UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ZING HEALTH, INC, et al., Plaintiffs, v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., Defendants.	Civil Action No. 25-4147 (RBW)

REPLY IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS

In bringing this case, Plaintiffs seek a second bite at the apple, following the dismissal of their amended complaint in a prior challenge. Under the doctrine of issue preclusion, Plaintiffs are barred from re-litigating that challenge, and, accordingly, their complaint here should be dismissed. *See Zing Health, Inc. v. Dep't of Health & Human Servs.*, Civ. A. No. 24-0855 (RBW), 2025 WL 2779926, at *7 (D.D.C. Sept. 30, 2025) ("*Zing I*").

In *Zing I*, after the Centers for Medicare & Medicaid Services ("CMS") recalculated the 2024 Star Ratings for all negatively affected Medicare Advantage organizations, CMS issued a letter retracting the termination and intermediate sanctions on Plaintiff Zing Health, Inc.'s ("Zing") plan ("CMS Notice of Retraction") and granted all the relief sought in the company's initial complaint. Zing then amended their complaint to demand additional relief, but this Court dismissed the amended complaint based on Plaintiffs' failure to establish Article III standing. *See Zing I*, 2025 WL 2779926, at *7. The Court found that Plaintiffs' challenges to the 2024 Star Ratings calculation and its plan termination and sanctions were moot and that Plaintiffs failed to

allege any concrete harm arising from the CMS memorandum notifying plans of the recalculated 2024 Star Ratings ("CMS Memorandum"). *See id.* at *5.

In this action, Plaintiffs lodge the same APA and Declaratory Judgment challenge, but base their claims on the CMS Notice of Retraction issued long ago to Zing instead of the contemporaneous CMS Memorandum. Plaintiffs do not allege any new facts since the dismissal of their first action that would establish their Article III standing. Thus, the doctrine of issue preclusion bars Plaintiffs' attempt to again invoke this Court's limited subject-matter jurisdiction.

Moreover, even if this Court could consider the alleged impact of CMS's Notice of Retraction, Plaintiffs *still* cannot show that they have suffered any redressable injury in fact from the notice. None of the arguments raised in their opposition brief overcomes the well-established rule that reputational harm does not satisfy the requirements of Article III standing when it is a secondary effect of an otherwise moot government action. Finally, Plaintiffs' claim for declaratory relief fares no better because they have already received complete relief.

Ultimately, Plaintiffs do not offer any meritorious argument to show that they have standing to pursue their claims or that the damages they seek are permissible under the APA. This case should be dismissed for lack of subject-matter jurisdiction.

ARGUMENT

I. Plaintiffs Have Not Alleged Any New Facts That Permit Re-Litigation of Standing.

This Court dismissed Plaintiffs' initial action alleging reputational and economic harms arising from the CMS Memorandum, concluding that, in bringing such action, Plaintiffs were attempting to circumvent the mootness of their claims. *See id.* at *5-6. As the Court observed, "In making this claim, the plaintiffs continue to conflate the harms they have alleged resulting from the now-retracted—and at this point unchallenged—Star Ratings, termination, and sanctions, with

any harm allegedly resulting from the CMS Memorandum itself, which is insufficient to carry their burden of establishing that they have Article III standing[.]" *Id.* at *6.

Plaintiffs now attempt to avoid both the mootness of their case and the inability of showing any injury in fact from the CMS Memorandum by targeting what they deem is "an entirely different CMS action"—the CMS Notice of Retraction. Pls.' Opp'n at 7. But Plaintiffs have merely substituted the CMS Notice of Retraction for the CMS Memorandum as the alleged source of its harms. Plaintiffs urge that this second action is not barred by issue preclusion because "the issue previously 'determined'" was not "*identical* to the one presented in the current litigation." *Id.* at 8-9 (emphasis added by Plaintiffs; quoting *Jahr v. District of Columbia*, 968 F. Supp. 2d 186, 191 (D.D.C. 2013) (citing *District of Columbia v. Gould*, 852 A.2d 50, 56 (D.C. 2004)).

However, as discussed in Defendants' opening brief (Defs.' Mot., ECF No. 12), issue preclusion applies not only where the same issue is raised in a subsequent action after dismissal for lack of subject-matter jurisdiction, but also where there are "facts existing prior to the entry of [] judgment *that could have been considered had plaintiff elected to raise them* by amending its complaint[.]" *Citizen Elecs. Co. v. OSRAM GmbH*, Civ. A. No. 05-1560 (ESH), 2005 WL 3484202, at *3 (D.D.C. Dec. 20, 2005), *aff'd*, 225 Fed. Appx. 890 (Fed. Cir. 2007) (emphasis added). Here, there is no question that Plaintiffs could have sought to establish standing based on alleged injury from the CMS Notice of Retraction at the time of their original action in this Court. Most allegations in both complaints are virtually identical, and the only new allegations regarding the CMS Notice of Retraction (issued on June 25, 2024) are based on facts that existed before Plaintiffs filed their amended complaint in the first action (filed on July 19, 2024). Plaintiffs have not alleged any "'occurrences subsequent to the original dismissal' that 'remed[y]' 'the

jurisdictional deficiency.'" *Nat'l Assn. of Home Builders v. EPA*, 786 F.3d 34, 41 (D.C. Cir. 2015) (citation and emphasis omitted).

Moreover, in asserting that the current action challenging the CMS Notice of Retraction is not precluded because its issues are not "identical" to those in *Zing I* regarding the CMS Memorandum, Plaintiffs mischaracterize the holding in *Jahr*. The *Jahr* court did not sanction duplicative litigation if the issues between the two cases were not "identical." Rather, the court held that the plaintiff's disparate treatment claim was precluded based on related arguments that *could have been* raised in the earlier action but were not: "Once an issue is raised and determined, the entire issue is precluded, not just particular arguments raised in support of it." *Jahr*, 968 F. Supp. 2d at 193. "That Mr. Jahr's arguments may differ somewhat from those previously presented does not allow him a second (or perhaps more accurately, fifth) bite at the apple. Mr. Jahr is not only precluded from arguing that he was treated differently from other similarly situated employees generally, but also that he was treated differently from other similarly situated African American employees because of his race—an argument he was free to raise in his [previous] proceedings." *Id.*

Here, too, Plaintiffs were "free to raise" their arguments regarding alleged harms from the CMS Notice of Retraction in their previous action. They failed to do so, and they cannot now re-litigate the issue of their standing "without frustrating the finality of [the] jurisdictional dismissal[]." *Citizen Elecs.*, 2005 WL 3484202, at *3.

II. Plaintiffs Cannot Establish Standing Based on Alleged Reputational Harm.

Plaintiffs claim that they continue to suffer reputational harm as a result of Zing's initial 2024 Star Ratings, the intermediate sanctions, and the termination of Zing's contract. As Defendants discussed in their opening brief, Plaintiffs lack standing to seek relief based on Zing's

reputational injury because CMS already has reversed the actions that gave rise to Plaintiffs' purported injury. Defs.' Mot.. at 8, 15-17. Plaintiffs state that there remain "unredressed injuries" in the form of reputational and economic harms. Pls.' Opp'n at 15. Even assuming that Plaintiffs' remaining injuries stemmed from the termination and sanctions, those injuries are a "byproduct of government action" that are no longer redressable once the government action has been reversed. *Foretich v. United States*, 351 F.3d 1198, 1212 (D.C. Cir. 2003). "[W]here reputational injury is the lingering effect of an otherwise moot aspect of a lawsuit, no meaningful relief is possible and the injury cannot satisfy the requirements of Article III." *Id.*

Plaintiffs' alleged "unredressed injuries" are no different from the "lingering harms" and "secondary effects" of an otherwise moot government action, and Plaintiffs thus fail to meet Article III standing requirements. *See* Defs.' Mot. at 18-20 (collecting cases holding). Plaintiffs argue that their "unredressed injuries" are still "susceptible to judicial correction," which would allow standing. Pls.' Opp'n at 15 (citing *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1001 (D.C. Cir. 1991)). Plaintiffs, however, do not cite any cases in which the extraordinary relief they seek was granted, and their attempt to distinguish *Penthouse* is unavailing. The *Penthouse* plaintiff alleged its reputational injury continued even after a critical government letter was retracted. The plaintiff sought damages for economic losses incurred because of the government letter, but the court held that the alleged injury was too speculative to confer standing. *Penthouse*, 939 F.2d at 1019. Zing's situation is identical, seeking relief from the Court to mitigate the reputational and financial losses allegedly incurred even after the government letter was retracted. The D.C. Circuit held that if the government's retraction of the offending letter did not itself restore a plaintiff's reputation, further relief from the court likely would not either. *Id*. So, too, here. CMS already has afforded Zing full relief by reversing the termination and sanctions. And, through the public display of the CMS

Notice of Retraction and the well-publicized recalculation of the 2024 Star Ratings in health industry news outlets, third parties such as Zing's creditors and contractors already have full access to the updated information.

Zing objects that this public information has not reached its low-income, underserved beneficiaries, who Zing claims "do not scour the government's Medicare Plan Finder for recalculated Star Ratings and belated termination reversals." Pls.' Opp'n at 14. As an initial matter, news of Zing's termination and sanctions is highly unlikely to have reached its beneficiaries if they were not looking at CMS's website—precisely where the retraction notice was posted, *see* CMS, Notice of Retraction of Termination and Intermediate Sanctions (June 25, 2024), https://www.cms.gov/files/document/zingtermination-sanctionretraction06252024.pdf. Plaintiffs do not allege, nor would there be a basis for them to do so, that CMS issued any notices of the termination directly to enrollees in Zing's plan, or that notices were required to be issued by Zing during this time. Under Medicare Advantage regulations, Zing was not required to issue notices to beneficiaries regarding its plan termination until thirty days before the effective date of the termination, which was scheduled for December 31, 2024. *See* 42 C.F.R. § 422.510(b)(1)(ii) ("The [Medicare Advantage] organization notifies its Medicare enrollees of the termination by mail at least 30 calendar days before the effective date of the termination."); Notice of Termination and Intermediate Sanctions at 2 (noting the December 31, 2024, effective date). The June 25, 2024, CMS Notice of Retraction of Zing's termination and intermediate sanctions thus was issued long before Zing was required to notify beneficiaries. Unsurprisingly, Zing does not allege that it sent notice of its plan termination to enrollees several months early, long before it was required to do so. Indeed, it had filed the initial Complaint in its first action by that time. There is simply no

plausible basis for Zing's claim that "hundreds of current beneficiaries disenrolled based on Zing's then-impending and improper termination." Pls.' Opp'n at 14.

Further, Plaintiffs' professed expectation that "targeted and affirmative outreach" to "Zing Health's target population" would address its alleged reputational and economic harms is speculative, particularly given its enrollees' probable lack of awareness of the plan's termination. CMS's recalculation of Zing's 2024 Star Ratings and retraction of the termination and sanctions renders moot Plaintiffs' claim based on alleged reputational harm, and any "vague" or "lingering" reputational harm is insufficient to support Plaintiffs' standing. *See, e.g.*, *Foretich*, 351 F.3d at 1212; *Penthouse*, 939 F.2d at 1019.

III. Plaintiffs Cannot Establish Any Basis for Declaratory Relief.

Because Plaintiffs' challenges to the 2024 Star Ratings calculation and its plan termination and sanctions are moot, and because they lack standing to seek relief based on Zing's alleged reputational injury, Plaintiffs have no basis upon which to seek declaratory relief. Plaintiffs now insist that the CMS Notice of Retraction presents "a substantial controversy" of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Pls.' Opp'n at 16. But that conclusory assertion does not establish standing for reasons already addressed. *Davis v. FEC*, 554 U.S. 724, 734 (2008) ("'a plaintiff must demonstrate standing for each claim [it] seeks to press' and 'for each form of relief' that is sought."). Plaintiffs also had every opportunity to raise their argument regarding the CMS Notice of Retraction in their previous action but failed to do so. Moreover, because their remaining claims are not cognizable, as discussed in Defendants' opening brief and above, Plaintiffs cannot seek any further relief under the Declaratory Judgment Act. "Where an intervening event renders the underlying case moot, a declaratory judgment can no longer affect[ ] the behavior of the defendant towards the plaintiff, and thus afford[s] the plaintiffs

no relief whatsoever." *NBC-USA Hous., Inc., Twenty-Six v. Donovan*, 674 F.3d 869, 873 (D.C. Cir. 2012) (quotation marks and citations omitted). Plaintiffs point to no cases providing for declaratory relief where a government action was reversed and where such relief was sought for alleged reputational harm. Accordingly, Plaintiffs' claims under the Declaratory Judgment Act should be dismissed.

CONCLUSION

For all the foregoing reasons and those in Defendants' opening brief, the Court should dismiss Plaintiffs' complaint for lack of subject-matter jurisdiction under Rule 12(b)(1).

Dated: May 15, 2026

Respectfully submitted,

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