

FILED UNDER SEAL

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

UNITEDHEALTHCARE BENEFITS OF
TEXAS, INC., et al.,

Plaintiffs,

v.

CENTERS FOR MEDICARE & MEDICAID
SERVICES, et al.,

Defendants.

Civil Action No. 6:24-cv-00357-JDK

**PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO SUPPLEMENT THE
ADMINISTRATIVE RECORD**

Plaintiffs moved this Court to supplement the administrative record with two extra-record documents. *See* Pls. Mot. to Suppl. the Admin. R., ECF No. 13. Specifically, Plaintiffs seek to supplement the administrative record with (1) the American Institute for Research, Survey II Accuracy & Accessibility Study Interviewer Training Manual – CMS Call Center Monitoring (January 2023) (hereinafter “Exhibit A”) and (2) CMS’s February 22, 2024, Reconsideration Determination(s) regarding Elevance Health Inc.’s contract numbers H2593, H40356, H5431, and R4487 (hereinafter “Exhibit B”). *See id.*, Exhs. A and B. In response, Defendants do not argue that the documents are not “background information” that will assist the Court in assessing Plaintiffs allegations. Instead, Defendants only argue that the Court may not permit supplementation in this instance because of their extremely narrow reading of a single, outlier district court case from a different district. This narrow reading, however, ignores important exceptions repeatedly permitted in this Circuit.

Supplementation is permitted when the district court needs “‘background information’ in order to determine whether the agency considered all of the relevant factors.” *Medina Cnty. Env’t. Action v. Surface Transport Bd.*, 602 F.3d 687, 706 (5th Cir. 2010). This exception recognizes that, at times, courts must look at background information “outside the record to see what the agency may have ignored.” *Tex. Bankers Ass’n v. Consumer Fin. Prot. Bureau*, No. 7:23-cv-144, 2024 U.S. Dist. LEXIS 152401, at *10-11 (S.D. Tex. Aug 26, 2024). This is one of those times.

Defendants do not meaningfully rebut this position, and they ignore Plaintiffs’ arguments and supporting case law. Instead, Defendants erroneously read *Texas Bankers* to limit extra-record materials only to those that “point out an entirely new general subject matter.” Defs.’ Opp’n to Pls.’ Mot. to Suppl. the Admin. R. at 4 (ECF No. 16). But this assertion asks too much from *Texas Bankers*. There, the district court rejected plaintiffs’ requested inclusion of a journal article published nearly a year *after* the final rule in question. *See compare Tex. Bankers*, 2024 U.S. Dist. LEXIS 152401 at *5 (final rule published May 2023) *with id.* at *11 (article published February 2024); *see also Oceana, Inc. v. Ross*, 454 F. Supp. 3d 62, 69 (D.D.C. 2020) (rejecting a declaration created *after* an agency decision as not background information). As a result, the article could not be considered “background information” and the agency could not have considered it when making its decision. In this case, the requested supplements were available to CMS when making its adverse Star Rating decision and should have been considered by CMS (but were not) when issuing this decision. As a result, the supposed restriction established by *Texas Bankers* is inapplicable to the documents in question here.

Moreover, “the Fifth Circuit allows a court to consider additional documents to get a sense of the universe of potential information in deciding whether the agency conducted a sufficiently thorough assessment.” *Gulf Coast Rod Reel & Gun Club, Inc. v. U.S. Army Corps of Eng’rs.*, No.

3:13-cv-126, 2015 U.S. Dist. LEXIS 56804, at *11 (S.D. Tex. April 20, 2015).¹ Background documents are those that help the court have a better understanding of the subject matter at issue. *Id.* Exhibits A and B are such documents as they help the court understand Plaintiffs' arguments that CMS acted arbitrarily and capriciously because it *failed* to consider all applicable guidance and another similar agency determination. Specifically, Plaintiffs seek to supplement the record with documents, which existed at the time of CMS's determination, that demonstrate that (1) CMS was arbitrary and capricious by failing to follow its own decision-making criteria, which existed at the time of its decision, and (2) CMS failed to treat Plaintiffs in the same manner as it had other similarly-situated health insurance plans. Both independently justify supplementing the record with these documents for the reasons described below.

Courts in this circuit have allowed plaintiffs to supplement the administrative record with documents, like Exhibit A, when they show an agency's considerations were insufficient. For instance, in *Sana Healthcare Carrollton, LLC*, the district court permitted the plaintiff to supplement the record with pre-existing materials that it argued showed that the government failed to consider all relevant factors before making an adverse determination. *See Sana Healthcare Carrollton, LLC v. Dept' of Health & Human Servs.*, No. 4:23-cv-738, 2024 U.S. Dist. LEXIS 94353, at *18-20 (E.D. Tex. May 28, 2024). Defendants do not counter this point; their only refutation is that CMS's Technical Notes (AR 1-32) contain similar information to Exhibit A. However, "the evidence itself is required to make that determination," even if the court ultimately determines that the government did not ignore such factors. *Sana Healthcare Carrollton*, 2024 U.S. Dist. LEXIS 94353, at * 19-20. Further, Plaintiffs contend that CMS's decision was arbitrary and

¹ The district court's decision to permit plaintiff to supplement the administrative record was not considered on appeal. *See Gulf Coast Rod, Reel & Gun Club v. U.S. Army Corps of Eng'rs*, 676 F. App'x 245 (5th Cir. 2017).

capricious because it violated its own decision-making criteria. Pls.' Mot. for Summ. J. at 13-15 (ECF No. 12). So too did the agency's contractor, which is demonstrated by Exhibit A. Therefore, Plaintiffs request to include Exhibit A meets the narrow exception.

Courts have also permitted Plaintiffs to supplement the record with documents, like Exhibit B, that demonstrate an agency's disparate treatment of similarly situated appellants. For instance, in *Vapor Train 2 LLC*, the district court permitted plaintiffs to supplement the record to demonstrate that an agency has failed to treat "like cases alike." *See, e.g., Vapor Train 2 LLC v. U.S. Food & Drug Admin.*, No. 6:22-cv-00429, 2024 U.S. Dist. LEXIS 103750, at *4 (E.D. Tex. June 4, 2024) (quoting *Univ. of Tex. M.D. Anderson Cancer Ctr. v. HHS*, 985 F.3d 472, 479 (5th Cir. 2021)). Plaintiffs seek to do the same here by including CMS's Elevance's decision. One of Plaintiffs' arguments is that CMS acted arbitrarily and capriciously by failing to respond to their concern that they had been treated differently than Elevance. Here, the fact that the Elevance decision is not in the administrative record shows, in and of itself, that CMS did not consider that decision (notwithstanding Plaintiffs' numerous requests that it do so during the plan preview process). To understand that omission in context, the Court should allow supplementation of the record. Defendants' only rebuttal is that CMS did consider another of Plaintiffs' similarly situated calls, even if not Elevance's, focusing again on its narrow reading of *Texas Bankers*. However, this does not evidence that CMS considered its prior Elevance decision and the similarities thereto when issuing its decision regarding Plaintiffs' call, as the Administrative Procedure Act requires. Therefore, Plaintiffs' request to include Exhibit B meets the narrow exception.

For these reasons, the Court should grant Plaintiff's Motion to Supplement the Administrative Record.

Respectfully submitted,

Jared M. Slade
Texas State Bar No. 24060618
jared.slade@alston.com
ALSTON & BIRD LLP
2200 Ross Avenue, Suite 2300
Dallas, Texas 75201
Telephone: 214-922-3400
Facsimile: 214-922-3899

/s/ Daniel G. Jarcho
William H. Jordan (Georgia Bar # 405122)
Daniel G. Jarcho (D.C. Bar #391837)
Kelley C. Barnaby (D.C. Bar #998757)
Christopher J. Frisina (D.C. Bar #1033185)
bill.jordan@alston.com
daniel.jarcho@alston.com
kelley.barnaby@alston.com
christopher.frisina@alston.com
ALSTON & BIRD LLP
950 F Street, N.W.
Washington, DC 20004
Telephone: (202) 239-3300
Facsimile: (202) 239-3333

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply in Support of Motion to Supplement the Administrative Record has been served via electronic mail this 7th day of November, 2024 to:

JAMES G. GILLINGHAM
Assistant United States Attorney
Texas State Bar No. 24065295
james.gillingham@usdoj.gov
110 N. College, Suite 700
Tyler, TX 75702
Tel: (903) 590-1400
Fax: (903) 590-1436

Counsel for Defendants

/s/ Daniel G. Jarcho
Daniel G. Jarcho