IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ZING HEALTH, INC., ZING HEALTH MICHIGAN, INC., AND ZING HEALTH CONSOLIDATOR, INC., *Plaintiffs,* v. DEPARTMENT OF HEALTH AND HUMAN SERVICES et al., *Defendants.*	Case No. 1:25-cv-04147 (RBW)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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Plaintiffs Zing Health, Inc. ("Zing"), Zing Health of Michigan, Inc. ("Zing Michigan"), and Zing Health Consolidator, Inc. ("ZHC," collectively, "Zing Health" or "Plaintiffs"), submit the following Opposition to the Motion to Dismiss the Complaint filed by Defendants Department of Health and Human Services ("HHS"), the Centers for Medicare & Medicaid Services, Robert F. Kennedy, Jr. in his official capacity as Secretary of HHS, and Mehmet Oz in his official capacity as Administrator of CMS (together, "Defendants" or "CMS").

INTRODUCTION

Zing Health filed this lawsuit to challenge and seek redress for CMS's failure to correct its improper termination and sanctions decisions. For months, CMS informed the public – including beneficiaries – that Zing Health's MA Plans were of low quality, would be terminated and subject to sanctions, and would no longer be available to beneficiaries, resulting in pervasive operational disruptions and concrete injuries to Zing Health. Zing Health was the *only* MA Plan to face this public reprimand as a result of the agency's miscalculated Star Ratings and, as a result, was prohibited from advertising and seeking enrollment from beneficiaries.

But it turned out CMS was wrong and the consequences it visited on Zing Health were mistaken, because CMS had unlawfully calculated its Star Ratings. CMS only owned up to its mistakes after two district courts held its actions were unlawful, and when it did it issued a belated Notice of Retraction that failed to address the substantial harms it caused Zing Health. CMS's delayed Notice indeed did nothing to address the harms suffered by Zing.

The agency's arbitrary and capricious actions have plainly caused Zing Health to suffer an injury in fact this Court is authorized to and should address. Nevertheless, CMS seeks to dismiss based on issue preclusion and lack of Article III standing. But granting their motion would require the Court to stretch issue preclusion beyond its recognized limits and adopt a heightened level of

redressability that is not constitutionally required.. The Court should deny CMS's motion for straightforward reasons.

First, the Court's prior ruling on standing does not preclude Zing Health's current lawsuit. Zing's prior lawsuit, Case No. 24-cv-00855 ("*Zing I*"), asserted claims challenging a different agency action – CMS's Memorandum, in which the agency recalculated the 2024 Star Ratings for 2025 Quality Bonus Payment purposes. But here, Zing Health challenges CMS's Notice of Retraction. Because the current lawsuit challenges an entirely different agency action, there is no issue preclusion from the Court's ruling in *Zing I*.

Second, Zing Health has suffered a cognizable injury in fact that is properly redressed by this Court. CMS argues it has already redressed Zing Health's injuries by recalculating the 2024 Star Ratings for all MA Plans. But Zing Health has suffered unique and concrete harms as the only plan that, because of CMS's unlawful actions, had a termination imposed on it that was only belatedly rescinded after two courts held its actions were unlawful. CMS's Notice of Retraction failed to address the unique and compounded harms that Zing Health has suffered as a result of the agency's action. Among other harms, Zing Health has had to endure months of misrepresentations about the quality of its plans, including to current and prospective enrollees of its MA Plans and been forced to refrain from marketing to the contrary. That presents an actual injury-in-fact the Court can redress via Zing Health's requested relief – that is, by engaging in targeted outreach to Zing's beneficiaries, including issuing a public statement on its website and within newspapers in Zing's service area and explaining Zing Health has never been terminated or sanctioned on CMS's MA Plan Finder.

Third, Zing Health's declaratory judgment claim presents a live controversy. CMS cannot avoid that conclusion simply because it believes Zing Health should be content with CMS's recalculation of its 2024 Star Ratings.

The Court should deny CMS's motion.

FACTUAL BACKGROUND

Zing is a Medicare Advantage health plan ("MA Plan") dedicated to improving health outcomes for underserved, minority beneficiaries by providing $0 premiums and deductibles, low maximum out-of-pocket costs, and Part D gap coverage. ECF No. 1, Complaint ("Cmplt.") ¶¶ 1 & 8. Zing's parent organization, ZHC, maintains several MA-PD contracts through Zing and other entities. *Id.* ¶ 9. For example, Zing Michigan operates contract H4624 and has the same geographic footprint and coverage as Zing. *Id.*¶ 10. Thus, Zing and Zing Michigan share the same administrative and capital burdens overseen and operated by ZHC. *Id.*

As part of the MA program, MA Plans contract with CMS to provide healthcare to beneficiaries. *Id.* ¶¶ 9, 51–59. CMS provides MA Plans with Star Ratings based on health and drug plan quality and performance measures. *Id.* ¶ 59. The Star Ratings are based on a five-star scale, with 1 star being the lowest rating and 5 stars being the highest. *Id.* ¶ 60. Star Ratings are used by Medicare beneficiaries when choosing to enroll in an MA Plan to compare health plans based on quality. *Id.* ¶¶ 57–58 & 63–65. The Star Ratings also impact the amount of additional funds CMS will pay to each MA Plan, including quality bonus payments. *Id.* ¶¶ 67–68. MA Plans that consistently receive Star Ratings below 3 stars may be terminated from the MA program altogether or have intermediate sanctions imposed. *Id.* ¶¶ 69–71 & 78. In short, 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

participate in the MA program. *Id.* ¶¶ 72–73. Their entire point is to reward and drive members to highly-rated plans and punish, deter members from, and terminate poor performing plans.

In 2020, CMS promulgated regulations that revised its Star Ratings methodology to include "guardrails" that provide stability and predictability for MA-PD plans by reducing the fluctuation in the cut points used to calculate annual Star Ratings. *See* 42 C.F.R. §§ 422.162, 422.166(a)(2), 423.182 & 423.186(a)(2); *see also* Cmplt. ¶¶ 89–95. The regulation required CMS to use actual plan performance data and cut points in developing Star Ratings. *Id.* ¶¶ 98–99. But in calculating MA Plans' 2024 Star Ratings, CMS applied an entirely different methodology that was not subject to any formal notice and comment rulemaking and directly contradicted its own regulation. *Id.* ¶ 119. Instead of using *actual* plan performance data from 2023 to calculate the 2024 cut points in accordance with the established guardrails for Star Ratings, CMS recalculated the 2023 cut points, creating *simulated* cut points, in violation of its own regulation. *Id.* ¶¶ 119 & 123.

The result was catastrophic. Zing's 2024 Star Ratings dropped dramatically, and made its MA Plans less attractive to beneficiaries selecting plans during the enrollment period. *Id.* ¶¶ 104 & 120. CMS also relied on the flawed ratings to *terminate* Zing's contract effective December 31, 2024. *Id.* ¶¶ 106–108. The termination threatened the ability of Zing's current members to access its coverage and maintain their relationships with physicians and other providers. *Id.* CMS's wrongful action also deprived other similarly-situated, vulnerable Medicare beneficiaries of the opportunity to choose Zing's MA-PD plan for all of 2024, and further deprived Zing Health of millions of dollars in revenue. *Id.* ¶¶ 109–117. As CMS now acknowledges, Zing was the *only* MA Plan to have its contract terminated based on CMS's erroneous 2024 Star Ratings. *Id.* ¶ 149; Mot. at 8.

Additionally, CMS further sanctioned Zing by suspending all of its marketing activities and prohibiting it from enrolling new members. *Id.* ¶¶ 111–13. The sanctions also permitted current beneficiaries to *disenroll* from Zing's plan. CMS's sanctions took effect immediately and remained in place without any expiration date. Zing was forced to affirmatively and publicly represent to beneficiaries that "Zing Health is not accepting enrollments" and deny any enrollments it received. *Id.* ¶¶ 112 & 131 & Ex. 2, at 5. CMS's termination and sanctions severely harmed Zing Health's reputation, goodwill, and competitive position in the market. *Id.* ¶ 28. And CMS's actions caused Zing to lose hundreds of beneficiaries. *Id.* ¶ 144.

Because of the disruption caused by CMS's improper 2024 Star Ratings and resulting sanctions and termination of Zing, ZHC and Zing Michigan also suffered harms to their operations. *Id.* ¶ 152. These harms included derailing a contract negotiation with a national pharmacy benefit management firm, which would have provided improved drug prices for beneficiaries. *Id.* ¶ 18. CMS's termination notice also seriously jeopardized Zing Health's recapitalization efforts, and ultimately increased its costs of capital. *Id.* ¶ 19. And although it eventually obtained the necessary capital, its long-term costs of accessing that capital significantly increased because of CMS's termination notice and sanctions. *Id.* ¶ 20. CMS's disruptions to Zing Health also discouraged health insurance agents and brokers from promoting to or enrolling beneficiaries with other Zing Health plans. *Id.* ¶ 21. CMS's adverse actions also further adversely impacted Zing Michigan and its ability to provide quality care and services under its contract. *Id.* ¶ 17.

After CMS refused to address its ratings errors and unlawful actions, Zing and other MA Plans brought suit against CMS to challenge CMS's 2024 Star Ratings under the APA.[1] *See Zing*

[1] *SCAN Health Plan v. Dep't of Health & Human Servs.*, Civ. A. No. 23-3910 (CJN) (D.D.C. 2024); *Elevance Health, Inc. v. Becerra*, Civ. A. No. 23-3902 (RDM) (D.D.C. 2024).

I, ECF No. 1. On summary judgment, two judges in this District held that CMS violated the APA by using simulated cut points because "the text of the regulation leaves only one reasonable interpretation" – that is, CMS must use "the *actual* cut points." *SCAN Health Plan*, ECF No. 33 at 9 & 13; *see id.* at 13 n.5; *see also Elevance Health, Inc.*, ECF No. 30 at 39. Those courts thus set aside CMS's erroneously calculated 2024 Star Ratings for the plaintiff MA Plans and ordered the agency to recalculate them in compliance with its regulation. *Id.*

Following those orders, CMS issued a Memorandum to MA Plans on June 13, 2024, announcing its intention to recalculate the 2024 Star Ratings. Cmplt., Ex. 3. Over six months after its initial imposition, CMS sent Zing a separate Notice of Retraction ("Notice"), summarily rescinding its termination and sanctions on June 25, 2024.[2] *Id.* ¶¶ 128–129.

But the Notice failed to redress the harms caused by CMS's wrongful imposition of termination and sanctions upon Zing. *Id.* ¶ 128. It failed even to address the six months' worth of harm its wrongful sanctions and termination caused Zing, during which existing members believed they would no longer have access to the plan for 2025. *Id.* ¶¶ 25 & 129. During those six months, Zing was forced to affirmatively represent to beneficiaries that "Zing Health is not accepting enrollments." *Id.*, Ex. 2, at 4. New members could not – and were in fact prevented from – enrolling in Zing's health plans. *See id.* Health insurance agents and brokers were discouraged from promoting to or enrolling beneficiaries with other Zing Health plans. *Id.* ¶ 21. And Zing Health's ability to provide reliable care for its enrollees was impacted by needing to shift its attention to CMS's misconduct and expend substantial resources and time to address the resulting fallout. *Id.* ¶¶ 152–153.

[2] CMS, *Notice of Retraction of Termination and Intermediate Sanctions* (June 25, 2024), https://www.cms.gov/files/document/zingtermination-sanctionretraction06252024.pdf.

The Notice also failed to acknowledge or address the Zing beneficiaries who chose to disenroll from the plan because of its impending (and erroneous) termination or those who were precluded from enrolling for over six months. *Id.* Nor did CMS make any effort to redress the harms that CMS's unlawful action caused to Zing Health's reputation and goodwill. *Id*.

In the end, CMS acted arbitrarily and discriminatorily by remediating certain harms to some plans while entirely failing to remediate the harms that its unlawful action caused Zing Health.

PROCEDURAL HISTORY

On March 25, 2024, Zing Health filed suit against CMS, challenging CMS's calculation of the 2024 Star Ratings and its subsequent adoption and implementation of the CMS Memorandum. *Zing I*, ECF No. 18 ¶¶ 167–176. The government filed a motion to dismiss, challenging Zing Health's standing to bring suit. *See Zing I*, ECF No. 20. At issue in *Zing I* was whether the plaintiffs suffered an injury-in-fact "based on the CMS Memorandum." *Zing I*, ECF No. 25, at 9 (emphasis added). As such, the Court recognized "analysis of the plaintiffs' standing is limited to their challenge to the adoption and implementation of the CMS Memorandum." *Id.* Ultimately, the Court granted the government's motion, finding "any harm allegedly resulting from the CMS Memorandum itself . . . is insufficient to carry its burden of establishing [Plaintiffs] have Article III standing." *See Zing I*, ECF No. 25, at 11. The Court reasoned that Zing Health had not identified any concrete harm arising from the CMS Memorandum itself. *Id.* at 10. The Court dismissed without prejudice. *See Zing I*, ECF No. 26.

On November 26, 2025, Zing Health filed this lawsuit for violation of the APA and declaratory relief. Here, it challenges an entirely different CMS action: the Notice of Retraction. *See* ECF No. 1, ¶¶ 25 & 128–29. The Notice failed to address the harms CMS caused Zing Health

to suffer, including its loss of beneficiaries who chose to disenroll from the plan because of Zing's impending (and erroneous) termination, those who were precluded from enrolling for over six months, and those discouraged from applying for enrollment in Zing by CMS's Medicare Plan Finder false representation of Zing's plan quality. *Id.* ¶¶ 130–33. Nor did CMS address the resulting harms to Zing Health's reputation and goodwill caused by the agency's unlawful action. *Id.* CMS acted arbitrarily and capriciously by failing to remediate any of these unique and actual harms it inflicted upon Zing Health alone.

STANDARD

A motion to dismiss under Rule 12(b)(1) is properly denied when a plaintiff establishes the Court has jurisdiction by a preponderance of the evidence. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). When scrutinizing the plaintiff's allegations, the Court can consider material outside of the pleadings, *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005), but "must accept as true all of the factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff," as long as they are not "unsupported by the facts alleged or legal conclusions that are cast as factual allegations," *Ellis v. Holy Comforter Saint Cyprian Cmty. Action Grp.*, 153 F. Supp. 3d 338, 341 (D.D.C. 2016).

Applying this standard here, the Court should deny CMS's motion.

ARGUMENT

I. Zing Health's Claims Are Not Precluded Because It Challenges – And Seeks Relief For Harms Caused By – A Different CMS Action.

CMS first argues Zing Health's claims here are precluded by the Court's decision in *Zing I*. Mot. at 12–15. Not so. For issue preclusion to apply, the Court must have "actually and necessarily determined" the issue. *Connors v. Tanoma Mining Co.*, 953 F.2d 682, 684 (D.C. Cir. 1992) (internal quotation and emphasis omitted). Critically, the issue previously "determined"

must have been "*identical* to the one presented in the current litigation." *Cf. 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) & *Hutchinson v. Dist. of Columbia Office of Employee Appeals*, 710 A.2d 227, 236 (D.C. 1998)) (emphasis added). And if it is "uncertain whether the issue was actually and necessarily decided in [the prior] litigation, then relitigation of the issue is not precluded" to avoid "unfairness." *Connors*, 953 F.2d at 684; *cf. Otherson v. INS*, 711 F.2d 267, 273 (D.C. Cir. 1983).

Here, the issues decided in *Zing I* are not remotely "identical." *Jahr*, 968 F. Supp. 2d at 191. In *Zing I*, Zing Health challenged CMS's calculation of the 2024 Star Ratings and its subsequent Memorandum. *See Zing I*, ECF No. 18 ¶¶ 167–176. As even Defendants concede, "Plaintiffs focused their APA action on CMS's [Memorandum]." Mot. at 9. Thus, in its decision in *Zing I*, the Court analyzed Zing's Article III standing "*based on the CMS Memorandum*." *Zing I*, ECF No. 25, at 9 (emphasis added); *see* Mot. at 10 ("The Court found the Plaintiffs failed to allege any concrete harm *arising from the CMS Memorandum itself*") (emphasis added). The Court granted the government's motion, finding "any harm allegedly resulting *from the CMS Memorandum* itself . . . is insufficient to carry its burden of establishing [Plaintiffs] have Article III standing." *See Zing I*, ECF No. 25, at 11 (emphasis added).

But in the instant case, Zing Health challenges a different agency action altogether – CMS's Notice. *See* ECF No. 1; Mot. at 10. And this Court must assess Zing Health's standing to challenge that action based on different facts and allegations too. It is thus simply not the case that this Court has "determined" Zing Health's Article III standing to challenge CMS's Notice of Retraction. It has not. As such, "the doctrine of issue preclusion [is] inapplicable." *Cf. Safadi v. Novak*, 574 F. Supp. 2d 52, 55 (D.D.C. 2008) (citing 18 James W. Moore, et al., Moore's Federal Practice S

132.02(2)(3), at 27-29 (3d ed.2008) ("The basic rule, that issue preclusion applies only if the issue in the prior litigation is identical to the issue in the subsequent litigation, entails the corollary that a difference in pertinent facts, sufficient to substantially change the issue, renders the doctrine of issue preclusion inapplicable.")).

Any doubts about that, too, are properly resolved in Zing Health's favor. So even if there is some uncertainty whether the issue decided in *Zing I* is "identical" to the one presented in the instant case – it is not –issue preclusion does not properly here. *Connors*, 953 F.2d at 684 (internal quotation & emphasis omitted); *cf. Otherson*, 711 F.2d at 273. Preventing Zing Health from challenging a distinct agency action that was not even before the *Zing I* would result in serious "unfairness." *Id.* That result also cannot be squared with the *Zing I* Court's core holding – specifically finding a lack of standing to challenge CMS's Memorandum – and dismissal "without prejudice." *See Zing I*, ECF No. 26. Clearly, by dismissing without prejudice, the Court allowed Zing Health to replead its claims to address the Court's ruling on the Memorandum. *Ponder v. Chase Home Fin., LLC*, 865 F. Supp. 2d 13, 18 (D.D.C. 2012). Zing Health has done so in its current Complaint by targeting a separate and distinct agency action and the harms caused by that separate action. *See Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996). Accordingly, applying issue preclusion here would result in serious "unfairness" to Zing Health and countermand the *Zing I* court's own directive. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980).

While CMS further argues Zing Health must satisfy the "curable defect" exception to avoid preclusion, that assumes, improperly, that issue preclusion applies here when it properly does not. Mot. at 14. Not so. Under the "curable defect" exception, issue preclusion does not apply to a re-raised jurisdictional issue when "the controlling facts have changed significantly" following dismissal "to sufficiently change the issue." Mot. at 14 (citing *Citizens Elecs. Co. v. OSRAM*

GmbH, 2005 WL 38484202, at *3 (D.D.C. Dec. 20, 2005)). But Zing Health is not seeking to relitigate an issue that has already been decided. *See supra* at 8–10. It challenges an entirely different agency action. *Compare Zing I*, ECF No. 18, ¶ 187, *with* ECF No. 1, ¶ 166. As such, the "curable defect" exception is of no moment. *Connors*, 953 F.2d at 684.

II. Zing Health Has Standing To Challenge CMS's Notice Of Retraction.

A. Plaintiffs Have Suffered An Injury In Fact.

CMS next argues Zing Health lacks standing to challenge CMS' Notice because it has not suffered a redressable injury in fact. Mot. at 15–20. CMS is mistaken, again. To establish Article III standing, Zing Health must show it has suffered an injury that is fairly traceable to CMS's conduct and redressable. *Lujan*, 504 U.S. at 590. The injury alleged must be "concrete and particularized," as well as "actual or imminent." *Zaidan v. Trump*, 317 F. Supp. 3d 8, 18 (D.D.C. 2018). Those injuries include economic harms, *Magruder v. Cap. One, Nat'l Ass'n*, 540 F. Supp. 3d 1, 7 (D.D.C. 2021) (recognizing economic and intangible harms confer standing), as well as harms to reputation and goodwill, *see Foretich v. United States*, 351 F.3d 1198, 1211 (D.C. Cir. 2003) (finding "injury to reputation can constitute a cognizable injury sufficient for Article III standing").[3] That is especially so for "reputational injur[ies]" that "deriv[e] directly from an unexpired and unretracted government action." *Id.* at 1213; *Rtskhiladze v. Mueller*, 110 F.4th 273, 277 (D.C. Cir. 2024).

Here, Zing Health has alleged "actual," "concrete," and "particularized" injuries in fact

[3] *See also Parsons v. U.S. Dep't of Just.*, 801 F.3d 701, 711 (6th Cir. 2015) ("Reputational injury, on the other hand, is sufficient to establish an injury in fact."); *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208, 220 (3d Cir. 2013) ("As a matter of law, reputational harm is a cognizable injury in fact."); *Gully v. Nat'l Credit Union Admin. Bd.*, 341 F.3d 155, 161 (2d Cir. 2003) ("The Supreme Court has long recognized that an injury to reputation will satisfy the injury element of standing.") (collecting cases).

caused by CMS's unlawful conduct. *Zaidan*, 317 F. Supp. 3d at 18. *First*, Zing suffered actual economic harms caused by CMS's delayed issuance of the Notice. *See* Cmplt. ¶¶ 161–64. For over six months, Zing was prohibited from any marketing to and enrolling beneficiaries. *Id.* ¶ 117 n.9. Thus, while simultaneously battling the stigma of its unlawful and lower Star Ratings, Zing could not contact current and potential beneficiaries, market and advertise its benefits to potential enrollees, or distribute any promotional materials whatsoever. *Id. See McBryde v. Comm. to Review Cir. Council Conduct & Disability Ords. of the Jud. Conf. of the U.S.*, 264 F.3d 52, 56–57 (D.C. Cir. 2001), cert. denied, 537 U.S. 821 (2002) (recognizing the stigma and resulting harms following government action negatively branding plaintiff); *see also Meese v. Keene*, 481 U.S. 465, 476–77 (same). Moreover, over 1,000 current enrollees disenrolled from Zing Health as a result of the sanctions imposed and announced by CMS. *See* 42 C.F.R. § 422.62(b)(5) (permitting beneficiaries to disenroll from an MA Plan "that has been sanctioned"). And CMS's six month delay in issuing the Notice entirely destroyed the terminated MA-PD plans commercially viability. Cmplt. ¶ 26. There cannot be any serious dispute that Zing Health suffered severe actual economic harms that confer standing.

Second, the Notice harmed – and continues to harm – Zing Health's reputation and competitive position. Cmplt. ¶¶ 144–66. CMS's public termination and sanctions were a scarlet letter for Zing Health – it intentionally made Zing's contract "less attractive to Medicare beneficiaries selecting a plan," *id.* ¶ 148, provided current enrollees over six months to withdraw and go elsewhere, and even prohibited it from contacting or enrolling beneficiaries, *id.* ¶ 21. And CMS's public sanctioning of Zing tanked negotiations between Zing Health and a national pharmacy benefit management firm and increased the costs of financing. *Id.* ¶¶ 24–25. Zing has had to expend "substantial resources" and time to address the reputational damage caused by the

agency's erroneous termination and associated sanctions. *See id.* ¶¶ 144–161; *McBryde*, 264 F.3d at 55, 57 (finding "official characterization" of the party in a negative light inflicted direct injury to his reputation). It is the only MA Plan that has had to do so. Cmplt. ¶ 162; Mot. at 8. These injuries readily "satisfy" Article III standing. *Zaidan*, 317 F. Supp. 3d at 18.

CMS further argues Zing Health's reputational harms and request for relief are just defamation claims barred by sovereign immunity. Mot. at 17–18. But that just mischaracterizes Zing Health's claims. Zing Health has properly brough its claims under the APA, which allows it to challenge and seek relief for the harms it has suffered from CMS's arbitrary and capricious Notice. Cmplt. ¶¶ 156–74. Just like any other federal agency, CMS does not enjoy sovereign immunity against *all* claims "seeking relief other than money damages" – especially those seeking injunctive and declaratory relief. *See* 5 U.S.C. § 702; *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988); *Fausto v. Gearan*, No. CIV. A. 93-1863(EGS), 1997 WL 540809, at *8 (D.D.C. Aug. 21, 1997). Zing Health's claims are thus properly "reviewable by this Court under the APA." *Fausto*, 1997 WL 540809, at *9.

B. Plaintiffs' Injuries Are Redressable.

CMS next argues its posting of the recalculated Star Ratings and the Notice on its website already redressed Zing Health's injuries. Mot. at 16. CMS is wrong. Redressability requires a substantial likelihood "the requested relief will redress the alleged injury." *Lujan*, 504 U.S. at 595. CMS chose solely to address Zing's harm by posting its recalculated 2024 Star Ratings and passively posting its Notice of Retraction on its website. *See* Cmplt., Ex. 3. But CMS's Notice entirely failed to redress Zing Health's severe and abiding reputational and business harms. If

CMS could defeat a challenge to its termination decisions by merely posting recalculated Star Ratings on its website without, APA review would be cold comfort indeed.

Zing Health's reputational harms are far more profound than other MA Plans' whose scores were miscalculated too. Zing's beneficiaries are low-income, underserved populations who do not scour the government's Medicare Plan Finder for recalculated Star Ratings and belated termination reversals. Cmplt. ¶¶ 7–9. New beneficiaries made their enrollment decisions based on the available, unlawful and incorrect Star Ratings, and hundreds of current beneficiaries disenrolled based on Zing's then-impending and improper termination. *See id.* ¶ 114 n.8; 42 CFR 422.162(b)(5). CMS's "unexpired and unretracted" Notice failed to redress these harms. *Foretich*, 351 F.3d at 1213. As Zing Health seeks in its Complaint, CMS should conduct targeted and affirmative outreach to inform Zing Health's target population, including former beneficiaries, that CMS erroneously calculated Zing's 2024 Star Ratings, resulting in its mistaken termination and onerous "intermediate sanctions." Cmplt. at Prayer for Relief. That outreach would partially redress Zing's loss of beneficiaries, its inability to market, and over half a year's worth of prohibited enrollment, which are unique and serious harms it alone suffered. *See Keene*, 481 U.S. at 477 (holding that a judicial declaration denouncing the government's actions would, at least partially, redress reputational injury). Moreover, CMS should affirmatively represent on its Medicare Plan Finder that Zing Health's contract has never been terminated or sanctioned to redress its prior misrepresentation that it had. That is all relief properly available under the APA. 5 U.S.C. § 706 ; *see, e.g.*, *Keene*, 481 U.S. at 477; *McBryde*, 264 F.3d at 57 (recognizing the judiciary's power to declare unlawful the government's "stigmatizing reports").

The authorities relied on by CMS do not support its argument and, in fact, support Zing Health's standing here. *See Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1019 (D.C. Cir. 1991);

Mot. at 27. For example, in *Meese*, Penthouse sought the recission of a governmental letter identifying it as a company that distributed pornography. 939 F.2d at 1014. But because the government had already rescinded that letter, the Court held the claim was no longer redressable since Penthouse had already "obtained the equitable relief it was seeking." *Id.* at 1018. But here, Zing Health asserts claims for *unredressed injuries*. *See* Cmplt. ¶¶ 167–95. CMS has not engaged in public outreach and correction to beneficiaries who were misled by its miscalculation of Zing's 2024 Star Ratings to redress Zing Health's reputational and competitive harms in the MA market, which were compounded by Zing's inability to market or enroll new beneficiaries for over six months. Those are "tangible, concrete effect[s]" that remain "susceptible to judicial correction" through the targeted outreach Zing Health requests. *Penthouse Int'l*, 939 F.2d at 1019; *McBryde*, 264 F.3d at 57.

III. Zing Health's Declaratory Judgment Claim Is Properly Before The Court.

CMS further argues that Zing Health's declaratory judgment claim is moot "because CMS has already granted Zing full relief," and thus no live controversy remains. Mot. at 21–22. But again, CMS conflates Zing Health's reputational injuries stemming from the delayed Notice of Retraction with those caused by erroneously calculating Zing's 2024 Star Ratings and its subsequent Memorandum.

Although CMS eventually rescinded its termination and sanctions on Zing's MA-PD plans, those actions do not fully address Zing Health's harms. *See supra* at Section II. The Notice of Retraction was issued *six months* after it imposed the initial termination and sanctions based on its flawed, unlawful Star Ratings calculation. During that time, existing members believed they would no longer have access to the plan for 2025. *See* ECF No. 1, ¶ 25. Because Zing was forced to affirmatively represent to beneficiaries that "Zing Health is not accepting enrollments," new members could not – and were in fact prevented from – enrolling in Zing's health plans. *Id.*, Ex.

2, at 4. Health insurance agents and brokers were discouraged from promoting to or enrolling beneficiaries with other Zing Health plans. *Id.* ¶ 21. And Zing Health's larger ability to provide reliable care for its enrollees was undermined by it having to shift its attention to CMS's misconduct and expend substantial resources and time to address the resulting fallout. *Id.* ¶¶ 152–153. The harms inflicted by CMS's original miscalculation and remedied with its recalculation of the 2024 Star Ratings are distinct from the unique injuries inflicted against Zing, as the sole MA Plan that CMS wrongfully terminated and sanctioned. *See* Mot. at 8. CMS's arbitrary and capricious delay in issuing its Notice of Retraction and failure to redress the harms Zing Health suffered remains "a substantial controversy" of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *RDP Techs., Inc. v. Cambi AS*, 800 F. Supp. 2d 127, 136 (D.D.C. 2011) (citing *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007)). Accordingly, the Court should deny CMS's motion on this ground, too.

CONCLUSION

The Court should deny Defendants' motion to dismiss.

Dated: April 24, 2026

By: _____

Paul Werner (D.C. Bar #482637)
Imad Matini (D.C. Bar # 1552312)
Tifenn Drouaud (D.C. Bar #90017819)
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
2099 Pennsylvania Ave., NW, Suite 100
Washington, DC 20006
Tel. (202) 747-1900
pwerner@sheppardm.com
imatini@sheppard.com
tdrouaud@sheppard.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2026, I electronically filed the foregoing document and the accompanying exhibits with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ Paul Werner
Paul Werner