IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCAN HEALTH PLAN 3800 Kilroy Airport Way Suite 100 Long Beach, CA 90806 *Plaintiff,* v. DEPARTMENT OF HEALTH AND HUMAN SERVICES Hubert H. Humphrey Building 200 Independence Avenue, S.W. Washington, D.C. 20201; CENTERS FOR MEDICARE & MEDICAID SERVICES 7500 Security Boulevard Baltimore, MD 21244; XAVIER BECERRA, in his official capacity as Secretary of the United States Department of Health and Human Services Hubert H. Humphrey Building 200 Independence Avenue, S.W., Washington, D.C., 20201; and CHIQUITA BROOKS-LASURE, in her official capacity as Administrator, Centers for Medicare & Medicaid Services 7500 Security Boulevard Baltimore, MD 21244, *Defendants.*	Case No.

COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff SCAN Health Plan ("SCAN") submits the following Complaint for declaratory and injunctive relief against Defendants Department of Health and Human Services ("HHS"), the

Centers for Medicare & Medicaid Services ("CMS"), Xavier Becerra, in his official capacity as Secretary of HHS, and Chiquita Brooks-LaSure, in her official capacity as Administrator of CMS (collectively, "Defendants"), and alleges as follows:

INTRODUCTION

1. SCAN brings this action to address two serious errors that CMS has made in calculating SCAN's 2024 Star Ratings, which, if not promptly corrected, will cost SCAN nearly *$250 million* in payments, impair its competitive and market position as a non-profit plan in an almost exclusively for-profit industry, and, most importantly, impede its ability to fulfill its mission of keeping more than 270,000 Medicare beneficiaries healthy and independent.

2. These two errors, and CMS's refusal to address them administratively, are a disturbing, if textbook, example of rigid and unreasonable agency decision-making that should be set aside. In the first error, CMS disregarded the plain text of its own regulation and adopted an "implied" approach, obscured within regulatory preamble and commentary, to calculate the 2024 Star Ratings. This new methodology, which was never the subject of any proper rulemaking, improperly reduced SCAN's Star Ratings. That result is directly contrary to the entire purpose of the regulation that CMS misapplied, which is to stabilize Star Ratings and thereby reduce wild, year over year ratings swings through use of explicit "guardrails."

3. In the second error, CMS considered customer service data that was tainted when an auditor, or "secret shopper," asked vague and inaccurate questions in French that delayed SCAN's response time to the questions, which negatively impacted its Star Ratings. Both of these actions fly in the face of CMS's own regulation, in violation of the Administrative Procedure Act ("APA").

4. SCAN is one of the nation's foremost not-for-profit Medicare Advantage health plans ("MA Plans"), serving over 270,000 members in California.[1] And unlike other MA Plans that also offer commercial health insurance plans, Medicare Advantage is SCAN's sole line of business and, as a result, SCAN's Star Ratings are critical to the company's ongoing operations.

5. MA Plans, like SCAN, receive annual Star Ratings from CMS, based on "health and drug plan quality and performance measures," that are used by Medicare beneficiaries to shop for plans. CMS also relies on the Star Ratings to determine MA Plans' eligibility to receive quality bonus payments and rebates that fund additional benefits for members.

6. CMS calculates the Star Ratings based on a clear and unambiguous methodology that includes the calculation of measure-specific "cut points."

7. In 2020, CMS promulgated regulations that revised its Star Ratings methodology to include "guardrails" that provide stability and predictability for MA Plans by reducing the fluctuation in the cut points used to calculate annual Star Ratings.

8. CMS is required to use actual cut points from the prior year to determine the appropriate cut points that are used to calculate an MA Plan's Star Ratings.

9. But in calculating the 2024 Star Ratings for SCAN, CMS applied an entirely different and new methodology that was not subject to any formal notice and comment rulemaking, and that directly contradicted the plain text of its own regulation.

10. Instead of using actual plan performance data from 2023 to calculate 2024 cut points in accordance with the established guardrails for Star Ratings, CMS recalculated the 2023 cut points by applying the Tukey outlier deletion method prematurely.

[1] SCAN also has affiliate health plans serving Medicare beneficiaries in Arizona, Nevada, New Mexico, and Texas.

11. When SCAN confronted the agency about its use of recalculated data, CMS asserted it was justified to do so for vague and unidentified "intrinsic" reasons.

12. The result was catastrophic: SCAN's 2024 Star Ratings dropped precipitously, disqualifying it from receiving quality bonus payments from CMS to fund critical supplemental benefits for its Medicare members and jeopardizing its ability to compete in the marketplace.

13. SCAN further learned from CMS that, in deriving its 2024 Star Ratings, CMS included a flawed and improper secret shopper call initiated by CMS, which should have been excluded from consideration.

14. Specifically, as part of its data collection, CMS placed a secret shopper call to SCAN posing as a French beneficiary, using objectively vague and ambiguous language that confused the translator and required additional time to clarify and address.

15. This one delay, which was a product of deficiencies in the manner in which the secret shopper initiated the inquiry, reduced SCAN's overall Star Ratings. That reduction resulted in SCAN becoming ineligible to receive hundreds of millions of dollars in quality bonus payments.

16. In other words, CMS's own secret shopper created a delay, which CMS used in its calculation to reduce SCAN's Stars Ratings, thereby disqualifying SCAN from receiving quality bonus payments. And because SCAN operates a single line of business as an MA Plan, the impact of CMS's 2024 Star Ratings is especially devastating to its operations and services.

17. CMS's failure to adhere to its articulated methodology to calculate SCAN's Star Ratings constitutes an unexplained and unreasonable departure from its own regulation, which carries dire consequences for SCAN and other MA Plans.

18. CMS further irrationally and unreasonably considered flawed data when calculating SCAN's 2024 Star Ratings.

19. CMS's refusal to follow its own promulgated methodology and reliance on flawed data are arbitrary and capricious agency actions in violation of the APA.

20. CMS's 2024 Star Ratings for SCAN should be vacated, and this matter should be remanded to the agency to adjust SCAN's 2024 Star Ratings based on a proper application of its regulation and use of data that is not inherently flawed.

21. To prevent SCAN from suffering irreparable harm from CMS's improper rating, and in light of the fast-approaching annual bid process, the Court should expedite the resolution of this matter on the merits, and also preliminarily enjoin CMS from relying on its improper Star Ratings to determine SCAN's quality bonus payments under the Medicare Advantage program.

PARTIES

22. SCAN is a non-profit public benefit corporation incorporated in California with its principal place of business in Long Beach, California.

23. Defendant HHS is the department of the federal government ultimately responsible for the federal Medicare and Medicaid programs.

24. HHS has delegated its authority to administer the Medicare and Medicaid programs to CMS. *See* 66 Fed. Reg. 35437.

25. Defendant CMS is a federal agency within HHS with the primary oversight responsibility for the Medicare program and the federal portion of the Medicaid program. It was created by the Reorganization Act of March 9, 1977. *See* 66 Fed. Reg. 35437.

26. Defendant Xavier Becerra is named in his official capacity as the Secretary of HHS. *See* 42 C.F.R. § 405.1136(d)(1).

27. Defendant Chiquita Brooks-LaSure is named in her official capacity as Administrator of CMS. The CMS Administrator is responsible for the administration of the Medicare program, including the Star Ratings for MA Plans. *Id.*

JURISDICTION & VENUE

28. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 because this action arises under the APA, 5 U.S.C. §§ 701 *et seq.*, and 42 U.S.C. §§ 1395 *et seq.*

29. Venue is proper in this Court under 28 U.S.C. § 1391(e) because this is an action against officers and agencies of the United States and a substantial part of the events giving rise to SCAN's claims occurred in this District.

30. The Complaint is timely under 28 U.S.C. § 2401(a).

REGULATORY AND FACTUAL BACKGROUND

The Medicare Program And Star Ratings

31. The Medicare program, authorized under Title XVIII of the Social Security Act ("SSA"), is a federal program that provides health insurance benefits for Americans aged 65 years and older and certain disabled persons. *See* 42 U.S.C. §§ 1395 *et seq.*

32. CMS is the federal agency responsible for administering the Medicare program.

33. Individuals enrolled in Medicare may elect to receive their benefits under Part C of the Medicare program, commonly referred to as the "Medicare Advantage" program, as an alternative to original Medicare.

34. Under Part C, CMS contracts with private insurance payors, commonly known as Medicare Advantage Plans ("MA Plans"), to provide and arrange for Medicare-covered benefits for Medicare beneficiaries who enroll in their benefit plan. *See* 42 C.F.R. § 422.4.

35. Besides arranging and paying Medicare-covered benefits of Medicare beneficiaries, MA Plans typically provide supplemental benefits as well as lower co-payments and other cost sharing, which further reduce the cost of covered services for beneficiaries.

36. The Medicare Advantage program is intended to shift the financial risk of providing health care to beneficiaries from the federal government to the privately run MA Plans in exchange for a per-member, per-month payment.

37. MA Plans that are better at keeping their members healthy, by effectively managing their care and providing important related services, receive higher ratings, and overall, perform better in the marketplace. *See generally* 42 C.F.R. § 422.160.

38. By providing additional benefits beyond those covered by Medicare, MA Plans compete with original Medicare and with one another to convince beneficiaries to select their plan.

39. In an effort to encourage MA Plans to offer high quality plans and to assist Medicare beneficiaries in selecting a Part C plan, CMS studies and surveys MA Plans for quality, compliance, and other metrics to develop numerical ratings for each MA Plan ("Star Ratings").

40. The Star Ratings are based on a five-star scale, with 1 star being the lowest rating and 5 stars being the highest. *See* 42 C.F.R. § 422.162(b); 42 C.F.R. § 422.166(h)(1)(ii).

41. The Star Ratings are designed to be "a true reflection of the plan's quality" and must be based on data that is "complete, accurate, reliable, and valid." 83 Fed. Reg. 16440, 16521 (Apr. 16, 2018).

42. Star Ratings information is widely available to Medicare beneficiaries to consider when choosing to enroll in an MA Plan. These measures are particularly important, as they allow beneficiaries to compare health plans based on quality.

43. CMS prominently displays Star Ratings in its online and print resources on available MA Plans as required under the SSA. *See* 42 U.S.C. § 1395w–21.

44. Indeed, through the online Medicare Plan Finder tool, CMS displays MA Plans in highest to lowest Star Ratings order to prospective members, with the express purpose of guiding beneficiaries to higher-rated plans first.

45. The Star Ratings also impact the amount of funds CMS will pay to each MA Plan.

46. Under Section 1853(o) of the SSA, CMS allocates quality bonuses to MA Plans based on their Star Ratings and awards additional funds to MA Plans rated at or above 4 stars. *See* 42 U.S.C. § 1395w–23. MA Plans use these bonuses, which are often in the tens, if not hundreds of millions, of dollars, to provide additional benefits and services to further improve care to their members.

47. Conversely, MA Plans that consistently receive Star Ratings below 3 stars may be terminated from the Medicare Advantage program altogether. *See* 42 C.F.R. § 162(b); 42 C.F.R. § 422.166(h)(1)(ii).

48. Thus, the Star Ratings have tremendous value to and impact on MA Plans to provide quality care and benefits to their members, compete in the marketplace, receive compensation, and even remain eligible to continue to participate in the Medicare Advantage program.

Calculation Of Star Ratings Generally

49. To calculate Star Ratings, CMS must use clear and unambiguous calculations established in its regulations. *See* 42 C.F.R. § 422.162(b); 42 C.F.R. § 422.166(h)(1)(ii).

50. Star Ratings for MA Plans are based on a calculation of numerous performance measures designed to assess member services and care, including but not limited to preventative health services, management of long-term conditions, member experiences with the health plan, member complaints, and customer service. *See Medicare 2024 Part C & D Star Ratings Technical Notes* at 26-100, CENTERS FOR MEDICARE AND MEDICAID SERVICES, https://www.cms.gov/files/document/2024technotes20230929.pdf.

51. CMS publishes these measures and the specifications that it uses to develop its Star Ratings. MA Plans (including SCAN) use them to target areas of improvement and investment to ensure they are maximizing their care and services for beneficiaries, and in turn, earn higher Star Ratings.

52. Any changes to the Star Ratings calculations can have serious, and sometimes catastrophic, impacts on MA Plans.

53. When MA Plans' Star Ratings fall, they may be disqualified from receiving quality bonus payments and can even be removed from the Medicare Advantage program altogether, resulting in devastating financial and coverage consequences for the plans and their beneficiaries.

54. Therefore, in developing each MA Plan's Star Ratings, CMS must treat each MA Plan "fairly and equally," judging them only on matters that are "under the control of the health or drug plan," in a system that will "minimize unintended consequences" adopted through a

"process of developing [a ratings methodology that] is transparent and allows for multi-stakeholder input." 83 Fed. Reg. 16440, 16521.

55. CMS calculates Star Ratings based on a rigid methodology – set forth in its own regulations – that focuses on "health and drug plan quality and performance measures." 42 C.F.R. § 422.166; Medicare 2024 Part C & D Star Ratings Technical Notes at 2 & 26-100.

56. Measures used to calculate Star Ratings can be grouped into two categories: those from the Consumer Assessment of Healthcare Providers and Systems surveys ("CAHPS"), and those from "non-CAHPS" sources. Medicare 2024 Part C & D Star Ratings Technical Notes, at 2 & 26-73.

57. CAHPS measures relate to member experience with healthcare providers, services, and plans, deriving data from "surveys that ask consumers and patients to evaluate the interpersonal aspects of health care." 42 C.F.R. § 422.162(a). In other words, they measure the member experience.

58. Non-CAHPS measures derive data from sources other than CAHPS surveys. *See* Medicare 2024 Part C & D Star Ratings Technical Notes, at 4. Non-CAHPS measures consist of data from, among other sources, the Healthcare Effectiveness Data and Information Set[2] and CMS's Part C and D reporting requirements. *Id.* at i.

59. Each CAHPS and non-CAHPs measure is given a numeric score. *Id.* at 2.

[2] The Healthcare Effectiveness Data and Information Set ("HEDIS") is a tool used by more than 90 percent of U.S. health plans to measure performance on important dimensions of care and service. More than 190 million people are enrolled in health plans that report quality results using HEDIS. *See* Healthcare Effectiveness Data and Information Set (HEDIS) - Healthy People 2030 | health.gov (last visited Dec. 29, 2023).

60. The agency then determines the "cut point" for each measure – that is, the range of scores that correspond with particular Star Ratings.[3]

61. The statistical method used to calculate the cut points differs for CAHPS and non-CAHPS measures. *Id.* at 8.

62. CAHPS measures employ a relative distribution and significance testing method,[4] while non-CAHPS measures are subject to a clustering sampling method. *Id.*

63. Together, the CAHPS and non-CAHPS measure scores and cut points are combined to develop each MA Plan's Star Ratings.

CMS Adopts Guardrail Requirements As Part Of The Star Ratings Methodology

64. On June 2, 2020, CMS promulgated a final rule establishing a new methodology for the calculation of Star Ratings. *See* 85 Fed. Reg. 33796. The new methodology was supposed to be applied starting in 2021, but was delayed because of the COVID-19 pandemic.

65. The final rule modified the methodology for non-CAHPS measures in two critical ways.

[3] For instance, the 2023 cut points for measure C11 (Controlling Blood Pressure) – which is measured as a percentage – were the following: below 39% for 1 Star, between 39% and 62% for 2 Stars, between 62% and 75% for 3 Stars, between 75% and 83% for 4 Stars, and above 83% for 5 Stars. *See* Medicare 2023 Part C & D Star Ratings Technical Notes, at 45-47.

[4] Clustering sampling is defined by CMS as a "variety of techniques used to partition data into distinct groups such that the observations within a group are as similar as possible to each other, and as dissimilar as possible to observations in any other group." 42 C.F.R. § 422.162(a). Clustering of the measure-specific scores means "that gaps that exist within the distribution of the scores are identified to create groups (clusters) that are then used to identify the four cut points resulting in the creation of five levels (one for each Star Rating), such that the scores in the same Star Rating level are as similar as possible and the scores in different Star Rating levels are as different as possible." *Id.*

66. *First*, the final rule explained that, starting in 2024, the Tukey outlier deletion method would be used in developing the cut points for non-CAHPS measures. *See* 42 C.F.R. § 422.166(a)(2).[5]

67. *Second*, and most importantly, the final rule implemented "guardrails" or "bi-directional caps that restrict upward and downward movement of a measure's cut points" from one year to the next. *Id.*[6]

68. Specifically, the guardrail prevents each measure's cut points from fluctuating more than 5% (upward or downward) from that of the previous year, thereby promoting stability in Star Ratings year over year. *See generally* 85 Fed. Reg. 33796-33911.

69. CMS thus adopted the guardrail requirement to provide stability and predictability from year-to-year. *See generally id.*

70. According to the regulation, CMS is supposed to rely on the actual cut points from the prior year to determine and calculate the guardrail to measure the cut points that ultimately would be used to develop the Star Ratings for the MA Plans.

71. CMS explained that it would incorporate the "guardrail so that the measure-threshold-specific cut points for non-CAHPS measures do not increase or decrease more than the value of the cap from 1 year to the next." *Id.*

72. Under the final rule, therefore, to calculate the 2024 Star Ratings cut points, CMS is required to remove Tukey outliers from its methodology and then apply the guardrail caps for

[5] Tukey outlier deletion is a "standard statistical methodology for removing outliers, to increase the stability and predictability of the star measure cut points." 85 Fed. Reg. 33798.

[6] A guardrail is defined by CMS as "a bidirectional cap that restricts both upward and downward movement of a measure threshold-specific cut point for the current year's measure-level Star Ratings as compared to the prior year's measure-threshold-specific cut point." 42 C.F.R. § 422.162(a).

each measure's cut points compared to the actual 2023 cut points. *See* 42 C.F.R. § 422.166(a)(2)(i).

73. Doing so is supposed to prevent the 2024 cut points from deviating more than 5% from the 2023 cut points, thereby bringing stability to the calculations and process for MA Plans and Star Ratings. *Id.*

CMS's Arbitrary Rejection Of Its Own Methodology To Develop The 2024 Star Ratings Caused SCAN's Star Ratings To Drop

74. Based on its high-quality care and services, SCAN has historically received top-tier Star Ratings that are critical to its operations and ability to serve its members.

75. Indeed, SCAN has received Star Ratings of 4.5 out of 5 from 2019 through 2023.

76. As previously noted, due to the COVID-19 pandemic, CMS delayed implementing its guardrail requirement for two years until 2023, when it was supposed to use that requirement to establish the 2024 Star Ratings. *See* 87 Fed. Reg. 22776.

77. Thus, 2023 was the first time that CMS implemented its guardrail requirement, when it established its 2024 Star Ratings. *See id.*

78. In August 2023, CMS notified MA Plans, including SCAN, of the first "plan preview" of their 2024 Star Ratings, which provided the data and scores for each measure, but not the actual Star Ratings.

79. Later, in September 2023, CMS notified SCAN and other MA Plans of the second plan preview for their 2024 Star Ratings. The second plan preview included CMS's preliminary Star Ratings.

80. SCAN's preliminary 2024 Star Ratings dropped precipitously to *3.5 stars* – far lower than its historically high ratings.

81. SCAN immediately contacted CMS for an explanation of the sudden and surprising drop in its Star Ratings.

82. In response, CMS advised that "the 2023 Star Ratings cut points were rerun . . . and [t]hese *rerun* 2023 Star Ratings cut points serve as the basis for the guardrails for the 2024 Star Ratings." *See* Exhibit ("Ex.") 1, CMS Stars Mailbox Correspondence on Sept. 8, 2023. That is to say, in computing SCAN's 2024 Star Ratings, CMS used rerun simulated 2023 cut points data.

83. But CMS's own regulation requires it to rely on the previous year's *actual* cut points and data – not simulated, rerun data. *See* 42 C.F.R. § 422.166(a)(2).

84. Nevertheless, CMS rejected the methodology set forth in the regulation, and refused to consider actual cut points for the prior year.

85. And the results were just as dire as expected: MA Plans' Star Ratings fluctuated wildly, and well-beyond the 5% caps on cut point swings that the guardrails are supposed to impose.

86. For 2024 Star Ratings, CMS's cut point for measure D01 (Call Center – Foreign Language Interpreter and TTY Availability) associated with a 3-Star Rating fluctuated from 64% to 86% – a difference of 22% – and the 4-Star Rating fluctuated from 80% to 96% – a difference of 16%.[7]

87. Those fluctuations well-exceed the 5% cap on fluctuations that the guardrails are supposed to provide.

[7] *See* https://www.cms.gov/medicare/health-drug-plans/part-c-d-performance-data (last visited Dec. 29, 2023).

88. Thus, SCAN's 2024 Star Ratings significantly dropped as a result of CMS's failure to apply its own regulations.

89. Had CMS followed the regulation as written, SCAN's Star Rating would have been 4 stars, rather than 3.5 stars.

90. CMS's failure to follow its own regulation resulted in the very thing that the guardrails were designed and intended to prevent: wild fluctuations in cut points that impact MA Plans' Star Ratings.

91. SCAN alerted CMS to its flawed methodology, explaining that the regulation requires CMS to apply the guardrail to actual cut points from the prior year, not to rerun data that effectively amount to simulated data points. SCAN also advised CMS that this flawed approach undermines the purpose and policy of the regulation to reduce wild fluctuations in ratings. *See* Ex. 2, CMS Stars Mailbox Correspondence on Sept. 11, 2023.

92. Rerunning the 2023 data is inconsistent with the plain and express language of the regulation, which calls for comparison between the current and prior year's actual and measure-specific-threshold cut points. *See* 42 C.F.R. § 422.166(a)(2)(i). It also frustrates the very purpose of CMS's guardrail regulation, which is to reduce risk and uncertainty for MA Plans by preventing dramatic swings in cut points and resulting ratings that can have massive adverse impacts on MA Plans and beneficiaries.

93. By its express terms, CMS's regulation does not permit the agency to recalculate the prior year's cut points for the purposes of generating and applying the guardrails. *See* Ex. 2.

94. When confronted with the flaws in its approach, CMS asserted that statements in its preamble to its final rule related to the use of Tukey outliers somehow permitted its departure from the regulation's actual text. *Id.*; 85 Fed. Reg. 9044; 85 Fed. Reg. 33833.

95. CMS further asserted that the authority to use rerun cut points was an unstated but "intrinsic part" of the agency's rule that it had every intention of applying. *See* Ex. 3, CMS Stars Mailbox Correspondence on Sept. 22, 2023.

96. Despite SCAN's efforts to further discuss and resolve its concerns, CMS refused to meaningfully engage with SCAN or reconsider its flawed approach and grave impacts of it.

97. As such, CMS ultimately released its final 2024 Star Ratings on October 13, 2023, where it rated SCAN at 3.5 Stars – a significant reduction from its past ratings, and a rating that is not "a true reflection of the plan's quality." 83 Fed. Reg. 16440, 16521 (Apr. 16, 2018).

CMS Used Other Flawed And Improper Data To Calculate SCAN's Star Ratings

98. CMS also relied on incorrect and disputed data for the "customer service" criteria to calculate SCAN's Star Ratings, which includes additional measures such as the "Call Center" measure.

99. As part of the Call Center measure, CMS audits the "Call Center - Foreign Language Interpreter and TTY Availability" of MA Plans.

100. This measure calculates the number of completed contacts in which a caller can "establis[h] contact with an interpreter and confir[m] that the customer service representative can answer questions about the plan's [health] benefit[s] within eight minutes." *See* Medicare 2024 Part C & D Star Ratings Technical Notes, at 73.

101. As part of this measure, CMS hires auditors – commonly referred to as "secret shoppers" – to pose as a beneficiary and call SCAN's customer service line.

102. On February 9, 2023, a CMS secret shopper posed as a French-speaking beneficiary, called SCAN's member services line, and asked to speak to "the right person to respond to questions concerning medical benefits of" a particular SCAN product.

103. During this call, SCAN's team connected the secret shopper with a French interpreter after 6 minutes and 35 seconds and substantively answered the question within 7 minutes and 30 seconds from when the secret shopper called, well within the eight-minute timeframe set by CMS. *See* Medicare 2024 Part C & D Star Ratings Technical Notes, at 73.

104. CMS, however, identified the call as outside the eight-minute timeframe because additional time was required upfront to clarify and understand the secret shopper's poorly phrased and confusing inquiry about SCAN's product.

105. Specifically, the secret shopper, speaking in French, used an ambiguous expression to refer to "medical benefits" – which has multiple and confusing English meanings – and also spelled the SCAN product name in a confusing manner.

106. Because of the ambiguity, the interpreter could not understand the question the first time and thus asked the secret shopper to repeat his question, causing additional delays in SCAN's ability to resolve the inquiry.

107. Additionally, the secret shopper spoke unusually slow and in a non-standard manner, including using confusing pauses that interrupted the shopper's own questions as they were asked. The secret shopper in fact spent approximately 25 seconds asking a single question, demonstrating the length of the pauses and self-made interruptions.

108. The delays and confusing pauses forced the interpreter to ask the shopper to repeat the question, adding an additional and unnecessary 34-second delay.

109. Thus, while SCAN substantively resolved the secret shopper's question within 7 minutes and 30 seconds, the call in total exceeded 8 minutes because of the ambiguity and errors in CMS's questions and the manner in which it was asked.

110. Despite these errors and the flawed data it provided, CMS nevertheless included this specific secret shopper's call as a data point in SCAN's Star Rating, which directly and adversely impacted its rating due to the extensive time it took to rectify the issues caused by the secret shopper's flawed translation and conduct.

111. Indeed, the February 9, 2023, call alone triggered a reduction in SCAN's Star Ratings. Without the call, SCAN's Star Ratings would have been 4 stars.

Defendants' Unlawful Conduct Has Harmed – And Continues To Harm – SCAN

112. Defendants' refusal to abide by their own regulation threatens to cause severe and irreparable harm to SCAN.

113. By applying some newfound "intrinsic" methodology to calculate guardrails, rather than its actual regulation, Defendants have used simulated, rerun data to calculate SCAN's Star Ratings.

114. Defendants have further improperly considered the flawed secret shopper call.

115. As a result, Defendants have issued a fundamentally flawed Star Ratings for SCAN of 3.5 stars.

116. The impact of that significant drop in SCAN's Star Ratings is serious and substantial.

117. By reducing SCAN's 2024 Star Ratings, CMS has rendered SCAN ineligible for quality bonus payments in 2025, thereby impacting its operations and ability to provide enhanced benefits and lower premiums to beneficiaries.

118. The reduced Star Ratings and accompanying consequences have also undermined SCAN's competitive position, reputation, and goodwill, and impacted its ability to compete against competitors, including those that may have benefited from Defendants' flawed and unlawful methodology.

119. Additionally, as a result of CMS's flawed rating methodology and reliance on flawed data, beneficiaries may, based on its Star Ratings, mistakenly conclude SCAN's offerings are inferior or lower in quality compared to the offerings of its competitors.

120. SCAN has tried to resolve the parties' dispute informally to no avail. Exs. 1-3.

121. Left with no other option, SCAN turns to this Court to require Defendants to comply with federal law, vacate the flawed Star Ratings assigned to SCAN, and enjoin them from relying on that unlawful rating in connection with SCAN's eligibility for quality bonus payments.

COUNT I
(Violation Of 5 U.S.C. § 706(2)(A) – Against All Defendants)
(Use Of Simulated And Rerun Cut Point Data)

122. SCAN realleges the allegations set forth in Paragraphs 1 through 121 of this Complaint as if fully set forth herein.

123. CMS's decision – as approved and directed by Defendants – to use simulated and rerun 2023 cut point data to calculate SCAN's 2024 Star Ratings is a final agency action made reviewable by 5 U.S.C. § 706(2) and 42 C.F.R. § 422.260(c)(3).

124. SCAN is adversely affected and aggrieved by Defendants' action.

125. Defendants' decision to use simulated and rerun cut point data for 2023 is arbitrary and capricious and contrary to law.

126. Defendants failed to engage in reasoned decision-making; to reasonably (or at all) explain their departure from CMS's own regulation; or to provide an adequate and reasonable explanation for their decision.

127. Defendants' action flies in the face of the plain and unambiguous text of their own regulation and undermines the policy and purpose of that regulation to reduce Star Ratings swings that harm MA Plans and beneficiaries.

128. Defendants acted unreasonably and contrary to law by deploying a methodology that is inconsistent with the approach mandated by their regulation, and was never disclosed to regulated parties – let alone adopted pursuant to any proper rulemaking proceedings.

129. As a result, Defendants' decision is arbitrary, capricious, and otherwise not in accordance with the law in violation of 5 U.S.C. § 706(2)(A).

130. SCAN has suffered and will continue to suffer irreparable harm as a result of Defendants' violations of 5 U.S.C. § 706(2)(A).

131. SCAN is entitled to injunctive and declaratory relief to remedy Defendants' unlawful conduct, as well as all other relief as set forth in its Prayer for Relief. *See* 5 U.S.C. § 705.

COUNT II
(Violation Of 5 U.S.C. § 706(2)(A) – Against All Defendants)
(Use Of Flawed Call Input)

132. SCAN realleges the allegations set forth in Paragraphs 1 through 121 of this Complaint as if fully set forth herein.

133. CMS's inclusion of the February 9, 2023, secret shopper call – as approved and directed by Defendants – to calculate SCAN's performance on the Foreign Language Interpreter

and TTY Availability measure for the 2024 Star Ratings is a final agency action made reviewable by 5 U.S.C. § 706(2) and 42 C.F.R. § 422.260(c)(3).

134. SCAN is adversely affected and aggrieved by the use of this flawed data measure.

135. Defendants' decision to consider the improper and flawed secret shopper call is arbitrary and capricious and contrary to law.

136. Defendants failed to engage in a reasoned decision-making; to consider important aspects of the problem they believed they faced; to consider the impact that the secret shopper call would have on SCAN's Star Ratings; to provide an adequate explanation for their decision to consider an improper secret shopper call that was flawed as a result of Defendants' own mishandling as part of SCAN's Star Ratings; and considered the secret shopper call even though contrary evidence demonstrated it should never have been considered.

137. The use of this data to calculate SCAN's 2024 Star Ratings is arbitrary, capricious, and otherwise not in accordance with the law in violation of 5 U.S.C. § 706(2)(A).

138. SCAN has suffered and will continue to suffer irreparable harm as a result of Defendants' violations of 5 U.S.C. § 706(2)(A).

139. SCAN is entitled to injunctive and declaratory relief to remedy Defendants' unlawful conduct, as well as all other relief as set forth in its Prayer for Relief. *See* 5 U.S.C. § 705.

COUNT III
Declaratory Judgment

140. SCAN realleges and incorporates Paragraphs 1 through 121 as if fully set forth herein.

141. CMS's calculation of the 2024 Star Ratings is a final agency action made reviewable by 5 U.S.C. § 706(2).

142. SCAN is adversely affected and aggrieved by the calculation of its Star Ratings.

143. An actual controversy has arisen and exists between SCAN and Defendants regarding Defendants' calculation of SCAN's 2024 Star Ratings using simulated and rerun 2023 data and a flawed audit call.

144. SCAN requests a declaration from this Court under 28 U.S.C. § 2201 that Defendants' calculation is arbitrary and capricious.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff SCAN prays that this Court vacate SCAN's 2024 Star Ratings and remand this matter to the agency for further consideration. Additionally, SCAN requests the Court to:

1. Adopt an expedited schedule to resolve the merits of this Complaint;

2. Declare that:

   - Defendants' rerunning of the 2023 cut points to calculate SCAN's 2024 Star Ratings directly conflicts with CMS's regulatory requirements and is arbitrary and capricious in violation of 5 U.S.C. § 706(2)(A);

   - Defendants' consideration of the February 9, 2023, flawed and improper Foreign Language Interpretation call to calculate SCAN's 2024 Star Ratings is arbitrary and capricious in violation of 5 U.S.C. § 706(2)(A); and

   - Defendants must recalculate SCAN's 2024 Star Ratings in compliance with CMS's final rule, specifically considering actual performance data and excluding consideration of the secret shopper call.

3. An injunction:

   - Preventing Defendants from using SCAN's 2024 Star Ratings in connection with any quality bonus payment eligibility decisions.

4. Award SCAN its reasonable attorney's fees and costs, as permitted by law; and

5. Grant such other further relief as this Court deems just and proper.

Dated: December 29, 2023

By: _____

Paul Werner (D.C. Bar #482637)
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
2099 Pennsylvania Ave N.W., Suite 1000
Washington, D.C. 20006
Tel. 202-747-1900
pwerner@sheppardmullin.com

Counsel for SCAN Health Plan

CIVIL COVER SHEET

JS-44 (Rev. 11/2020 DC)

I. (a) PLAINTIFFS
SCAN Health Plan

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF 88888
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS
U.S. Dep't of Health & Human Servs., Centers for Medicare and Medicaid Servs., XAVIER BECERRA, in his official capacity as Secretary of Health & Human Servs., and CHIQUITA BROOKS-LASURE, in her official capacity as Administrator of Ctrs. for Medicare and Medicaid Servs.

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)
Paul Werner
SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP
2099 Pennsylvania Avenue NW, Suite 100
Washington, D.C. 20006 (202) 747-1900

ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION
(PLACE AN x IN ONE BOX ONLY)

- ○ 1 U.S. Government Plaintiff
- ◉ 3 Federal Question (U.S. Government Not a Party)
- ○ 2 U.S. Government Defendant
- ○ 4 Diversity (Indicate Citizenship of Parties in item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) **FOR DIVERSITY CASES ONLY!**

	PTF	DFT		PTF	DFT
Citizen of this State	○ 1	○ 1	Incorporated or Principal Place of Business in This State	○ 4	○ 4
Citizen of Another State	○ 2	○ 2	Incorporated and Principal Place of Business in Another State	○ 5	○ 5
Citizen or Subject of a Foreign Country	○ 3	○ 3	Foreign Nation	○ 6	○ 6

IV. CASE ASSIGNMENT AND NATURE OF SUIT

(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

○ A. *Antitrust*
- ☐ 410 Antitrust

○ B. *Personal Injury/ Malpractice*
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Medical Malpractice
- ☐ 365 Product Liability
- ☐ 367 Health Care/Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Product Liability

◉ C. *Administrative Agency Review*
- ☒ 151 Medicare Act

Social Security
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

Other Statutes
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 890 Other Statutory Actions (If Administrative Agency is Involved)

○ D. *Temporary Restraining Order/Preliminary Injunction*

Any nature of suit from any category may be selected for this category of case assignment.

(If Antitrust, then A governs)

○ E. *General Civil (Other)* OR **○ F. *Pro Se General Civil***

Real Property
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent, Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

Personal Property
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

Bankruptcy
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

Prisoner Petitions
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Conditions
- ☐ 560 Civil Detainee – Conditions of Confinement

Property Rights
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent – Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016 (DTSA)

Federal Tax Suits
- ☐ 870 Taxes (US plaintiff or defendant)
- ☐ 871 IRS-Third Party 26 USC 7609

Forfeiture/Penalty
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

Other Statutes
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 430 Banks & Banking
- ☐ 450 Commerce/ICC Rates/etc
- ☐ 460 Deportation
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions
- ☐ 470 Racketeer Influenced & Corrupt Organization
- ☐ 480 Consumer Credit
- ☐ 485 Telephone Consumer Protection Act (TCPA)
- ☐ 490 Cable/Satellite TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes
- ☐ 890 Other Statutory Actions (if not administrative agency review or Privacy Act)

G. *Habeas Corpus/ 2255*	H. *Employment Discrimination*	I. *FOIA/Privacy Act*	J. *Student Loan*
☐ 530 Habeas Corpus – General ☐ 510 Motion/Vacate Sentence ☐ 463 Habeas Corpus – Alien Detainee	☐ 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)*	☐ 895 Freedom of Information Act ☐ 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	☐ 152 Recovery of Defaulted Student Loan (excluding veterans)

K. *Labor/ERISA (non-employment)*	L. *Other Civil Rights (non-employment)*	M. *Contract*	N. *Three-Judge Court*
☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 740 Labor Railway Act ☐ 751 Family and Medical Leave Act ☐ 790 Other Labor Litigation ☐ 791 Empl. Ret. Inc. Security Act	☐ 441 Voting (if not Voting Rights Act) ☐ 443 Housing/Accommodations ☐ 440 Other Civil Rights ☐ 445 Americans w/Disabilities – Employment ☐ 446 Americans w/Disabilities – Other ☐ 448 Education	☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholder's Suits ☐ 190 Other Contracts ☐ 195 Contract Product Liability ☐ 196 Franchise	☐ 441 Civil Rights – Voting (if Voting Rights Act)

V. ORIGIN

◉ 1 Original Proceeding ○ 2 Removed from State Court ○ 3 Remanded from Appellate Court ○ 4 Reinstated or Reopened ○ 5 Transferred from another district (specify) ○ 6 Multi-district Litigation ○ 7 Appeal to District Judge from Mag. Judge ○ 8 Multi-district Litigation – Direct File

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)

Admin Procedures Act (5 USC 706 et seq); Arbitrary & capricious agency action by CMS for Star Ratings calculation

VII. REQUESTED IN COMPLAINT ☐ CHECK IF THIS IS A **CLASS ACTION** UNDER F.R.C.P. 23 **DEMAND $** **JURY DEMAND:** Check YES only if demanded in complaint YES ☐ NO ☒

VIII. RELATED CASE(S) IF ANY (See instruction) YES ☐ NO ☒ If yes, please complete related case form

DATE: 12/29/2023 **SIGNATURE OF ATTORNEY OF RECORD** /s/ Paul Werner

INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.

III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.

IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.

VI. CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.

VIII. RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

Exhibit 1

From: CMS PartC&DStarRatings <PartCandDStarRatings@cms.hhs.gov>
Sent: Friday, September 08, 2023 10:37 AM
To: Moon Leung <[redacted]>
Cc: CMS PartC&DStarRatings <PartCandDStarRatings@cms.hhs.gov>
Subject: RE: Guardrail Question on CY2024 Star Rating 2nd Preview

Hi Moon,

When we proposed and finalized Tukey outlier deletion in the 2021 final rule (CMS–4190–F), we described that in the first year of adding Tukey outlier deletion, the prior year's thresholds would be rerun, including mean resampling and Tukey outer fence deletion so that the guardrails would be applied such that there is consistency between the years. For the purposes of calculating the guardrails for the 2024 Star Ratings, the 2023 Star Ratings cut points were rerun including mean resampling, Tukey outlier deletion and no guardrails. These rerun 2023 Star Ratings cut points serve as the basis for the guardrails for the 2024 Star Ratings.

Best Regards,
Joy

From: Moon Leung <[redacted]>
Sent: Friday, September 8, 2023 1:38 AM
To: CMS PartC&DStarRatings <PartCandDStarRatings@cms.hhs.gov>
Subject: Guardrail Question on CY2024 Star Rating 2nd Preview

Hi CMS Star Team,

After reviewing the cut points for CY2024 and CY2023, it appears that the Guardrail rule was not applied to some Non-CAHPS Star measure cut points. Here are two examples:

Measure #	Measure	Source	WG	Year	Wgt	1 Star	2 Star	3 Star	4 Star	5 Star
C11	Diabetes Care – Blood Sugar Controlled	HEDIS	CM	2023	3	< 39%	≥ 39% to < 62%	≥ 62% to < 75%	≥ 75% to < 83%	≥ 83%
				2024	3	< 58%	≥ 58% to < 72%	≥ 72% to < 80%	≥ 80% to < 87%	≥ 87%
						2024 vs 2023	19%	10%	5%	4%

Measure #	Measure	Source	WG	Year	Wgt	1 Star	2 Star	3 Star	4 Star	5 Star
D01	Availability of TTY/TDD Services and Foreign Language Interpretation When Members Call the Drug Plan	Call Center	AD	2023	4	< 30%	≥ 30% to < 64%	≥ 64% to < 80%	≥ 80% to < 91%	≥ 91%
				2024	4	< 73%	≥ 73% to < 86%	≥ 86% to < 96%	≥ 96% to < 99%	≥ 99%
						2024 vs 2023	43%	22%	16%	8%

Can you respond to us regarding this potential error, or explain why the guardrails published in the final rule were not applied to the cut points?

Thanks very much for your help in advance.

Moon

Confidentiality Notice: This email may contain confidential information, some or all of which may be protected health information (PHI) as defined by the federal Health Insurance Portability & Accountability Act (HIPAA) Privacy Rule, or may otherwise be proprietary, privileged, confidential and/or exempt from disclosure under applicable law. This email is intended for the exclusive use of the individual to whom it is addressed. The authorized recipient is obligated to maintain the information in a safe, secure, and confidential manner and is prohibited from using this information for purposes other than intended and prohibited from disclosing this information to any other party unless required to do so by law or regulation.

IMPORTANT WARNING: If you are not the intended recipient you are hereby notified that any disclosure, dissemination, distribution or copying of this information is strictly prohibited and may be subject to legal restriction or sanction. Please notify the sender by return email or phone. Thank you for your prompt attention in this matter.

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IMPORTANT WARNING: If you are not the intended recipient you are hereby notified that any disclosure, dissemination, distribution or copying of this information is strictly prohibited and may be subject to legal restriction or sanction. Please notify the sender by return email or phone. Thank you for your prompt attention in this matter.

Exhibit 2

From: Michael Plumb
Sent: Monday, September 11, 2023 6:13 PM
To: [redacted]
Cc: PartCandDStarRatings@cms.hhs.gov; Renee Delphin-Rodriguez [redacted]>; Moon Leung [redacted]
Subject: Guardrail Question on CY2024 Star Rating 2nd Preview

Cheri,
Hope you are well and that you had a nice summer. We wanted to reach out to you regarding the exchange (see below) that we've had with the CMS Stars Mailbox with respect to the application of the guardrails to the 2024 cut rates for non-CAHPS Star measures. In response to our inquiry, the CMS Stars Mailbox explained that "**rerun** 2023 star rating cut points serve as the basis for the guardrails for the 2024 Star Ratings." This is concerning to us because it is not consistent with Section 422.166(a)(2)(i).

§ 422.166 Calculation of Star Ratings.

(a) Measure Star Ratings —

(1) Cut points. CMS will determine cut points for the assignment of a Star Rating for each numeric measure score by applying either a clustering or a relative distribution and significance testing methodology. For the Part D measures, CMS will determine MA–PD and PDP cut points separately.

(2) Clustering algorithm for all measures except CAHPS measures.

(i) The method maximizes differences across the star categories and minimizes the differences within star categories using mean resampling with the hierarchal clustering of the current year's data. Effective for the Star Ratings issued in October 2023 and subsequent years, prior to applying mean resampling with hierarchal clustering, Tukey outer fence outliers are removed. Effective for the Star Ratings issued in October 2022 and subsequent years, CMS will add a guardrail so that the measure-threshold-specific cut points for non-CAHPS measures do not increase or decrease more than the value of the cap from 1 year to the next. The cap is equal to 5 percentage points for measures having a 0 to 100 scale (absolute percentage cap) or 5 percent of the restricted range for measures not having a 0 to 100 scale (restricted range cap). New measures that have been in the Part C and D Star Rating program for 3 years or less use the hierarchal clustering methodology with mean resampling with no guardrail for the first 3 years in the program.

The language highlighted in yellow ensures that the cut points for non-CAHPS measures do not increase from year to year by more than the 5 percent cap, given that the very purpose of the guardrails is to provide stability and predictability for plans. The statute does not provide for the re-calculation of the prior year cut points for purposes of the application of the guardrails.

The Final Rule, as well as prior year Fact Sheets, define guardrails as "bi-directional caps that restrict upward and downward movement of a measure's cut points for the current year's measure-level Star Ratings compared to the prior year's measure-threshold specific cut points." This again states the comparison points are current year and prior year measure specific cut points.

There are non-CAHPS star measures such as D01 where the proposed 2024 cut points increase far in excess of 5 percentage points "from 1 year to the next." The 4 star cut points for measure D01 are proposed to change massively

from ">=80% to <91%" in 2023 to ">=96% to <99%." Those proposed cut points are not consistent with the language in the final rule with respect to application of guardrails to year over year changes.

We would be happy to jump on a call to discuss this further, but hopefully the references above to the specific language in the Final Rule identifies the need for a revision of the extreme cut point changes proposed in the 2nd preview.

Michael Plumb
Chief Financial Officer
SCAN Group & SCAN Health Plan

Renée Delphin-Rodriguez (she/her/hers)
Chief Legal Officer & General Counsel
SCAN Group & SCAN Health Plan

From: CMS PartC&DStarRatings <PartCandDStarRatings@cms.hhs.gov>
Sent: Monday, September 11, 2023 10:56 AM
To: Michael Plumb [redacted]
Cc: Moon Leung [redacted]; CMS PartC&DStarRatings <PartCandDStarRatings@cms.hhs.gov>
Subject: RE: Guardrail Question on CY2024 Star Rating 2nd Preview

Hi Michael,

We are calculating cut points consistently with what we stated in the rule for the first year Tukey outlier deletion is applied. For example, in the proposed rule at 85 FR 9044 it said: "We request commenter feedback on Tukey outer fence outlier deletion as an additional step prior to hierarchal clustering. In the first year that this would be implemented, the prior year's thresholds would be rerun, including mean resampling and Tukey outer fence deletion so that the guardrails would be applied such that there is consistency between the years."

As another example at 85 FR 33833 in the final rule, "We requested comments on our proposal to use Tukey outer fence outlier deletion as an additional step prior to hierarchal clustering. We explained that under our proposal in the first year of implementing this process, the prior year's thresholds would be rerun, including mean resampling and Tukey outer fence deletion so that the guardrails would be applied such that there is consistency between the years."

As noted earlier, for the purposes of calculating the guardrails for the 2024 Star Ratings, the 2023 Star Ratings cut points were rerun including Tukey outlier deletion and no guardrails. These rerun 2023 Star Ratings cut points serve as the basis for the guardrails for the 2024 Star Ratings.

Since the 2023 Star Ratings cut points were rerun to apply Tukey outlier deletion, you cannot apply the bi-directional guardrails to the 2023 Star Ratings cut points published in the Medicare 2023 Part C & D Star Ratings Technical Notes.

As an example, for D01 (Call Center – Foreign Language Interpreter and TTY Availability) measure for MA-PDs, the rerun 2023 Star Ratings cut points are as follows:

1 star cut point:	< 68%
2 star cut point:	>= 68% to < 81%
3 star cut point:	>=81% to < 91%
4 star cut point:	>=91% to <97%
5 star cut point:	>= 97%

The bi-directional guardrails are applied to the above cut points.

The final 2024 Star Ratings cut points for D01 are as follows:

1 star cut point:	< 73 %
2 star cut point:	>= 73 % to < 86 %
3 star cut point:	>= 86 % to < 96 %
4 star cut point:	>= 96 % to < 99 %
5 star cut point:	>= 99 %

Please note that guardrails were applied for this measure to the 1, 2 and 3 star cut points.

We plan to add a table to the 2024 Part C & D Star Ratings Technical Notes with the 2023 Star Ratings cut points that were rerun with Tukey outlier deletion and mean resampling.

Best Regards,
Joy

From: Michael Plumb [redacted]
Sent: Monday, September 11, 2023 1:07 AM
To: CMS PartC&DStarRatings <PartCandDStarRatings@cms.hhs.gov>
Cc: Moon Leung [redacted]
Subject: RE: Guardrail Question on CY2024 Star Rating 2nd Preview

Thank you for your prompt response. However, we are following up because it does not seem to us that your response in the email below is consistent with what is actually included in the final rule.

We've combed through the attached final rule (CMS-4201-F) as well as the actual Federal Register for the references to the use of the cut point guardrails.

Page 671 of the attached final rule includes the following section that describes the Calculation of Star Ratings:

§ 422.166 Calculation of Star Ratings.
(a) * * *
(2) * * *
(i) The method maximizes differences across the star categories and minimizes the differences within star categories using mean resampling with the hierarchal clustering of the current year's data. Effective for the Star Ratings issued in October 2023 and subsequent years, prior to applying mean resampling with hierarchal clustering, Tukey outer fence outliers are removed. Effective for the Star Ratings issued in October 2022 and subsequent years, CMS will add a guardrail so that the measure-threshold-specific cut points for non-CAHPS measures do not increase or decrease more than the value of the cap from 1 year to the next. The cap is equal to 5 percentage points for measures having a 0 to 100 scale (absolute percentage cap) or 5 percent of the restricted range for measures not having a 0 to 100 scale (restricted range cap). New measures that have been in the Part C and D Star Rating program for 3 years or less use the hierarchal clustering methodology with mean resampling with no guardrail for the first 3 years in the program.
* *

The portion highlighted in yellow specifies that "CMS will add a guardrail so that the measure-threshold-specific cut points for non-CAHPS measures do not increase or decrease more than the value of the cap from 1 year to the next." That clearly states that the guardrails are meant to ensure that the cut points for non-CAHPS measures do not increase from year to year by more than the 5 percent cap. That is not consistent with the assertion in the e-mail response below that "rerun 2023 star rating cut points serve as the basis for the guardrails for the 2024 Star

Ratings." There is no reference that we can find in the final rule that references the recalculation of the prior years cut points for purposes of the application of the guardrails.

The Final Rule, as well as prior year Fact Sheets, define guardrails as "bi-directional caps that restrict upward and downward movement of a measure's cut points for the current year's measure-level Star Ratings compared to the prior year's measure-threshold specific cut points." This again states the comparison points are current year and prior year measure specific cut points.

As we referenced in our original e-mail below, there are non-CAHPS star measures such as D01 where the proposed 2024 cut points increase far in excess of 5 percentage points "from 1 year to the next." (4 star cut points for measure D01 are proposed to change from ">=80% to <91%" in 2023 to ">=96% to <99%.") Those proposed cut points are not consistent with the language in the final rule, so it seems it would be appropriate to modify those cut points.

Michael Plumb
CFO, SCAN Health Plan

Exhibit 3

From: CMS PartC&DStarRatings <PartCandDStarRatings@cms.hhs.gov>
Sent: Friday, September 22, 2023 6:21 AM
To: Michael Plumb [redacted]>; Rice, Cheri (CMS/CM) [redacted]

Cc: Renee Delphin-Rodriguez [redacted]>; Moon Leung [redacted]>; CMS PartC&DStarRatings <PartCandDStarRatings@cms.hhs.gov>
Subject: RE: Guardrail Question on CY2024 Star Rating 2nd Preview

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We know a meeting is being set up with Cheri. In the meantime, here is additional background about cut points. As we stated in the CY 2021 NPRM (85 FR 9044) and final rule (CMS–4190–F) (85 FR 33833, 33835), for the first year that Tukey outlier deletion is implemented (2024 Star Ratings), we will rerun the prior year's thresholds using mean resampling and Tukey outlier deletion so that guardrails will be applied consistently between years. This is an intrinsic part of the Tukey outlier deletion rule and the rule satisfied the requirements in the Administrative Procedure Act for notice and comment rulemaking. CMS was clear in this rulemaking that in the first year of implementing this process the prior year's thresholds will be rerun.

Best regards,

Part C and D Star Ratings Team

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

SCAN HEALTH PLAN

Plaintiff(s)

v.

U.S. Department of Health & Human Services, et al.

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* U.S. Department of Health & Human Services
Hubert H. Humphrey Building
200 Independence Avenue SW
Washington, DC 20201

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Paul A. Werner
SHEPPARD MULLIN RICHTER & HAMPTON LLP
2099 Pennsylvania Avenue NW, Suite 100
Washington, DC 20006
Telephone: (202) 747-1900
pwerner@sheppardmullin.com

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____ was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

SCAN HEALTH PLAN

Plaintiff(s)

v.

U.S. Department of Health & Human Services, et al.

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Paul A. Werner
SHEPPARD MULLIN RICHTER & HAMPTON LLP
2099 Pennsylvania Avenue NW, Suite 100
Washington, DC 20006
Telephone: (202) 747-1900
pwerner@sheppardmullin.com

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____ was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____ , a person of suitable age and discretion who resides there, on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is designated by law to accept service of process on behalf of *(name of organization)* _____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

SCAN HEALTH PLAN

Plaintiff(s)

v.

U.S. Department of Health & Human Services, et al

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* XAVIER BECERRA, Secretary of Health and Human Services
U.S. Department of Health & Human Services
Hubert H. Humphrey Building
200 Independence Avenue SW
Washington, DC 20201

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Paul A. Werner
SHEPPARD MULLIN RICHTER & HAMPTON LLP
2099 Pennsylvania Avenue NW, Suite 100
Washington, DC 20006
Telephone: (202) 747-1900
pwerner@sheppardmullin.com

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

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Signature of Clerk or Deputy Clerk

Civil Action No.

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❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

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I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

AO 440 (Rev. 06/12; DC 3/15) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Columbia

SCAN HEALTH PLAN

Plaintiff(s)

v.

U.S. Department of Health & Human Services, et al.

Defendant(s)

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* CHIQUITA BROOKS-LASURE, Administrator,
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Paul A. Werner
SHEPPARD MULLIN RICHTER & HAMPTON LLP
2099 Pennsylvania Avenue NW, Suite 100
Washington, DC 20006
Telephone: (202) 747-1900
pwerner@sheppardmullin.com

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

ANGELA D. CAESAR, CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

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I declare under penalty of perjury that this information is true.

Date: _____

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Server's signature

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Printed name and title

_____
Server's address

Additional information regarding attempted service, etc: