UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ZING HEALTH, INC.,

Plaintiffs,

v.

XAVIER BECERRA,
Secretary of Health and Human Services, et al.,

Defendants.

Civil Action No. 24-0855 (RBW)

MOTION TO DISMISS AMENDED COMPLAINT AND
MEMORANDUM IN SUPPORT THEREOF

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Defendants, the Department of Health and Human Services, its Secretary, the Centers for Medicare & Medicaid Services ("CMS"), and its Administrator, respectfully move to dismiss the Amended Complaint in full for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure ("Rule") 12(b)(1).

Plaintiff Zing Health, Inc. ("Zing") initially filed this action to seek a declaration "that: [1] 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); [and] [2] Defendants must recalculate Zing's 2024 Star Ratings in compliance with CMS's final rule, specifically considering actual performance date," as well as an injunction "[p]reventing Defendants from using Zing's 2024 Star Ratings in connection with any termination and intermediate sanctions decision." Compl. (ECF No. 1) at Prayer for Relief. After two Judges in this District rejected CMS's calculation of the 2024 Star Ratings based on the same arguments Zing raised here, *see, e.g.*, *Elevance Health, Inc. v. Becerra*, Civ. A. No. 23-3902 (RDM), 2024 WL 2880415 (D.D.C. June 7, 2024); *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), CMS elected not to appeal and instead recalculated the 2024 Star Ratings for all negatively affected Medicare Advantage organizations, consistent with *Elevance* and *SCAN*. *See* Am. Compl. Ex. 3, CMS Mem. of June 13, 2024 (ECF No. 18 at 44).[1] In recognition that CMS's voluntary action afforded aggrieved Medicare Advantage organizations all relief, another plaintiff that had challenged the 2024 Star Ratings' calculations voluntarily dismissed its action shortly after CMS's deadline to

[1] The exhibits to the Amended Complaint are included in a single PDF with the Amended Complaint itself. Defendants use the CM/ECF-assigned pagination.

appeal *Elevance* and *SCAN* passed. Notice of Voluntary Dismissal, *Clover Ins. Co. v. Becerra*, Civ. A. No. 24-1385 (BAH) (D.D.C. Aug. 12, 2024), ECF No. 17.

Zing, however, was not satisfied with the relief afforded and elected to chart a different course. Rather than recognizing that its 2024 Star Ratings had been recalculated, that its termination and intermediate sanctions had been rescinded, and that it was afforded the relief it sought, Zing instead amended its complaint, not to dismiss its claims, but to continue to seek the same declaratory and injunctive relief and also to demand additional relief, while adding two more plaintiffs that were not parties to the initial Complaint, Zing Health of Michigan, Inc. ("Zing Michigan"), and Zing Health Consolidator, Inc. *See* Am. Compl (ECF No. 18) at Prayer for Relief.

The Amended Complaint should be dismissed for lack of subject-matter jurisdiction. The entire case (raising two counts under the Administrative Procedure Act ("APA") and one count under the Declaratory Judgment Act) fails for lack of subject-matter jurisdiction. This case involves Plaintiffs' challenges to two rescinded agency actions—termination of Zing's Medicare Part D contract based on its poor performance, which was scheduled to take effect on December 31, 2024, and the imposition of intermediate sanctions. Indeed, CMS rescinded the actions before Zing even filed its Amended Complaint because CMS decided to recalculate Zing's Star Ratings consistent with *Elevance* and *SCAN*. Under the recalculated 2024 Star Ratings, Zing no longer met the criteria for termination or intermediate sanctions. Zing received personal notice of the rescission, and CMS also publicly posted on its website Zing's updated 2024 Star Ratings and notice of the recission.

Thus, as explained below, Plaintiffs lack Article III standing to pursue their claims; Plaintiffs' remaining claims are barred by sovereign immunity; Plaintiffs seek impermissible

damages precluded by the APA; and Plaintiffs are not entitled to a declaratory judgment because they have already received complete relief. For all these reasons, this case should be dismissed.

STATUTORY AND REGULATORY FRAMEWORK

I. The Medicare Program and Part D.

The Medicare provisions of the Social Security Act (known as "the Medicare Act") established a national program of healthcare coverage for the aged and disabled. 42 U.S.C. §§ 1395–1395kkk. The Medicare program is administered by the Secretary of Health and Human Services, 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, *et seq.*, 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, and the statute permits these plans to offer additional supplemental benefits, such as dental, vision, and hearing. *Id.* §§ 1395w-21 to 1395w-29; *id.* §§ 1395w-101 to 1395w-154. Part D offers subsidized prescription drug insurance coverage (also known as prescription drug plans).

Medicare beneficiaries have two main options for obtaining Part D benefits. For beneficiaries not enrolled in Medicare Advantage, private insurance companies offer stand-alone Part D plans. 42 C.F.R. §§ 422.2, 423.4. Such private insurers are known as prescription drug

plan sponsors. *Id.* For beneficiaries enrolled in Medicare Advantage 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. *Id*. Such private insurers are known as Medicare Advantage organizations. *Id*.

Collectively, the terms used to refer to prescription drug plan sponsors that offer stand-alone plans and Medicare Advantage organizations that offer Medicare Advantage Prescription Drug plans are "Part D plan sponsors" and "Part D sponsors." *Id.* § 423.4. These terms are interchangeable. Zing is a Medicare Advantage organization that offers Medicare Advantage Prescription Drug plans (and therefore is also a Part D plan sponsor or Part D sponsor). Zing's contract at issue, Contract H7330, *see* Am. Compl. (ECF No. 18) ¶ 117 n.9, involves one or more Medicare Advantage Prescription Drug plans offered by Zing. This case involves Zing's performance under its contract with CMS to provide Part D benefits to Medicare enrollees.

II. Part D Contract Requirements and Enforcement.

All Part D sponsors must comply with the requirements in 42 C.F.R. Part 423.[2] 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. These requirements include: maintaining administrative and management

[2] The regulations at 42 C.F.R. Part 422 establish standards and requirements under Part C for Medicare services furnished, or paid for, by Medicare Advantage organizations through Medicare Advantage plans. *See*, *e.g.*, 42 C.F.R. § 422.1(b). The regulations at 42 C.F.R. Part 423 establish standards and requirements under Part D for organizations participating in the Voluntary Medicare Prescription Drug Program. *See*, *e.g.*, *id.* § 423.1(b). Medicare Advantage organizations that offer Medicare Advantage Prescription Drug plans must comply with the requirements of Part 422 with respect to Part C services, and they must also "follow the requirements of part 423 . . . specifically related to the prescription drug benefit." *Id.* § 422.500(a). Because Zing's contract H7330 involves a Medicare Advantage Prescription Drug plan, the requirements of Part D apply, and this section discusses the regulations under Part 423.

arrangements satisfactory to CMS, including personnel and systems sufficient for administering the plan; performing utilization management; and conducting quality assurance activities consistent with Medicare requirements. 42 C.F.R. §§ 423.504(b)(4), 423.505(b)(25). A Part D sponsor must have enough staff and systems to "organize, implement, control, and evaluate . . . the furnishing of prescription drug services, the quality assurance, medication therapy management, and drug or utilization management programs, and the administrative and management aspects of the organization." *Id.* § 423.504(b)(4)(ii).

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. *Id.* § 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.

III. The Star Ratings System and CMS's Termination Authority.

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 Part D Plan Ratings are organized into four domains that correspond to the program requirements with which Part D plan sponsors must comply. 77 Fed. Reg. at 22,110. These domains are Drug Plan Customer Service, Member Complaints and Changes in the Drug Plan's Performance, Member Experience with the Drug Plan, and Drug Safety and Accuracy of Drug Pricing. 42 C.F.R. § 423.186(b)(1)(ii). Each domain is composed of various measures, and each individual measure receives its own Star Rating. *Id.* § 423.186(a). The ratings assigned to individual measures are aggregated, using a methodology established by regulation, to calculate overall and Part C and Part D summary ratings, with the same overall and summary ratings applied to all plans offered under the same contract. *Id.* §§ 422.166, 423.186. Summary ratings are assigned for Medicare Advantage Prescription Drug plans to reflect performance on, respectively, Part C (Medicare Advantage) and Part D measures. *Id.* §§ 422.166(c)–(d), 423.186(c)–(d). An overall rating is assigned to Medicare Advantage Prescription Drug plan contracts and reflects the weighted mean of the combined Part C and Part D measure-level ratings for the contract. *Id.* §§ 422.166(c), 423.186(c). 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.

From the outset, the Star Ratings system was designed to provide beneficiaries information on plan performance to consider when choosing a plan during enrollment and to assist CMS in identifying low-performing plans for compliance actions. *Proposed Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs for Contract Year 2012*, 75 Fed. Reg. 71,190, 71,219 (Nov. 22, 2010). In 2011, CMS issued guidance to Part D sponsors expressly stating that they "should interpret a less than 'average' (or three-star) summary rating on either their Part C or D performance to be a notice from CMS that they are to take corrective action to come into compliance with program requirements." CMS, *Announcement of Calendar Year 2012 Medicare Advantage Capitation Rates and Medicare Advantage and Part D Payment Policies and Final Call Letter*, at 119 (Apr. 4, 2011), https://www.cms.gov/Medicare/Health-Plans/MedicareAdvtgSpecRateStats/downloads/announcement2012.pdf. CMS further notified Part D sponsors that it "considers organizations that fail for three straight years to achieve at least a three-star summary rating on Part C or D to have ignored over a significant period of time their obligation to meet program requirements and to be substantially out of compliance with their Medicare contracts." *Id.* at 120.

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.

Since 2012, CMS has also utilized the Star Ratings system to incentivize higher performance among Medicare Advantage and Medicare Advantage Prescription Drug plans through "quality bonus payments." CMS provides additional funding to higher-scoring plans, through an increase in the benchmark against which Medicare Advantage organizations bid and in the portion of the savings between the bid and benchmark the Medicare Advantage organization is permitted to use as a rebate. 42 U.S.C. §§ 1395w-23(o)(1), (o)(3)(A)(i) (increasing the applicable percentage that calculates the benchmark for plans earning a rating of four stars or higher); *id.* § 1395w-24(b)(1)(C)(v) (increasing the "final applicable rebate percentage" according to rating). Quality bonus payments are not at issue for Zing because Zing undisputedly performed too poorly to receive such bonus payments under either calculation methodology.

FACTUAL AND PROCEDURAL BACKGROUND

I. Termination of Zing's Contract and Initial Appeals.

Zing is a Medicare Advantage organization that, since January 1, 2020, has operated a Medicare Advantage Prescription Drug Plan under contract H7330. Am. Compl. Ex. 2, Ltr. of

Jan. 5, 2024 (ECF No. 18 at 39–40); Notice of Termination & Intermediate Sanctions at 2, enclosed herewith as Ex. 1 ("Mot. Ex. 1"). 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." Notice of Termination & Intermediate Sanctions at 1, Mot. Ex. 1. Specifically, Zing's contract H7330 received Part D summary Star Ratings of 2.5, 2.5, and 2.5 for contract years 2022, 2023, and 2024, respectively. *Id.* at 3. 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 1, 3. 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 3–4.

On January 9, 2024, Zing requested a hearing before the CMS hearing officer to challenge the termination of contract H7330 and the imposition of intermediate sanctions, raising several legal and equitable arguments as to why CMS should withdraw the sanctions. *See* Intermediate Sanctions & Termination Dockets, Mot. Ex. 2. Two months later, on March 25, 2024, Zing filed the instant action 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. (ECF No. 1) ¶¶ 10–11. Zing's federal court challenge to the 2024 Star Ratings methodology set forth arguments raised earlier by two other Medicare Advantage organizations, in *SCAN* and *Elevance*. 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* Compl. (ECF No. 1) at Prayer for Relief. The underlying argument regarding CMS's methodology for calculating the 2024 Star Ratings was the same. A few weeks after filing its initial Complaint in this Court, on May 7, 2024, Zing withdrew its administrative hearing request, and its administrative appeal was promptly dismissed. *See, e.g.*, Zing's Withdrawal Ltr., Mot. Ex. 3; Intermediate Sanctions & Termination Dockets (entries on May 8, 2024), Mot. Ex. 2. Zing proceeded to contest its contract termination and sanctions solely through this action.

II. Star Ratings Litigation and Resolution.

On June 3, 2024, and June 7, 2024, respectively, courts in this District issued decisions in *SCAN* and *Elevance*. Both cases proceeded on an expedited schedule. 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 Tukey outliers removed.[3] *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 Tukey 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 at 1, *SCAN*, *supra*, ECF No. 34. Shortly thereafter, another court in this District issued a decision in

[3] Because the dispositive issues in this motion concern this Court's jurisdiction rather than the highly technical aspects of CMS's methodology for calculating the 2024 Star Ratings, Defendants merely summarize here the holding in parallel cases. The parties do not dispute that the Star Ratings methodology Zing has challenged in the instant action is the same as the methodology at issue in *SCAN* and *Elevance*. *See* Am. Compl. ¶¶ 135–36. For a fuller discussion of Tukey outliers, Defendants respectfully refer the Court to *Elevance*, 2024 WL 2880415, at *5–6.

Elevance 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. Am. Compl. Ex. 3, CMS Mem. of June 13, 2024 (ECF No. 18 at 44). On June 13, 2024, CMS issued a notice to all Medicare Advantage organization compliance officers 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.* The memorandum further explained that CMS had "assigned all contracts the recalculated 2024 overall and/or summary Star Ratings if those recalculated ratings result in higher [Quality Bonus Payment] Ratings than what was previously assigned based on the contract's overall and/or summary 2024 Star Ratings that were released in October 2023." *Id.* The memorandum provided instructions on how to access the updated information about quality bonus payment ratings and stated that CMS would "update the 2024 Star Ratings information for all contracts on Medicare Plan Finder in the coming weeks." *Id.* Because several plans would receive higher quality bonus payments after the recalculation, CMS provided them the opportunity to resubmit their Contract Year 2025 bids. *Id.* at 2. Plaintiffs attached the memorandum to their Amended Complaint as Exhibit 3. Notwithstanding that quality

bonus payments were not at issue for Zing, Plaintiffs complain that CMS's memorandum did not discuss the recission of Zing's contract termination and the intermediate sanctions. Am Compl. ¶¶ 138–42, 182–87. CMS separately addressed Zing's contract termination and the intermediate sanctions in a discrete notice sent to Zing on June 25, 2024. Notice of Retraction of Termination & Intermediate Sanctions at 1, Mot. Ex. 4.

After the June 13, 2024, memorandum, on July 1, 2024, CMS sent a notice to the industry stating that updated 2024 Star Ratings Data was available in the Health Plan Management System, a tool that allows two-way communication between CMS and Medicare Advantage Prescription Drug plan sponsors. *See* Am. Compl. Ex. 4, CMS Mem. of July 1, 2024 (ECF No. 18 at 47). On July 2, 2024, CMS posted the updated 2024 Star Ratings for all plans—including Zing's plans offered under contract H7330—on "Medicare Plan Finder," a website that displays public information about available plans, including the plan's star ratings, to help beneficiaries compare plans and choose their coverage. *See id.*; 42 C.F.R. § 422.166(h).

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. Notice of Retraction of Termination & Intermediate Sanctions at 1, Mot. Ex. 4. 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 reverse 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. The June 25, 2024, retraction notice was simultaneously posted on CMS's website. CMS, *Notice of Retraction of Termination and Intermediate Sanctions* (June 25, 2024), https://www.cms.gov/files/document/zingtermination-sanctionretraction06252024.pdf. As with the other plans, CMS also posted Zing's updated 2024 Star Rating on "Medicare Plan Finder." Am. Compl. Ex. 4, CMS Mem. of July 1, 2024 (ECF No. 18 at 47); Medicare Plan Finder Profiles, Mot. Ex. 5. Thus, prior to the filing of the Amended Complaint, there was already a "public statement" correcting Zing's 2024 Star Ratings.

To further clarify, in its Medicare Plan Finder profile, the overall and summary ratings for this Zing contract appear for both Zing plans that are under the contract at issue in this case. *See, e.g.*, Medicare Plan Finder Profiles at 13, Mot. Ex. 5 (Zing Select Care IL); *id.* at 23 (Zing Elite Select IL). Medicare Plan Finder displays the contract's updated 2024 Part D summary Star Rating under "[s]ummary rating of drug plan quality," which shows that Zing's contract achieved a Part D summary Star Rating of three stars, *id.* at 13, 23, not the 2.5 stars Zing initially received and that Zing complains of here. *See* Am. Compl. ¶ 113 ("Zing's 2024 Part D Star Ratings came in at 2.5 Stars – far lower than its expected 3 Star Rating."). Defendants note that Zing's Medicare Plan Finder profile continues to identify Zing's plan as having "received low ratings for three years" based on the requirements for Medicare Plan Finder Performance icons at 42 C.F.R. § 422.166(h). The regulation provides: "A contract receives a low performing icon as a result of its performance on the Part C or Part D summary ratings. . . . If the contract had any combination of Part C or Part D summary ratings of 2.5 or lower in all 3 years of data, it is marked with a low performing icon." 42 C.F.R. § 422.166(h)(1)(ii)(A). Zing received (and does not contest) summary ratings of 2.5 for Part D in 2022 and 2023, Am. Compl. ¶ 110, and a summary rating of two for Part C in 2024, *see generally* Am. Compl. (not contesting two-star rating received for

Part C). To be clear, Defendants have already issued public statements available for all to see that state: (1) that "[i]n 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," CMS, Notice of Retraction of Termination and Intermediate Sanctions (June 25, 2024), https://www.cms.gov/files/document/zingtermination-sanctionretraction06252024.pdf; (2) that "Zing Health no longer meets the threshold for a termination or intermediate sanction," *id.*; (3) that "CMS is retracting the termination and intermediate sanction for contract H7330," *id.*; and (4) that Zing's "[s]ummary rating of drug plan quality" is three stars, not 2.5, Medicare Plan Finder Profiles at 13, 23, Mot. Ex. 5.

III. Allegations in the Amended Complaint.

On July 11, 2024, Zing filed the Amended Complaint, adding other parties and seeking additional relief beyond setting aside CMS's methodology for calculating the 2024 Star Ratings and enjoining the plan termination and imposition of intermediate sanctions. Specifically, Zing added Zing Health Michigan, Inc., and its parent organization, Zing Health Consolidator, Inc., as plaintiffs. Am. Compl. ¶¶ 45, 47. Plaintiffs now allege that "CMS's flawed Star Ratings, contract termination, sanctions, and publications have seriously undermined and irreparably harmed Zing's competitive position, reputation, and goodwill with beneficiaries and other market participants." *Id.* ¶ 161. Plaintiffs also allege that CMS's June 13, 2024, notice provided relief only to plans that saw increases in their quality bonus payments—and "thereby afforded only limited relief to certain plans to address certain problems"—but did not "commit" to vacating past terminations or sanctions imposed on plans that were impacted by the Star Ratings recalculation. *Id.* ¶¶ 139–41. Plaintiffs seek to have this Court grant further remedies, by ordering CMS to: (1) issue a public statement of "its error" that would be posted on CMS's website and in local newspapers; (2) engage

in "specific outreach" to current and former enrollees in Zing's plan; and (3) 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.

As discussed below, each of the requests for relief in the Amended Complaint is either (1) moot in light of CMS's notice to Zing and the public of its retraction of Zing's termination and the imposed sanctions or (2) is prohibited by law. The APA does not allow for awards of damages, nor would it allow a plan that does not qualify as a "new plan," to be treated as a new plan.

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

The Amended Complaint leaves out crucial and dispositive details regarding CMS's granting of relief to Zing following the decisions in *SCAN* and *Elevance*. That relief renders moot Plaintiffs' APA claims regarding Zing's 2024 Star Ratings calculation and the now-rescinded termination and sanctions on its plan. Plaintiffs' additional claims for relief for alleged reputational harms and money damages are barred by the doctrines of standing and sovereign immunity (given that the APA does not allow claims for money damages), and, moreover, are not authorized by law. For the reasons discussed below, each of Plaintiffs' claims against Defendants fails for lack of subject matter jurisdiction.

I. Plaintiffs' APA Challenge to CMS's Methodology for Calculating Zing's 2024 Star Rating Is Moot (Count I).

Article III of the Constitution limits federal-court jurisdiction to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1; *accord Barringer v. Exec. Off. for U.S. Att'ys*, Civ. A. No. 22-1387 (RBW), 2023 WL 4027490, at *1 n.1 (D.D.C. June 15, 2023). "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Off. English v. Arizona*, 520 U.S. 43, 67 (1997) (quotation marks omitted). "Even where litigation poses a live controversy when filed, . . . [the C]ourt [must] refrain from deciding it if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Clarke v. United States*, 915 F.2d 699, 701 (D.C. Cir. 1990) (quotation marks omitted). For example, "[a] party may lack a legally cognizable interest in the outcome [of a case] when, among other things, the court can provide no effective remedy because a party has already obtained all the relief it has sought." *Indian River Cnty. v. Rogoff*, 254 F. Supp. 3d 15, 18 (D.D.C. 2017) (quotation marks omitted; quoting *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1204 (D.C. Cir. 2013)).

In the Amended Complaint, Plaintiffs allege that CMS's methodology using simulated 2023 cut points for calculating the 2024 Star Ratings is arbitrary and capricious. Am. Compl. ¶ 170. Prior to the filing of the Amended Complaint, CMS had already recalculated Zing's 2024 Star Ratings and reversed its termination of Zing's contract and sanctions. *See id.* ¶ 34. Following the decisions in *SCAN* and *Elevance*, CMS recalculated the scores for all Medicare Advantage plans affected by the challenged methodology, and CMS notified the industry that it had "recalculated the 2024 Star Ratings using the published 2023 Star Ratings cut points to determine the guardrails for the 2024 Star Ratings." Am. Compl. Ex. 4, CMS Mem. of July 1, 2024 (ECF No. 18 at 47); *see also* Am. Compl. Ex. 3, CMS Mem. of June 13, 2024 (ECF No. 18 at 44). Using the "published 2023 Star Rating cut points" rather than "simulated cut points" was the crux of the issue in *SCAN*, *Elevance*, and Count I of Plaintiffs' Amended Complaint. In addition, on June 25, 2024, CMS sent Zing a Notice of Retraction of Termination and Intermediate Sanctions, in which CMS explicitly stated, "[i]n 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." Notice of Retraction of Termination & Intermediate Sanctions at 1, Mot. Ex. 4. Moreover, by July 2, 2024, CMS posted the updated 2024 Star Ratings on Medicare Plan Finder. Am. Compl. Ex. 4, CMS Mem. of July 1, 2024 (ECF No. 18 at 47).

With respect to the challenged methodology and Zing's 2024 Star Ratings, Plaintiffs' action no longer presents a live controversy or an injury that can be redressed by a favorable decision. As such, Plaintiffs' claims under Count I and their requests for declaratory and injunctive relief are moot. It is a "well-settled principle of law [that] when an agency has rescinded and replaced a challenged [agency action], litigation over the legality of the original [action] becomes moot." *Akiachak Native Cmty. v. Dep't of Interior*, 827 F.3d 100, 113 (D.C. Cir. 2016); *accord*

Chang v. United States, Civ. A. No. 22-0352 (RBW), 2023 WL 8697831, at *13 (D.D.C. Dec. 15, 2023); *see also Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008) ("[B]ecause the [agency] already eliminated the [challenged p]olicy and plaintiffs never allege that the [agency] will reinstitute it, any injunction or order declaring it illegal would accomplish nothing—amounting to exactly the type of advisory opinion Article III prohibits."); *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 46 (D.C. Cir. 1992) (a "case is plainly moot" when an agency's "challenged orders" have been "superseded by a subsequent . . . order").

Notably, Plaintiffs do not object to CMS's recalculation of Zing's 2024 Star Rating and have acknowledged that CMS has taken "remedial action to correct the [ ] termination of Zing's [Medicare Advantage Prescription Drug] plan." Am. Compl. ¶ 34. Plaintiffs have not attempted to evoke any of the exceptions to the mootness doctrine, which would fail in any event. For instance, Plaintiffs cannot invoke the capable of repetition, yet evading review exception. *See Chang*, 2023 WL 8697831, at *13–14. The parties in both *SCAN* and *Elevance* jointly requested and received expedited review because all parties recognized that the final calculation of the 2024 Star Ratings must occur by June 2024, which is now long past, and, thereafter, cannot be recalculated. *See, e.g.*, Tr. of Summ. J. Hrg. at 46:4–47:10, *Elevance*, *supra*, ECF No. 29. This deadline is required by statute so that Medicare Advantage organizations can submit their bids for the following year by "the first Monday in June of each [ ] year." 42 U.S.C. § 1395w-24(a)(1)(A). For substantially similar reasons, Plaintiffs do not and cannot evoke the voluntary cessation exception. *See Chang*, 2023 WL 8697831, at *15–16 ("Again, because the Department has already terminated the [program in question] and the plaintiff has not alleged that the Department or the defendants '[are] likely to or even considering reinstituting' it, 'any injunction or order declaring it illegal would accomplish nothing—amounting to exactly the type of advisory opinion

Article III prohibits.' Given that the plaintiff offers no basis on which the Court can conclude that 'there is [a] reasonable expectation' that the [government's conduct] 'will recur,' and that this Court could provide a meaningful remedy to the plaintiff, the Court concludes that the 'voluntary cessation' exception also does not apply in this case.") (citations omitted; quoting *Larsen*, 525 F.3d at 4, and *Aref v. Lynch*, 833 F.3d 242, 251 (D.C. Cir. 2016)).

Accordingly, Count I of Plaintiffs' Amended Complaint is moot, and Plaintiffs' claims under the APA should be dismissed.

II. Plaintiffs Lack Standing to Challenge the Implementation of the CMS Memorandum, and Their Claim of Competitive Harm Is Moot (Count II).

In Count II of their Amended Complaint, Plaintiffs take issue with CMS's June 13, 2024, notice to Medicare Advantage plan sponsors (which they term the "CMS Memorandum") informing them of CMS's recalculation of the 2024 Star Ratings for 2025 quality bonus payment purposes. Am. Compl. Ex. 3, CMS Mem. of June 13, 2024 (ECF No. 18 at 44–45). Plaintiffs allege that through its memorandum, CMS provided "only limited redress for the harms caused" by its original calculations of 2024 Star Ratings "by only reevaluating quality bonus payment eligibility for certain plans." Am. Compl. ¶ 182. Plaintiffs assert that by not redressing the "harmful effects" of Zing's termination and sanctions through the CMS Memorandum issued to all Medicare Advantage organizations and prescription drug plan sponsors, CMS's action "is arbitrary and capricious and contrary to law." *Id.* ¶¶ 183, 185–88. Plaintiffs' claims regarding the memorandum are not correct, but in any event, they should be dismissed as moot. Plaintiffs allege that they suffered competitive harms because the memorandum excluded Zing from receiving "any redress or relief," Am. Compl. ¶ 184, but the challenged memorandum itself notified all Medicare Advantage organizations that: "we plan to update the 2024 Star Ratings information for all contracts on Medicare Plan Finder in the coming weeks." Am. Compl. Ex. 3, CMS Mem. of June

13, 2024 (ECF No. 18 at 45). Indeed, after the decisions in *SCAN* and *Elevance*, CMS provided relief to all Medicare Advantage plans affected by the challenged methodology for the 2024 Star Ratings. With respect to Zing, on June 25, 2024, CMS retracted the termination and intermediate sanction for Zing's contract, H7330. Notice of Retraction of Termination & Intermediate Sanctions at 1, Mot. Ex. 4. Plaintiffs' allegation that CMS provided "limited redress" and "failed to address . . . the termination and sanction decisions that harmed Plaintiffs" (Am. Compl. ¶¶ 182–83) is incorrect and is flatly contradicted by CMS's June 25, 2024, retraction notice to Zing. Notice of Retraction of Termination & Intermediate Sanctions at 1, Mot. Ex. 4. Plaintiffs' claim that the CMS Memorandum arbitrarily failed to provide Zing relief from the termination and sanction no longer presents a live controversy or an injury that can be redressed by a favorable decision.

Plaintiffs also lack standing to challenge the content of the memorandum. 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). "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly . . . allege facts demonstrating' each element." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (alteration in original; quoting *Warth*, 422 U.S. at 518). A party faces an "uphill battle" in establishing standing if it "is not [it]self the object of the government

action or inaction" being challenged. *Mackinac Ctr. for Pub. Pol'y v. Cardona*, 102 F.4th 343, 351 (6th Cir. 2024) (quoting *Lujan*, 504 U.S. at 562).

CMS's June 13, 2024, memorandum was issued in response to adverse rulings in litigation between CMS and higher-performing Medicare Advantage plans that were eligible for quality bonus payments. Plaintiffs correctly state that the notice did not address Zing's termination—and indeed, there was no reason for the memorandum to mention Zing specifically, since its contract was the only one where a contract termination would be affected by the recalculation of the Star Ratings and quality bonus payments were not an issue for Zing. CMS's silence in one particular document with respect to Zing's unique situation hardly means Zing thereby suffered an injury in fact because of the issuance of the memorandum, for at least two reasons.

First, Plaintiffs do not claim that the memorandum caused Zing to suffer "an invasion of a legally protected interest" that affected Zing "in a personal and individual way." *Spokeo*, 578 U.S. at 339. In fact, Plaintiffs do not allege that the memorandum injured Zing at all. Rather, Plaintiffs' grievance is that Zing was left out of the memorandum. But Zing offers no reason why CMS was required to discuss Zing in a memorandum issued to all Medicare Advantage organizations and Part D sponsors that was designed to explain CMS's course of action in response to court decisions where CMS's actions would affect all the organizations (as to recalculating the Star Ratings) or most of the organizations (updating quality bonus payment status). No organization or sponsor was specifically named in the memorandum other than in the citations to the recent court decisions that triggered CMS's actions. Nor does Zing identify any legal requirement under which CMS should have offered Zing relief specifically through the mechanism of the memorandum or should have informed all Medicare Advantage beneficiaries of the change directly.

Second, Plaintiffs do not explain how a decision by this Court to grant relief under the APA with respect to the memorandum would redress Zing's alleged injury. Zing's Star Rating has already been recalculated, and Zing, prior to filing the Amended Complaint, received separate notice that Zing's termination and sanctions had been rescinded, *see* Notice of Retraction of Termination & Intermediate Sanctions at 1, Mot. Ex. 4, so there is no longer any redressable injury for this court to address.

Because the allegations in the Amended Complaint do not demonstrate that Zing suffered a redressable injury in fact from the June 13, 2024, memorandum, Plaintiffs lack standing to challenge the action. Plaintiffs' claim regarding the CMS Memorandum should be dismissed.

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

Under Count III of their Amended Complaint, Plaintiffs seek a declaration from this Court, pursuant to 28 U.S.C. § 2201, that CMS's calculation of the 2024 Star Ratings, CMS's decision to terminate and impose sanctions upon Zing's contract, and CMS's implementation of the CMS Memorandum were "arbitrary and capricious." Am. Compl. ¶ 195. 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 III, 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 using actual 2023 cut points, 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.

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

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, and the termination of its contract that had not been scheduled to take effect until December 31, 2024 (and that is now rescinded). *See, e.g.*, Am. Compl. ¶ 161 ("CMS's flawed Star Ratings, contract termination, sanctions, and publications have seriously undermined and irreparably harmed Zing's competitive position, reputation, and goodwill with beneficiaries and other market participants."). In the Amended Complaint, the Zing 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 error and the correction of Zing's 2024 Star Ratings, to be posted both on the CMS website and in one or more newspapers of general circulation" in its impacted service area, and (2) to "[e]ngage in specific outreach" to current enrollees and recent former enrollees of Zing's plan. *See* Am. Compl. at Prayer for Relief.

As an initial matter, prior to Plaintiffs filing the Amended 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://www.cms.gov/files/document/zingtermination-sanctionretraction06252024.pdf; Medicare Plan Finder Profiles, Mot. Ex. 5. 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.[4] Zing's claims for relief are moot, 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," Am. Compl. ¶¶ 6, 143, 187, 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,

[4] *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-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.

misrepresentation, deceit, or interference with contract rights"). Here, too, Plaintiffs' claim of 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. 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. Am. Compl. at Prayer for Relief. Beneficiaries already have access to CMS's "public statements" retracting Zing's termination and sanctions, as well as Zing's re-calculated Star Ratings. 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, Zing alleges 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.

V. The Requested Relief for Zing Michigan Is Barred by the APA Because It Is a Substitute for Monetary Compensation and Is Not Legally Required.

In its Amended Complaint, Plaintiffs seek further relief from this Court in the form of advantageous status for a separate Medicare Advantage Prescription Drug plan, Zing Michigan. Plaintiffs request this relief as compensation for the losses that they claim followed from CMS's allegedly inadequate relief for the termination of contract H7330. Specifically, Plaintiffs demand that "CMS should further be directed to treat Zing Michigan's H4624 contract as a new contract

for the 2025 contract year to lessen the adverse financial impact on Zing Health and competitive harms it has suffered as a result of CMS's unlawful ratings calculations and the limited relief afforded to certain plans to address certain (but not all) impacts of its unlawful action." Am. Compl. ¶ 42; *see also id.* at Prayer for Relief ("Require remedial action by Defendants to . . . [t]ake all actions necessary to ensure that Zing Health is not competitively disadvantaged as a result of CMS's corrective actions to cure its unlawful star ratings calculations, including, but not limited to, treat Zing Michigan's H4624 contract as a new plan for the 2025 contract year.").

In seeking "new plan" status for Zing Michigan for the 2025 contract year, Plaintiffs ask for a benefit that was not afforded to any other plan. In essence, Plaintiffs seek money damages as compensation for Zing's alleged "competitive harms" resulting from the now-rescinded termination and sanctions. Under 42 C.F.R. § 422.166(d)(2)(vi), new Medicare Advantage plans are entitled to certain enhanced benefits with respect to the calculation of their Star Ratings and quality bonus payment ratings. The Amended Complaint does not allege that Zing Michigan qualifies as a "new plan," *see generally* Am. Compl., which is a Medicare Advantage contract offered by a parent organization that has not had another Medicare Advantage contract in the previous three years. *See* 42 C.F.R. § 422.252. If Zing Michigan were to obtain new plan status, this would effectively provide an unearned increase in its Star Rating and quality bonus payment status, contrary to Medicare Advantage regulations. Plaintiffs cannot invoke the Court's equitable jurisdiction to obtain relief to which they are not entitled by law. *See Goodluck v. Biden*, 104 F.4th 920, 924 (D.C. Cir. 2024) ("A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law[.]" (alteration in original; quoting *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 122 (1874))).

Plaintiffs' claim for relief should be dismissed because treating Zing Michigan as a "new plan" is not authorized by the Medicare statute or regulations and is contrary to the definition of a "new [Medicare Advantage] plan" under 42 C.F.R. § 422.252. As such, the relief that Plaintiffs seek is not available under the APA. The remedy provisions of the APA provide for two options: "(1) to compel agency action unlawfully withheld or unreasonably delayed" or "(2) hold unlawful and set aside agency action, findings, and conclusions." 5 U.S.C. § 706. Treating Zing Michigan as a "new plan" does not fit either category under Section 706. As the Supreme Court has made clear, "the only agency action that can be compelled under the APA is action legally *required*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (emphasis in original).

The new plan status that Plaintiffs seek is, at bottom, a mechanism for obtaining money damages. However, money damages likewise are expressly barred under the APA. *See* 5 U.S.C. § 702 ("An action in a court of the United States seeking relief other than money damages[.]"); *Bowen v. Massachusetts*, 487 U.S. 879, 892–93 (1988). As the Supreme Court has explained, the United States has not waived its sovereign immunity under the APA for claims seeking money damages. *Dept. of Army v. Blue Fox, Inc*., 525 U.S. 255, 260–61 (1999); *accord Tex. Border Coal. v. Napolitano*, 614 F. Supp. 2d 54, 57 n.2 (D.D.C. 2009). The APA's bar against money damages claims prohibits not only direct claims for money damages, but also claims styled in equity that are "merely a means to the end of satisfying a claim for the recovery of money." *Blue Fox*, 525 U.S. at 262. In *Blue Fox*, the Supreme Court drew a distinction between specific relief, which attempts "to give the plaintiff the very thing to which he was entitled" under the law, and compensatory (or substitute) relief, which is intended "to substitute for a suffered loss." *Id.* at 262–63. The Supreme Court held that the APA permits only specific relief, and that compensatory or substitute relief "falls outside of § 702's waiver of sovereign immunity." *Id.*

at 263. The Court found that the plaintiff's claim for an equitable lien was effectively a mechanism for obtaining monetary damages because "its goal is to seize or attach money in the hands of the Government as compensation for the loss resulting from the default of the prime contractor," *id.*; accordingly, its APA claim was barred by sovereign immunity, just like Zing's.

Plaintiffs do not allege that treating Zing Michigan as a "new plan" would give them "the very thing to which [they were] entitled" under the law. Rather, Plaintiffs want "new plan" status for Zing Michigan "to lessen" the allegedly "adverse financial impact on Zing Health and competitive harms it has suffered" because of the now-rescinded termination and sanctions on its contract. Am. Compl. ¶ 42. In other words, the "new plan" status is sought by Zing to compensate Plaintiffs for their alleged financial and competitive harms, even though CMS has already retracted the very action that Plaintiffs claim is unlawful. Under 5 U.S.C. § 702 and the Supreme Court's analysis in *Blue Fox*, Plaintiffs' claim for relief therefore falls outside the scope of the APA's waiver of sovereign immunity.

Plaintiffs' requested relief for Zing Michigan is unavailable under the APA and their claim is jurisdictionally barred and therefore should be dismissed.

* * *

CONCLUSION

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

Dated: September 11, 2024
Washington, DC

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ZING HEALTH, INC., Plaintiffs, v. XAVIER BECERRA, Secretary of Health and Human Services, et al., Defendants.	Civil Action No. 24-0855 (RBW)

DEFENDANT'S INDEX OF EXHIBITS

Defendants, the Department of Health and Human Services, its Secretary, the Centers for Medicare & Medicaid Services ("CMS"), and its Administrator, respectfully submit the following Index of Exhibits in connection with its motion to dismiss for lack of jurisdiction.

- Exhibit 1: Notice of Termination & Intermediate Sanctions;
- Exhibit 2: Intermediate Sanctions & Termination Dockets;
- Exhibit 3: Zing's Withdrawal Letter;
- Exhibit 4: Notice of Retraction of Termination & Intermediate Sanctions;
- Exhibit 5: Medicare Plan Finder Profiles;

* * *

Dated: September 11, 2024

Respectfully submitted,

MATTHEW M. GRAVES, D.C. Bar #481052
United States Attorney

BRIAN P. HUDAK
Chief, Civil Division

By: /s/ *Douglas C. Dreier*
DOUGLAS C. DREIER, D.C. Bar #1020234
Assistant United States Attorney
601 D Street, NW
Washington, DC 20530
(202) 252-2551

Attorneys for the United States of America

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 AND D OVERSIGHT AND ENFORCEMENT GROUP

December 27, 2023

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

Re: Notice of Termination and Intermediate Sanctions (Suspension of Enrollment and Marketing) for Medicare Advantage-Prescription Drug Contract Number: H7330

Dear Mr. Clifton:

The Centers for Medicare & Medicaid Services (CMS) hereby notifies you of its decision to terminate (effective 11:59:59 P.M. Eastern Standard Time (EST) December 31, 2024) Zing Health, Inc. (Zing Health) Medicare Advantage-Prescription Drug (MA-PD)[1] contract H7330 pursuant to Sections 1860D-12(b)(3)(B) and 1857(c)(2) of the Social Security Act and 42 C.F.R. §§ 422.510(a)(4)(ix) and 423.509(a)(4)(x).

In addition to the termination and in accordance with 42 C.F.R. §§ 422.752(b), 422.756(a), 423.752(b) and 423.756(a), CMS is also providing notice to Zing Health that CMS has made a determination to impose intermediate sanctions on MA-PD contract H7330. The intermediate sanctions will consist of the suspension of enrollment of Medicare beneficiaries into Zing Health's contract (42 C.F.R. §§ 422.750(a)(1) and 423.750(a)(1)), and the suspension of all marketing activities to Medicare beneficiaries (42 C.F.R. §§ 422.750(a)(3) and 423.750(a)(3)). The intermediate sanctions will be effective 15 calendar days from the date of receipt of this notice, or January 12, 2024. CMS will provide Zing Health with detailed instructions regarding the enrollment and marketing suspensions in a separate communication.

The basis for this action is that CMS has determined that Zing Health has 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 for contract H7330.

[1] MA-PD refers to a Medicare Advantage organization that offers a qualified prescription drug plan. The MA-PD is subject to the same Part D requirements at 42 C.F.R. Part 423 as a stand-alone Part D plan sponsor. 42 C.F.R. § 423.458(a).

Summary of Noncompliance

H7330 is an MA-PD contract that has been in operation since January 1, 2020. Medicare regulations at 42 CFR §§ 422.504(a)(17) and 423.505(b)(26) require MA-PD contracts to maintain Part C and Part D summary plan rating scores of at least three stars. H7330 has had three consecutive years of low Part D summary Star Ratings as of the 2024 Star Ratings released in October 2023, in violation of 423.505(b)(26) and Art. II.D.3 of the Prescription Drug Plan Contract. Therefore, Zing Health has failed substantially to carry out the terms of its contract and CMS has made the determination to impose intermediate sanctions and to terminate contract H7330 at the end of 2024.

Parts C and D Star Rating Requirements

Since 2007, CMS has developed and published annual performance ratings for stand-alone Medicare prescription drug plan (PDP) contracts. In 2008, CMS began issuing ratings for Medicare Advantage (MA) contracts as well. The ratings are based on measures that address a range of health and drug plan performance categories, including access to care, access to prescription medications, and communication with members. The scores in each performance category are based on data reported by MA-PDs, member satisfaction, and monitoring conducted by CMS and its contractors. MA-PD contracts receive a score for each performance measure, a summary score each for Part C and Part D, as well as overall ratings. These overall scores are called Star Ratings.[2]

The performance measures used to calculate a contract's Part C and Part D summary Star Ratings reflect an MA-PD's contract performance across multiple Medicare program requirements. A contracting organization's administrative and management arrangements necessarily have a direct impact on its performance of a similarly broad range of program requirements.[3] Therefore, CMS considers a low Part C or Part D summary Star Rating to be evidence that the MA-PD has insufficient administrative and management arrangements to meet its obligations as an MA-PD plan sponsor.

Based on that determination, CMS established the Medicare requirement that all contracts maintain Part C and Part D summary plan rating scores of at least three stars. *See* 42 C.F.R. §§ 422.504(a)(17) and 423.505(b)(26). In addition, CMS may terminate an MA-PD contract if it achieves a Part C summary plan rating of less than three stars for three consecutive contract years (*see* 42 C.F.R. § 422.510(a)(4)(xi)), or a Part D summary plan rating of less than three stars for three consecutive contract years (*see* 42 C.F.R, § 423.509(a)(4)(x)).

CMS has also promulgated regulations that state that CMS may terminate an MA-PD if the organization has substantially failed to comply with the regulatory requirements contained in

[2] *See* 42 C.F.R. §§ 422.160-166 and 423.180-186 for details on the calculation of Star Rating measures.
[3]Medicare regulations at 42 C.F.R. §§ 422.503(b)(4)(ii) and 423.504(b)(4)(ii) require MA-PD organizations to have administrative and management arrangements satisfactory to CMS, including personnel and systems sufficient for the organization to market and administer benefit plans and conduct utilization management and quality assurance activities consistent with Medicare requirements.

Part 422 or Part 423 or both (*see* 42 C.F.R. § 422.510(a)(4)(ix)). CMS has stated that "organizations that offer both Part C and Part D benefits must fully meet the requirements of each program independently". 77 FR 22109. CMS reiterated this position in the 2015 Call Letter, stating that "CMS will terminate MA-PD contracts that scored a Part D summary rating of less than three stars in each of the most recent consecutive rating periods, regardless of their Part C summary ratings during the same period."

Violations Related to Part D Summary Star Ratings

CMS has determined that Zing Health's contract H7330 failed to comply with Part D Star Ratings requirements by failing to achieve a Part D summary Star Rating of at least three stars for three consecutive years in violation of 42 C.F.R. § 423.505(b)(26) and Art. II.D.3 of the Prescription Drug Plan Contract, and so CMS may terminate the contract. 42 C.F.R. § 423.509(a)(4)(x). Specifically, the three consecutive annual Part D Star Ratings for contract H7330 are as follows:

- 2022 Part D Summary Star Rating of 2.5
- 2023 Part D Summary Star Rating of 2.5
- 2024 Part D Summary Star Rating of 2.5

Zing Health was informed of its Part D summary Star Ratings for 2022, 2023, and 2024 on October 6, 2021, October 4, 2022, and October 13, 2023, respectively.[4]

Basis for Termination and Intermediate Sanctions

Pursuant to 42 C.F.R. § 423.509(a)(4)(x), CMS may terminate a Part D plan sponsor's contract if it "achieves a Part D summary plan rating of less than 3 stars for 3 consecutive contract years."[5] In addition, pursuant to 42 C.F.R. § 422.510(a)(4)(ix), CMS may terminate an MA-PD's contract if it substantially "failed to comply with the regulatory requirements contained in [Part 422] or Part 423 or both." CMS has determined that Zing Health's contract H7330 substantially failed to comply with the Part D Star Ratings requirements by failing to achieve a Part D summary Star Rating of at least three stars for three consecutive years. This is in violation of 42 C.F.R. §23.505(b)(26) and Art. II.D.3 of the Prescription Drug Plan Contract, and CMS will terminate the contract. *Id.*, 42 C.F.R. §§ 422.510(a)(4)(ix), 423.509(a)(4)(x).

Pursuant to 42 C.F.R. §§ 422.752(b) and 423.752(b), if CMS makes a determination that could lead to a contract termination under §§ 422.510(a) and 423.509(a), CMS may impose intermediate sanctions at §§ 422.750(a)(1) and (3) and 423.750(a)(1) and (3). Therefore, since CMS has determined that Zing Health's contract H7330 has achieved a Part D summary plan

[4] Part D summary Star Ratings data for 2022, 2023, and 2024 is publicly available at https://www.cms.gov/medicare/health-drug-plans/part-c-d-performance-data by navigating to "2022 Star Ratings Data Table", "2023 Star Ratings Data Table", and "2024 Star Ratings Data Table."

[5] Pursuant to 42 C.F.R. § 423.4, the definition of "Part D sponsor" includes "a PDP sponsor, MA organization offering a MA-PD plan, a PACE organization offering a PACE plan including qualifying prescription drug coverage, and a cost plan offering qualified prescription drug coverage."

rating of less than 3 stars for 3 consecutive contract years (*see* § 423.509(a)(4)(x)), CMS is imposing intermediate sanctions specified at §§ 422.750(a)(1) and (3) and 423.750(a)(1) and (3) in addition to terminating contract H7330.[6]

Procedural Requirements for Termination and Intermediate Sanctions

Under 42 C.F.R. §§ 422.510(c)(1)(i) and 423.509(c)(1)(i), before providing a notice of termination of the contract, CMS provides the MA-PD plan sponsor with notice specifying the MA-PD plan sponsor's deficiencies and a reasonable opportunity of at least 30 calendar days to develop and implement a corrective action plan to correct the deficiencies.

Zing Health has been on notice of the need to improve its Part D summary Star Ratings performance since the issuance of the 2022 Star Ratings on October 6, 2021. Each year CMS provides MA-PDs with two preview periods before Star Ratings become public (*see* 42 C.F.R. §§ 422.166(h)(2) and 423.186(h)(2)). During the preview periods, Zing Health had the opportunity to review preliminary calculations and seek corrections, if necessary, to the underlying data and calculations before the Star Ratings became public. In addition, Zing Health received a corrective action notice on February 25, 2022, for its 2022 Star Ratings, and on February 24, 2023, for its 2023 Star Ratings. The corrective action notices informed Zing Health of its Star Rating, requested that Zing Health develop and implement a corrective action plan to improve its operations for the areas that resulted in a low Star Rating, and put Zing Health on notice that its contract would be eligible for termination if it received a Part D Summary Star Rating of below three stars for three (3) consecutive years.

Therefore, in accordance with 42 C.F.R. §§ 422.510(c) and 423.509(c), Zing Health was provided notice of its insufficient Part D summary Star Ratings and was afforded reasonable opportunities to correct this deficiency by improving its Star Rating performance, which it failed to do.

With respect to the intermediate sanctions CMS is imposing, 42 C.F.R. § 423.756(c)(3) provides that the intermediate sanctions will remain in effect until CMS is satisfied that the deficiencies that are the basis for the sanction determination have been corrected and are not likely to recur. However, in light of CMS's decision to terminate contract H7330 and its imposition of intermediate sanctions pursuant to 42 C.F.R. § 423.752(b), the intermediate sanctions at § 423.750(a)(1) and (3) will remain in effect until the contract is terminated.

Opportunity to Respond to Intermediate Sanctions Notice

Pursuant to 42 C.F.R. §§ 422.756(a)(2) and 423.756(a)(2), Zing Health has (10) calendar days from the date of receipt of this notice to provide a written rebuttal to the intermediate sanctions determination, or by January 7, 2024. Please note that CMS considers receipt as the day after the notice is sent by fax, e-mail, or overnight mail, which in this case would be December 28, 2023. If you choose to submit a rebuttal, please send it to the attention of Kevin Stansbury at the

[6] 42 C.F.R. §§ 422.756(d) and 423.756(d) authorize CMS to terminate a contract in addition to imposing sanctions described at §§ 422.750 and 423.750.

address noted below. Note that the sanctions imposed pursuant to this letter are not stayed pending a rebuttal submission. 42 C.F.R. §§ 422.756(b)(3) and 423.756(b)(3).

Right to Request Hearings for Termination and Intermediate Sanctions

Zing Health may request a hearing before a CMS hearing officer in accordance with the procedures outlined in 42 C.F.R. Subpart N of Parts 422 and 423. If Zing Health wishes to appeal both the contract termination determination and intermediate sanctions determination, Zing Health **must send separate written requests for a hearing for each determination** according to the procedures in 42 C.F.R. Subpart N of Parts 422 and 423.

Pursuant to 42 C.F.R. §§ 422.662, 422.756(b), 423.651(b), and 423.756(b), a written request(s) for a hearing must be received by CMS within fifteen (15) calendar days after receipt of this notice, or by January 12, 2024. If Zing Health appeals the intermediate sanctions determination, a request for a hearing will not delay the date specified by CMS when the intermediate sanctions become effective. *See* 42 C.F.R. §§ 422.756(b)(3) and 423.756(b)(3).

The request for a hearing must be sent to CMS electronically to the CMS Office of Hearings (OH). OH utilizes an electronic filing and case management system, the Office of Hearings Case and Document Management System ("OH CDMS").

Zing Health should complete the one-time OH CDMS registration process as soon as possible after receiving this Notice, even if Zing Health is unsure whether it will appeal its determination. After the registration process is complete, Zing Health must then file its request for a hearing within the time frame set forth above.

Registration information (including how to add an outside representative/law firm to participate in the appeal), filing instructions and general information may be found on the OH webpage at https://www.cms.gov/regulations-guidance/cms-hearing-officer/electronic-filing. Follow the OH CDMS External Registration Manual for step-by-step instructions regarding registration and the OH CDMS Hearing Officer User Manual for appeal filing instructions.[7]

A copy of the hearing request(s) should also be emailed to CMS at the following address:

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

[7] If technical assistance is required, please contact the OH CDMS Help Desk at 1-833-783-8255 or by email at helpdesk_ohcdms@cms.hhs.gov. The hours of operation are Monday–Friday (excluding federal holidays) from 7:00 a.m. to 8:00 p.m. Eastern Time.

CMS will consider the date the Office of Hearings receives the request via the CDMS as the date of receipt of the request(s). The request(s) for a hearing must include the name, fax number, and e-mail address of the contact within Zing Health (or an attorney who has a letter of authorization to represent the organization) with whom CMS should communicate regarding the hearing request(s).

If Zing Health has any questions about this notice, please call or email the enforcement contact provided in the email notification.

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

Case Name: Zing Health FYE 12/31/2024

Appeal Type: Medicare Advantage/Prescription Drug Plan ("MA/PD") - Intermediate Sanctions

Docket Number: H-24-00003

Contract/Plan/Provider Number: H7330

Case History

DATE	PARTY ORGANIZATION	ACTION	DOCUMENTS
5/8/2024	Hearing Officer	Case Closure Notification	View Documents
5/7/2024	Sheppard Mullin Richter & Hampton LLP	Other Correspondence - Notice of Withdrawal	View Documents
5/1/2024	Hearing Officer	Grant Request for Record Hearing	View Documents
4/30/2024	Sheppard Mullin Richter & Hampton LLP	Other Correspondence - Election of Record Hearing	View Documents
4/29/2024	MAPD Appeals Team	Other Correspondence - CMS Reply Brief	View Documents
3/29/2024	Hearing Officer	Letter Issued Earlier Today	View Documents
3/29/2024	Hearing Officer	Grant Request for Decision on Written Record	View Documents
3/28/2024	Sheppard Mullin Richter & Hampton LLP	Brief Response Submitted	View Documents
3/18/2024	MAPD Appeals Team	Other Correspondence - CMS Response Brief and MSJ	View Documents

DATE	PARTY ORGANIZATION	ACTION	DOCUMENTS
2/2/2024	Sheppard Mullin Richter & Hampton LLP	Other Correspondence - Corrected Filing - Signed Appeal Brief	View Documents
2/2/2024	Sheppard Mullin Richter & Hampton LLP	Brief Response Submitted	View Documents
1/24/2024	Hearing Officer	Request for Information Sent	View Documents
1/24/2024	Hearing Officer	Joint Briefing Schedule	View Documents
1/23/2024	Sheppard Mullin Richter & Hampton LLP	Other Correspondence - Proposed Briefing Schedule	View Documents
1/19/2024	Hearing Officer	Summary of Pre-Hearing Conference Discussion	View Documents
1/16/2024	Hearing Officer	Pre-Hearing Conference Scheduled for January 18, 2024 at 10:00am-10:30am EST	View Documents
1/16/2024	Sheppard Mullin Richter & Hampton LLP	Other Correspondence - Request for Date of Pre-Hearing Conference	View Documents
1/12/2024	Hearing Officer	Pre-Hearing Conference	View Documents
1/9/2024	Hearing Officer	Case Acknowledgement Sent	View Documents
1/9/2024	Zing Health	Appeal Submitted (H-24-00003)	View Documents

Hearing Officer Home Page

Case Name: Zing Health FYE 12/31/2024

Appeal Type: Medicare Advantage/Prescription Drug Plan ("MA/PD") - Contract Termination

Docket Number: H-24-00004

Contract/Plan/Provider Number: H7330

Case History

DATE	PARTY ORGANIZATION	ACTION	DOCUMENTS
5/8/2024	Hearing Officer	Case Closure Notification	View Documents
1/19/2024	Hearing Officer	Summary of Pre-Hearing Conference Discussion	View Documents
1/12/2024	Hearing Officer	Pre-Hearing Conference Scheduled for January 18, 2024 at 10:00 am - 10:30 am	View Documents
1/9/2024	Hearing Officer	Case Acknowledgement Sent	View Documents
1/9/2024	Zing Health	Appeal Submitted (H-24-00004)	View Documents

Hearing Officer Home Page

EXHIBIT 3

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

Christine M. Clements
202.747.1848 direct
cclements@sheppardmullin.com

File Number: 77HD-373657

May 7, 2024

Office of Hearings
Centers for Medicare and Medicaid Services
7500 Security Boulevard
Baltimore, MD

Re: Docket Nos. H-24-00003 & H-24-00004; Hearing – Withdrawal of Appeal, CMS Termination of Medicare Advantage-Prescription Drug Contract Number H7330, Zing Health, Inc.

Dear Office of Hearings:

Zing Health, Inc. respectfully notifies the Office of Hearings that it hereby withdraws its appeal of the decision by the Centers for Medicare & Medicaid Services to terminate Medicare Advantage-Prescription Drug Contract Number H7330 and to impose intermediate sanctions on that contract.

Respectfully yours,

DocuSigned by:
Christine Clements
72437D5B8CB8407...
Christine M. Clements
for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

SMRH:4878-2696-7484.1
cc: Seema Dargar, Office of the General Counsel

EXHIBIT 4

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop C1-22-06
Baltimore, Maryland 21244-1850

CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR MEDICARE

MEDICARE PARTS C AND D OVERSIGHT AND ENFORCEMENT GROUP

June 25, 2024

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

RE: Notice of Retraction of Termination and Intermediate Sanctions (Suspension of Enrollment and Marketing) for Medicare Advantage-Prescription Drug Contract Number: H7330

Dear Mr. Clifton:

On December 27, 2023, the Centers for Medicare & Medicaid Services (CMS) notified you of its decision to terminate (effective 11:59:59 P.M. Eastern Standard Time (EST) December 31, 2024) Zing Health, Inc. (Zing Health) Medicare Advantage-Prescription Drug (MA-PD) contract H7330 because contract H7330 failed to maintain a Part D Summary Star Rating of at least three (3) stars for three consecutive years (see §423.509(a)(4)(x)). In addition to the termination, CMS imposed intermediate sanctions on MA-PD contract H7330.

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.

If you have any questions about this notice, please call or email the enforcement contact provided in your email notification.

Sincerely,

/s/

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

cc: Kevin Stansbury, CMS/CM/MOEG/DCE
Ashley Hashem, CMS/OPOLE
Adams Solola, CMS/OPOLE
Avalon Gordon, CMS/OPOLE
Seema Darger, HHS/OGC
Matthew Campbell, HHS/OGC
David Hoskins, HHS/OGC

EXHIBIT 5

Zing Health

Zing Select Care IL (HMO)

Plan type: Medicare Advantage with drug coverage

Plan ID: H7330-001-0

Plan website | **Non-members:** 1-833-866-9464 | **Members:** 1-833-866-9464

Contact plan to enroll

What you'll pay

Total monthly premium
$0.00

Health deductible
$0.00

Primary doctor
$0
copay

Overview

PREMIUMS

Total monthly premium	$0.00
Health premium	$0.00
Drug premium	$0.00
Standard Part B premium	$174.70
Part B premium reduction	No

DEDUCTIBLES

The amount you must pay each year before your plan starts to pay for covered services or drugs.

Health deductible	$0
Drug deductible	$0.00

MAXIMUM YOU PAY FOR HEALTH SERVICES

Maximum you pay for health services	$3,850 In-network

CONTACT INFORMATION

Plan address	225 W. Washington Street Suite 450 Chicago, IL 60606

Benefits & Costs

DOCTOR SERVICES

View Provider Network Directory

Primary doctor visit	$0 copay	
Specialist visit	$15 copay per visit	

TESTS, LABS, & IMAGING		
Diagnostic tests & procedures	$0-25 copay	Limits apply
Lab services	$0 copay	Limits apply
Diagnostic radiology services (like MRI)	$50-150 copay	Limits apply
Outpatient x-rays	$0 copay	Limits apply
Emergency care	$135 copay per visit (always covered)	
Urgent care	$0-10 copay per visit (always covered)	
HOSPITAL SERVICES		
Inpatient hospital coverage	$275 per day for days 1 through 6 $0 per day for days 7 through 90	Limits apply
Outpatient hospital coverage	$300 copay per visit	Limits apply
SKILLED NURSING FACILITY		
Skilled nursing facility	$0 per day for days 1 through 20 $203 per day for days 21 through 100	Limits apply

PREVENTIVE SERVICES

Health care to prevent illness or detect illness at an early stage, when treatment is likely to work best (like Pap tests, flu shots, and screening mammograms).

Learn more about your costs for preventive services

Preventive services	$0 copay	

AMBULANCE

Ground ambulance	$175 copay	

THERAPY SERVICES

Occupational therapy visit	$20 copay	Limits apply
Physical therapy & speech & language therapy visit	$20 copay	Limits apply

MENTAL HEALTH SERVICES

Outpatient group therapy with a psychiatrist	$25 copay	Limits apply
Outpatient individual therapy with a psychiatrist	$25 copay	Limits apply
Outpatient group therapy visit	$25 copay	Limits apply
Outpatient individual therapy visit	$25 copay	Limits apply

OPIOID TREATMENT PROGRAM SERVICES

Opioid treatment program services	In-network: $25 copay	Limits apply

OTHER SERVICES

Durable medical equipment (like wheelchairs & oxygen)	20% coinsurance per item	Limits apply
Prosthetics (like braces, artificial limbs)	20% coinsurance per item	Limits apply
Dialysis	In-network: 20% coinsurance	
Diabetes supplies	0-20% coinsurance per item	

Drug Coverage

See if there's help to lower costs for drugs you take.

PHARMACIES

Check the network status of each pharmacy on your list. You can change pharmacies at any time to find lower costs for drugs.

Add Pharmacies

Add pharmacies to get better cost estimates

Your drug costs can change depending on your plan and pharmacy. Adding pharmacies to your account can give you better out-of-pocket cost estimates when comparing plans.

COSTS BY DRUG TIER

Plans group their drug lists into tiers. The drug costs below show how much you'll pay for drugs in each tier based on the coverage phase you're in.

Learn more about drug tiers.

	Initial coverage phase	Gap coverage phase [1]	Catastrophic coverage phase
Preferred Generic	$0.00 copay	$0.00 copay	Generic drugs: $0 copay Brand-name drugs: $0 copay
Generic	$5.00 copay	—	Generic drugs: $0 copay Brand-name drugs: $0 copay
Preferred Brand	$47.00 copay	—	Generic drugs: $0 copay Brand-name drugs: $0 copay
Non-Preferred Drug	$100.00 copay	—	Generic drugs: $0 copay Brand-name drugs: $0 copay
Specialty Tier	33%	—	Generic drugs: $0 copay Brand-name drugs: $0 copay

[1] For all other drugs, you pay 25% for generic drugs and 25% for brand-name drugs.

PART B DRUGS

These are drugs you usually get at a doctor's office or hospital outpatient setting, like the flu shot, chemotherapy, or other shots.

Chemotherapy drugs	0-20% coinsurance	Limits apply
Other Part B drugs	0-20% coinsurance	Limits apply
Part B insulin	0-20% coinsurance (up to $35)	Limits apply

Extra Benefits

HEARING

Hearing exam	In-network: $0 copay	
Fitting/evaluation	In-network: $0 copay	
Hearing aids - all types	Not covered	

PREVENTIVE DENTAL

Care to prevent or find problems with your teeth and gums.

Oral exam	Covered under office visit	Limits apply
Cleaning	Covered under office visit	Limits apply
Fluoride treatment	Covered under office visit	Limits apply
Dental x-rays	Covered under office visit	Limits apply

COMPREHENSIVE DENTAL

Care to maintain or treat problems with your teeth and gums.

Non-routine services	$0 copay	Limits apply
Diagnostic services	$0 copay	Limits apply
Restorative services	$0 copay	Limits apply
Endodontics	$0 copay	Limits apply
Periodontics	$0 copay	Limits apply
Extractions	$0 copay	Limits apply
Prosthodontics, other oral/maxillofacial surgery, & other services	$0 copay	Limits apply

VISION

Routine eye exam	$0 copay	Limits apply
Contact lenses	$0 copay	Limits apply
Eyeglasses (frames & lenses)	$0 copay	Limits apply
Eyeglass frames only	$0 copay	Limits apply
Eyeglass lenses only	$0 copay	Limits apply
Upgrades	Not covered	

MEDICALLY-APPROVED NON-OPIOID PAIN MANAGEMENT SERVICES

Chiropractic services	Not covered
Acupuncture	Not covered
Massage therapy	Not covered
Alternative therapies	Not covered

Health Education	Not covered
Counseling Services	Not covered
Support for Caregivers of Enrollees	Not covered
Personal Emergency Response System (PERS)	Not covered
Fitness benefit	Some coverage
Transportation services for non-emergency care: Any health-related locations	Not covered
Transportation services for non-emergency care: Plan-approved locations	Some coverage
Over the counter drug benefits	Some coverage
In-home support services	Some coverage
Home and bathroom safety devices	Some coverage
Meals for short duration	Some coverage
Annual physical exams	Some coverage
Telehealth	Some coverage
Worldwide emergency	Some coverage

SPECIAL BENEFITS

You may get these benefits if you have a qualifying chronic condition or other factors. Contact the plan to see if you qualify before you enroll.

Reduced cost sharing for qualifying individuals	Not covered

Star Ratings

+ Expand All Ratings

This plan has received low ratings for three years. If you still want to enroll, contact the plan

Overall star rating

Overall rating is based on the categories below.

+ **Health plan star rating**

Summary rating of health plan quality

+ **Drug plan star rating**

Summary rating of drug plan quality

Zing Health

Zing Elite Select IL (HMO)

Plan type: Medicare Advantage with drug coverage

Plan ID: H7330-004-0

Plan website | **Non-members:** 1-833-866-9464 | **Members:** 1-833-866-9464

Contact plan to enroll

What you'll pay

Total monthly premium
$0.00

Health deductible
$0.00

Primary doctor
$0
copay

Overview

PREMIUMS

Total monthly premium	$0.00
Health premium	$0.00
Drug premium	$0.00
Standard Part B premium	$174.70
Part B premium reduction	No

DEDUCTIBLES

The amount you must pay each year before your plan starts to pay for covered services or drugs.

Health deductible	$0
Drug deductible	$0.00

MAXIMUM YOU PAY FOR HEALTH SERVICES

Maximum you pay for health services	$2,900 In-network

Plan address	225 W. Washington Street Suite 450 Chicago, IL 60606

Benefits & Costs

DOCTOR SERVICES

View Provider Network Directory

Primary doctor visit	$0 copay	
Specialist visit	$15 copay per visit	

TESTS, LABS, & IMAGING

Diagnostic tests & procedures	$0-25 copay	Limits apply
Lab services	$0 copay	Limits apply
Diagnostic radiology services (like MRI)	$50-150 copay	Limits apply
Outpatient x-rays	$0 copay	Limits apply
Emergency care	$135 copay per visit (always covered)	
Urgent care	$0-10 copay per visit (always covered)	

HOSPITAL SERVICES

Inpatient hospital coverage	$275 per day for days 1 through 6 $0 per day for days 7 through 90	Limits apply
Outpatient hospital coverage	$250 copay per visit	Limits apply

Skilled nursing facility	$0 per day for days 1 through 20 $203 per day for days 21 through 100	Limits apply

PREVENTIVE SERVICES

Health care to prevent illness or detect illness at an early stage, when treatment is likely to work best (like Pap tests, flu shots, and screening mammograms).

Learn more about your costs for preventive services

Preventive services	$0 copay	

AMBULANCE

Ground ambulance	$175 copay	

THERAPY SERVICES

Occupational therapy visit	$20 copay	Limits apply
Physical therapy & speech & language therapy visit	$20 copay	Limits apply

MENTAL HEALTH SERVICES

Outpatient group therapy with a psychiatrist	$15 copay	Limits apply
Outpatient individual therapy with a psychiatrist	$15 copay	Limits apply
Outpatient group therapy visit	$15 copay	Limits apply
Outpatient individual therapy visit	$15 copay	Limits apply

OPIOID TREATMENT PROGRAM SERVICES

Opioid treatment program services	In-network: $15 copay	Limits apply

Durable medical equipment (like wheelchairs & oxygen)	20% coinsurance per item	Limits apply
Prosthetics (like braces, artificial limbs)	20% coinsurance per item	Limits apply
Dialysis	In-network: 20% coinsurance	
Diabetes supplies	0-20% coinsurance per item	

See if there's help to lower costs for drugs you take.

PHARMACIES

Check the network status of each pharmacy on your list. You can change pharmacies at any time to find lower costs for drugs.

Add Pharmacies

Add pharmacies to get better cost estimates

Your drug costs can change depending on your plan and pharmacy. Adding pharmacies to your account can give you better out-of-pocket cost estimates when comparing plans.

COSTS BY DRUG TIER

Plans group their drug lists into tiers. The drug costs below show how much you'll pay for drugs in each tier based on the coverage phase you're in.

Learn more about drug tiers.

	Initial coverage phase	Gap coverage phase[1]	Catastrophic coverage phase
Preferred Generic	$0.00 copay	$0.00 copay	Generic drugs: $0 copay Brand-name drugs: $0 copay
Generic	$0.00 copay	–	Generic drugs: $0 copay Brand-name drugs: $0 copay
Preferred Brand	$47.00 copay	–	Generic drugs: $0 copay Brand-name drugs: $0 copay
Non-Preferred Drug	$100.00 copay	–	Generic drugs: $0 copay Brand-name drugs: $0 copay
Specialty Tier	33%	–	Generic drugs: $0 copay Brand-name drugs: $0 copay

[1] For all other drugs, you pay 25% for generic drugs and 25% for brand-name drugs.

PART B DRUGS

These are drugs you usually get at a doctor's office or hospital outpatient setting, like the flu shot, chemotherapy, or other shots.

Chemotherapy drugs	0-20% coinsurance	Limits apply
Other Part B drugs	0-20% coinsurance	Limits apply
Part B insulin	0-20% coinsurance (up to $35)	Limits apply

Extra Benefits

Hearing exam	In-network: $0 copay	
Fitting/evaluation	In-network: $0 copay	
Hearing aids - all types	Not covered	

PREVENTIVE DENTAL

Care to prevent or find problems with your teeth and gums.

Oral exam	Covered under office visit	Limits apply
Cleaning	Covered under office visit	Limits apply
Fluoride treatment	Covered under office visit	Limits apply
Dental x-rays	Covered under office visit	Limits apply

COMPREHENSIVE DENTAL

Care to maintain or treat problems with your teeth and gums.

Non-routine services	$0 copay	Limits apply
Diagnostic services	$0 copay	Limits apply
Restorative services	$0 copay	Limits apply
Endodontics	$0 copay	Limits apply
Periodontics	$0 copay	Limits apply
Extractions	$0 copay	Limits apply
Prosthodontics, other oral/maxillofacial surgery, & other services	$0 copay	Limits apply

Routine eye exam	$0 copay	Limits apply
Contact lenses	$0 copay	Limits apply
Eyeglasses (frames & lenses)	$0 copay	Limits apply
Eyeglass frames only	$0 copay	Limits apply
Eyeglass lenses only	$0 copay	Limits apply
Upgrades	Not covered	

MEDICALLY-APPROVED NON-OPIOID PAIN MANAGEMENT SERVICES

Chiropractic services	Not covered
Acupuncture	Not covered
Massage therapy	Not covered
Alternative therapies	Not covered

Health Education	Not covered
Counseling Services	Not covered
Support for Caregivers of Enrollees	Not covered
Personal Emergency Response System (PERS)	Not covered
Fitness benefit	Some coverage
Transportation services for non-emergency care: Any health-related locations	Not covered
Transportation services for non-emergency care: Plan-approved locations	Some coverage
Over the counter drug benefits	Some coverage
In-home support services	Some coverage
Home and bathroom safety devices	Some coverage
Meals for short duration	Some coverage
Annual physical exams	Some coverage
Telehealth	Some coverage
Worldwide emergency	Some coverage

SPECIAL BENEFITS

You may get these benefits if you have a qualifying chronic condition or other factors. Contact the plan to see if you qualify before you enroll.

Reduced cost sharing for qualifying individuals	Not covered

Star Ratings

+ Expand All Ratings

This plan has received low ratings for three years. If you still want to enroll, contact the plan

Overall star rating

Overall rating is based on the categories below.

+ **Health plan star rating**

Summary rating of health plan quality

+ **Drug plan star rating**

Summary rating of drug plan quality

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ZING HEALTH, INC., Plaintiffs, v. XAVIER BECERRA, Secretary of Health and Human Services, et al., Defendants.	Civil Action No. 24-0855 (RBW)

[PROPOSED] ORDER

UPON CONSIDERATION of Defendants' motion to dismiss, and the entire record herein, it is hereby

ORDERED that Defendants' motion to dismiss is GRANTED; and it is further

ORDERED that this action is DISMISSED without prejudice.

The Clerk is directed to close this case.

SO ORDERED, this _____ day of _____, 202__.

_____
REGGIE B. WALTON
United States District Judge