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VIA EMAIL AND FEDEX

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Re: Cease and Desist Unlawful Retaliation and Discrimination Against Exempted Employees

Dear Ms. Zachary and Mr. Johnson:

We write on behalf of [REDACTED] and other similarly situated employees (“**Exempted Employees**”) of Merck Pharmaceuticals, Inc. (“**Merck**”) who sought either religious or medical accommodations to its mandatory COVID-19 vaccine policy (“**Policy**”). Although Merck granted many requests for medical or religious exemption, the manner in which it chose to accommodate its Exempted Employees constitutes unlawful discrimination and retaliation against employees who engaged in protected activities under Title VII of the Civil Rights Act of 1964¹ (“**Title VII**”), the Americans with Disabilities Act² (“**ADA**”), the Pennsylvania Human Relations Act³ (“**PHRA**”), and the New Jersey Law Against Discrimination⁴ (“**NJLAD**”). Additionally, the Accommodations Policy unlawfully regards Exempted Employees as disabled in violation of the ADA. We urge Merck to immediately rescind its testing and masking protocols and provide accommodations that are objectively reasonable, or face litigation.

I. BACKGROUND

In August of 2021, Merck instituted a mandatory COVID-19 vaccine policy for its employees. In instituting the Policy, and consistent with state and federal law, Merck stated it would allow for religious and medical exemptions. Alongside many other Merck employees, [REDACTED] sought a

¹ 42 U.S.C. §2000(e) *et seq.*

² 42 U.S.C. § 12112 *et seq.*

³ 43 P.S. § 951

⁴ N.J. Rev. Stat. §10:5-12.

medical and religious⁵ exemption. [REDACTED] submitted his exemption requests on September 30, 2021, the stated deadline.

[REDACTED] medical exemption request was accepted in November of 2021 and his religious exemption was granted in December of 2021, which was the same general timeframe that other Merck employees' exemption requests were either accepted or denied.

On January 4, 2022, immediately after granting a number of exemption requests, Merck instituted what it apparently characterizes as the "reasonable accommodations" of mandating weekly COVID testing and masking requirements for its Exempted Employees. Merck requires all Exempted Employees, even those possessing natural immunity, to test regularly for COVID-19, and requires invasive nasal swab PCR tests at its worksites rather than less intrusive tests. On information and belief, several Exempted Employees have had adverse reactions to the nasal swab PCR testing and have requested that Merck allow them to use an FDA approved, and less invasive, saliva test.

It is our understanding that Merck has repeatedly refused saliva testing for its worksites. Merck's justification for subjecting its Exempted Employees to invasive testing is apparently on grounds that "workplace safety" demands it. On March 7, 2022, at a time when, upon information and belief, its vaccinated employees were testing positive for COVID-19 at disproportionately higher rates than its unvaccinated Exempted Employees, Merck lifted all masking requirements for its vaccinated employees.

Merck has not required that its employees get a COVID-19 booster injection for any employees, even though boosters are recommended by the CDC in most circumstances. Despite the fact that its vaccinated, secular, and non-disabled employees undisputedly can, and are, contracting and spreading COVID-19, Merck does not subject them to regular testing or masking protocols.

To date, Merck has refused to recognize the natural immunity of Exempted Employees as grounds for relieving them from testing and masking mandates. On information and belief, many employees have requested exemption from the testing and masking requirements for religious and medical reasons. Many more have requested that their natural immunity be recognized as a reasonable accommodation. Merck has made no exceptions to its testing and masking policies for these individuals.

On information and belief, Merck closely tracks COVID-19 infections in its workforce. Consistent with recent data from across the world and in the United States, Merck's internal tracking system demonstrates that, in the last six months since instituting its testing protocols, its vaccinated employees are contracting COVID-19 at higher rates than its Exempted Employees. This fact is fatal to any argument that subjecting Exempted Employees to the onerous requirements of masking and invasive testing is for "workplace safety." To the extent Merck has not already taken steps to maintain and safeguard such records, the company should, in anticipation of litigation, take immediate steps to ensure that all records related to the infection rates of vaccinated and unvaccinated employees are carefully preserved. See attached Preservation of Evidence Letter.⁶

⁵ Exhibit 1, [REDACTED] Religious and Medical Exemption Requests.

⁶ Exhibit 2.

II. MERCK'S "SAFETY PROTOCOLS" CONSTITUTE UNLAWFUL RETALIATION

In context, it is apparent that Merck's punitive testing and masking policies are not "reasonable" accommodations, but rather constitute unlawful retaliation. These policies are directed exclusively at employees who have either proclaimed their religious beliefs or who have demonstrated serious medical issues. The testing and masking requirements were instituted in close temporal proximity to participation in protected activities (seeking medical and religious exemptions). Consequently, Merck has engaged in unlawful retaliation under Title VII, the ADA, the PHRA, and the NJLAD.

Merck is undoubtedly familiar with the applicable legal standards. We write to highlight the issues we believe will be relevant in the event these matters proceed to litigation, and to explain why Merck must revise its current accommodations process to provide objectively reasonable, non-retaliatory accommodations to Exempted Employees by, for example, recognizing natural immunity, permitting saliva testing as alternative to nasal testing at its worksites, and dropping masking requirements.

To establish a *prima facie* case of retaliation under any of the three statutes,⁷ an employee must show: (1) protected employee activity; (2) a materially adverse action by the employer either after or contemporaneous with the employee's protected activity; and (3) a causal connection between the employee's protected activity and the employer's adverse action.⁸

If the plaintiff makes these showings, the burden of production of evidence shifts to the employer to present a legitimate, non-retaliatory reason for having taken the adverse action.⁹ If the employer advances such a reason, the burden shifts back to the plaintiff to demonstrate that "the employer's proffered explanation was false, and that retaliation was the real reason for the adverse employment action."¹⁰

A. Exempted Employees Will Satisfy a *Prima Facie* Case of Retaliation

i. Protected Activity

Merck's Exempted Employees will establish a *prima facie* case of retaliation. They satisfy the first element of their retaliation claim because all engaged in the protected activities of seeking

⁷ The Third Circuit analyzes retaliation claims under Title VII the same as for retaliation claims under the ADA. *See Krouse v. Am. Sterilizer Co.*, 126 F.3d 494, 500 (3d Cir. 1997) ("We begin our analysis by examining the framework for deciding a claim of unlawful retaliation under the ADA. The ADA retaliation provision, 42 U.S.C. § 12203(a), states that '[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge ... under [the ADA]. This provision is similar to Title VII's prohibition of retaliation. *See* 42 U.S.C. § 2000e-3(a). Accordingly, we analyze ADA retaliation claims under the same framework we employ for retaliation claims arising under Title VII.").

⁸ *Id.*; *see also Craig v. Suburban Cablevision, Inc.*, 140 N.J. 623, 629-30 (1995) ("To establish a *prima facie* case of discriminatory retaliation [under the NJLAD], plaintiffs must demonstrate that: (1) they engaged in a protected activity known by the employer; (2) thereafter their employer unlawfully retaliated against them; and (3) their participation in the protected activity caused the retaliation.").

⁹ *Daniels v. Sch. Dist. of Phila.*, 776 F.3d 181, 193 (3d Cir. 2015).

¹⁰ *Id.*

religious and/or medical exemptions.¹¹

ii. **Materially Adverse Action**

Regarding the second element, Merck took materially adverse action against its Exempted Employees after they sought exemption. In the context of retaliation claims, “materially adverse action” means it “well might have dissuaded a reasonable worker” from engaging in protected activities.¹² This standard is objective in that it asks what the “reasonable employee” would believe. *Id.* And, notably, it involves a fact-intensive inquiry in that the “significance of any given act of retaliation will often depend upon the particular circumstances. Context matters.” *Id.* at 69.

The significance of natural immunity will undoubtedly be an important factor in determining whether Merck’s targeted safety protocols constitute materially adverse action against Exempted Employees. Considering that the overwhelming majority of Merck’s Exempted Employees possess natural immunity, including ██████████ the targeted testing protocols are punitive, not preventative, and would dissuade reasonable employees from engaging in protected activity. While Merck signals the virtue of its policies as “protecting the workforce,” that assertion will be tested against reality. The reality is that natural immunity is demonstrating superior efficacy to vaccine elicited immunity, and the overwhelming majority of Merck’s Exempted Employees possess natural immunity. A recent study from the New England Journal of Medicine determined no “discernable differences” in protection against symptomatic infection were detected when comparing immunization acquired through previous infection, vaccination (at least 3 doses), and hybrid immunity.¹³ In fact, as early as mid-2021, natural immunity was exhibiting a stronger immune response than vaccine-elicited immunity.¹⁴ Finally, the COVID vaccines are increasingly demonstrating **no efficacy**¹⁵ and even **negative efficacy**¹⁶ against the dominant Omicron variant. Merck is undoubtedly aware of these facts as its own COVID-19 employee tracking data demonstrates that the overwhelming majority of its employees who miss work due to COVID-19 infection are fully vaccinated.

¹¹ Seeking exemption is protected activity. *See, e.g., Richardson v. Dougherty Cnty., Ga.*, 185 Fed. App’x 785, 790 (11th Cir. 2006) (treating a request for religious accommodation as protected expression)); *see also Creusere v. Bd. of Educ. of City Sch. Dist. of City of Cincinnati*, 88 Fed. App’x 813, 821 (6th Cir. 2003) (“[Plaintiff] was clearly engaged in a protected activity by requesting religious accommodation ...”).

¹² *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006).

¹³ Exhibit 3, Altarawneh, et al., *Effects of Previous Infection and Vaccination on Symptomatic Omicron Infections*, New England Journal of Medicine (June 2022).

¹⁴ *See CDC Morbidity and Mortality Weekly Report: COVID-19 Cases and Hospitalizations by COVID-19 Vaccination Status and Previous COVID-19 Diagnosis — California and New York, May–November 2021* (stating that by early October 2021, persons with natural immunity “had lower case rates than persons who were vaccinated alone”), available at <https://www.cdc.gov/mmwr/volumes/71/wr/mm7104e1.htm>.

¹⁵ *See, e.g., United Kingdom Health Security Agency Vaccine Surveillance Report*, Week 12, 2022 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1063023/Vaccine-surveillance-report-week-12.pdf (demonstrating that vaccine-elicited immunity demonstrates **no efficacy** against the Omicron variant; notably, for the 60-69 age group that have received boosters, the vaccines demonstrated **negative 369% efficacy**).

¹⁶ *See, e.g., Effectiveness of COVID-19 vaccines against Omicron or Delta symptomatic infection and severe outcomes available at <https://www.medrxiv.org/content/10.1101/2021.12.30.21268565v2>* (demonstrating **negative efficacy** for vaccine-based immunity); *see also Danish Cohort Study, available at <https://www.medrxiv.org/content/10.1101/2021.12.20.21267966v2>*. (demonstrating the same).

These findings should not be surprising given that vaccines, by design, attempt to emulate the immunity created by a natural infection.¹⁷ Nonetheless, vaccines never achieve the same level of protection afforded by natural infection from a virus.¹⁸ They universally confer inferior immunity to having had the actual virus, and even the best vaccines do not confer immunity to all recipients.¹⁹ In those who do obtain simulated immunity from vaccination, the immunity created wanes over time,²⁰ as has been repeatedly demonstrated in the case of the COVID-19 vaccines. Thus, considering the established science on natural immunity and Merck’s own records, which demonstrates that vaccinated employees are an equal and likely greater contagion threat than their naturally immune colleagues, the company’s “workplace safety” justification is highly suspect, at best.

It is patently obvious that requiring employees, even those with natural immunity, to undergo painful and possibly dangerous testing on a weekly basis can and does dissuade a reasonable employee from engaging in protected activities. Because they are thrust deep into the nasal cavity, nasal swab tests are notorious for causing extreme discomfort and side effects. Known side effects of these tests include nosebleeds, severe headaches, and, in extreme cases, causing leaks of cerebrospinal fluid.²¹ As further evidence that Merck’s testing policy is punitive rather than preventative, Merck has refused to allow Exempted Employees to utilize saliva tests provided at worksites as an alternative nasal swab testing. There is no clinical benefit in terms of accuracy nor an economic benefit to support a demand for nasopharyngeal swab testing as compared to saliva testing.²² We submit that Merck’s insistence that Exempted Employees endure violations of bodily autonomy for no good reason is a clear indication of the company’s retaliatory intent.

Further, despite vaccine inefficacy and the realities of natural immunity, Merck targeted its Exempted Employees for further shame and exclusion by making them wear masks, while permitting secular and non-disabled employees to roam mask free, as of March 7, 2022 (even though vaccinated

¹⁷ See Plotkin’s Vaccines, 7th Edition, at Section 2.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Kalpana Gupta, et al., *Adverse effects of nasopharyngeal swabs: Three-dimensional printed versus commercial swabs*, Infection Control & Hospital Epidemiology, Volume 42, Issue 5, Cambridge University (May 2021) <https://doi.org/10.1017/ice.2020.297> (Side effects of nasopharyngeal swabs reported include epistaxis [nosebleeds], headaches, earaches, and rhinorrhea [leaking of nasal fluid]); See e.g., Christopher Blake Sullivan, MD, et al., *Cerebrospinal Fluid Leak After Nasal Swab Testing for Coronavirus Disease 2019*, JAMA Otolaryngology – Head & Neck Surgery (Oct. 1, 2020) <https://jamanetwork.com/journals/jamaotolaryngology/fullarticle/2771362> (40-year-old woman leaking cerebrospinal fluid after nasopharyngeal swab from COVID-19 nasal PCR test); see also Sandeep G. Mistry, et al., *The COVID swab and the skull base – how to stay safe*, Medical Journal of Australia (Dec. 4, 2020) <https://www.mja.com.au/journal/2020/covid-swab-and-skull-base-how-stay-safe> (discussing the risk and potential for skull-based injuries from improper sampling techniques by unskilled administrators of nasopharyngeal swab tests).

²² See Butler-Laporte, Guillaume, et al., *Comparison of Saliva and Nasopharyngeal Swab Nucleic Acid Amplification Testing for Detection of SARS-CoV-2*, JAMA Intern. Med. 2021 (Jan. 15, 2021) <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2775397> (finding COVID-19 saliva tests to be diagnostically comparable in accuracy to that of nasal swab testing); Lisboa Bastos, Mayara, et al., *The Sensitivity and Costs of Testing for SARS-CoV-2 Infection With Saliva Versus Nasopharyngeal Swabs*, American College of Physicians, 174 Ann. Intern. Med 582 (Jan. 12, 2021) <https://www.acpjournals.org/doi/10.7326/M20-6569> (“our analysis suggests that the added cost (\$8093) of detecting an additional SARS-CoV-2 infection with nasopharyngeal swabs could be used to collect more than 3900 saliva samples.”).

employees were increasingly demonstrating greater contagion threats at this time). These targeted “safety protocols,” consequently, are inauthentic and would discourage a reasonable employee from engaging in protected activities under Title VII, the ADA, and the NJLAD.

iii. Causal Connection

Merck’s Exempted Employees will satisfy the third element of a retaliation claim because Merck instituted its targeted, irrational safety protocols soon after its employees engaged in protected activities. “The requisite causal connection can be established by showing temporal proximity between the Title VII protected activity and the adverse action.”²³ Notably, the causation analysis “is highly context-specific.”²⁴

The relevant time frame between protected activity and retaliatory action is not even three months (September 30, 2021, exemption submission deadline to the January 4, 2022, testing requirement); Merck terminated a significant number of its employees who sought exemption in December of 2021 and January of 2022, and instituted its targeted testing protocols just weeks, and in some cases days, after finalizing its exemption review and approvals. Exempted employees were in employment limbo, subject to termination, for the three months between submitting an exemption request and receiving final approval. They engaged in the ongoing protected activity of seeking accommodation for the duration of these three months. Upon receiving a final approval, they were immediately thereafter subjected to Merck’s painful and groundless testing protocols.

B. Non-Retaliatory Justifications and Pretext

Any non-retaliatory reason asserted by Merck will be shown as pretextual. Once Exempted Employees satisfy a *prima facie* case for discrimination, the burden of production of evidence shifts to Merck “to present a legitimate, non-retaliatory reason for having taken the adverse action.”²⁵ We presume Merck will assert an “employee safety” justification, at which point the burden shifts to Exempted Employees to show that Merck’s “proffered explanation was false, and that retaliation was the real reason for the adverse employment action.”²⁶

Exempted employees will be able to show pretext. At a minimum, because of the strength and relative durability of natural immunity, genuine issues of material fact plainly exist regarding whether Merck’s targeted safety protocols were based on retaliation, rather than safety. We are confident that, in the event Merck persists with its punitive masking and testing policies, and these cases proceed to litigation, additional documentation will arise further substantiating Merck’s retaliatory intent.

III. THE ENHANCED SAFETY PROTOCOLS TARGETING EXEMPTED EMPLOYEES HAVE CREATED A HOSTILE WORK ENVIRONMENT

²³ *Hallman v. PPL Corp.*, Civil Action No. 11-cv-02834, at *16 (E.D. Pa. Jan. 31, 2014).

²⁴ *Kachmar v. Sungard Data Systems*, 109 F.3d 173, 178 (3d Cir. 1997).

²⁵ *Daniels v. Sch. Dist. of Phila.*, 776 F.3d 181, 193 (3d Cir. 2015).

²⁶ *Id.*

Exempted Employees will be able to establish that Merck’s safety protocols have created a hostile work environment. For hostile work environment claims based on religion,²⁷ a plaintiff must demonstrate five elements: “(1) the employee[] suffered intentional discrimination because of [religion]; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same [religion] in that position; and (5) the existence of respondeat superior liability.”²⁸

A. Intentional Discrimination

For many of the same reasons that Merck’s targeted testing policies are retaliatory, they also demonstrate intentional discrimination. Regarding the first element for a hostile work claim, the Third Circuit does not require a factfinder to analyze the mind of the alleged harasser and uncover discriminatory intent with absolute certainty. “Rather, it merely requires a showing that the offender’s behavior was . . . based on a protected category . . . and was sufficiently severe or pervasive to alter the conditions of the victim’s employment.”²⁹ Here, discrimination is clearly implied because vaccinated employees undisputedly can (and are) consistently contracting and spreading the SAR-COV-2, and, as evidenced by Merck’s own records, they are contracting the virus at disproportionately higher rates. Moreover, Merck has not mandated COVID-19 booster injections, even though the CDC recommends them. Thus, Merck’s “workplace safety” rationale is inauthentic and quite obviously provides strong evidence of intentional religious discrimination. In short, subjecting Exempted Employees to groundless, painful, and invasive weekly testing and submitting them to irrational and asymmetric daily masking protocols is dehumanizing to a sufficient degree to alter the terms of their employment.

B. The Discrimination is Sufficiently Severe and Pervasive

Because Exempted Employees are subjected to daily masking and painful, invasive nasal swab testing on a weekly basis, the discrimination is also sufficiently severe and pervasive. The severity of weekly nasal swab testing is magnified by the fact that safer and less painful alternatives exist, which Merck has refused to allow at its worksites. Further, in addition to being irrational, prolonged mask wearing leads to what has become known as “mask fatigue.” The practice also produces other adverse health effects. The emergence of mask fatigue attributed to extended mask wearing has been described as “the lack of energy that accompanies, and/or follows prolonged wearing of a mask.”³⁰ Aspects of mask fatigue include the following:

Pressure/pain over ears, cheeks, and nose; skin breakdown; aggravation of acne; itching; contact dermatitis; voice fatigue; laryngitis; sore throat; respiratory compromise; Hypoxia; Hypercapnia; increased work of breathing; dizziness; headache; irritability; physical exhaustion; decreased concentration/work efficiency; confusion and

²⁷A similar analysis applies under the ADA for employees possessing qualifying disabilities. *See, e.g., Walton v. Mental Health Ass’n*, 168 F.3d 661, 667 (3d Cir. 1999).

²⁸ *Kunin v. Sears Roebuck & Co.*, 175 F.3d 289, 293 (3d Cir. 1999)

²⁹ *Abramson v. William Paterson Coll.*, 260 F.3d 265, 278 (3d Cir. 2001).

³⁰ Kalra, Sanjay, *et al.*, *Mask Fatigue*, J. Pak. Med. Assoc. (Dec. 2020), available at <https://pubmed.ncbi.nlm.nih.gov/33475571/>.

disorientation; breathlessness; reduced fluid and food intake; chronic health effects on renal and metabolic functions; aggravation of anxiety, depression, and feeling of impending doom; claustrophobia; impaired social interaction/recognition; and maskophobia.³¹

A study published by the International Journal of Environmental Research and Public Health discussed Mask-Induced Exhaustion Syndrome (“MIES”).³² The researchers in this study were able to demonstrate a statistically significant correlation in the quantitative analysis between the negative side effects of blood-oxygen depletion and fatigue in mask wearers.³³ Additionally, the study found increased carbon dioxide blood content, a drop in blood oxygen saturation, increased heart rate, increased respiratory rate, increased pulse rate.³⁴ Considering these factors, the targeted testing and masking protocols are sufficiently severe and pervasive.

C. Detrimental Impacts and Objective “Reasonable Person” of Same Religion Standard

A jury could easily find the targeted safety protocols detrimentally impacted all Exempted Employees, including ██████████. They have been mocked, ridiculed, and purposefully excluded by their co-workers and supervisors from various activities. For these employees, the shaming and isolation has been some of the most difficult and painful experience of their careers. Further, because of the irrationality, severity, and continual nature of this mistreatment, a reasonable person with a disability or one of any religion would be detrimentally impacted by Merck’s targeted safety protocols.

D. Respondeat Superior

Regarding the final element, a basis for *respondeat superior* liability, the masking and testing policies originated from Merck’s corporate headquarters. Exempted employees who sought clarification from their managers on the policies were repeatedly told in effect that “this is coming from corporate.” For the foregoing reasons, many Merck employees, including ██████████ will be able to establish a *prima facie* case for a hostile work environment that Merck will be unable to rebut.

IV. MERCK’S ACCOMMODATIONS POLICY INSTITUTES UNLAWFUL “REGARDED AS” DISABILITY-BASED DISCRIMINATION

In addition to being unlawfully retaliatory, Merck’s Accommodations Policy engages in “regarded as” disability-based discrimination under the ADA. Infectious diseases, such as human immunodeficiency virus (“AIDS”) can be qualifying disabilities under the ADA, even if the carrier

³¹ *Id.* (emphasis added.)

³² Kisielinski, Kai, *et al.*, *Is a Mask That Covers the Mouth and Nose Free from Undesirable Side Effects in Everyday Use and Free of Potential Hazards?*, Int. J. Environ. Res. Public Health (Apr. 20, 2021), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8072811/>.

³³ *Id.*

³⁴ *Id.*

is asymptomatic.³⁵ COVID-19 can be a qualifying disability under the ADA.³⁶ In the context of the Rehabilitation Act,³⁷ employers are prohibited from discriminating against employees who it believes might soon be contagious.³⁸

In this regard, Congress expanded the definition of “handicapped individual” so as to preclude discrimination against a “person who has a record of, or is regarded as having, an impairment [but who] may at present have no actual incapacity at all.”³⁹ To treat individuals, like ██████████ who does not presently have COVID-19, is to unlawfully regard them as having a disability. Excluding individuals with perceived contagious diseases from the protections of the Rehabilitation Act and the ADA⁴⁰ “would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were ‘otherwise qualified.’ Rather, they would be vulnerable to discrimination on the basis of mythology -- precisely the type of injury Congress sought to prevent.”⁴¹

Since instituting its irrational testing policies in January of 2022, Merck has established a systematic policy of disability-based discrimination through regarding its Exempted Employees as if they were perpetually infected with COVID-19.⁴² Merck has also behaved as though the perceived disability is not transitory or minor.

The ADA prohibits employers from discriminating against employees with perceived disabilities.⁴³ The disparate treatment of Exempted Employees through asymmetrical safety protocols demonstrates that Merck clearly regards its Exempted Employees as having “a physical impairment”⁴⁴ that substantially limits their ability to work. By requiring its Exempted Employees to mask and test for an extended period of time, while exempting its vaccinated employees, Merck

³⁵ *Bragdon v. Abbott*, 524 U.S. 624, 628, 118 S. Ct. 2196, 2200 (1998).

³⁶ See *Brown v. Roanoke Rehab. & Healthcare Ctr.*, No. 3:21-CV-00590-RAH, 2022 U.S. Dist. LEXIS 30548, at *14 (M.D. Ala. Feb. 22, 2022); see also *Alvarado v. ValCap Grp., LLC*, Civil Action No. 3:21-CV-1830-D, 2022 U.S. Dist. LEXIS 58010, at *9 (N.D. Tex. Mar. 30, 2022).

³⁷ 29 U.S.C.S. § 794.

³⁸ *Sch. Bd. of Nassau Cnty., Fla. v. Arline*, 480 U.S. 273, 284–86 (1987).

³⁹ *Id.* at 279.

⁴⁰ See *Williams v. Philadelphia Hous. Auth. Police Dep’t*, 380 F.3d 751, 775 (3d Cir. 2004) (“Given that the “regarded as” sections of both [the Rehabilitation Act and the ADA] play a virtually identical role in the statutory scheme, and the well-established rule that the ADA must be read “to grant at least as much protection as provided by ... the Rehabilitation Act.”).

⁴¹ *Nassau*, 480 U.S. 273, at 285-86.

⁴² See 29 C.F.R. 1630.2(g)(1)(iii) (defining disability to include “[b]eing regarded as having such an impairment” and being “subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not ‘transitory and minor’”).

⁴³ See 42 U.S.C. 12102(1) (Disability is defined as “being regarded as having such an impairment [that substantially limits one or more major life activities]).”

⁴⁴ See 29 C.F.R. 1630.2(h) (defining “physical or mental impairment” as “(1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as [the]. . . **respiratory . . . [and] immune [systems]. . .**”) (emphasis added).

has signaled it regards its unvaccinated employees as perpetually infected with COVID-19 and, therefore, perceives them as disabled under the ADA.

Disparate treatment of an employee based on a perceived medical condition constitutes unlawful discrimination unless the employer can demonstrate through objective evidence that the individual poses a “direct threat” to the workplace⁴⁵ “that cannot be eliminated or reduced by reasonable accommodation.”⁴⁶ Under the applicable standards, Merck cannot show that the Exempted Employees it regards as disabled are a direct threat to the workforce without similarly imposing these requirements on vaccinated employees.

The ADA defines a “direct threat” as:

a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a “direct threat” shall be **based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job.** This assessment shall be based on a **reasonable medical judgment** that relies on **the most current medical knowledge and/or on the best available objective evidence.** In determining whether an individual would pose a direct threat, the factors to be considered include: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm.⁴⁷

Further:

It is unlawful for a covered entity to use standards, criteria, or methods of administration, which are not **job-related and consistent with business necessity**, and: (a) That have the effect of discriminating on the basis of disability; or (b) That perpetuate the discrimination of others who are subject to common administrative control.⁴⁸

Merck’s uniform treatment of all Exempted Employees as a direct threat *per se* fails to provide the required individualized assessment of the employee’s situation, particularly considering that most all of the employees Merck regards as disabled possess natural immunity, which has been recognized by health authorities across the world as providing strong and durable protection against COVID-19. Moreover, its failure to acknowledge the reality of its own internal numbers on vaccinated employees, who are contracting COVID-19 at disproportionately higher rates, only further undermines any assertion of legitimate business necessity for its targeted safety protocols.

⁴⁵ 29 C.F.R. §1630.2(r).

⁴⁶ *Kinder Morgan Bulk Terminals, Inc. v. United Steel*, 9 F. Supp. 3d 507, 516 (E.D. Pa. 2014).

⁴⁷ *Id.* (emphasis added).

⁴⁸ 29 C.F.R. §1630.7 (emphasis added).

Moreover, the Accommodations Policy runs contrary to “reasonable medical judgment that **relies on the most current medical knowledge** and/or on the **best available objective evidence**”⁴⁹ as required under the ADA. As early as July 2021, the CDC Director, Dr. Rochelle P. Walensky admitted that the vaccinated had similarly high viral loads of SARS-CoV-2 as the unvaccinated and thus could still contract and spread the Delta variant.⁵⁰ A study put forth by the CDC and the Wisconsin Department of Health services in August 2021 affirmed this statement, indicating that the vaccinated had a 5% higher viral load than the unvaccinated and were not only just as likely to transmit the virus as the unvaccinated, but posed a greater contagion risk due to the increased likelihood of asymptomatic infection.⁵¹

It must also be re-emphasized that the available COVID-19 vaccines are ineffective against the dominant Omicron variant (which was dominant at the time Merck instituted targeted testing protocols), which is clearly evidenced by Merck’s own internal testing data. This demonstrated ineffectiveness negates any assertion of a legitimate business purpose for Merck’s targeted safety protocols.

The currently available vaccines were engineered from an isolated SARS-CoV-2 sample collected from an infected patient in Wuhan, China, on December 26, 2020 (Wuhan-Hu-1).⁵² Consequently, the genetic code upon which both the mRNA and viral vector vaccines were developed was that of the parental strain, which has been replaced by the Alpha, Beta, Gamma, Delta, and now the Omicron variant of the virus.⁵³ Each variant of the virus has become more genetically distinct from the original strain, and, consequently, has substantially weakened vaccine efficacy against each new variant, so much so that the available vaccines are increasingly demonstrating **no efficacy**⁵⁴ or even **negative efficacy**⁵⁵ against the most recent variants.

⁴⁹ 29 C.F.R. §1630.2(r) (emphasis added).

⁵⁰ *Statement from CDC Director Rochelle P. Walensky, MD, MPH on Today’s MMWR*, CDC News Room (July 30, 2021) available at <https://www.cdc.gov/media/releases/2021/s0730-mmwr-covid-19.html> [<https://perma.cc/VR5V-E67A>] (“Today, some of those data were published in CDC’s Morbidity and Mortality Weekly Report (MMWR), demonstrating that Delta infection resulted in similarly high SARS-CoV-2 viral loads in vaccinated and unvaccinated people. High viral loads suggest an increased risk of transmission and raised concern that, unlike with other variants, vaccinated people infected with Delta can transmit the virus.”).

⁵¹ See <https://www.medrxiv.org/content/10.1101/2021.07.31.21261387v4.full.pdf>.

⁵² Jackson, L. *et al.*, *An mRNA Vaccine against SARS-CoV-2 – Preliminary Report*, *N Engl J Med* (Nov. 12, 2020), available at https://www.nejm.org/doi/10.1056/NEJMoa2022483?url_ver=Z39.88-2003&rfr_id=ori:rid:crossref.org&rfr_dat=cr_pub%20%20pubmed.

⁵³ See <https://www.who.int/en/activities/tracking-SARS-CoV-2-variants/> (discussing evolution of COVID variants).

⁵⁴ See, e.g., *United Kingdom Health Security Agency Vaccine Surveillance Report*, Week 12, 2022 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1063023/Vaccine-surveillance-report-week-12.pdf (demonstrating that vaccine-elicited immunity demonstrates **no efficacy** against the Omicron variant; notably, for the 60-69 age group that have received boosters, the vaccines are demonstrating **negative 369% efficacy**).

⁵⁵ See, e.g., *Effectiveness of COVID-19 vaccines against Omicron or Delta symptomatic infection and severe outcomes* available at <https://www.medrxiv.org/content/10.1101/2021.12.30.21268565v2> (demonstrating **negative efficacy** for vaccine-based immunity); see also *Danish Cohort Study*, available at <https://www.medrxiv.org/content/10.1101/2021.12.20.21267966v2>. (demonstrating the same).

The current science does not support a finding that Exempted Employees pose any more of a threat to the workplace than do their vaccinated colleagues and does not justify discriminatory application of testing and masking requirements to only those Exempted Employees. Consequently, Merck has engaged and continues to engage in unlawful discrimination under the ADA. Regardless of whether Merck possesses a duty to accommodate the employees it regards as disabled, Merck will be exposed to comprehensive liability under the ADA if it takes any adverse employment action, to include maintaining a hostile work environment, against any of its unvaccinated employees it has regarded as disabled.

V. CONCLUSION

Merck's Accommodations Policy is a clumsy, thinly veiled attempt to discriminate and retaliate against its religious employees as well as those possessing qualifying disabilities. We urge Merck to engage in the interactive process with its Exempted Employees and grant them accommodations that are objectively reasonable, rather than retaliatory. For a large majority of Exempted Employees who possess natural immunity, this would only require that Merck recognize the scientific reality, established over hundreds of years, that natural immunity is at least equivalent to vaccine-elicited immunity.

On behalf of [REDACTED] and other Exempted Employees, we request a response by **5 PM EST on Monday, July 4, 2022**. Title VII, the ADA, the PHRA, and the NJLAD provides various damages for employment discrimination, including replacement of lost wages, attorney fees, compensatory damages for emotional distress, medical issues, and other expenses resulting from a discriminatory decision. Significantly, to the extent discrimination is willful, as the record supports here, punitive damages are available.

[REDACTED] and other Exempted Employees fully intend to pursue all these remedies should Merck persist in its unlawful actions. Nothing stated or not stated here shall constitute a waiver of any claims, rights, causes of action, defenses, positions, or remedies possessed by [REDACTED] or other Exempted Employees. Each of the foregoing is expressly reserved. The Firm's contact regarding this matter is Walker D. Moller, Esq. at wmoller@sirillp.com.

Sincerely,



Debra Gambella, Esq.
Walker D. Moller, Esq.
Catherine Cline, Esq.
Laura M. Carroll, Esq.

cc:

[REDACTED]

Enclosures