

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)

**REPLY IN FURTHER SUPPORT OF
DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT**

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

 I. Plaintiffs Cannot Establish Standing Based on the CMS Memorandum..... 3

 II. Plaintiffs Cannot Establish Standing Based on Alleged Reputational Harm. 5

 III. The Requested Relief for Zing Michigan Is Not Available under the APA. 7

CONCLUSION..... 10

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Am.’s Cmty. Bankers v. FDIC</i> , 200 F.3d 822 (D.C. Cir. 2000)	9
<i>Bowen v. Massachusetts</i> , 487 U.S. 879 (1988)	9
<i>Dep’t of Army v. Blue Fox, Inc.</i> , 525 U.S. 255 (1999)	8
<i>Elevance Health, Inc. v. Becerra</i> , Civ. A. No. 23-3902 (RDM), 2024 WL 2880415 (D.D.C. June 7, 2024)	2
* <i>Foretich v. United States</i> , 351 F.3d 1198 (D.C. Cir. 2003)	5, 7
<i>Md. Dep’t of Hum. Res. v. Dep’t of Health & Hum. Servs.</i> , 763 F.2d 1441 (D.C. Cir. 1985)	9
<i>Norton v. S. Utah Wilderness All.</i> , 542 U.S. 55 (2004)	8
* <i>Penthouse Int’l, Ltd. v. Meese</i> , 939 F.2d 1001 (D.C. Cir. 1991)	5, 6, 7
<i>SCAN Health Plan v. Dep’t of Health & Hum. Servs.</i> , Civ. A. No. 23-3910 (CJN), 2024 WL 2815789 (D.D.C. June 3, 2024)	2
<i>Steele v. United States</i> , 200 F. Supp. 3d 217 (D.D.C. 2016)	8, 9
 Statutes	
5 U.S.C. § 702	8
5 U.S.C. § 706	2, 3, 10
 Rules	
Fed. R. Civ. P. 12	10
 Regulations	
42 C.F.R. § 422.510	6-7

Defendants respectfully submit this reply in further support of their motion to dismiss (ECF No. 20, “Motion”) the Amended Complaint in this matter (ECF No. 18).

INTRODUCTION

After the Centers for Medicare and Medicaid Services (“CMS”) recalculated the 2024 Star Ratings for all negatively affected Medicare Advantage organizations and granted Plaintiff Zing Health, Inc. (“Zing”)—all the relief sought in its initial Complaint—Zing amended the Complaint to demand additional relief. Despite CMS’s retraction of the termination and intermediate sanctions on Zing’s plan, which rendered Zing’s case moot and deprived Zing of standing, Zing—now joined by co-plaintiffs Zing Health of Michigan, Inc. (“Zing Michigan”) and Zing Health Consolidator, Inc. (“Zing Consolidator”)—presses its view that it is suffering ongoing competitive harms that are allegedly redressable by “targeted outreach” to enrollees and by treating Zing Michigan’s contract as a new plan for the 2025 contract year.

To try to circumvent the mootness of its claims, Plaintiffs challenge as arbitrary and capricious a Memorandum that CMS issued to all Medicare Advantage organizations whose 2025 quality bonus payments were affected by CMS’s recalculation of the 2024 Star Ratings. Plaintiffs, however, did not suffer any redressable injury in fact from the Memorandum, and Zing was separately afforded relief based on the Star Ratings recalculation. Accordingly, Plaintiffs lack standing to pursue claims regarding the CMS Memorandum. Plaintiffs also attempt to establish standing based on alleged reputational harms from the rescinded termination and sanctions. But none of the arguments raised in their response brief (ECF No. 22) overcomes the well-established rule that reputational harm does not satisfy the requirements of Article III standing when it is a secondary effect of an otherwise moot government action. Finally, the additional relief requested for Zing Michigan is barred by the Administrative Procedure Act (“APA”) because it is not

authorized by law and falls outside the scope of the APA's waiver of sovereign immunity, given that the APA does not allow claims for recovery of money damages.

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

ARGUMENT

As an initial matter, Plaintiffs have now withdrawn one of the three counts in the Amended Complaint. Pls.' Opp'n (ECF No. 22) at 11 n.4. That is, Plaintiffs abandon Count I, which alleged that Defendants violated 5 U.S.C. § 706(2)(A) by using simulated and rerun cut point data when calculating Zing's Star Ratings. *Id.*; see also Am. Compl. (ECF No. 18) ¶¶ 167–76. Irrelevantly, and without providing any support for their assertion, Plaintiffs attempt to blame Defendants for Plaintiffs' decision to plead Count I and not abandon it until October 25, 2024, because "CMS would not confirm whether it would appeal those decisions," i.e., *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), and *Elevance Health, Inc. v. Becerra*, Civ. A. No. 23-3902 (RDM), 2024 WL 2880415 (D.D.C. June 7, 2024), "despite Zing Health's numerous inquiries." Pls.' Opp'n at 11 n.4.

Defendants are unaware of any of "Zing Health's numerous inquiries" regarding whether Defendants would appeal, *id.*, but decisions regarding whether the Department of Justice will or will not authorize an appeal of an adverse decision necessarily take time and require multiple levels of review and Solicitor General approval. And October 25, 2024, is months after the early August 2024 deadlines for Defendants to appeal *SCAN* and *Elevance* had run and months after a different negatively impacted plan dismissed its case, Notice of Voluntary Dismissal, *Clover Ins. Co. v. Becerra*, Civ. A. No. 24-1385 (BAH) (D.D.C. Aug. 12, 2024), ECF No. 17.

In any event, Plaintiffs' abandonment of Count I leaves Count II, alleging that Defendants violated 5 U.S.C. § 706(2)(A) by not addressing Zing in the CMS Memorandum regarding quality bonus payments, Am. Compl. ¶¶ 177–90, and Count III, alleging that Plaintiffs are entitled to a declaratory judgment, *id.* ¶¶ 191–95. Neither remaining cause of action fares any better than the withdrawn cause of action.

I. Plaintiffs Cannot Establish Standing Based on the CMS Memorandum.

Despite the mootness of the case following CMS's recalculation of Zing's 2024 Star Ratings and the subsequent rescission of Zing's termination and intermediate sanctions, Plaintiffs endeavor to keep the controversy "live" by claiming their alleged reputational injuries stem from CMS's June 13, 2024, Memorandum issued to all Medicare Advantage organizations. Plaintiffs argue that the Memorandum was arbitrary and capricious because it "failed to treat all plans equally," Pls.' Opp'n (ECF No. 22) at 10, by "only reevaluating quality bonus payment eligibility for certain plans," without remedying Zing's alleged harms, Am. Compl. (ECF No. 18) ¶ 182. Plaintiffs posit that because the CMS Memorandum remains "unexpired and unretracted," its case cannot be moot. Pls.' Opp'n at 13.

Plaintiffs' arguments regarding the CMS Memorandum are befuddling. As noted in Defendants' opening brief, there was no reason for the CMS Memorandum to mention Zing specifically, as quality bonus payments were not an issue for Zing. Defs.' Open. Br. (ECF No. 20) at 27. Zing's contract was the only one where a contract termination had been affected by the recalculation of the 2024 Star Ratings, Am. Compl. ¶ 162, so CMS appropriately informed Zing by separate notice that its termination and sanctions had been rescinded. *See* Notice of Retraction of Termination & Intermediate Sanctions (ECF No. 20-5). Zing does not explain how Zing—let alone either of the other two Plaintiffs—suffered an "injury in fact" from the quality-bonus-

payment CMS Memorandum, nor do Plaintiffs identify any legal requirement under which CMS should have offered Zing relief specifically through the mechanism of the CMS Memorandum rather than by separate notice. Moreover, with respect to the issue of redressability, it is not clear what Plaintiffs would have this Court do with the CMS Memorandum. The Amended Complaint does not ask this Court to compel CMS to include Plaintiffs' requested relief in the CMS Memorandum, nor does it ask this Court to set aside the CMS Memorandum. Plaintiffs fail to show how the CMS Memorandum caused an injury in fact that could be redressed by this Court, and they therefore lack standing to challenge the implementation of the CMS Memorandum.

At the end of the day, CMS already has granted Zing the relief it sought in its original complaint—i.e., recalculation of the 2024 Star Ratings and reversal of Zing's termination and intermediate sanctions—and the CMS Memorandum is the only putative “agency action” for Zing to seize upon in its attempt to find a basis for subject matter jurisdiction, as Plaintiffs notably are not attempting to set aside the retraction of their termination and intermediate sanctions (ECF No. 20-5). In short, because Plaintiffs did not suffer any redressable injury in fact from the CMS Memorandum, Plaintiffs lack standing and their claim regarding the CMS Memorandum should be dismissed.

In a footnote, Plaintiffs state that: “Defendants’ assert that ‘Zing’s contract H7330 received Part D summary Star Ratings of 2.5 . . . for contract yea[r] 2024’ . . . That is incorrect, and only shows CMS’s continued refusal to accept responsibility for its misconduct.” Pls.’ Opp’n at 10 n.2 (referencing Defs.’ Open. Br. at 15). Plaintiffs’ attempt to isolate a sentence that merely was describing the history of this action, prior to the recalculation of Zing’s Star Ratings for 2024, is, most charitably, baffling. Defendants’ brief clearly and accurately notes: “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.” Defs.’ Open. Br. at 18. There is no dispute that Zing’s Star Ratings were recalculated. Indeed, that is why Plaintiffs have withdrawn Count I that had sought to set aside the calculation of Zing’s Star Ratings. *See, e.g.*, Pls.’ Opp’n at 11 n.4; Am. Compl. ¶¶ 167–76.

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

Plaintiffs claim that they continue to suffer reputational harm as a result of Zing’s initial 2024 Star Ratings, the intermediate sanctions, and the termination of Zing’s contract. As CMS discussed in its opening brief, Plaintiffs lack standing to seek relief based on Zing’s reputational injury because CMS already has reversed the actions that gave rise to Plaintiffs’ purported injury. Defs.’ Open. Br. at 32–34. Plaintiffs state that there remain “unredressed injuries” in the form of reputational and economic harms. Pls.’ Opp’n at 16. Even assuming that Plaintiffs’ remaining injuries stemmed from the termination and sanctions, those injuries are a “byproduct of government action” that are no longer redressable once the government action has been reversed. *Foretich v. United States*, 351 F.3d 1198, 1212 (D.C. Cir. 2003). “[W]here reputational injury is the lingering effect of an otherwise moot aspect of a lawsuit, no meaningful relief is possible and the injury cannot satisfy the requirements of Article III.” *Id.*

Plaintiffs’ alleged “unredressed injuries” are no different from the “lingering harms” and “secondary effects” of an otherwise moot government action noted in cases where plaintiffs failed to meet Article III standing requirements. *See* Defs.’ Open. Br. at 32–34 (collecting cases). Plaintiffs argue that their “unredressed injuries” are still “susceptible to judicial correction,” which would allow standing. Pls.’ Opp’n at 16 (citing *Penthouse Int’l, Ltd. v. Meese*, 939 F.2d 1001 (D.C. Cir. 1991)). Plaintiffs do not cite any cases in which the extraordinary relief they seek was granted, and their attempt to distinguish *Penthouse* is unavailing. The *Penthouse* plaintiff alleged

its reputational injury continued even after a critical government letter was retracted. The plaintiff sought damages for economic losses incurred because of the government letter, but the court held that the alleged injury was too speculative to confer standing. *Penthouse*, 939 F.2d at 1019. Zing’s situation is identical, seeking relief from the Court to mitigate the reputational and financial losses allegedly incurred even after the government letter was retracted. The D.C. Circuit held that if the government’s retraction of the offending letter did not itself restore a plaintiff’s reputation, further relief from the court likely would not either. *Id.* Here, too, CMS already has afforded Zing full relief by reversing the termination and sanctions (ECF No. 20-5). In light of the public display of CMS’s notice of the retraction and the well-publicized recalculation of the 2024 Star Ratings in health industry news outlets, third parties such as Zing’s creditors and contractors already have full access to the updated information.

Zing objects that this public information has not reached its low-income, underserved beneficiaries, who Zing claims “are not scouring the government’s Medicare Plan Finder for recalculated Star Ratings and belated termination reversals.” Pls.’ Opp’n at 15. As an initial matter, news of Zing’s termination and sanctions is highly unlikely to have reached its beneficiaries if they were not looking at CMS’s website—precisely where the retraction notice was posted, *see CMS, Notice of Retraction of Termination and Intermediate Sanctions* (June 25, 2024), <https://www.cms.gov/files/document/zingtermination-sanctionretraction06252024.pdf>. The Amended Complaint does not and cannot allege that CMS issued any notices of the termination directly to enrollees in Zing’s plan, nor were notices required to be issued by Zing during this time. Under Medicare Advantage regulations, Zing was not required to issue notices to beneficiaries regarding its plan termination until thirty days before the effective date of the termination, which was scheduled for December 31, 2024. *See* 42 C.F.R. § 422.510(b)(1)(ii) (“The

[Medicare Advantage] organization notifies its Medicare enrollees of the termination by mail at least 30 calendar days before the effective date of the termination.”); Notice of Termination and Intermediate Sanctions (ECF No. 20-2) at 2 (noting the December 31, 2024, effective date). The June 25, 2024, notice of the retraction of Zing’s termination and intermediate sanctions (ECF No. 25-2) thus was issued long before Zing was required to notify beneficiaries. Unsurprisingly, Zing does not allege that it sent notice of its plan termination to enrollees several months early, long before it was required to do so, and notwithstanding that it had filed the initial Complaint in this action by that time. Unless Zing’s enrollees were indeed reading CMS’s website and health industry news sources, there is simply no basis for Zing’s fanciful assertion (not included in its Amended Complaint) that “over 1,000 current beneficiaries made disenrollment decisions based on Zing’s then-impending and improper termination.” Pls.’ Opp’n at 15.

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

III. The Requested Relief for Zing Michigan Is Not Available under the APA.

Plaintiffs seek further relief from this Court in the form of “new plan” status for Zing Michigan for the 2025 contract year. Plaintiffs request this relief as compensation for their alleged losses, “to lessen the adverse financial impact on Zing Health and competitive harms it has

suffered” following the termination of Zing’s plan. 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 . . . including, but not limited to, treat Zing Michigan’s H4624 contract as a new plan for the 2025 contract year.”).

As discussed in CMS’s opening brief (at 34–37), Plaintiffs’ requested relief for Zing Michigan is barred by the APA for two reasons. First, because Zing Michigan does not actually qualify as a “new plan” under Medicare Advantage regulations, the relief Plaintiffs seek is not authorized by the Medicare statute or regulations. Accordingly, Plaintiff’s requested relief is not available under the APA, because “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). Second, money damages are expressly barred under the APA, 5 U.S.C. § 702, as are claims styled in equity that are “merely a means to the end of satisfying a claim for the recovery of money.” *Dep’t of Army v. Blue Fox, Inc.*, 525 U.S. 255, 262 (1999). Because new Medicare Advantage plans are entitled to certain enhanced benefits with respect to the calculation of their Star Ratings and quality bonus payment ratings, Plaintiffs’ request for this advantageous status essentially seeks a substitute for money damages as compensation for Zing’s alleged “competitive harms.” *See* Defs.’ Open. Br. at 35. Plaintiffs candidly allege that they want “new plan” status for Zing Michigan “to lessen” the allegedly “adverse financial impact on Zing Health and competitive harms it has suffered.” Am. Compl. ¶ 42. Because Plaintiffs’ claim for relief is plainly compensatory, it falls outside the scope of the APA’s waiver of sovereign immunity. *Blue Fox*, 525 U.S. at 262–63.

To avoid this result, Plaintiffs improperly rely on *Steele v. United States*, 200 F. Supp. 3d 217, 222 (D.D.C. 2016), to characterize their requested relief as “restitution.” *Steele* involved the

Internal Revenue Service’s assessment of certain fees on tax preparers that allegedly exceeded the amount permitted by the statutory scheme. The court observed that under the APA, “if plaintiffs’ request for restitution was effectively a demand for ‘money damages,’ then the Court would lack jurisdiction over that portion of plaintiffs’ claims.” *Id.* at 221–22. The court described “money damages” as “compensation for economic losses suffered by the government’s alleged wrongdoing,” whereas a claim for “restitution” was presented where plaintiffs “want the government to return that which ‘rightfully belonged to them in the first place.’” *Id.* at 224 (citing *Am. ’s Cmty. Bankers v. FDIC*, 200 F.3d 822, 830 (D.C. Cir. 2000)). The court found that because the tax preparers wanted “to get their money back,” their claim for monetary relief constituted restitution rather than money damages and therefore was encompassed within the APA’s waiver of sovereign immunity. *Id.* at 224 (quoting *Am. ’s Cmty. Bankers*, 200 F.3d at 830).

The redress Plaintiffs demand consists of “targeted outreach” by CMS to Zing’s former and potential enrollees, informing them “that CMS erroneously calculated Zing’s 2024 Star Ratings,” along with reclassification of Zing Michigan’s H4624 contract as a “new plan.” Pls.’ Opp’n at 16; Am. Compl. ¶¶ 41–42, Prayer ¶ 4. Plaintiffs attempt to characterize these forms of relief as “restitution” by claiming they would “restore” to Zing “a fair, competitive fighting chance as [a Medicare Advantage] plan.” Pls.’ Opp’n at 12. But the relief Plaintiffs seek is nothing like the specific relief courts have regarded as restitution. As the Supreme Court explained in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), while “money damages” “normally refers to a sum of money used as compensatory relief” or intended “to *substitute* for a suffered loss,” “specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.” *Id.* at 895 (cleaned up; emphasis in original; quoting *Md. Dep’t of Hum. Res. v. Dep’t of Health & Hum. Servs.*, 763 F.2d 1441, 1446 (D.C. Cir. 1985)). Plaintiffs cannot claim

that Zing is “entitled” to targeted outreach to enrollees by CMS or to a legally unauthorized status change for Zing Michigan that is wholly contrary to the regulatory definition of “new [Medicare Advantage] plan.” To the contrary, Zing’s claim for relief plainly is compensatory.

In sum, Plaintiffs’ requested relief for Zing Michigan falls outside the scope of the APA’s waiver of sovereign immunity, going far beyond a request to “set aside” agency action, 5 U.S.C. § 706(2)(A). Plaintiffs’ claim therefore should be dismissed.

CONCLUSION

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

Dated: November 15, 2024
Washington, DC

Respectfully submitted,

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