

Congress of the United States  
Washington, DC 20510

February 6, 2018

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

Dear Member Emanuel:

We write to follow-up on your January 26, 2018 response to our December 21, 2017 letter regarding your participation in a series of National Labor Relations Board (“the Board”) actions, including the vote to remand the *Browning Ferris Industries* (“*BFI*”) case. These actions include a December 14, 2017 Board decision in *Hy-Brand Industrial Contractors*, 365 NLRB No. 156 (2017) (“*Hy-Brand*”), overturning the Board’s previous decision regarding its joint employer standard in *BFI*. On December 15, 2017, the Board directed the General Counsel to request the United States Court of Appeals for the D.C. Circuit to remand *BFI* back to the Board for reconsideration. For reasons that have yet to be explained, the Board voted unanimously to rescind that direction on December 19. Nonetheless, the General Counsel filed the remand motion later that day. By participating in the Board’s action to bring *BFI* back to the Board, you are likely in violation of both federal regulations and the Administration’s Ethics pledge.

Prior to your tenure on the Board, you were a senior partner in the labor and employment practice at Littler Mendelson, P.C. (Littler) for 13 years. Littler represents a party to the *BFI* matter, Leadpoint Industries.<sup>1</sup> As you know, Executive Order 13770 (the “Ethics Pledge”) prohibits Executive Branch employees from “participat[ing] in any particular matter involving specific parties that is directly and substantially related to [a] former employer . . .” Exec. Order. No. 13770(1). A matter is “directly and substantially related” to a former employer if the former employer represents a party in the matter. Exec. Order. No. 13770(2)(d).

Additionally, federal regulations require employees to “endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part.” 5 C.F.R. § 2635.101(b)(14). Executive branch employees “should not participate” in a matter when “the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter.” 5 C.F.R. § 2635.502(a). That is why in your signed ethics agreement with the Office of Government Ethics you state that “[f]or a period of one year after [your] resignation [from Littler], [you] will not participate personally and substantially in any

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<sup>1</sup> Littler has publicly acknowledged this representation. See, e.g., Michael Lotito, Maury Baskin, and Missy Parry, *NLRB Imposes New “Indirect Control” Joint Employer Standard in Browning Ferris*, LITTLER MENDELSON, P.C., Aug. 28, 2015, at page 1, n.2 available at [https://www.littler.com/files/2015\\_8\\_insight\\_nlrp\\_imposes\\_new\\_.pdf](https://www.littler.com/files/2015_8_insight_nlrp_imposes_new_.pdf).

particular matter involving specific parties in which [you] know the firm is a party or represents a party . . . .”

Accordingly, you should not have participated in any case where Littler represents a party. However, in your January 26 letter to Members of Congress, you stated that you participated in directing the General Counsel to ask the Court to remand *BFI* back to the Board for reconsideration consistent with precedent set out in the *Hy-Brand* decision and more favorable to Littler’s client. The court granted the remand request, which benefits the interests of your former firm and its client. This action appears to be in direct contravention of your commitments to the Office of Government Ethics, to the requirements of the Ethics Pledge, and to the requirements of federal regulations.

In your letter, you attempt to explain your actions by saying that you did not know that Littler represented a party in the *BFI* case. We would like to remind you that at the time of your confirmation in July 2017, you did in fact know that Littler represented a party in the *BFI* matter. Following your confirmation hearing, on July 14, 2017, we sent you a series of written questions. Senator Murray’s Question 18 specifically asked that you provide a list of all cases decided by the Board and that are currently on appeal in which Littler Mendelson represents a party. In response you produced a list of cases. *BFI* is clearly indicated on that list. (Attachment A). As a result, it would appear that you did in fact know that Littler was a party to *BFI*, and that your action in joining the request for remand violates both the Ethics Pledge and the federal regulations.

During your confirmation process, you further committed to Senator Murray in writing that in addition to signing the ethics pledge, you would “request advice regarding recusal issues from the Board’s ethics office.” However, you have now acknowledged that you had *not* received any guidance from the ethics office regarding your recusal obligations in *BFI* or other cases.

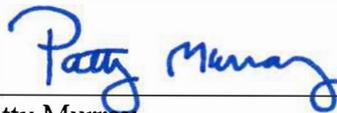
In order to more fully understand the circumstances surrounding your apparent violation of the pledge and the ethics regulations please provide the following by February 20, 2018:

1. Please provide a copy of the Board’s case management system list of the parties and counsel in the *BFI* case.
2. Please provide a copy of the Board’s December 15, 2017 directive and the December 19, 2017 rescission of that directive.
3. Please provide a detailed timeline of events between the Board’s action to request the remand of *BFI* on December 15, 2017, and the Board’s action to rescind that directive on December 19, 2017. Include the time and date of any conversations that you or any member of your staff had with Designated Agency Ethics Officials or with the General Counsel or any member of his staff.
4. With regard to the events of December 19, provide the time that the General Counsel filed the request for remand with the D.C. Circuit Court of Appeals, and the time that the Board acted to rescind the request for remand.

5. Please provide all communications between you or any member of your staff and the General Counsel or members of his staff that refer to or reference timing of the filing of the *BFI* remand.
6. Please provide the full list of all matters you are currently recused from and specify whether you are recused from any participation in the *Murphy Oil* case currently pending before the Supreme Court.
7. Please list all of the cases affected by the Board's December 15, 2017 directive.
8. Please state if you will recuse yourself from any further Board consideration or action on *BFI* or *Volkswagen Grp. Of Am. v. NLRB*, Nos. 16-1309, 16-1353 (D.C. Cir.) given the appearance issues that these cases represent with regard to your participation.

If you have any questions about this request, please contact John\_DElia@help.senate.gov, Carly\_Rush@help.senate.gov, Kyle.deCant@mail.house.gov, and Lindsay\_Owens@warren.senate.gov. We look forward to hearing from you.

Sincerely,



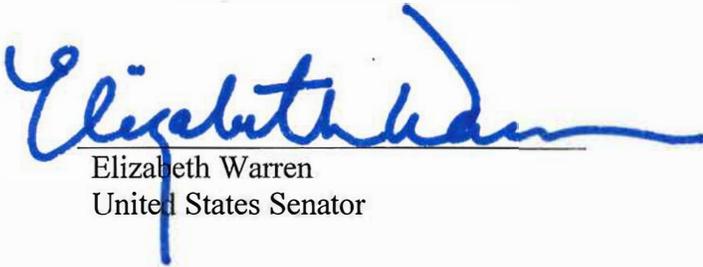
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Patty Murray  
Ranking Member  
Senate Committee on Health,  
Education, Labor and Pensions



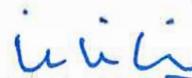
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Robert C. "Bobby" Scott  
Ranking Member  
House Committee on Education and  
the Workforce



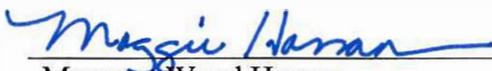
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Elizabeth Warren  
United States Senator



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



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Margaret Wood Hassan  
United States Senator



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Donald Norcross  
United States Representative