

**Congress of the United States**  
**Washington, DC 20510**

December 21, 2017

Hon. William Emanuel  
Member  
National Labor Relations Board  
1015 Half Street, S.E.  
Washington, D.C. 20570

Dear Member Emanuel:

We write with regard to your participation in the National Labor Relations Board's (Board) decision in *Hy-Brand Industrial Contractors (Hy-Brand)*<sup>1</sup> and the Board's motions for remand in *Browning-Ferris Industries (BFI)*<sup>2</sup> and *Volkswagen Group of America (Volkswagen)*.<sup>3</sup> Last week, you provided a determinative vote in *Hy-Brand* to overturn the Board's previous decision in *BFI*, which held that companies with indirect or reserved control of the terms and conditions of employment could be a "joint employer" under the National Labor Relations Act (NLRA).<sup>4</sup>

The *Hy-Brand* decision represents a low-point for the Board. The Board broke with its long established practice by failing to invite briefs from the public regarding this significant reversal. The Board took this step although the *BFI* decision itself remains under review by a federal court of appeals. The Board took this action although no party in *Hy-Brand* sought such a step, and did so in a case involving a *single* employer that could have been easily resolved on the facts. This decision by you and the two other Republican Members of the Board is a rushed and ill-considered action that will have long-term repercussions for the Board's reputation as a neutral administrator of the NLRA. This headlong rush to nullify the *BFI* decision without fair process or consideration of the collateral impact will strip away the NLRA's protections from millions of workers.

Additionally, we note that Littler Mendelson, the law firm where you were a shareholder until joining the Board less than three months ago, represented one of the parties in both *BFI* and *Volkswagen* when they were before the Board.

Accordingly, we request that you provide us the following information by January 12, 2018:

1. When were you assigned to the *Hy-Brand* case?
2. Were you on the original three-member panel in *Hy-Brand*?

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<sup>1</sup> 365 NLRB No. 156 (2017).

<sup>2</sup> *Browning Ferris Indus. v. NLRB*, Nos. 16-1028, 16-1063, 16-1064 (D.C. Cir.) (motion for remand filed Dec. 19, 2017).

<sup>3</sup> *Volkswagen Grp. Of Am. v. NLRB*, Nos. 16-1309, 16-1353 (D.C. Cir.) (motion for remand filed Dec. 19, 2017).

<sup>4</sup> 362 NLRB No. 186 (2015).

3. Did you request to participate in *Hy-Brand*?
4. Given that the parties in *Hy-Brand* did not brief the question of whether the *BFI* joint employer standard should be revisited, what briefs or other materials did you review in deciding *Hy-Brand*?
5. Did the Board hold a vote to determine whether to invite briefs, arguments, or other information from the public regarding consideration of overturning the holding in *BFI*?
6. If so, please provide any record, vote tally sheet, meeting minutes, and any other document concerning any such vote among Board members.
7. Please describe in full, and provide any documents relating to, your participation in the *Hy-Brand* case.
8. Please provide any communications that occurred after January 19, 2017 between you, or a member of your Board staff, and any attorney or staff member of Littler Mendelson that represented a party in the *BFI* matter.
9. Please provide any communications that occurred after January 19, 2017 between you, or a member of your office, and any person or entity not employed by the Board, concerning *BFI* or any legal issue involved in *BFI*.
10. Please provide any communications that occurred after January 19, 2017 between you, or a member of your staff, and any attorney or staff member of Littler Mendelson that represented a party in the *Volkswagen* matter.
11. Please provide any communications that occurred after January 19, 2017 between you, or a member of your office, and any person or entity not employed by the Board, concerning *Volkswagen* or any legal issue involved in *Volkswagen*.
12. Given that your former partners at Littler Mendelson P.C. represented a party in *BFI* before the Board, did you recuse yourself from the Board's decision to move to remand the *BFI* case from the U.S. Court of Appeals for the D.C. Circuit back to the Board? If not, why not?
13. Please describe in full, and provide any documents, including vote sheets, relating to your participation in the Board's decision to move to remand *BFI* to the Board.
14. Given that your former partners at Littler Mendelson P.C. represented a party in *BFI* before the Board, and that you have previously stated that you will recuse yourself from any Board cases in which Littler Mendelson represents a party, will you recuse yourself from *BFI* in the event that case is remanded to the Board?
15. Given that your former partners at Littler Mendelson P.C. represent Volkswagen, did you recuse yourself from the Board's decision to move to remand the *Volkswagen* case from the U.S. Court of Appeals for the D.C. Circuit back to the Board? If not, why not?

16. Please describe in full, and provide any documents, including vote sheets, relating to your participation in the Board's decision to move to remand *Volkswagen* to the Board.
17. Given that your former partners at Littler Mendelson P.C. represent Volkswagen, and that you have previously stated that you will recuse yourself from any Board cases in which Littler Mendelson represents a party, will you recuse yourself from *Volkswagen* in the event that case is remanded to the Board?
18. Please provide any guidance or other documents or communications that you received from the Board's Designated Agency Ethics Official concerning your recusal obligations.

Please contact our staff at [John\\_DElia@help.senate.gov](mailto:John_DElia@help.senate.gov), and [Kyle.deCant@mail.house.gov](mailto:Kyle.deCant@mail.house.gov) if you have any questions about this request. We look forward to hearing from you.

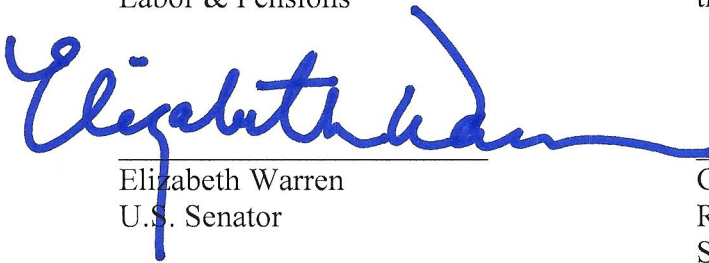
Sincerely,



Patty Murray  
U.S. Senator  
Ranking Member  
Committee on Education,  
Labor & Pensions



Robert C. "Bobby" Scott  
U.S. Representative  
Ranking Member  
Committee on Education and  
the Workforce



Elizabeth Warren  
U.S. Senator



Gregorio Kilili Camacho Sablan  
Ranking Member  
Subcommittee on Health, Employment,  
Labor and Pensions



Margaret Wood Hassan  
U.S. Senator



Donald Norcross  
U.S. Representative

cc: The Honorable Lamar Alexander  
Chairman  
U.S. Senate Committee on Health, Education, Labor and Pensions

The Honorable Virginia Foxx  
Chairwoman  
U.S. House of Representatives Committee on Education and the Workforce

Lori W. Ketcham  
Associate General Counsel, Ethics  
Designated Agency Ethics Official  
National Labor Relations Board  
1015 Half Street, S.E.  
Washington, D.C. 20570