

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 22

MERCK & COMPANY,

Respondent,

and

UNITED STEEL WORKERS OF AMERICA  
LOCAL 4-575, AFL-CIO

Charging Party.

Cases 22-CA-090990

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**RESPONDENT MERCK & CO., INC.'S BRIEF IN SUPPORT OF ITS  
MOTION FOR SUMMARY JUDGMENT**

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## PRELIMINARY STATEMENT

Respondent Merck & Co., Inc. submits this brief in support of its motion for summary judgment pursuant to Section 102.24 of the Rules and Regulations of the National Labor Relations Board ("NLRB") to dismiss with prejudice the Complaint issued by Region 22 in this matter.

In its Complaint, the Region alleges the Company violated §§ 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 151, et seq. ("Act") when it allegedly refused to bargain regarding certain changes to the Company's medical benefits offered to retired employees. Although ignored by the Region in its Complaint, from the date the alleges changes were announced (March 2012) through the date the changes ultimately were implemented (January 1, 2013), the parties had in place a contract which provided the Company with the "sole" right to make the very changes at issue in the Region's Complaint. In light of the foregoing and as shown below, the Region's Complaint must be dismissed for several independent reasons.

First, the Union's Charge is untimely. The Region alleges in its Complaint that the Union was on notice of the Company's decision to make the alleged unilateral changes regarding retiree health benefits in or about March 2012. If the Company had a bargaining obligation regarding that subject, that announcement marked the beginning of the six-month statute of limitations under the Act regarding those changes. Since the Region alleges the Union filed its Charge on October 10, 2012 – i.e. seven months after the announcement – the Union's Charge is untimely and must be dismissed.

Second, there are no fact issues regarding the changes to retiree health benefits that warrant a hearing. It is undisputed that at the time the alleged changes were announced and

implemented, the parties had fully bargained the issue of retiree health benefits which provided the Company with the unilateral right to make the changes at issue here. The Region's decision to conveniently omit the critical fact that the parties reached a Memorandum of Agreement for a successor contract on April 19, 2012 ("2012 MOA"), is not sufficient to create a fact issue where none exists. The 2012 MOA establishes that the parties negotiated retiree health benefits, which negotiations resulted in the parties agreeing that the Union waived its right to bargain regarding changes to such benefits (including those that already had been announced).

Finally, not only did the Company bargain over the subject, the Union expressly acknowledged that fact. In executing the 2012 MOA, the Union expressly agreed that the Company "bargained in good faith and...met all collective bargaining obligations..." (emphasis added). While the foregoing establishes that the Union's allegations lack credibility, that acknowledgement also constitutes a settlement of any unfair labor practices that could have been raised in connection with the parties' negotiations for a successor contract, which settlement must be enforced. In sum, the Union expressly agreed to waive and settle the instant alleged unfair labor practice purportedly stemming from the negotiations for a successor contract and the Board must hold the Union to that settlement.

For all of the foregoing independent reasons, the Region's Complaint must be dismissed with prejudice as a matter of law.

#### **STATEMENT OF FACTS**

Respondent, Merck & Co. Inc. ("Company") is an employer engaged in the manufacture and sale of pharmaceuticals, with a site located in Rahway, New Jersey (Complaint, ¶ 2).<sup>1</sup>

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<sup>1</sup> For purposes of this motion only, the factual allegations set forth in the Region's Complaint will be assumed true. Nothing herein should be construed as a waiver of the Company's right to

Charging Party, United Steel Workers of America, Local 4-575, AFL-CIO ("Union"), is a labor organization representing for the purpose of collective bargaining employees of the Company in the following unit:

All hourly, research, production and maintenance employees employed at Respondent's Rahway, New Jersey facility, but excluding all Power Plant employees with the occupational classifications of Watch Engineer, Operating Engineer I, Operating Engineer II, Relief Engineer, or Starting Position; all other office, clerical, professional, timekeeping, technical (including all laboratory assistants), professional efficiency, and personnel employees, watchmen and guards, managerial employees and all supervisory employees with the authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action.

(Complaint, ¶¶ 5 & 7).

The Company and the Union have been parties to several successive collective bargaining agreements, including a collective bargaining agreement effective May 1, 2009 through April 30, 2012 (2009 CBA) (Complaint, ¶ 8). In the 2009 CBA, the parties had negotiated the following provision with respect to retiree health benefits:

Medical Benefits for Retirees. Active employees who retire with 10 or more years of credited service under the Pension Plan at or over age 55, and their eligible dependents, will immediately be eligible to be covered by Retiree Choice or its successor program(s) applicable to salaried retirees, *as the terms and conditions of such medical and dental benefits programs may be modified by the Company from time to time at its sole discretion.*

(2009-2012 Master Agreement, Art. III, Paragraph (O) (emphasis added), attached to the Certification of Lorin Bradley ("Bradley Cert."), as Exhibit A, filed simultaneously herewith).

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challenge the factual allegations set forth in the Region's Complaint in the event a hearing on this matter is conducted.

The Region alleges that in or about March 2012 (during the term of the 2009 CBA), the Company announced in a Notice to employees that it was changing effective January 1, 2013 (during the period covered by the 2012 MOA), the eligibility and subsidy paid for retiree health benefits provided to bargaining unit employees upon their retirement (Complaint, ¶ 11).

The Region alleges in its Complaint that on April 19, 2012, the Union requested to bargain with the Company regarding the retiree health benefit changes (Complaint, ¶ 12). That very date, the Company and the Union entered into the 2012 MOA for a successor contract effective May 1, 2012 through April 30, 2015 (Bradley Cert., Exhibit B). In the 2012 MOA, the parties agreed to continue all terms of the 2009 CBA, unless those terms were expressly modified by the 2012 MOA or other agreement of the parties (Id.). The waiver provision identified above contained in Article III, Paragraph (O) of the Master Agreement was not modified in the 2012 MOA or otherwise. Accordingly, the Union's agreement to waive any right to bargain regarding changes to retiree health benefits has been in effect continuously since at least May 1, 2009.

In entering into the 2012 MOA, the Union also expressly agreed that both parties had "bargained in good faith and have met all collective bargaining obligations...." (Id.).

On or about October 10, 2012, approximately seven months after the Company's March 2012 announcement of the changes at issue here, the Union filed its Unfair Labor Practice Charge alleging that "since on or about April 16, 2012<sup>2</sup>...[the Company] has refused to bargain over changes to the retiree health plan that will affect active employees upon retirement." The Region filed its Complaint on or about January 30, 2013, and the hearing currently is scheduled to begin on May 13, 2013.

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<sup>2</sup> The Company recognizes that the Union's Charge and the Region's Complaint allege that the purported refusal to bargain occurred on different dates.

While the Region's Complaint recognizes that the parties had a contract effective May 1, 2009 through April 30, 2012, it makes no mention of the MOA the parties entered into on April 19, or the express waiver contained therein.

## ARGUMENT

### POINT I

#### **SUMMARY JUDGMENT IS APPROPRIATE WHERE, AS HERE, THERE IS NO GENUINE ISSUE OF FACT REQUIRING A HEARING.**

Motions for Summary Judgment filed pursuant to Section 102.24 of the Board's Rules and Regulations, are analyzed under the federal standard. Manville Forest Products Corp., 269 NLRB 390 (1984) (applying Fed. R. Civ. P. 56(c) and granting Respondent's motion for summary judgment); Lake Charles Memorial Hosp., 240 NLRB 1330 (1979). Under Federal Rule of Civil Procedure 56(c), summary judgment is proper when "the pleadings, the discovery and disclosure materials, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In resolving a motion for summary judgment, the Board must determine "whether the evidence presents a sufficient disagreement to require submission to a[n Administrative Law Judge] or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, 477 U.S. 242, 251-52 (1986). More specifically, the Board must grant summary judgment against any party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case as to which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Anderson, 477 U.S. at 248. Properly applied, Rule 56 will "isolate and dispose of factually unsupported claims." Celotex, 477 U.S. at 323-24.

Here, summary judgment is appropriate because there exists no genuine issue of material fact. First, there is no factual dispute that the Union failed to file its Charge within the § 10(b) period. Further, while the Company disputes many of the factual allegations made by the Region in its Complaint, even if such allegations were true, in light of the clear contractual language and signed 2012 MOA, there is no genuine issue of fact that the Company fulfilled its bargaining obligation and had the right to make the alleged unilateral changes at issue. Accordingly, there is no issue of fact that will affect the outcome of this matter and the Region's Complaint must be dismissed as a matter of law with prejudice.

## POINT II

### **THE UNION'S CHARGE IS UNTIMELY AND MUST BE DISMISSED.**

In its Complaint, the Region alleges that that Company announced the changes to the retiree health benefits in March 2012 (Complaint, ¶ 11). The Region further alleges that the Union filed its Charge on October 10, 2012 – more than six months after the Union was put on notice of the Company's decision to make the alleged unilateral changes (Complaint, ¶ 1(a)).

It is well-settled that the six month statute of limitations under § 10(b) of the Act begins to run as of the date the charging party receives actual or constructive notice of the alleged unfair labor practice. See St. Barnabas Med. Ctr., 343 NLRB 1125, 1127 (2004) (recognizing that the statute of limitations begins upon the initial refusal to bargain); United States Postal Service Marina Mall Processing Ctr., 271 NLRB 397 (1984) (finding in the context of an alleged discriminatory discharge that it is the date of the alleged unlawful act and not the date its consequences will become effective that begins the six-month limitations period); see also Delaware State College v. Ricks, 449 U.S. 250 (1980) (holding that the statute of limitations begins to run as of the notice of the alleged unlawful decision rather than the date the decision

will take effect). Accordingly, since the Region alleges that the Union had actual notice of the Company's decision to take the alleged unilateral action at issue as of March 2012, its Charge filed on October 10, 2012, is untimely and must be dismissed.

### POINT III

#### **THE CONTRACTUAL LANGUAGE IN EFFECT AT ALL RELEVANT TIMES CONSTITUTES A CLEAR AND UNMISTAKABLE WAIVER OF THE UNION'S RIGHT TO BARGAIN REGARDING THE ALLEGED UNILATERAL CHANGES.**

Putting aside the fact that the Union's Charge is untimely, there are no disputed facts warranting a trial in this matter. Critically, there is no dispute that in March 2012 (when the alleged unilateral changes were announced), on April 16, 2012 (when the Union alleges in its Charge it demanded to bargain over the alleged unilateral changes), on April 19, 2012 (the date the Region alleges the Union demanded to bargain over the alleged unilateral changes), January 1, 2013 (when the alleged unilateral changes were implemented), and every day in between and since, the parties had in place a contract containing a clear and unmistakable waiver of the Union's right to bargain regarding changes to retiree health benefits. Accordingly, based on the language of the 2009 CBA and the 2012 MOA, the Region cannot establish that the Company refused to bargain in violation of the Act.

The Union and the Company have been parties to successor collective bargaining agreements for several years (Complaint, ¶ 8). Prior to the 2012 negotiations, the Company and the Union were parties to a collective bargaining agreement effective May 1, 2009 through April 30, 2012 (Id.). The 2009 CBA contained the following clear and unmistakable waiver of the Union's right to bargain regarding changes to retiree health benefits:

Medical Benefits for Retirees. Active employees who retire with 10 or more years of credited service under the Pension Plan at or

over age 55, and their eligible dependents, will immediately be eligible to be covered by Retiree Choice or its successor program(s) applicable to salaried retirees, as the terms and conditions of such medical and dental benefits programs may be modified by the Company from time to time at its sole discretion.

(Bradley Cert., Exh. A (emphasis added)). The Board has repeatedly found similar language to constitute a clear and unmistakable waiver of a right to bargain over certain subjects. See e.g., Quebecor World Mt. Morris II, LLC, 353 NLRB No. 1 (2008) (finding language that provides the employer with the "exclusive" right to make the changes at issue constitutes a "clear and unmistakable waiver"), pet. for enforcement dismissed 572 F.3d 342 (7<sup>th</sup> Cir. 2009);<sup>3</sup> Provena Hosp. d/b/a Provena St. Joseph Medical Center, 350 NLRB 808, 815-16 (2007) (same); Consolidated Foods Corp., 183 NLRB 832 (1970) (finding that language which provides the employer with the "sole" right to make the changes at issue constitutes a waiver of the union's right to bargain over the subject); see also Mary Thompson Hosp., 296 NLRB 1245, 1249 (1989) (finding language that "reserves" the employer's right to make the changes at issue constitutes a "clear and unmistakable waiver"), enfd. 943 F.2d 741 (1991). Since the foregoing clear and unmistakable waiver regarding retiree health benefits was in effect at all potentially relevant times, the Region cannot establish as a matter of law that the Company failed to bargain regarding that subject in violation of §8(a)(5) of the Act.

As noted, the Region alleges that the Union demanded to bargain over retiree health benefits on April 19, 2012 – the very day the parties executed the 2012 MOA, through which the Union agreed to continue to waive its right to bargain changes to retiree health benefits.

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<sup>3</sup> For purposes of this motion, Respondent has analyzed the contract language under the NLRB's waiver standard as the language at issue constitutes such a waiver. Respondent does not concede, however, that the NLRB's waiver standard is the proper standard to apply and expressly reserves the right to argue at any later proceeding that the NLRB or any reviewing court should apply the contract coverage analysis.

The Union alleges the purported demand to bargain occurred before the parties executed the 2012 MOA on April 19. Thus, the Union's agreement to the waiver language in the successor contract establishes unequivocally that the parties indeed bargained over the issue, and fully set forth the rights of each party – i.e., that the Union waived its right to bargain over that subject. Even if the Union sought to bargain the changes to the retiree health benefits prior to the execution of the MOA, such a proposal would be no different than any other proposal that is exchanged during the course of negotiations and ultimately is withdrawn. In short, the fact that the Union ultimately agreed to a waiver regarding retiree health benefits in the 2012 MOA demonstrates beyond doubt that in fact the issue was bargained. Thus, the Union is precluded from asserting that the Company refused to bargain over that subject during the course of the negotiations.

On the other hand, if the Region alleges that the purported demand to bargain was made on April 19 after the MOA was executed (which would be contrary to the allegations in the Union's Charge), the Company clearly had no obligation to bargain since the Union already agreed to waive any such rights in the successor agreement. Either way, no violation of the Act could have occurred.

In short, regardless of the version of "facts" the Region ultimately presents to the ALJ, the result must be the same – the dismissal of the Complaint with prejudice. Accordingly, summary judgment must be granted.

#### POINT IV

#### **THE UNION'S AGREEMENT THAT THE COMPANY BARGAINED IN GOOD FAITH AND FULFILLED ITS BARGAINING OBLIGATIONS MUST BE ENFORCED.**

While no set of facts could establish that the Company refused to bargain regarding the subject of retiree health benefits during the course of negotiations for a successor agreement, the Union must be precluded from pursuing any such claim based on their agreement that the Company bargained in good faith and met all collective bargaining obligations. As noted, in entering into the MOA, the parties agreed to the following:

the parties agree that they have bargained in good faith and have met all collective bargaining obligations...

(Bradley Cert., Exh. B). Such language constitutes a settlement of any allegations that the Union could have made that the Company had bargained in bad faith or otherwise failed to meet its bargaining obligations during negotiations. The Union must be held to that agreement. Septix Waste, Inc., 346 NLRB 494, 495 (2006) ("The Board's longstanding and well-established policy is to favor such private agreements because they advance the Act's purpose of encouraging industrial stability and the peaceful settlement of labor disputes...This policy of encouraging peaceful settlement of labor disputes can only be effective if the parties to agreements are not able to circumvent the agreements by later reviving those disputes."); see also Courier-Journal, 342 NLRB 1149, 1150 (2004). Here, in connection with the settlement of the contract, the Union expressly agreed that the Company bargained in good faith and met all of its collective bargaining obligations. The Union must not be allowed to ignore that agreement.

Accordingly, while the undisputed facts establish that the Company fully bargained with the Union regarding retiree health benefits, the Union's express agreement that the Company had

fulfilled all such obligations nonetheless must be enforced. Such an agreement provides an additional basis upon which the Region's Complaint must be dismissed with prejudice.

**CONCLUSION**

For each of the foregoing reasons, the Company's motion for summary judgment must be granted and the Region's Complaint be dismissed with prejudice.

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