

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 (CRC)

DEFENDANTS' MOTION TO DISMISS

Defendants, by and through the undersigned counsel, respectfully move to dismiss Plaintiffs' complaint, ECF No. 1, pursuant to Federal Rules of Civil Procedure 12(b)(1). The grounds for dismissal are set forth in the accompanying memorandum. A proposed order is also enclosed.

Dated: March 11, 2026

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS**

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Defendants, by and through undersigned counsel, respectfully submit this memorandum of points and authorities in support of their motion to dismiss Plaintiffs Zing Health, Inc. (“Zing”), Zing Health of Michigan, Inc., and Zing Health Consolidator, Inc.’s (collectively, “Plaintiffs”) complaint (“Compl.”), ECF No. 1, under Federal Rule of Civil Procedure (“Rule”) 12(b)(1) for lack of subject-matter jurisdiction. This action is nearly identical to an earlier action brought by Plaintiffs that was dismissed due to lack of Article III standing, and the doctrine of issue preclusion bars Plaintiffs from re-litigating standing. Moreover, even if not precluded, Plaintiffs have not alleged any additional facts that could establish their standing.

INTRODUCTION

In its first action, Zing challenged the Centers for Medicare & Medicaid Services (“CMS”) methodology for calculating the 2024 Star Ratings and sought to enjoin CMS from using Zing’s poor performance in the 2024 Star Ratings as a basis to terminate its contract and impose intermediate sanctions. Shortly after the filing of the complaint, two Courts in this District rejected CMS’s calculation of the 2024 Star Ratings based on the same arguments Zing raised. *See Elevance Health, Inc. v. Becerra*, Civ. A. No. 23-3902 (RDM), 2024 WL 2880415 (D.D.C. June 7, 2024) (“*Elevance*”); *SCAN Health Plan v. Dep’t of Health & Hum. Servs.*, Civ. A. No. 23-3910 (CJN), 2024 WL 2815789 (D.D.C. June 3, 2024) (“*SCAN*”). In response, CMS elected to recalculate the 2024 Star Ratings for all negatively affected Medicare Advantage organizations, including Zing. With this, Zing’s 2024 Star Rating increased to a level of acceptable performance, and CMS accordingly retracted Zing’s termination and intermediate sanctions.

Despite CMS having afforded Zing all the relief it had sought in its action, Zing amended its complaint to add Zing Health of Michigan, Inc. and Zing Health Consolidator, Inc. as Plaintiffs, and demanded additional relief under the Administrative Procedure Act (“APA”) for purported reputational and economic harms. The Court dismissed Plaintiffs’ amended complaint, ruling they

had not met their burden of establishing Article III standing. Specifically, the Court noted that Plaintiffs' challenges to the 2024 Star Ratings calculation and its plan termination and sanctions were moot because CMS had recalculated the ratings and reversed the termination and sanctions decisions. As to Plaintiffs' remaining challenge to the CMS Memorandum issued to all Medicare Advantage organizations regarding its recalculation of 2024 Star Ratings, the Court held that Plaintiffs failed to show any injury in fact because they did not allege any concrete harms arising from the CMS Memorandum itself.

In the present action, Plaintiffs once again seek redress for the very same administrative actions—the recalculated 2024 Star Ratings and the retracted contract termination and sanctions—under the APA. Plaintiffs now direct their challenge to CMS's retraction notice issued to Zing instead of the CMS Memorandum sent to all affected Medicare Advantage organizations. But Plaintiffs have again failed to properly invoke this Court's limited subject-matter jurisdiction. The doctrine of issue preclusion bars Plaintiffs' renewed attempt to establish their standing. In an attempt to circumvent the failings of their claims, Plaintiffs have merely shifted their attention to a different contemporaneous CMS decision letter and have failed to allege any change of fact since the dismissal of their first action. As such, Plaintiffs have failed to cure the jurisdictional defects of their previous complaint. And even if Plaintiffs were not re-litigating claims that the Court had already dismissed, Plaintiffs continue to seek damages based on alleged reputational harms that do not confer standing, and they fail to show entitlement to declaratory judgment because they have already received complete relief. For all these reasons, this case should be dismissed for lack of subject matter jurisdiction.

STATUTORY AND REGULATORY FRAMEWORK

I. The Medicare Program and Part D

The Medicare provisions of the Social Security Act (known as “the Medicare statute”) established a national program of healthcare coverage for the aged and disabled. 42 U.S.C. §§ 1395–1395mmm. The Medicare program is administered by the Secretary of Health and Human Services (“Secretary”), through CMS, a component of the Department of Health and Human Services. Medicare consists of four parts. Part A, 42 U.S.C. §§ 1395c to 1395i-6, provides for the payment of inpatient hospital and related post-hospital benefits on behalf of eligible individuals. Part B, 42 U.S.C. §§ 1395j to 1395w-6, establishes a voluntary supplemental insurance program for the payment of physicians’ and other health services.

Under Parts C and D, CMS contracts with private insurance companies to provide Medicare insurance coverage to enrolled beneficiaries. *Id.* §§ 1395w-21 to 1395w-23, 1395w-27 (Part C); *id.* §§ 1395w-102 to 1395w-104, 1395w-112 (Part D). Plans operated under Part C—also known as Medicare Advantage plans—provide the benefits that their enrollees are entitled to receive under Medicare Parts A and B. *Id.* §§ 1395w-21 to 1395w-29; *id.* §§ 1395w-101 to 1395w-154. Part D provides for subsidized prescription drug insurance coverage.

For beneficiaries enrolled in a Medicare Advantage plan under Part C, private insurance companies provide Part D benefits through Medicare Advantage Prescription Drug plans that integrate prescription drug and health care coverage under Parts A and B. 42 C.F.R. §§ 422.2, 423.4. Such private insurers are known as Medicare Advantage organizations. *Id.* Zing is a Medicare Advantage organization that offers Medicare Advantage Prescription Drug plans. *See* Compl. ¶ 10. Zing’s contract at issue, Contract H7330, *see id.* ¶¶ 8, 108, 116-17, involves one or more Medicare Advantage Prescription Drug plans offered by Zing. *See* Compl. Ex. 1, CMS Letter

of Dec. 27, 2023 (ECF No. 1-2). This case involves Zing’s performance under its contract with CMS to provide Part D benefits to Medicare enrollees.

II. The Star Ratings System and CMS’s Termination Authority

All Part D sponsors must comply with the requirements in 42 C.F.R. Part 423. The regulations in Part 423 describe the systems that Part D organizations must maintain and set forth the provisions that must be in all Part D contracts to ensure the quality of services provided to Medicare beneficiaries. The Secretary has a variety of tools to enforce compliance with Part D program requirements and the terms of Part D sponsors’ contracts. CMS may issue compliance letters for lower-level deficiencies, and CMS may impose “intermediate sanctions” for more serious deficiencies and regulatory violations. 42 C.F.R. § 423.505(n); *id.* §§ 423.750, 423.752. Finally, Congress granted the Secretary authority to terminate a contract with a Part D sponsor “at any time” if the Secretary determines that the Part D sponsor “has failed substantially to carry out the contract, is carrying out the contract in a manner inconsistent with the efficient and effective administration” of Part D, or the Part D sponsor “no longer substantially meets the applicable conditions” of Part D. 42 U.S.C. § 1395w–27(c)(2), (h)(1) (incorporated by reference in 42 U.S.C. § 1395w-112(b)(3)(F)). CMS has implemented the Secretary’s contract termination authority in the regulation at 42 C.F.R. § 423.509.

Among the bases for contract termination is consistently poor performance, as measured by CMS’s Star Ratings system. CMS uses a five-star scale to assess plan quality and measure compliance with Part D program requirements. The ratings are based on process measures that focus on measuring the quality of care, outcome measures that address the result of that care, and measures that relate to administrative processes that support and direct the provision of care. *Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs for*

Contract Year 2013 and Other Changes, 77 Fed. Reg. 22,072, 22,108 (Apr. 12, 2012). These ratings are called the “Star Ratings” and they “reflect structure, process, and outcome indices of quality” for Part D plans. 42 C.F.R. § 423.182(c)(1). The 2024 Part D summary Star Rating for Zing’s contract H7330 is at issue in this case.

The Part D summary Star Rating is on a one-star to five-star scale, ranging from one (worst rating) to five (best rating) in half-star increments, using traditional rounding rules. *Id.* § 423.186(c)(3). A Star Rating of three denotes the regulatory performance standard or “average” performance relative to the industry. 77 Fed. Reg. at 22,109. CMS “reserved 1- and 2-Star Ratings for performance that was significantly below what a review of industry-wide performance would show to be acceptable and achievable by competently administered sponsors.” *Id.* at 22,111. Under the Star Ratings system, plans receiving a summary score below three stars “are among the weakest performers in the Medicare Part C and D programs.” *Id.* at 22,109.

In 2012, the Secretary promulgated regulations authorizing CMS to use consistently low summary Star Ratings—i.e., three consecutive years of summary Star Ratings below three stars—as the basis for contract termination of a Part D plan. The regulation at 42 C.F.R. § 423.509(a)(4)(x) provides: “CMS may at any time terminate a contract if CMS determines that the Part D plan sponsor . . . [a]chieves a Part D summary plan rating of less than 3 stars for 3 consecutive contract years.” As CMS explained during rulemaking, “[a] summary rating of less than 3 stars can be achieved only when a sponsor demonstrates poor performance across a range of measures.” 77 Fed. Reg. at 22,109. The regulatory changes were intended to “give entities that want to administer benefits to Medicare beneficiaries strong incentives to pay attention to the star rating criteria and provide for better quality health care if they wish to stay in or join the program.” *Id.* at 22,107. Ultimately, the goal of this regulation was “to remove poor performers from participation” in

Medicare’s Part D program and to enable CMS “to protect beneficiaries from poor care.” *Id.* at 22,107–08.

FACTUAL AND PROCEDURAL BACKGROUND

I. Termination of Zing’s Contract

Zing is a Medicare Advantage organization that, since January 1, 2020, has operated a Medicare Advantage Prescription Drug Plan under contract H7330. Compl. Ex. 1 at 3. On December 27, 2023, CMS issued to Zing a notice of its intent to terminate contract H7330, effective December 31, 2024, based on CMS’s determination that Zing “substantially failed to carry out its contract with CMS by failing to achieve a Part D summary Star Rating of at least three stars in three consecutive Star Rating periods.” *Id.* at 2. Specifically, Zing’s contract H7330 received a Part D summary Star Rating of 2.5 for each of contract years 2022, 2023, and 2024. *Id.* at 4. Accordingly, CMS imposed termination pursuant to 42 C.F.R. § 423.509(a)(4)(x) (Part D summary plan rating of less than three stars for three consecutive contract years) and 42 C.F.R. § 422.510(a)(4)(ix) (failure to comply with the regulatory requirements contained in Part 422 or Part 423 or both). *Id.* at 2, 4. CMS also imposed intermediate sanctions consisting of the suspension of enrollment of Medicare beneficiaries into Zing’s contract and the suspension of all marketing activities, effective January 12, 2024. *Id.* at 4-5.

II. Zing’s Initial Star Ratings Complaint and CMS’s Retraction

On March 25, 2024, Zing filed its first suit in this Court, challenging CMS’s methodology for calculating the 2024 Star Ratings, alleging that the 2023 cut points were calculated “by prematurely applying the Tukey outlier deletion method.” Compl., *Zing Health, Inc. v. Becerra*, Civ. A. No. 24-0855 (ECF No. 1), ¶¶ 10–11 (“*Zing I* Compl.”). Zing’s challenge set forth arguments raised earlier by two other Medicare Advantage organizations, in *SCAN* and *Elevance*. See Not. of Supp. Auth., *Zing Health, Inc. v. Becerra*, Civ. A. No. 24-0855 (ECF No. 13) (stating

that these cases involved “the very same claims at issue in this suit”), The *SCAN* and *Elevance* lawsuits sought relief based on the impact of the 2024 Star Ratings on those plans’ quality bonus payments, whereas Zing sought reversal of its plan termination and sanctions. *See Zing I* Compl. at Prayer for Relief. The underlying argument regarding CMS’s methodology for calculating the 2024 Star Ratings was the same.

On June 3, 2024, and June 7, 2024, respectively, courts in this District issued decisions in *SCAN* and *Elevance*. In *SCAN*, the court found that CMS violated the regulations at 42 C.F.R. §§ 422.166(a)(2)(i) and 423.186(a)(2)(i) in calculating SCAN’s 2024 Star Ratings by applying the guardrail to hypothetical cut points for 2023, which were determined using the previous year’s data but with certain outliers removed. *SCAN*, 2024 WL 2815789, at *5–7. The court concluded that the text of the regulation required CMS to apply the guardrail to the actual cut points instead (i.e., without removing the outliers from the 2023 data). *Id.* Accordingly, the court ordered CMS’s calculation of SCAN’s 2024 Star Ratings to be set aside and enjoined CMS from “utilizing Plaintiff’s original 2024 Star Rating of 3.5 stars in connection with any quality bonus payment eligibility decisions.” Order, *SCAN Health Plan v. Dep’t of Health & Hum. Servs.*, Civ. A. No. 23-3910 (CJN) (ECF No. 34), 1. Shortly thereafter, in *Elevance*, another court in this District issued a decision likewise holding that CMS’s calculation of the 2024 Star Ratings with simulated cut point data was contrary to the regulation at 42 C.F.R. § 422.166(a)(2)(i). *See Elevance*, 2024 WL 2880415, at *13–19. The court ordered the 2024 Star Ratings to be set aside and recalculated by applying the guardrail to actual cut points for 2023. *Id.* at *17. The court pointed out that the remedy was “limited to *Elevance*—and, more precisely, to BCBS of Georgia,” but noted that “CMS . . . is free to decide whether other [Medicare Advantage organizations] should receive similar relief in the administrative process.” *Id.* at *19.

Following the decisions in *SCAN* and *Elevance*, CMS opted to recalculate the 2024 Star Ratings for all plans by applying guardrails to the actual 2023 cut points. Compl. Ex. 5, CMS Mem. of June 13, 2024 (ECF 1-6), at 2. On June 13, 2024, CMS issued a notice to all Medicare Advantage organization compliance officers (“CMS Memorandum”) regarding the 2025 quality bonus payments, stating, “[i]n light of recent court decisions, CMS is recalculating the 2024 Star Ratings for 2025 Quality Bonus Payment [] purposes to address the application of Tukey outlier deletion and guardrails as codified at 42 C.F.R. §§ 422.166(a)(2)(i) and 423.186(a)(2)(i).” *Id.*

CMS’s recalculation of the 2024 Star Ratings resulted in a higher score for Zing’s contract H7330, increasing its Part D summary Star Rating to three stars. Compl. Ex. 6, CMS Letter of June 25, 2024 (ECF No. 1-7). Because the recalculation affected Zing’s eligibility to participate in Medicare as a Part D sponsor, rather than the quality bonus payments it would receive, CMS offered relief to Zing (the sole terminated Medicare Advantage plan for 2024) by separate notice. *Id.* On June 25, 2024, CMS informed Zing by letter that it would retract the termination and intermediate sanctions:

In light of recent court decisions, on June 13, 2024, CMS recalculated the 2024 Star Ratings and contract H7330’s Part D Summary Star Rating increased from 2.5 to 3 stars. As a result, Zing Health no longer meets the threshold for a termination or intermediate sanction under 42 C.F.R. §§ 422.510(a)(4)(ix) and 423.509(a)(4)(x). Therefore, CMS is retracting the termination and intermediate sanction for contract H7330.

Id. (“Notice of Retraction”). The June 25, 2024 retraction notice was simultaneously posted on CMS’s website to provide notice to the public of the retraction. CMS, *Notice of Retraction of Termination and Intermediate Sanctions* (June 25, 2024), <https://perma.cc/WSY6-56XJ>. As with the other plans, CMS also publicly posted Zing’s updated 2024 Star Rating on “Medicare Plan Finder.” Am. Compl., *Zing Health, Inc. v. Becerra*, Civ. A. No. 24-0855 (ECF No. 18), Ex. 4 (“*Zing I Am. Compl.*”).

III. Zing's First Amended Complaint and District Court's Dismissal.

Following CMS's retraction of Zing's plan termination and the intermediate sanctions, Zing filed an amended complaint in its initial action on July 19, 2024. *See Zing I* Am. Compl. The amended complaint added other parties and sought additional relief beyond setting aside CMS's methodology for calculating the 2024 Star Ratings and enjoining the plan termination and imposition of sanctions. Specifically, Zing added Zing Health Michigan, Inc., and its parent organization, Zing Health Consolidator, Inc., as plaintiffs. *Id.* ¶¶ 45, 47. Plaintiffs added an allegation that CMS's contract termination and sanctions harmed "Zing's competitive position, reputation, and goodwill with beneficiaries and other market participants." *Id.* ¶ 161. Plaintiffs focused their APA action on CMS's June 13, 2024 notice to all Medicare Advantage organizations, claiming the CMS Memorandum was arbitrary and capricious because it provided relief only to plans that saw increases in their quality bonus payments but did not provide relief to Zing for the termination and sanctions. *Id.* ¶¶ 139–41. Plaintiffs sought to have this Court grant further remedies by ordering CMS to issue a public statement of "its error" that would be posted on CMS's website and in local newspapers, to engage in "specific outreach" to current and former enrollees in Zing's plan; and to rectify Plaintiffs' alleged "competitive[] disadvantage[]" by treating Zing Michigan's H4624 contract as a "new plan" for the 2025 contract year. *Id.* at Prayer for Relief.

Defendants moved to dismiss the First Amended Complaint (Case No. 24-855, ECF No. 20) for lack of subject-matter jurisdiction, which the Court granted. *See Zing Health, Inc. v. U.S. Dep't of Health & Hum. Servs.*, Civ. A. No. 24-855 (RBW), 2025 WL 2779926 (D.D.C. Sept. 30, 2025) ("*Zing I*"). The Court stated that Zing "apparently recogniz[ed]" that its challenge to the 2024 Star Ratings calculation "is now moot" following CMS's recalculation. *Id.* at *5. The Court noted that "[s]imilarly, the plaintiffs do not directly challenge the termination and sanctions"

because CMS had retracted the actions. *Id.* Plaintiffs instead directed their allegations of arbitrariness at the CMS Memorandum, arguing that Zing’s economic and reputational harms were ostensibly redressable by the Court because the CMS Memorandum remained in effect. *Id.* at *4. The Court found the Plaintiffs failed to allege any concrete harm arising from the CMS Memorandum itself. *Id.* at *5. “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.

IV. Allegations in the Instant Complaint

On November 26, 2025, Plaintiffs filed the instant complaint. Like the prior complaint, Plaintiffs’ new complaint seeks to challenge as arbitrary and capricious the 2024 Star Ratings calculations and resulting contract termination and intermediate sanctions. Compl. ¶¶ 158, 174. Plaintiffs likewise seek nearly identical forms of relief, including remedial action by CMS to issue a “public statement of its erroneous termination and sanctions decisions,” “specific outreach” to enrollees in Zing’s plan, and actions to address Zing’s alleged competitive disadvantage. *Id.* at Prayer for Relief. The new complaint primarily differs by shifting the focus of its grievance from the June 13, 2024 CMS Memorandum issued to all Medicare Advantage organizations to the June 25, 2024 Notice of Retraction issued specifically to Zing. *Compare, e.g., Zing I Am.* Compl. ¶ 187 (“Defendants’ implementation of the CMS Memorandum failed to sufficiently remedy the harms its erroneous Star Ratings caused to Plaintiffs, including Zing Health’s termination and sanctions decisions.”) *with* Compl. ¶ 166 (“Defendants’ Notice of Retraction failed to sufficiently remedy

the harms its erroneous Star Ratings caused to Plaintiffs, specifically Zing Health's termination and sanctions decisions.").

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(1) presents "a threshold challenge to the Court's jurisdiction" and requires the Court to "ensure that it is acting within the scope of its jurisdictional authority." *Ellison v. Napolitano*, 901 F. Supp. 2d 118, 123 (D.D.C. 2012) (citation omitted). The plaintiff bears the burden of establishing that the court has subject matter jurisdiction. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Koch v. Walter*, 934 F. Supp. 2d 261, 266 (D.D.C. 2013). The existence of disputed facts does not preclude a ruling upon a 12(b)(1) motion. "Instead, the court must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000). As such, the court "may consider such materials outside the pleadings as it deems appropriate to resolve the question [of] whether it has jurisdiction to hear the case." *Scolaro v. D.C. Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000) (citation omitted); *see also Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

ARGUMENT

As in *Zing I*, Plaintiffs have failed to properly invoke this Court's subject-matter jurisdiction. First, Plaintiffs have not alleged any change in the controlling facts of standing since the dismissal of their prior complaint. As such, the doctrine of issue preclusion bars Plaintiffs from re-litigating their lack of standing to seek redress for the rescinded termination and intermediate sanctions. Second, even if not precluded, Plaintiffs' claims for relief in the new complaint for alleged reputational harms still cannot establish standing. For the reasons discussed below, each of Plaintiffs' claims against Defendants fails for lack of subject matter jurisdiction.

I. Issue Preclusion Bars Plaintiffs From Re-Litigating Their Lack of Standing.

Claim preclusion and issue preclusion “prevent[] repetitious litigation involving the same causes of action or the same issues.” *I.A.M. Nat’l Pension Fund, Benefit Plan v. Indus. Gear Mfg. Co.*, 723 F.2d 944, 946 (D.C. Cir. 1983). “[T]hese two doctrines protect against ‘the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions.’” *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (alteration in original; citation omitted). The doctrine of issue preclusion forecloses litigation of issues of fact or law that were actually litigated and necessarily decided by a valid and final judgment between the parties. *See Lawlor v. Nat’l Screen Servs.*, 349 U.S. 322, 326 (1955).

Issue preclusion applies not only to judgments on the merits but also to judgments pertaining to jurisdiction. *See Am. Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932) (“The principles of *res judicata* apply to questions of jurisdiction as well as to other issues.”) (citation omitted). “[T]he doctrine of *res judicata* . . . ordinarily precludes subsequent challenge to a finding that jurisdiction *does* exist . . . [and] it precludes subsequent challenge to a finding of *non* - jurisdiction.” *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1195 (D.C. Cir. 1983) (Scalia, J.); *see also GAF Corp. v. United States*, 818 F.2d 901, 912 & n.72 (D.C. Cir. 1987) (“Although the dismissal of a complaint for lack of jurisdiction does not adjudicate the merit[s] so as to make the case *res judicata* on the substance of the asserted claim, it does adjudicate the court’s jurisdiction, and a second complaint cannot command a second consideration of the same jurisdictional claims.” (internal quotation marks and citation omitted)).¹

¹ Courts have at various times applied both doctrines of claim preclusion (*res judicata*) and issue preclusion (collateral estoppel) when analyzing repeated litigation over jurisdiction.

Issue preclusion generally applies if three conditions exist: “(1) the same issue now being raised was ‘contested by the parties and submitted for judicial determination in the prior case’; (2) the issue was ‘actually and necessarily determined by a court of competent jurisdiction in the prior case’; and (3) preclusion does not ‘work a basic unfairness to a party bound by the first determination.’” *Newdow v. Bush*, 391 F. Supp. 2d 95, 99 (D.D.C. 2005) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

All three requirements for issue preclusion are indisputably satisfied here. First, the parties and the jurisdictional issue decided in *Zing I* are the same as the parties and the issue presented here. The jurisdictional issue is whether Plaintiffs have standing to bring their claims regarding the retracted termination and sanctions after CMS’s recalculation of the 2024 Star Ratings. Second, the issue was actually litigated because standing was the basis of the court’s judgment in *Zing I*. See *Zing*, 2025 WL 2779926, at *6 (“the plaintiffs have not met their burden of establishing that they have Article III standing”). And third, Plaintiffs had full and fair opportunity to establish their standing in *Zing I*. Indeed, the allegations presented in the instant complaint are nearly

Defendants’ analysis here focuses on issue preclusion based on the D.C. Circuit’s explanation of the distinction between the two doctrines in the jurisdictional context in *National Ass’n of Home Builders v. E.P.A.*, 786 F.3d 34 (D.C. Cir. 2015). As the court clarified, “Issue preclusion operates differently from claim preclusion with respect to jurisdiction-based prior decisions: Because a jurisdictional dismissal does not involve an adjudication on the merits, it will not bar relitigation of the cause of action originally asserted, but it may preclude . . . relitigation of the precise issues of jurisdiction adjudicated. That is, although the dismissal of a complaint for lack of jurisdiction does not adjudicate the merits so as to make the case res judicata on the substance of the asserted claim, it does adjudicate the court’s jurisdiction, and a second complaint cannot command a second consideration of the same jurisdictional claims.” *Id.* at 41 (cleaned up); see also *Outdoor One Commc’ns LLC v. Charter Twp. of Canton, Michigan*, 155 F.4th 776, 782 (6th Cir. 2025) (issue preclusion “is the more applicable doctrine” when barring a subsequent suit after dismissal for lack of jurisdiction); 18A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4436 (3d ed. June 2024 Update) (“Ordinarily, issue preclusion on the subject-matter jurisdiction question takes the form of a direct estoppel against a second effort to assert the same basis of jurisdiction for the same claim.”)

identical to the allegations contained in the previous complaint, and Plaintiffs' mere shift in focus from claiming harms based on the CMS Memorandum to claiming harms based on the Notice of Retraction is a strategy that does nothing more than seek a second bite at the apple. Plaintiffs could have easily raised the same allegations regarding the Notice of Retraction in its first amended complaint (which was filed several weeks after the Notice of Retraction was sent to Zing). And in any event, neither the CMS Memorandum nor the Notice of Retraction can confer standing when Plaintiffs' underlying grievance has nothing to do with either CMS decision letter but is ultimately based on purported harms "from the now-retracted—and at this point unchallenged—Star Ratings, termination, and sanctions," as the Court found in *Zing I. Id.*

While issue preclusion does not apply to bar re-litigation of jurisdictional issues if the "curable defect" exception applies, Plaintiffs' claims here do not satisfy that exception. To fall under that limited exception, as this Court has explained, the plaintiff must establish that "the controlling facts have changed significantly since the earlier judgment," and changed to a degree "sufficient to substantially change the issue." *Citizen Elecs. Co. v. OSRAM GmbH*, 2005 WL 3484202, at *3 (D.D.C. Dec. 20, 2005), *aff'd*, 225 Fed. Appx. 890 (Fed. Cir. 2007); *see also GAF Corp. v. United States*, 818 F.2d 901, 912-13 (D.C. Cir. 1987) ("A claim of jurisdiction is not precluded if . . . in the interim subsequent to the initial dismissal there are developments tending to 'cure' the jurisdictional deficiency identified in the first suit.") (cleaned up). "The exception is sharply limited, however, by the requirement that new allegations of a sufficient 'precondition requisite' identify '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) (quoting *Dozier*, 702 F.2d at 1191). In other words, a litigant can seek to establish jurisdiction in

a refiled case “only if *a material change following dismissal* cured the original jurisdictional deficiency.” *Id.* (emphasis added)

The instant complaint fails to satisfy this exception. Plaintiffs’ new complaint does not contain a single allegation showing that any facts relevant to standing have changed since the dismissal of their previous complaint. As noted above, most allegations in both complaints are nearly identical, and the only new allegations regarding the Notice of Retraction are based on facts that existed before the filing of the first amended complaint, let alone before the dismissal of that complaint. As explained in another case dismissing a complaint for lack of subject-matter jurisdiction under the doctrine of issue preclusion, “facts existing prior to the entry of [] judgment that could have been considered had plaintiff elected to raise them by amending its complaint, cannot . . . be considered [in a subsequent suit] without frustrating the finality of jurisdictional dismissals.” *Citizen Elecs.*, 2005 WL 3484202, at *3; *see also Magnus Elecs, Inc. v. La Republica Argentina*, 830 F.2d 1396, 1401 (7th Cir. 1987) (“[I]t does not make sense to allow a plaintiff to bring the same suit over and over again in the same court, each time alleging additional facts that the plaintiff was aware of from the beginning of the suit, until it finally satisfies the jurisdictional requirements.”). Plaintiffs cannot now re-litigate the issue of their standing simply by focusing the new complaint’s allegations on a different agency letter that was available to them long before the dismissal of their original complaint.

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

Although issue preclusion bars Plaintiffs from re-litigating standing, even if not so precluded, Plaintiffs cannot establish standing.

Notwithstanding CMS’s recalculation of the 2024 Star Ratings for all Medicare Advantage plans and its retraction of Zing’s intended termination and sanctions in June 2024, Plaintiffs claim

that they continue to suffer reputational harm as a result of Zing’s initial 2024 Star Ratings, the intermediate sanctions (which were reversed), and the termination of its contract that had not been scheduled to take effect until December 31, 2024 (which was also reversed). *See, e.g.*, Compl. ¶ 148 (“CMS’s contract termination and sanctions decisions have seriously undermined and irreparably harmed Zing’s competitive position, reputation, and goodwill with beneficiaries and other market participants.”). In the instant complaint, Plaintiffs ask the Court to require additional “remedial action” by CMS to repair the alleged harm to Zing’s reputation by: (1) issuing a public statement “of its erroneous termination and sanctions decisions, to be posted both on the CMS website, and in one or more newspapers of general circulation” in its impacted service area, (2) to “[e]ngage in specific outreach” to former enrollees of Zing’s plan, and (3) to “[t]ake all actions necessary to ensure that Zing Health is not competitively disadvantaged as a result of CMS’s improper termination and sanctions decisions including, but not limited to, denoting that Zing Health’s contract has never been terminated or sanctioned on CMS’s MA Plan Finder.” *See* Compl. at Prayer for Relief.

As an initial matter, prior to Plaintiffs filing the Complaint, CMS already provided relief by publicly displaying Zing’s recalculated 2024 Star Ratings on Medicare Plan Finder, and by posting its notice of retraction of the termination and sanctions on CMS’s website. *See, e.g.*, CMS, *Notice of Retraction of Termination and Intermediate Sanctions* (June 25, 2024), <https://perma.cc/WSY6-56XJ>. In addition, the *SCAN* and *Elevance* decisions from this District, which ordered CMS to recalculate the 2024 Star Ratings, have been widely publicized in national newspapers and health industry news outlets.² Zing’s claims for relief are moot, and were moot

² *E.g.*, Anna Wilde Mathews, *Medicare Will Recalculate Quality Ratings of Medicare Advantage Plans*, Wall St. J., June 14, 2024, <https://www.wsj.com/health/healthcare/medicare->

prior to the filing of this action, and the additional “remedial action” that Zing seeks is neither required nor warranted.

Even apart from mootness, Plaintiffs’ claims seeking redress for alleged reputational harm should be dismissed because they are barred by sovereign immunity and because Plaintiffs lack standing. Plaintiffs allege their reputational harm resulted from CMS’s “erroneous calculation” and its “erroneous Star Rating,” Compl. ¶¶ 6, 166, 172, but their claim is foreclosed by the well-established rule that the government is immune from suits sounding in defamation. *See, e.g., Olaniyi v. District of Columbia*, 763 F. Supp. 2d 70, 91 (D.D.C. 2011) (“[T]he dissemination of information about the [incident] which purportedly harmed the plaintiff’s reputation in the eyes of third parties” “‘resound[s] in the heartland of the tort of defamation,’ and is therefore barred under 28 U.S.C. § 2680(h).” (citation omitted; quoting *Jimenez-Nieves v. United States*, 682 F.2d 1, 6 (1st Cir. 1982))). For example, in *Kugel v. United States*, 947 F.2d 1504, 1506 (D.C. Cir. 1991), the plaintiff filed a tort claim against the FBI, alleging that its fraud investigation harmed his reputation and resulted in business losses, bankruptcy, and public humiliation. The FBI’s investigation was eventually terminated, and plaintiff was cleared. *Id.* Although the plaintiff’s claim was styled as “negligent” execution of an investigation, the Court held that his claim was actually a claim for defamation and was thus barred by the Federal Tort Claims Act. *Id.* at 1507; *see also* 28 U.S.C. § 2680(h) (barring “[a]ny claim arising out of . . . libel, slander, misrepresentation, deceit, or interference with contract rights”). Here, too, Plaintiffs’ claim of

[will-recalculate-quality-ratings-of-medicare-advantage-plans-eebee409](#); Susan Morse, *CMS Is Recalculating 2024 Medicare Advantage Star Ratings*, Healthcare Fin. News, June 14, 2024, <https://www.healthcarefinancenews.com/news/cms-recalculating-2024-medicare-advantage-star-ratings>; Nona Tepper, *Elevance, Aetna Among Insurers to Benefit from Higher Star Ratings*, Modern Healthcare, June 17, 2024, <https://www.modernhealthcare.com/medicare/2024-medicare-advantage-star-ratings-elevance-aetna-scan>.

reputational injury is equivalent to a defamation claim, for which the government has not waived its sovereign immunity.

Second, the reputational harm that Zing alleges does not constitute an injury that can confer standing under the circumstances of this case. Article III requires a plaintiff to “allege[] such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.” *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (quotation marks omitted). To establish standing, a plaintiff must demonstrate that it has: “(1) an ‘injury in fact’ that is ‘concrete and particularized’ as well as ‘actual or imminent’; (2) a ‘causal connection’ between the injury and the challenged conduct; and (3) a likelihood, as opposed to mere speculation, ‘that the injury will be redressed by a favorable decision.’” *Ark Init. v. Tidwell*, 749 F.3d 1071, 1075 (D.C. Cir. 2014) (quoting *Lujan*, 504 U.S. at 560–61). Standing is “not dispensed in gross,” and “a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.” *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 734 (2008) (quotation marks omitted). Plaintiffs must demonstrate their standing to seek remedies for their alleged reputational harm. “A plaintiff must maintain standing throughout the course of litigation. ‘If events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot.’” *Foretich v. United States*, 351 F.3d 1198, 1210 (D.C. Cir. 2003) (quoting *McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Orders*, 264 F.3d 52, 55 (D.C. Cir. 2001)).

With respect to Plaintiffs’ claim that they are entitled to relief because of alleged damage to Zing’s reputation and goodwill, this argument is squarely foreclosed because CMS has already reversed the actions that gave rise to Zing’s purported injury. On the one hand, reputational harm may satisfy the requirements of Article III standing “where reputational injury derives directly

from an unexpired and unretracted government action.” *Foretich*, 351 F.3d at 1213. This is because “[r]edress is possible in such a case”—i.e., where the damage to reputation is directly caused by the government’s action, which the court may find unlawful. *Id.* at 1214. But “where 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.* at 1212; *see also McBryde*, 264 F.3d at 57 (“In this circuit, when injury to reputation is alleged as a secondary effect of an otherwise moot action, we have required that ‘some tangible, concrete effect’ remain, susceptible to judicial correction.”). As the D.C. Circuit has made clear:

[W]here harm to reputation arises as a byproduct of government action, the reputational injury, without more, will not satisfy Article III standing when that government action itself no longer presents an ongoing controversy. Because the cause of the reputational harm is an otherwise moot government action, a judicial declaration that the action was unlawful is not likely to provide any further relief beyond that resulting from the expiration of the action itself.

Foretich, 351 F.3d at 1212–13. In other words, even taking Zing’s allegations regarding reputational harm as true (for purposes of this motion only), the purported harm is a “lingering effect” rather than an “injury in fact” because it is not fairly redressable by the court. CMS’s recalculation of Zing’s 2024 Star Ratings and retraction of the termination and sanctions renders moot any claim based on alleged reputational harm, and any remaining harm is insufficient to support Zing’s standing.

Plaintiffs’ Prayer for Relief implies that a “public statement” of CMS’s “error” and “specific outreach” by CMS to beneficiaries will somehow remedy Zing’s reputational harm. Compl. at Prayer for Relief. However, beneficiaries already have access to CMS’s “public statements” retracting Zing’s termination and sanctions, as well as Zing’s re-calculated Star Ratings. Moreover, the reputational harm that Zing alleges is similar to that claimed by plaintiffs in a number of other cases where courts have held that the rescinded government action deprived

them of Article III standing. For example, in *Penthouse International, Ltd. v. Meese*, 939 F.2d 1011 (D.C. Cir. 1991), the plaintiff alleged there was reputational harm caused by a government letter that labeled its publication as pornography, and the plaintiff claimed the injury continued even after the letter was retracted. *Id.* at 1018–19. Specifically, it claimed that it continued to suffer “considerable reputational and financial injury” because distributors declined to carry the magazine, even after the government’s retraction of the letter. *Id.* The plaintiff argued that a declaratory judgment finding the government’s action unlawful would mitigate the reputational and financial harm. The D.C. Circuit disagreed, noting that if the government’s retraction of the letter did not provide relief, a declaratory judgment likely would not either. *Id.* at 1019. The D.C. Circuit held that the alleged injury was too speculative to confer standing. *Id.*; *see also Adams v. Jud. Council of Sixth Cir.*, Civ. A. No. 17-1894 (ABJ), 2020 WL 5409142, at *7 (D.D.C. Sept. 9, 2020) (“The proposed amended complaint does not allege any ongoing tangible harm to plaintiff or his reputation that continues to flow from the now-terminated misconduct proceedings, beyond whatever vague negative impressions may arise from the fact that the misconduct proceeding took place and sanctions were ordered. Under the law of this Circuit, that is not enough to overcome mootness.”) (citation omitted); *McBryde*, 264 F.3d at 57 (“[C]laims of reputational injury can be too vague and unsubstantiated to preserve a case from mootness.”).

Here, too, Plaintiffs allege no more than “vague” and “lingering” reputational harms. An order for additional “remedial action” by CMS will not mitigate those supposed harms, especially if the retracted termination and sanctions—along with a publicly displayed notice of the retraction and the well-publicized recalculated 2024 Star Ratings, all of which already has occurred—have not already done so. Zing’s alleged reputational harm does not confer standing on Plaintiffs; accordingly, their claims should be dismissed.

III. The Declaratory Judgment Act Does Not Provide a Cause of Action.

Under Count II of their Complaint, Plaintiffs seek a declaration from this Court, pursuant to 28 U.S.C. § 2201, that CMS’s calculation of the 2024 Star Ratings and CMS’s decision to terminate and impose sanctions upon Zing’s contract, were “arbitrary and capricious.” Compl. ¶ 174. As discussed above, Plaintiffs’ APA claims regarding each of these issues are not cognizable because CMS has already granted Zing full relief, and the claims are therefore moot. Plaintiffs have no further basis upon which to seek declaratory relief, and the Declaratory Judgment Act does not provide a cause of action in any event.

The D.C. Circuit has held that the Declaratory Judgment Act, 28 U.S.C. § 2201, does not “provide a cause of action.” *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011). “It is a well-established rule that the Declaratory Judgment Act is not an independent source of federal jurisdiction. Rather, the availability of [declaratory] relief presupposes the existence of a judicially remediable right.” *Id.* (quotation marks omitted); *see also Skelly Oil Co. v. Phillips Petrol. Co.*, 339 U.S. 667, 671 (1950) (“[T]he operation of the Declaratory Judgment Act is procedural only.”) (alteration in original; quoting *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937)); *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 33 n.3 (1st Cir. 2007) (“Although the plaintiffs style ‘declaratory judgment’ as a cause of action, the provision that they cite, 28 U.S.C. § 2201(a), creates a remedy, not a cause of action.”); *Maynard v. Architect of the Capitol*, 544 F. Supp. 3d 64, 77 (D.D.C. 2021) (“[T]he Court agrees with several of its colleagues that ‘the Declaratory Judgment Act does not provide a waiver of sovereign immunity.’”) (quoting *Stone v. Dep’t of Hous. & Urb. Dev.*, 859 F. Supp. 2d 59, 64 (D.D.C. 2012)).

Under Count II, Plaintiffs merely seek a remedy for claims in which they have already obtained the relief sought—i.e., recalculation of Zing’s 2024 Star Ratings, and a retraction of

CMS's decision to terminate and impose sanctions upon Zing's contract. "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); *see also Long v. Bureau of Alcohol, Tobacco & Firearms*, 964 F. Supp. 494, 497 (D.D.C. 1997) ("Plaintiffs cannot evade the mootness of their claim by requesting a declaratory judgment. While the Declaratory Judgment Act . . . permits a federal court to declare the rights of a party whether or not further relief is or could be sought, . . . a declaratory judgment may not be used to secure judicial determination of moot questions.") (quotation marks and citations omitted). For these reasons, Plaintiffs' claims under the Declaratory Judgment Act should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff's Complaint for lack of subject-matter jurisdiction under Rule 12(b)(1).

* * *

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Respectfully submitted,

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