IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ZING HEALTH, INC.
225 W. Washington Street, Suite 450
Chicago, Illinois 60606

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, D.C. 20201;

CENTERS FOR MEDICARE & MEDICAID SERVICES
7500 Security Boulevard
Baltimore, MD 21244;

XAVIER BECERRA, in his official capacity as Secretary of the United States Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, S.W.,
Washington, D.C., 20201; and

CHIQUITA BROOKS-LASURE, in her official capacity as Administrator, Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244,

Defendants.

Case No. 1:24-cv-855

COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff Zing Health, Inc. ("Zing"), submits the following Complaint for declaratory and injunctive relief against Defendants Department of Health and Human Services ("HHS"), the

Centers for Medicare & Medicaid Services ("CMS"), Xavier Becerra, in his official capacity as Secretary of HHS, and Chiquita Brooks-LaSure, in her official capacity as Administrator of CMS (collectively, "Defendants" or "CMS"), and alleges as follows:

INTRODUCTION

1. Zing brings this action to address a serious error that CMS has made in calculating Zing's 2024 Star Ratings, which, if not promptly corrected, will cause Zing to be unfairly terminated from participating in the Medicare Advantage Program, thereby precluding it from serving low-income and minority beneficiaries and undermining its mission of addressing inadequacies in the healthcare system.

2. This erroneous calculation and CMS's refusal to address it in compliance with its own regulation are a disturbing, if textbook, example of rigid and unreasonable agency decision-making that should be set aside.

3. CMS disregarded the plain text of its own regulation and adopted an "implied" approach, obscured within regulatory preamble and commentary, to calculate the 2024 Star Ratings. This new methodology, which was never the subject of any proper rulemaking, improperly reduced Zing's Star Ratings. That result is directly contrary to the entire purpose of the regulation that CMS misapplied, which is to stabilize Star Ratings and thereby reduce wild, year-over-year ratings swings through use of explicit "guardrails."

4. Zing was founded in 2019 by physician entrepreneurs and a healthcare executive with the mission to address healthcare disparities among historically underserved populations. In fact, 83% of the Medicare beneficiaries enrolled in Zing's MA-PD plans are Black or Hispanic and 75% receive low-income subsidies for the Medicare Part D coverage.

5. Moreover, Zing offers two of only seven available MA-PD HMO plans with Cook County Hospital System that services these underserved beneficiaries with $0 premiums and deductibles, low maximum out-of-pocket costs, and Part D coverage gap coverage.

6. MA Plans, like Zing, receive annual Star Ratings from CMS based on "health and drug plan quality and performance measures" that are used by Medicare beneficiaries to shop for plans. CMS also relies on the Star Ratings to determine MA Plans' eligibility to receive quality bonus payments and rebates that fund additional benefits for their Medicare members.

7. CMS calculates the Star Ratings based on a clear and unambiguous methodology that includes the calculation of measure-specific "cut points."

8. In 2020, CMS promulgated regulations that revised its Star Ratings methodology to include "guardrails" that provide stability and predictability for MA Plans by reducing the fluctuation in the cut points used to calculate annual Star Ratings.

9. CMS is required to use actual cut points from the prior year to determine the appropriate cut points that are used to calculate an MA-PD plan's Star Ratings.

10. But in calculating the 2024 Star Ratings for Zing, CMS applied an entirely different and new methodology that was not subject to any formal notice and comment rulemaking, and that directly contradicted the plain text of its own regulation.

11. Instead of using actual plan performance data from 2023 to calculate 2024 cut points in accordance with the established guardrails for Star Ratings, CMS recalculated the 2023 cut points by prematurely applying the Tukey outlier deletion method.

12. When Zing confronted the agency about its use of recalculated data, CMS merely asserted it did not agree with Zing and refused to abide by its own regulation.

13. The result was catastrophic: Zing's 2024 Part D Star Rating remained low, and became the third and last data point used by CMS to *terminate* Zing's contract from the MA-PD program effective December 31, 2024, threatening its beneficiaries' ability to receive coverage and depriving it of millions of dollars in revenue.

14. In addition to terminating Zing's contract, CMS also imposed marketing and enrollment sanctions on Zing, which effectively foreclosed new enrollments into Zing's MA-PD plans for the remainder of 2024.

15. CMS's failure to adhere to its articulated methodology to calculate Zing's Star Ratings constitutes an unexplained and unreasonable departure from its own regulation, which carries dire consequences for Zing and other MA Plans.

16. CMS's refusal to follow its own promulgated methodology and reliance on flawed data are arbitrary and capricious agency actions in violation of the APA.

17. CMS's 2024 Star Ratings for Zing should be vacated, and this matter should be remanded to the agency to adjust Zing's 2024 Star Ratings based on a proper application of its regulation and use of data that is not inherently flawed.

18. To prevent Zing from suffering irreparable harm from CMS's improper rating, the Court should expedite the resolution of this matter on the merits and also enjoin CMS from relying on its improper Part D Star Ratings to terminate Zing's contract with CMS.

PARTIES

19. Zing is a for-profit corporation incorporated in Illinois, duly licensed as a health maintenance organization in Illinois, and with its principal place of business in Chicago, Illinois.

20. Defendant HHS is the department of the federal government ultimately responsible for the federal Medicare and Medicaid programs.

21. HHS has delegated its authority to administer the Medicare and Medicaid programs to CMS. *See* 66 Fed. Reg. 35437.

22. Defendant CMS is a federal agency within HHS with the primary oversight responsibility for the Medicare program and the federal portion of the Medicaid program. It was created by the Reorganization Act of March 9, 1977. *See* 66 Fed. Reg. 35437.

23. Defendant Xavier Becerra is named in his official capacity as the Secretary of HHS. *See* 42 C.F.R. § 405.1136(d)(1).

24. Defendant Chiquita Brooks-LaSure is named in her official capacity as Administrator of CMS. The CMS Administrator is responsible for the administration of the Medicare program, including the Star Ratings for MA Plans. *Id.*

JURISDICTION & VENUE

25. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1331 because this action arises under the APA, 5 U.S.C. §§ 701 *et seq.*, and 42 U.S.C. §§ 1395 *et seq.*

26. Venue is proper in this Court under 28 U.S.C. § 1391(e) because this is an action against officers and agencies of the United States and a substantial part of the events giving rise to Zing's claims occurred in this District.

27. The Complaint is timely under 28 U.S.C. § 2401(a).

REGULATORY AND FACTUAL BACKGROUND

The Medicare Program And Star Ratings

28. The Medicare program, authorized under Title XVIII of the Social Security Act ("SSA"), is a federal program that provides health insurance benefits for Americans aged 65 years and older and certain disabled persons. *See* 42 U.S.C. §§ 1395 *et seq.*

29. CMS is the federal agency responsible for administering the Medicare program.

30. Individuals enrolled in Medicare may elect to receive their benefits under Part C of the Medicare program, commonly referred to as the "Medicare Advantage" program, as an alternative to original Medicare.

31. Under Part C, CMS contracts with private insurance payors, commonly known as Medicare Advantage Plans ("MA Plans"), to provide and arrange for Medicare-covered benefits for Medicare beneficiaries who enroll in their benefit plan. *See* 42 C.F.R. § 422.4.

32. Most MA Plans also provide Medicare Part D prescription drug coverage. *See* 42 C.F.R. § 422.4(c)(1).

33. MA Plans that provide offer Part D coverage are referred to as MA-PD plans. *See* 42 C.F.R. § 423.4.

34. Besides arranging and paying Medicare-covered benefits of Medicare beneficiaries, MA Plans typically provide supplemental benefits as well as lower co-payments and other cost sharing, which further reduce the cost of covered services for beneficiaries.

35. The Medicare Advantage program is intended to shift the financial risk of providing health care to beneficiaries from the federal government to the privately run MA Plans in exchange for a per-member, per-month payment.

36. MA Plans that are better at keeping their members healthy, by effectively managing their care and providing important related services, receive higher ratings, and overall, perform better in the marketplace. *See generally* 42 C.F.R. § 422.160.

37. By providing additional benefits beyond those covered by Medicare, MA Plans compete with original Medicare and with one another to convince beneficiaries to select their plan.

38. In an effort to encourage MA Plans to offer high quality plans and to assist Medicare beneficiaries in selecting a Part C plan, CMS studies and surveys MA Plans for quality, compliance, and other metrics to develop numerical ratings for each MA Plan ("Star Ratings").

39. The Star Ratings are based on a five-star scale, with 1 star being the lowest rating and 5 stars being the highest. *See* 42 C.F.R. § 422.162(b); 42 C.F.R. § 422.166(h)(1)(ii).

40. MA Plans that also provide Part D coverage receive a separate Part D Star Rating. *See* 42 C.F.R. § 422.162(b).

41. The Star Ratings are designed to be "a true reflection of the plan's quality" and must be based on data that is "complete, accurate, reliable, and valid." 83 Fed. Reg. 16440, 16521 (Apr. 16, 2018).

42. Star Ratings information is widely available to Medicare beneficiaries to consider when choosing to enroll in an MA Plan. These measures are particularly important, as they allow beneficiaries to compare health plans based on quality.

43. CMS prominently displays Star Ratings in its online and print resources on available MA Plans as required under the Social Security Act ("SSA"). *See* 42 U.S.C. § 1395w–21.

44. Indeed, through the online Medicare Plan Finder tool, CMS displays MA Plans in highest to lowest Star Ratings order to prospective members, with the express purpose of guiding beneficiaries to higher-rated plans first.

45. The Star Ratings also impact the amount of funds CMS will pay to each MA Plan.

46. Under Section 1853(o) of the SSA, CMS allocates quality bonuses to MA Plans based on their Star Ratings and awards additional funds to MA Plans rated at or above 4 stars. *See* 42 U.S.C. § 1395w–23.

47. MA Plans use these bonuses, which are often in the tens, if not hundreds of millions, of dollars, to provide additional benefits and services to further improve care to their members.

48. Conversely, MA Plans that consistently receive Star Ratings below 3 stars may be terminated from the Medicare Advantage program altogether. *See* 42 C.F.R. § 422.510(a)(4)(xi); 42 C.F.R. § 423.509(a)(4)(x).

49. Thus, 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 continue to participate in the Medicare Advantage program.

Calculation Of Star Ratings Generally

50. To calculate Star Ratings, CMS must use clear and unambiguous calculations established in its regulations. *See* 42 C.F.R. § 422.162(b); 42 C.F.R. § 422.166(h)(1)(ii); 42 C.F.R. § 423.182(b); 42 C.F.R. § 423.186(h)(1)(ii).

51. Star Ratings for MA Plans are based on a calculation of numerous performance measures designed to assess member services and care, including but not limited to preventative health services, management of long-term conditions, member experiences with the health plan, member complaints, and customer service. *See Medicare 2024 Part C & D Star Ratings Technical Notes* at 26-100, CENTERS FOR MEDICARE AND MEDICAID SERVICES, https://www.cms.gov/files/document/2024technotes20230929.pdf.

52. CMS publishes these measures and the specifications that it uses to develop its Star Ratings. MA Plans (including Zing) use them to target areas of improvement and investment to ensure they are maximizing their care and services for beneficiaries, and in turn, earn higher Star Ratings.

53. Any changes to the Star Ratings calculations can have serious, and sometimes catastrophic, impacts on MA Plans.

54. When Star Ratings fall due to changes in criteria and calculation methodology, MA Plans may be disqualified from receiving quality bonus payments and can even be removed from the Medicare Advantage program altogether, resulting in devastating financial and coverage consequences for MA Plans and beneficiaries.

55. Therefore, in developing each MA Plan's Star Ratings, CMS must treat each MA Plan "fairly and equally," judging them only on matters that are "under the control of the health or drug plan," in a system that will "minimize unintended consequences" adopted through a "process of developing [a ratings methodology that] is transparent and allows for multi-stakeholder input." 83 Fed. Reg. 16440, 16521.

56. CMS calculates Star Ratings based on a rigid methodology – set forth in its own regulations – that focuses on "health and drug plan quality and performance measures." 42 C.F.R. § 422.166; Medicare 2024 Part C & D Star Ratings Technical Notes at 2 & 26-100.

57. Measures used to calculate Star Ratings can be grouped into two categories: those from the Consumer Assessment of Healthcare Providers and Systems surveys ("CAHPS"), and those from "non-CAHPS" sources. Medicare 2024 Part C & D Star Ratings Technical Notes, at 2 & 26-73.

58. CAHPS measures relate to member experience with healthcare providers, services, and plans, deriving data from "surveys that ask consumers and patients to evaluate the interpersonal aspects of health care." 42 C.F.R. § 422.162(a). In other words, they measure the member experience.

59. Non-CAHPS measures derive data from sources other than CAHPS surveys. *See* Medicare 2024 Part C & D Star Ratings Technical Notes, at 4. Non-CAHPS measures consist of data from, among other sources, the Healthcare Effectiveness Data and Information Set[1] and CMS's Part C and D reporting requirements. *Id.* at i.

60. Each CAHPS and non-CAHPs measure is given a numeric score. *Id.* at 2.

61. The agency then determines the "cut point" for each measure – that is, the range of scores that correspond with particular Star Ratings.[2]

62. The statistical method used to calculate the cut points differs for CAHPS and non-CAHPS measures. *Id.* at 8.

63. CAHPS measures employ a relative distribution and significance testing method,[3] while non-CAHPS measures are subject to a clustering sampling method. *Id.*

---

[1] The Healthcare Effectiveness Data and Information Set ("HEDIS") is a tool used by more than 90 percent of U.S. health plans to measure performance on important dimensions of care and service. More than 190 million people are enrolled in health plans that report quality results using HEDIS. *See* Healthcare Effectiveness Data and Information Set (HEDIS) - Healthy People 2030 | health.gov (last visited Mar. 25, 2024).

[2] For instance, the 2023 cut points for measure C11 (Controlling Blood Pressure) – which is measured as a percentage – were the following: below 39% for 1 Star, between 39% and 62% for 2 Stars, between 62% and 75% for 3 Stars, between 75% and 83% for 4 Stars, and above 83% for 5 Stars. *See* Medicare 2023 Part C & D Star Ratings Technical Notes, at 45-47.

[3] Clustering sampling is defined by CMS as a "variety of techniques used to partition data into distinct groups such that the observations within a group are as similar as possible to each other, and as dissimilar as possible to observations in any other group." 42 C.F.R. § 422.162(a). Clustering of the measure-specific scores means "that gaps that exist within the distribution of the scores are identified to create groups (clusters) that are then used to identify the four cut points resulting in the creation of five levels (one for each Star Rating), such that the scores in

64. Together, the CAHPS and non-CAHPS measure scores and cut points are combined to develop each MA Plan's Star Ratings.

CMS Adopts Guardrail Requirements As Part Of The Star Ratings Methodology

65. On June 2, 2020, CMS promulgated a final rule establishing a new methodology for the calculation of Star Ratings. *See* 85 Fed. Reg. 33796. The new methodology was supposed to be applied starting in 2021, but was delayed because of the COVID-19 pandemic.

66. The final rule modified the methodology for non-CAHPS measures in two critical ways.

67. *First*, the final rule explained that, starting in 2024, the Tukey outlier deletion method would be used in developing the cut points for non-CAHPS measures. *See* 42 C.F.R. § 422.166(a)(2).[4]

68. *Second*, and most importantly, the final rule implemented "guardrails" or "bi-directional caps that restrict upward and downward movement of a measure's cut points" from one year to the next. *Id.*[5]

69. Specifically, the guardrail prevents each measure's cut points from fluctuating more than 5% (upward or downward) from that of the previous year, thereby promoting stability in Star Ratings year over year. *See generally* 85 Fed. Reg. 33796-33911.

---

the same Star Rating level are as similar as possible and the scores in different Star Rating levels are as different as possible." *Id.*

[4] Tukey outlier deletion is a "standard statistical methodology for removing outliers, to increase the stability and predictability of the star measure cut points." 85 Fed. Reg. 33798.

[5] A guardrail is defined by CMS as "a bidirectional cap that restricts both upward and downward movement of a measure threshold-specific cut point for the current year's measure-level Star Ratings as compared to the prior year's measure-threshold-specific cut point." 42 C.F.R. § 422.162(a).

70. CMS thus adopted the guardrail requirement to provide stability and predictability from year-to-year. *See generally id.*

71. According to the regulation, CMS is supposed to rely on the actual cut points from the prior year to determine and calculate the guardrail to measure the cut points that ultimately would be used to develop the Star Ratings for the MA Plans.

72. CMS explained that it would incorporate the "guardrail so that the measure-threshold-specific cut points for non-CAHPS measures do not increase or decrease more than the value of the cap from 1 year to the next." *Id.*

73. Under the final rule, therefore, to calculate the 2024 Star Ratings cut points, CMS is required to remove Tukey outliers from its methodology and then apply the guardrail caps for each measure's cut points compared to the actual 2023 cut points. *See* 42 C.F.R. § 422.166(a)(2)(i).

74. Doing so is supposed to prevent the 2024 cut points from deviating more than 5% from the 2023 cut points, thereby bringing stability to the calculations and process for MA Plans and Star Ratings. *Id.*

CMS's Arbitrary Rejection Of Its Own Methodology To Develop The 2024 Star Ratings Caused Zing To Receive A Lower Star Ratings

75. As a new MA-PD Plan, Zing has struggled to receive high Star Ratings, receiving a 2.5 in both 2022 and 2023.

76. As previously noted, due to the COVID-19 pandemic, CMS delayed implementing its guardrail requirement for two years until 2023, when it was supposed to use that requirement to establish the 2024 Star Ratings. *See* 87 Fed. Reg. 22776.

77. Thus, 2023 was the first time that CMS implemented its guardrail requirement, when it established its 2024 Star Ratings. *See id.*

78. Zing's 2024 Part D Star Ratings came in at 2.5 Stars – far lower than its expected 3 Star Rating.

79. CMS may terminate an MA Plan contract when the Plan does not comply with the regulatory requirements of the Medicare Advantage Program, including if a plan achieves less than a 3-Star rating on Part C or Part D for three years in a row. *See* 42 C.F.R. §§ 422.510(a)(4)(xi), 423.509(a)(4)(x).

80. Because of Zing's 2024 Part D Star Rating, Zing had received three Part D Star Ratings below the 3-Star threshold. Accordingly, CMS initiated termination of Zing's contract.

81. Zing initiated an administrative appeal relating to the procedures CMS failed to adhere to, including the calculation of its 2024 Star Ratings.

82. In response to Zing's challenge, CMS advised that "the 2023 Star Ratings cut points were rerun . . . and [t]hese *rerun* 2023 Star Ratings cut points serve as the basis for the guardrails for the 2024 Star Ratings." *See* Exhibit ("Ex.") 1, CMS Letter to Zing on Jan. 26, 2024.

83. That is to say, in computing Zing's 2024 Star Ratings, CMS used rerun simulated 2023 cut points data.

84. But CMS's own regulation requires it to rely on the previous year's *actual* cut points and data – not simulated, rerun data. *See* 42 C.F.R. § 422.166(a)(2).

85. Nevertheless, CMS rejected the methodology set forth in the regulation, and refused to consider actual cut points for the prior year.

86. And the results were just as dire as expected: MA Plans' Star Ratings fluctuated wildly, and well-beyond the 5% caps on cut point swings that the guardrails are supposed to impose.[6]

87. Thus, Zing's 2024 Part D Star Rating was significantly lower than expected as a result of CMS's failure to apply its own regulations.

88. Had CMS followed the regulation as written, Zing's Part D Star Rating would have been 3 stars – which would have precluded CMS from terminating Zing's contract.

89. CMS's failure to follow its own regulation resulted in the very thing that the guardrails were designed and intended to prevent: wild fluctuations in cut points that impact MA Plans' Star Ratings.

90. Zing alerted CMS to its flawed methodology, explaining that the regulation requires CMS to apply the guardrail to actual cut points from the prior year, not to rerun data that effectively amount to simulated data points. *See* Ex. 2, Zing Letter to CMS on Jan. 5, 2024.

91. Rerunning the 2023 data is inconsistent with the plain and express language of the regulation, which calls for comparison between the current and prior year's actual and measure-specific-threshold cut points. *See* 42 C.F.R. § 422.166(a)(2)(i).

92. It also frustrates the very purpose of CMS's guardrail regulation, which is to reduce risk and uncertainty for MA Plans by preventing dramatic swings in cut points and resulting ratings that can have massive adverse impacts on MA Plans and beneficiaries.

93. By its express terms, CMS's regulation does not permit the agency to recalculate the prior year's cut points for the purposes of generating and applying the guardrails. *See* Ex. 2.

---

[6] *See* https://www.cms.gov/medicare/health-drug-plans/part-c-d-performance-data (last visited Mar. 25, 2024).

94. When confronted with the flaws in its approach, CMS asserted that statements in its preamble to its final rule related to the use of Tukey outliers somehow permitted its departure from the regulation's actual text. Ex. 1; 85 Fed. Reg. 9044; 85 Fed. Reg. 33833.

95. Despite Zing's efforts to further discuss and resolve its concerns, CMS refused to meaningfully engage with Zing or reconsider its flawed approach and grave impacts of it.

96. As such, CMS ultimately used this third flawed Star Ratings – a rating that is not "a true reflection of the plan's quality" – to justify terminating Zing's contract. 83 Fed. Reg. 16440, 16521 (Apr. 16, 2018).

CMS's Unlawful Conduct Has Harmed – And Continues To Harm – Zing

97. CMS's refusal to abide its own regulation threatens to cause severe and irreparable harm to Zing.

98. By applying some newfound "intrinsic" methodology to calculate guardrails, rather than its actual regulation, Defendants have used simulated, rerun data to calculate Zing's Star Ratings.

99. As a result, Defendants have issued fundamentally flawed Part D and overall Star Ratings for Zing of 2.5 stars.

100. The impact of Defendants' action is serious and substantial.

101. By issuing a flawed 2024 Part D Star Rating for Zing's contract, CMS made Zing's contract eligible for termination and did in fact notify Zing that it was terminating Zing's contract program effective December 31, 2024, which will cause Zing to cease operations and discontinue providing services to low socioeconomic and minority beneficiaries.

102. In reliance of its termination notice to Zing, CMS also imposed marketing and enrollment sanctions on Zing, which prevent Zing from enrolling new beneficiaries in its MA-PD plans for the remainder of 2024.

103. The flawed Star Ratings, accompanying contract termination and marketing and enrollment sanctions have also undermined Zing's competitive position, reputation, and goodwill.

104. Additionally, as a result of CMS's flawed rating methodology, beneficiaries will lose their health coverage and be unable to access equivalent care.

105. Zing has tried to resolve the parties' dispute informally to no avail. Exs. 1-2.

106. Left with no other option, Zing turns to this Court to require Defendants to comply with federal law, vacate the flawed Star Ratings assigned to Zing, and enjoin them from relying on that unlawful rating in connection with Zing's eligibility as a Medicare Advantage organization.

COUNT I
(Violation Of 5 U.S.C. § 706(2)(A) – Against All Defendants)
(Use Of Simulated And Rerun Cut Point Data)

107. Zing realleges the allegations set forth in Paragraphs 1 through 106 of this Complaint as if fully set forth herein.

108. CMS's decision – as approved and directed by Defendants – to use simulated and rerun 2023 cut point data to calculate Zing's 2024 Star Ratings is a final agency action made reviewable by 5 U.S.C. § 706(2) and 42 C.F.R. § 422.260(c)(3).

109. Zing is adversely affected and aggrieved by Defendants' action.

110. Defendants' decision to use simulated and rerun cut point data for 2023 is arbitrary and capricious and contrary to law.

111. Defendants failed to engage in reasoned decision-making; to reasonably (or at all) explain their departure from CMS's own regulation; or to provide an adequate and reasonable explanation for their decision.

112. Defendants' action flies in the face of the plain and unambiguous text of their own regulation and undermines the policy and purpose of that regulation to reduce Star Ratings swings that harm MA Plans and beneficiaries.

113. Defendants acted unreasonably and contrary to law by deploying a methodology that is inconsistent with the approach mandated by their regulation, and was never disclosed to regulated parties – let alone adopted pursuant to any proper rulemaking proceedings.

114. As a result, Defendants' decision is arbitrary, capricious, and otherwise not in accordance with the law in violation of 5 U.S.C. § 706(2)(A).

115. Zing has suffered and will continue to suffer irreparable harm as a result of Defendants' violations of 5 U.S.C. § 706(2)(A).

116. Zing is entitled to injunctive and declaratory relief to remedy Defendants' unlawful conduct, as well as all other relief as set forth in its Prayer for Relief. *See* 5 U.S.C. § 705.

COUNT II
Declaratory Judgment

117. Zing realleges and incorporates Paragraphs 1 through 106 as if fully set forth herein.

118. CMS's calculation of the 2024 Star Ratings is a final agency action made reviewable by 5 U.S.C. § 706(2).

119. Zing is adversely affected and aggrieved by the calculation of its Star Ratings.

120. An actual controversy has arisen and exists between Zing and Defendants regarding Defendants' calculation of Zing's 2024 Star Ratings using simulated and rerun 2023 data.

121. Zing requests a declaration from this Court under 28 U.S.C. § 2201 that Defendants' calculation is arbitrary and capricious.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Zing prays that this Court vacate Zing's 2024 Star Ratings and remand this matter to the agency for further consideration. Additionally, Zing requests the Court to:

1. Adopt an expedited schedule to resolve the merits of this Complaint;

2. Declare that:

   - Defendants' rerunning of the 2023 cut points to calculate Zing's 2024 Star Ratings directly conflicts with CMS's regulatory requirements and is arbitrary and capricious in violation of 5 U.S.C. § 706(2)(A);

   - Defendants must recalculate Zing's 2024 Star Ratings in compliance with CMS's final rule, specifically considering actual performance data.

3. An injunction:

   - Preventing Defendants from using Zing's 2024 Star Ratings in connection with any termination and intermediate sanction decisions.

4. Award Zing its reasonable attorney's fees and costs, as permitted by law; and

5. Grant such other further relief as this Court deems just and proper.

Dated: March 25, 2024

By: _____

Paul Werner (D.C. Bar #482637)
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
2099 Pennsylvania Ave N.W., Suite 1000
Washington, D.C. 20006
Tel. 202-747-1900
pwerner@sheppardmullin.com

Counsel for Zing Health, Inc.

CIVIL COVER SHEET

JS-44 (Rev. 11/2020 DC)

I. (a) PLAINTIFFS
Zing Health, Inc.

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF 88888
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS
U.S. Dep't of Health & Human Servs., Centers for Medicare and Medicaid Servs., XAVIER BECERRA, in his official capacity as Secretary of Health & Human Servs., and CHIQUITA BROOKS-LASURE, in her official capacity as Administrator of Ctrs. for Medicare and Medicaid Servs.

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)
Paul Werner
SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP
2099 Pennsylvania Avenue NW, Suite 100
Washington, D.C. 20006 (202) 747-1900

ATTORNEYS (IF KNOWN)

II. BASIS OF JURISDICTION
(PLACE AN x IN ONE BOX ONLY)

- ○ 1 U.S. Government Plaintiff
- ◉ 3 Federal Question (U.S. Government Not a Party)
- ○ 2 U.S. Government Defendant
- ○ 4 Diversity (Indicate Citizenship of Parties in item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) **FOR DIVERSITY CASES ONLY!**

	PTF	DFT		PTF	DFT
Citizen of this State	○ 1	○ 1	Incorporated or Principal Place of Business in This State	○ 4	○ 4
Citizen of Another State	○ 2	○ 2	Incorporated and Principal Place of Business in Another State	○ 5	○ 5
Citizen or Subject of a Foreign Country	○ 3	○ 3	Foreign Nation	○ 6	○ 6

IV. CASE ASSIGNMENT AND NATURE OF SUIT

(Place an X in one category, A-N, that best represents your Cause of Action and one in a corresponding Nature of Suit)

○ **A. *Antitrust***
- ☐ 410 Antitrust

○ **B. *Personal Injury/ Malpractice***
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Medical Malpractice
- ☐ 365 Product Liability
- ☐ 367 Health Care/Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Product Liability

◉ **C. *Administrative Agency Review***
- ☒ 151 Medicare Act

Social Security
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

Other Statutes
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 890 Other Statutory Actions (If Administrative Agency is Involved)

○ **D. *Temporary Restraining Order/Preliminary Injunction***

Any nature of suit from any category may be selected for this category of case assignment.

(If Antitrust, then A governs)

○ **E. *General Civil (Other)*** OR ○ **F. *Pro Se General Civil***

Real Property
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent, Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

Personal Property
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

Bankruptcy
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

Prisoner Petitions
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Conditions
- ☐ 560 Civil Detainee – Conditions of Confinement

Property Rights
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 835 Patent – Abbreviated New Drug Application
- ☐ 840 Trademark
- ☐ 880 Defend Trade Secrets Act of 2016 (DTSA)

Federal Tax Suits
- ☐ 870 Taxes (US plaintiff or defendant)
- ☐ 871 IRS-Third Party 26 USC 7609

Forfeiture/Penalty
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

Other Statutes
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 430 Banks & Banking
- ☐ 450 Commerce/ICC Rates/etc
- ☐ 460 Deportation
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions
- ☐ 470 Racketeer Influenced & Corrupt Organization
- ☐ 480 Consumer Credit
- ☐ 485 Telephone Consumer Protection Act (TCPA)
- ☐ 490 Cable/Satellite TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes
- ☐ 890 Other Statutory Actions (if not administrative agency review or Privacy Act)

○ **G. *Habeas Corpus/ 2255*** ☐ 530 Habeas Corpus – General ☐ 510 Motion/Vacate Sentence ☐ 463 Habeas Corpus – Alien Detainee	○ **H. *Employment Discrimination*** ☐ 442 Civil Rights – Employment (criteria: race, gender/sex, national origin, discrimination, disability, age, religion, retaliation) *(If pro se, select this deck)*	○ **I. *FOIA/Privacy Act*** ☐ 895 Freedom of Information Act ☐ 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	○ **J. *Student Loan*** ☐ 152 Recovery of Defaulted Student Loan (excluding veterans)
○ **K. *Labor/ERISA (non-employment)*** ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Mgmt. Relations ☐ 740 Labor Railway Act ☐ 751 Family and Medical Leave Act ☐ 790 Other Labor Litigation ☐ 791 Empl. Ret. Inc. Security Act	○ **L. *Other Civil Rights (non-employment)*** ☐ 441 Voting (if not Voting Rights Act) ☐ 443 Housing/Accommodations ☐ 440 Other Civil Rights ☐ 445 Americans w/Disabilities – Employment ☐ 446 Americans w/Disabilities – Other ☐ 448 Education	○ **M. *Contract*** ☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholder's Suits ☐ 190 Other Contracts ☐ 195 Contract Product Liability ☐ 196 Franchise	○ **N. *Three-Judge Court*** ☐ 441 Civil Rights – Voting (if Voting Rights Act)

V. ORIGIN

◉ 1 Original Proceeding ○ 2 Removed from State Court ○ 3 Remanded from Appellate Court ○ 4 Reinstated or Reopened ○ 5 Transferred from another district (specify) ○ 6 Multi-district Litigation ○ 7 Appeal to District Judge from Mag. Judge ○ 8 Multi-district Litigation – Direct File

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)

Admin Procedures Act (5 USC 706 et seq); Arbitrary & capricious agency action by CMS for Star Ratings calculation

VII. REQUESTED IN COMPLAINT ☐ CHECK IF THIS IS A **CLASS ACTION** UNDER F.R.C.P. 23 **DEMAND $** **JURY DEMAND:** Check YES only if demanded in complaint YES ☐ NO ☒

VIII. RELATED CASE(S) IF ANY (See instruction) YES ☐ NO ☒ If yes, please complete related case form

DATE: 03/25/2024 **SIGNATURE OF ATTORNEY OF RECORD** /s/ Paul Werner

INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and services of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the cover sheet.

I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff if resident of Washington, DC, 88888 if plaintiff is resident of United States but not Washington, DC, and 99999 if plaintiff is outside the United States.

III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.

IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of the case.

VI. CAUSE OF ACTION: Cite the U.S. Civil Statute under which you are filing and write a brief statement of the primary cause.

VIII. RELATED CASE(S), IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

Exhibit 1

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, Maryland 21244-1850

CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR MEDICARE

MEDICARE PARTS C & D OVERSIGHT AND ENFORCEMENT GROUP

January 26, 2024

Mr. Andrew Clifton
Chief Executive Officer
Zing Health, Inc.
225 West Washington Street, Suite 450
Chicago, IL 60606

Re: CMS Response to Zing Health, Inc.'s January 5, 2024 "Rebuttal to Intermediate Sanctions Contract H7330"

Dear Mr. Clifton:

Thank you for submitting your rebuttal on behalf of Zing Health, Inc. (Zing Health) dated January 5, 2024, in response to CMS's intermediate sanctions notice. We reviewed the additional information provided in your response but do not agree that it impacts the basis for the intermediate sanctions imposed by CMS on December 27, 2023. Your response did not present new information or evidence demonstrating that Zing Health was in compliance with Part D Star Ratings requirements.

In its rebuttal, Zing Health correctly states that these sanctions are discretionary. CMS exercises its discretion to issue sanctions to protect beneficiaries from enrolling in poor-performing plans. CMS established the Star Ratings system to provide both comparative information on plan quality and a means to evaluate compliance with regulatory and contract requirements. *See* 42 C.F.R. § 423.180(b). The basis for CMS's sanctions is that CMS determined that Zing Health failed to achieve a Part D summary Star Rating of at least three stars in three consecutive Star Rating periods. *See* 42 C.F.R. §§ 423.509(a)(4)(x) and 423.752(b). These ratings indicate poor performance by Zing Health through its inability to achieve at least an "average" star rating over an extended period. Therefore, CMS imposed sanctions to ensure beneficiaries can choose from plans that demonstrate the ability to offer a minimum level of quality to their enrollees.

Additionally, your rebuttal argues that imposing intermediate sanctions is arbitrary and capricious. Specifically, Zing Health argues that CMS's imposition of marketing and enrollment sanctions on H7330 constitutes inconsistent application of CMS's discretionary authority because when CMS issued a termination notice to Imperial Health Plan of California (H2793) due to that plan's low Part D Star Ratings, CMS did not impose these sanctions. However, the decision to impose intermediate sanctions in Zing Health's case was made pursuant to regulatory authority, and CMS has appropriately exercised its discretion based on the specific facts and circumstances and available information in each case. A different outcome in a previous case does not render CMS's decision arbitrary and capricious. Indeed, in *Kort v. Burwell*, 209 F.Supp.3d 98, 112 (D.D.C.

2016), cited in Zing Health's rebuttal, the court aptly noted that "the actions of [r]egulatory agencies do not establish rules of conduct to last forever, and an administrative agency is not disqualified from changing its mind." (citing *Am. Trucking Ass'ns, Inc. v. Atchison, T. & S.F.R. Co.*, 387 U.S. 397, 416 (1967); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993); internal quotations omitted). Moreover, CMS has consistently imposed intermediate sanctions on all other similarly situated contracts eligible for termination at the end of December 2024. As such, its decision was not arbitrary and capricious.

Zing Health also asserts that per the organization's current modeling, H7330 is on track to obtain a three-Star Part D rating for 2025. While we appreciate Zing Health's willingness to improve its rating, at this time, it is premature for any plan or CMS to predict 2025 Star Ratings, and also does not excuse the three previous years of low Star Ratings.

Furthermore, Zing Health states that it believes that its failure to achieve a 2024 Part D rating of three-Stars is, in part, due to CMS's premature application of the Tukey outlier deletion methodology and its use of recalculated cut points instead of actual plan performance data from 2023 to calculate 2024 cut points, in accordance with the established guardrails for Star Ratings. However, CMS does not agree with Zing Health's statements. CMS stated in the CY 2021 proposed rule (85 FR 9044) and final rule (CMS–4190–F) (85 FR 33833, 33835), for the first year that Tukey outlier deletion is implemented (2024 Star Ratings), we will rerun the prior year's thresholds using mean resampling and Tukey outlier deletion so that guardrails will be applied consistently between years. Thus, to calculate the guardrails for the 2024 Star Ratings, the 2023 Star Ratings cut points were rerun with mean resampling, Tukey outlier deletion, and no guardrails. These *rerun* 2023 Star Ratings cut points, not the 2023 cut points previously published in the Medicare 2023 Part C & D Star Ratings Technical Notes, serve as the basis for the guardrails for the 2024 Star Ratings, per the CY 2021 final rule.

Your rebuttal also contends that sanctioning H7330 will only harm the vulnerable, underserved, and high-needs populations of beneficiaries that Zing Health seeks to serve. CMS is aware that Zing Health has many members from vulnerable populations. CMS confirmed that there are other plan options with higher Part D Star Ratings available to serve the beneficiaries in H7330's service area.

Lastly, CMS's decision to terminate and impose intermediate sanctions on Zing Health for its low Part D Star Ratings is separate from CMS's communications with Zing Health about the organization's proposed contract novation and consolidation.

As always, if your team has any questions regarding the sanctions, please reach out to your Enforcement Lead who will be available to assist you.

Sincerely,

/s/

John A. Scott
Director
Medicare Parts C and D Oversight and Enforcement Group

cc: Kevin Stansbury, CMS/MOEG/DCE
Vanessa Duran, CMS/MDBG
Mark Newsom, CMS/MDBG
Linda Anders, CMS/MDBG
Michael Neuman, CMS/MDBG
Arianne Spaccarelli, CMS/MDBG
Elizabeth Goldstein, CMS/ MDBG
Kathryn Coleman, CMS/MCAG
Julie Uebersax, CMS/MCAG
Megan Mason, CMS/OPOLE
Raymond Swisher, CMS/OPOLE
Adams Solola, CMS/OPOLE
Avalon Gordon, CMS/OPOLE

Exhibit 2

SheppardMullin

Sheppard, Mullin, Richter & Hampton LLP
2099 Pennsylvania Avenue, NW, Suite 100
Washington, D.C. 20006-6801
202.747.1900 main
202.747.1901 fax
www.sheppardmullin.com

202.747.1848 direct
cclements@sheppardmullin.com

January 5, 2024

File Number: 77HD-344521

VIA E-MAIL AND U.S. MAIL

Kevin Stansbury
Director, Division of Compliance Enforcement
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244
Mail Stop: C1-22-06
E-Mail: kevin.stansbury@cms.hhs.gov

Re: Zing Health, Inc. Rebuttal to Intermediate Sanctions
Contract H7330

Dear Mr. Stansbury:

Pursuant to 42 C.F.R. § 422.756(a)(2), Zing Health, Inc. ("Zing") hereby submits this Rebuttal to the determination of the Centers for Medicare and Medicaid Services ("CMS") to impose intermediate sanctions on Zing's Medicare Advantage-Prescription Drug ("MA-PD") contract H7330. Sanctions are not warranted here where Zing has taken full accountability for its past performance, has been in close communication with CMS regarding its ongoing efforts to improve its performance, and has made significant investments in improving its performance on Part D star rating measures with positive results. Most importantly, imposing sanctions and terminating Zing will only harm the already underserved Medicare beneficiaries in the communities that Zing serves. Further, Zing hopes to novate H7330 and consolidate it with its higher-rated affiliate Zing Health of Michigan (H4624), which will alleviate the administrative and financial burden of operating two overlapping Medicare Advantage organizations and allow Zing to devote more resources to improving quality across the board. Finally, imposing intermediate sanctions is arbitrary and capricious because it constitutes inconsistent application of CMS's discretionary authority. For these reasons and as further detailed below, Zing respectfully requests that CMS reconsider its imposition of intermediate sanctions and withdraw them before they go into effect on January 12, 2024.

H7330 Will Achieve at least 3-Star Part D Rating in 2025

Zing takes full responsibility for its past performance and understands the importance of meeting the quality benchmarks CMS sets to protect Medicare beneficiaries. Since starting out in 2020, Zing has worked to improve its performance, and each year Zing's Part D rating has gone up accordingly. In 2022, CMS rated H7330 Part D at 2.483; in 2023, this rating improved to 2.594; and in 2024, H7330's Part D rating is 2.625. Zing achieved these gains through deliberate changes to its operations—including making changes in its leadership and migrating to a new pharmacy benefit manager—and seeking guidance from industry experts and consultants.

SheppardMullin

In fact, current modeling, which Zing shared with CMS during a meeting on December 15, 2023, conservatively predicts that H7330 is on track to obtain a 3-Star Part D rating for 2025. Zing's efforts to strategically engage members, physicians, and pharmacies is delivering improved Medication Adherence results. Provider partnership, data management, and information exchange have vastly improved HEDIS execution, and more than 50 percent of all HEDIS measures already exceed 2024 results. Further, Zing's targeted member engagement, care management, and coordinated care initiatives have improved raw scores and are expected to yield 4+ Stars across quality improvement measures.

Not only is Zing actively improving its performance on Part D measures, but Zing has also been transparent with CMS regarding its efforts and predictions for the future. Zing has met with CMS several times, including most recently on December 15, 2023, to assure CMS of its commitment and efforts to improve its Star Ratings. Notably, Zing also provided evidence of the positive results it is achieving. Zing is diligently working to improve its performance, and imposing intermediate sanctions only makes it more difficult for Zing to be successful.

While Zing acknowledges its responsibility for achieving a minimum 3-Star rating on Part C and Part D measures, Zing believes that its failure to achieve a 2024 Part D rating of 3-Stars is in part due to CMS's premature application of the Tukey outlier deletion methodology and use of recalculated cut points instead of actual plan performance data from 2023 to calculate 2024 cut points in accordance with the established guardrails for Star Ratings.

Sanctions Against Zing Harm the Beneficiaries CMS and Zing Serve

CMS states that its goals are to "further advance health equity, expand coverage, and improve health outcomes for the more than 170 million individuals supported by CMS programs . . . by identifying and working to eliminate barriers to CMS-supported benefits, services, and coverage."[1] Suspending marketing and enrollment for H7330 will adversely impact a vulnerable, high-needs population of beneficiaries by making access to benefits and care even more challenging.

Zing Health was founded in 2019 by two African American physician entrepreneurs, a seasoned healthcare executive, and Health2047 (the American Medical Association innovation subsidiary), to address inadequacies in the healthcare system by creating collaborative, community-based MA plans. Appellant's mission is to focus on Social Determinants of Health to reach and reduce healthcare disparities among those underserved populations who suffer from chronic conditions.

Zing offers two of only seven available MA-PD HMO plans with Cook County Hospital System that specifically target low-income beneficiaries through $0 premiums and deductible, low maximum out of pocket costs, and Part D gap coverage. These two plans are ranked #1 and #3 in total value-added benefits. The plans include benefits like monthly allowances toward healthy food and utilities, in-home support services, and transportation to dialysis centers. These plans

[1] *CMS Framework for Health Equity*, CMS.gov, https://www.cms.gov/priorities/health-equity/minority-health/equity-programs/framework (last visited Jan. 2, 2024).

make accessible to some of the neediest Medicare beneficiaries services that meaningfully improve their health and lives.

Thus, sanctioning and terminating H7330 is inconsistent with CMS's strategic focus on health equity. Therefore, Zing respectfully requests that the sanctions be withdrawn so it may continue to be available to serve the beneficiaries it was founded to reach.

Zing Plans to Novate H7330 to Combine with a Higher Rated Plan

Being new to the MA-PD program, as well as serving a historically underserved population of beneficiaries, have made it challenging for Zing to achieve a 3-star Part D rating to date. As detailed above, Zing is confident that H7330 will reach 3-stars by 2025, but regardless, it also hopes to novate H7330 to combine with the higher-rated contract held by Zing Health of Michigan - H4624.[2] H4624 overlaps the geographic footprint of H7330 except for three Chicago collar counties, and Zing intends to expand H4624 to include those counties in 2025.

Because of its coverage area and beneficiary population, H4624 does not face the same challenges as H7330, like high Unable to Reach rates. Combining the plans will eliminate the administrative and financial burdens of managing two separate plans, and will allow Zing to reallocate resources to continued quality improvement of H4624. Perhaps most importantly, novating H7330 to and consolidating that contract with H4624 will allow Zing to continue serving the vulnerable populations currently serviced by H7330.

Since Zing intends to novate H7330 to Zing Health of Michigan and consolidate that contract with H4624, CMS's imposition of enrollment sanctions on H7330 will eliminate a critically needed MA plan option for 2024 that is specifically tailored to meet the unique health and health-related needs of high risk/low income beneficiaries.

Importantly, if CMS proceeds with the planned termination of H7330, the novation and contract consolidation will ensure that members enrolled in H7330 will be able to continue in a plan for 2025 that is in the same parent organization as the plan they originally chose when they enrolled in Zing. This fact differentiates H7330 from other contracts that CMS has terminated due to low Star Ratings, and further underscores why the imposition of marketing and enrollment sanctions on H7330 is not warranted.

Applying Sanctions to H7330 Is Arbitrary and Capricious

CMS has discretion to impose intermediate sanctions—or not—in response to violations of the Medicare regulations.[3] However, CMS's discretionary authority is not limitless, and to be

[2] H4624 was rated 3.637 in 2023 and 2.868 in 2024.
[3] 42 C.F.R. § 422.752(a).

SheppardMullin

reasonable, CMS must apply its discretion consistently across contractors.[4] In other words, CMS cannot treat two contractors disparately where their violations are identical or substantially similar.

On February 22, 2023, CMS terminated Imperial Health Plan of California Plan H2793.[5] In the termination letter, CMS cited Imperial's below 3-star Part D rating for three consecutive years as the sole reason for termination. Specifically, contract H2793 received Part D Summary Star Ratings of 2.5, 2.5, and 2, for years 2023, 2022, and 2021 respectively. Yet CMS did not impose any intermediate sanctions on Imperial. Like Imperial, CMS cited Zing's three consecutive years below a 3-star Part D rating as the sole reason for its termination. However, despite identical bases for termination, CMS imposed marketing and enrollment sanctions on Zing and none on Imperial. Indeed, Imperial's star ratings were lower than Zing's, and yet Zing suffered more severe repercussions. There is no basis for CMS's disparate treatment of Zing and Imperial, and thus imposing intermediate sanctions on Zing is arbitrary and capricious.

CONCLUSION

For the reasons stated above, Zing objects to CMS's imposition of intermediate sanctions and respectfully requests that they be withdrawn before they become effective on January 12, 2024. Zing intends to appeal the intermediate sanctions and termination and seek hearings on both issues.

Sincerely,

DocuSigned by:
Christine Clements
72437D5B8CB8407...

Christine M. Clements
for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

SMRH:4888-9446-3898.4

cc: Andrew Clifton

[4] See *Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) ("Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld."); *see also Kort v. Burwell*, 209 F.Supp.3d 98, 112 (D.D.C. 2016) (finding that CMS's decision to allow Medicare coverage of one diagnostic test but not another similar test was arbitrary and capricious).

[5] *See* Termination Notice for Medicare Advantage-Prescription Drug Contract Number: H2793, *available at* https://www.cms.gov/files/document/imperialtermination02222023.pdf (last visited Jan. 1, 2024).