

# INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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June 13, 2019

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Frederick J. Cole  
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## **Re: Formal Request for the Criminal Prosecution and Administrative Sanction of NFI, LP**

Dear Attorney General Grewal and Mr. Cole,

We write to encourage your offices to investigate, prosecute, and sanction NFI, LP, in connection with material misrepresentations to the Economic Development Authority (“EDA”) in its application for nearly eighty million dollars in state benefits through the Grow New Jersey tax incentive program.<sup>1</sup> Please accept this correspondence as a formal request that (i) the Office of the Attorney General investigate and prosecute NFI for the crimes of false swearing and making material misrepresentations in an effort to obtain a government contract, and (ii) the Economic Development Authority investigate and impose administrative penalties on NFI because of its misrepresentations and its history of violating workers’ rights.

NFI lied to obtain benefits from our state, and when NFI lied, it committed a crime. NFI has a criminal history, and willfully concealed its 2005 federal conviction for wire fraud in its application for Grow NJ benefits, despite the fact that the Grow NJ application requires

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<sup>1</sup> NJ EDA Project Summary – Grow New Jersey Assistance Program recommendation concerning NFI, LP at 3-4 (obtained via Open Public Records Act request).

disclosure of such a conviction.<sup>2</sup> NFI also concealed that the company was facing lawsuits alleging violations of laws protecting workers at the time of its Grow NJ application.<sup>3</sup>

55,000 Teamsters live and pay taxes in New Jersey while working in critical industries including transportation, logistics and public services. New Jersey Teamsters believe that our state's limited resources should not be used to benefit irresponsible, law-breaking employers. NFI has a decades-long history of treating its employees unfairly, as evidenced by a federal court finding that an affiliate<sup>4</sup> was a willful violator of the Fair Labor Standards Act, and by other administrative findings that the company has refused to pay employees proper overtime compensation and even the statutory minimum wage, and that it violated federal labor laws protecting workers' right to form a union.<sup>5</sup> In recent years, NFI has been named in lawsuits alleging that it misclassified its employees as contractors, that it avoided paying employment taxes, that it unlawfully denied employees benefits, and that it made improper deductions from employees' wages.<sup>6</sup> A recent nationwide Department of Labor investigation into NFI's employment practices determined that NFI misclassified dispatchers, and wrongfully denied them overtime wages; in the same year as NFI applied for Grow NJ benefits, the company was forced to pay over \$1 million to more than 300 employees to remedy those violations.<sup>7</sup>

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<sup>2</sup> *USA v. Interactive Logistics, Inc.*, D.N.J. Case No. 05-cr-00872.

<sup>3</sup> *Marshall v. National Freight, Inc.*, 1979 U.S. Dist. LEXIS 9989, Lab. Cas. (CCH) P33,839.

<sup>4</sup> The NFI entities discussed in this memo include affiliates identified by NFI, LP, in its Grow NJ application, as well as other entities within the closely-held company's control group. National Freight, Inc.; NFI Interactive Logistics, LLC; and NFI Industries, Inc. are entities discussed herein that NFI named in its application as affiliates "that are directly or indirectly controlled by the business that will contribute either Full-Time Employees or Capital Investment at the Qualified Business Facility." NJEDA Application for Financial Assistance at 17 (obtained via Open Public Records Act request). The remainder of the entities discussed herein were not named in NFI's application, but fall within the disclosure requirement's definition of "controlled group," because they are "persons having an overt or covert relationship such that any one of them directly or indirectly controls or has the power to control the other." NJEDA Application for Financial Assistance at 15 (obtained via Open Public Records Act request). These entities are Interactive Logistics, Inc., d/b/a NFI Interactive Logistics, Inc.; CMI Transportation LLC; K&R Transportation California LLC; and Cal Cartage Transportation Express LLC. See Section B and footnotes 19 and 56, *infra*, for detailed explanations of these relationships. Unless otherwise specified, we refer to all these entities collectively as "NFI."

<sup>5</sup> *NFI Interactive Logistics, LLC*, NLRB Case No. 25-CA-031011, 2010 NLRB LEXIS 345 (NLRB September 10, 2010).

<sup>6</sup> *Marsh v. NFI Interactive Logistics LLC*, N.D. Tx. Case No. 3:16-cv-02799; *Portillo et al. v. Nat'l Freight, Inc. & NFI Interactive Logistics, Inc.*, D.N.J. Case No. 15-cv-07908; *California v. CMI Transp. LLC, et al.*, California Superior Court Case BC689321; *California v. K&R Transp. California LLC, et al.*, California Superior Court Case BC689322; *California v. Cal Cartage Transp. Express LLC, et al.*, California Superior Court Case BC689320.

<sup>7</sup> DOL Wage & Hour Div. Case IDs 1690496, 1775692, 1775694, 1775696, 1775699, 1775701, 1775703 1775707, 1812719; also see *National Freight to Pay More than \$1M in Back Wages to 357 Workers After U.S. Labor Department Investigation*, Release No. 16-0754, available at <https://www.dol.gov/newsroom/releases/whd/whd20160825-0> (Aug. 25, 2016).

NFI's lie about its past criminal and alleged civil wrongs was, itself, a criminal act, because it propounded its lie in a certified document submitted to the state in its effort to obtain public funding. NFI should be prosecuted and barred from receiving any financial assistance from the state, including the nearly eighty million dollars it currently stands to gain through the Grow NJ program.

### **A. Background**

New Jersey has long recognized that "it is essential that all persons supplying goods or services to the State of New Jersey must meet a standard of responsibility which assures the State and its citizens that such persons will both compete and perform honestly in their dealings with the State...."<sup>8</sup> The Economic Development Authority ("EDA"), created to foster employment in the state, implemented regulations that are consistent with this imperative.<sup>9</sup> Specifically, EDA regulations provide that the authority should decline to give financial assistance to any applicant that has violated, among other things, criminal laws connected with the performance of a public or private contract; laws governing hours of labor, minimum wage standards, prevailing wage standards, and discrimination in wages; laws governing the conduct of occupations or professions of regulated industries; and indeed "any law which may bear upon a lack of responsibility or moral integrity."<sup>10</sup>

When the EDA developed the Grow NJ program, it enforced these regulations by requiring applicants for assistance to certify that they had not been found responsible for the violations enumerated in the EDA's regulations in a legal proceeding in a judicial or administrative tribunal. The EDA's application form expressly warns applicants that a false certification will subject them not only to civil action by the EDA, which could "at its option terminate its financial assistance," but to criminal prosecution.<sup>11</sup> NFI did not heed this warning.

### **B. NFI's Application for Grow NJ Benefits**

NFI, LP, submitted its Grow NJ application on October 24, 2016. It claimed that in exchange for the receipt of a Grow NJ tax credit, it and a number of its related companies would continue to employ 670 of their employees in New Jersey rather than moving the employees' jobs to Philadelphia.<sup>12</sup> As required by the application, NFI submitted an "affiliates chart" identifying each of these related companies that were affiliates, defined as "an entity that directly or indirectly controls, is under common control with, or is controlled by the business" either directly or indirectly, and which would "contribute either Full-Time Employees or Capital

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<sup>8</sup> Executive Order # 34, Brendan Byrne, March 17, 1976 (quoted in *N.J. Sch. Const. Corp. v. Technica, Inc., et al.*, 2006 N.J. AGEN LEXIS 756, \*13-21).

<sup>9</sup> N.J. Stat. § 34:1B-2.

<sup>10</sup> N.J.A.C. 19:30-2.2.

<sup>11</sup> NJEDA Application for Financial Assistance at 16 (obtained via Open Public Records Act request).

<sup>12</sup> NJEDA Application for Financial Assistance at 10-11 (obtained via Open Public Records Act request).

Investment at the Qualified Business Facility.”<sup>13</sup> The companies NFI identified as affiliates include NFI Industries, Inc.; National Freight, Inc., and NFI Interactive Logistics, LLC.<sup>14</sup>

Using a slightly different definition of affiliate—“persons having an overt or covert relationship such that any one of them directly or indirectly controls or has the power to control another”—the Grow NJ application also required NFI to disclose any pending or resolved litigation involving an affiliate that might disqualify NFI from state assistance.<sup>15</sup> Based on our research, which is outlined below, it is our opinion that this definition of affiliate obligated NFI to disclose the criminal and civil litigation history of its affiliate Interactive Logistics, Inc., even though NFI did not identify that company on its affiliates chart. Interactive Logistics, Inc., is registered to do business in New Jersey as NFI Interactive Logistics, Inc.<sup>16</sup> According to the company’s own federal court filings, NFI Interactive Logistics, Inc., does business as both NFI Interactive Logistics, LLC, and as National Freight, Inc.<sup>17</sup> The two latter entities are named as affiliates in the Grow NJ application.<sup>18</sup> We believe that NFI Interactive Logistics, Inc., is an affiliate of those entities within the Grow NJ definition, both because it does business under their names, meaning it has the power to bind them contractually and legally, and because the companies have replaced each other as parties to litigation without the necessity of formal impleading.<sup>19</sup>

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<sup>13</sup> NJEDA Application for Financial Assistance at 17-18 (obtained via Open Public Records Act request).

<sup>14</sup> NFI Operating Companies Structure – Grow NJ application of NFI, LP (obtained via Open Public Records Act request).

<sup>15</sup> NJEDA Application for Financial Assistance at 15 (obtained via Open Public Records Act request).

<sup>16</sup> N.J. Dept. of State Division of Commercial Recording Application for Certificate of Authority of Interactive Logistics, Inc., filed Apr. 28, 2000, at 2 (corporate resolution adopting NFI Interactive Logistics, Inc., as an alternate name; obtained via Open Public Records Act request); *also see USA v. Interactive Logistics, Inc.* D.N.J. Case No. 05-cr-00872, Dkt. No. 1 (Compl. ¶ 1(a)).

<sup>17</sup> *See Interactive Logistics, Inc. v. Markel Ins. Co.*, D.N.J. Case No. 08-cv-1834, Dkt. No. 1 (Compl. at ¶ 6); *Brime v. Eckenrode & Interactive Logistics, Inc.*, E.D. Va. Case No. 08-cv-0095, Dkt. No. 1 (Notice of Removal at 2); *Fitzgerald v. Interactive Logistics, Inc. d/b/a Nat’l Freight, Inc. or NFI Interactive*, U.S. D.O.L. Case No. 2001-STA-00052, available at [http://www.oalj.dol.gov/DECISIONS/ALJ/STA/2001/fitzgerald stephen w v national freight and 2001sta00052 \(nov 13 2002\) 114148 cadec sd.PDF#](http://www.oalj.dol.gov/DECISIONS/ALJ/STA/2001/fitzgerald%20stephen%20w%20v%20national%20freight%20and%202001sta00052%20(nov%2013%202002)%20114148%20cadec%20sd.PDF#).

<sup>18</sup> NFI Operating Companies Structure – Grow NJ application of NFI, LP (obtained via Open Public Records Act request).

<sup>19</sup> In *Interactive Logistics, Inc. v. Markel*, the NFI plaintiff sued to enforce an insurance policy. The complaint recites that it is being brought by “Plaintiff Interactive Logistics, Inc. d/b/a and a/k/a NFI Interactive Logistics, Inc., LLC” D. N.J. 08-cv-1834, Dkt. No. 1 (Compl. preamble). The abbreviation “d/b/a” is commonly understood to stand for “doing business as” while the abbreviation “a/k/a” is commonly understood to stand for “also known as”. In short, in New Jersey, Interactive Logistics, Inc. is “also know as” “NFI Interactive Logistics, LLC”. The complaint in *Markel* goes on to recite that the insurance policy at issue in the case insured “Interactive Logistics, Inc. d/b/a Interactive Logistics and NFI Interactive Logistics, LLC.” D.N.J. 08-cv-1834, Dkt. No. 1 (Compl. at ¶ 6). In *Brime v. Eckenrode*, defendant “Interactive Logistics, Inc. t/a National Freight, Inc.,” removed a personal injury suit against it and co-

In its application, NFI ignored its relationship to Interactive Logistics, Inc., and flatly denied that it or any affiliates as defined above were involved in or had been found responsible for any relevant litigation. Sidney Brown, NFI's CEO, certified on behalf of NFI that all information contained within the company's Grow NJ application was true. Brown specifically

certif[ied] under penalty of law that the representations contained herein [the application] are accurate; that I am familiar with the information submitted in this document, including all attachments, and have personally exercised an appropriate degree of due diligence to reasonable ensure that the information contained in this document, and all attachments are true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment. I understand that, in addition to criminal penalties, I may be liable for civil administrative penalties and that submitting false information or submitting materially inaccurate information may be grounds for denial, revocation or termination of any award of tax credits for which I may be seeking approval ...<sup>20</sup>

Based on the facts outlined above, in our opinion, Brown's certification bound NFI to two false claims: first, that neither NFI nor its affiliates had violated criminal laws governing contract performance, and second, that neither NFI nor its affiliates were party to pending legal proceedings alleging that they had violated laws governing hours of labor and minimum wage standards. As discussed below, these statements were false; Interactive Logistics, Inc., has a criminal history in connection with the performance of a contract, and at the time of the Grow NJ application, National Freight, Interactive Logistics, Inc., and NFI Interactive Logistics, LLC, were all parties to litigation alleging violations of laws governing hours of labor and minimum wage standards.

Five months after NFI submitted its Grow NJ application, the EDA awarded it a \$79,377,980 tax credit, intended to abate the company's tax bills over the course of ten years.<sup>21</sup>

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defendant Eckenrode. *Brime v. Eckenrode & Interactive Logistics, Inc.*, E.D. Va. Case No. 08-cv-0095, Dkt. No. 1 (Notice of Removal at 2). The court subsequently entered an "Order Substituting Name of Corporate Defendant," after counsel for plaintiff and for defendant Interactive Logistics, Inc., agreed that NFI Interactive Logistics LLC was the correct corporate defendant that employed Eckenrode, the NFI driver defendant. Significantly, the parties agreed that NFI Interactive Logistics, LLC, did not need to be served, and that all pleadings filed by Interactive Logistics, Inc., would be deemed filed by NFI Interactive Logistics, LLC. *Brime*, E.D. Va. Case No. 08-cv-0095, Dkt. No. 7 (Order Substituting Name of Corporate Defendant at 1).

<sup>20</sup> CEO Certification – GROW NJ certification of applicant NFI, LP (obtained via Open Public Records Act request).

<sup>21</sup> NJ EDA Approved GrowNJ Projects Under NJ Economic Opportunity Act at 22, available at [https://www.njeda.com/pdfs/reports/Approved\\_GrowNJ\\_EOA.aspx](https://www.njeda.com/pdfs/reports/Approved_GrowNJ_EOA.aspx). Like all Grow NJ beneficiaries, NFI can now sell its credit at no less than 75% of its face value; the EDA's award vested NFI with a marketable security valued at approximately \$60,000,000 or more. N.J. Stat. § 34:1B-248.

Like all Grow NJ beneficiaries, NFI can now sell its credit at no less than 75% of its face value; the EDA's award vested NFI with a marketable security valued at more than \$59,000,000.<sup>22</sup>

### **1. NFI Failed to Disclose its Prior Conviction for Three Counts of Wire Fraud**

In 2005, an NFI affiliate, Interactive Logistics, Inc., pled guilty to three counts of wire fraud after it defrauded Anheuser-Busch, a client, of approximately \$225,000.<sup>23</sup> NFI and Anheuser-Busch had entered a contract wherein the parties would share certain revenue according to a specific schedule. Rather than honor that agreement, NFI "knowingly and willfully transmitted fraudulent invoices... that falsely understated the amounts owed" to Anheuser-Busch.<sup>24</sup> NFI's scheme was elaborate, directed by senior executives, and involved two sets of books and the submission of falsified invoices to its client on a weekly basis.<sup>25</sup> After being charged with three counts of wire fraud, each of the three NFI principals—Sidney, Jeffrey, and Irwin Brown, who are still the company's only shareholders—authorized pleading guilty to all counts.<sup>26</sup> NFI agreed to pay full restitution to Anheuser-Busch, in addition to a court-imposed fine of \$850,000.

NFI's guilty plea means that the company's sworn statements that "no... [NFI, LP, its officers, directors or affiliates have not been found guilty, liable or responsible in any Legal Proceeding for the commission of a criminal offense in the performance of a public or private contract]," and "no... [NFI, LP, its officers, directors or affiliates have not been found in violation of criminal laws involving commission of any felony or indictable offense under State, Federal or foreign law]" are demonstrably false.<sup>27</sup> NFI's plea, by its terms, constituted a "finding" of guilt; because the NFI affiliate defendant was within a "Controlled Group" of NFI-related companies, the Grow NJ application compelled disclosure of the litigation and NFI's certified disavowal of its criminal history was, itself, a criminal act.

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<sup>22</sup> N.J. Stat. § 34:1B-248.

<sup>23</sup> *USA v. Interactive Logistics, Inc.*, D.N.J. Case No. 05-cr-00872.

<sup>24</sup> *Id.*, Dkt. No. 1 (Compl. ¶ 7).

<sup>25</sup> *Id.*, Dkt. No. 1 (Compl. ¶¶ 10-14).

<sup>26</sup> *Id.*, Dkt. No. 2 (Unanimous Action by the Shareholders & Directors of Interactive Logistics, Inc., d/b/a NFI Interactive Logistics, Inc.). As is characteristic of NFI-related companies, the three directors of Interactive Logistics, Inc., are also the three directors of Grow NJ applicant NFI, LP. NJEDA Application for Financial Assistance at 1 (obtained via Open Public Records Act request). Sidney Brown, CEO of both NFI, LP, and NFI Interactive Logistics, Inc., signed NFI Interactive Logistics, Inc.'s guilty plea and then, later, executed the certification on behalf of NFI, LP, vowing that none of the company's affiliates had a criminal history. See N.J. Dept. of State Division of Commercial Recording Application for Certificate of Authority of Interactive Logistics, Inc., filed Apr. 28, 2000, at 1 (identifying Sidney Brown as CEO; obtained via Open Public Records Act request).

<sup>27</sup> NJEDA Application for Financial Assistance at 13-15 (obtained via Open Public Records Act request).

## 2. NFI Failed to Disclose Pending Legal Proceedings Alleging Violations of Wage and Hour Laws

NFI also made the willfully false statement that “No...[NFI, LP, its officers, directors or affiliates are not a party to pending Legal Proceedings alleging the violation of any laws governing hours of labor, minimum wage standards, or discrimination in wages.]”<sup>28</sup> In fact, at the time of the EDA application, three NFI affiliates within the application’s definition of “Controlled Group” were defendants in two pending legal proceedings alleging violations of laws governing hours of labor and minimum wage standards.

In the first case, *Portillo v. NFI*, a group of eight truck drivers who made deliveries to Trader Joe’s stores for NFI alleged that they and more than fifty of their colleagues were not paid at all for certain time they worked.<sup>29</sup> The drivers were forced to purchase their own trucks and “lease” them without compensation to NFI, which prohibited them from working for any other company. The drivers alleged that NFI did not fairly reimburse them for their fuel costs, made the drivers pay for their own workers compensation insurance, and even refused to pay them for all of the miles they drove, violating its contracts with the drivers and unjustly enriching itself at the drivers’ expense.<sup>30</sup> NFI attempted to dismiss the *Portillo* plaintiffs’ complaint but the Federal District Court for the District of New Jersey denied NFI’s motion less than a month before the company filed its Grow NJ application.<sup>31</sup> *Portillo* is still in active litigation today, and the class of affected drivers has grown to more than 100.<sup>32</sup>

The second case, *Marsh v. NFI*, is also a class action, and alleged violations of laws governing hours of work and minimum wage standards.<sup>33</sup> The *Marsh* plaintiffs are logistics coordinators and similarly-situated employees who claimed that NFI had a policy of wrongly classifying the coordinators as exempt from overtime. Even though the coordinators routinely worked over 40 hours per week, they alleged they were consistently denied any pay for hours they worked in excess of 40. The *Marsh* plaintiffs alleged that NFI’s violation of the federal Fair Labor Standards Act was willful, and that NFI “deliberately trained, supervised, instructed, and authorized its managerial employees” to violate the law “in order to enhance profits and reduce its labor costs.”<sup>34</sup>

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<sup>28</sup> NJEDA Application for Financial Assistance at 14-15 (obtained via Open Public Records Act request).

<sup>29</sup> *Portillo et al. v. Nat’l Freight, Inc. & NFI Interactive Logistics, Inc.*, D.N.J. Case No. 15-cv-07908.

<sup>30</sup> *Portillo*, Dkt. No. 1-3 (Compl. ¶¶ 20, 22, 25, 26, 28, 39); also see Dkt. No. 102 (Amd. Compl.).

<sup>31</sup> *Id.*, Dkt. Nos. 48, 49 (Opinion & Order).

<sup>32</sup> *Id.*, Dkt. No. 102 (Amd. Compl. ¶ 39).

<sup>33</sup> *Marsh v. NFI Interactive Logistics LLC*, N.D. Tx. Case No. 3:16-cv-02799.

<sup>34</sup> *Id.*, Dkt. No. 1 (Compl. ¶¶ 13, 15, 18-20).

*Marsh* was filed shortly before NFI submitted its Grow NJ application, and the company expressly admitted in a court filing that it had knowledge of the case by October 3, 2016, three weeks before the company submitted the application.<sup>35</sup> *Marsh* was not resolved until 2018, when NFI settled with the plaintiffs on undisclosed terms.<sup>36</sup>

Both *Portillo* and *Marsh* are “legal proceedings” within the Grow NJ application’s definition thereof. Both cases were also “pending” at the time NFI submitted its application, and both cases allege the violation of laws governing hours of labor. NFI’s knowledge of both the *Portillo* and *Marsh* cases at the time it applied for Grow NJ benefits is uncontestable, and when NFI disavowed involvement in any pending wage litigation it did so knowing that its sworn disavowal was false.<sup>37</sup>

### 3. New Jersey Statute Criminalizes NFI’s False Statements

New Jersey criminalizes making a false certification to a state authority like the EDA,<sup>38</sup> and making a knowing “material representation that is false in connection with the negotiation, award or performance of a government contract,”<sup>39</sup> including the incentive agreements into which the EDA enters with all recipients of Grow NJ financial assistance.<sup>40</sup> Because NFI stands

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<sup>35</sup> *Id.*, Dkt. No. 6 (Stipulation Regarding Defendant’s Answer Date ¶ 1).

<sup>36</sup> *Id.*, Dkt. No. 28 (Status Report & Notice of Settlement).

<sup>37</sup> NFI compounded its falsehood in a document it titled “Supplement to Additional Background Questions,” which concerned legal proceedings. GROW NJ application of NFI, LP (obtained via Open Public Records Act request). In the “supplement,” NFI admitted that it “has been a party to employment-related litigation in the ordinary course of its business. Such litigation has involved, among other claims, allegations of discrimination and harassment,” but claimed that “[n]o member of the Controlled Group has been found guilty, liable, or responsible for any such claims.” NFI ignored the application’s instruction to disclose pending litigation, however, and made no mention at all of the criminal history of members of the Controlled Group.

Moreover, by claiming in its “supplement” that no NFI affiliate had been found responsible for “employment-related” violations or discrimination, NFI ignored a 1979 federal judgment that found that NFI liable for willfully violating the Fair Labor Standards Act and falsely represented a 2010 administrative finding that it discriminated against an employee for his union support in violation of the National Labor Relations Act. *See Marshall v. National Freight, Inc.*, 1979 U.S. Dist. LEXIS 9989, Lab. Cas. (CCH) P33,839; *NFI Interactive Logistics, LLC*, NLRB Case No. 25-CA-031011, 2010 NLRB LEXIS 345 (NLRB September 10, 2010). These findings of liability are discussed further in Section C, *infra*.

<sup>38</sup> N.J. Stat. § 2C:28-2(a) (“false swearing”). Sidney Brown, the NFI CEO who executed the Grow NJ certification disavowing any criminal history, also signed the company’s guilty plea, and may bear individual criminal liability. N.J. Stat. §§ 2C:2-7(d); 2C:28-2(a).

<sup>39</sup> N.J. Stat. § 2C:21-34(b).

<sup>40</sup> Recently, the state superior court held that “government contracts” within the meaning of that statute should be construed broadly, and not “limited to those providing for the procurement of goods and services from vendors.” *State v. Bernardi*, 456 N.J. Super. 176, 190, 192 A.3d 1040, 1047-1048, 2018 N.J. Super. LEXIS 123, \*14, 2018 WL 4084216. In *Bernardi*, the “contract” at issue was an administrative consent order in which a corporation agreed to remediate a landfill. The incentive agreement into which NFI and the EDA will enter sets forth the same

to gain \$79,377,980 in tax credits from the Grow NJ program,<sup>41</sup> its false statements to the EDA constitute a crime of the second degree, which is punishable by a term of imprisonment between five and ten years, payment of restitution to the state, and, because NFI is a corporate defendant, a fine of \$450,000, triple the amount that can be assessed to an individual convicted of such a crime.<sup>42</sup>

### **C. NFI's History of Violating Workers' Rights Should Bar it from Receiving State Financial Assistance**

The regulations governing the EDA are intended to prevent the authority from providing financial assistance to irresponsible employers like NFI. NFI's criminally false statements warrant prosecution, and those statements along with the company's history of violating workers' rights should also bar it from receiving financial assistance from the EDA.

The EDA is empowered to look beyond NFI's false statements and find that disqualification from public financial assistance is warranted for the violation of laws governing hours of labor, minimum wage standards," laws governing the "conduct of occupations or professions of regulated industries" like trucking, laws "which may bear upon a lack of responsibility or moral integrity," and "[a]ny other cause of such serious and compelling nature... to warrant disqualification for assistance...."<sup>43</sup>

Even if NFI had not lied on its Grow NJ application, as detailed above, the company's history should compel disqualification under the EDA's standards. The federal Department of Labor has, since 2003, cited NFI for hundreds of violations of the Fair Labor Standards Act, which governs hours of labor and minimum wage standards. The DOL found that at NFI locations around the country, the company unlawfully paid dispatchers flat salaries, regardless of the number of hours they worked, even though the dispatchers were entitled to overtime, and that, despite paying "yard spotters" by the hour, NFI unlawfully denied the spotters overtime wages.<sup>44</sup> Just months before NFI submitted its Grow NJ application, the DOL issued a press

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type of mutual obligations as a consent agreement. See N.J. Stat. § 34:1B-245 for the elements of the incentive agreement.

<sup>41</sup> NJ EDA Project Summary – Grow New Jersey Assistance Program recommendation concerning NFI, LP, at 3-4 (obtained via Open Public Records Act request).

<sup>42</sup> N.J. Stat. §§ 2C:43-4, 2C:44-2.

<sup>43</sup> N.J.A.C. 19:30-2.2.

<sup>44</sup> See, *inter alia*, DOL Wage & Hour Div. Case IDs 1690496, 1775692, 1775694, 1775696, 1775699, 1775701, 1775703 1775707, and 1812719.

release announcing that the company was required to pay \$1,072,061 to 357 employees to remedy its numerous violations of the law.<sup>45</sup>

These recent violations, in addition to independently violating the FLSA, were identical to violations of which NFI was found liable in 1979 and violated a standing court order.<sup>46</sup> In *Marshall v. National Freight, Inc.*, a federal court placed a permanent injunction on the NFI affiliate defendant, prohibiting it from permitting dispatchers to work more than 40 hours without overtime compensation, ordering it to pay the dispatchers \$650,000 it had wrongfully withheld from them, and finding that “an order enjoining defendant against violations at any of its locations throughout the United States is . . . necessary,” because NFI “willfully violated the Act as to more than one group of employees in the past. And it instructed supervisory personnel to put incorrect entries in the records of hours worked.”<sup>47</sup> Despite the federal injunction, NFI either persisted in or resumed its misclassification of dispatchers; more than 200 of the overtime violations in the 2016 DOL investigation were the result of NFI denying dispatchers their rightful overtime wages.<sup>48</sup>

Because NFI is a transportation and logistics company, it must comply with laws governing “occupations of regulated industries,” as referenced in the EDA’s regulations. Instead, NFI has repeatedly violated such laws, specifically those applicable to trucking.<sup>49</sup> In the year preceding NFI’s Grow NJ application, the company was cited for more than a hundred violations by the Federal Motor Carrier Safety Administration (“FMCSA”), the agency tasked with preventing commercial motor vehicle-related fatalities and injuries. During that year alone, NFI breached driving safety standards, including the prohibition on drivers using mobile phones while driving, and NFI trucks frequently violated state and local speed limit laws. NFI also violated hours-of-service standards, which are intended to limit the operation of commercial vehicles by drivers who are sick or tired.<sup>50</sup>

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<sup>45</sup> *National Freight to Pay More than \$1M in Back Wages to 357 Workers After U.S. Labor Department Investigation*, Release No. 16-0754, available at <https://www.dol.gov/newsroom/releases/whd/whd20160825-0> (Aug. 25, 2016).

<sup>46</sup> *Marshall v. National Freight, Inc.*, 1979 U.S. Dist. LEXIS 9989, Lab. Cas. (CCH) P33,839.

<sup>47</sup> *Id.* at \*37.

<sup>48</sup> DOL Wage & Hour Div. Case IDs 1775692, 1775707, and 1812719.

If NFI omitted mention of *Marshall* knowingly and answered “No... [NFI, LP, its officers, directors or affiliates have not been found guilty, liable or responsible in any legal proceeding for the violation of any laws governing hours of labor, [or] minimum wage standards],” it again perpetrated the crimes of false swearing and making false representations in connection with the award of a government contract. See Section C(3), *supra*.

<sup>49</sup> *State v. Hernandez*, 2010 WL 4028568 (N.J.Super.A.D.), 3 (noting, in a criminal case, that “[i]t is well-settled that commercial trucking is a highly regulated industry”).

<sup>50</sup> NFI’s history of FMCSA violations was retrieved through the FMCSA archive; available upon request.

NFI has also violated the law in ways that, in our view, bear generally upon its lack of responsibility and moral integrity, particularly in relation to the workers it employs. In two separate 2010 cases, administrative law judges found NFI liable for violating the National Labor Relations Act (“NLRA”), including by maintaining unlawful restrictions on employee speech at approximately 50 NFI facilities nationwide,<sup>51</sup> and by disciplining an employee in retaliation for his union support.<sup>52</sup> In the latter case, an NFI driver sought to organize a union with his coworkers because he was concerned by ever-worsening conditions at his Indiana warehouse, including NFI’s elimination of a driver bidding procedure and limits on how long drivers could idle their trucks. In response, NFI threatened drivers that unionizing would be futile, and then disciplined the driver who was leading the organizing effort because of his union support.<sup>53</sup> The judge ordered NFI to rescind the discipline and to post a notice to all its employees in which it agreed to cease and desist from interfering with employees’ rights under the NLRA.<sup>54</sup> NFI did not file exceptions to either of the ALJs’ orders, and the NLRB adopted the orders in the absence of exceptions.<sup>55</sup>

NFI has continued to disregard workers’ rights on an even larger scale in the years following its application for Grow NJ benefits. In October 2017, NFI acquired California Cartage Company, a California-based group of trucking companies that have faced multiple court and administrative agency actions for misclassifying truck drivers working at major ports, and for violating the rights of warehouse workers.<sup>56</sup> Since the acquisition, NFI-owned companies operating in California have been named as defendants in several similar cases. In January 2018, NFI-owned CMI Transportation LLC and related co-defendants were sued by the Los Angeles city attorney for misclassifying more than 200 of their drivers as independent contractors, and thereby perpetuating an illegal “scheme to increase their profits—by unlawfully evading their

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<sup>51</sup> *NFI Indus., Inc.*, NLRB Case No. 04-CA-036842, 2010 NLRB LEXIS 9, ALJ Decision at \*15-16 (NLRB January 8, 2010).

<sup>52</sup> *NFI Interactive Logistics, LLC*, NLRB Case No. 25-CA-031011, 2010 NLRB LEXIS 345 (NLRB September 10, 2010).

<sup>53</sup> *Id.*, ALJ Decision at \*36-37.

<sup>54</sup> *Id.* at \*52-53.

<sup>55</sup> <https://www.nlr.gov/case/04-CA-036842>; <https://www.nlr.gov/case/25-CA-031011>.

<sup>56</sup> NFI Industries, Inc., an affiliate named in NFI’s Grow NJ application, now owns CMI Transportation LLC, K&R Transportation California LLC, and Cal Cartage Transportation Express LLC, through its purchase of California Cartage Company. See <https://www.nfiindustries.com/wp-content/uploads/2018/05/Warehousing-in-Southern-California.pdf> and <https://www.portoflosangeles.org/commission/agenda-archive-and-videos/092018-regular-agenda> for a description of the transaction. According to lawsuits filed by the Los Angeles City Attorney, NFI Industries, Inc., formed the three companies “for the sole purpose” of operating the trucking and drayage businesses that it purchased from California Cartage Company. *California v. CMI Transp. LLC, et al.*, Super. Ct. of L.A. Cty Case No. BC689321, Compl. ¶ 8; *California v. K&R Transp. California LLC, et al.*, Super. Ct. of L.A. Cty Case No. BC689322, Compl. ¶ 8; *California v. Cal Cartage Transp. Express LLC, et al.*, Super. Ct. of L.A. Cty Case No. BC689320, Compl. ¶ 8.

obligations to provide benefits, pay relevant taxes, and absorb various operating costs.”<sup>57</sup> That case remains in active litigation, as do two other California prosecutions of NFI-owned companies based on similar evidence that the NFI-owned companies were violating the labor rights of an additional 200 drivers.<sup>58</sup>

In light of the EDA’s mission to foster employment in New Jersey, and the state’s public policy of contracting with employers who are responsible, the Authority should find NFI’s extensive history of alleged and proven violations of workers’ rights under state and federal laws sufficiently compelling to warrant disqualification.<sup>59</sup>

#### **D. The Office of the Attorney General & the Economic Development Authority Should Take Action Against NFI**

We appreciate the efforts of your offices in support of reform and accountability at the EDA, to ensure that our state’s limited resources benefit employers that are honest, responsible, and law abiding. The EDA’s Grow NJ program is expected to deprive New Jersey of billions of dollars in potential tax revenue, and NFI specifically is expected to benefit from a \$79,377,980 tax credit.<sup>60</sup> The wisdom behind such tax incentives is a policy decision, not a prosecutorial one. It is clear, however, that NFI is far from meeting the “standard of responsibility” to which New Jersey holds firms doing business with our state. New Jersey taxpayers and New Jersey workers deserve employers who will “both compete and perform honestly” in their dealings with the state. NFI’s willful misstatements about its criminal history, and about litigation challenging its fairness as an employer, compel the conclusion not only that NFI is an unworthy recipient of public funds, but that it is a criminal actor defrauding the state.

NFI does not deserve Grow NJ benefits, and its dishonesty in securing those benefits should not go unpunished. Again, please treat this letter as a formal request for investigation, prosecution, and administrative action. Please notify us if we may be of assistance to your offices.

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<sup>57</sup> *CMI Transp. LLC*, Case No. BC689321, Compl. ¶¶ 1, 8.

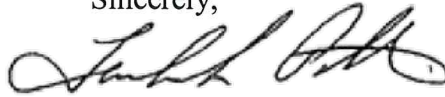
<sup>58</sup> *See id.*, Notice of Related Cases (referencing *K&R Transp. California LLC*, Case No. BC689322; *Cal Cartage Transp. Express LLC*, Case No. BC689320).

NFI unsuccessfully petitioned to remove all three cases; the Federal District Court for the Central District of California remanded them to state court ten days later. *See California v. CMI Transp. LLC, et al.*, C.D. Ca. Case No. 18-cv-0898; *California v. K&R Transp. California LLC, et al.*, C.D. Ca. Case No. 18-cv-00900; *California v. Cal Cartage Transp. Express LLC, et al.*, C.D. Ca. Case No. 18-cv-00896.

<sup>59</sup> *See, e.g., N.J. Schools Constr. Corp. v. Technica, Inc., et al.*, N.J. AGEN LEXIS 756, \*21-22 (upholding the EDA’s disqualification of an applicant for school construction contracts because the applicant’s nondisclosure of prevailing wage, wage payment, and OSHA violations “amount[ed] to ‘a cause of such serious and compelling nature’ as may warrant the disqualification/ debarment of persons” under EDA regulations).

<sup>60</sup> NJ EDA Project Summary – Grow New Jersey Assistance Program recommendation concerning NFI, LP, at 3-4 (obtained via Open Public Records Act request).

Sincerely,

A handwritten signature in black ink, appearing to read "Fredrick P. Potter, Jr.", with a stylized, cursive script.

Fredrick P. Potter, Jr.

cc: Kevin A. Quinn, Esq.

Economic Development Authority Incentives Task Force c/o Professor Ronald Chen, Esq.

Jim Walden, Esq.