UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MERCK, SHARP & DOHME CORP.

and **Case 06-CA-163815**

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 10-580, AFL-CIO, CLC

MERCK, SHARP & DOHME CORP.

and **Case 05-CA-168541**

LOCAL 94C, INTERNATIONAL CHEMICAL WORKERS COUNCIL OF THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO

MERCK, SHARP & DOHME CORP.

and **Case 22-CA-168483**

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 4-575, AFL-CIO, CLC

RESPONDENT MERCK, SHARP & DOHME CORPORATION'S REPLY TO THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO REOPEN THE RECORD TO ADDUCE ADDITIONAL EVIDENCE

Merck, Sharp & Dohme Corp. ("Merck" or "Respondent"), by and through their undersigned counsel, submits the following Reply to the General Counsel's Opposition to Respondent's Motion to Reopen the Record to Adduce Additional Evidence.

The General Counsel makes two primary arguments in opposition to Merck's Motion. First, the General Counsel argues that Merck's motion "does not meet the requirements of Sections 102.48(d)(1) and (2) of the National Labor Relations Board's Rules and Regulations" because the Board has not yet issued its decision. This argument is incorrect because it ignores the portion of Section 102.48(d)(2) which specifically contemplates the filing of a motion to reopen the record to adduce additional evidence prior to a Board decision. The rule states in relevant part: "Any motion pursuant to this section shall be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, **except that a motion for leave to adduce additional evidence shall be filed promptly** on discovery of that evidence." *See* 102.48(d)(2) (emphasis added).

The evidence at issue in Merck's motion—email correspondences from the General Counsel to Merck's counsel representing that the General Counsel was pursuing a narrow theory of violation specific to union activity at Merck's Rahway, New Jersey and West Point, Pennsylvania plants—became relevant only after the ALJ issued his decision finding a violation on a wholly different theory. As contemplated by Section 102.48(d)(2), Merck filled its motion at the earliest possible moment—contemporaneously with its exceptions to the ALJ's decision. Had Merck waited until after a decision issued, the General Counsel would no doubt argue Merck failed to file its motion "promptly." Furthermore, the Board regularly accepts motions to

reopen the record to adduce additional evidence filed contemporaneously with exceptions. *Atlantic Creosoting Co., Inc.*, 242 NLRB 192, fn. 1 (1979) (motion to reopen the record filed with exceptions); *see also Weis Markets, Inc.*, 325 NLRB 871, fn. 1 (1998) (granting motion to reopen the record filed prior to issuance of Board decision).

Second, the General Counsel argues that Merck's motion should be denied because its due process exception lacks merit. Merck addresses the validity of its due process exception in its Brief filed in support of its exceptions and incorporates those arguments as if set forth fully herein. *See* Brief in support of Exceptions, pg. 40-46.

For all the reasons set forth in Respondent's Motion to Reopen the Record to Adduce Additional Evidence, Respondent's Exceptions and Brief in support thereof, and this Reply, Respondent requests that the Board grant its motion.

Respectfully submitted,

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