IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

HUMANA INC., and AMERICANS FOR BENEFICIARY CHOICE,

Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; CENTERS FOR MEDICARE & MEDICAID SERVICES; XAVIER BECERRA, in his official capacity as Secretary of Health and Human Services; and CHIQUITA BROOKS-LASURE, in her official capacity as Administrator of the Centers for Medicare and Medicaid Services,

Defendants.

Civil Action No. 24-cv-01004-O

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPLETE THE ADMINISTRATIVE RECORD

Respectfully submitted,

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I. Introduction

Plaintiffs have moved the goalposts and now accuse Defendants of missing a field goal. Their motion should be denied. First, Plaintiffs filed a Complaint alleging failures by the Centers for Medicare & Medicaid Services ("CMS" or the "Agency") to disclose data during the Medicare Part C plan preview process. Compl. ¶¶ 74-82, 112-120, ECF No. 1. The Complaint also challenged the Agency's allegedly unfair treatment of certain calls recorded as "unsuccessful" and an Agency policy governing callbacks. *Id.* ¶¶ 90-103, 121-39. Pursuant to a negotiated briefing schedule, CMS compiled and produced the Administrative Record. Then, after receiving the Administrative Record, Plaintiffs moved the goalposts: they filed two documents on the same day—an Amended Complaint (ECF No. 21) and a motion challenging the Administrative Record. The motion alleges that the administrative record CMS filed is insufficient to allow summary-judgment briefing on Count I of the Complaint. Yet their Amended Complaint—which the Motion to Complete cites throughout—substantively modified the scope of Count I. CMS compiled and filed a complete Administrative Record consistent with the original complaint. Plaintiffs have not, and cannot, make the legally required significant showing that the Administrative Record is incomplete. For these reason and for those further explained below, Plaintiffs' motion should be denied.

II. Background

Plaintiffs filed their original Complaint on October 18, 2024. Compl., ECF No. 1. Defendants agreed to Plaintiffs' proposed briefing schedule, and, on November 7, 2024, the parties jointly moved for the Court to adopt it. Joint Mot. to Establish a Briefing

Schedule, ECF No. 17. That jointly agreed schedule did not include any dates on which Plaintiffs would file an amended complaint. *See id.* The Court granted the motion, establishing a joint briefing schedule. Order, ECF No. 18.

Defendants compiled the administrative record and filed it four days before the deadline agreed to by the parties. Administrative R., ECF No. 21. On the same day that Defendants filed the administrative record, Defendants' counsel provided the full administrative record to Plaintiffs' counsel via an electronic file-sharing service, and Plaintiffs' counsel confirmed receipt that same day. The record included 468 pages as well as numerous Excel files.[1] The Excel files contain data provided to Humana during the Medicare Star Ratings plan preview process.

On November 27, one day before the Thanksgiving holiday, Plaintiffs filed two documents: (1) Plaintiffs' Brief in Support of Their Expedited Motion to Complete the Administrative Record (ECF No. 22), and (2) an amended complaint (ECF No. 21).[2] The day after Thanksgiving, Plaintiffs filed an errata to their original motion to Complete the Administrative Record (ECF No. 23-1), which moved forward by two weeks (to December 27, 2024) Plaintiffs' proposed date for CMS to produce all the additional materials Plaintiffs' seek to have added to the administrative record. *Compare* Pls.' Mot.

[1] Plaintiffs do not mention the Excel files, wrongly characterizing the AR as "comprising just 468 pages." Plaintiffs' Motion to Complete the Administrative Record 3, ECF No. 23-1.

[2] Simultaneous with this response, Defendants are filing a motion to strike Plaintiffs' first amended complaint for failure to comply with Rule 15.

8,[3] *with* Errata to Pls.' Br. in Supp. of Their Expedited Mot. Complete the Administrative R. 1, ECF No. 23.

Separately, Plaintiffs' counsel submitted a Freedom of Information Act ("FOIA") request to CMS on September 25, 2024. Defs.' App. 2 ¶ 2.[4] The information Plaintiffs' counsel sought in the FOIA request is identical to the information listed in Paragraph 80 of Plaintiffs' original Complaint. Defs.' App. 2 ¶ 2.[5] On October 18, 2024, CMS's FOIA Officer notified Plaintiffs' counsel that the estimated cost for processing the FOIA request would be $22,636 and further stated that, upon receiving the check for advance payment, the FOIA office would initiate the document search and promptly respond. Defs.' App. 2 ¶ 2. The FOIA office received payment on November 4, 2024. Defs.' App. 2 ¶ 2. CMS provided the requested documents to Plaintiffs' counsel, with certain exclusions related to protected health information ("PHI"), on December 4, 2024—two days before filing this response brief. Defs.' App. 2 ¶ 2. Before CMS provided the FOIA production, Defendants' counsel sought Plaintiffs' counsel's consent to delay Defendants' obligation to respond to their Motion to allow Plaintiffs' counsel to review the FOIA production and for the parties to meet and confer on a satisfactory resolution to the present disagreement over the scope of the record. Plaintiffs declined.

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[3] Citations to "Pls.' Mot." refer to Plaintiffs' Motion to Complete the Administrative Record, ECF No. 23-1.

[4] In compliance with Local Rule 7.2, this response is accompanied by an appendix. Citations to the appendix are designated as "Defs.' App."

[5] For the reasons explained more fully below (*see infra* at 4-7), Defendants cite principally to Plaintiffs' original Complaint and not to their Amended Complaint.

III. Legal Standard

"The designation of the administrative record, like any established administrative procedure, is entitled to a presumption of administrative regularity." *Aderholt v. Bureau of Land Mgmt.*, No. 7:15-cv-162-O, 2017 WL 11698630, , at *2 (N.D. Tex. May 1, 2017). "Overcoming the presumption of regularity requires that a party make a significant showing—variously described as 'strong,' 'substantial,' or 'prima facie'—that it will find material in the agency's possession indicative of bad faith or an incomplete record." *Id.* (internal quotation omitted); *see also The Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111, 114 (D.D.C. 2009) (explaining that "the plaintiff must overcome this strong presumption of regularity by putting forth concrete evidence that the documents it seeks to add to the record were actually before the decisionmakers") (internal quotations omitted). The record does not "include every potentially relevant document existing within its agency." *Pac. Shores Subdivision v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 7 (D.D.C. 2006).

IV. Argument and Authorities

A. Plaintiffs Amended Their Complaint To Support Their Request for an Expanded Administrative Record, Which Is Impermissible.

Consistent with the agreed-upon briefing schedule, Defendants compiled the Administrative Record based on Plaintiffs' original complaint (and before Plaintiffs filed the First Amended Complaint without consent or leave from the Court do so). Plaintiffs do not object to the Administrative Record as it concerns Counts II-IV in the original complaint. Pls.' Mot. 1. In fact, they rely on the Administrative Record to add a new

Count II (again without consent or leave to do so). *See* Am. Compl 34-45, ECF No. 21. What Plaintiffs do contend is that the Administrative Record CMS filed "has made informed summary judgment on the first claim in the complaint impossible." Pls' Br. In Supp. of Their Expedited Mot. to Complete the Administrative R. 9, ECF No. 23-1. Plaintiffs do not provide an explanation for this conclusory statement, which in any event is wrong.

Count I is a challenge to the Defendants' alleged "Refusal to Disclose Information Needed For Validation." Compl. 31, ECF No. 1. That Count alleges that CMS "refused to share all of the data for plan sponsors to validate the agency's Star Ratings Calculations." *Id.* ¶ 113. Specifically, Plaintiffs allege that the Agency's alleged failure to disclose the data Human requested was at odds with the Agency's own regulations and therefore, according to the Plaintiffs, an "arbitrary and capricious" Agency action. *Id.* ¶¶ 115-16. The original Count I requested that "Humana's 2025 Star Ratings should be set aside" and that the "Court should remand to the agency *with directions to disclose all relevant data to Humana and to allow the company to complete a full validation analysis and submit comments and feedback to the agency based thereon*." *Id.* ¶ 120 (emphasis added). In other words, the challenge Plaintiffs brought in their original Count I was to alleged nondisclosure of data, and the remedy they sought was a remand with instructions to CMS to disclose the data. *Id.*

But in their amended complaint, Plaintiffs changed the remedy they were requesting. They deleted their request that the Court "remand to the agency with directions to disclose all relevant data." *Compare id.*, *with* Am. Compl. ¶ 131. In its

place, they now assert, in their motion to "complete" the administrative record, that they are entitled to the data they seek, not on remand, but right away—as part of the administrative record. Pls.' Mot. 8. They seek a Court order requiring the Agency to provide this data by December 27, 2024. Pls' Br. In Supp. of Their Expedited Mot. to Complete the Administrative R. 1. And they ask the Court to order this remedy without first providing any summary-judgment briefing on whether they are entitled to disclosure of the data under the APA arbitrary-and-capricious standard or the regulations cited in Count I. Instead, they seek to obtain the data (a significant part of the remedy sought in Count I) through a backdoor: an allegation that the Administrative Record is somehow incomplete. Pls.' Mot. 8.

The parties agreed to brief summary-judgment motions on all four counts of the Complaint to allow this Court to decide the merits of Plaintiffs' claims. Joint Mot. to Establish a Briefing Schedule 1, ECF No. 17. Plaintiffs have now apparently changed their minds, and they believe this Court should award them much of the relief sought in the original Count I without their having to demonstrate any entitlement to such relief. It cannot be the case that a litigant in an APA case can obtain partial relief on a substantive claim regarding whether disclosure of information was required by later insisting that the information belongs in the administrative record.

Perhaps recognizing this dissonance, Plaintiffs changed Count I in their amended complaint,[6] upon which they base their theory that the administrative record is deficient.

Plaintiffs have substantively modified Count I in two ways. First, they have added an entirely new Paragraph 125, which (for the first time) alleges that "the cut points are therefore arbitrary and capricious."[7] Am. Compl. ¶ 125. And the next paragraph, replacing the former paragraph 120, no longer seeks a remand with "directions to disclose all relevant data to Humana." Plaintiffs now contend that "CMS must issue new 2025 Star Ratings according to fully validated and confirmed data and statistical analyses, in accordance with the APA and the agency's regulations." Am. Compl., ¶ 126. In other words, Plaintiffs' new Count I is no longer about disclosure, even though the original Count I—upon which Defendants relied in compiling the Administrative Record—unambiguously was. This Court should not countenance Plaintiffs' changing their original claims while simultaneously insisting that the previously filed Administrative Record conform to their new claims.[8]

[6] *Compare* Comp. ¶¶ 112-20, *with* Am. Compl. ¶¶ 117-26.

[7] In their original complaint, Plaintiffs made this allegation: "Upon information and belief, these contracts would have received higher star ratings had the cut points been correctly calculated. However, Humana was not permitted to validate, and therefore could not fully challenge, the calculations because CMS denied access to the data necessary for doing so." Compl. ¶ 107, ECF No. 1. Plaintiffs' belated effort to recast this challenge as a claim that their Complaint has been a challenge all along to the *Star Ratings themselves*, rather than to the agency's conduct during the plan preview period, is unavailing.

[8] This is particularly true in light of Defendants' good-faith efforts, rejected by Plaintiffs, to resolve this matter via a meet-and-confer. *See supra* at 3.

B. Plaintiffs' Arguments Are Unavailing.

1. Plaintiffs attempt to retroactively broaden the scope of the Agency action they challenge.

In their motion, Plaintiffs contend that their original complaint cannot be read as challenging only "CMS's 'decisions regarding Humana's requests for modification' during the plan preview periods." Pls.' Mot. 7. It is unclear why not. For one thing, Plaintiffs complaint alleges that the "plan preview periods are the last opportunity that a plan sponsor may or must use to administratively challenge an adverse change in a contract's Star Rating from one year to another resulting from the use of erroneous cut points or otherwise unlawful calculation methodologies." Compl. ¶ 104. In other words, according to the characterization of the Agency action in their own complaint, Plaintiffs are appealing the results of their "administrative[] challenge" during "plan preview periods"—precisely the issues covered by the Administrative Record that CMS filed.

Aside from their citation to the three paragraphs of the Complaint regarding final agency action, Plaintiffs cite a few other paragraphs for the proposition that their challenge has always been to the calculation of the Star Ratings writ large and not to the agency's actions regarding Humana during the plan preview period. *See* ECF No. 23-1 at 7-8 (citing Am. Compl. ¶¶ 8, 11, 112, 113, 115, ECF No. 21.). These paragraphs do not support Plaintiffs' position.

- *Paragraph 8* discusses Humana's participation in the plan preview periods.

- *Paragraph 11* refers to an alleged refusal by CMS to allow third parties to validate CMS's work, consistent with Plaintiffs' claim being about a lack of data provided.
- *Paragraph 112* again refers to Humana allegedly not being permitted to validate the calculations, and alleges only on "information and belief" that its contracts would have received higher ratings.
- *Paragraph 113* alleges that CMS's "singe call" requirements were "irrational, unexplained, and unlawful." (That allegation is irrelevant to Count 1; rather, the allegation refers to a challenge alleged in Count 4.)
- Finally, *Paragraph 115* refers to "Star Ratings . . . not grounded in validated data or sound methodologies."

While it is true that these paragraphs appeared (some with different numbers) in the original complaint, these allegations cannot fairly be read, as Plaintiffs now contend, as a "challenge to Humana's 2025 Star Ratings themselves" as well as every one of CMS's "policies and practices supporting them." Pls. Mot. 7. Rather, a fair reading of Plaintiffs' original complaint is that it challenges CMS's response to Humana's request for modification of its 2025 Star Ratings during the 2024 Plan Preview Process. CMS compiled and filed a complete Administrative Record consistent with that challenge. *See* Certification, ECF No. 19-1. Plaintiffs have not, and cannot, carry their burden of demonstrating otherwise.

2. The Record Certification is consistent with the allegations in Plaintiffs' original complaint.

Plaintiffs contend that this Court should refer to the Record Certification to find the record deficient. Pls.' Mot. 6. However, the Record Certification is wholly consistent with the claims in Plaintiffs' *original* complaint. In their original complaint, Plaintiffs' challenged four Agency actions during the plan preview process, which they described as:

1. "Refusal to Disclose Information Needed for Validation" (Count I);
2. "Disparate Treatment of Similar Call Disconnections" (Count II);
3. "No-Callback Policy" (Count III); and
4. "Study Call Where No Connection Was Made" (Count IV).

CMS provided a complete administrative record with respect to those challenges. *See* Certification, ECF No. 19-1.

The sole case Plaintiffs rely on is not on point. Pls. Mot. 6-7. In *Washington v. U.S. Dep't of State*, No. C18-1115RSL, 2019 WL 1254876 (W.D. Wash. Mar. 19, 2019), the certification described the administrative record as being limited to "non-privileged documents and materials . . . in support of the decision" at issue. *Id.* at *2. That certification clearly *excluded* both privileged materials and documents not supporting the decision. *Id.* The certification in this case, by contrast, did not exclude anything—it was simply not as broad in scope as Plaintiffs (now) insist it should have been. But Plaintiffs cannot show that their original complaint required CMS to include the materials they now insist should be part of the administrative record.

C. Notwithstanding the Foregoing, Defendants Have Substantially Complied with Plaintiffs' Request for the Materials Identified in Paragraph 80.

The only items Plaintiffs identify with any specificity as missing from the Administrative Record are those in Paragraph 80 of the original complaint. Two days before Defendants' counsel filed this response, CMS provided those materials to Plaintiffs in response to a FOIA request, except for items that could not be produced because they contain PHI. Defs.' App. 2 ¶ 2. When Defendants' counsel became aware that the production would be delivered, they promptly notified Plaintiffs' counsel and requested a meet-and-confer to allow the parties to discuss a way to resolve the present disagreement without further motions practice. Plaintiffs declined.

Plaintiffs now have in their possession most of the materials that they contend, "at a minimum," are required to complete the Administrative Record. Pls.' Mot. 8. And although Defendants maintain their objections—for the reasons described above—to including those materials in the Administrative Record, in the spirit of compromise, Defendants do not object to Plaintiffs including the materials they obtained under FOIA in their summary-judgment briefing to the extent that Plaintiffs consider them necessary for the Court's disposition of the issues.

D. Producing the Additional Materials Plaintiffs Now Seek Would Be Infeasible.

Plaintiffs do not acknowledge the breathtaking scope of the materials they now insist CMS include in the Administrative Record. They now seek "*any and all* documents, data, analysis, communications, and other materials that CMS considered or had before it in its determination of the 2025 Star Ratings for plaintiff Humana." Pls.'

Mot. 8. But because Star Ratings are graded on a curve,[9] the "materials that CMS considered or had before it in its determination of the 2025 Star Ratings for Plaintiff Humana,"[10] would necessarily include the materials for calculating *all* Star Ratings for *all* plans.

"Grading on a curve" makes producing the additional materials Plaintiffs' seek infeasible for at least three reasons. First, the additional material contains competitively sensitive information belonging to Humana's competitors, who have not been afforded any opportunity to object to the government's sharing data with a business rival. Defs' App. 2 ¶ 3. Second, the additional material includes surveys of beneficiaries (i.e., participants in Humana plans) who could be personally identified if Humana received the information it seeks. Defs' App. 2 ¶ 4. But most fundamentally, the materials Plaintiffs seek include six-hundred-million lines of data containing Protected Health Information ("PHI"). Defs' App. 3 ¶ 5. CMS cannot disclose PHI consistent with the requirements of the HIPAA regulations. *See, e.g.*, 45 C.F.R. § 164.502. And given the massive volume of data (i.e., six-hundred-million lines), there is *no* schedule (much less the December 27, 2024 deadline the Plaintiffs propose) on which CMS could perform the required redactions. Defs' App. 3 ¶ 5. No other party challenging CMS's decisions related to the issuance of Star Ratings has even suggested that the Administrative Record should include the massive amount of data that Humana contends must be included. In sum,

[9] Defs.' App. 2 ¶ 3; s*ee also SCAN Health Plan v. Dep't of Health & Human Servs.*, No. 1:23-cv-03910, 2024 WL 2815789, at *2 (N.D. Tex. June 3, 2024).

[10] Pl's Mot. 8.

Plaintiffs have not carried their heavy burden to overcome the "presumption of administrative regularity" that attaches to CMS's original designation of the Administrative Record, *see Aderholt*, 2017 WL 11698630, at *2. Nor has Humana shown that the records it seeks should be included in the Administrative Record. Moreover, it would be exceptionally burdensome (and practically not feasible) for CMS to provide the massive amount of data they seek consistent with its other legal obligations and current resources.

V. Conclusion

Plaintiffs do not argue that their original complaint justifies their challenge to the administrative record; rather, they rely on their first amended complaint (filed without leave or consent to do so) to support their argument that the administrative record is deficient. But their first amended complaint significantly expands the scope of Plaintiffs' challenge to the Agency's action and changes the remedy they request. The Agency did not have access to the Plaintiffs' amended complaint when the Agency compiled the Administrative Record, or when the Agency agreed to the parties' briefing schedule. Instead, the Agency had the Plaintiffs' *original* complaint. CMS compiled and filed a complete Administrative Record consistent with the original complaint. Plaintiffs have not, and cannot, carry their burden of demonstrating otherwise. For the reasons stated above, this Court should deny Plaintiffs' Motion to Complete the Administrative Record.

Respectfully submitted,

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Certificate of Service

On December 6, 2024, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Andrea Hyatt
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