

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*?

I reviewed the exceptions, briefs, and other public documents that the parties in *Hy-Brand* filed with the Board, as well as the Board's internal casehandling documents pertaining to that case. I also reviewed drafts of the majority and dissenting opinions in *Hy-Brand*, which contained detailed statements of the arguments in favor of and against the decision. I have attached the public documents that were reviewed.

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 of *BFI*?

The Board in *Hy-Brand* did not overturn the holding of *BFI*, and instead overruled the standard for determining joint employer status articulated in *BFI*. The Board members discussed whether briefs should be solicited with respect to a number of cases that the Board was considering including, among others, *Hy-Brand*, and a majority of the members (former Chairman Miscimarra, then-Member Kaplan, and Member Emanuel) decided that soliciting briefs was unnecessary. Both the majority and dissenting opinions in *Hy-Brand* and other lead decisions issued at that time address the decision not to solicit briefs.

6. If so, please provide any record, vote tally sheet, meeting minutes, and any other document concerning any such vote among Board members.

To my knowledge, there are no responsive documents.

7. Please provide in full, and provide any documents relating to, your participation in the *Hy-Brand* case.

See number 4 above. Public documents reviewed while participating in the case are attached. Internal casehandling documents and drafts of the majority and dissenting opinions are being withheld pursuant to the deliberative process privilege as they are both pre-decisional and a part of the Board's deliberations in that they make recommendations or express opinions on legal or policy matters.

8. Please provide any communication 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.

None occurred.

9. Please provide any communication 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*.

In November, 2017, I was invited to meet the Secretary of Labor, Alex Acosta. When I met Secretary Acosta, I mentioned that the Board had a pending case involving the joint employer issue, but I did not identify the case, and I stated that I was not able to discuss it. This was a reference to the *Hy-Brand* case.

10. Please provide any communication 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.

None occurred.

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*.

None occurred.

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?

See answer to Question No. 13 below.

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.

On December 15, I voted to direct the General Counsel to seek a remand of several Board decisions pending before the courts of appeals, including *BFI*. By unanimous vote of the Board members, that directive was rescinded on December 19. Copies of my email votes are attached, with redactions of deliberative process material. At the same time, the Board recognized that the General Counsel, as an officer of the court, has an independent ethical duty to notify the courts of recent Board decisions that bear on cases pending before the courts, including *BFI*, and stated its expectation that the General Counsel would continue to perform that ethical duty. These communications with the General Counsel are protected by the attorney client privilege. On December 19, 2017, the General Counsel filed a motion with the D.C. Circuit seeking a remand of the pending *BFI* case.

At the time of these events, I was unaware that the Littler Mendelson firm represented Leadpoint Business Services, a party in the *BFI* case, when that case was previously pending before the Board. Littler Mendelson is a huge law firm of more than 1,000 lawyers, and I was involved in only a small fraction of the firm's practice. In any event, under Section 10(e) of the NLRA, the Board no longer had jurisdiction over the case as of the filing of the record in the related D.C. Circuit cases on March 14, 2016 (D.C. Cir. Case Nos. 16-1028, 16-1063, 16-1064). Leadpoint did not contest the Board's *BFI*

decision in these proceedings before the D.C. Circuit, nor did Littler Mendelson enter an appearance with the court.

As I stated in response to your November 21, 2017 inquiry and pledged under Executive Order 13770, for two years following my appointment to the NLRB, I will recuse myself in all Board cases in which my "former employer," Littler Mendelson, or my own "former clients," are a party or represent a party. If Littler represents Leadpoint in the *BFI* case after it is remanded to the Board, I will recuse myself from participation in that case, subject to the time limit in the Ethics Pledge. However, I was not required to recuse myself from voting for the directive to the General Counsel because, as noted above, Littler did not represent Leadpoint in the *BFI* case before the D.C. Circuit, the Board did not have jurisdiction over the case, and I was unaware that Littler had ever represented any party when the case was before 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?

Yes, I will recuse myself if Littler Mendelson represents a party in the case, subject to the time limit in the Ethics Pledge. Further, even if Littler Mendelson does not represent a party if the case is remanded to the Board, or the time limit has expired, I will consult with the NLRB's DAEO before participating in the case.

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?

I took no part in any decision to seek remand in the *Volkswagen* case.

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.

See number 15 above; there are no documents to provide.

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.

Yes, if Littler Mendelson represents *Volkswagen* before the Board, subject to the time limit in the Ethics Pledge. Further, even if Littler Mendelson does not represent a party if the case is remanded to the Board, or the time limit has expired, I will consult with the NLRB's DAEO before participating in the case.

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.

There are no guidance documents from the DAEO pertaining to the cases discussed in your inquiry.

If you or any members of your staffs have questions or need additional assistance, please do not hesitate to contact Carmen Torres Spell, Director of the Office of Congressional and Public Affairs, at 202-273-1991.

Sincerely,

A handwritten signature in cursive script that reads "William J. Emanuel".

William J. Emanuel
Board Member