments and change the ratings.

MS. MUNDY: Uh-huh.

THE COURT: But if part of the rating was based on a decision by Maximus on appeal, an appellate decision by Maximus, does CMS have the authority to override Maximus's finding on appeal?

MS. MUNDY: Yes.

THE COURT: Okay. And where in the record does it say that?

MS. MUNDY: I think it's --

THE COURT: Or where in the regs does it say that?

MS. MUNDY: Sure. So the regulations -- and I can get the exact thing. It's about the plan preview process and where that allows CMS. I think the underlying administrative record -- this is an informal process, but the underlying administrative record shows with regard to Star Rating the CMS Star Ratings team retains that final ability. The same as with them asking to throw out the CAHPS survey data or anything else, that if CMS identifies an issue, then they can take action.

And CMS said, "We will" --

THE COURT: Even if the issue is a raw score or a proposed rating that resulted from a Maximus appeal decision?

MS. MUNDY: Sure. So if they believed Maximus got it wrong, and they said we don't want to count this, so now you maybe have a -- the denominator is now 17, and we'll look at -- instead of 18 for this contract, and we'll look at those 17 cases, and we'll identify your Star Rating. They noted that they would -- quote, will look at these cases again because they wanted to make sure that Alignment -- or, excuse me, that Maximus got it right.

They -- just because they agreed with --

THE COURT: All right. Let's stop there.

MS. MUNDY: Sure.

THE COURT: When you say we'll look at it again,

we want to make sure Maximus got it right, understood.

MS. MUNDY: Uh-huh.

THE COURT: And they contact Maximus, "Can you take a second look at this?"

MS. MUNDY: Uh-huh.

THE COURT: "There's been an objection. There are some concerns. Here are our views."

If Maximus says, "No, we got it right," is there any authority -- and if so, where? -- that CMS has to override that Maximus final decision?

MS. MUNDY: Yes, as far as it applies to Star Ratings. And I think that this issue -- the issue of whether an independent review -- whether there's an unconstitutional delegation, it's certainly CMS's position that it's not in any aspect of the Medicare Advantage plan. I want to be clear on that.

But I think that the issue before this Court is narrowly tailored to the impact of that independent review entity on Star Ratings, and I think the record demonstrates that CMS retained that final authority, that it was not a rubber stamp, and I --

THE COURT: It could disregard Maximus's decision.

MS. MUNDY: Yes, and I --

THE COURT: And, again, I hear you, but if I'm sitting down to write an opinion, and I want to cite

something to support that proposition, what do I cite?

MS. MUNDY: I think you -- I think you can cite what the cases say as what the standard is for nondelegation, which is that it's not merely a rubber stamp, and that -- let me find them before I -- and that the administrative record here, which is the issue before this Court, shows that CMS engaged meaningfully, that it retained that final ability to make a decision, and under the precedent in this circuit, that that is well within the bounds of the nondelegation doctrine.

THE COURT: That sounds pretty general to me.

MS. MUNDY: In the most recent D.C. Circuit decision, *Hight v. DHS*, the D.C. Circuit confirmed --

THE COURT: One more time on that case name.

MS. MUNDY: *Hight* -- H-I-G-H-T -- *v. DHS*, it's a 2025 case. It confirms that fact-gathering by a private entity is lawful when the agency conducts its own review. That's the standard. There's no doubt, based on the administrative record, that CMS conducted its own review. There's no doubt that CMS did not say, "You're whistling in the wind. We can't do anything about what Maximus did." They took the time to look at those decisions.

Yes, they provided the rationale that Maximus provided, but it also agreed -- they said we are going to uphold these decisions indicating CMS was making an

affirmative decision to agree with Maximus's determination.

THE COURT: Okay.

MS. MUNDY: And the briefing here shows that CMS continues to maintain it got those two cases that were brought before CMS correctly. We're not saying Maximus got it wrong, but we didn't have any ability to change it.

CMS agreed with Maximus's decision, and maybe they could have disagreed. Maybe they could have said you're right, or they'd taken that in and they could have disregarded it. But they did agree, and there's a rational basis for this agreement as briefed here with those specific underlying cases as well.

THE COURT: Okay. Mr. Kimberly.

So flip side of that question to you: Is there any authority you can point to to say that a Maximus appeal decision is final and binding on CMS?

MR. KIMBERLY: Yes. It was the -- sorry, it was the provisions I cited to the Court earlier --

THE COURT: Okay.

MR. KIMBERLY: -- which include 1395w-22 Paragraph (g)(5), 42 CFR 422.592(i), 42 CFR 422.600(a), 42 CFR 422.616. These all confirm that Maximus decisions are final and binding and not reviewable by CMS.

THE COURT: In connection with a Star Rating determination.

MR. KIMBERLY: Well, sure, but, Your Honor, I mean, this is like -- you might think of this as something like a collateral attack on the decision. It would be a strange end run around this process if an MAO could obtain CMS review that is foreclosed in the actual substantive regulatory context through the Star Rating system.

THE COURT: Okay.

MR. KIMBERLY: I think it would also be quite unusual for CMS to say yes, Maximus got it wrong in this context but allow the Maximus determination against the MAO to stand.

THE COURT: Okay.

MR. KIMBERLY: And I would just note on JA3, this is AR3 as well, CMS didn't say we're going back to look again. It said thank you for raising this. We are going back to Maximus to look again at these issues.

There's no indication that CMS did anything in this process other than punt these questions to Maximus and allow Maximus to resolve them, and this is precisely the scenario that the Eastern District of Texas said violates the nondelegation doctrine.

THE COURT: Okay.

MR. KIMBERLY: Thank you.

THE COURT: Next issue.

MR. KIMBERLY: Oh, sorry, next issue. I'm sorry,

I'm looking at the clock.

THE COURT: Next issue. And I've got about 10 minutes.

MR. KIMBERLY: Okay, great. Okay. I'm sorry. I thought we were wrapping up.

All right. I did want to touch briefly on the minimum denominator issue. You know, this is another at bottom arbitrary and capricious issue that we raised. The minimum denominator question is one that goes to application of the Tukey Outlier Deletion Rule to these particular contracts, in particular the 3443 and 9686. The issue was raised in the rule-making.

THE COURT: By Alignment?

MR. KIMBERLY: By Alignment and others.

THE COURT: Okay. And when you say "the issue," the removal of outlier data issue and the minimum denominator issue specifically?

MR. KIMBERLY: Yes, exactly. So the removal of outliers is, as a logical matter, certain to compress the cut points. If you've got a body of data points and you take out the outliers, you're going to be squished in the middle. That makes the system much more sensitive to movements in raw scores.

THE COURT: Okay. But keeping the outliers in leads to reliance --

MR. KIMBERLY: Right.

THE COURT: -- on unreliable data.

MR. KIMBERLY: Exactly. So what Alignment explained is if you're going to engage in outlier removal, the least that you need to do to ensure that the system continues to work is adjust the minimum denominator to address this increase in sensitivity which applied without a denominator adjustment means that many plans will be incapable of earning each of the five stars.

THE COURT: Okay. Regardless of the merits of that -- of your preferred approach, did CMS respond to that suggestion?

MR. KIMBERLY: Not meaningfully, Your Honor. I would point the Court to 88 Federal Register 22,296 to 297. And there -- this is the full extent of the agency's response to this issue. "Closer cut points do not necessarily imply lower reliability or lessen the ability to distinguish between contracts." That's it. That's all they said. It's an ipse dixit. It's no response at all, and there's no discussion at all in any of that response why adjusting the minimum denominator requirement isn't appropriate.

I would note just very briefly at --

THE COURT: You note in your briefs this hypothetical that if there are only 11 data points for a

particular measure and you eliminate one or if the plan flunks one of those data points, then they automatically drop from a 5 to a 3; there's no way to get a 4.

MR. KIMBERLY: Right.

THE COURT: I mean, I'm sure the math is right on that, but is that -- did that happen --

MR. KIMBERLY: Yes.

THE COURT: -- to one of your plans --

MR. KIMBERLY: Yes.

THE COURT: -- specifically? And, you know, I guess that is mathematically a feature of the rule, but why does that automatically show that, you know, the results are not reliable or indicative of performance?

MR. KIMBERLY: Yes, and actually the scenario that we described, which has happened, is one in which a plan goes from 5 to 2 with one error.

THE COURT: Okay.

MR. KIMBERLY: In our case --

THE COURT: Well, a score on one measure goes from 5 to 2.

MR. KIMBERLY: Yes, exactly. That's correct.

THE COURT: That doesn't necessarily mean they overall -- right.

MR. KIMBERLY: So on two measures, plans make timely decisions about appeals and reviewing appeal

decisions. These are the two measures impacted by the Maximus issues. Contracts 3443 and 9686 dropped from 5 stars to 3 stars with one error. So they were categorically incapable of achieving a 4 Star Rating on those measures.

Now, why is that arbitrary and capricious?

THE COURT: I'm sorry, I don't mean to interrupt you, but I'm going to forget. Was the adoption of the Tukey Outlier Rule challenged initially when it was first promulgated?

MR. KIMBERLY: I know there have been lawsuits concerning it. I don't think this issue has been challenged facially.

THE COURT: Okay. Okay.

MR. KIMBERLY: So we're raising it in this as-applied context.

You know, 1395w-23 Paragraph (o)(4) is what establishes the Star Ratings program, and it directs CMS to establish, quote, a 5 Star Rating system. It follows, I think, just as a matter of congressional objectives and common sense that in administering a 5-star system of ratings that each rated contract be able to achieve 5 stars. It's not a 4-star system --

THE COURT: Well, this doesn't -- if not being able to achieve one of the stars on one of the 40 measures or 36 measures, however many there are, that does not

prohibit or mean that a plan cannot achieve an overall measure of any stars, correct?

MR. KIMBERLY: Well, that's correct, Your Honor, but what the implementing regulations all make clear is that this 5-star system is implemented through measured level ratings that are also -- that reflect the same 5-star system.

THE COURT: Okay.

MR. KIMBERLY: And, you know --

THE COURT: Because there are certain -- as I understand it, there are cases where a particular plan may not receive any star at all, any Star Rating at all on a particular measure.

MR. KIMBERLY: Well, that -- and our position is that ought to be the case here. If you can't -- if you can't earn -- if, as a mathematical and factual matter, you can't earn each of the five ratings, then you shouldn't be subject to the rating at all. There ought to be a minimum denominator requirement that ensures that each rated plan can actually achieve each of the five stars on the relevant measures.

THE COURT: Okay.

MR. KIMBERLY: Thank you.

THE COURT: Ms. Mundy.

MS. MUNDY: I think my colleague's cite to the

congressional requirement for 5 Star Ratings is faulty logic for each individual measure for the reasons that Your Honor already pointed out. There's nothing to suggest that Alignment couldn't achieve, you know, an overall Star Rating on a given measure.

And I just want to discuss briefly the minimum denominator threshold. CMS makes a determination about what the minimum amount for any of the individual measures would be required to to ensure that the rating has meaning; i.e., that it's statistically significant; that there wouldn't be noise in having that individual rating. And it makes that determination well in advance of the -- of those -- when they get the data points.

There's a second step that comes in that once they see which plans met the minimum denominator, that they then do that clustering algorithm, that they then remove the Tukey Outlier Deletion.

But what Alignment is asking for is an exception to this practice done universally for all plans in this predictable way that plans know what the minimum denominator is for a given measure going into it, and then they ask them to reverse the process to then -- once there's the cut points to ensure, to then look again, to look at that minimum denominator threshold, to ensure that they could meet every theoretical Star Rating increment on a given

measure.

This is asking CMS to undo a process that is codified in regulation and through guidance as to how Star Ratings are calculated, and the technical guidance is codified with a reference to the technical guidance.

THE COURT: Okay. Is Mr. Kimberly correct that the passage that he read was the sum and substance of the agency's response to the concern that Alignment raised in this regard?

MS. MUNDY: The section on -- there's been multiple rule-makings on Tukey Outlier Deletion, but CMS's position that because the numbers are closer together does not necessarily --

THE COURT: Understood.

MS. MUNDY: Yes, that is their response because it's true, as explained in the briefs, that when you're removing statistical outliers -- and CMS actually explained that for most measures there's no -- for many measures there's no outliers. For even ones where there's outliers there's not a significant shift.

For the very few that there is a shift, CMS feels that it better represents the actual data to distinguish between the plans.

THE COURT: I understand all that. I mean, going back to my baseball analogies, when they publish, you know,

a batting average, they throw out folks that have a minimum number because that's noise, and that would skew the results, and, as a result, the clusters, if they were going to cluster them, would be compressed.

But they raised a specific concern about the minimum number of denominators, and I guess my question is, is there a response by CMS to that specifically?

MS. MUNDY: No. They raised a response to compression, and CMS responded appropriately.

Their now solution in their briefing is to this idea of minimum denominators, which was not a part of the common end response in the rule-making.

THE COURT: Okay. Putting aside whether it was raised as a comment to the rule-making, was it raised in the preview -- the Star Rating preview process or at any time before the suit was filed here?

MS. MUNDY: I believe they did raise that in the Administrative Record, and CMS explains that the minimum denominators and Tukey Outlier Deletion is something that is codified in regulation, and that's not a place where CMS will say we'll throw out the Tukey Outlier Deletion for you and your plan only. That would be allowing them to not --

THE COURT: Okay. So is it in your briefs, that citation to how CMS responded during the preview period to the minimum denominator issue specifically?

MS. MUNDY: During the plan preview period? It's in the Joint -- it's in the Administrative Record.

THE COURT: Okay.

MS. MUNDY: I don't believe I cited to CMS's -- or CMS's response during the plan preview because I think Alignment accepted that this wasn't a place -- I think they raised these concerns, but I think they accepted -- they said we understand that this is the type of process that requires the regulatory change --

THE COURT: Okay.

MS. MUNDY: -- and so CMS was not engaging.

This was different from the Maximus issue. This is different from the Spanish language. This is sort of a -- CMS viewed it as a programmatic complaint.

THE COURT: I see. I see.

All right. I'm going to cut you folks off here. If we need any further information, we'll file something -- we'll post something on the docket, but I think we have everything we need, and we will endeavor to get something out in the timetable that you all have requested. And, again, it may not be a full dressed memorandum opinion, but it will certainly explain where we've come out.

All right. We're adjourned.

(Whereupon the hearing was adjourned at 12:28 p.m.)

CERTIFICATE OF OFFICIAL COURT REPORTER

I, LISA A. MOREIRA, RDR, CRR, do hereby certify that the above and foregoing constitutes a true and accurate transcript of my stenographic notes and is a full, true and complete transcript of the proceedings to the best of my ability.

Dated this 20th day of June, 2025.

/s/Lisa A. Moreira, RDR, CRR
Official Court Reporter
United States Courthouse
Room 6718
333 Constitution Avenue, NW
Washington, DC 20001

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/s/Lisa [1] - 67:10

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