UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MERCK & CO., INC. and MERCK SHARP & DOHME LLC, Plaintiffs, v. ROBERT F. KENNEDY, JR., in his official capacity as Secretary of the Department of Health and Human Services, *et al.*,[1] Defendants.	Civil Action No. 1:23-cv-01615-CKK

NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants respectfully notify the Court of the attached decision of the Second Circuit in *Boehringer Ingelheim Pharmaceuticals, Inc. v. U.S. Department of Health & Human Services*, No. 24-2092 (2d Cir. Aug. 7, 2025).

Boehringer involved a parallel challenge to the constitutionality of the Medicare Drug Price Negotiation Program. Like Plaintiffs here, Boehringer asserted that the Negotiation Program effects a physical taking without just compensation and runs afoul of the First Amendment. The Second Circuit rejected both arguments.

First, the Second Circuit explained that participation in Medicare is voluntary. Op. 25-30. And because "Boehringer voluntarily chose to participate in the Negotiation Program," the court concluded that "no taking has occurred." Op. 31. The court rejected Boehringer's reliance on *Horne v. USDA*, 576 U.S. 350, (2015), explaining that *Horne* "is materially different" because the plaintiffs there "challenged an actual seizure of their personal property (raisins) without

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Robert F. Kennedy, Jr., Secretary of Health and Human Services, is automatically substituted as a defendant in his official capacity for his predecessor, Xavier Becerra. Dr. Mehmet Oz, Administrator of the Centers for Medicare & Medicaid Services, is likewise automatically substituted as a defendant in his official capacity for his predecessor, Chiquita Brooks-Lasure.

compensation." Op. 33. That situation is not comparable to one in which the government merely "set[s] the price that it would pay for certain services in its commercial capacity." *Id.* The court confirmed that the government may establish the terms on which it pays for goods and emphasized that Medicare providers can still set the terms on which they offer their goods and services to other customers. Op. 33-35. This case, and *Horne*, therefore, call for "different constitutional analyses." Op. 35.

The Second Circuit then held that the Manufacturer Agreement does not impermissibly compel or coerce speech. The court explained that a manufacturer has a choice in whether to sign the agreement and is not compelled to do so. Op. 41-42; *see* Op. 28-30. And it further held that the Negotiation Program does not impose an unconstitutional condition on manufacturers' rights under the First Amendment. Op. 42-47. The court explained that "laws establishing conditions on spending under federally funded programs without implicating recipients' activity in the private market do not run afoul of the unconstitutional conditions doctrine." Op. 43. Because the Negotiation Program "is plainly related to the government's legitimate goal of controlling Medicare costs" and "applies only to sales of the selected drugs that occur within the four corners of Medicare," the Second Circuit held that the Negotiation Program does not violate the unconstitutional conditions doctrine. Op. 46-47.

All of this reasoning applies equally here.

DATE: August 11, 2025

Respectfully submitted,

ERIC J. HAMILTON
Deputy Assistant Attorney General
Civil Division

MICHELLE R. BENNETT
Assistant Branch Director
Federal Programs Branch

/s/ Stephen M. Pezzi
STEPHEN M. PEZZI (D.C. 995500)
Senior Trial Counsel
CASSANDRA M. SNYDER (D.C. 1671667)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW
Washington, DC 20005
Tel: (202) 305-8576
Email: stephen.pezzi@usdoj.gov

Counsel for Defendants