

**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 FOR SUMMARY JUDGMENT AND  
OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

CMS’s entire position is that, because the call in question allegedly did not “connect,” the CMS caller was not required to ask the required “introductory question” in French. But CMS conceded no fewer than three times during the administrative process that the call *did* connect. That conceded connection required the caller to ask the introductory question in French, which he failed to do. As a result, the call should have been “invalidated” (and not counted against Plaintiffs) under CMS’s clear rules. CMS’s contrary decision was arbitrary and capricious and threatens to misinform millions of Medicare beneficiaries about the quality of Plaintiffs’ Medicare Advantage plans. This Court should hold CMS to its prior position that the challenged call connected and direct CMS to invalidate the call and recalculate Plaintiffs’ Star Ratings. This will ensure that Medicare beneficiaries promptly receive accurate information about Plaintiffs’ plans.

## ARGUMENT

### **I. CMS’S STAR RATINGS DECISION IS ARBITRARY AND CAPRICIOUS**

#### **A. CMS Correctly Conceded Three Times During the Administrative Process That the Challenged Call “Connected”.**

CMS does not dispute that if the call at issue “connected,” then CMS should have “invalidated” it because the test caller failed to ask the “introductory question” in French. CMS also agrees that under its established criteria:

- The call is categorized as “not successfully completed” (and is thus counted against the plan) if the call did not “connect” to a customer service representative (during Phase 2 of the test-call process) due to the fault of the plan call center or its provider.
- By contrast, the call is invalidated (and removed from the study) if the call “connects” to a customer service representative but the test caller does not ask the introductory question (during Phase 3 of the test-call process).

*Compare* Pls.’ Br. at 7-9 *with* CMS Br. at 8, 13. In this case, if the call “connected” the only remaining question is whether the test caller asked the introductory question in French. If the test

caller chose not to ask the question, it does not matter who was at fault for that choice: CMS failed to follow its own criteria. And here, the caller indisputably did *not* ask that introductory question, so CMS can only prevail if the call never connected in the first place. That question is dispositive concerning both of Plaintiffs' primary claims. CMS Br. at 14 (premising defense to "introductory question" claim on an alleged failure to connect), 17 (premising defense to disparate treatment claim on an alleged failure to connect).

The problem for CMS here is that it already answered that question, three times, during the administrative process. On each occasion, CMS conceded that the call *did* connect. First, on July 25, 2024, during the plan preview process, CMS conceded that the call connected:

The interviewer was able to *connect* with the plan and inform the plan they needed a French interpreter. The interviewer was on hold and then *connected* with a CSR but only heard the sound of a voice for a second. The interviewer said, "Hello," but there was no response from the CSR. The interviewer continued to hold until the CSR disconnected.

(AR 086) (emphasis added). CMS made the same concession in an email on September 16, 2024, later in the plan preview process. (AR 199) ("The plan's provided recording confirms the interviewer's experience, that they *connected* to a CSR and heard someone say something and then cut out.") (emphasis added). And CMS's final Star Ratings decision issued on September 24, 2024, likewise conceded that both the call recording and the interviewer's experience confirm that the call connected:

The plan's provided recording confirms the interviewer's experience, that they *connected* to a CSR and heard someone say something and then cut out.

(AR 223) (emphasis added). As explained below, these concessions end the case.

**1. CMS’s Concessions During the Administrative Process That the Call “Connected” Bar Its Contrary *Post Hoc* Litigation Position Here.**

The “‘grounds upon which an administrative order must be judged are those upon which the record discloses its action was based.’” *Louisiana v. United States DOE*, 90 F.4th 461, 469 (5th Cir. 2024) (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). This basic principle of administrative law means that CMS cannot now, during litigation, reverse course from the administrative process (when the actual decision was made) and contend for the first time here that the call never connected. That would be an impermissible “‘*post hoc* salvage operation[ ] of counsel.’” *Spirit Airlines, Inc. v. U.S. Dep’t of Transp.*, 997 F.3d 1247, 1256 (D.C. Cir. 2021) (quoting *Fla. Power & Light Co. v. FERC*, 85 F.3d 684, 689 (D.C. Cir. 1996)). An agency is not “‘free to defend its decision by supplying new, *post hoc* rationalizations for it when sued.” *Wages & White Lion Invs., L.L.C. v. FDA*, 90 F.4th 357, 371 (5th Cir. 2024). “The Supreme Court has repeatedly reaffirmed [a] prohibition on ‘convenient litigating position[s]’ and ‘*post hoc* rationalization[s].’” *Louisiana*, 90 F.4th at 469 (citing *Kisor v. Wilkie*, 588 U.S. 558 (2019)).

CMS’s current litigation position violates these important principles. CMS did not base its final decision on any assertion that the call failed to “connect” (and instead conceded that it did connect). CMS is bound by its prior concessions, which foreclose the agency’s sole defense to Plaintiffs’ two primary claims.

**2. The Undisputed Record Evidence Supports CMS’s Concession That the Call Did “Connect”.**

Although CMS’s repeated concession that the call connected is dispositive, it is worth noting that CMS did not make that concession for no reason. The agency conceded that fact because it is clear and undisputed. As CMS explained, the “plan’s provided recording” and the “interviewer’s experience” both “confirm[ed]” the fact that the caller “connected to a CSR and

heard someone say something and then cut out.” (AR 223.)<sup>1</sup> CMS agrees that the recording of the call is the true and accurate evidence of what actually happened during the call. CMS Br. at 2, 14. CMS also does not dispute that the recording (and digital call record) show that the tester said an opening greeting, after which neither party said anything else during the following 8 minutes and 17 seconds, after which the call center disconnected the call. Pls.’ Br. at 10-11; CMS Br. at 13-14. These undisputed facts show that the call connected, pure and simple, as CMS conceded three times during the administrative process.

Attempting to muddy the waters, CMS asserts that the test caller “believed” he was on hold during the call. CMS Br. at 2, 15. But that is a tacit concession that he was not *actually* on hold. And the contemporaneous digital record of the call clearly shows that the call was in fact not put on hold, and that the customer service representative instead remained connected to the test caller for 8 minutes and 17 seconds before terminating the call. (AR 239 (Ex. A) (showing “Agent Hold” of 00:00:00, “Agent Duration” of 00:08:17, and “Agent Talk” of 00:08:17.)) The test caller’s call log also is consistent with the undisputed fact that the call center disconnected the call “after about 500 seconds.” (Native File for AR 182.) The caller was not on hold, and was connected for more than eight minutes, yet never asked the introductory question in French.

CMS also asserts that a “connection” requires both an actual connection with a customer service representative and confirmation, by the tester, that the connection occurred. CMS Br. at 13. That assertion cannot be a basis for sustaining CMS’s decision, because it is a new issue that the agency did not consider at the time of the decision. *Louisiana*, 90 F.4th at 469.

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<sup>1</sup> The reference to “cutting out” is not explained, but it cannot mean that the call immediately disconnected. As discussed below, CMS conceded that the call was not disconnected until more than eight minutes after the customer service representative answered.

In any event, the contemporaneous call notes clearly show that the caller confirmed the connection, stating that “[a]fter about 500 seconds ‘the called person hung up’ [and] line disconnected.” CMS Br. at 14 (quoting AR 66 and citing Native File for AR 182.) The call obviously could not have been “disconnected” “after about 500 seconds” unless it had first been “connected” during that time. And the connection duration of about 500 seconds matches the digital call record, which shows that the call stayed connected for 8 minutes and 17 seconds (i.e., 497 seconds). (AR 239 (Ex. A); *see also* Native File for AR 196.) This undisputed record evidence supports CMS’s original concession that a “connection” did occur.

In addition, although the Court need not address the issue for the reasons noted above, CMS’s position that caller confirmation is necessary for a connection to take place is simply another reason to enter summary judgment for Plaintiffs. The agency’s technical notes are entirely inconsistent on the question of whether such confirmation is a necessary element of a “connection.” *Compare* AR 006 (“The call is considered **connected** when the caller connects with the CSR.”) and AR 009 (“A call is considered **connected** when the caller reaches the CSR (phase 2).”) *with* AR 011 (“A call is considered **connected** when the caller confirms that the call connects to the CSR.”). A “rule[ ] [that is] internally inconsistent, [is], by definition, arbitrary and capricious.” *United States SBA v. Weather King Heating & Air, Inc.*, 648 B.R. 200, 217-18 (N.D. Ohio 2023).

Perhaps aware that its position before this Court is inconsistent with its decisions during the administrative process and the undisputed facts, CMS appears at times to invite the Court to conclude as a matter of “common sense” that the call was, at its core, a failure and, thus, that it was fair to treat it as such. CMS Br. at 14. As explained further below, that is not an accurate summary of the facts. But more importantly, that is not how administrative law works. The fact

that CMS could have created rules deeming this kind of call a failure does not mean that it actually did so in this case. On the contrary, the rules CMS created in this case show that the call connected and, thus, should have been invalidated when the caller failed to ask the introductory question.

As CMS itself notes elsewhere (CMS Br. at 11), this Court must review the *actual* rationale of the agency under the “arbitrary and capricious” standard. CMS violated its own decision-making criteria when it included the disputed call in the study, rendering its decision arbitrary and capricious, and ripe for summary judgment.<sup>2</sup>

**B. CMS’s Star Ratings Decision Was Arbitrary and Capricious Because It Treated Plaintiffs Differently Than Other Similarly Situated Plans Without a Rational Basis for the Distinction.**

CMS does not deny that it would be arbitrary and capricious to treat Plaintiffs differently than Elevance’s plans. CMS contends that it did not do so, because in the Elevance situation, there was no evidence that problems with the call were the fault of the Elevance call center. CMS Br. at 16 (Elevance’s call was different than disputed call because for Elevance there was no clear evidence that the “call center was to blame”). This argument misses the mark.

To begin with, the question whether the test caller was at fault for his decision not to ask the introductory question is irrelevant to Plaintiffs’ first (“introductory question”) claim. If the call “connects,” the only question is whether the test caller asked the introductory question (and not who was at fault if he chose not to do so). Here, the call connected and the test caller failed to

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<sup>2</sup> The decision also was arbitrary and capricious for the independent reason that CMS never responded to the “introductory question” objection during the plan preview process. Pls.’ Br. at 19-20. CMS asserts that it did respond when it noted that the call center did not try to engage the test caller. CMS Br. at 22. But the problem here is that the *test caller* did not try to engage the *call center* (by asking the introductory question required by CMS’s criteria). CMS never responded to the issue, rendering its decision arbitrary and capricious, and no remand on this issue is appropriate, because a remand would unfairly delay resolution of the parties’ dispute and serve no useful purpose. Even if CMS had responded, it would not have been able to show that the test caller followed the “introductory question” requirement.

ask the introductory question, rendering who was at “fault” for that choice irrelevant under CMS’s decision-making criteria.

In addition, CMS’s assertion that Plaintiffs were at “fault” does not hold muster. In the challenged call, the specific problem was that, after the call connected, no meaningful dialog occurred between the test caller and the call center.<sup>3</sup> But CMS’s own criteria establish a clear dividing line between the connection and the dialog by distinguishing Phase 2 (“Connect”) from Phase 3 (“Introductory Question”). Pls.’ Br. at 8. CMS does not even refer to Phase 2 or Phase 3 in its brief and instead attempts to blur the distinction.

Once Phase 3 begins, CMS’s decision-making criteria place responsibility for initiating the dialog squarely on the shoulders of the test caller, who *must* ask the “introductory question.” Pls.’ Br. at 7-9. CMS has simply shifted that responsibility to Plaintiffs here by stating that “[a]t no point during your provided record[ ] can your plan be heard trying to engage the French speaking caller.” Pls.’ Br at 19. CMS acted arbitrarily and capriciously by refusing to invalidate Plaintiffs’ call, yet invalidating Elevance’s call, when there was no evidence that either call center was at fault under CMS’s rules.<sup>4</sup>

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<sup>3</sup> CMS has abandoned any argument that the call center was at fault because it eventually disconnected the call (after more than eight minutes). *Compare* Pls.’ Br. at 21 *with* CMS Br. at 22-23.

<sup>4</sup> The decision also is arbitrary and capricious for the independent reason that CMS never responded to the Elevance “disparate treatment” objection during the plan preview process. Pls.’ Br. at 20-21. CMS attempts to change the subject from the Elevance call to a different call involving the United call center in 2022, claiming that if it addressed the other United call there was no need to discuss Elevance. CMS Br. at 19-20, 22. CMS completely misses the mark. The issue here is whether United was treated differently than another similarly-situated company (not whether CMS treated United consistently over time). Elevance is not merely “another example of the same precedent.” CMS Br. at 22. Elevance is a separate entity, for which CMS invalidated a call because there was no evidence that the issue was Elevance’s fault. Pls.’ Br. at 15-18. This failure to respond rendered the decision arbitrary and capricious, because “rather than attempt[ing] to distinguish” the different treatment of the Elevance plans, the agency “ignored [it] completely.”

**C. CMS Engaged in an Impermissible Delegation of Authority, and a Clear Error of Judgment, by Delegating the Decision to a Private-Party Contractor With a Conflict of Interest.**

CMS also engaged in an impermissible delegation of authority by delegating the decision at issue to a private-party contractor. In their opening brief, Plaintiffs explained that the CMS decisionmaker asked the private contractor what it should do and then parroted the contractor's conclusion twice — verbatim — as the primary rationale for the decision on the disputed call. Pls.' Br. at 23. CMS ignores the contractor's role on the disputed call and changes the subject to its role on *different* calls that are not at issue in this case. CMS Br. at 24. For the disputed call, CMS improperly ceded “near-total deference” to the contractor's conclusion. Pls.' Br. at 22.<sup>5</sup>

Finally, regardless of whether the delegation was unlawful *per se*, CMS made a clear error of judgment by relying, for the decision on this particular call, on a contractor with a vested interest in the outcome. Pls.' Br. at 23-24. CMS is wrong when it asserts there would need to be a *financial* conflict of interest for CMS to have engaged in a clear error of judgment. *See* CMS Br. at 24. By the time of the final decision about the call, it was obvious that a critical issue was whether the customer service representative or the contractor's test caller was to blame for problems with the

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*Republic Airline, Inc. v. U.S. Dep't of Transp.*, 669 F.3d 296, 301 (D.C. Cir. 2012). Furthermore, no remand on this issue is appropriate, because a remand would unfairly delay resolution of the parties' dispute and serve no useful purpose. Even if CMS had responded, it would not have been able to establish that Plaintiffs were treated the same as Elevance, given the agency's concession that a call should be invalidated if a problem with it is not the call center's fault.

<sup>5</sup> The Court has not yet ruled on Plaintiffs' motion to supplement the administrative record. If the Court grants the motion, the contractor's training materials will be in the record, and the Court should consider an additional reason that CMS's deference to its contractor is particularly inappropriate here: the contractor did not follow its own standards during the call. Specifically, the contractor's training manual requires its callers to ask the opening question as soon as they connect with the customer service representative. *See* CCM SSI Training Manual at 17, attached as Exhibit A to Pls.' Mot. To Suppl. Admin. R. (ECF No. 13) (“Once a live CSR answers the phone, you ask the opening question verbatim . . .”). The caller did not do that after the connection was made. Just as CMS acts arbitrarily and capriciously when it violates its own protocols, the agency acts arbitrarily and capriciously by deferring to a contractor that violates *its* own protocols.

call. In addition, by that time, Plaintiffs had advised the CMS decisionmaker that extraordinary consequences would flow from that evaluation of blame. Plaintiffs had notified CMS that over 1,900,000 current beneficiaries (served under twelve different Medicare Advantage contracts) would have their plans' overall Star Ratings improperly suppressed if the call was not invalidated. (AR 198-99.) Instead of hiding behind its own misinterpretation and improper decision-making, CMS should instead want to provide Medicare beneficiaries with accurate information regarding Medicare Advantage health plans. Its overly bureaucratic attempt to justify its wrong decision and strange refusal to correct its mistake is odd for an agency that should want to give meaningful and proper insight to seniors. With that much riding on the decision, this Court should now hold that CMS acted arbitrarily and capriciously by having the contractor evaluate whether its own test-caller colleague was to blame for problems with the call.

### **CONCLUSION**

The Court should grant Plaintiffs' motion for summary judgment and deny CMS's cross-motion. CMS has conceded that the challenged call connected, so there is no need or warrant for any remand, which would delay the proceedings, harm Plaintiffs, and mislead Medicare members about the quality of Plaintiffs' plans. In entering judgment for Plaintiffs, the Court should issue an injunction requiring CMS to invalidate the challenged call, recalculate Plaintiffs' 2025 Star Ratings accordingly, and promptly publish the recalculated ratings on the Medicare Plan Finder.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT has been served via electronic mail this 7th day of November 2024 on:

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