Case Nos. 16-1028, 16-1063, 16-1064

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC.
D/B/A BFI NEWBY ISLAND RECYCLING,

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner

AND

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 350,

Intervenor

INTERVENOR'S MOTION FOR RECONSIDERATION OF ORDER REMANDING CASE TO NATIONAL LABOR RELATIONS BOARD

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To the Honorable, the Judges of the United States
Court of Appeals for the District of Columbia Circuit:

Pursuant to Fed. R. App. P. 27(b), the Intervenor, Sanitary Truck Drivers and Helpers Local 350, International Brotherhood of Teamsters, hereby moves for reconsideration of this Court's December 22, 2017, order remanding this case to the National Labor Relations Board ("NLRB" or the "Board").

I. INTRODUCTION

The Court should, on reconsideration, deny the NLRB's Motion to Remand on the ground that the Board's recent decision in *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 156 (2017) -- the sole basis for the Board's remand request -- is defective and will soon be the subject of a motion for reconsideration before the Board. In *Hy-Brand*, a 3-2 decision by the full Board, the majority spent 31 of 35 pages discussing this case, despite the fact that one of the three Board members voting to overrule the decision in this case is recused from participation because his former law firm represents one of the two employers. Further, unlike in this case, the joint employer ruling was not necessary to the holding under review in *Hy-Brand*; the Administrative Law Judge ruled in favor of the charging party employees on the basis that the employers at issue -- who, among other things, shared a complete identity of ownership -- constituted a single employer. The Board's illegitimate use of the *Hy-Brand* case as a vehicle to overrule its decision in this case without a majority to do so and where the joint employer issue was not

necessary to the outcome is a transparent abuse and provides a strong basis for the Board to reconsider its decision. This Court should, therefore, grant the motion for reconsideration or, in the alternative, withdraw its decision to remand and hold this case in abeyance until the motion for reconsideration in *Hy-Brand* is decided.

II. PROCEDURAL HISTORY

This case is before the Court on a petition for review of a Board decision and order against Browning-Ferris Industries of California, Inc. d/b/a Newby Island Recyclery ("BFI") and FPR-II, LLC d/b/a Leadpoint Business Services ("Leadpoint"), reported at 363 NLRB No. 95 (2016), which was based in part on the Board's Decision on Review in the underlying representation proceeding, reported at 362 NLRB No. 186 (2015) (collectively, the *Browning-Ferris* case). In *Browning-Ferris*, the Board restated its joint-employer standard and found that BFI and Leadpoint were joint employers of the petitioned-for unit of employees. BFI petitioned for review in this Court. This Court heard argument on March 9, 2017.

On December 14, 2017, the NLRB issued its decision in *Hy-Brand* and purported to expressly overrule *Browning-Ferris*.[1] *Hy-Brand* is not yet a final decision. The NLRB filed its motion for remand in this Court based exclusively on *Hy-Brand* before the time period elapsed for the parties in *Hy-Brand* to move the

[1] "[W]e overrule Browning-Ferris." *Hy-Brand*, 365 NLRB No. 156 at 2.

Board for reconsideration. This Court granted the motion before the time for the Intervenor to file an opposition had run.

III. GROUNDS FOR GRANTING THE MOTION

A. The Intervenor Had No Opportunity to Oppose the Motion to Remand

The Court granted the NLRB's Motion to Remand before the time for an opposition had run and before the Intervenor has an opportunity to file an opposition.

B. The Charging Parties Intend to File a Motion for Reconsideration in *Hy-Brand*

The undersigned Intervenor's Counsel has communicated with counsel for the Charging Party employees in *Hy-Brand* and been informed that counsel will file a motion for reconsideration in that case pursuant to 29 C.F.R. § 102.48(c) within the 28 days permitted by that subsection. The Intervenor intends to move to intervene in *Hy-Brand* and support the motion for reconsideration on the grounds that the *Hy-Brand* decision is defective as explained below.

C. One Member of the 3-2 Majority in *Hy-Brand* Should Have Been Recused from Participating

The decision in *Hy-Brand* is defective insofar as it purports to overrule the Board's *Browning-Ferris* decision because one member of the majority in the 3-2 *Hy-Brand* decision, Member William J. Emanuel, was barred from participating in such a decision by the governing rules of ethics.

Prior to his appointment to the NLRB, Member Emanuel was a shareholder with the firm of Littler Mendelson. *See* Emanuel to Ketcham (agency ethics officer), June 30, 2017, at http://altgov2.org/wp-content/uploads/Emanuel-William-finalEA.pdf?7ba951&7ba951. Littler is counsel to one of the two respondent employers before the Board in *Browning-Ferris*. Member Emanuel is thus unquestionably barred from participating in *Browning-Ferris*. In *Hy-Brand*, Member Emanuel purported to overrule the decision in the pending *Browning-Ferris* case from which he is recused. That was a violation of the governing rules of ethics.

Littler was counsel for Respondent Leadpoint before the Board in this case and was counsel to Leadpoint in the underlying representation case, both under review here. Leadpoint actively participated in the representation case through Littler, including filing multiple briefs addressing the joint employer issue. *See Browning-Ferris Industries of California, Inc.*, Case No. 32-RC-109684, Motion (Sept. 10, 2013), Opposition (June 26, 2014), Docket at https://www.nlrb.gov/case/32-RC-109684. Leadpoint actively participated in the unfair labor practice case, filing an answer through Littler. *See* Attachment 1. Throughout the NLRB cases on review here, Leadpoint, through Littler, has asserted that BFI is not a joint employer of its employees. Leadpoint has an

economic interest shielding its customer BFI and similar customers from the legal responsibilities that attach to being a joint employer.

Members of the NLRB are executive branch employees bound by two sets of ethical standards: the Standards of Ethical Conduct for Employees of the Executive Branch established in Title 5 of the Code of Federal Regulations, and the Ethics Commitments by Executive Branch Appointees set forth by Executive Order 13770. Executive branch employees are also regulated by certain restrictions found in 18 U.S.C. § 208.

Executive Order 13770 specifically prohibits executive branch employees, for a period of two years from the date of appointment, from "participat[ing] in any particular matter involving specific parties that is directly and substantially related to [her or his] former employer." Ex. Order 13770, 82 Fed. Reg. 9333 (Jan. 28, 2017). A matter is "[d]irectly and substantially related" if "the appointee's former employer or a former client is a party or represents a party." *Id.* "Former employer" is any person "for whom the appointee has within the 2 years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner." *Id.* The Code imposes the same restriction for a one-year period.

The Code and the Executive Order clearly required Member Emanuel to recuse himself from *Browning-Ferris* on the grounds the Littler serves as counsel

to a party and Emanuel was a shareholder with Littler within the past two years.

The decision by the Board in *Hy-Brand* purported to overturn the decision in *Browning-Ferris* from which Member Emanuel is recused from participating. The impact of the decision in *Hy-Brand*, if it is permitted to control this case, is no different than if Member Emanuel had directly participated in *Browning-Ferris*, where his former firm represents a party. The provisions of the Executive Order and Code cited above thus barred Member Emanuel from participating in *Hy-Brand* as a vehicle to overturn the decision in this case.

Moreover, the Code requires government 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). An employee "should not participate" in any matter where "the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter," unless a designated agency official is informed of the appearance problem and gives his or her authorization. *Id.* § 2645.502. A reasonable person with knowledge of the facts would conclude that Member Emanuel's impartiality was compromised in *Hy-Brand* such that his participation violated 5 C.F.R. § 2635.101(b).

Member Emanuel's obligation to recuse himself from *Hy-Brand* is made clear by review of the decision in that case. This is not a case where Member

Emanuel participated in a decision that simply altered a prior Board construction that *might* affect the outcome in *Browning-Ferris*. Rather, here, Member Emanuel participated in a decision that directly and expressly overruled the decision in *Browning-Ferris*. "[W]e overrule *Browning-Ferris*." *Hy-Brand*, 365 NLRB No. 156 at 2. Here, Member Emanuel participated in a decision that extensively discussed and expressly rejected the decision in *Browning-Ferris*. Indeed, at least 31 pages of the 35-page opinion in *Hy-Brand* concern *Browning-Ferris*. *Hy-Brand*, 365 NLRB No. 156 at 1-30. This is not a case where the Board simply disagreed with the legal standard applied in an earlier case. Here, the *Hy-Brand* decision discussed the facts in this case extensively and applied the law to those facts. The decision purported to summarize "the evidence the *Browning-Ferris* majority relied on to find joint-employer status in that case":

> (1) a few contract provisions that indirectly affected the otherwise unfettered right of Leadpoint (the supplier employer) to hire its own employees; (2) reports made by BFI representatives to Leadpoint of two incidents that understandably resulted in discipline, one where a Leadpoint employee was observed passing a "pint of whiskey" at the BFI jobsite, and another where a Leadpoint employee "destroyed" a drop box; (3) one contractually established pay rate ceiling restriction for Leadpoint employees, obviously stemming from the cost-plus nature of the contract; (4) BFI's control of its own facility's hours and production lines; (5) a recordkeeping requirement for Leadpoint employee hours (again, obviously stemming from the cost-plus nature of the contract); (6) a single pre-shift meeting to advise Leadpoint supervisors what lines will be running and what tasks they are supposed to do on those lines; (7) monitoring of productivity; (8) establishment of one type of generally applicable production

> assignment scheme for Leadpoint; and (9) "on occasion" addressing Leadpoint employees directly about productivity. 362 NLRB No. 186, slip op. at 18–19.

Hy-Brand, 365 NLRB No. 156 at 18-19. Based on that review of the evidence in *Browning-Ferris*, the Board in *Hy-Brand* concluded, "That is all there was, and the Regional Director correctly decided under then-extant law that it was not enough to show BFI was the joint employer of Leadpoint's employees." *Id*. at 19. Member Emanuel thus reviewed the evidence in *Browning-Ferris*, applied the law to the evidence in *Browning-Ferris*, extensively discussed the logic of *Browning-Ferris*, and purported to overrule the decision in *Browning-Ferris* though he is unquestionably recused from participating in *Browning-Ferris*.

The rules of ethics do not permit such obvious evasion. Federal courts have so ruled in cases involving similar fact patterns under the judicial recusal statute.[2] Numerous cases establish the commonsense principle that when an ethical standard requires recusal in Case X, that same ethical standard necessarily also requires recusal in a case where an official is being asked to overrule a prior decision in the

[2] While the statutory standard governing judicial recusal set forth in 29 U.S.C. § 455 does not by its terms apply to Board Members, because the standards governing Board members and the standards governing judges are similar, several Board Members have applied the judicial standard as construed by the courts to their own conduct, while others have found that "the standards set forth [in § 455] as well as their construction by the court offer useful guidance in the application" of the executive orders and code provisions governing Board Members. *See Detroit Newspapers*, 326 NLRB 700, 710-13 (1998) (separate opinion by Chairman Gould); *Pomona Valley Hospital Medical Center*, 355 NLRB 234, 239 (2010) (Member Becker ruling on motions).

still pending Case X. For example, in *In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136 (6th Cir. 1990), seven separate cases filed by FDIC against Aetna were consolidated and assigned to Judge Hull. *Id*. at 1138. Aetna sought a writ of mandamus ordering Judge Hull to recuse himself from those cases, because the judge's daughter had been counsel in four of them. Judge Hull initially recused himself from all seven cases, which were reassigned to another judge, but Judge Hull later reassigned back to himself the three cases in which his daughter had not been counsel. The Sixth Circuit held that recusal from those three cases was also required, because of their potentially controlling effect on the other four cases:

> . . . . A decision on the merits of any important issue in any of the seven cases, moreover, could or might constitute the law of the case in all of them, or involve collateral estoppel, or might be highly persuasive as a precedent. Thus, even if the [daughter's] firm were not counsel of record for FDIC in all of the seven cases but only some of them, and was not of counsel in the three cases reassigned by Judge Hull to himself, we would find that the circumstances would indicate to a reasonable party, such as Aetna, that his partiality might be implicated, and/or that § 455 would apply.

Id. at 1143. The Sixth Circuit based its order on a finding that the seven cases involved "substantially similar issues and similar controlling questions of law." *Id*.

Here, the concerns expressed by the Sixth Circuit are even more apparent. *Hy-Brand* and *Browning-Ferris* did not simply involve "similar controlling questions of law," *Hy-Brand* purported to overrule the decision in *Browning-Ferris*.

Similarly, in *Shell Oil Co. v. United States*, 672 F.3d 1283, 1285 (Fed. Cir. 2012), Judge Smith of the Federal Court of Claims initially entered a judgment in favor of four plaintiffs – Shell Oil, Arco, Texaco and Union Oil – but then recused himself and vacated the judgments as to Union Oil and Texaco (but not Shell Oil and Arco) after realizing that his wife had a financial interest in those two companies. The Federal Circuit held that Judge Smith should have recused himself and vacated the judgments as to all four plaintiffs:

> [G]iven the identity of issues involved, the parties do not dispute that a decision in this case will control the outcome in the severed case involving Texaco and Union Oil . . . . The government argues that, if judge's opinions [*sic*] with respect to Shell Oil and Arco are allowed to stand, the government would be precluded from challenging the court's determinations under the doctrine of collateral estoppel because the issues would have already been decided adversely to the government. We agree. Because the Oil Companies' . . . contracts contain substantially similar language and the facts relating to dumping waste at the McColl site are nearly identical as to all four companies, the judgment here could have a preclusive or prejudicial effect in the severed case.

Id. at 1293 (internal citation omitted).

Likewise here, there can be no dispute that the ruling in *Hy-Brand* purports to "control the outcome" in *Browning-Ferris*.

Finally, in *Matter of Hatcher*, 150 F.3d 631, 632 (7th Cir. 1998), Judge Kocoras presided over three related gang trials. Defendant Hatcher was a named co-conspirator in two of those cases and the defendant in a third (the *Hatcher* case), while Defendant Hoover was a named co-conspirator in two cases (one

being the *Hatcher* case) and the defendant in a third (the *Hoover* case). *Id*. Hatcher moved to have Judge Kocoras recused from the *Hatcher* case because the judge's son worked for the prosecution in the *Hoover* case. *Id*. at 633. The Seventh Circuit found that "the circumstances of this case required [the judge] to recuse himself under § 455(a) because of the significant risk of an appearance of impropriety." *Id*. The appellate court recognized that the *Hatcher* and *Hoover* "cases are formally separate proceedings" and that it was not holding that "any connection, however tenuous, between two cases would require recusal." *Id*. at 638. Nevertheless, because of the relationship between the cases, the Seventh Circuit concluded that Court found that Judge Kocoras's "impartiality might reasonably be questioned" as a result of the relationships between those cases, such that recusal was required. *Id*. at 637.

Similarly here, recusal was required because the ruling in *Hy-Brand* purports to have a controlling and fully dispositive effect in *Browning-Ferris*. The connection between *Browning-Ferris* and *Hy-Brand* was far from "tenuous."

The ethical principle is thus both a matter of common sense and well established: if a public official is recused from participating in Case X, that official must also be recused from Case Y where the tribunal is contemplating reversing a prior holding in the still pending Case X, even if those cases are wholly separate. Member Emanuel was barred from participating in the decision in *Hy-Brand* and

therefore this Court should not rely on that decision to remand this case to the Board.

D. The Joint Employer Question was Not Properly Before the Board in *Hy-Brand*

The Board should not have purported to overrule *Browning-Ferris* in *Hy-Brand* because the question at issue in this case -- what evidence is relevant to the determination of whether two entities jointly employ a group of employees -- was not properly before the Board in *Hy-Brand*. In *Hy-Brand*, the administrative law judge found that the two entities, small businesses fully controlled by the same four family members, were actually a single employer. 365 NLRB No. 156 at 50.[3] As dissenting Members Pearce and McFerran explained, "It is undisputable . . . that this case is missing the foundational element of a joint-employer claim – namely separate and independent employers." *Id*. at 37. The ALJ's single employer finding, not reversed or even discussed by the majority in *Hy-Brand*, rendered a joint employer analysis "both unnecessary and nonsensical." Id. at 37 n. 6. Only as a secondary, alternative holding did the judge find that the two entities would be joint employers *if* they were not a single employer. *Id*. at 51. *Hy-Brand* was thus a straight-forward, single employer case, disposed of by the ALJ in four pages compared to the 35 pages consumed by the Board's *sua sponte*,

[3] "Both entities have the same owners in identical percentages, with common presidents, vice-presidents, secretaries, treasurers, safety officers, and human resources officials." *Id*. at 50.

wholly unnecessary and improper discussion of the *Browning-Ferris* standard and analysis of the facts of this case. *Compare* 365 NLRB No. 156 at 48-52 to *id*. at 1-35.

Before the *Hy-Brand* Board, no party challenged the governing standard for addressing questions of joint employment. Indeed, the employer's 31-page brief to the Board devoted only a single, citation-free paragraph to the Judge's alternative, joint employment finding. 365 NLRB No. 156 at 38 n. 9. The employer did not ask the Board to overrule its decision in *BFI*. *See* Respondent's Brief in Support of Exceptions (Jan. 9, 2017), *Hy-Brand Industrial Contractors, Ltd.*, 25-CA-163189, NLRB Docket at https://www.nlrb.gov/case/25-CA-163189. No amicus raised the question as no amicus briefs were filed due to the Board's departure from "established Agency norms" of inviting amicus participation when it is considering reversing precedent of substantial import. *Id*. at 38. As the dissent points out, "[N]either the parties nor the public could have anticipated that the Board was planning to overrule precedent in this case." *Id*. at 39 n. 12.[4]

[4] In addition, the lack of notice to the parties and the public, heighten the dangers posed by Member Emanuel's conflict of interest. Because no party and no amicus in *Hy-Brand* raised or briefed the issue of overturning the decision in this case, the public cannot determine what arguments Member Emanuel relied on in reaching his decision including whether his decision was influenced by any role he had in advising Leadpoint or his former partners regarding the joint-employer issue in *Browning-Ferris*, particularly because Member Emanuel reached the decision in *Hy-Brand* less than three months after joining the Board and leaving Littler.

The standard applicable to claims of joint employment was thus not properly before the Board in *Hy-Brand*.

E. The *Hy-Brand* Majority Erred in Applying Its New Joint Employer Standard to the Facts of this Case

Even if the Board had properly rejected the joint employment standard adopted in *Browning-Ferris*, the new standard adopted in *Hy-Brand* is consistent with the Board's holding in this case. Thus the *Hy-Brand* Board improperly overruled the decision in this case.

The Board's decision in *Hy-Brand* makes clear that the majority has no "disagreement with the *Browning-Ferris* standard for determining joint employer status insofar as "it treats indicia of indirect, and even potential, control to be probative of joint-employer status" so long as evidence of those forms of control is accompanied by "evidence of direct control." 365 NLRB No. 156 at 4. Because there was evidence of direct control over several central terms and conditions of employment in this case, the new *Hy-Brand* standard is consistent with the holding in this case.

As pointed out in our opening brief (at 24-29), there was considerable evidence of direct control over key terms and conditions of employment here. Most importantly, it is undisputed that BFI directly controlled employees' workload and the speed of their work. BFI established the location of the work stations on each material stream in its recycling facility, determined how many

employees work at each station, determined the quantity of materials placed on each stream, determined the speed of the stream, and determined the standard applied to the sorted materials at the end of the stream. JA-386, 373. Leadpoint played no role in determining the employees' workload and was powerless to adjust it in any way. BFI thus exercised direct and exclusive control over a central, mandatory subject of bargaining – work load. *See Bonham Cotton Mills, Inc*., 121 NLRB 1235, 1266 (1958), *enf'd*, 289 F.2d 903 (5th Cir. 1961). In *Hy-Brand*, without the benefit of any briefing or argument on the factual issues in this case and the presence of Member Emanuel's conflict, the majority, nonetheless, made factual determinations in his case and did so erroneously. The *Hy-Brand* Board dismissed the undisputed evidence in a single phrase: "BFI's control of its own facility's production lines," finding that it was insufficient to establish joint employment. 365 NLRB No. 156 at 18.

In a wholly inaccurate characterization of the evidence, the *Hy-Brand* majority stated, "The evidence relied on by the Browning-Ferris majority amounted to a collection of general contact terms and business practices common to most contracting entities." *Id*. at 19. The *Hy-Brand* majority thus erred in overturning the decision in this case even under its improperly adopted, new, joint employment standard.

On remand, the Board will likely consider itself to be bound by its erroneous application of the law to the facts in this case. Remand is thus inappropriate.

F. By Overruling the Decision in this Pending Case Without Affording the Intervenor Notice or an Opportunity to be Heard, the Board Deprived the Intervenor's Legally Protected Property Interest Without Due Process of Law

By purporting to overrule the decision in this case without any form of notice to the parties, the Board deprived the Intervenor of due process of law.

Under the Board's decision in *Browning-Ferris*, the Intervenor local union has a legal right to bargain with BFI. The Intervenor had a constitutionally protected property interest in that legal right. The *Hy-Brand* decision purports to deprive the Intervenor of that right despite the fact that the Intervenor had no notice and could not have discovered that the Board was contemplating depriving it of its legal right in *Hy-Brand*.

Timely notice and an opportunity to be heard are the central element of due process. The Supreme Court has made clear that "[i]t is . . . fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (*quoting Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)). Here, Intervenor had neither.

The Board can, of course, change its construction of ambiguous provisions of the NLRA so long as it provides a reasoned explanation for doing so. And it can, under appropriate circumstances, apply that construction in all cases pending adjudication. It is not appropriate, however, to overrule a prior Board decision still pending on review in the courts without prior notice to the parties in that case.

It is no answer to the lack of notice to say that the Intervenor has a right to be heard by the Board when this case is remanded. That is too late. The Members of the Board have already made up their minds and written a lengthy decision explaining why they believe the prior decision in this case should be overturned. Giving the Intervenor an opportunity to change their minds after the fact is no substitute for the required prior notice and right to be heard in a timely manner particularly when there were absolutely "no extraordinary or exigent circumstances which would warrant satisfying due process by a subsequent hearing." *Tom Growney Equip. v. Shelley Irrigation Dev.*, 834 F.2d 833, 836 (9th Cir. 1987). The lack of notice and deprivation of a meaningful opportunity to be heard, deprived Intervenor of property without due process and, thus, this Court cannot rely on *Hy-Brand* as a basis for remand.

IV. CONCLUSION

For the above stated reasons, this Court should reconsider its decision to grant the motion to remand and either deny the motion or hold the motion in abeyance pending the outcome of the motion for reconsideration in *Hy-Brand*.

Dated at Oakland, California,
this 4th day of January 2018

Respectfully submitted,

By: */s/ Susan K. Garea*

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ATTACHMENT 1

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC. D/B/A BFI NEWBY ISLAND RECYCLERY and FPR-II, LLC, D/B/A LEADPOINT BUSINESS SERVICES and SANITARY TRUCK DRIVERS AND HELPERS, LOCAL 350, INTERNATIONAL BROTHERHOOD OF TEAMSTERS.	Case No. 32-CA-160759

LEADPOINT BUSINESS SERVICES' ANSWER TO COMPLAINT

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LEADPOINT BUSINESS SERVICES' ANSWER TO COMPLAINT

COMES NOW FPR-II, LLC, D/B/A LEADPOINT BUSINESS SERVICES (hereinafter "Leadpoint"), in answer to the Complaint issued on October 23, 2015 in the above-captioned matter by Regional Director George Velastegui on behalf of the General Counsel of the National Labor Relations Board, and alleges as follows:

1. (a) In response to Paragraph 1(a) of the Complaint, Leadpoint is without knowledge or information sufficient to form a belief as to the truth of the allegation, and on that basis denies each and every allegation contained therein.

(b) In response to Paragraph 1(b) of the Complaint, Leadpoint is without knowledge or information sufficient to form a belief as to the truth of the allegation, and on that basis denies each and every allegation contained therein.

(c) In response to Paragraph 1(c) of the Complaint, Leadpoint is without knowledge or information sufficient to form a belief as to the truth of the allegation, and on that basis denies each and every allegation contained therein.

2. (a) In response to Paragraph 2(a) of the Complaint, Leadpoint is without knowledge or information sufficient to form a belief as to the truth of the allegation, and on that basis denies each and every allegation contained therein.

(b) In response to Paragraph 2(b) of the Complaint, Leadpoint is without knowledge or information sufficient to form a belief as to the truth of the allegation, and on that basis denies each and every allegation contained therein.

3. In response to Paragraph 3 of the Complaint, Leadpoint admits that at all material times, Leadpoint has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Except as so specifically admitted, Leadpoint is without knowledge or information sufficient to form a belief as to the truth of the allegations, and on that basis denies each and every allegation contained in Paragraph 3 of the Complaint.

4. In response to Paragraph 4 of the Complaint, upon information and belief, Leadpoint admits the material allegations contained therein.

5. In response to Paragraph 5 of the Complaint, Leadpoint is without knowledge or information sufficient to form a belief as to the truth of the allegation, and on that basis denies each and every allegation contained therein.

6. (a) In response to Paragraph 6(a) of the Complaint, Leadpoint admits the employees solely employed by Leadpoint referenced within Paragraph 6(a) constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act. Except as so specifically admitted, Leadpoint denies each and every allegation contained in Paragraph 6(a) of the Complaint.

(b) In response to Paragraph 6(b) of the Complaint, Leadpoint admits that on April 25, 2014, in Case 32-RC-109684, a representation election was conducted among the employees in the Unit solely employed by Leadpoint and on, September 14, 2015, the Union was certified as the exclusive collective-bargaining representative of the Unit solely employed by Leadpoint. Except as so specifically admitted, Leadpoint denies each and every allegation contained in Paragraph 6(b) of the Complaint.

(c) In response to Paragraph 6(c) of the Complaint, Leadpoint admits that at all times since September 14, 2015, the Union has been the exclusive collective-bargaining representative of the employees in the Unit solely employed by Leadpoint. Except as so specifically admitted, Leadpoint denies each and every allegation contained in Paragraph 6(c) of the Complaint.

7. In response to Paragraph 7 of the Complaint, Leadpoint is without knowledge or information sufficient to form a belief as to the truth of the allegation, and on that basis denies each and every allegation contained therein.

8. In response to Paragraph 8 of the Complaint, Leadpoint is without knowledge or information sufficient to form a belief as to the truth of the allegation, and on that basis denies each and every allegation contained therein.

9. In response to Paragraph 9 of the Complaint, Leadpoint denies each and every allegation contained.

10. In response to Paragraph 10 of the Complaint, Leadpoint denies each and every allegation contained.

AFFIRMATIVE DEFENSES

As a FIRST, SEPARATE AND AFFIRMATIVE DEFENSE to the Complaint, Leadpoint alleges that the Complaint does not state facts sufficient to constitute an unfair labor practice in violation of the National Labor Relations Act (hereinafter referred to as "the Act").

As a SECOND, SEPARATE AND AFFIRMATIVE DEFENSE to the Complaint, Leadpoint alleges that the Complaint does not state a claim upon which relief can be granted.

As a THIRD, SEPARATE AND AFFIRMATIVE DEFENSE to the Complaint, Leadpoint alleges that no relief can be granted to the Charging Party based upon the equitable doctrines of laches, waiver and/or unclean hands.

As a FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE to the Complaint, Leadpoint alleges that assuming, *arguendo*, any allegation in the Complaint is found to be a violation, the remedy requested is inappropriate as a matter of law.

As a FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE to the Complaint, Leadpoint alleges that the allegations of the Complaint are unconstitutionally vague under the Fifth and Fourteenth Amendments to the United States Constitution. Such vague allegations violate the Act and the National Labor Relations Board's Rules and Regulations, or both. The allegations are vague because they do not provide adequate facts to indicate that the National Labor Relations Board has fulfilled its statutory mandate of fully investigating charges before issuing a complaint. Their vagueness makes it impossible for Leadpoint to intelligently respond

to them. Moreover, there are inadequate procedural safeguards under the Rules and Regulations to permit either the issuance of the Complaint or a trial to be conducted based upon such vague allegations.

As a SIXTH, SEPARATE AND AFFIRMATIVE DEFENSE to the Complaint, Leadpoint alleges that the Complaint is improperly pled as Leadpoint is not given enough information to reply to the allegations.

Leadpoint reserves the right to assert any additional affirmative defenses it discovers during the course of these proceedings.

WHEREFORE, Leadpoint respectfully requests the Administrative Law Judge dismiss the Complaint in its entirety and grant Leadpoint all appropriate relief.

Dated: November 6, 2015

LITTLER MENDELSON
A Professional Corporation

By: /s/ Michael G. Pedhirney
MICHAEL G. PEDHIRNEY
Attorneys for FPR-II, LLC, D/B/A
LEADPOINT BUSINESS SERVICES

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Littler Mendelson, P.C., 650 California Street, 20th Floor, San Francisco, California 94108.2693. On November 6, 2015, I served the within document(s):

- **LEADPOINT BUSINESS SERVICES' ANSWER TO COMPLAINT**

☐ by facsimile transmission at or about _____ on that date. This document was transmitted by using a facsimile machine that complies with California Rules of Court Rule 2003(3), telephone number 415.399.8490. The transmission was reported as complete and without error. A copy of the transmission report, properly issued by the transmitting machine, is attached. The names and facsimile numbers of the person(s) served are as set forth below.

☒ by placing a true copy of the document(s) listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at San Francisco, California addressed as set forth below.

☐ by depositing a true copy of the same enclosed in a sealed envelope, with delivery fees provided for, in an overnight delivery service pick up box or office designated for overnight delivery, and addressed as set forth below.

☐ by personally delivering a copy of the document(s) listed above to the person(s) at the address(es) set forth below.

☒ Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the person(s) at the e-mail address(es) as set forth below on the date referenced above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. The electronic notification address of the person making the service is jrsmith@littler.com.

Joshua Ditelberg, Esq.
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VIA EMAIL AND MAIL

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Susan K. Garea, counsel for Intervenor, International Brotherhood of Teamsters Local 350, and a member of the Bar of this Court, certify pursuant to Federal Rule of Appellate Procedure 32(a)(2) that the foregoing motion of Intervenor, International Brotherhood of Teamsters Local 350, contains 4269 words of proportionately spaced, 14-point typeface, and the word processing system used was Microsoft Word 2010.

Dated at Oakland, California,
this 4th day of January 2018

/s/ Susan K. Garea
Susan K. Garea
BEESON, TAYER & BODINE

CERTIFICATE OF SERVICE

I, Susan K. Garea, counsel for Intervenor, International Brotherhood of Teamsters Local 350, and a member of the Bar of this Court, certify that on January 4, 2018, I caused a copy of the foregoing motion of Intervenor, International Brotherhood of Teamsters Local 350, to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that all parties required to be served will be served by the appellate CM/ECF system.

Dated at Oakland, California,
this 4th day of January 2018

/s/ Susan K. Garea
Susan K. Garea
BEESON, TAYER & BODINE