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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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HMO LOUISIANA, INC.,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES, et al.,

Defendants.
----- x

CA No: 1:24-cv-02931-CRC

Washington, D.C.
Wednesday, July 2, 2025
3:08 p.m.

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

APPEARANCES:

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1 P R O C E E D I N G S

2 THE COURTROOM DEPUTY: Good afternoon. We're here
3 today for a motion hearing in Civil Action 24-2931, *HMO*
4 *Louisiana, Inc. v. The Department of Health and Human*
5 *Services, et al.*

6 Beginning with counsel for the plaintiff, if you
7 would approach the lectern and identify yourself for the
8 record.

9 MS. WIGGER: Thank you. Good afternoon, Your
10 Honor; my name is Hannah Wigger, and I represent HMO
11 Louisiana in this matter. I'm joined by my co-counsel, Paul
12 Werner, Tifenn Drouaud, and Imad Matini.

13 THE COURT: Okay. Did you guys get an earful
14 before?

15 MS. WIGGER: Not yet.

16 THE COURT: At the hearing before?

17 MR. MATINI: We did not.

18 THE COURT: I was going to say welcome to my
19 world, but...

20 MR. BARDO: Good afternoon, Your Honor; John Bardo
21 on behalf of the government. I'm joined at counsel table by
22 Ken Whitley and Kristin Roddy. Mr. Whitley is a Special
23 Assistant U.S. Attorney so he's going to be taking the lead
24 on the argument.

25 THE COURT: Very well. Welcome, everybody.

1 MR. BARDO: Thank you, Your Honor.

2 THE COURT: All right. Ms. Wigger, it's your
3 challenge so why don't we start with you.

4 MS. WIGGER: Thank you, Your Honor.

5 THE COURT: All right.

6 MS. WIGGER: Your Honor, we are here today because
7 CMS issued a Star Rating for services not actually offered
8 in violation of its own regulations and the APA. That error
9 has cost HMO Louisiana tens of millions of dollars in
10 Quality Bonus Payments that it needs to provide supplemental
11 services to its members, including things like reduced cost
12 sharing, vision services, dental, hearing aids, that kind of
13 stuff.

14 HMO Louisiana is entitled to summary judgment on
15 its APA and declaratory judgment claims because CMS's
16 actions violate the plain text of its regulations and
17 undermine the basic statutory objective to provide Star
18 Ratings that are a true reflection of the plan's quality.
19 And I would like to take each of those in turn.

20 First, CMS's calculation of HMO Louisiana's --

21 THE COURT REPORTER: I'm going to ask you to slow
22 down because I see that you're reading.

23 MS. WIGGER: Sorry. It's a problem I have so feel
24 free to interrupt me.

25 THE COURT: We've got plenty of time.

1 MS. WIGGER: CMS's calculations of HMO Louisiana's
2 2025 Star Rating is contrary to its own regulations. HMO
3 Louisiana contracts with CMS to provide an alternative to
4 traditional government managed Medicare.

5 THE COURT: Okay. So contrary to -- the
6 regulation that you're saying it's contrary to is 42 CFR
7 422.161(b)(3)?

8 MS. WIGGER: Correct, and technical notes that are
9 incorporated as well --

10 THE COURT: Let's start with the main regulation.

11 MS. WIGGER: Yes, Your Honor.

12 THE COURT: All right. And didn't HMOLA take the
13 position in the negotiation process that that regulation, in
14 fact, required consideration of measure C02 or C05?

15 MS. WIGGER: Yes, sir.

16 THE COURT: And why weren't you right then as
17 opposed to being right now?

18 MS. WIGGER: Yes, Your Honor. When this dispute
19 started between the parties, there were several measures
20 that were at issue between the parties.

21 THE COURT: Right.

22 MS. WIGGER: And HMO Louisiana was trying to work
23 with CMS to come to a global resolution of this case in the
24 context of settlement discussions and to understand how CMS
25 actually treated several of these measures. In that

1 context, they did ask CMS to collect data for different
2 measures, but the issue here is how CMS actually applied
3 that data to the one measure that's at issue here.

4 THE COURT: Okay. Let's just pause. So that
5 regulation says that for the first two years after
6 consolidation CMS calculates the Star Rating based on
7 enrollment weighted averages of the scores of the
8 consolidated contracts. Enrollment is calculated as of
9 July.

10 Why doesn't that directly cover the situation with
11 respect to Measure C05?

12 MS. WIGGER: Because that is a general provision
13 that is made more specific in the technical notes that are
14 also incorporated by the -- in the Federal Code that
15 directly relate to the way that data is applied to Measure
16 C05.

17 THE COURT: Okay. And so the technical note is at
18 Page 37 of the AR.

19 MS. WIGGER: It begins there, Your Honor, yes, and
20 I can point you to specific provisions at issue here.

21 THE COURT: Hold on.

22 MS. WIGGER: So for Measure C05, that begins on
23 JA45. I believe that's the same AR number for the earlier
24 numbers.

25 THE COURT: Okay.

1 MS. WIGGER: So JA45 speaks to how data is applied
2 to Measure C05. And, again, this is incorporated into the
3 operative regulations at 42 CFR 422.164(a).

4 So under its regulations at AR45, CMS is required
5 to exclude from its calculation of Measure C05 contracts
6 with an effective termination date on or before June 15,
7 2024.

8 Attachment E to these technical notes, which is at
9 JA127, reiterates that same calculation. So at JA127, CMS
10 sets forth a two-step process; not the two-step process that
11 they reference in their opposition brief, but the two-step
12 process in their regulation for how they calculate Measure
13 C05.

14 That two-step process under Step 1, they start
15 with all contracts that offer at lease one SNP plan. Now,
16 here that's only the consumed contract. The surviving
17 contract never offered an SNP plan so it was never evaluated
18 for it.

19 Step 2 at JA127 is to, quote, exclude any
20 contracts with an effective termination date on or before
21 the deadline to submit data validation results to CMS, which
22 is, again, June 15th of 2024.

23 THE COURT: But you took the position in your
24 October 14, '24, letter objecting to CMS's exclusion of
25 Measure C05 data that Contract 5576 was not terminated

1 because it was consumed after the consolidation with
2 Contract 6453.

3 You're now taking the opposite position. You
4 convinced CMS to adopt your position. They did. Now you're
5 complaining about it.

6 MS. WIGGER: Your Honor, again, at the beginning
7 of this case HMO Louisiana was trying to understand what CMS
8 had done and how they could resolve it.

9 THE COURT: Well, you were doing more than trying
10 to understand it. You were urging them to accept your
11 position, which they did. And you objected to their
12 interpretation of the technical note to prohibit inclusion
13 of data from terminated contracts.

14 MS. WIGGER: That's true. HMO Louisiana did do
15 that. However, looking at these regulations --

16 THE COURT: Now, you can tell me you're entitled
17 to change your position. They're not. That's what I
18 expected to hear. But you can't say that wasn't your
19 position because you were just trying to understand the
20 issues. Right?

21 MS. WIGGER: It's what was in the letter that is
22 in the record from HMO Louisiana at the beginning of this
23 case.

24 THE COURT: Okay.

25 MS. WIGGER: But the issue is that what CMS

1 actually did still has to comply with the APA. And when you
2 look at the APA --

3 THE COURT: And why doesn't it comply with
4 regulation?

5 MS. WIGGER: Because the regulation says that data
6 from contracts with an effective termination date on or
7 before June of 2024 has to be excluded. This contract --

8 THE COURT: That's the technical note.

9 MS. WIGGER: Correct.

10 THE COURT: Why don't we get there.

11 First of all, is it binding, or is it not binding?
12 Is it agency guidance that's not binding, or is it something
13 the agency has to adhere to?

14 MS. WIGGER: No, it's binding. It's been
15 incorporated into the regulations.

16 THE COURT: Okay. And if it weren't incorporated
17 into the regulations, would it still be binding?

18 MS. WIGGER: Yes, it's still binding on the
19 agency. The agency --

20 THE COURT: What authority -- what's your best
21 authority for that proposition?

22 MS. WIGGER: The APA. Because when the agency
23 sets out regulations and says, "This is how I'm going to
24 calculate" --

25 THE COURT: Well, wait, wait, wait. We've got

1 regulations, notice and comment, et cetera, right?

2 We have informal agency internal guidance via a
3 technical note, right?

4 Let's say that they're not incorporated into the
5 regulations. Are they binding?

6 MS. WIGGER: Yes.

7 THE COURT: What authority do you have for that?

8 MS. WIGGER: The APA. Because under the decisions
9 that interpret the APA, the agency cannot act arbitrary and
10 capriciously, and part of that is that it can't treat
11 parties differently. So if it says this is how I'm going to
12 calculate data and validate it in order to determine the
13 substantial benefits, these tens of millions of dollars I'm
14 going to hand out under the Star Rating program, it has to
15 do the same for every program.

16 THE COURT: So if an agency deviates from
17 nonbinding agency guidance, that's nevertheless arbitrary
18 and capricious under the APA in all cases.

19 MS. WIGGER: It is in this case.

20 THE COURT: Is that your position?

21 MS. WIGGER: It would be in this case at least.
22 I'm not going to say in all cases, but it would at least be
23 in this case because they would not be treating programs the
24 same way. They would be arbitrarily treating this
25 programming differently.

1 THE COURT: Okay. So as I understand it, your
2 position or HMOLA's positions in the negotiations was that
3 that technical note really did not apply because this
4 contract had not been terminated.

5 So having accepted that position, isn't it fair to
6 say that the agency changed its position because it agreed
7 that that technical note doesn't apply to situations where
8 there's a consolidation of a contract.

9 MS. WIGGER: I don't know why the agency changed
10 its position, but --

11 THE COURT: Okay.

12 MS. WIGGER: -- I would like to say something on
13 the termination piece of this.

14 THE COURT: Okay.

15 MS. WIGGER: There doesn't seem to be any real
16 dispute that this contract has actually terminated, the
17 subsumed contract.

18 The agency's regulations do not define
19 "termination" as a distinct concept from consolidation, but
20 they do define "consumed contract," and that's at 42 CFR
21 422.162(a). And in that definition, they defined a consumed
22 contract as one that will no longer exist after a contract
23 year's end as a result of consolidation. That has to mean
24 terminated. If it doesn't exist anymore, that has to mean
25 that it terminated it.

1 And, again, that is how the agency itself referred
2 to this contract. They referred to it as a terminated
3 contract at JA217 in that same correspondence.

4 THE COURT: Okay. So let's assume you're correct.
5 Let's assume that the subsumed contract was terminated.
6 Then isn't that flatly inconsistent with the agency's
7 obligation to, you know, take data from both contracts in
8 assessing the quality of a consolidated contract for the
9 first two years?

10 MS. WIGGER: No, I don't read it that way, and
11 here's why. When you look at the technical notes for each
12 of these measures, it lists specific exclusion. There's a
13 general rule that you would consider all the data and then
14 there's a specific way in the technical notes that the
15 agency is to look at each of these measures.

16 When you look at each of the measures, there's
17 specific exclusions to each measure.

18 THE COURT: Okay.

19 MS. WIGGER: The exclusion for C05 happens to have
20 that date as June 15th. The exclusion for other measures
21 doesn't, and some of them aren't even date related.

22 THE COURT: Okay.

23 MS. WIGGER: And so there may be a general
24 directive that they would consider data, but the way that
25 they do that is more specifically defined and they have more

1 specific controls.

2 THE COURT: Okay. So the agency, through notice
3 and comment, decided that we're going to consider both
4 contracts or, you know, the consumed and the surviving
5 contracts' data for some measurements, but just not for CO5.
6 That's your --

7 MS. WIGGER: I think it's a little bit more
8 nuanced than that. So it's not that we're going to consider
9 some data from some and not others. It's just that they
10 have different cutoffs or exclusions for different measures.

11 THE COURT: Okay.

12 MS. WIGGER: Some are dates -- tied to dates.
13 Some are tied to when different visits took place.

14 THE COURT: Okay.

15 MS. WIGGER: But, Your Honor, I think that CO5 is
16 also a unique measure, because CO5, unlike some of the other
17 measures, including the other one that was at issue between
18 the parties, relates to the presence of a specific program
19 as opposed to something like a quality measure that both
20 contracts would have. And so in this case the problem is
21 that you have the surviving contract that actually should be
22 being evaluated because that's what people will be signing
23 up for --

24 THE COURT: Okay. Let's stop there.

25 MS. WIGGER: Yes.

1 THE COURT: I want to -- so let's go to 30,000
2 feet.

3 MS. WIGGER: Okay.

4 THE COURT: When two contracts combine --

5 MS. WIGGER: Yes.

6 THE COURT: -- and one contract offered a special
7 needs plan, that contract is subsumed within a surviving
8 plan. The surviving plan continues to offer a special needs
9 plan or the surviving contract continues to offer a special
10 needs plan.

11 In effect, isn't that just a continuation of the
12 same plan? It has the same enrollees, correct?

13 MS. WIGGER: It would likely have --

14 THE COURT: Many would overlap with the same
15 enrollees, the same plan administrators, the same nursing
16 homes where people are getting care. Correct?

17 MS. WIGGER: Potentially.

18 THE COURT: Okay.

19 MS. WIGGER: I think that there would be a
20 different pool when you put the contracts together,
21 potentially different management, different policies.

22 THE COURT: Okay.

23 MS. WIGGER: I don't think it's fair to say that
24 the plan that existed in the subsumed contract exists
25 exactly how it did in the surviving contract.

1 THE COURT: It may not be exact, but it certainly
2 shares some attributes of the consumed plan that used to
3 offer special need plans. Is that fair?

4 MS. WIGGER: It could.

5 THE COURT: Okay.

6 MS. WIGGER: Or there could be a reason that they
7 combined contracts and that they believe that the contract
8 that is going to survive is stronger.

9 THE COURT: Okay. But there is some overlap, some
10 continuation of services, doctors, facilities, contract
11 administration. You know, if I'm signing up for, you know,
12 that surviving plan and I -- or surviving contract and I
13 need special needs services, shouldn't consumers be able to
14 consult a Star Rating, or wouldn't it be helpful to have a
15 Star Rating for that plan that considers those special needs
16 services that are continuing even though the surviving or
17 the consumed plan has been discontinued?

18 MS. WIGGER: There's nothing in the record that
19 shows that those special needs services are the same or
20 unchanged in the surviving contract. So that Star Rating is
21 not a fair reflection of the actual quality of the surviving
22 contract.

23 THE COURT: Okay. Well --

24 MS. WIGGER: The Star Rating of the overall
25 program I think is more instructive, and the problem here is

1 that the Star Rating of the overall program took a massive
2 hit because of an SNP program that it didn't control at all,
3 and that is fundamentally unfair.

4 THE COURT: Okay. There was one thing from the
5 record that I want you to -- that I had difficulty
6 understanding. Just hold on. Bear with me.

7 (Pause)

8 THE COURT: Okay. In the September 12, '24, email
9 from Mr. Miller to CMS, which is at AR317 to '19, at AR319
10 Mr. Miller writes, "Despite its relevance to the Star Rating
11 calculation for the surviving contract, HMOLA was unable to
12 submit data for two measures for Contract H5576 due to a
13 technical issue with HPMS."

14 What is the technical issue with HPMS? Was this a
15 computer issue or an issue on CMS's side? Why did he refer
16 to it as a technical issue?

17 MS. WIGGER: My understanding is it was an issue
18 on CMS's side such that they literally could not upload
19 data, which, again, we think is consistent with the
20 technical notes.

21 THE COURT: Okay. And so if CMS makes a
22 determination that a particular piece of data is -- should
23 not be factored into the Star Rating system, it prevents
24 plans from even submitting that data. Is that what that
25 refers to?

1 MS. WIGGER: I don't know that is actually true.

2 THE COURT: Okay.

3 MS. WIGGER: I just know in this case they
4 literally could not upload their --

5 THE COURT: And remind me what "HPMS" stands for.

6 MS. WIGGER: That I do not know off the top of my
7 head.

8 THE COURT: Okay.

9 Okay. So your central argument is that the
10 technical notes are incorporated into the regs; that,
11 notwithstanding what HMOLA's position was initially, the
12 inclusion of CO5 data should not occur because the consumed
13 contract had been terminated consistent with CMS's original
14 position; and therefore the action is arbitrary and
15 capricious.

16 MS. WIGGER: That is correct. And we'd ask the
17 Court to set aside the Star Rating and order CMS to
18 recalculate it.

19 THE COURT: Okay. Thank you.

20 MS. WIGGER: Thank you.

21 THE COURT: All right. So you're Mr. Whitley?
22 Is that right?

23 MR. WHITLEY: That's right, Your Honor.

24 THE COURT: Where are you on detail from?

25 MR. WHITLEY: I'm in the office of general counsel

1 at the Department of Health and Human Services.

2 THE COURT: All right. So you probably know what
3 "HPMS" stands for.

4 MR. WHITLEY: Yes, Your Honor. For your
5 information, it's health plan management system. I'm happy
6 to discuss it further.

7 I'm Special Assistant United States Attorney
8 Kenneth Whitley on behalf of the defendants. Good
9 afternoon. May it please the Court.

10 Your Honor, we're here today because HMOLA won't
11 take yes for an answer. In September 2024 HMOLA asked CMS
12 to include special needs plan data from its consumed
13 contract in calculating the CO5 measure for its surviving
14 contract. CMS agreed to do so.

15 HMOLA expected its overall score to increase from
16 3.5 to 4 stars. When CMS permitted HMOLA to submit its
17 data, its Star Rating remained the same at 3.5 stars.

18 In this litigation, HMOLA is asking this Court to
19 require CMS to calculate its Star Rating for the
20 consolidated contract without the CO5 measure, which was
21 three stars, but to maintain the five stars it achieved on
22 the D11 measure. This Court should reject this effort to
23 cherry-pick beneficial measure scores and jettison adverse
24 ones.

25 HMOLA was correct the first time. The approach

1 CMS took was consistent with its regulations.

2 THE COURT: Okay.

3 MR. WHITLEY: Your Honor, I -- I'm sorry.

4 THE COURT: Hold on. So both sides have changed
5 their position obviously, right? CMS started with the part
6 that the technical note required not -- you know, required
7 that CO5 data not be considered for the consumed contract,
8 all right. At some point CMS changed its mind.

9 Now they changed their mind as well, but they're a
10 private party. They're entitled to do that. They're not
11 subject to the APA. CMS is.

12 And so I guess my first question is, where in the
13 record does the government explain -- or where in the record
14 did CMS explain why it changed its position that the
15 technical note on terminated contracts prohibited
16 consideration of data on measurement CO5 in calculating the
17 25 Star Rating?

18 MR. WHITLEY: Your Honor --

19 THE COURT: Was it required to explain why it
20 changed its mind?

21 MR. WHITLEY: The regulation set out a plan
22 preview process, Section 422.166(h)(2). To set out the plan
23 preview process there are two planned previews that occur,
24 first in August and September, and that process exists to
25 allow individual contracts to, you know, ask for corrections

1 or clarifications about their Star Ratings.

2 CMS responded and accepted the corrections that
3 HMOLA asked for, and that explanation is at Pages 315 and
4 '16 of the record.

5 THE COURT: Hold on. 315 and 316.

6 All right. I have 315 and 316. Where does CMS
7 explain why it changed its position and adopted HMOLA's
8 position?

9 MR. WHITLEY: Sorry, just one second, Your Honor.

10 THE COURT: Take your time.

11 The last sentence on 315?

12 MR. WHITLEY: Yes, that's right.

13 THE COURT: Okay. So it basically says that it's
14 Louisiana Blue's request, and after further consideration
15 CMS agreed to accept Contract H5576's 2023 SNP data.

16 MR. WHITLEY: That's right, Your Honor.

17 THE COURT: Is that the sum and substance of CMS's
18 explanation for why it changed its position that the
19 technical note concerning terminated contracts applied?

20 MR. WHITLEY: That's the sum of the explanation in
21 the record. CMS's explanation is that the exclusion did not
22 apply. CMS excluded special needs plan data from the
23 consumed contract because it improperly regarded that
24 contract as terminated. That was incorrect.

25 THE COURT: Okay.

1 MR. WHITLEY: Because it regarded the consumed
2 contract as terminated, the line and guidance applied
3 regarding the data validations deadline and how it regarded
4 terminated contracts.

5 THE COURT: Okay. So an agency can change its
6 position, of course. But doesn't it have to explain the
7 change under the APA? And if so, the question then becomes
8 whether -- and this is -- I take it it's a form of informal
9 adjudication. There's an adjudication over whether one
10 rating or another rating should apply.

11 To what extent does the agency have to explain its
12 change, and has it sufficiently explained it by way of this
13 sentence?

14 MR. WHITLEY: Your Honor, the explanation CMS gave
15 was sufficient. It is sufficient for CMS to say it agreed
16 with the request, HMOLA's request.

17 This is an informal adjudication, as you stated,
18 and so, you know, the plan preview process is meant to be
19 sort of an iterative process, a back-and-forth to allow
20 plans to express their questions about their -- and
21 objections to the way Star Ratings are calculated. There's
22 no formal requirements that CMS issue an extensive decision.

23 Again, I direct you to Section 422.166(h)(2) of
24 the regulations that discuss the plan preview process.
25 There are no formal requirements for CMS to issue some kind

1 of extensive written opinion.

2 THE COURT: So implicit in the -- I take it your
3 argument is implicit in the statement "CMS agreed to accept
4 Contract H5576's '23 SNP data" is "We agree with the
5 rationale that HMOLA offered during this consultative
6 process."

7 MR. WHITLEY: Yes, Your Honor, that's correct.

8 I take HMOLA to be making two arguments in this
9 litigation.

10 The first is that if a surviving contract is not
11 the contract to have offered a special needs plan during the
12 measurement year, then that consolidated contract should not
13 be evaluated on the CO5 measure. That's not supported by
14 CMS's regulations anywhere.

15 As Your Honor alluded to already, Sections
16 422.162(b)(3)(i) and 422.162(b)(3)(iv)(B)(1) create a
17 requirement that consolidated contracts be evaluated on
18 measure scores during a measure year for the consumed and
19 the surviving contract.

20 THE COURT: Okay. Well, address your colleague's
21 argument that while that may be generally so, the technical
22 notes create some specific exclusions to that general
23 principle, including one involving specifically Measure CO5.

24 MR. WHITLEY: Your Honor, that's respectfully just
25 wrong. The guidance creates an exception for terminated

1 contracts.

2 Again, the error that CMS made was in regarding
3 the consumed contract as terminated. But the consumed
4 contract wasn't terminated for some of the reasons --

5 THE COURT: What does it mean for a -- in the
6 normal course, putting aside consolidated contracts, what
7 does it mean to -- or under what circumstances is a contract
8 terminated?

9 MR. WHITLEY: Your Honor, Sections 422.508, 510,
10 and 512 lay out the grounds for termination, and they are
11 varied. Terminations can occur by agreement of the parties;
12 they can occur at CMS's initiation alone; or they can occur
13 because of the reason -- at the sort of initiation of the
14 Medicare Advantage organization.

15 There are various reasons that a contract might
16 terminate, but I would point out that a contract can
17 terminate any time during the year. Not so with a consumed
18 contract. Contract consolidation only occurs at the end of
19 a planned year, and as you already suggested, during a
20 contract consolidation enrollees from the consumed contract
21 become enrolled in the surviving consolidated contract.

22 When a contract is terminated, which, again, can
23 happen at any time during the year, there's a special
24 enrollment period. Individuals can enroll in any plan or no
25 plan at all. It's quite different than a consumed contract

1 which lives on in the surviving consolidated contract.

2 It really would make no sense for CMS to treat a
3 consumed contract the same way it does a terminated
4 contract, and the regulatory definitions make that clear. A
5 consumed contract means a contract that will no longer exist
6 after a contract year's end as a result of consolidation.

7 This guidance is unique to termination, and it's
8 unique to termination for a reason, and that's that unlike a
9 contract consolidation, if there's a contract termination
10 before June 15th -- that's the date laid out in this line
11 and guidance -- the terminated contract will not receive a
12 Star Rating at all.

13 If it terminates after that date, the terminated
14 contract will likely receive a Star Rating, but that Star
15 Rating will not be made public. It will be, you know, part
16 of the internal system for CMS and for the utility of the
17 plan.

18 THE COURT: Okay.

19 MR. WHITLEY: And so fundamentally, a consumed
20 contract is just different than a terminated contract, and
21 CMS was convinced by the rationale set forth in HMOLA's
22 communication.

23 THE COURT: And the initial interpretation was
24 just erroneous.

25 MR. WHITLEY: Your Honor, CMS's error was in

1 classifying the consumed contract as terminated. Its
2 reading of the guidance is -- I mean, insofar as it read the
3 word "terminated" to cover consumed contract, that
4 interpretation was erroneous.

5 THE COURT: Okay. And it wasn't quite clear from
6 the papers, but how did that error get surfaced? You know,
7 is there sort of an elevation process? Does it go to the
8 general counsel's office or --

9 MR. WHITLEY: That's right. This instance is the
10 first time that this issue has ever been raised with CMS,
11 and that's just because there are not that many contract
12 consolidations in a year. There are not that many contract
13 consolidations that involve special needs plans, and, of
14 course, it's even less likely that there's a consumed
15 contract that offers special needs plans, and a surviving
16 contract does not.

17 Lastly, to further narrow this sort of range of
18 cases just for your information, this only occurs in the
19 second year after a consolidation. So this isn't a frequent
20 problem, but yes, the HMOLA brought this problem to CMS for
21 the first time, and CMS brought this issue to the office of
22 general counsel.

23 THE COURT: Okay.

24 MR. WHITLEY: Your Honor, what I really want to
25 make clear is that either approach that HMOLA is advocating

1 here amounts to sort of a picking and choosing of measure
2 scores a la carte, and what I mean by that is if it's true
3 that the consumed contract really terminated on January 1,
4 2024, that means that, consistent with the guidance, they
5 shouldn't be -- the consolidated contract shouldn't be
6 evaluated on Measure C05 but also Measure D11. Measure D11
7 includes the same exclusion guidance that was at issue here,
8 but HMOLA's consolidated contract scored five stars on that,
9 on the D11 measure. They're not before this Court asking,
10 you know, CMS to require that D11 be excluded.

11 On the other side, with regard to the theory
12 that --

13 THE COURT: I get your point, but the plaintiff is
14 the master of his or her complaint, right? And they can
15 challenge what they want to challenge.

16 MR. WHITLEY: That's precisely right, Your Honor,
17 but what I'm saying -- what I'm articulating is that HMOLA
18 is not able to articulate a principled position. The
19 positions that it's articulated not only are at odds with
20 CMS's rules, but are unprincipled. And just as another
21 example, if HMOLA's consolidated contract, the surviving
22 contract, was required to be the one to offer special needs
23 plans in the 2023 measurement year, Measures C06 and C07
24 should also not apply because they're special needs plan
25 measures as well. But, again, HMOLA scored five stars on

1 each of those measures.

2 I'm just trying to emphasize, Your Honor, that
3 this litigation is really an effort to cherry-pick the
4 beneficial measure scores and jettison the ones that are
5 adverse to HMOLA.

6 THE COURT: Tell me this. What if the surviving
7 plan did not offer -- or the surviving contract did not
8 offer a special needs plan. Would it have been appropriate
9 nevertheless to incorporate the C05 data for the consumed
10 plan?

11 MR. WHITLEY: Your Honor, you're asking if the
12 consolidated contract didn't offer a special needs plan in
13 2025?

14 THE COURT: Yes.

15 MR. WHITLEY: It would be inappropriate for CMS to
16 evaluate the consolidated contract based on the C05 measure,
17 and Section 422.162(b)(1) makes that clear. The rule is
18 that if a plan in 2025 is offered a special needs plan in
19 either its consumed or -- sorry, a surviving or consumed
20 contract offered a special needs plan in 2023, that plan
21 would be evaluated on C05 for the 2025 Star Rating.

22 THE COURT: What sense would that make?

23 Well, if either of the consumed plan or the
24 surviving plan continued to offer special needs coverage.

25 MR. WHITLEY: I'm sorry, your question --

1 THE COURT: If the regulation is in the
2 disjunctive, all right? If the consumed plan or the
3 consumed contract offered a special needs plan or the
4 surviving contract offered a special needs plan, then the
5 regulation requires CMS to consider the CO5 measure for the
6 consumed plan even though going forward it's not -- no one's
7 offering special needs services.

8 MR. WHITLEY: I think you're misunderstanding. If
9 in 2025 the consolidated contract is not offering a special
10 needs plan, then it would be inappropriate and at odds with
11 CMS's regulations to evaluate that plan on the CO5 measure
12 or any of the special needs plan measures.

13 THE COURT: Okay.

14 MR. WHITLEY: And, Your Honor, I really want to
15 emphasize, because I think HMOLA said it best in its
16 correspondence with the CMS, that for CMS to exclude the CO5
17 measure, quote, would negate the entire regulatory framework
18 for calculating Star Ratings following a contract
19 consolidation, which aims to prevent Medicare Advantage
20 organizations from consolidating a low-performing contract
21 into a higher-performing contract in order to shed the low
22 scores. That's at Page 242 of the administrative record.

23 But, Your Honor, if this Court endorsed HMOLA's
24 approach in this case, it would incentivize plans to
25 consolidate the lower-performing plan into a higher

1 performing one. And that really doesn't make much policy
2 sense, but more importantly it's at odds with CMS's
3 regulations, which, together, stand for the proposition that
4 consolidated contracts get evaluated on the basis of their
5 constituent parts.

6 THE COURT: Okay. One last question. Do you
7 consider the technical notes to be binding or not?

8 MR. WHITLEY: Your Honor, we do consider the
9 technical notes to be binding. We do not consider the
10 regulations to have incorporated the technical notes.
11 Section 164A merely says that the measures are listed in
12 guidance. That's not an incorporation of the guidance into
13 regulations, it's just an instruction to list measures in
14 the guidance.

15 I don't think that's an issue in this case because
16 the guidance here does not actually conflict with the
17 regulations.

18 THE COURT: Okay. So your position is that the
19 guidance is binding, but does not conflict with the
20 regulations and does not apply because this was not a
21 terminated contract?

22 MR. WHITLEY: That is correct, Your Honor.

23 THE COURT: Got it. Okay.

24 MR. WHITLEY: I just wanted to touch on one
25 question, which was why or what was the technical error?

1 Why was HMOLA unable to submit data? And that's because the
2 health plan management system is keyed to the guidance, and
3 CMS's interpretation of consumed contracts as terminated
4 sort of governed that process, and as so it's correct that
5 HMOLA was unable, through the sort of portal for health
6 plans, to submit the relevant information.

7 THE COURT: Okay. So not only did you have to
8 change your position with respect to HMOLA, but you had to
9 reprogram the portal.

10 MR. WHITLEY: That's correct.

11 THE COURT: Okay. Which is probably no small
12 task.

13 MR. WHITLEY: You know, there are a number of
14 these portals that -- you know, for various CMS programs,
15 and they're quite skilled at bringing things up to speed.

16 I do believe that in this case the data was
17 submitted manually via email to CMS.

18 THE COURT: Okay. Right. Thank you.

19 MR. WHITLEY: If Your Honor has no further
20 questions, we ask that you grant the government's motion for
21 summary judgment and deny HMOLA's motion for summary
22 judgment.

23 THE COURT: Ms. Wigger, last word.

24 MS. WIGGER: Thank you, Your Honor. I'd like to
25 address just a few points that were raised by CMS, and I

1 want to start with the agency's explanation for why it
2 changed its position in this case.

3 THE COURT: Uh-huh.

4 MS. WIGGER: So the agency, of course, if it is
5 going to change a position, as the Court noted, must offer a
6 reasoned basis for actually doing so.

7 THE COURT: And does that apply -- does that
8 principle apply with full force in an informal adjudication
9 like this that's a back-and-forth consultation negotiation?

10 MS. WIGGER: It does, because this didn't end in
11 informal adjudication. This ended in a Star Rating, which
12 is a final agency action that impacted millions of people
13 who were receiving this healthcare service.

14 THE COURT: But it's not a rule making.

15 MS. WIGGER: It's not a rule making, but --

16 THE COURT: It's an adjudication. It's a
17 determination that's based on disputed facts and
18 interpretations of data, and there's a back-and-forth, and a
19 final agency decision results from that, which is why you're
20 able to come to court under the APA.

21 MS. WIGGER: Yes.

22 THE COURT: But it is nevertheless an informal
23 adjudication.

24 It's not a court proceeding, right?

25 MS. WIGGER: That's true, Your Honor, but if the

1 agency is going to deviate from the regulations it puts out
2 to every other player in the market, it still has to give a
3 reasoned explanation for doing so.

4 THE COURT: Okay.

5 MS. WIGGER: And I want to look back at AR315 or
6 JA225. The agency doesn't give and didn't give today any
7 explanation whatsoever, no matter how strong, for its
8 deviation.

9 THE COURT: But why isn't implicit in that rather
10 terse -- granted -- explanation that we agree with the
11 rationale that you all have provided to us?

12 MS. WIGGER: Because what the agency actually
13 said -- it spends a paragraph reciting HMO Louisiana's
14 position, which says nothing about its position very
15 carefully, and then it says nevertheless, we agree, quote,
16 to accept data along with your accompanying verifications.

17 There is a fundamental difference between
18 accepting data and applying the data. And CMS has to
19 actually apply the data in a way that's consistent with the
20 regulations that it says it considers are binding and are,
21 in fact, binding in this case. And our argument, as we
22 discussed earlier, of course, is that it just didn't do that
23 based on the plain text of those regulations.

24 THE COURT: But viewed in context, in the context
25 of this, you know, months-long back-and-forth exchanging of

1 letters, exchanging of positions, why can't the Court, in
2 the terms of the APA or APA authority, reasonably discern
3 the agency's rationale and decision-making process?

4 MS. WIGGER: Because the agency said absolutely
5 nothing about its rationale for its decision. There is no
6 basis for the Court to do so because the agency didn't
7 explain -- again, as the Court noted, it didn't explain the
8 change that required it to accept data in a different way
9 for one specific measure, and so there is nothing on which
10 the Court can discern there.

11 THE COURT: Assuming I agree with you, all right,
12 wouldn't the remedy not be vacatur but remand without
13 vacatur to allow the agency to beef up its explanation?

14 MS. WIGGER: I think just a simple vacating and
15 remanding would be more effective. As the Court, I'm sure,
16 knows, you can't -- the agency cannot give post hoc
17 justifications for its actions, and that's what it's done in
18 this case and no doubt what it would do on remand. So the
19 Court should vacate this.

20 And, Your Honor, the Court has vacated -- this
21 Court, the District of Columbia, has vacated Star Ratings
22 cases for very similar reasons, for not appropriately
23 applying technical notes and other agency guidance. And
24 those cases include the *Scan Healthcare* case, which was in
25 2024. That's not a published case, but it's at Westlaw

1 2815789, and it includes the *Elevance* case, also from 2024,
2 also from this Court, at 736 Fed. Supp. 3d 1. In both cases
3 the agency failed to apply its regulations, and the Court
4 vacated the Star Rating and had the agency recalculate the
5 Star Rating in that case.

6 There's another case out of Texas called *United*
7 *Healthcare* --

8 THE COURT: Well, tell me this. If I were to do
9 that, and the agency recalculated the Star Rating, wouldn't
10 that recalculation have to entail the other measure that you
11 all are not suing on? If this is a general principle that
12 the agency misapplied in calculating HMOLA's Star Rating,
13 why wouldn't that principle apply to the other challenged
14 measure?

15 MS. WIGGER: For starters, Your Honor, that other
16 measure, D11, is not before the Court, so the Court couldn't
17 make any ruling related to it. And if that dispute were to
18 materialize, that would be dealt with separately.

19 However, I do want to address this cherry-picking
20 point that was raised by CMS, and I alluded to this earlier.
21 Each of these measures in the technical notes, like 40 or 50
22 of them, are different, and the exclusions are different,
23 and that includes C05 and D11.

24 As I said earlier, C05 relates to a specific
25 program that is offered or not. D11 is a quality measure

1 that applies to every single plan. The language of the
2 exclusion is different for the two of them.

3 So the exclusion language that we're relying on
4 here to say that CMS violated the plain text of its
5 regulations for C05 says that the data is not available.

6 It has different language for D11. I think it
7 says something to the effect of not required to report.

8 Those phrases, "data not available" and "not
9 required to report" are separately defined in the
10 regulations. It's at JA186 --

11 THE COURT: Okay.

12 MS. WIGGER: -- I believe, and what they indicate
13 is that those measures are -- the application of data to
14 those measures is treated differently, and what we're
15 challenging here is the way the data was applied to Measure
16 C05; not necessarily the fact that CMS accepted the data per
17 the letter that they sent after negotiations, but the way
18 that they chose to apply it here. And our argument is that
19 for Measure C05, the way that they applied it pretty much
20 indisputably violates the plain text of their binding
21 technical notes.

22 That's something CMS has never addressed. They do
23 not argue that it violates the plain text of their technical
24 notes. They point back to the federal code. They say that
25 there's a difference now that they've found between

1 "termination" and "consolidation," which, as I said earlier,
2 is not supported by the definition of "consolidation" that's
3 in the federal code. But they've never challenged that they
4 violated the plain text of the technical notes, and because
5 of that, their action is arbitrary and capricious.

6 THE COURT: Okay. Thank you.

7 MS. WIGGER: Thank you.

8 THE COURT: All right. The Court will take the
9 matter under advisement. We'll get something out sooner
10 rather than later, and we'll stand in recess.

11 (Whereupon the hearing was

12 adjourned at 3:53 p.m.)

13 **CERTIFICATE OF OFFICIAL COURT REPORTER**

14
15 I, LISA A. MOREIRA, RDR, CRR, do hereby
16 certify that the above and foregoing constitutes a true and
17 accurate transcript of my stenographic notes and is a full,
18 true and complete transcript of the proceedings to the best
19 of my ability.

20 Dated this 11th day of August, 2025.

21
22
23 /s/Lisa A. Moreira, RDR, CRR
24 Official Court Reporter
25 United States Courthouse
Room 6718
333 Constitution Avenue, NW
Washington, DC 20001

	4	30:12, 35:5 Action [1] - 2:3 actions [2] - 3:16, 32:17 actual [1] - 14:21 address [3] - 21:20, 29:25, 33:19 addressed [1] - 34:22 adhere [1] - 8:13 adjourned [1] - 35:12 adjudication [7] - 20:9, 20:17, 30:8, 30:11, 30:16, 30:23 administration [1] - 14:11 administrative [1] - 27:22 administrators [1] - 13:15 adopt [1] - 7:4 adopted [1] - 19:7 Advantage [2] - 22:14, 27:19 adverse [2] - 17:23, 26:5 advisement [1] - 35:9 advocating [1] - 24:25 afternoon [4] - 2:2, 2:9, 2:20, 17:9 agency [3] - 8:12, 8:13, 8:19, 8:22, 9:2, 9:9, 9:16, 9:17, 10:6, 10:9, 11:1, 11:15, 12:2, 20:5, 20:11, 30:4, 30:12, 30:19, 31:1, 31:6, 31:12, 32:4, 32:6, 32:13, 32:16, 32:23, 33:3, 33:4, 33:9, 33:12 agency's [4] - 10:18, 11:6, 30:1, 32:3 agree [4] - 21:4, 31:10, 31:15, 32:11 agreed [5] - 10:6, 17:14, 19:15, 20:15, 21:3 agreement [1] - 22:11 aids [1] - 3:12 aims [1] - 27:19 al [2] - 1:6, 2:5 allow [3] - 18:25, 20:19, 32:13 alluded [2] - 21:15, 33:20 alone [1] - 22:12 alternative [1] - 4:3 amounts [1] - 25:1 AND [2] - 1:6, 1:20 answer [1] - 17:11 ANTHONY [1] - 1:13	B
'16 [1] - 19:4 '19 [1] - 15:9 '23 [1] - 21:4 '24 [2] - 6:24, 15:8	4 [1] - 17:16 40 [1] - 33:21 42 [3] - 4:6, 6:3, 10:20 422.161(b)(3) [1] - 4:7 422.162(a) [1] - 10:21 422.162(b)(1) [1] - 26:17 422.162(b)(3)(i) [1] - 21:16 422.162(b)(3)(iv)(B)(1 [1] - 21:16 422.164(a) [1] - 6:3 422.166(h)(2) [1] - 20:23 422.166(h)(2) [1] - 18:22 422.508 [1] - 22:9 458-1733 [1] - 1:22	APA [13] - 3:8, 3:15, 8:1, 8:2, 8:22, 9:8, 9:9, 9:18, 18:11, 20:7, 30:20, 32:2 APPEARANCES [1] - 1:11 application [1] - 34:13 applied [7] - 5:2, 5:15, 6:1, 19:19, 20:2, 34:15, 34:19 applies [1] - 34:1 apply [12] - 10:3, 10:7, 19:22, 20:10, 25:24, 28:20, 30:7, 30:8, 31:19, 33:3, 33:13, 34:18 applying [2] - 31:18, 32:23 approach [4] - 2:7, 17:25, 24:25, 27:24 appropriate [1] - 26:8 appropriately [1] - 32:22 AR [2] - 5:18, 5:23 AR315 [1] - 31:5 AR317 [1] - 15:9 AR319 [1] - 15:9 AR45 [1] - 6:4 arbitrarily [1] - 9:24 arbitrary [4] - 9:9, 9:17, 16:14, 35:5 argue [1] - 34:23 argument [6] - 2:24, 16:9, 21:3, 21:21, 31:21, 34:18 arguments [1] - 21:8 articulate [1] - 25:18 articulated [1] - 25:19 articulating [1] - 25:17 aside [2] - 16:17, 22:6 assessing [1] - 11:8 Assistant [2] - 2:23, 17:7 assume [2] - 11:4, 11:5 assuming [1] - 32:11 attachment [1] - 6:8 Attorney [2] - 2:23, 17:7 attributes [1] - 14:2 August [2] - 18:24, 35:20 authority [4] - 8:20, 8:21, 9:7, 32:2 available [2] - 34:5, 34:8 Avenue [4] - 1:14, 1:21, 1:24, 35:24 averages [1] - 5:7	back-and-forth [4] - 20:19, 30:9, 30:18, 31:25 Bardo [1] - 2:20 BARDO [3] - 1:16, 2:20, 3:1 based [4] - 5:6, 26:16, 30:17, 31:23 basic [1] - 3:17 basis [3] - 28:4, 30:6, 32:6 bear [1] - 15:6 become [1] - 22:21 becomes [1] - 20:7 beef [1] - 32:13 BEFORE [1] - 1:10 beginning [3] - 2:6, 7:6, 7:22 begins [2] - 5:19, 5:22 behalf [2] - 2:21, 17:8 beneficial [2] - 17:23, 26:4 benefits [1] - 9:13 best [3] - 8:20, 27:15, 35:18 between [5] - 4:19, 4:20, 12:17, 31:17, 34:25 binding [13] - 8:11, 8:12, 8:14, 8:17, 8:18, 9:5, 28:7, 28:9, 28:19, 31:20, 31:21, 34:20 bit [1] - 12:7 Blue's [1] - 19:14 Bonus [1] - 3:10 brief [1] - 6:11 bringing [1] - 29:15 brought [2] - 24:20, 24:21 but.. [1] - 2:19
1	5		
1 [3] - 6:14, 25:3, 33:2 11th [1] - 35:20 12 [1] - 15:8 14 [1] - 6:24 15 [1] - 6:6 15th [3] - 6:22, 11:20, 23:10 164A [1] - 28:11 1:24-cv-02931-CRC [1] - 1:3	50 [1] - 33:21 510 [1] - 22:9 512 [1] - 22:10 5576 [1] - 6:25		
2	6		
2 [2] - 1:4, 6:19 20001 [2] - 1:25, 35:25 20006 [1] - 1:15 202 [3] - 1:15, 1:18, 1:25 20201 [1] - 1:21 2023 [3] - 19:15, 25:23, 26:20 2024 [7] - 6:7, 6:22, 8:7, 17:11, 25:4, 32:25, 33:1 2025 [7] - 1:4, 4:2, 26:13, 26:18, 26:21, 27:9, 35:20 20530 [1] - 1:18 2099 [1] - 1:14 24-2931 [1] - 2:3 242 [1] - 27:22 25 [1] - 18:17 2815789 [1] - 33:1	601 [1] - 1:17 609 [1] - 1:22 6453 [1] - 7:2 6718 [2] - 1:24, 35:24		
3	7		
3.5 [2] - 17:16, 17:17 30,000 [1] - 13:1 315 [4] - 19:3, 19:5, 19:6, 19:11 316 [2] - 19:5, 19:6 330 [1] - 1:21 333 [2] - 1:24, 35:24 354-3187 [1] - 1:25 37 [1] - 5:18 3:08 [1] - 1:5 3:53 [1] - 35:12 3d [1] - 33:2	736 [1] - 33:2 747-2673 [1] - 1:15		
	8		
	A		
	ability [1] - 35:19 able [3] - 14:13, 25:18, 30:20 absolutely [1] - 32:4 accept [5] - 7:10, 19:15, 21:3, 31:16, 32:8 accepted [3] - 10:5, 19:2, 34:16 accepting [1] - 31:18 accompanying [1] - 31:16 accurate [1] - 35:17 achieved [1] - 17:21 act [1] - 9:9 action [3] - 16:14,		
	C		
			CA [1] - 1:3 calculate [4] - 6:12, 8:24, 9:12, 17:19 calculated [2] - 5:8, 20:21 calculates [1] - 5:6 calculating [4] - 17:13, 18:16, 27:18, 33:12 calculation [4] - 3:20, 6:5, 6:9, 15:11 calculations [1] - 4:1 cannot [2] - 9:9, 32:16 capricious [3] - 9:18, 16:15, 35:5

<p>capriciously [1] - 9:10 care [1] - 13:16 carefully [1] - 31:15 carte [1] - 25:2 case [19] - 4:23, 7:7, 7:23, 9:19, 9:21, 9:23, 12:20, 16:3, 27:24, 28:15, 29:16, 30:2, 31:21, 32:18, 32:24, 32:25, 33:1, 33:5, 33:6 cases [6] - 9:18, 9:22, 24:18, 32:22, 32:24, 33:2 central [1] - 16:9 certainly [1] - 14:1 CERTIFICATE [1] - 35:13 certify [1] - 35:16 cetera [1] - 9:1 CFR [3] - 4:6, 6:3, 10:20 challenge [3] - 3:3, 25:15 challenged [2] - 33:13, 35:3 challenging [1] - 34:15 change [7] - 7:17, 20:5, 20:7, 20:12, 29:8, 30:5, 32:8 changed [10] - 10:6, 10:9, 18:4, 18:8, 18:9, 18:14, 18:20, 19:7, 19:18, 30:2 cherry [3] - 17:23, 26:3, 33:19 cherry-pick [2] - 17:23, 26:3 cherry-picking [1] - 33:19 choosing [1] - 25:1 chose [1] - 34:18 CHRISTOPHER [1] - 1:10 circumstances [1] - 22:7 Civil [1] - 2:3 claims [1] - 3:15 clarifications [1] - 19:1 classifying [1] - 24:1 clear [4] - 23:4, 24:5, 24:25, 26:17 CMS [54] - 3:7, 4:3, 4:23, 4:24, 5:1, 5:2, 5:6, 6:4, 6:9, 6:21, 7:4, 7:7, 7:25, 15:9, 15:21, 16:17, 17:11, 17:14, 17:16, 17:19,</p>	<p>18:1, 18:5, 18:8, 18:11, 18:14, 19:2, 19:6, 19:15, 19:22, 20:14, 20:15, 20:22, 20:25, 21:3, 22:2, 23:2, 23:16, 23:21, 24:10, 24:20, 24:21, 25:10, 26:15, 27:5, 27:16, 29:14, 29:17, 29:25, 31:18, 33:20, 34:4, 34:16, 34:22 CMS's [16] - 3:15, 3:20, 4:1, 6:24, 15:15, 15:18, 16:13, 19:17, 19:21, 21:14, 22:12, 23:25, 25:20, 27:11, 28:2, 29:3 co [1] - 2:11 co-counsel [1] - 2:11 CO2 [1] - 4:14 CO5 [31] - 4:14, 5:11, 5:16, 5:22, 6:2, 6:5, 6:13, 6:25, 11:19, 12:5, 12:15, 12:16, 16:12, 17:13, 17:20, 18:7, 18:16, 21:13, 21:23, 25:6, 26:9, 26:16, 26:21, 27:5, 27:11, 27:16, 33:23, 33:24, 34:5, 34:16, 34:19 CO6 [1] - 25:23 CO7 [1] - 25:23 Code [1] - 5:14 code [2] - 34:24, 35:3 colleague's [1] - 21:20 collect [1] - 5:1 COLUMBIA [1] - 1:1 Columbia [1] - 32:21 combine [1] - 13:4 combined [1] - 14:7 comment [2] - 9:1, 12:3 communication [1] - 23:22 complaining [1] - 7:5 complaint [1] - 25:14 complete [1] - 35:18 comply [2] - 8:1, 8:3 computer [1] - 15:15 concept [1] - 10:19 concerning [1] - 19:19 conflict [2] - 28:16, 28:19 consider [8] - 11:13, 11:24, 12:3, 12:8, 27:5, 28:7, 28:8, 28:9 consideration [3] - 4:14, 18:16, 19:14</p>	<p>considered [1] - 18:7 considers [2] - 14:15, 31:20 consistent [5] - 15:19, 16:13, 18:1, 25:4, 31:19 consolidate [1] - 27:25 consolidated [15] - 5:8, 11:8, 17:20, 21:12, 21:17, 22:6, 22:21, 23:1, 25:5, 25:8, 25:21, 26:12, 26:16, 27:9, 28:4 consolidating [1] - 27:20 consolidation [13] - 5:6, 7:1, 10:8, 10:19, 10:23, 22:18, 22:20, 23:6, 23:9, 24:19, 27:19, 35:1, 35:2 consolidations [2] - 24:12, 24:13 constituent [1] - 28:5 constitutes [1] - 35:16 Constitution [2] - 1:24, 35:24 consult [1] - 14:14 consultation [1] - 30:9 consultative [1] - 21:5 consumed [33] - 6:16, 7:1, 10:20, 10:21, 12:4, 14:2, 14:17, 16:12, 17:12, 18:7, 19:23, 20:1, 21:18, 22:3, 22:17, 22:20, 22:25, 23:3, 23:5, 23:19, 24:1, 24:3, 24:14, 25:3, 26:9, 26:19, 26:23, 27:2, 27:3, 27:6, 29:3 consumers [1] - 14:13 context [4] - 4:24, 5:1, 31:24 continuation [2] - 13:11, 14:10 continued [1] - 26:24 continues [2] - 13:8, 13:9 continuing [1] - 14:16 contract [84] - 6:16, 6:17, 8:7, 10:4, 10:8, 10:16, 10:17, 10:20, 10:22, 11:2, 11:3, 11:5, 11:8, 12:21, 13:6, 13:7, 13:9, 13:24, 13:25, 14:7, 14:10, 14:12, 14:20, 14:22, 15:11, 16:13, 17:13, 17:14, 17:20,</p>	<p>18:7, 19:23, 19:24, 20:2, 21:10, 21:11, 21:12, 21:19, 22:3, 22:4, 22:7, 22:15, 22:16, 22:18, 22:20, 22:21, 22:22, 22:25, 23:1, 23:3, 23:4, 23:5, 23:6, 23:9, 23:11, 23:14, 23:20, 24:1, 24:3, 24:11, 24:12, 24:15, 24:16, 25:3, 25:5, 25:8, 25:21, 25:22, 26:7, 26:12, 26:16, 26:20, 27:3, 27:4, 27:9, 27:18, 27:20, 27:21, 28:21 Contract [5] - 6:25, 7:2, 15:12, 19:15, 21:4 contracts [22] - 4:3, 5:8, 6:5, 6:15, 6:20, 7:13, 8:6, 11:7, 12:4, 12:20, 13:4, 13:20, 14:7, 18:15, 18:25, 19:19, 20:4, 21:17, 22:1, 22:6, 28:4, 29:3 contracts' [1] - 12:5 contrary [3] - 4:2, 4:5, 4:6 control [1] - 15:2 controls [1] - 12:1 convinced [2] - 7:4, 23:21 COOPER [1] - 1:10 correct [11] - 4:8, 8:9, 11:4, 13:12, 13:16, 16:16, 17:25, 21:7, 28:22, 29:4, 29:10 corrections [2] - 18:25, 19:2 correspondence [2] - 11:3, 27:16 cost [2] - 3:9, 3:11 counsel [5] - 2:6, 2:11, 2:21, 16:25, 24:22 counsel's [1] - 24:8 course [5] - 20:6, 22:6, 24:14, 30:4, 31:22 court [2] - 30:20, 30:24 Court [23] - 1:23, 1:23, 16:17, 17:9, 17:18, 17:22, 25:9, 27:23, 30:5, 32:1, 32:6, 32:7, 32:10, 32:15, 32:19, 32:20, 32:21, 33:2, 33:3, 33:16, 35:8, 35:23</p>	<p>COURT [104] - 1:1, 2:13, 2:16, 2:18, 2:25, 3:2, 3:5, 3:21, 3:25, 4:5, 4:10, 4:12, 4:16, 4:21, 5:4, 5:17, 5:21, 5:25, 6:23, 7:9, 7:16, 7:24, 8:3, 8:8, 8:10, 8:16, 8:20, 8:25, 9:7, 9:16, 9:20, 10:1, 10:11, 10:14, 11:4, 11:18, 11:22, 12:2, 12:11, 12:14, 12:24, 13:1, 13:4, 13:6, 13:14, 13:18, 13:22, 14:1, 14:5, 14:9, 14:23, 15:4, 15:8, 15:21, 16:2, 16:5, 16:8, 16:19, 16:21, 16:24, 17:2, 18:2, 18:4, 18:19, 19:5, 19:10, 19:13, 19:17, 19:25, 20:5, 21:2, 21:20, 22:5, 23:18, 23:23, 24:5, 24:23, 25:13, 26:6, 26:14, 26:22, 27:1, 27:13, 28:6, 28:18, 28:23, 29:7, 29:11, 29:18, 29:23, 30:3, 30:7, 30:14, 30:16, 30:22, 31:4, 31:9, 31:24, 32:11, 33:8, 34:11, 35:6, 35:8, 35:13 Courthouse [2] - 1:24, 35:23 COURTROOM [1] - 2:2 cover [2] - 5:10, 24:3 coverage [1] - 26:24 create [2] - 21:16, 21:22 creates [1] - 21:25 CRR [3] - 1:23, 35:15, 35:22 cutoffs [1] - 12:10</p> <p style="text-align: center;">D</p> <p>D.C [1] - 1:4 D11 [9] - 17:22, 25:6, 25:9, 25:10, 33:16, 33:23, 33:25, 34:6 data [41] - 5:1, 5:3, 5:15, 6:1, 6:21, 6:25, 7:13, 8:5, 9:12, 11:7, 11:13, 11:24, 12:5, 12:9, 15:12, 15:19, 15:22, 15:24, 16:12, 17:12, 17:17, 18:7, 18:16, 19:15, 19:22,</p>
---	---	--	---	---

<p>20:3, 21:4, 26:9, 29:1, 29:16, 30:18, 31:16, 31:18, 31:19, 32:8, 34:5, 34:8, 34:13, 34:15, 34:16</p> <p>date [7] - 6:6, 6:20, 8:6, 11:20, 11:21, 23:10, 23:13</p> <p>Dated [1] - 35:20</p> <p>dates [2] - 12:12</p> <p>DC [5] - 1:15, 1:18, 1:21, 1:25, 35:25</p> <p>deadline [2] - 6:21, 20:3</p> <p>dealt [1] - 33:18</p> <p>decided [1] - 12:3</p> <p>decision [4] - 20:22, 30:19, 32:3, 32:5</p> <p>decision-making [1] - 32:3</p> <p>decisions [1] - 9:8</p> <p>declaratory [1] - 3:15</p> <p>defendants [1] - 17:8</p> <p>Defendants [2] - 1:7, 1:16</p> <p>define [2] - 10:18, 10:20</p> <p>defined [3] - 10:21, 11:25, 34:9</p> <p>definition [2] - 10:21, 35:2</p> <p>definitions [1] - 23:4</p> <p>dental [1] - 3:12</p> <p>deny [1] - 29:21</p> <p>Department [2] - 2:4, 17:1</p> <p>DEPARTMENT [2] - 1:6, 1:20</p> <p>DEPUTY [1] - 2:2</p> <p>Despite [1] - 15:10</p> <p>detail [1] - 16:24</p> <p>determination [2] - 15:22, 30:17</p> <p>determine [1] - 9:12</p> <p>deviate [1] - 31:1</p> <p>deviates [1] - 9:16</p> <p>deviation [1] - 31:8</p> <p>difference [2] - 31:17, 34:25</p> <p>different [14] - 5:1, 12:10, 12:13, 13:20, 13:21, 22:25, 23:20, 32:8, 33:22, 34:2, 34:6</p> <p>differently [3] - 9:11, 9:25, 34:14</p> <p>difficulty [1] - 15:5</p> <p>direct [1] - 20:23</p> <p>directive [1] - 11:24</p> <p>directly [2] - 5:10, 5:15</p>	<p>discern [2] - 32:2, 32:10</p> <p>discontinued [1] - 14:17</p> <p>discuss [2] - 17:6, 20:24</p> <p>discussed [1] - 31:22</p> <p>discussions [1] - 4:24</p> <p>disjunctive [1] - 27:2</p> <p>dispute [3] - 4:18, 10:16, 33:17</p> <p>disputed [1] - 30:17</p> <p>distinct [1] - 10:19</p> <p>District [1] - 32:21</p> <p>DISTRICT [3] - 1:1, 1:1, 1:10</p> <p>doctors [1] - 14:10</p> <p>DOJ [1] - 1:17</p> <p>DOJ-USAO [1] - 1:17</p> <p>dollars [2] - 3:9, 9:13</p> <p>done [2] - 7:8, 32:17</p> <p>doubt [1] - 32:18</p> <p>down [1] - 3:22</p> <p>Drouaud [1] - 2:12</p> <p>DROUAUD [1] - 1:13</p> <p>due [1] - 15:12</p> <p>during [6] - 21:5, 21:11, 21:18, 22:17, 22:19, 22:23</p>	<p>error [5] - 3:8, 22:2, 23:25, 24:6, 28:25</p> <p>ESQ [6] - 1:12, 1:12, 1:13, 1:13, 1:16, 1:19</p> <p>et [3] - 1:6, 2:5, 9:1</p> <p>evaluate [2] - 26:16, 27:11</p> <p>evaluated [7] - 6:17, 12:22, 21:13, 21:17, 25:6, 26:21, 28:4</p> <p>exact [1] - 14:1</p> <p>exactly [1] - 13:25</p> <p>example [1] - 25:21</p> <p>exception [1] - 21:25</p> <p>exchanging [2] - 31:25, 32:1</p> <p>exclude [3] - 6:5, 6:19, 27:16</p> <p>excluded [3] - 8:7, 19:22, 25:10</p> <p>exclusion [8] - 6:24, 11:12, 11:19, 11:20, 19:21, 25:7, 34:2, 34:3</p> <p>exclusions [4] - 11:17, 12:10, 21:22, 33:22</p> <p>exist [3] - 10:22, 10:24, 23:5</p> <p>existed [1] - 13:24</p> <p>exists [2] - 13:24, 18:24</p> <p>expected [2] - 7:18, 17:15</p> <p>explain [8] - 18:13, 18:14, 18:19, 19:7, 20:6, 20:11, 32:7</p> <p>explained [1] - 20:12</p> <p>explanation [10] - 19:3, 19:18, 19:20, 19:21, 20:14, 30:1, 31:3, 31:7, 31:10, 32:13</p> <p>express [1] - 20:20</p> <p>extensive [2] - 20:22, 21:1</p> <p>extent [1] - 20:11</p>	<p>35:3</p> <p>Federal [1] - 5:14</p> <p>feet [1] - 13:2</p> <p>few [1] - 29:25</p> <p>final [2] - 30:12, 30:19</p> <p>First [1] - 3:20</p> <p>first [9] - 5:5, 8:11, 11:9, 17:25, 18:12, 18:24, 21:10, 24:10, 24:21</p> <p>five [3] - 17:21, 25:8, 25:25</p> <p>flatly [1] - 11:6</p> <p>following [1] - 27:18</p> <p>FOR [1] - 1:1</p> <p>force [1] - 30:8</p> <p>foregoing [1] - 35:16</p> <p>form [1] - 20:8</p> <p>formal [2] - 20:22, 20:25</p> <p>forth [6] - 6:10, 20:19, 23:21, 30:9, 30:18, 31:25</p> <p>forward [1] - 27:6</p> <p>framework [1] - 27:17</p> <p>free [1] - 3:24</p> <p>frequent [1] - 24:19</p> <p>full [2] - 30:8, 35:17</p> <p>fundamental [1] - 31:17</p> <p>fundamentally [2] - 15:3, 23:19</p>	<p style="text-align: center;">H</p> <p>H5576 [1] - 15:12</p> <p>H5576's [2] - 19:15, 21:4</p> <p>HAMPTON [1] - 1:14</p> <p>hand [1] - 9:14</p> <p>Hannah [1] - 2:10</p> <p>HANNAH [1] - 1:12</p> <p>happy [1] - 17:5</p> <p>head [1] - 16:7</p> <p>HEALTH [2] - 1:6, 1:20</p> <p>health [3] - 17:5, 29:2, 29:5</p> <p>Health [2] - 2:4, 17:1</p> <p>Healthcare [2] - 32:24, 33:7</p> <p>healthcare [1] - 30:13</p> <p>hear [1] - 7:18</p> <p>HEARING [1] - 1:9</p> <p>hearing [4] - 2:3, 2:16, 3:12, 35:11</p> <p>HELD [1] - 1:10</p> <p>helpful [1] - 14:14</p> <p>hereby [1] - 35:15</p> <p>higher [2] - 27:21, 27:25</p> <p>higher-performing [1] - 27:21</p> <p>hit [1] - 15:2</p> <p>HMO [13] - 1:2, 2:3, 2:10, 3:9, 3:14, 3:20, 4:1, 4:2, 4:22, 7:7, 7:14, 7:22, 31:13</p> <p>HMOLA [20] - 4:12, 15:11, 17:10, 17:11, 17:15, 17:16, 17:18, 17:25, 19:3, 21:5, 21:8, 24:20, 24:25, 25:17, 25:25, 26:5, 27:15, 29:1, 29:5, 29:8</p> <p>HMOLA's [10] - 10:2, 16:11, 19:7, 20:16, 23:21, 25:8, 25:21, 27:23, 29:21, 33:12</p> <p>hoc [1] - 32:16</p> <p>hold [4] - 5:21, 15:6, 18:4, 19:5</p> <p>homes [1] - 13:16</p> <p>Honor [36] - 2:10, 2:20, 3:1, 3:4, 3:6, 4:11, 4:18, 5:19, 7:6, 12:15, 16:23, 17:4, 17:10, 18:3, 18:18, 19:9, 19:16, 20:14, 21:7, 21:15, 21:24, 22:9, 23:25, 24:24, 25:16, 26:2, 26:11, 27:14, 27:23, 28:8,</p>
	E		G	
		F		
		<p>facilities [1] - 14:10</p> <p>fact [3] - 4:14, 31:21, 34:16</p> <p>factored [1] - 15:23</p> <p>facts [1] - 30:17</p> <p>failed [1] - 33:3</p> <p>fair [4] - 10:5, 13:23, 14:3, 14:21</p> <p>Fed [1] - 33:2</p> <p>federal [2] - 34:24,</p>		

<p>28:22, 29:19, 29:24, 30:25, 32:20, 33:15 HONORABLE [1] - 1:10 HPMS [4] - 15:13, 15:14, 16:5, 17:3 Human [2] - 2:4, 17:1 HUMAN [2] - 1:6, 1:20</p>	<p>instruction [1] - 28:13 instructive [1] - 14:25 internal [2] - 9:2, 23:16 interpret [1] - 9:9 interpretation [4] - 7:12, 23:23, 24:4, 29:3 interpretations [1] - 30:18 interrupt [1] - 3:24 involve [1] - 24:13 involving [1] - 21:23 issue [18] - 4:20, 5:2, 5:3, 5:20, 7:25, 12:17, 15:13, 15:14, 15:15, 15:16, 15:17, 20:22, 20:25, 24:10, 24:21, 25:7, 28:15 issued [1] - 3:7 issues [1] - 7:20 iterative [1] - 20:19 itself [1] - 11:1</p>	<p>last [3] - 19:11, 28:6, 29:23 lastly [1] - 24:17 lay [1] - 22:10 lead [1] - 2:23 lease [1] - 6:15 least [2] - 9:21, 9:22 lectern [1] - 2:7 less [1] - 24:14 letter [3] - 6:24, 7:21, 34:17 letters [1] - 32:1 likely [3] - 13:13, 23:14, 24:14 line [2] - 20:2, 23:10 Lisa [1] - 1:23 LISA [1] - 35:15 list [1] - 28:13 listed [1] - 28:11 lists [1] - 11:12 literally [2] - 15:18, 16:4 litigation [3] - 17:18, 21:9, 26:3 lives [1] - 23:1 LLP [1] - 1:14 look [5] - 8:2, 11:11, 11:15, 11:16, 31:5 looking [1] - 7:15 Louisiana [10] - 2:4, 2:11, 3:9, 3:14, 4:3, 4:22, 7:7, 7:14, 7:22, 19:14 LOUISIANA [1] - 1:2 Louisiana's [3] - 3:20, 4:1, 31:13 low [2] - 27:20, 27:21 low-performing [1] - 27:20 lower [1] - 27:25 lower-performing [1] - 27:25</p>	<p>10:24, 22:5, 22:7, 24:2, 25:2 means [2] - 23:5, 25:4 meant [1] - 20:18 Measure [13] - 5:11, 5:15, 5:22, 6:2, 6:5, 6:12, 6:25, 21:23, 25:6, 34:15, 34:19 measure [24] - 4:14, 5:3, 11:17, 12:16, 12:19, 17:13, 17:20, 17:22, 17:23, 21:13, 21:18, 25:1, 25:9, 26:4, 26:16, 27:5, 27:11, 27:17, 32:9, 33:10, 33:14, 33:16, 33:25 measurement [3] - 18:16, 21:12, 25:23 measurements [1] - 12:5 Measures [1] - 25:23 measures [18] - 4:19, 4:25, 5:2, 11:12, 11:15, 11:16, 11:20, 12:10, 12:17, 15:12, 25:25, 26:1, 27:12, 28:11, 28:13, 33:21, 34:13, 34:14 Medicare [3] - 4:4, 22:14, 27:19 members [1] - 3:11 merely [1] - 28:11 might [1] - 22:15 Miller [2] - 15:9, 15:10 millions [3] - 3:9, 9:13, 30:12 mind [3] - 18:8, 18:9, 18:20 misapplied [1] - 33:12 misunderstanding [1] - 27:8 months [1] - 31:25 months-long [1] - 31:25 MOREIRA [1] - 35:15 Moreira [2] - 1:23, 35:22 MOTION [1] - 1:9 motion [3] - 2:3, 29:20, 29:21 MR [34] - 2:17, 2:20, 3:1, 16:23, 16:25, 17:4, 18:3, 18:18, 18:21, 19:9, 19:12, 19:16, 19:20, 20:1, 20:14, 21:7, 21:24, 22:9, 23:19, 23:25, 24:9, 24:24, 25:16, 26:11, 26:15, 26:25,</p>	<p>27:8, 27:14, 28:8, 28:22, 28:24, 29:10, 29:13, 29:19 MS [67] - 2:9, 2:15, 3:4, 3:6, 3:23, 4:1, 4:8, 4:11, 4:15, 4:18, 4:22, 5:12, 5:19, 5:22, 6:1, 7:6, 7:14, 7:21, 7:25, 8:5, 8:9, 8:14, 8:18, 8:22, 9:6, 9:8, 9:19, 9:21, 10:9, 10:12, 10:15, 11:10, 11:19, 11:23, 12:7, 12:12, 12:15, 12:25, 13:3, 13:5, 13:13, 13:17, 13:19, 13:23, 14:4, 14:6, 14:18, 14:24, 15:17, 16:1, 16:3, 16:6, 16:16, 16:20, 29:24, 30:4, 30:10, 30:15, 30:21, 30:25, 31:5, 31:12, 32:4, 32:14, 33:15, 34:12, 35:7 MULLIN [1] - 1:14 must [1] - 30:5</p>
<p style="text-align: center;">I</p>	<p style="text-align: center;">J</p>	<p style="text-align: center;">M</p>	<p style="text-align: center;">N</p>	
<p>identify [1] - 2:7 Ill [1] - 1:13 Imad [1] - 2:12 IMAD [1] - 1:12 impacted [1] - 30:12 implicit [3] - 21:2, 21:3, 31:9 importantly [1] - 28:2 improperly [1] - 19:23 IN [1] - 1:1 inappropriate [2] - 26:15, 27:10 Inc [1] - 2:4 INC [1] - 1:2 incentivize [1] - 27:24 include [2] - 17:12, 32:24 includes [3] - 25:7, 33:1, 33:23 including [3] - 3:11, 12:17, 21:23 inclusion [2] - 7:12, 16:12 inconsistent [1] - 11:6 incorporate [1] - 26:9 incorporated [8] - 4:9, 5:14, 6:2, 8:15, 8:16, 9:4, 16:10, 28:10 incorporation [1] - 28:12 incorrect [1] - 19:24 increase [1] - 17:15 Independence [1] - 1:21 indicate [1] - 34:12 indisputably [1] - 34:20 individual [1] - 18:25 individuals [1] - 22:24 informal [6] - 9:2, 20:8, 20:17, 30:8, 30:11, 30:22 information [3] - 17:5, 24:18, 29:6 initial [1] - 23:23 initiation [2] - 22:12, 22:13 insofar [1] - 24:2 instance [1] - 24:9</p>	<p>JA127 [3] - 6:9, 6:19 JA186 [1] - 34:10 JA217 [1] - 11:3 JA225 [1] - 31:6 JA45 [2] - 5:23, 6:1 January [1] - 25:3 jettison [2] - 17:23, 26:4 John [1] - 2:20 JOHN [1] - 1:16 joined [2] - 2:11, 2:21 JUDGE [1] - 1:10 judgment [4] - 3:14, 3:15, 29:21, 29:22 July [2] - 1:4, 5:9 June [5] - 6:6, 6:22, 8:7, 11:20, 23:10 justifications [1] - 32:17</p> <p style="text-align: center;">K</p> <p>Ken [1] - 2:22 Kenneth [1] - 17:8 KENNETH [1] - 1:19 keyed [1] - 29:2 kind [2] - 3:12, 20:25 knows [1] - 32:16 Kristin [1] - 2:22</p> <p style="text-align: center;">L</p> <p>laid [1] - 23:10 language [3] - 34:1, 34:3, 34:6</p>	<p>main [1] - 4:10 maintain [1] - 17:21 managed [1] - 4:4 management [3] - 13:21, 17:5, 29:2 manually [1] - 29:17 market [1] - 31:2 massive [1] - 15:1 master [1] - 25:14 materialize [1] - 33:18 MATINI [2] - 1:12, 2:17 Matini [1] - 2:12 matter [3] - 2:11, 31:7, 35:9 mean [6] - 10:23,</p>	<p>name [1] - 2:10 narrow [1] - 24:17 necessarily [1] - 34:16 need [2] - 14:3, 14:13 needs [24] - 3:10, 13:7, 13:8, 13:10, 14:13, 14:15, 14:19, 17:12, 19:22, 21:11, 24:13, 24:15, 25:22, 25:24, 26:8, 26:12, 26:18, 26:20, 26:24, 27:3, 27:4, 27:7, 27:10, 27:12 negate [1] - 27:17 negotiation [2] - 4:13, 30:9 negotiations [2] - 10:2, 34:17 never [4] - 6:17, 34:22, 35:3 nevertheless [4] - 9:17, 26:9, 30:22, 31:15 nonbinding [1] - 9:17 normal [1] - 22:6 note [9] - 5:17, 7:12, 8:8, 9:3, 10:3, 10:7, 18:6, 18:15, 19:19 noted [2] - 30:5, 32:7 notes [17] - 4:8, 5:13, 6:8, 11:11, 11:14,</p>	

<p>15:20, 16:10, 21:22, 28:7, 28:9, 28:10, 32:23, 33:21, 34:21, 34:24, 35:4, 35:17 nothing [4] - 14:18, 31:14, 32:5, 32:9 notice [2] - 9:1, 12:2 notwithstanding [1] - 16:11 nuanced [1] - 12:8 number [2] - 5:23, 29:13 numbers [1] - 5:24 nursing [1] - 13:15 NW [4] - 1:14, 1:17, 1:24, 35:24</p>	<p>12:19 opposite [1] - 7:3 opposition [1] - 6:11 order [3] - 9:12, 16:17, 27:21 organization [1] - 22:14 organizations [1] - 27:20 original [1] - 16:13 overall [3] - 14:24, 15:1, 17:15 overlap [2] - 13:14, 14:9 own [2] - 3:8, 4:2</p>	<p>13:10, 13:12, 13:15, 13:24, 14:2, 14:12, 14:15, 14:17, 17:5, 17:12, 18:21, 18:22, 19:22, 20:18, 20:24, 21:11, 22:24, 22:25, 23:17, 25:24, 26:7, 26:8, 26:10, 26:12, 26:18, 26:20, 26:23, 26:24, 27:2, 27:3, 27:4, 27:6, 27:10, 27:11, 27:12, 27:25, 29:2, 34:1 plan's [1] - 3:18 planned [2] - 18:23, 22:19 plans [8] - 14:3, 15:24, 20:20, 24:13, 24:15, 25:23, 27:24, 29:6 player [1] - 31:2 plenty [1] - 3:25 point [6] - 5:20, 18:8, 22:16, 25:13, 33:20, 34:24 points [1] - 29:25 policies [1] - 13:21 policy [1] - 28:1 pool [1] - 13:20 portal [2] - 29:5, 29:9 portals [1] - 29:14 position [27] - 4:13, 6:23, 7:3, 7:4, 7:11, 7:17, 7:19, 9:20, 10:2, 10:5, 10:6, 10:10, 16:11, 16:14, 18:5, 18:14, 19:7, 19:8, 19:18, 20:6, 25:18, 28:18, 29:8, 30:2, 30:5, 31:14 positions [3] - 10:2, 25:19, 32:1 post [1] - 32:16 potentially [2] - 13:17, 13:21 precisely [1] - 25:16 presence [1] - 12:18 pretty [1] - 34:19 prevent [1] - 27:19 prevents [1] - 15:23 preview [4] - 18:22, 18:23, 20:18, 20:24 previews [1] - 18:23 principle [4] - 21:23, 30:8, 33:11, 33:13 principled [1] - 25:18 private [1] - 18:10 problem [5] - 3:23, 12:20, 14:25, 24:20 proceeding [1] - 30:24 proceedings [1] -</p>	<p>35:18 process [15] - 4:13, 6:10, 6:12, 6:14, 18:22, 18:23, 18:24, 20:18, 20:19, 20:24, 21:6, 24:7, 29:4, 32:3 program [7] - 9:14, 9:15, 12:18, 14:25, 15:1, 15:2, 33:25 programming [1] - 9:25 programs [2] - 9:23, 29:14 prohibit [1] - 7:12 prohibited [1] - 18:15 proposition [2] - 8:21, 28:3 provide [3] - 3:10, 3:17, 4:3 provided [1] - 31:11 provision [1] - 5:12 provisions [1] - 5:20 public [1] - 23:15 published [1] - 32:25 put [1] - 13:20 puts [1] - 31:1 putting [1] - 22:6</p>	<p>23:21, 31:11, 32:3, 32:5 RDR [3] - 1:23, 35:15, 35:22 read [2] - 11:10, 24:2 reading [2] - 3:22, 24:2 real [1] - 10:15 really [7] - 10:3, 23:2, 24:24, 25:3, 26:3, 27:14, 28:1 reason [3] - 14:6, 22:13, 23:8 reasonably [1] - 32:2 reasoned [2] - 30:6, 31:3 reasons [3] - 22:4, 22:15, 32:22 recalculate [2] - 16:18, 33:4 recalculated [1] - 33:9 recalculation [1] - 33:10 receive [2] - 23:11, 23:14 receiving [1] - 30:13 recess [1] - 35:10 reciting [1] - 31:13 record [9] - 2:8, 7:22, 14:18, 15:5, 18:13, 19:4, 19:21, 27:22 reduced [1] - 3:11 refer [1] - 15:15 reference [1] - 6:11 referred [2] - 11:1, 11:2 refers [1] - 15:25 reflection [2] - 3:18, 14:21 regard [1] - 25:11 regarded [3] - 19:23, 20:1, 20:3 regarding [2] - 20:3, 22:2 regs [1] - 16:10 regulation [10] - 4:6, 4:10, 4:13, 5:5, 6:12, 8:4, 8:5, 18:21, 27:1, 27:5 regulations [27] - 3:8, 3:16, 4:2, 6:3, 6:4, 7:15, 8:15, 8:17, 8:23, 9:1, 9:5, 10:18, 18:1, 20:24, 21:14, 27:11, 28:3, 28:10, 28:13, 28:17, 28:20, 31:1, 31:20, 31:23, 33:3, 34:5, 34:10 regulatory [2] - 23:4, 27:17</p>
O	P			
<p>objected [1] - 7:11 objecting [1] - 6:24 objections [1] - 20:21 objective [1] - 3:17 obligation [1] - 11:7 obviously [1] - 18:5 occur [5] - 16:12, 18:23, 22:11, 22:12 occurs [2] - 22:18, 24:18 October [1] - 6:24 odds [3] - 25:19, 27:10, 28:2 OF [5] - 1:1, 1:6, 1:9, 1:20, 35:13 offer [10] - 6:15, 13:8, 13:9, 14:3, 25:22, 26:7, 26:8, 26:12, 26:24, 30:5 offered [10] - 3:7, 6:17, 13:6, 21:5, 21:11, 26:18, 26:20, 27:3, 27:4, 33:25 offering [2] - 27:7, 27:9 offers [1] - 24:15 office [3] - 16:25, 24:8, 24:21 Official [1] - 1:23 OFFICIAL [1] - 35:13 official [1] - 35:23 one [14] - 5:3, 6:15, 10:22, 12:17, 13:6, 15:4, 19:9, 20:9, 21:23, 25:22, 28:1, 28:6, 28:24, 32:9 one's [1] - 27:6 ones [2] - 17:24, 26:4 operative [1] - 6:3 opinion [1] - 21:1 opposed [2] - 4:17,</p>	<p>p.m [2] - 1:5, 35:12 Page [2] - 5:18, 27:22 Pages [1] - 19:3 papers [1] - 24:6 paragraph [1] - 31:13 part [3] - 9:10, 18:5, 23:15 particular [1] - 15:22 parties [5] - 4:19, 4:20, 9:11, 12:18, 22:11 parts [1] - 28:5 party [1] - 18:10 Paul [1] - 2:11 PAUL [1] - 1:13 pause [1] - 5:4 Pause [1] - 15:7 Payments [1] - 3:10 Pennsylvania [1] - 1:14 people [3] - 12:22, 13:16, 30:12 per [1] - 34:16 performing [4] - 27:20, 27:21, 27:25, 28:1 period [1] - 22:24 permitted [1] - 17:16 phrases [1] - 34:8 pick [2] - 17:23, 26:3 picking [2] - 25:1, 33:19 piece [2] - 10:13, 15:22 place [1] - 12:13 plain [6] - 3:16, 31:23, 34:4, 34:20, 34:23, 35:4 Plaintiff [2] - 1:3, 1:12 plaintiff [2] - 2:6, 25:13 plan [46] - 6:15, 6:17, 13:7, 13:8, 13:9,</p>	<p>plans [8] - 14:3, 15:24, 20:20, 24:13, 24:15, 25:23, 27:24, 29:6 player [1] - 31:2 plenty [1] - 3:25 point [6] - 5:20, 18:8, 22:16, 25:13, 33:20, 34:24 points [1] - 29:25 policies [1] - 13:21 policy [1] - 28:1 pool [1] - 13:20 portal [2] - 29:5, 29:9 portals [1] - 29:14 position [27] - 4:13, 6:23, 7:3, 7:4, 7:11, 7:17, 7:19, 9:20, 10:2, 10:5, 10:6, 10:10, 16:11, 16:14, 18:5, 18:14, 19:7, 19:8, 19:18, 20:6, 25:18, 28:18, 29:8, 30:2, 30:5, 31:14 positions [3] - 10:2, 25:19, 32:1 post [1] - 32:16 potentially [2] - 13:17, 13:21 precisely [1] - 25:16 presence [1] - 12:18 pretty [1] - 34:19 prevent [1] - 27:19 prevents [1] - 15:23 preview [4] - 18:22, 18:23, 20:18, 20:24 previews [1] - 18:23 principle [4] - 21:23, 30:8, 33:11, 33:13 principled [1] - 25:18 private [1] - 18:10 problem [5] - 3:23, 12:20, 14:25, 24:20 proceeding [1] - 30:24 proceedings [1] -</p>	Q	<p>quality [5] - 3:18, 11:8, 12:19, 14:21, 33:25 Quality [1] - 3:10 questions [2] - 20:20, 29:20 quite [3] - 22:25, 24:5, 29:15 quote [3] - 6:19, 27:17, 31:15</p>
			R	
			<p>raised [3] - 24:10, 29:25, 33:20 range [1] - 24:17 rather [2] - 31:9, 35:10 rating [2] - 20:10 Rating [24] - 3:7, 4:2, 5:6, 9:14, 14:14, 14:15, 14:20, 14:24, 15:1, 15:10, 15:23, 16:17, 17:17, 17:19, 18:17, 23:12, 23:14, 23:15, 26:21, 30:11, 33:4, 33:5, 33:9, 33:12 Ratings [5] - 3:18, 19:1, 20:21, 27:18, 32:21 rationale [5] - 21:5,</p>	

<p>reiterates [1] - 6:9 reject [1] - 17:22 relate [1] - 5:15 related [2] - 11:21, 33:17 relates [2] - 12:18, 33:24 relevance [1] - 15:10 relevant [1] - 29:6 relying [1] - 34:3 remained [1] - 17:17 remand [2] - 32:12, 32:18 remanding [1] - 32:15 remedy [1] - 32:12 remind [1] - 16:5 report [2] - 34:7, 34:9 REPORTER [2] - 3:21, 35:13 Reporter [3] - 1:23, 1:23, 35:23 represent [1] - 2:10 reprogram [1] - 29:9 request [3] - 19:14, 20:16 require [2] - 17:19, 25:10 required [9] - 4:14, 6:4, 18:6, 18:19, 25:22, 32:8, 34:7, 34:9 requirement [1] - 21:17 requirements [2] - 20:22, 20:25 requires [1] - 27:5 resolution [1] - 4:23 resolve [1] - 7:8 respect [2] - 5:11, 29:8 respectfully [1] - 21:24 responded [1] - 19:2 result [2] - 10:23, 23:6 results [2] - 6:21, 30:19 RICHTER [1] - 1:14 Roddy [1] - 2:22 Room [2] - 1:24, 35:24 rule [4] - 11:13, 26:17, 30:14, 30:15 rules [1] - 25:20 ruling [1] - 33:17 RYAN [1] - 1:19</p>	<p>25:25 scores [6] - 5:7, 17:23, 21:18, 25:2, 26:4, 27:22 second [2] - 19:9, 24:19 Section [4] - 18:22, 20:23, 26:17, 28:11 Sections [2] - 21:15, 22:9 see [1] - 3:22 seem [1] - 10:15 sense [3] - 23:2, 26:22, 28:2 sent [1] - 34:17 sentence [2] - 19:11, 20:13 separately [2] - 33:18, 34:9 September [3] - 15:8, 17:11, 18:24 service [1] - 30:13 Services [2] - 2:5, 17:1 SERVICES [2] - 1:6, 1:20 services [8] - 3:7, 3:11, 3:12, 14:10, 14:13, 14:16, 14:19, 27:7 set [4] - 16:17, 18:21, 18:22, 23:21 sets [2] - 6:10, 8:23 settlement [1] - 4:24 several [2] - 4:19, 4:25 shares [1] - 14:2 sharing [1] - 3:12 shed [1] - 27:21 SHEPPARD [1] - 1:14 shows [1] - 14:19 side [3] - 15:15, 15:18, 25:11 sides [1] - 18:4 signing [2] - 12:22, 14:11 similar [1] - 32:22 simple [1] - 32:14 single [1] - 34:1 situation [1] - 5:10 situations [1] - 10:7 skilled [1] - 29:15 slow [1] - 3:21 small [1] - 29:11 SNP [5] - 6:15, 6:17, 15:2, 19:15, 21:4 sooner [1] - 35:9 sorry [4] - 18:3, 19:9, 26:19, 26:25 Sorry [1] - 3:23 sort [7] - 20:19, 22:13, 24:7, 24:17, 25:1,</p>	<p>29:4, 29:5 speaks [1] - 6:1 special [25] - 13:6, 13:8, 13:9, 14:3, 14:13, 14:15, 14:19, 17:12, 19:22, 21:11, 22:23, 24:13, 24:15, 25:22, 25:24, 26:8, 26:12, 26:18, 26:20, 26:24, 27:3, 27:4, 27:7, 27:9, 27:12 Special [2] - 2:22, 17:7 specific [10] - 5:13, 5:20, 11:12, 11:14, 11:17, 12:1, 12:18, 21:22, 32:9, 33:24 specifically [2] - 11:25, 21:23 speed [1] - 29:15 spends [1] - 31:13 stand [2] - 28:3, 35:10 stands [2] - 16:5, 17:3 Star [29] - 3:7, 3:17, 4:2, 5:6, 9:14, 14:14, 14:15, 14:20, 14:24, 15:1, 15:10, 15:23, 16:17, 17:17, 17:19, 18:17, 19:1, 20:21, 23:12, 23:14, 26:21, 27:18, 30:11, 32:21, 33:4, 33:5, 33:9, 33:12 stars [6] - 17:16, 17:17, 17:21, 25:8, 25:25 start [4] - 3:3, 4:10, 6:14, 30:1 started [2] - 4:19, 18:5 starters [1] - 33:15 statement [1] - 21:3 States [2] - 17:7, 35:23 STATES [2] - 1:1, 1:10 statutory [1] - 3:17 stenographic [1] - 35:17 step [5] - 6:10, 6:11, 6:14, 6:19 Step [1] - 6:14 still [4] - 8:1, 8:17, 8:18, 31:2 stop [1] - 12:24 Street [1] - 1:17 strong [1] - 31:7 stronger [1] - 14:8 stuff [1] - 3:13 subject [1] - 18:11 submit [5] - 6:21, 15:12, 17:16, 29:1, 29:6 submitted [1] - 29:17</p>	<p>submitting [1] - 15:24 substance [1] - 19:17 substantial [1] - 9:13 subsumed [4] - 10:17, 11:5, 13:7, 13:24 sufficient [2] - 20:15 sufficiently [1] - 20:12 suggested [1] - 22:19 suing [1] - 33:11 sum [2] - 19:17, 19:20 summary [3] - 3:14, 29:21 Supp [1] - 33:2 supplemental [1] - 3:10 supported [2] - 21:13, 35:2 surfaced [1] - 24:6 survive [1] - 14:8 surviving [25] - 6:16, 12:4, 12:21, 13:7, 13:8, 13:9, 13:25, 14:12, 14:16, 14:20, 14:21, 15:11, 17:13, 21:10, 21:19, 22:21, 23:1, 24:15, 25:21, 26:6, 26:7, 26:19, 26:24, 27:4 SW [1] - 1:21 system [4] - 15:23, 17:5, 23:16, 29:2</p>	<p>termination [10] - 6:6, 6:20, 8:6, 10:13, 10:19, 22:10, 23:7, 23:8, 23:9, 35:1 terminations [1] - 22:11 terms [1] - 32:2 terse [1] - 31:10 Texas [1] - 33:6 text [6] - 3:16, 31:23, 34:4, 34:20, 34:23, 35:4 THE [106] - 1:1, 1:1, 1:10, 2:2, 2:13, 2:16, 2:18, 2:25, 3:2, 3:5, 3:21, 3:25, 4:5, 4:10, 4:12, 4:16, 4:21, 5:4, 5:17, 5:21, 5:25, 6:23, 7:9, 7:16, 7:24, 8:3, 8:8, 8:10, 8:16, 8:20, 8:25, 9:7, 9:16, 9:20, 10:1, 10:11, 10:14, 11:4, 11:18, 11:22, 12:2, 12:11, 12:14, 12:24, 13:1, 13:4, 13:6, 13:14, 13:18, 13:22, 14:1, 14:5, 14:9, 14:23, 15:4, 15:8, 15:21, 16:2, 16:5, 16:8, 16:19, 16:21, 16:24, 17:2, 18:2, 18:4, 18:19, 19:5, 19:10, 19:13, 19:17, 19:25, 20:5, 21:2, 21:20, 22:5, 23:18, 23:23, 24:5, 24:23, 25:13, 26:6, 26:14, 26:22, 27:1, 27:13, 28:6, 28:18, 28:23, 29:7, 29:11, 29:18, 29:23, 30:3, 30:7, 30:14, 30:16, 30:22, 31:4, 31:9, 31:24, 32:11, 33:8, 34:11, 35:6, 35:8 theory [1] - 25:11 therefore [1] - 16:14 they've [2] - 34:25, 35:3 three [1] - 17:21 tied [2] - 12:12, 12:13 Tifenn [1] - 2:12 TIFENN [1] - 1:13 today [4] - 2:3, 3:6, 17:10, 31:6 together [2] - 13:20, 28:3 took [4] - 6:23, 12:13, 15:1, 18:1</p>
<p style="text-align: center;">S</p> <p>SAYED [1] - 1:12 Scan [1] - 32:24 score [1] - 17:15 scored [2] - 25:8,</p>			<p style="text-align: center;">T</p> <p>table [1] - 2:21 task [1] - 29:12 technical [29] - 4:8, 5:13, 5:17, 6:8, 7:12, 8:8, 9:3, 10:3, 10:7, 11:11, 11:14, 15:13, 15:14, 15:16, 15:20, 16:10, 18:6, 18:15, 19:19, 21:21, 28:7, 28:9, 28:10, 28:25, 32:23, 33:21, 34:21, 34:23, 35:4 tens [2] - 3:9, 9:13 terminate [2] - 22:16, 22:17 terminated [28] - 6:25, 7:13, 10:4, 10:16, 10:24, 10:25, 11:2, 11:5, 16:13, 18:15, 19:19, 19:24, 20:2, 20:4, 21:25, 22:3, 22:4, 22:8, 22:22, 23:3, 23:11, 23:13, 23:20, 24:1, 24:3, 25:3, 28:21, 29:3 terminates [1] - 23:13</p>	

<p>top ^[1] - 16:6 touch ^[1] - 28:24 traditional ^[1] - 4:4 TRANSCRIPT ^[1] - 1:9 transcript ^[2] - 35:17, 35:18 treat ^[2] - 9:10, 23:2 treated ^[2] - 4:25, 34:14 treating ^[2] - 9:23, 9:24 true ^[7] - 3:18, 7:14, 16:1, 25:2, 30:25, 35:16, 35:18 trying ^[5] - 4:22, 7:7, 7:9, 7:19, 26:2 turn ^[1] - 3:19 two ^[11] - 5:5, 6:10, 6:11, 6:14, 11:9, 13:4, 15:12, 18:23, 21:8, 34:2 two-step ^[4] - 6:10, 6:11, 6:14</p>	<p>validation ^[1] - 6:21 validations ^[1] - 20:3 varied ^[1] - 22:11 various ^[2] - 22:15, 29:14 verifications ^[1] - 31:16 via ^[2] - 9:2, 29:17 viewed ^[1] - 31:24 violate ^[1] - 3:16 violated ^[2] - 34:4, 35:4 violates ^[2] - 34:20, 34:23 violation ^[1] - 3:8 VIRGINIE ^[1] - 1:13 vision ^[1] - 3:12 visits ^[1] - 12:13</p>	<p>13:19, 13:23, 14:4, 14:6, 14:18, 14:24, 15:17, 16:1, 16:3, 16:6, 16:16, 16:20, 29:24, 30:4, 30:10, 30:15, 30:21, 30:25, 31:5, 31:12, 32:4, 32:14, 33:15, 34:12, 35:7 Wigger ^[3] - 2:10, 3:2, 29:23 word ^[2] - 24:3, 29:23 world ^[1] - 2:19 writes ^[1] - 15:10 written ^[1] - 21:1</p>
U	W	Y
<p>U.S ^[2] - 1:24, 2:23 unable ^[3] - 15:11, 29:1, 29:5 unchanged ^[1] - 14:20 under ^[9] - 6:4, 6:14, 9:8, 9:14, 9:18, 20:7, 22:7, 30:20, 35:9 undermine ^[1] - 3:17 unfair ^[1] - 15:3 unique ^[3] - 12:16, 23:7, 23:8 UNITED ^[2] - 1:1, 1:10 United ^[3] - 17:7, 33:6, 35:23 unlike ^[2] - 12:16, 23:8 unprincipled ^[1] - 25:20 up ^[4] - 12:23, 14:11, 29:15, 32:13 upload ^[2] - 15:18, 16:4 urging ^[1] - 7:10 USAO ^[1] - 1:17 utility ^[1] - 23:16</p>	<p>wait ^[3] - 8:25 Washington ^[6] - 1:4, 1:15, 1:18, 1:21, 1:25, 35:25 Wednesday ^[1] - 1:4 weighted ^[1] - 5:7 welcome ^[2] - 2:18, 2:25 WERNER ^[1] - 1:13 Werner ^[1] - 2:12 Westlaw ^[1] - 32:25 whatsoever ^[1] - 31:7 WHITLEY ^[32] - 1:19, 16:23, 16:25, 17:4, 18:3, 18:18, 18:21, 19:9, 19:12, 19:16, 19:20, 20:1, 20:14, 21:7, 21:24, 22:9, 23:19, 23:25, 24:9, 24:24, 25:16, 26:11, 26:15, 26:25, 27:8, 27:14, 28:8, 28:22, 28:24, 29:10, 29:13, 29:19 Whitley ^[4] - 2:22, 16:21, 17:8 WIGGER ^[68] - 1:12, 2:9, 2:15, 3:4, 3:6, 3:23, 4:1, 4:8, 4:11, 4:15, 4:18, 4:22, 5:12, 5:19, 5:22, 6:1, 7:6, 7:14, 7:21, 7:25, 8:5, 8:9, 8:14, 8:18, 8:22, 9:6, 9:8, 9:19, 9:21, 10:9, 10:12, 10:15, 11:10, 11:19, 11:23, 12:7, 12:12, 12:15, 12:25, 13:3, 13:5, 13:13, 13:17,</p>	<p>year ^[8] - 21:12, 21:18, 22:17, 22:19, 22:23, 24:12, 24:19, 25:23 year's ^[2] - 10:23, 23:6 years ^[2] - 5:5, 11:9 yourself ^[1] - 2:7</p>
V		
<p>vacate ^[1] - 32:19 vacated ^[3] - 32:20, 32:21, 33:4 vacating ^[1] - 32:14 vacatur ^[2] - 32:12, 32:13 validate ^[1] - 9:12</p>		