STATE OF WASHINGTON
DOUGLAS COUNTY SUPERIOR COURT

WAFLA, a Washington nonprofit corporation, Petitioner, vs. WASHINGTON STATE ATTORNEY GENERAL'S OFFICE, a Washington state agency, Respondent.	NO. 16-2-00306-8 WASHINGTON STATE OFFICE OF THE ATTORNEY GENERAL'S OPPOSITION TO PETITION TO SET ASIDE SECOND CIVIL INVESTIGATIVE DEMAND

Respondent State of Washington (State) opposes WAFLA's Petition for Order Setting Aside Second Civil Investigative Demand for Interrogatories and Production of Documents and asks this Court to DENY the Petition to Set Aside.

I. INTRODUCTION

The legislature has given the Attorney General broad authority to investigate possible violations of the Consumer Protection Act by requesting information and documents through a civil investigative demand ("CID"). Acting upon a reasonable belief that WAFLA has knowledge of information relevant to an ongoing investigation, the Attorney General issued a CID calling for WAFLA to identify, among other things, the names of current and former members of its board of directors and officers. In response, WAFLA claims that this CID violates constitutional principles and that it impermissibly intrudes on personal affairs under *State v. Miles*.

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WAFLA is wrong. No good cause exists to set aside the CID at issue here because (a) the State acted under the express statutory authority granted to it by the Washington State Consumer Protection Act ("CPA"), RCW 19.86.110; (b) the CID complies as to form with the statutory requirements; (c) the information sought is reasonably relevant to determining whether WAFLA's conduct violated the CPA and/or the Sherman Act; and (d) WAFLA's conduct did occur in trade and commerce as required by the CPA and the Sherman Act. There are no constitutional or other infirmities with the challenged CID. At each stage of its investigation of WAFLA's conduct, the State complied with the law and made considerable efforts to be reasonable and accommodating in its dealings with WAFLA. While WAFLA has made conclusory mention of the burden of the State's CID in its petition, that claim is unsupported by any evidence of the supposed burden. In the absence of evidence affirming this statement, WAFLA has waived any claim it may have concerning the undue burden of the State's CID. As such, the Court should deny WAFLA's Petition to Set Aside the Second CID.

II. COUNTER STATEMENT OF FACTS

The Washington State Attorney General has been investigating WAFLA's conduct as it pertains to the Employment Security Department's ("ESD") 2015 Agricultural Peak Employment Wage and Practices Survey ("Survey"), to determine whether WAFLA, by and through its members and/or controlling officers or board members, engaged in price fixing and other violations of the state and federal antitrust laws in the market for agricultural labor. In assessing these potential violations, the State issued CIDs to WAFLA and its members under the authority of the Consumer Protection Act, RCW 19.86.110.

The State issued its first CID to WAFLA on December 31, 2015, in response to allegations that WAFLA had encouraged local agricultural growers to manipulate the wage setting mechanism for the H-2A Temporary Agricultural Worker Program, by coaching growers on how to respond to ESD's 2015 Survey. On January 25, 2016, the State held a meet and confer with counsel for WAFLA to address concerns with the scope of the CID and

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explain the subject matter of the investigation. The State agreed to narrow the scope and relevant time period and to provide key terms to search for responsive documents, in order to reduce WAFLA's purported burden to respond. Further, the State agreed to extend the response deadline by a month to February 24, 2016. The State continued to accommodate WAFLA by accepting piecemeal responses through June 30, 2016, and a final privilege log on August 10, 2016.

As part of its ongoing investigation, the State also sought survey responses from ESD and issued CIDs to growers identified by WAFLA as members during September and October 2015, the time period when the Survey was administered. WAFLA protested, stating it would move to set aside the CIDs if they were not withdrawn. WAFLA requested that the State respond to its objections by June 1, and the State agreed not to raise the 20-day requirement to file a petition to set aside in exchange for additional time to respond to WAFLA's objections. The State then responded to WAFLA's objections and agreed to extend the response deadline for WAFLA's members. WAFLA did not move to set aside the State's CIDs to its members.

On July 12, less than two weeks after completing its production, WAFLA requested that the State terminate its investigation and raised several purported deficiencies with the December 31, 2015 CID. In response, the State agreed to meet with WAFLA and its counsel on August 25, to discuss the substance of its investigation and WAFLA's concerns with the first CID. During this meeting, the State reiterated the subject matter of the investigation and informed WAFLA that its members were not a part of its investigation. The State also advised WAFLA that it would be making additional information and document requests concerning WAFLA's board of directors and officers, in order to determine whether WAFLA by and through its board of directors and/or controlling officers had engaged in wage-fixing in violation of the state and federal antitrust laws.

The State advised WAFLA and its counsel that it would formalize the additional requests in writing. WAFLA, however, preemptively submitted a 25-page document

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consisting of 2015 board reports and meeting minutes, along with an explanatory letter from counsel dated September 7, 2016. The State responded, noting that the documents provided would not be sufficient to terminate its investigation, and again informing WAFLA that it would formalize its request for additional information in a second civil investigative demand ("Second CID"). The State received acknowledgment from WAFLA's counsel to this effect (September 8, email), and issued its Second CID on September 16, with a return date of October 14.

On September 27, the State received a letter from WAFLA that purported to serve as a "meet and confer" regarding the Second CID. WAFLA renewed its objections to the State's authority to issue its CID and requested narrowing of the relevant period for responsive inquiries and documents. When asked, WAFLA's counsel confirmed that this request would have effectively limited WAFLA's responsive production to those documents already produced by WAFLA on September 8. Counsel discussed WAFLA's requests by phone on September 28 and 29. In response to WAFLA's request to narrow the relevant time period for the CID to a seven-month window (June 1, 2015 to December 31, 2015), the State offered to narrow the responsive period to a marginally larger 16-month window (September 2014 through December 2015), explaining that this time period was tailored to yield relevant information to the State's investigation. The State also offered to defer ***all*** of its requests for production and all but three interrogatories, for the limited time period of 16 months. Thus, the State ultimately sought answers to only three questions, concerning the identification of WAFLA's board of directors and officers and their involvement in administration of WAFLA's Survey guidance.

The State requested a response to its proposal by October 4. On October 5, after receiving no response, the State followed up with WAFLA. On October 7, WAFLA emailed to reject the State's offer. As reason for its refusal, WAFLA and its counsel stated only that "[w]e have concerns about the reservation of rights to seek documents at a later date as that

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does not give us the opportunity to properly preserve our objections." WAFLA did not respond to subsequent phone calls from the State and on October 10, without further negotiation or discussion, moved to set aside the State's Second CID.

III. EVIDENCE RELIED UPON

The State relies upon the Declaration of Chiedza Nziramasanga and exhibits attached thereto, together with the pleadings and briefs submitted herein.

IV. COUNTERSTATEMENT OF ISSUES

1. Whether the CID issued to WAFLA by the Washington State Attorney General, is issued under the lawful authority granted to the Attorney General?

2. Whether the CID issued to WAFLA by the Washington State Attorney General, violates WAFLA's constitutional rights?

V. ARGUMENT

A. The Second CID was issued under the authority of the Consumer Protection Act to investigate potential antitrust violations.

1. The Attorney General properly exercised its authority to conduct pre-suit discovery.

The Attorney General has broad statutory authority to investigate possible violations of the Consumer protection Act. Under RCW 19.86.110(1), the Attorney General is authorized to issue a CID "[w]henever [he] believes that any person . . . (b) may have knowledge of any information which the attorney general believes relevant to the subject matter of an investigation" of a possible violation of RCW 19.86.020-060. The State Supreme Court long ago held that the Attorney General has wide latitude in requesting information through a CID under RCW 19.86.110 in *Steele v. State*, 85 Wn.2d 585, 585, 537 P.2d 782 (1975) and *Steele* is the controlling Washington State case on RCW 19.86.110.

In *Steele*, the Attorney General's Office issued a CID to an employment agency pursuant to an investigation of potential violations of the CPA. The operators of the employment agency petitioned to set aside the State's CID alleging that it was an unreasonable search and seizure based upon a "bare suspicion" of illegality. *Steele*, 85 Wn.2d at 592. The

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trial court set aside the civil investigative demand. The Supreme Court reversed, holding, in relevant part, that the Attorney General may embark "upon investigations without absolute assurance that violations of the Consumer Protection Act have occurred [,]" so long as the Attorney General does not act arbitrarily in instituting the investigation. *Steele*, 85 Wash. 2d at 594–95. The Attorney General does not act arbitrarily where an adequate foundation exists for the investigation. *Id.* at 595. "'Even if one were to regard the request for information . . . as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.'" *Steele*, quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652, 70 S. Ct. 357, 368, L. Ed. 401 (1950). Relying on the holdings in *Oklahoma Press* and *Morton Salt*, the Supreme Court held that the CID was constitutional because (1) the investigation was within the authority of the Attorney General's Office (employment agencies are not exempt from RCW 19.86.); (2) the demand was not too indefinite (especially "when the investigation was into the affairs of a corporation or business"); and (3) the information sought was reasonably relevant to the investigation. *Id.* at 594–95. The standard set out in *Steele* is the relevant standard for determining whether a CID has been issued within the authority of the Attorney General.

In this case, the State's inquiry was within the authority of the Antitrust Division to investigate potential antitrust violations. Prior to issuing its first CID, the State engaged in a preliminary analysis of WAFLA's conduct to determine whether such conduct warranted further investigation. As part of its analysis, the State researched the laws and regulations governing the H-2A program and state and federal agricultural wage surveys. The State also spoke with industry stakeholders concerned by WAFLA's guidance. The State's initial review of WAFLA's survey guidance indicated the potential for collusive conduct and agreements about wages. Finding this to be adequate foundation for further investigation, the State issued its CID to WAFLA. Here, the State met the standards as set forth in RCW 19.86.110 and

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affirmed in *Steele*. The State exercised due diligence in determining further investigation was appropriate, and did not act arbitrarily in issuing its CID.

Wage fixing is an unreasonable restraint of trade that violates federal and state antitrust law. 15 U.S.C. § 1; RCW 19.86.030. Seeking to raise awareness of conduct that may result in violations of the antitrust laws, in October 2016 the Department of Justice Antitrust Division and the Federal Trade Commission issued joint guidance to human resource professionals and others involved in hiring and compensation decisions. The federal agencies describe circumstances under which nonprofit organizations and trade associations, working to keep costs down for their members, might enter into agreements to decrease wages or cap wage increases for hired employees. As competitors for the same pool of employees, the guidance notes that nonprofit and trade associations engaging in such agreements could be held criminally and civilly liable for anticompetitive wage fixing. *See* Department of Justice Antitrust Division, Federal Trade Commission, *Antitrust Guidance for Human Resource Professionals* (2016), https://www.justice.gov/atr/file/903511/download. Thus, it is wrong for WAFLA to baldly assert that "wafla's conduct cannot, as a matter of law, implicate any of the acts cited in the CID." Pet. at 11.

Notably, a number of class actions involving alleged wage fixing among organizations that supply foreign workers have been filed. For example, a class of H-2A sheepherders filed suit against ranchers and ranching organizations alleging violations of the Sherman Act. More specifically, the sheepherders claimed that defendant ranchers and ranching organizations had violated the antitrust laws by fixing wages and eliminating a competitive market for labor. *See Rodolfo Llacua, et al. v. Western Range Association*, 2016 WL 3449370 (D. Colo. Jun. 3, 2016). In another example, a class of foreign *au pairs* hired to provide nanny services under the J-1 Visa program, filed suit against for-profit and non-profit sponsor organizations (designated by the U.S. Department of State as the exclusive entities permitted to recruit and place *au pairs*) for price fixing under Section 1 of the Sherman Act. *Beltran v. InterExchange,*

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Inc., 176 F. Supp. 3d 1066 (D. Colo. Mar. 31, 2016); *Nziramasanga Decl.* ¶ 29, Exbibit M. In that case, the plaintiffs alleged that defendant sponsors had agreed among themselves to fix wages by creating an artificially low and anticompetitive wage floor for *au pairs*. *Id.* at 1071. The District Court held that the complaint sufficiently alleged an agreement to suppress wages. *Id.* at 1075–79.

Against this backdrop, there can be no serious contention that the inquiry into potentially anticompetitive conduct was not within the authority of the Attorney General, as required by *Steele*.

2. The Second CID is reasonably relevant to determining whether WAFLA's conduct violated the Washington State Consumer Protection Act.

There is no Fourth Amendment violation where the State makes a routine request for records relevant to a pre-suit investigation. Corporations and businesses are not afforded the same protections under the Fourth Amendment as are private citizens. *Steele*, citing *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 204–206, 66 S. Ct. 494, 90 L. Ed. 614 (1946), "[C]orporations and businesses historically have been subject to wide investigative powers." *Steele*, 85 Wn.2d at 593. As noted above, the Court in *Steele* held that a CID issued by the Attorney General pursuant to the CPA did not violate the Fourth Amendment, where the inquiry was within the authority of the Attorney General, the demand was not too indefinite, and the information sought was reasonably relevant to the investigation. *Id.* at 594.

Here, all records sought pursuant to the Second CID were reasonably relevant to a proper inquiry, the purpose of which was to determine two issues: whether WAFLA is subject to the CPA and whether its conduct was in violation of it. Acting under its statutory authority, the State issued its Second CID having reason to believe that WAFLA would have knowledge concerning the composition of its board of directors and officers. Further, the State believed that WAFLA would know the roles its board members and officers played in WAFLA's

guidance to its members concerning ESD's 2015 wage and practices survey. The requested information is relevant to the subject matter of this investigation.

As described in *N. Carolina State Bd. of Dental Examiners v. F.T.C.* and *Am. Soc. of Mech. Engineers, Inc. v. Hydrolevel Corp.*, organizations can be liable for conspiring with their board members and/or controlling officers. For example, in *North Carolina State Bd. of Dental Examiners*, 717 F.3d 359, the Court held board was capable of conspiring because its board of directors was comprised of actual and/or potential competitors, and in *American Soc. of Mechanical Engineers, Inc.*, 456 U.S. 556, the court held that an engineering organization was liable as a participant in conspiracy with its high ranking members, who had engaged in an anticompetitive agreement and were considered agents of the organization. *North Carolina State Bd. of Dental Examiners*, 717 F.3d at 373; *American Soc. of Mechanical Engineers, Inc.*, 456 U.S. 556. The potential for conspiracy price-fixing in the context of trade associations is especially high, where members often hold shared economic interests and have opportunities to meet to discuss pricing and output decisions at association meetings, trade shows and conferences. Thus, the State's inquiries concerning WAFLA's board of directors and officers were relevant to determining whether its board members or officers had conspired with WAFLA in issuing its survey guidance.

Direct evidence of concerted conduct is often scarce. However, courts frequently allow evidence of tacit agreements to refute claims of conscious parallelism. *White v. R.M. Packer Co.*, 635 F.3d 571, 575–76 (1st Cir. 2011) (A tacit agreement can by shown by "uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable or accompanied by other conduct that in context suggests that each competitor failed to make an independent decision."). Further, the antitrust laws have "granted fact finders some latitude to find collusion or conspiracy from parallel conduct and inferences drawn from the circumstances." *Oltz v. St Peter's Cmty. Hosp.*, 861 F.2d 140, 1450–51 (9th

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Cir. 1988). In Light of those standards, the information requested is reasonably relevant to determining whether an antitrust violation has occurred.

3. The Second CID complies with the statutory requirements set forth in RCW 19.86.110.

RCW 19.86.110 also imposes requirements on the form of the CID, all of which were met here. The CID states the "statute and section or sections thereof, the alleged violation of which is under investigation, and the general subject matter of the investigation[,]" as required by RCW 19.86.110(1)(a) and *Steele*. First, the Second CID provides the statute underlying the investigation:

> Pursuant to RCW 19.86.110, demand is hereby made upon WAFLA by the State of Washington, through Robert W. Ferguson, Attorney General, to produce for inspection and copying certain documents. The Attorney General believes WAFLA is in possession, custody or control of documents and have knowledge of information which is relevant to the subject matter of an investigation now in progress. This investigation is being conducted pursuant to the Washington Consumer Protection Act, Chapter 19.86 RCW and/or the Sherman Act, 15 U.S.C. § 1 et seq.

By declaring that the CID has been issued pursuant to RCW 19.86.110, the CID provided notice to WAFLA of the Attorney General's authority to investigate possible violations of the Washington Consumer Protection Act. More specifically, this statement provides notice to WAFLA that the Attorney General has authority to investigate possible violations of Sections 19.86.020 (prohibiting unfair competition), 19.86.030 (prohibiting contracts, combinations and conspiracies in restraint of trade or commerce), 19.86.040 (prohibiting monopolization and attempts to monopolize or combine or conspire with others to monopolize any part of trade or commerce) and the Sherman Act.

The Second CID provides a statement of the "general subject matter of the investigation" as required by RCW 19.86.110(2)(a). The attorney general may initiate investigations without "absolute assurance that violations of the Consumer Protection Act have occurred." *Steele*, 85 Wn.2d at 585. As such, CIDs need not allege possible violations with specificity. *Steele*, 85 Wn.2d at 592. The subject matter of the investigation in *Steele* was

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noted in the subpoena as "unfair and deceptive practices in the operation of an employment agency." *Id.* at 592. The Court held that this general and broad language complied with the statute and rejected the challenge to the civil investigative demand. *Id.* at 592.

The subject matter description provided by the State in the Second CID is more than sufficient under *Steele*, and provides WAFLA notice of the general subject matter of the State's investigation. The "definitions and general instructions" section of the Second CID provides notice that the investigation relates to WAFLA's interactions with Agricultural Growers in relation to the Employment Security Department's 2015 Agricultural Peak Employment Wage and Practices Survey and the H-2A Temporary Agricultural Worker program. The Survey is used to establish working conditions and pay rates under the H-2A Temporary Seasonal Worker Program. Thus, the Second CID generally provides that the subject matter of the State's investigation is anticompetitive conduct in the operation of the H-2A Seasonal Worker Program. That meets the standard imposed by RCW 19.86.110(2)(a).

Finally, and perhaps most fundamentally, since the inception of its investigation, and certainly by the time of the Second CID, the State made known to WAFLA that its investigation is focused on allegations that WAFLA provided guidance to its members regarding the completion and submission of the Survey and possible antitrust violations. Indeed, WAFLA's own letters to the State show that it knew full well the nature of the State's investigation. *See Nziramasanga Decl.* ¶ 14, Exhibit D, Letter from Kristin Ferrera, Esq., to Chiedza Nziramasanga, AAG, *Re: ESD Survey Litigation*, at 13 (Jul. 19, 2016) ("The AG is manufacturing an investigation of wage fixing without any basis in fact."). It is highly disingenuous for WAFLA to claim that it is unaware of the nature of the State's investigation.

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4. WAFLA's conduct occurred in trade or commerce as required by the CPA, RCW 19.86.010(2) because it was an incidental benefit to WAFLA's dues paying members and purchasers of its H-2A labor contracting services.

WAFLA's conduct of providing survey guidance occurred in trade or commerce, regardless of whether WAFLA provided information to its members free of charge. The CPA applies to "every person who conducts unfair or deceptive practices in any trade or commerce." *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984). In *Salois v. Mut. of Omaha Ins. Co.*, the defendant insurance company, contended that its refusal to provide certain benefits and coverage could not be reached by the CPA because the statute was only applicable to acts or practices designed to induce a potential buyer to purchase goods or services. 90 Wn.2d 355, 581 P.2d 1349 (1978) *holding modified by Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). The Court disagreed, holding that while the definition of trade or commerce "shall include sales," those words should be understood to encompass "more than just sales." *Id.* at 359. The Court held that while the defendant had not engaged in unfair practices with regard to the sale of its policy, it had done so by failing to uphold the potential benefits and security of coverage purchased by Plaintiff under the insurance policy. *Id.* at 360.

In the same way insurance beneficiaries pay premiums for potential benefits and coverage, WAFLA members pay dues for potential services such as human resource consulting and labor contracting support. Such services affect or occur in trade or commerce, when provided to assist growers engaged in the production and distribution of crops both locally and interstate. Access to the survey guidance and webinar was an incidental benefit to WAFLA's membership (access to the webinar video was later accessible to the public via YouTube) and thus occurred in trade or commerce. While WAFLA contends that it membership dues remained the same whether members attended the webinar or not, and that they received no pecuniary gain from their guidance or webinar, the fact remains that these resources were reserved for dues paying members and those who purchased WAFLA human

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resource and labor contracting services. Consequently, WAFLA cannot escape potential liability under the CPA by alleging that its conduct did not occur in trade or commerce. This result is consistent with the spirit of the CPA, which is to "be liberally construed that its beneficial purposes may be served." *Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wn.2d 793, 799, 363 P.3d 587 (2015) (quoting RCW 19.86.920).

5. WAFLA's conduct occurred in and affects interstate commerce as required by the Sherman Act, 15 U.S.C. § 1.

The Sherman Act prohibits anticompetitive conduct "in restraint of trade or commerce among the several States." 15 U.S.C. § 1. In order to establish jurisdiction under the Sherman Act, a plaintiff "must allege the relationship between the activity involved and some aspect of interstate commerce . . . or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce." *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 233, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980). However, the Supreme Court has held that in order to establish jurisdiction under the Sherman Act a plaintiff "need not allege, or prove an actual effect on interstate commerce to support federal jurisdiction." *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 330, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991); *See also McLain*, 444 U.S. at 233 ("If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases."). A party's use of instrumentalities of interstate commerce (telephone, fax, U.S. mail, internet, e-mail) to conduct business, has often been used to meet this burden. Moreover, the Supreme Court has applied the Sherman Act to wholly intrastate conduct on more than one occasion. *See McLain*, 444 U.S. at 233 (holding that federal jurisdiction had been established where Plaintiffs alleged that a real estate brokers' trade association had engaged in intrastate price-fixing conspiracy that was integrally tied to interstate commercial activities such as mortgage lending by multistate lending

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institutions); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975) (holding that that federal jurisdiction had been established where state and county bar association's minimum-fee schedule for title examination services constituted price-fixing affecting interstate transactions such as title lending). As such, WAFLA's contention that "intrastate, or 'local conduct,' is exempt from Sherman Act liability," is incorrect. Pet.'s Br. Mot. Set Aside 11-12.

There can be no serious dispute here that WAFLA's conduct occurred in interstate commerce. "A corporation is generally 'engaged "in commerce"' when it is itself 'directly engaged in the production, distribution, or acquisition of goods or services in interstate commerce.'" *United States v. Robertson*, 514 U.S. 669, 672, 115 S. Ct. 1732, 131 L. Ed. 2d 714 (1995). Farm labor that WAFLA provides to its member growers is an indisputable and necessary input in bringing Washington's agricultural crops to market. Those crops are distributed and sold across state borders throughout the United States. Further still, WAFLA facilitates transportation for foreign H-2A workers to travel from Mexico, across state lines, to Washington to work on farms and orchards across the state. The evidence in this case also shows that WAFLA uses the instrumentalities of interstate commerce to conduct their daily business, availing itself of both telephone and internet to communicate with members, vendors, and agencies (intrastate/interstate) regarding the H-2A program. Specifically, WAFLA subcontracts with hotels, bus companies, and service providers located in Mexico and southern California to assist in transporting H-2A workers to Washington State on behalf of its members. This is quintessentially conduct that affects interstate commerce. *See Robertson*, 514 U.S. at 670–71 (hiring and paying expenses for out-of-state workers to travel constituted interstate commerce).

In addition, WAFLA's membership is not limited to Washington State. Indeed, WAFLA's own 2015 report notes that WAFLA changed its name from Washington Farm Labor Association to simply 'WAFLA' "in recognition of the fact that we are helping

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seasonal employers *throughout the Pacific Northwest*" in California, Oregon, and Idaho. *See* WAFLA, *2015 Report to Members* (2016), *Nziramasanga Decl.* ¶ 30, Exhibit N. (emphasis added). These states conduct surveys similar to the annual ESD Agricultural Peak Employment Wage Practices Survey. As is true for the ESD Survey, these state surveys serve the purpose of establishing the state prevailing wage set by DOL. While WAFLA alleges that the guidance webinar was directed toward their Washington membership, this guidance was accessible to out-of-state members. It is not unlikely that such guidance could be instructive to WAFLA's out-of-state membership, in setting advantageous prevailing wages for their respective states. Given the facts presented in this case and broad federal antitrust jurisdiction under the Sherman Act, WAFLA's conduct did in fact affect and occur in interstate/foreign commerce. Thus, such conduct is reasonably relevant to the State's investigation into potential violations of the Sherman Act.

B. The Second CID does not violate WAFLA's Constitutional Rights.

1. The information sought by the State does not abridge protections provided by the Washington State Constitution.

The Second CID does not make unlawful inquiries into the private affairs of WAFLA, its board members, and its officers and does not violate Article 1, § 7 of the Washington State Constitution. Nor does the nature of the State's requests require that the Second CID be reviewed, authorized and/or issued by a neutral magistrate.

WAFLA relies on *State v. Miles*, 160 Wn.2d 236, 156 P.3d 864 (2007) in concluding that the State did not issue its Second CID under "authority of law," as required by Article 1, § 7. *Miles*, 160 Wn.2d 236. In *Miles*, a state agency issued an administrative subpoena to a bank seeking the defendant's banking records without notice to the defendant. *Id.* at 240. The court found the administrative subpoena invalid under Article 1, § 7. The court established that administrative subpoenas seeking to investigate an individual's private affairs, without

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notice to the individual, must be justified by more than statutory authority. *Id.* at 248. During the court's inquiry into what might constitute private affairs, it revealed that constitutional protection may extend to an individual's banking records, telephone records, or garbage put out for collection. *Id.* at 245.

WAFLA's reliance on *Miles* is misplaced for several reasons. *Miles*, 160 Wn.2d 236. First, in direct contrast to *Miles,* the State served the CID on WAFLA. The State notified WAFLA *in advance* that it was planning to make additional information requests, and the Second CID was addressed to WAFLA, providing WAFLA notice of the information and documents requested. *See Oklahoma Press Pub. Co.*, 327 U.S. at 195 (noting that an administrative subpoena is reasonable when the government has not physically entered a citizen's property or seized anything, but has rather requested that documents be produced, and described the documents to be produced). Further, the Second CID made no inquiries into the private affairs of WAFLA, its board of directors, or its officers. The interrogatories in the Second CID relate to conduct and matters wholly within the ordinary course of business at WAFLA, and maintained by WAFLA in the course of its business. See *Oklahoma Press Pub. Co.*, 327 U.S. at 204–205 (holding that corporations are not entitled to all of the constitutional protections provided private individuals, and noting that a corporation and its officers do not benefit from Fifth Amendment protections when it comes to corporate records, regardless of the records' potential incriminating effects). WAFLA does not, because it cannot, provide any support for the broad proposition that a corporation has a privacy interest in the names of its current and former directors and agents. The names of WAFLA's current and former directors and officers—particularly when made directly to the very organization for which these individuals served in an official capacity—is a far cry from the banking records at issue in *Miles.* Because the State has requested ordinary course documents directly from the party likely to have them, the State has acted within its lawful authority in issuing the Second CID.

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It should be noted that during the September 29th call concerning the Second CID, WAFLA's counsel informed the State of WAFLA's reluctance to identify its board members and officers. *Nziramasanga Decl.*, ¶ 24. As reason for its reluctance, counsel argued that identification could subject WAFLA's board members and officers to individual CIDs in the same way the State had issued CIDs to WAFLA's members. This argument does not make sense. Nothing in the discovery rules prevents the identification of potential witnesses. Discovery regularly seeks the names of witnesses and other individuals at an organization so that they can be deposed or subpoenaed for documents. Further, the CPA provides that a CID may be addressed to "any person" believed to be in possession of documents or information relating to a possible violation. WAFLA cannot shield its board members and officers from identification for fear they may become subject to investigation. Given the nature of antitrust violations, the State has a legitimate interest in WAFLA's communications with current and former directors or officers, since such communications could constitute a restraint of trade. *American Soc. of Mechanical Engineers, Inc.*, 456 U.S. 556 (holding that a nonprofit trade association, could be liable as a participant in a price-fixing conspiracy for the acts of its agents within their apparent authority).

2. The State's CID does not abridge WAFLA's First Amendment Rights because anticompetitive conduct is not protected speech.

The First Amendment to the U.S. Constitution broadly protects the freedom of speech, which is not an absolute right. *See Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 69 S. Ct. 684, 93 L. Ed. 834 (1949)) ("The First Amendment does not 'make it . . . impossible ever to enforce laws against agreements in restraint of trade . . . .'"). The CPA grants the State the authority to regulate anticompetitive conduct in violation of the antitrust laws. RCW 19.86.110. In conjunction, the Attorney General is authorized to

determine who may have participated in any such violations. Any incidental burdens that may result from regulation, including those on speech, do not preclude the State from exercising its express authority.

The U.S. Supreme Court has already rejected the very arguments WAFLA raises here. In *Oklahoma Press*, Petitioners made the argument that as a newspaper publishing business, the First Amendment protected it from pre-suit subpoenas seeking production of materials related to its business activities. *Oklahoma Press Pub. Co.*, 327 U.S. 186. Petitioners asserted that such requests would have a chilling effect on its activities. The Supreme Court rejected this assertion, noting that along with Congress' authority to regulate commerce and business activity, came Congress' ability to exercise its authority through pre-suit subpoena. *Id.* at 192–193.

In issuing its Second CID, the State does not seek to regulate speech, nor does it seek to prevent Petitioners from exercising its First Amendment rights to petition ESD and/or other governmental bodies concerning legislation, rules or procedures. Here, the State is strictly concerned with anticompetitive conduct in violation of the antitrust laws—agreements in restraint of trade. Much like Petitioners in *Oklahoma Press Pub. Co.*, 327 U.S. 186, WAFLA improperly characterizes the State's investigation into suspected price fixing and other violations of the state and federal antitrust laws as an attempt to regulate constitutionally protected free speech. While corporations may be entitled to the same speech protections conferred upon individuals, such speech is not constitutionally protected if eliciting anticompetitive conduct in violation of the state and federal antitrust laws. *See National Soc. of Professional Engineers*, 435 U.S. at 697. While WAFLA contends it merely provided suggestions to its membership regarding how to answer the Survey, it provides no support whatsoever for the proposition that this is protected speech. Nor can it – such speech cannot be said to be constitutionally protected if used to facilitate an agreement to engage in illegal price fixing. *See National Soc. of Professional Engineers*, 435 U.S. at 697 (holding that a

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violation of the Sherman Act may warrant restraints that impinge upon the violator's constitutional liberties, noting that an injunction against price fixing abridges the freedom of businessmen to talk to one another about prices, but does not prevent the court from issuing the injunction). If such were the case, the State would be unable to effectively exercise its authority to investigate and regulate any cartel conduct, which involves cartelists communicating with one another to achieve improper anticompetitive ends, and which is often discovered through circumstantial evidence such as corporate communications.

VI. CONCLUSION

The State has complied with the law and has acted reasonably in its information gathering efforts. Petitioners have incorrectly asserted that the Washington State Attorney General has issued its Second CID in violation of the First and Fourth Amendments to the United States Constitution, as well Article 1, § 7 of the Washington State Constitution. Petitioners' objections to the Second CID should be denied. The CPA expressly authorizes the Attorney General to issue CIDs as consistent with the Attorney General's authority to investigate potential violations of the state and federal antitrust laws. The State's Second CID is reasonable and consistent in form with the requirements of the CPA. For the foregoing reasons, the State respectfully asks the Court deny Petitioners' Petition to Set Aside the Second CID and to dismiss the Petition.

DATED this 21st day of November, 2016.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of the Washington State Office of the Attorney General's Opposition to Petition to Set Aside Second Civil Investigative Demand and this Certificate of Service to be served on the following via e-mails:

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