

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

HUMANA INC. *et al.*,

Plaintiffs,

v.

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

Defendants.

Case No. 24-cv-1004-O

**PLAINTIFFS' BRIEF IN SUPPORT OF THEIR EXPEDITED
MOTION TO COMPLETE THE ADMINISTRATIVE RECORD**

The administrative record (AR) filed on November 21, 2024, is facially incomplete and must be amended to include any and all documents, data, analyses, communications, and other materials the Centers for Medicare and Medicaid Services (CMS) considered or had before it in its determination of the 2025 Star Ratings for plaintiff Humana.

Expedited consideration of this motion is warranted. The parties negotiated (and the Court adopted) an accelerated briefing schedule for cross motions for summary judgment in lieu of a motion for a preliminary injunction. But plaintiffs' agreement to an accelerated summary judgment schedule was predicated on CMS producing a complete AR. Without a complete AR, plaintiffs are unable to brief summary judgment on Count I of the complaint. Plaintiffs therefore request that the Court order expedited briefing on this motion, and that it ultimately order CMS to produce a complete AR by or before December 27, 2024.

BACKGROUND

a. The Star Ratings system is a CMS-administered performance measurement system established by statute for the Medicare Advantage (MA) and Medicare Part D

benefit programs. Star Ratings play a central role in both programs. *See* FAC ¶¶ 39-48.¹ First, they provide agents and brokers, and the Medicare beneficiaries they serve, with information about a plan's quality, enabling them to compare plans when shopping during the annual enrollment period. FAC ¶ 40. Second, they help CMS evaluate and monitor MA and Part D plans and ensure compliance with regulatory and contract requirements. FAC ¶ 41. And third, they are used in administering a scheme of bonus payments for high quality MA plans, known as quality bonus payments (QPBs). FAC ¶ 43. QPBs can reach hundreds of millions or even billions of dollars annually, and plans must use those payments either to lower costs for their enrollees or to provide additional benefits. *Id.*

b. This lawsuit challenges CMS's calculation of Humana's 2025 Star Ratings. The ratings system depends on complex and regrettably error-prone (FAC ¶¶ 74-78) statistical analyses of voluminous datasets. *See generally* FAC ¶¶ 33-38; 42 U.S.C. §§ 1395w-22(e)(1), (3); 1395w-23(o)(4)(A); 1395w-151(b). CMS is required by the standard rules for agency decisionmaking, and by 42 C.F.R. § 422.166(h)(2) and related regulations, to make its data available for public review and validation during the Star Ratings plan preview periods. *See* FAC ¶¶ 67, 77, 89.

With respect to Count I of the complaint, plaintiffs allege that CMS refused to disclose the data needed to confirm the agency's 2025 Star Ratings calculations. FAC ¶¶ 9, 79, 117. Humana expressly requested and was denied large swaths of data. FAC ¶ 80. Plaintiffs allege injury on that basis alone. But in addition, and in light of the substantial and unexplained swings in the 2025 Star Ratings results compared with recent prior years,

¹ FAC citations are to the amended complaint, filed shortly before this motion, at docket no. 21. The amended complaint adds a new Count II but does not affect the agency action being challenged, the scope of relief, or the contents of the administrative record.

they also allege that CMS’s calculations were factually mistaken or otherwise arbitrary and capricious; and that Humana’s “contracts would have received higher Star Ratings had the cut points been correctly calculated.” FAC ¶ 112. Explaining that agents and brokers depend on the Star Ratings to reflect plan quality accurately, plaintiffs further allege that ABC’s members are injured because, “[w]hen Star Ratings are not grounded in validated data or sound methodologies, they cannot be taken to reflect accurately the quality and performance of plans.” FAC ¶ 115.

In addition to Count I, plaintiffs challenge CMS’s treatment of three test calls to Humana’s customer service call centers. Plaintiffs allege that the agency acted arbitrarily and capriciously because it has treated similar calls differently without justification; it has imposed irrational, extra-regulatory requirements on MA plans by forbidding callbacks within regulatory time limits; and it included a call as connected and failed, despite that the caller never asked a question, in violation of the agency’s regulations. FAC ¶¶ 132-152. Plaintiffs further allege unlawful subdelegation of agency discretion. FAC ¶¶ 127-131. Plaintiffs allege that Humana’s 2025 Star Ratings for the contracts impacted by the miscounted test calls should be vacated and set aside.

c. On November 21, 2024, CMS filed an AR comprising just 468 pages. The certification of completeness (Dkt. 19-1) does not state that the AR includes true and correct copies of the materials considered by CMS in calculating Humana’s 2025 Star Ratings. Rather, it states that the AR includes only “true and correct copies of the materials considered by CMS in rendering its decisions regarding Humana’s requests for modification of its 2025 Star Ratings during the 2024 Plan Preview Process.”

The AR thus contains almost no documents or data to support the agency’s calculation of Humana’s 2025 Star Ratings. Among other things, it does not include the data

that the agency, during the plan preview period, expressly indicated it was relying on for its Star Ratings calculations, but which it refused to disclose. *See* FAC ¶ 80. Nor does it contain any other documents, data, or analyses underlying the agency’s determination of the 2025 measure-level cut points that were not already disclosed to Humana.

Rather, the filed AR consists only of agency emails, previously disclosed portions of data, and a public CMS policy document. The first 108 pages are communications and other documents relating exclusively to Counts II-IV of the complaint. *See* AR1-108. The next 145 pages reproduce correspondence between CMS and Humana during the plan preview periods, after CMS already had reached its preliminary determination of the 2025 Star Ratings for Humana plans, using the data that Humana had requested but was not allowed to see. *See* AR 109-254. Inasmuch as the first 254 pages contain any data that CMS relied on in calculating the 2025 Star Ratings, it is data that CMS already disclosed to Humana during the plan preview periods. The remaining pages of the AR are a copy of CMS’s publicly available Technical Notes on the Star Ratings program. AR255-468.

ARGUMENT

A. The AR must include all materials that were before the agency at the time it made its decision

The APA provides that a court reviewing agency action must evaluate “the whole record” to determine whether that action is lawful. 5 U.S.C. § 706. The Supreme Court held in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), that the “whole record” means “the full administrative record that was before the [agency] at the time [it] made [its] decision.” *Id.* at 420. Courts in this District have held that for the AR to be “complete,” it therefore must “include all materials that ‘might have influenced the agency’s decision,’ and not merely those upon which the agency relied in its final decision.”

City of Dallas v. Hall, 2007 WL 3257188, at *4 (N.D. Tex. 2007) (quoting *Amfac Resorts, LLC v. Department of the Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001)); accord *Medina County Environmental Action Association v. STB*, 602 F.3d 687, 706 (5th Cir. 2010).

The prevailing rule is thus clear: An agency must include *everything* before it that might have influenced its decision, at the time it made its decision. It cannot limit the AR only to those materials it wishes the reviewing court to see.

Indeed, judicial review under the APA does not work if the agency is permitted to decide unilaterally what documents it submits to the reviewing court as the administrative record. Effective review depends upon the AR containing all relevant materials presented to the agency, including not only materials supportive of the government’s decision but also materials contrary to the government’s decision. See *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43-44 (1983). Otherwise, the reviewing court cannot engage in the “thorough, probing, in-depth review” that the APA requires. *Overton Park*, 401 U.S. at 415-416. A court deprived of a full administrative record could not intelligently determine whether the decision subject to challenge was based on flawed or adequate data and flawed or adequate analysis; or whether it was in any other way “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A).

For these reasons, the “whole” and “full” administrative record “consists of all documents and materials directly or indirectly considered by the agency” “at the time of the decision” that is under review. *Hall*, 2007 WL 3257188, at *4.

B. The AR is incomplete and must be amended

1. Although there is a “general presumption” that the “record compiled by the agency” represents the whole record (*OnPath Federal Credit Union v. U.S. Department of*

Treasury, 73 F.4th 291, 300 (5th Cir. 2023) (quoting *Medina County*, 602 F.3d at 706)), an agency “may not unilaterally determine what constitutes the administrative record” (*Hall*, 2007 WL 3257188, at *4). Courts may therefore order the agency to “complete[] the record by adding something that ‘should have properly been included in the administrative record [but] was not.’” *La Union del Pueblo Entero v. FEMA*, 141 F. Supp. 3d 681, 694 (S.D. Tex. 2015) (quoting *Gulf Coast Rod Reel and Gun Club v. U.S. Army Corps of Engineers*, 2015 WL 1883522, at *1 (S.D. Tex. Apr. 20, 2015)). In particular, courts in the Fifth Circuit “routinely allow supplementation of the administrative record” when “an agency considered evidence which it failed to include in the record.” *National Association for Gun Rights v. Garland*, 2024 WL 3517504, at *15 (N.D. Tex. 2024).

That is the case here. The AR in this case is plainly incomplete. CMS should be ordered to amend the AR to include all documents and data that were before the agency and may have influenced the agency’s determination of Humana’s 2025 Star Ratings.

2. This motion is most easily resolved by reference to the certification of completeness filed with the AR. There, Elizabeth Goldstein, Director of CMS’s Division of Consumer Assessment and Plan Performance, certifies that “the materials listed in the accompanying index comprise true and correct copies of the materials considered by CMS *in rendering its decisions regarding Humana’s requests for modification of its 2025 Star Ratings during the 2024 Plan Preview Process.*” Dkt. 19-1, at 1 (emphasis added).

That certification, taken at face value, confirms the incompleteness of the AR. *See, e.g., Washington v. Department of State*, 2019 WL 1254876, at *2 (W.D. Wash. 2019) (granting motion to complete the AR where the “certification of the administrative record as ‘complete’ [was] worded in such a way that it does not support an inference that the

agency has produced all materials it considered, directly or indirectly, when making” the decision subject to review).

To begin, plaintiffs’ challenge cannot be to CMS’s “decisions regarding Humana’s requests for modification” during the plan preview periods. The APA grants review only of a “final” agency action, which is one that “(1) marks the consummation of the agency’s decisionmaking process and (2) is one by which rights or obligations have been determined, or from which legal consequences will flow.” *Smith v. Berryhill*, 587 U.S. 471, 481 (2019) (cleaned up). CMS’s “decisions regarding Humana’s requests for modification” during the plan preview periods (Dkt. 19-1, at 1) were interlocutory only. They were made final only insofar as they merged into the agency’s final Star Ratings decision. *See* FAC ¶¶ 109-111 (explaining that the Star Ratings decision is a “final” agency action).

Even if it were possible to limit this APA case to a challenge only of CMS’s interim “decisions regarding Humana’s requests for modification” during the plan preview periods (it is not), the complaint states expressly and repeatedly that plaintiffs’ challenge is to Humana’s 2025 Star Ratings themselves, and to CMS’s unlawful policies and practices supporting them. *See* FAC Prayer for Relief (a); FAC ¶ 109 (describing the challenged agency action as “the final 2025 Star Ratings [issued by CMS] on October 10, 2024”).

The broad scope of the first cause of action confirms this. Again, it alleges that CMS’s calculations reflect unexpected swings in cut points that are more readily explained by data anomalies or calculation errors than by true changes in plan quality. *E.g.*, FAC ¶¶ 8, 11, 113. As for injury, it alleges that Humana’s “contracts would have received higher Star Ratings had the cut points been correctly calculated” (FAC ¶ 112) and that ABC’s members will have to undertake additional due diligence on plans because, “[w]hen Star Ratings are

not grounded in validated data or sound methodologies, they cannot be taken to reflect accurately the quality and performance of plans” (FAC ¶ 115).

The AR in this case must therefore comprise not only the materials included in the filed record, but *any and all* documents, data, analyses, communications, and other materials that CMS considered or had before it in its determination of the 2025 Star Ratings for plaintiff Humana. These other materials must include, at minimum and without exclusion, the data described in Paragraph 80 of the complaint, which were requested by, but denied to, Humana. The agency concededly relied on those data in its Star Ratings calculations. Those data, and all other data and documents before the agency which may have influenced the agency’s Star Ratings decision, must be included within the “whole” or “full” AR in this case.

C. Expedited briefing and disposition of this motion is warranted

The Court should, moreover, resolve this motion expeditiously and order CMS to produce a complete AR by or before January 10, 2025.

As the motion to establish a briefing schedule notes, plaintiffs need relief by mid-April 2025 at the latest, or they will suffer additional irreparable harms beyond those they already have incurred. *See* Dkt. 17, at 1. If they do not have a clear answer from the Court on all of the claims presented in the complaint by that time, it will significantly limit Humana’s ability to submit informed bids for Contract Year 2026 under the MA program. As a practical matter, work on the bid process begins in earnest in early February of each year with CMS’ release of the Advance Rate Notice. Receiving the AR by December 27 and a final judgment from the Court no later than the first Monday in April will allow sufficient time to conform Humana’s bids to any changes in Humana’s 2025 Star Ratings, which will directly influence the CY 2026 bids.

The parties thus negotiated a schedule for cross-motions for summary judgment that would permit decision in the first half of April 2025, avoiding the need for a motion for a preliminary injunction. But CMS's filing of a facially incomplete AR has made informed summary judgment briefing on the first claim in the complaint impossible. Expedited resolution of the present motion is therefore necessary to ensure that the parties are able to promptly brief summary judgment on the first count of the complaint.²

Plaintiffs accordingly respectfully request that the Court order CMS to respond to the motion no later than **December 6**; allow plaintiffs to file a reply, if any, by or before **December 10**; and enter an order on this motion by or before **December 16** requiring CMS to compile and produce the complete AR on or before **December 27, 2024**.

CONCLUSION

The Court should grant plaintiffs' expedited motion to complete the administrative record and order CMS to amend the administrative record with any and all documents, data, analyses, communications, and other materials that CMS considered or had before it in its determination of the 2025 Star Ratings for plaintiff Humana.

The Court should further order CMS to file a response to the motion no later than **December 6**; allow plaintiffs to file a reply by or before **December 10**; and enter an order on this motion by or before **December 16**, requiring CMS to compile and produce the complete AR on or before **December 27, 2024**.

² Plaintiffs intend to follow the current briefing schedule for purposes of seeking summary judgment on Counts II-V of the amended complaint. They reserve the right to seek summary judgment on Count I separately.

Dated: November 27, 2024

Respectfully submitted,

/s/ Michael B. Kimberly

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CERTIFICATE OF CONFERENCE

Pursuant to Local Rule 7.1(b), undersigned counsel certifies that he contacted counsel for the defendants by email dated November 26, 2024 at 12:18 PM Eastern Time. The email explained the relief requested and sought a conference and the government's position. Undersigned counsel received an automatic email response stating that counsel for the government was then away from the office and would return Friday, November 29, 2024. The parties accordingly were unable to confer on the relief requested before the filing of this motion, and the motion is presumed opposed.

/s/ Michael B. Kimberly

Michael B. Kimberly

CERTIFICATE OF SERVICE

Undersigned counsel certifies that a true and correct copy of this document was served via CM/ECF on all counsel of record pursuant to the Federal Rules of Civil Procedure on November 27, 2024.

/s/ Michael B. Kimberly

Michael B. Kimberly

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Defendants.

Case No. 24-cv-1004-O

[PROPOSED] ORDER

Before the Court is plaintiffs' Expedited Motion to Complete the Administrative Record and Brief in Support thereof. Having considered plaintiffs' motion and brief, together with applicable law, the Court hereby **ORDERS** that:

- Defendants are to file a response to the motion no later than **December 6**;
- Plaintiffs are to file a reply, if any, by or before **December 10**.

SO ORDERED.

Dated: _____

HON. REED O'CONNOR
United States District Judge

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[PROPOSED] ORDER

Before the Court is plaintiffs' Expedited Motion to Complete the Administrative Record and Brief in Support thereof. Having considered plaintiffs' motion and brief, together with applicable law, plaintiffs' Expedited Motion to Complete the Administrative Record is **GRANTED**. The Court accordingly **ORDERS** defendants to compile and produce the complete administrative record on or before **December 27, 2024**, including any and all documents, data, analyses, communications, and other materials that the Center for Medicare and Medicaid Services (CMS) considered or had before it in its determination of the 2025 Star Ratings for plaintiff Humana.

SO ORDERED.

Dated: _____

HON. REED O'CONNOR
United States District Judge