IN THE COURT OF COMMON PLEAS
OF DAUPHIN COUNTY, PENNSYLVANIA

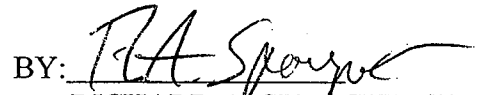
COMMONWEALTH OF PENNSYLVANIA,	:	**IN THE COURT OF**
	:	**COMMON PLEAS OF**
v.	:	**DAUPHIN COUNTY**
	:	
LOUIS DENAPLES and	:	**NO. 165 and 166 MD 2008**
MOUNT AIRY #1 LLC.	:	

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO QUASH PRESENTMENT
AND DISMISS CRIMINAL COMPLAINTS

Movants incorporate the facts, arguments and authorities set forth in their Motion to Quash Presentment and Dismiss Criminal Complaints and for the reasons set forth in the Motion respectfully request that this Honorable Court grant Movants argument and issue an Order quashing Presentment No. 6 and dismissing the Criminal Complaints.

Respectfully submitted,

SPRAGUE & SPRAGUE

BY: 

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CERTIFICATION OF SERVICE

I, Theodore J. Chylack, Esquire, hereby certify that on this date I served a true and correct copy of the foregoing Motion to Quash Presentment and Dismiss Criminal Complaints, along with accompanying Memorandum of Law and Supplemental Memorandum of Law in Support of Motion to Quash Presentment and Criminal Complaint Against Mount Airy #1 LLC, upon the following persons *via* hand delivery:

Francis T. Chardo, Esquire
First Assistant District Attorney
Dauphin County
Front and Market Streets
Harrisburg, PA 17101

SPRAGUE & SPRAGUE

Theodore J. Chylack, Esquire

Date: February 20, 2008

IN THE COURT OF COMMON PLEAS
OF DAUPHIN COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	**IN THE COURT OF**
	:	**COMMON PLEAS OF**
v.	:	**DAUPHIN COUNTY**
	:	**NO. ___ CD 2008**
MT. AIRY #1 LLC	:	

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH PRESENTMENT AND CRIMINAL COMPLAINT AGAINST MOUNT AIRY #1 LLC

INTRODUCTION

Mount Airy #1 LLC (hereafter "Mount Airy" or "the Corporation") seeks to quash the Grand Jury Presentment and Criminal Complaint charging the corporation with four counts of perjury based on the testimony of Mount Airy LLC's sole member, Louis DeNaples. The alleged false testimony was given in a verbatim sworn statement before the Pennsylvania Gaming Control Board on August 16, 2006.

Quashal of these unwarranted and unprecedented charges is required as a matter of law, for at least three reasons. First, a corporation cannot be guilty of perjury, which by definition can only apply to a natural person capable of taking an oath and forming the purely personal *subjective* criminal intent necessary to sustain a perjury conviction. It is for this reason that, despite exhaustive research, your Movant has not found ***a single case*** where the charge of perjury against a corporation was sustained.[1] Conversely, the common law has long recognized that a corporation (apart from its individual principals) cannot as a matter of law commit such a crime.

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[1] Our research revealed **only one** case where a corporate entity was even charged with perjury. That case was dismissed pre-trial. *State v. St. Paul Fire & Marine Ins. Co.*, 835 So. 2d 230 (Ala. Crim. App. 2000)

Second, close analysis of the jurisprudence of corporate criminal liability reveals that the sound public policy underlying the gradual expansion of corporate criminal responsibility for certain crimes is wholly absent when applied to the charge of perjury. In a perjury case, there is no difficulty in identifying the potentially culpable person, as may be the case with other corporate offenses, where assigning individual blame within a large corporate structure may be impossible. Similarly, no additional deterrence will be achieved by adding relatively minor internal corporate sanctions to the already onerous criminal sanction faced by the alleged perjurer. Finally, it is simply inconceivable to expect that a corporation could possibly deter or prevent an offense which can only be committed by an individual, who under oath makes a statement that *he subjectively believes is untrue.* This is particularly true in the present case where the Presentment alleges that Mr. DeNaples made false statements regarding *his personal knowledge* of other persons arising from alleged contacts that long *predate* even the formation of the corporation.

Third, assuming that a corporation can be guilty of perjury, the evidence in the record and the plain language of the Gaming Act make clear that Louis DeNaples could not, as a matter of law, have been acting "in behalf of the corporation" as required by the Pennsylvania corporate liability statute. 18 Pa. C.S.A. §307(c).

Under the Gaming Act, Mr. DeNaples was individually subject to a wholly *separate* licensure provision. He *personally* was required to meet the character and fitness requirements of the Act before he could be affiliated with *any* gaming applicant, not just Mount Airy. Accordingly, the transcript of Mr. DeNaples' testimony relied upon by the Investigating Grand Jury reveals specific areas of questions directed at Mr. DeNaples as a corporate representative,

while other areas were directed (as they must have been given the subject matter) to Mr. DeNaples, individually and not as a corporate representative. All of the alleged perjurious statements fall into the latter category.

More importantly, under the terms of the Gaming Act itself, Mount Airy had nothing to gain by the alleged false testimony, and indeed, everything to lose. The Act expressly provides for divestiture by a licensing applicant in the event that a "principal" of the applicant does not meet the character requirements. Moreover, Mount Airy risked denial or revocation of its *own* license if any agent of the corporation provided false or misleading information to the Gaming Board. As such, if Mr. DeNaples was untruthful, such action was inimical to the best interest of the corporation and clearly not in behalf of or in furtherance of Mount Airy's corporate purpose.

The Dauphin County District Attorney's office has already demonstrated its disdain for both the Gaming Act and those on the Board who have been charged with its administration. By filing these unprecedented charges against a corporation, which arise solely from the acts of an individual testifying about his personal background, that Office again seeks to subvert the comprehensive regulatory scheme by substituting its judgment for that of the Gaming Board. Fortunately, the law does not allow for such a perversion of the criminal process. The charges against Mount Airy must be dismissed.

II. MATERIAL FACTS

On November 14, 2005, Louis DeNaples executed the Operating Agreement of Mount Airy as its sole member. Mount Airy's stated purpose was to engage "in any lawful act or activity for which limited liability companies may be formed...." Management of the Corporation was to be conducted by DeNaples as the sole member and he was empower to act "for the

furtherance of the business affairs of the Company." *See* Exhibit "K "

On December 21, 2005, Mt. Airy submitted an application to the Gaming Board to operate a slot machine facility at the site of a shuttered resort, to be known as the Mount Airy Resort and Casino. As the sole member of Mount Airy, Louis DeNaples was likewise required to submit a separate application for a "principal" and "key employee" license under the Gaming Act. 4 Pa.C.S.A §§1311.1 and 1311.2. Incident thereto, Mount Airy and DeNaples provided the Gaming Board with thousands of pages of documents pertaining to both Mount Airy's and DeNaples' personal and financial history.

Following submission of those applications, Mr. DeNaples appeared before Board representatives and answered additional questions under oath on August 16, September 28, 2006 and December 4, 2006. During those appearances, Mr. DeNaples answered questions relating to his personal history. He also answered questions directed at the application of Mount Airy. On December 20, 2006, the Gaming Board approved Mount Airy's application for license under the Gaming Act. It also approved the application of Louis DeNaples as a principal and key employee.

The Gaming Board decision did not sit well with those in the Dauphin County District Attorney's office. First Assistant District Attorney Francis Chardo called the decision "an outrage." [2] Thus motivated, he caused to be filed a Notice of Submission with the Fourth Dauphin County Investigating Grand Jury to investigate whether Mr. DeNaples provided false testimony or false statements in connection with the licensure process. In short, the Investigating

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[2] Mr. Chardo had previously testified before the House Republican Caucus that allowing the Gaming Board's Bureau of Investigation and Enforcement to investigate applicants as opposed to the Pennsylvania State Police was akin to the fox guarding the hen house.

Grand Jury was to be used to discredit the decision of the Board.

On January 23, 2008, the Investigating Grand Jury issued Presentment No. 6, purporting to find that Louis DeNaples gave false testimony on August 16, 2006, "concerning *his* (gaming license) application." Presentment No. 6, at 2 (emphasis added). Specifically, the Investigating Grand Jury alleged that it "received credible evidence demonstrating the falsity of sworn statements made by DeNaples" pertaining to the following matters:

A. Count One - Perjury Related to Dealings with William D'Elia;

B. Count Two - Perjury Related to Dealings with Russell Bufalino;

C. Count Three - Perjury Related to Dealings with Shamsud-din Ali; and

D. Count Four - Perjury Related to Dealings with Ron White.

Based on the allegations, the Investigating Grand Jury recommended that the District Attorney or his designee, institute criminal proceedings against Louis A. DeNaples and charge him with four counts of perjury. See Exhibit "E," Presentment No. 6 at 23.

Despite its prior finding that Mr. DeNaples testified falsely "concerning *his* application," the Investigating Grand Jury also recommended the institution of criminal proceedings against Mt. Airy. It recommended that Mt. Airy be charged with four counts of perjury on the basis that, at the time of DeNaples' testimony, he "was acting on behalf of Mt. Airy #1, LLC as a high managerial agent." Presentment No. 6 at 22-23. The Presentment contains no other allegation to support the charges leveled against the Corporation, nor does it set forth in what manner Mr. DeNaples was acing in behalf of Mount Airy by uttering the alleged falsities.

On January 30, 2008, the Commonwealth filed a criminal complaint against Mount Airy #1 LLC. The Complaint charges four counts of perjury in connection with a proceeding under the Gaming Act in violation of 4 Pa. C. S. §1518 and 18 Pa.C.S. §4902(a). The four counts

against the Corporation arise from the identical conduct that is set forth in the Complaint against Mr. DeNaples. *See* Exhibit "H," Criminal Complaint against Mt. Airy #1 LLC at 2-3. Further, the Affidavit of Probable Cause in support of the Criminal Complaint relies exclusively on "Presentment No. 6 issued by the 4th Dauphin County Investigating Grand Jury." See Exhibit " " Criminal Complaint at 5.

III. SCOPE OF REVIEW

A presentment, and the criminal complaint upon which it rests, must set forth sufficient facts to establish that a crime has been committed and to apprise the defendant of the nature of the charges. Pa. R. Crim. P. 504. Where the complaint fails to adequately describe an offense against the peace and dignity of the Commonwealth, it must be dismissed. *Commonwealth ex rel. Fitzpatrick v. Mirarchi*, 481 Pa. 385, 392 A.2d 1346 (1978).

IV. ARGUMENT

The Presentment and the Criminal Complaint against Mt. Airy are fatally flawed. First, they purport to allege the offense of perjury by a corporation. A corporation cannot commit such a crime, in this or any other jurisdiction. Moreover, this Court should reject the Commonwealth's invitation to create such an offense, where no sound policy reason supports such an extension of corporate criminal liability, particularly where the alleged falsehoods relate to alleged personal relationships and not on any alleged conduct undertaken on behalf of the corporation. Lastly, assuming *arguendo,* a corporation can be guilty of the crime of perjury, the Presentment and Complaint are bereft of any facts to support the proposition that the alleged false testimony was "in behalf of the corporation" as required by Pennsylvania law. Indeed the only fact alleged in the Presentment bearing on this question was that Mr. DeNaples "testified

under oath concerning *his* application."

1. **Corporations Cannot As A Mater of Law Commit Perjury**

For at least the last 150 years, the law has recognized that a corporation cannot commit the crime of perjury. *Queen v. Great N. of Eng. Ry.*, 115 Eng. Rep. 1294, 1298 (Q.B. 1846). There the Court held that a corporation could not be liable for treason or perjury among other offenses, because "[t]hese plainly derive their character from the corrupted mind of the person committing them, and are violations of social duties that belong to men and subjects."

Courts in this country have also long recognized that "it is true that there are some crimes, which in their nature cannot be committed by corporations." *New York Central and Hudson River Railroad Company v. United States.* 212 U.S. 481 (1909). Perjury has long been recognized as one such crime. *State v. Lehigh*, 94 N.J.L. 171, 176 (N.J. 1920) ("It is true that there are crimes [perjury, for example] of which a corporation cannot, in the nature of things, be guilty.") *Commonwealth v. Illinois C. R. Co.*, 152 Ky. 320, 322 (Ky. 1913) (It is true there are crimes of which, from their very nature, as perjury for example, they cannot be guilty); *United States v. John Kelso Co.*, 86 F. 304, 306 (N.D. Cal. 1898) (corporation cannot be guilty of perjury, bigamy, perjury, rape, or murder). *See also* Note, 60 *Harv. L. Rev.* 283, 284 (1946) (collecting cases).

The rationale underlying this basic truth lies in the fact that these crimes, by their very nature, involve a breach of the individual's duty to society and cannot, by definition be committed by a juridical person. This is particularly true of the crime of perjury.

The crime of perjury is defined in 18 Pa.C.S.A. § 4902(a), which states: "A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false

statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material *and he does not believe it to be true.*" (emphasis added) *See also Commonwealth v. Bidner*, 282 Pa. Super. 100, 422 A.2d 847 (1980); *Commonwealth v. Lafferty*, 276 Pa. Super. 400, 419 A.2d 518 (1980); *Commonwealth v. Yanni*, 208 Pa. Super. 191, 222 A.2d 617 (1966). By definition, the elements of the offense preclude corporate liability.

A corporation cannot take an oath or affirmation. That is the act of an individual. If it cannot take an oath, it cannot commit perjury. This basic truth is perhaps best exemplified by the requirements of Section 302 of the Sarbannes-Oxley Act of 2002, which required for the first time that individual corporate officers affirm, under oath, the truth of corporate financial statements. 15 U.S.C. § 7241. It is the individual officer who owes a duty to testify truthfully and who will be exposed to criminal liability for doing failing to do so, not the corporation.

The theory of corporate liability also falls short when one considers the enhanced *mens rea* requirement necessary to sustain a perjury conviction. In order to convict a person of perjury in Pennsylvania, the Commonwealth must prove more than mere falsity. It must prove that the defendant *subjectively believed* that his or her statement was not truthful. A subjective belief cannot be held by an organization. By its very nature, perjury is a crime that can only be committed by an individual who subjectively believes he is testifying falsely. *Blasi v. Attorney General*, 120 F.Supp.2d 451(MD Pa. 2000), *aff'd,* 275 F.3d 33 (3d Cir. 2001).

While the law recognizes that it is proper in certain limited circumstances to impute the guilty knowledge of its agents to that of the corporation, the law has never gone so far as to attempt to impute a purely personal subjective belief of an agent to that of its principal. It is for

this reason that there is no reported case in this or any other jurisdiction where a charge of perjury by a corporation has been sustained.

It is axiomatic that penal statutes are to be strictly construed and any ambiguity must be interpreted in favor of the accused and against the prosecution. *Commonwealth v. Driscoll*, 485 Pa. 99, 401 A.2d 312 (1979). This is particularly true where "doubt exists concerning the proper scope of any penal statute." *Commonwealth v. Scolieri*, 571 Pa. 658, 813 A.2d 672 (2002). While section 4902 of the Crimes Code by its express terms reaches "persons," the General Assembly did not unambiguously intend to extend corporate criminal liability to crimes that can only be committed by natural persons. This Honorable Court should follow 150 years of precedent and refuse the Commonwealth's invitation to extend the perjury statute beyond its well settled reach.

2. The Policy Reasons Behind Imposition of Corporate Criminal Liability Do Not Support the Unprecedented Extension Sought by the Commonwealth

Early common law rejected any notion that corporations could be held criminally responsible. The small size of corporations made it relatively easy to identify individuals responsible for corporate wrongdoing. As corporations grew in size, power, and number, however, the common-law rule was reconsidered. These developments were facilitated by the growth of regulatory or public welfare offenses, which were *malum prohibitum*, and imposed liability regardless of the actor's intent. Imposition of criminal responsibility on a corporation was thus justified as necessary to protect the public's welfare. *See, e.g. United States v. Dotterweich*, 320 U.S. 277 (1943) (corporation held liable for violation of federal Food, Drug, and Cosmetic Act).

The law of corporate liability for more serious offenses requiring *mens rea* has proceeded more cautiously. Yet even here, the expansion of corporate liability was grounded in sound public policy and done only on a case by case basis.

The major purpose advanced for corporate criminal liability to non regulatory offenses is preventive: the hope that the *in terrorem* effect of criminal sanctions aimed at the corporation will deter illegal acts by corporate agents. These sanctions may prompt corporations to undertake internal disciplinary measures aimed at avoiding liability. The Commentary to the Model Penal Code makes this point quite clearly when it notes that deterring illegal acts of corporate agents is the "ultimate justification" for imposition of liability upon the entity. *Model Penal Code and Commentaries*, Section 2.07, American Law Institute, Part 1, p.336 (1985) (hereinafter cited *"Commentaries"*). [3]

In discussing the vicarious nature of the liability sought to be imposed by this section, the commentators cautioned, however, that vicarious corporate liability should only be imposed where it "clearly may be expected to accomplish desirable social purposes." *Id.* Thus, in situations where such deterrence is unnecessary or impossible, the policy underpinnings of the extension of corporate criminal responsibility disappear.

Indeed, the drafters of the model provision expressly recognized that "to the extent that shareholders participate in criminal conduct,...they may be reached directly through application of ordinary principles of criminal liability." *Commentaries*, 336. This also explains why there is

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[3] The Pennsylvania Crimes Code provision on corporate liability, 18 Pa. C.S.A.§307, is closely modeled on the Model Penal Code provision. As such, in determining its reach, it is appropriate to rely upon the commentaries of its drafters. *See*, *Commonwealth v. Brown*, 473 Pa. 458, 462 n. 4, 375 A.2d 331, 334 n. 4 (1977) (Model Penal Code Comments are not binding, but may be used to resolve problems in interpreting Crimes Code provisions.")

not a single reported case where a corporation was sought to be held criminally responsible for such crimes as murder, perjury, treason, bigamy or rape. It is for the simple reason that "such offenses may be effectively punished and deterred by prosecution directed against the guilty individual. *Commentaries*, p. 338.

Such are the circumstances as alleged in the Presentment. Here, there is no difficulty in identifying the potentially culpable individual. It is not disputed that Mr. DeNaples was the person who testified under oath. Thus identification of the potentially culpable person has already occurred.

Similarly, no additional deterrence will be achieved by adding relatively minor internal corporate sanctions to the already onerous criminal sanction faced by the alleged perjurer. Finally, it is simply inconceivable to expect that a corporation could possibly deter or prevent an offense which can only be committed by an individual, who under oath makes a statement that *he subjectively believes is untrue.* This is particularly true in the present case where the Presentment alleges that Mr. DeNaples made false statements regarding *his personal knowledge* of other persons arising from alleged contacts that *long predate* even the formation of the corporation. As discussed above, perjury requires a showing of subjective intent. Assuming perjury was committed, Mount Airy could not have stopped it.

Not only is there lacking any sound policy reasons for the extension of criminal liability to Mt. Airy under these unique facts, but there are also significant policy reasons for refusing this unwarranted and unprecedented expansion of corporate criminal liability. If Mr. DeNaples is found to have committed perjury (which Mount Airy and Mr. DeNaples vigorously dispute), he will not only suffer the opprobrium of conviction and potential incarceration, but under the

Gaming Act, will also be *debarred* from receiving any pecuniary benefit from Mount Airy. Indeed, he will be prohibited from participating in *any way* in the operation of Mt. Airy's affairs. Section 1326(b) of the Gaming Act expressly grants the Gaming Board the power to "suspend, revoke or deny renewal of any permit or license..." if it is determined that an applicant has provided false or misleading information in connection with the application for or renewal of a license. 4 Pa. C.S.A. § 1326(b). Since the corporation's alleged liability is wholly vicarious and dependent upon an antecedent conviction of Mr. DeNaples, any *additional* fine that would be meted out to the Corporation could not impact Mr. DeNaples, who if convicted, would have already forfeited his right or interest in any future profits of the corporation.

Conversely, if the charges brought against Mount Airy are sustained, the harm visited will be borne, not by the alleged perpetrator, but by wholly innocent parties. Over 900 employees who rely on Mount Airy for their livelihoods will lose their jobs. The local small businesses which are flourishing in an otherwise economically depressed area will lose contracts with Mount Airy, which pays those local businesses more than $700,000 per **week.** Last, but certainly not least, the shuttering of Mount Airy would cost the taxpayers of this Commonwealth lost revenues of $1.45 million each and every **week**. [4]

The evolution of jurisprudence leading to the extension of criminal liability for certain crimes makes clear that such extensions are not taken lightly and were grounded in notions of simple fairness and sound public policy. This Court should reject the Commonwealth's effort to

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[4] *See* Letter of Doug Harbach, Director of Communications Pennsylvania Gaming Control Board to the Editor, *Philadelphia Inquirer*, February 15, 2008. *http://www.philly.com/inquirer/opinion/20080215_Letters_to_the_Editor.html*

impute criminal responsibility upon a corporation for so subjective a crime as perjury, where those very policy reasons generally advanced in favor or corporate responsibility are not only inapposite, but support rejection of these unwarranted and unwise charges.

3. The Presentment and Criminal Complaint Fail To Sufficiently Allege That Louis DeNaples Was Acting In Behalf Of Mount Airy

The Crimes Code sets forth the circumstances where a corporation may be held criminally liable for the acts of its "high managerial agents." It provides in pertinent part:

> A corporation may be convicted of the commission of an offense if . . . the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.

18 Pa. C.S. A. §307(a)(3).

This subsection section recognizes that it is fundamental that before the criminal law will impute criminal liability to a corporation, there must be some showing that the illegal conduct was "in behalf of the corporation." Without such a finding, one would have the imposition of liability without fault. Such was not the intent of the drafters. The commentary to this section in the Model Penal Code succinctly points out the necessity of showing both "the rank of or authority of the officer or agent *and* the requirement that the conduct be engaged in on behalf of the corporation and within the scope of employment." *Commentaries* at p. 340.

Similarly, the Pennsylvania cases interpreting section 307 recognize that both elements must be established. For example, in *Commonwealth v. Penn Valley Resorts, Inc.,* 343 Pa. Super 387, 494 A.2d 1139 (1985), the court upheld the conviction of a resort for involuntary manslaughter and furnishing liquor to minors, where its company's president contracted to

provide an open bar to a group of students. The Court rejected the notion that the corporation need ratify or affirm the decision of its president, but instead noted that corporations are criminally accountable for the actions of a "high managerial agent" *who commits a wrongdoing in the scope of his office. Penn Valley Resorts*, 343 Pa. Super. at 393, 494 A.2d at 1142. This has also long been the federal law. In the landmark decision *New York C. & H. R. R. Co. v. United States*, 212 U.S. 481, 29 S. Ct. 304 (1909), the Supreme Court upheld the conviction of a corporation for illegal rebates paid by common carriers. The Court held that imposition of liability on the corporation was proper because:

> " [i]n such cases... liability is not imputed because the principal actually participates in the malice or fraud, *but because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment in the business of the principal."*

New York C. & H. R. R. Co. v. United States, 212 U.S. at 493, 29 S. Ct. at 306. (emphasis added).

Here, the Presentment fails to set forth any fact to support that the alleged falsehoods were uttered "in behalf of" Mount Airy, as required by the statute. Indeed, the Presentment alleges just the opposite. Mr. DeNaples appeared before the Board as both an individual and in his corporate capacity, answering questions related to both his personal application and the application of Mount Airy. Yet, the Investigating Grand Jury found as fact that DeNaples gave alleged false testimony "concerning his application." Presentment, p.2. The Investigating Grand Jury's own finding precludes the imposition of liability upon Mount Airy as a matter of law.

In the unlikely event that this clear finding is insufficient to dispose of the issue, the facts

alleged in support of the charges and review of the entire Transcript of Mr. DeNaples' testimony before the Board, support the finding that the alleged falsehoods were not proffered in behalf of Mount Airy, but instead were related to Mr. DeNaples' personal application.

Clearly, Mr. DeNaples was questioned by the Board in both his individual and corporate capacities. The August 16, 2006 transcript reflects the meticulousness with which representatives of the Gaming Board separately questioned Mr. DeNaples concerning the gaming application of Mount Airy (see, e.g. PCBG Exhibit 4, Mt. Airy Disclosure Form; Exhibit "J," Transcript, August 16, 2006, pp. 123-136) and Mr. DeNaples' personal application. (PGCB Exhibit 2, DeNaples' Key Employee Application and Exhibit 3 Personal History Disclosure form.) Indeed, the questioners made this line of demarcation from clear the outset.

> We're here today to go over *your application, as well as the application of Mount Airy.* We're going to go through the documents and ask you about each page and making sure we have the most true and correct information as of today. Later on today, we'll be going through Mount Airy doing the same thing. I expect this to be a very long day. (Emphasis Added)

See Exhibit "J," Transcript, August 16, 2006, p.5.

Notably absent from the Presentment (and therefore fatal to the charges) is any reference to alleged false testimony provided by Mr. DeNaples that was proffered in behalf of or in any way related to Mount Airy. Nowhere is the distinction between Louis DeNaples, the person and Louis DeNaples, corporate representative more starkly shown than through the following exchange in the August 16th Transcript concerning Mr. D'Elia and Mount Airy. This particular testimony followed immediately after the passage quoted on page 5 of the Presentment. For obvious reasons, it was omitted from the Presentment:

Q. Has Mr. D'Elia ever transacted any business with or on behalf of Mount Airy?
A No.
Q. Has he ever been associated with Mount Airy?
A No, ma'am.

August 16, 2006 at p. 225.

The Grand jury does not allege that these responses, or any other made on behalf of Mount Airy, are untrue. Yet, the Presentment blithely charges Mount Airy with felonious conduct solely on the basis that at the time of his testimony, Mr. DeNaples was "was acting on behalf of Mt. Airy #1, LLC as a high managerial agent." This bald reference to the statutory language is insufficient as a matter of law to sustain the charges against Mt. Airy. *Commonwealth v. Smouse*, 406 Pa. Super 369, 594 A.2d 666 (1991) (Mere reference to statutory language in criminal complaint insufficient).

Further, it is not disputed that each of the perjury counts allege falsity by Louis DeNaples in his descriptions of personal and business dealings unrelated to the affairs of Mount Airy. In fact, these alleged dealings long predate the formation of Mount Airy. For example, in alleging that DeNaples falsely denied a relationship with William "Big Billy" D'Elia, the Presentment cites, *inter alia,* DeNaples attendance at a wedding *eight years ago*, describes an alleged business deal relating to the placement of pay phones *over twenty years ago,* and documents, including a phone book seized from D'Elia *seven years ago*. Presentment No. 6 at pp. 5-7.

The same is true to even a greater extent as to Count 2. Therein the Grand Jury alleges that Mr. DeNaples' testimony concerning his alleged relationship with reputed organized crime

boss Russell Bufalino was knowingly false. Russell Bufalino died *over 14 years ago*. More tellingly, all of the facts set forth in support of this charge allegedly occurred in the 1970's, some *30 years ago*. Presentment No. 6 at pp. 8-9. Counts 3 and 4 similarly relate solely to alleged dealings unrelated to Mount Airy which occurred between *two and five years* before its formation. Presentment No. 6 at pp. 11-22, 23.

Where, as here, the specific references to the testimony cited in the Presentment as forming the basis for the perjury charges do not relate to Mount Airy, and were undisputedly made by Mr. DeNaples in furtherance of *his application* for a "principal" gaming license under the Gaming Act, the charges against Mount Airy fail as a matter of law. As such, the Presentment and Complaint against Mount Airy must be dismissed.

IV. CONCLUSION

For all the foregoing reasons, Mount Airy #1 LLC respectfully requests that this Honorable Court enter an Order dismissing the Criminal Complaint against it.

Respectfully submitted,
SPRAGUE & SPRAGUE

BY: _____

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CERTIFICATION OF SERVICE

I, Theodore J. Chylack, Esquire, hereby certify that on this date I served a true and correct copy of the foregoing Motion to Quash Presentment and Dismiss Criminal Complaints, along with accompanying Memorandum of Law and Supplemental Memorandum of Law in Support of Motion to Quash Presentment and Criminal Complaint Against Mount Airy #1 LLC, upon the following persons *via* hand delivery:

Francis T. Chardo, Esquire
First Assistant District Attorney
Dauphin County
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Harrisburg, PA 17101

SPRAGUE & SPRAGUE

Theodore J. Chylack, Esquire

Date: February 20, 2008

IN THE COURT OF COMMON PLEAS
OF DAUPHIN COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	**IN THE COURT OF**
	:	**COMMON PLEAS OF**
v.	:	**DAUPHIN COUNTY**
	:	
LOUIS DENAPLES and	:	**NOS. 165 and 166 MD 2008**
MOUNT AIRY #1 LLC.	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF LOUIS DENAPLES AND MOUNT AIRY #1 LLC FOR RELEASE TO MOVANTS OF GRAND JURY MINUTES, LEGAL INSTRUCTIONS GIVEN TO GRAND JURORS, EXCULPATORY INFORMATION AND WITNESS TRANSCRIPTS

INTRODUCTION

Louis DeNaples and Mount Airy #1 LLC (hereafter "DeNaples" and "Mount Airy" or "Movants") have each been charged with four counts of perjury based on DeNaples's verbatim sworn statement before the Pennsylvania Gaming Control Board on August 16, 2006. The sworn statement was provided by DeNaples as part of the process of his applying for a "principal" gaming license – a process that required DeNaples to undergo scrutiny of virtually every aspect of DeNaples' entire life. In light of the fact that DeNaples is 67 years old, and has myriad business interests in

Northeastern Pennsylvania, including two landfills, a used auto parts conglomerate,[1] vast real estate holdings and as a bank officer and major stockholder,[2] the volume and breadth of information demanded of DeNaples by the Board was enormous.[3] Moreover, as DeNaples is "hands on" with respect to his operations, going to work at 5:00 a.m. each morning, taking time out only for daily mass, and working a full day every day until he goes home at night, DeNaples encounters hundreds of people each week.

As part of the license application process, DeNaples was interviewed under oath by staff of the Board on multiple occasions – including the sworn statement of August 16, 2006 that gave rise to the charges against DeNaples. The questioning by the Board staff covered many, many areas as one would expect with the multiple endeavors engaged in by DeNaples. Also, at times the questioning probed decades back into the past. Significantly, the questions in many areas are patently vague and ambiguous, and often DeNaples' responses to these vague and ambiguous

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[1]Media reports have failed to accurately report the scope of DeNaples Auto Parts' operation. When one hears about "auto parts sales," it conveys an image of a neighborhood parts store. This is simply not the case. Through diligent efforts over decades, Louis DeNaples and his family have grown a business that is national, and even international, in scope. DeNaples Auto Parts harvests parts from a scrap yard that is seven square miles and uses the latest technology to disassemble, catalogue and store parts in a 115,000 square foot building (the size of four football fields) that are then available to a national network of automobile mechanical and collision repair shops. The auto parts operation alone employs 40 people.

[2]In addition to his business interests, DeNaples' charitable and religious activities are almost legendary as he is a major benefactor of the University of Scranton, Scranton Preparatory School, Community Medical Center in Scranton and the United Way. It was recently revealed that he helped out the cash-strapped borough of Dunmore by building a new police station and by buying a $650,000 fire truck for the fire department. Of course, information as to DeNaples' charitable activities had to be provided to the Board as well.

[3]Indeed, DeNaples testified that in order to transport the documents demanded by the Board, he had a tractor-trailer truck specially outfitted with shelving to transport the paper. In addition, the investigation of DeNaples encompassed over 1800 hours of investigation.

questions are colloquial and literal. However, even where DeNaples could not recall names or could not honestly say that he "knew" someone, he would relate what information he could recall about the subject of the inquiry (as in the cases of Shamsud-din Ali and Ron White). After the excruciatingly painstaking investigation process, the Board awarded DeNaples a license.

Some eighteen months later, after picking through this voluminous record, the Dauphin County District Attorney's office culled out four excerpts of exceedingly vague questions and answers that it says are willful, material lies and which merit charges against DeNaples and Mount Airy. It is of great significance that Presentment No. 6 does not reveal or suggest that DeNaples was engaged in any other criminal activity or that any of the "facts" that DeNaples is accused of lying about relate to any criminal activity.

The process employed by the Office of District Attorney was the most notoriously public grand jury investigation in American jurisprudence.[4] Putting aside for the moment the known bias of the Dauphin County District Attorney's office in matters of gaming,[5] and putting aside the fact

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[4]It strains neither credulity nor cynicism to conclude that the public nature of the investigation was a tactic to prejudice the public at large and any potential jury pool against DeNaples, and to obtain almost daily publicity for First Assistant District Attorney Chardo, the Attorney for the Commonwealth, who was heading the grand jury investigation.

[5]Mr. Chardo made his agenda clear through both testimony before the House of Representatives where he took sides – squarely with the State Police – in a bureaucratic turf war between the Pennsylvania State Police and the Gaming Board as to what entity would provide background checks under the Gaming Act. Mr. Chardo's motives have been further demonstrated by his unsuccessful prosecution of a Gaming Board employee for allegedly falsifying educational credentials on his employment application. The employee was suspended but then reinstated after an internal investigation found no wrongdoing by the employee. Undeterred, Mr. Chardo proceeded ahead with the prosecution, which garnered significant publicity for Mr. Chardo and his office. Ultimately, all charges against the employee were thrown out by the Court. The details of these matters are more fully discussed in Petitioners' pending Application before the Pennsylvania Supreme Court.

that the Dauphin County District Attorney's office has cozied up to the Pennsylvania State Police in its ongoing battle for the budget and personnel to do background checks on gaming applicants, the central cog in the charges against DeNaples and Mount Airy is William D'Elia (hereafter "D'Elia") – a "corrupt and polluted source" if ever there was one. Reputedly a mobster, D'Elia has been under indictment federally since June 2006 for a bevy of offenses including conspiracy to commit perjury and subornation of perjury, as well as witness tampering, obstruction of justice, solicitation of homicide and money laundering. Even a cursory reading of the Presentment recommending charges against DeNaples and Mount Airy reveals that it relies predominantly on D'Elia's testimony – testimony which D'Elia no doubt hopes will earn him favorable treatment in his own legal travails.

Thus, this unholy triumvirate of the Dauphin County District Attorney's office, the Pennsylvania State Police and William D'Elia (who is also reputedly a longtime State Police Confidential Informant) each with their own motivations have combined their forces as allies in a prosecution against Movants. It is against this backdrop that Movants make this request for immediate disclosure of grand jury minutes, legal instructions given to grand jurors, exculpatory information and witness transcripts.

PROCEDURAL HISTORY AND FACTS

The detailed facts underlying this request for relief are set forth in detail in the motion and those averments are incorporated herein by reference and will not be repeated here. Suffice it to say that Movants request immediate disclosure of grand jury minutes, legal instructions given to grand jurors, exculpatory information and witness transcripts because this disclosure is essential to enable Movants to protect their constitutionally-guaranteed right to liberty under the Fourteenth Amendment

to the United States Constitution and Art. 1, § 1of the Pennsylvania Constitution and their right to reputation under Article 1, § 1 of the Pennsylvania Constitution, which right is entitled to be enforced in the Courts of this Commonwealth under Art. 1, § 11 of the Pennsylvania Constitution. Simply stated, due process and the provisions of this Commonwealth's constitution require disclosure of the information sought.

ARGUMENT

A. Movants Are Entitled To Immediate Disclosure Of Non-Testimonial Grand Jury Records

Movants have requested various non-testimonial grand jury records which are necessary to challenge both Presentment No. 6 and Report No. 1 returned by the Investigating Grand Jury. The records sought by Movants include:

a. Attendance records for the grand jurors;

b. A log of what evidence was presented to the grand jurors and the day on which it was presented;

c. Legal instructions given to the grand jurors regarding the matter under investigation, including but not limited to:

i. Instructions given to grand jury at outset of the grand jury's term regarding any matter related to the conduct of the grand jury;

ii. Instructions given on perjury, including instructions on the requirement of falsity, the element of subjective knowledge of falsity, materiality and the requirement that perjury cannot be established on the uncorroborated testimony of one witness;

iii. Instructions given on corporate liability for the crime of perjury;

iv. Instructions on the standard for a *prima facie* case;

iv. Instructions given on standards of law required for returning a Presentment;

v. Instruction given on standards of law required for returning a Report; and

vi. All legal instructions given to the jurors concerning a witness' invocation of the privilege against self-incrimination;

d. Any request, and any records of the vote taken, by the grand jurors for the extension of the term of the Investigating Grand Jury as required by 42 Pa.C.S. §4548;

e. The original notice of submission submitted by the attorney for the Commonwealth; and

f. Any reference by the Attorney for the Commonwealth to "The Godfather" or any other inflammatory reference to organized crime or *La Cosa Nostra* or the Mafia.[6]

All of these records are sought for legal challenges to the Presentment that could be potentially

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[6]This is not an idle request. Movants represent that they have been informed that a witness before the Investigating Grand Jury was being questioned by Mr. Chardo, the Attorney for the Commonwealth, about an annual dinner event in the 1970s and early 1980s arranged by an organization called the Italian-American Civic Association. The witness testified that he attended the event on two occasions and that he went because there were good entertainers. The witness specifically mentioned Jerry Vale and Al Martino. When the witness mentioned Al Martino, Mr. Chardo turned to the grand jurors and exclaimed: "Al Martino, that's the guy from the Godfather!" Obviously, such a comment can have no legitimate purpose and the very fact that it was made entitles Movants to explore whether other remarks of this nature were made in an attempt to inflame the grand jurors.

waived if not raised prior to the preliminary hearing. Such challenges include but are not limited to a request to quash Presentment No. 6 on the grounds that the grand jurors were not instructed on the law and/or were not instructed properly and adequately on the law,[7] a request to quash Presentment No. 6 on the grounds that the Attorney for the Commonwealth failed to present exculpatory evidence to the grand jurors, a request to quash Presentment No. 6 on the ground that the term of the Investigating Grand Jury was not extended properly, a request to quash Presentment No. 6 on the grounds that the investigation was irreparably tainted by a fatally defective original submission and/or a request to quash Presentment No. 6 on the ground of prosecutorial misconduct before the grand jury.

Movants' challenges to Presentment No. 6 must be brought in a timely fashion – *i.e.*, before the preliminary hearing – or else valuable rights may be lost. Accordingly, these materials are required immediately.

B. **Movants Are Entitled To Disclosure Of the Record Reviewed By Judge Hoover On Which He Made The Finding That Accusations Against Movants That Were In Report No. 1(But Not In Presentment No. 6) Are Supported By A Preponderance Of The Evidence**

Report No. 1 includes multiple accusations against Movants that are not included in Presentment No. 6, including accusations that are false, malicious and prejudicial to Movants. Such accusations include:

a. Louis DeNaples had met with a known member of the Lucchese organized crime family, Salvatore Avellino;

[7]It should be noted that in a related matter, *Commonwealth v. Sica*, the Commonwealth provided a copy of the instruction to the grand jurors on perjury to counsel for the defendant. Thus, there can be no legal objection to affording Movants the legal instructions that have been requested.

b. DeNaples escaped a potentially lengthy prison term by employing his organized crime contacts to fix a criminal trial on his behalf;

c. DeNaples invoked his constitutional privilege against self-incrimination;

d. DeNaples, through counsel, vigorously opposed any scrutiny by law enforcement agencies of the testimony in support of his gaming application;

e. Freedom of Information Act documents obtained by DeNaples' attorneys were requested to be provided to the Bureau of Investigation and Enforcement, but were never provided; and

f. The *Philadelphia Inquirer* quoted Governor Rendell as stating that "if in fact a tie is found between Louis DeNaples and organized crime, I am confident that the gaming commission will strip him of his license."

All of the above-accusations in Report No. 1 have been publicly disclosed under the Order of Judge Hoover of January 28, 2008, *see* Exhibit "H," despite the fact that Judge Hoover had an obligation to seal Report No. 1 to prevent prejudice to Movants. 42 Pa.C.S. § 4552 mandates that:

> Upon submission of a report pursuant to subsection (a), if the supervising judge finds the filing of such report as a public record may prejudice fair consideration of a pending criminal matter, **he shall order** such report sealed and such report shall not be subject to subpoena or public inspection during the pendency of the criminal matter except upon order of the court.

There can be no question that the matters disclosed in Report No. 1 "may prejudice fair consideration of a pending criminal matter." Report No. 1 improperly asserts that "DeNaples invoked the Constitutional privilege against self-incrimination and accuses him of "employing his organized crime contacts to fix his criminal trial." *See* Exhibit "G," Report No. 1 at 26. These accusations, as well as the other enumerated accusations, have been made publicly without affording Movants

any opportunity to meet and rebut them. Movants are being deprived of due process of law by reason of this improper disclosure and require access to the documents and testimony relied on in making these accusations in order to vindicate their fundamental rights under the United States and Pennsylvania Constitutions.

C. Movants Are Entitled To Immediate Disclosure Of The Grand Jury Testimony Of The Witnesses Identified In Presentment No. 6

The preliminary hearing is a critical stage of the criminal proceedings against the Movants at which the Movants are entitled to effective representation of counsel. Under Pennsylvania law, 42 Pa.C.S. § 4551(e) explicitly states that "when the attorney for the Commonwealth proceeds on the basis of a presentment, a complaint shall be filed and the defendant shall be entitled to a preliminary hearing as in other criminal proceedings." The Supreme Court has also recognized the importance of a preliminary trial and a defendant's right to effective counsel in *Coleman v. Alabama*, 399 U.S. 1 (1970). Indeed the preliminary hearing is especially important in this case since it is the first available opportunity the Movants have had to truly challenge the malicious accusations made against them.

In order to offer the Movants effective representation, the undersigned counsel has to be able to prepare for the preliminary hearing as well as effectively-cross examine the Commonwealth's witnesses. At the very least, due process of law requires that Movants be provided with copies of the transcripts of testimony of the witness relied on by the Commonwealth. Due to the large number of witnesses listed in the above motion, it is only fair that Movants counsel be provided with the transcripts of the testimony of the witnesses' designated by the Commonwealth, including William D'Elia, Thomas Joseph, Jeanne Stanton, Samuel Marranca, Salvatore DeFrancesco, Barry Shapiro, Eugene DeNaples, Dominick DeNaples, Patrick Walsh, Shamsud-din Ali, Jamie Brazil, John

Minora, Samuel Staten, Sr., John Meighan, Roger Greenbank, John Street, Salvatore Avellino and Richard L. James, prior to the preliminary hearing.

D. The Original Notice of Submission

Denying the Movants request to a copy of the *original* Notice of Submission has effectively prevented the Movant from being able to challenge the legitimacy of this investigation. There is no authority under the Grand Jury Act which allows the withdrawal of a Notice of Submission. Rather a Notice of Submission is a legislatively mandated safeguard which prevents abuse of Grand Jury powers. The Pennsylvania Supreme Court has previously ruled that:

> The more traditional functions of the judiciary are brought to bear when the grand jury begins to exercise its powers. Once the grand jury exercises its powers, individuals affected by the exercise...may challenge the validity and adequacy of the notice by which a matter was submitted to the grand jury, and the exercise of power by the grand jury toward the individual through a subpoena challenge.

Appeal of Washington, 490 Pa. At 39-30, 415 A.2d at 21 (citations omitted).

Movants have been repeatedly denied access to the original Notice of Submission and have not been able to review its legal adequacy. By denying the Movants the original Notice of Submission, Movants are essentially being deprived their right to challenge the central document upon which the investigation was founded.

E. Brady Materials

Under the due process clause of the Fourteenth Amendment, the Movants are entitled to all exculpatory materials that are requested from the Commonwealth. The Supreme Court has ruled in *Brady v. Maryland*, 373 U.S. 83 (1963), that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Therefore,

Movants are entitled to copies of all exculpatory materials under *Brady*, as well as a designation of what exculpatory materials were presented to the grand jurors and what exculpatory materials were not presented to the grand jurors. Withholding these materials would be a violation of the Movants' Constitutional rights.

CONCLUSION

The matter before the Court is an extraordinary matter encompassing extraordinary facts that require extraordinary relief. It cannot be gainsaid that Movants have been adversely affected, indeed substantially prejudiced, by the proceedings of the Fourth Dauphin County Investigating Grand Jury, the publicity attendant thereto, the failure of the Supervising Judge to remedy the effects of that publicity and indeed, the disclosure of Report No. 1. Having suffered that prejudice, Movants are entitled to disclosure of the requested materials as a matter of fundamental fairness and the need to vindicate their constitutional rights. Therefore, based upon the foregoing, Movants request that this Honorable Court direct the immediate release to Movants of the material sought by Movants.

Respectfully submitted,

SPRAGUE & SPRAGUE

BY: 

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CERTIFICATION OF SERVICE

I, Theodore J. Chylack, Esquire, hereby certify that on this date I served a true and correct copy of the foregoing Motion of Louis DeNaples and Mount Airy #1, LLC for Release to Movants of Grand Jury Minutes, Legal Instructions Given to Grand Jurors, Exculpatory Information and Witness Transcripts, along with accompanying Memorandum of Law, upon the following persons *via* hand delivery:

Francis T. Chardo, Esquire
First Assistant District Attorney
Dauphin County
Front and Market Streets
Harrisburg, PA 17101

SPRAGUE & SPRAGUE

Theodore J. Chylack, Esquire

Date: February 20, 2008