FILED UNDER SEAL

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

STATE OF OHIO, Plaintiffs v. ANTHONY M. CAFARO, SR., et al., Defendants.	)	Case No. 2010 CR 00800 Judge William H. Wolff, Jr.

MOTION AND MEMORANDUM OF LAW IN SUPPORT OF MOTION TO TEMPORARILY SEAL ALL BILLS OF PARTICULARS AND NOTICES OF INTENT TO INTRODUCE RULE 404(B) EVIDENCE UNTIL AFTER TRIAL

Now come Defendants Anthony Cafaro, Sr., Flora Cafaro, The Cafaro Company, Ohio Valley Mall Company, and The Marion Plaza, Inc. (collectively "the Defendants"), by and through the undersigned counsel, and hereby move this Court for an Order temporarily sealing all bills of particulars and notices of intent to introduce Rule 404(B) evidence until after trial in this matter is concluded. A memorandum in support of this motion is attached.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO TEMPORARILY SEAL ALL BILLS OF PARTICULARS AND NOTICES OF INTENT TO INTRODUCE RULE 404(B) EVIDENCE UNTIL AFTER TRIAL

I. INTRODUCTION

On November 3, 2010, the State filed its Bill Of Particulars For John Zachariah ("Zachariah bill of particulars") as to co-defendant John Zachariah only under seal. This Motion and its supporting Memorandum request that the Zachariah bill of particulars, and each succeeding one as to all other defendants, remain under seal until the conclusion of trial. In addition, to the extent the State intends to respond to the defendants' request for notice of an intent to introduce Rule 404(B) evidence, those responses should also remain under seal until the conclusion of the trial.

Bills of particulars and notice of an intent to introduce Rule 404(B) evidence are akin to notices of discovery. They are not judicial pleadings that require a court decision regarding a contested matter of law. They are not filed as part of a judicial proceeding that itself enjoys a qualified First Amendment right of public access. They are not judicial documents that result by their nature in a substantive court decision that implicates the historic role of the qualified common law and First Amendment access to such documents. They are far more akin to exchanges of discovery that both state and federal courts have conclusively determined are **not** subject to any qualified right of public access. Absent such a constitutional or common law right, the risk that disclosure will compromise the critical right, protected by the Sixth Amendment, to an impartial jury selected from the county where the charges are brought, mandates the temporary sealing of all bills of particulars and notices of the intent to introduce Rule 404(B) evidence until the trial is complete. Alternatively, even if there is a public right of

access, its value is more than counterbalanced by the inexorability that any unsealing will catalyze - - massive and prejudicial pretrial publicity.

This motion and memorandum briefly recount the publicity in Mahoning County, largely resulting from a practice of its leading print medium, *The Vindicator*, sensationalizing and editorializing the contents of the State's disclosures in the Flora Cafaro and Martin Yavorcik bill of particular responses. Although the Zachariah bill of particulars is more sober in tone than that filed as to defendants Yavorcik and Flora Cafaro, it does refer at length to evidentiary matters, including specific documents that may or may not be admitted at trial.

The Zachariah bill of particulars, if unsealed, will prejudice not only Zachariah but also defendant Anthony Cafaro, Sr. and the other defendants therefore file this motion and memorandum, but also reserve the right to file a more specific opposition to the unsealing of future bills of particulars and notices of intent to introduce Rule 404(B) evidence, including the responses they expect to be filed regarding the charges against them.

II. STATEMENT OF FACTS

A. The Zachariah Bill Of Particulars Is A Discovery Document

The Zachariah bill of particulars represents an attempt at providing greater particularity for only certain select offenses charged. *See* Zachariah bill of particulars, Exhibit 1. The Zachariah bill of particulars provides no particularity as it relates to the pattern of corrupt activity or conspiracy offenses charged. The sparse statements relating to the pattern of corrupt activity offense consist of nothing more than the State's opening argument. With respect to the perjury, bribery, and tampering with records offenses, the Zachariah bill of particulars makes, in some instances, specific reference to documents the State produced to the parties in discovery. These discovery documents may never be admitted as evidence at trial or may be excluded for use by

the State in the manner it currently intends. Nevertheless, the Zachariah bill of particulars represents no more than the State's disclosure of certain evidence relating to only certain of the offenses alleged against Zachariah.

The nearly 50,000 documents the State produced to the parties in response to the defendants' discovery requests were not filed publically, nor would it have been permissible for the State to do so. Accordingly, the manner in which the State intends to use such documents should not be permitted to be played out in a public forum in advance of trial. The Zachariah bill of particulars amounts to no more than the State's voluntary disclosure of how it intends to use certain documents produced in discovery for only some of the offenses charged against Zachariah.

B. Media Coverage of Response to Flora Cafaro's and Martin Yavorcik's Request for Bills of Particulars

On August 31, 2010, in response to requests contained in bills of particulars filed separately by two defendants, Flora Cafaro and Martin Yavorcik, the State filed its response that made representations about evidentiary matters outside the proper, but limited, function of a bill of particulars answer. *See* State's Response to Flora Cafaro and Yavorcik's Motion For A Bill Of Particulars ("Flora Cafaro and Yavorcik bill of particulars"), Exhibit 2. The response, for instance, included an unresponsive and inflammatory representation that the State intended to offer "bad act" evidence as to the conduct of other defendants to prove its criminal charges against Flora Cafaro and Yavorcik. *Id.* at 8. Also included were matters appropriate to discovery responses, not to a bill of particulars, including references to the content of what witnesses told the State's investigators and to an uninvited statement as to the involvement of the FBI in the state investigation. *Id.* at 6 and fn 4.

The Flora Cafaro and Yavorcik bill of particulars additionally contained a statement of the State's intent to offer evidence of uncharged financial transactions other than the single $15,000 transaction that alone provides the basis of the single count charged against Flora Cafaro and Yavorcik. ("Defendant Yavorcik is the same attorney that was solicited by Anthony M. Cafaro, Sr., his brother John J. Cafaro and his sister Flora Cafaro and backed financially in an amount totaling $120,000..."). *Id.* at 7. Even more egregious is the unnecessary and impermissible representation that "*[t]his is not the first time Anthony Cafaro or other members of the Enterprise has made clandestine payments and the State will seek to offer and introduce other acts evidence.*" *Id.* at 8 (emphasis added). Such an allegation was not responsive or appropriate for a response to a bill of particulars. The allegation was highly inflammatory and made reference to an intent to offer evidence outside the indictment which could well be excluded upon proper motion. It expressly did **not** relate to the specific defendants whose request was being responded to, since neither Flora Cafaro nor Yavorcik were charged in any other count in the 73-count indictment, *i.e.*, they were specifically excluded from all "Enterprise" and "Conspiracy" related allegations. Finally, the State advised that it had the future option to attach evidentiary documents to its bill of particulars responses as to other defendants. *Id.* at 5, fn 3.

Not surprisingly, Youngstown's only daily newspaper, *The Vindicator* (hereinafter "Vindicator"), in a front page banner headline and article on September 1, 2010 made extensive reference not only to additional, uncharged, financial transactions between Flora Cafaro and Yavorcik but also, predictably, to the inflammatory and unnecessary allegations against Anthony Cafaro, Sr. *See* Vindicator article, Exhibit 3. The State's response regarding "this is not the first

time Anthony Cafaro...made clandestine payments" and the State's promise to "seek to offer and introduce other acts evidence" was quoted verbatim on the front page of the Vindicator. *Id.*

A September 5, 2010 column by Bertram de Souza in the Sunday Vindicator proclaimed the media's intent to scrutinize and report on all future filings and evidentiary disclosures. *See* Vindicator article, Exhibit 4. De Souza, who sits on the Vindicator's editorial board as well as being its chief political columnist, wrote that "**[h]ow this enterprise operated will be laid out in detail when the bill of particulars relating to the indictments are filed by the special prosecutors, and when the evidence is presented through discovery.**" *Id.* (Emphasis added). It is, of course, the purpose of a trial -- not a bill of particulars or notice of intent to use Rule 404(B) evidence -- to provide proof of whether there is an Enterprise – an allegation already accepted as fact by de Souza – and "how this Enterprise operated." *Id.*

De Souza's column also referenced the Flora Cafaro and Yavorcik bill of particulars filing, stating that "last week's release of a bill of particulars...sheds a great deal of light on the direction the prosecutor(s) are taking the case. The details of the bill of particulars were published in Wednesday's Vindicator. But there's one sentence in the nine page documents that reveals the strategy the prosecutors have adopted." *Id.* De Souza then re-quotes the inflammatory allegation about Anthony Cafaro, Sr. and "clandestine" but uncharged conduct. De Souza asks the rhetorical question, "why would prosecutors include that sentence in a document that lays out what Flora Cafaro did to conceal a $15,000 transaction...?" *Id.* He then answers the question by saying it was to let the "defendants know" that the prosecution intends to take the "government/political corruption route." *Id.*

It is therefore incontrovertible that any allegations similar to the ones included in the Flora Cafaro and Yavorcik bill of particulars will result in front page coverage in the Vindicator

and, predictably, evoke successive articles and columns reiterating and analyzing the nature of the political or criminal allegations made by the State. It is also beyond dispute that future articles will focus on defendant Anthony Cafaro, Sr., his businesses, and on the Vindicator's institutional belief that it was political corruption (not community concern or the right of an entity to pursue civil litigation) that delayed the Mahoning County Department of Job & Family Services move to Oakhill. *See* September 19, 2010, column by de Souza, Exhibit 5. The content of the September 19th column, which matches the editorial position of the paper and the intensely personalized attacks on Mr. Cafaro (as well as pre-judging the existence of both corruption and an "Enterprise"), is further proof that future bills of particulars and notices of intent to introduce Rule 404(B) evidence, if unsealed, will be widely and repeatedly quoted by the Vindicator as is the front page prominence paid by the Vindicator to the September 9 and September 14, 2010 procedural orders of the Court. *See* Vindicator articles, Exhibits 6 and 7.

C. **The Vindicator's Established Bias**

The past practices of the Vindicator conclusively demonstrate that it will feature any unsealed motions in repeated front page stories and reinforce an already well-documented institutional bias that the Vindicator has repeatedly revealed regarding defendant Anthony Cafaro, Sr., his sister Flora, and the several Cafaro entities charged in the indictment. For example, post-indictment coverage prejudicially includes front page articles headed by the label "The Oakhill 7" with pictures and articles relating to the defendants, their family history, and the subject matter of the pending charges. *See* Vindicator article, Exhibit 8. Just the repeated moniker "The Oakhill 7" (a not so subtle reminder of the infamous "Chicago Seven" trial of the 1960s) undermines the presumption of innocence, particularly with its "mug shot" type lineup of photos of the seven individual defendants.

Mahoning County is essentially a one-newspaper county. The Vindicator's business records reflect a circulation of 36,343 copies of its newspaper daily with 45,723 on Sunday in a county that in 2000 had 257,000 residents. Given the multiplying factor, *i.e.*, that each copy of the newspaper is read by multiple people (approximately 2.19), the effect of the Vindicator on the future jury venire of Mahoning County cannot be overstated. By comparison, the next leading local paper, the *Warren Tribune Chronicle*, published in neighboring Trumbull County, has a circulation of less than 1,100 (1,025 daily and 1,058 on Sundays) in Mahoning County.

Additionally, the ratings of WFMJ, a channel owned by the same owners as the Vindicator, is at least twice the ratings of the next most watched station during the peak news hours of 6-7 AM, 7-8 AM, 8-9 AM, and has a 5.2 rating at the 6-7 PM time period, dwarfing the competition's 3.0 rating. *See* list of ratings, Exhibit 9. Given the common ownership, it is unsurprising that WFMJ also ran a news article on August 31, 2010 matching that of the Vindicator and referring to the impermissible and extraneous allegations against Anthony Cafaro, Sr. contained in the Flora Cafaro and Yavorcik bill of particulars. *See* Exhibit 10 ("Prosecutors say this isn't the first time Anthony Cafaro or other members of the enterprise have made clandestine payments and the state will seek to offer other acts as evidence").

Disclosures in court pleadings that might be dissipated in a larger metropolis with multiple sources of news and a greater variety of subjects of public interest will inexorably be etched in the public consciousness of a small county subject to receiving its local information largely from a single source. As a paper holding near monopolistic control over the Mahoning County media, the prejudice created by the Vindicator is already deep-seated and must be considered when assessing whether unsealing pleadings will have the effect of adding fuel to an ongoing fire, fatally undermining the constitutional rights of the defendants to a jury selected

fairly from the county where the criminal charges have been lodged. Despite the Vindicator's suggestion that its rights supersede the rights of the defendants to an impartial jury, and that a change of venue would substitute for an unbiased cross-section of Mahoning County jurors (*see e.g.* Vindicator editorial, September 12, 2010, Exhibit 11) the option of a temporary sealing of any filings, which if unsealed would predictably result in front page Vindicator articles, is compellingly supported on this unique record by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution right of the defendants to a fair trial in Mahoning County rather than elsewhere.

We live in the Internet Age. Since the Vindicator maintains a web-site containing not only its archives but also a specific link to two documents – the first being the State's Response to the Flora Cafaro and Martin Yavorcik bill of particulars (*see* Exhibit 2) the second being the 73-count indictment, the damage of adverse articles referring to allegations about the defendants cannot even assuredly be erased with time. The wisdom of the procedure set in place by the Court is unassailable, for absent automatic sealing there would be no mechanism to assure that a filed-unsealed pleading would not, for months, up to and including the time for jury selection and trial, be prominently linked on the Vindicator web site and easily accessible to venire persons who might otherwise be less exposed to the pretrial publicity.

Further, the decision to seal or unseal must be made in the context of a future venire that has already been exposed to a significant number of prejudicial articles, columns, and editorials regarding defendant Anthony Cafaro, Sr. and the charged co-defendants.[1] Disclosures in court pleadings that might be dissipated in a larger metropolis with multiple sources of news and a

[1] If the State disputes either the institutionalized bias of the Vindicator favoring a move to Oakhill and criticizing Anthony Cafaro, Sr., his family, and the County's Garland Plaza lease or the Vindicator's practice of giving prejudicial front page coverage to the investigation and prosecution of this case, the defendants request leave to supplement this filing with an appendix of articles supporting these conclusions.

greater variety of subjects of public interest will inexorably be etched in the public consciousness of a small county subject to receiving its local information largely from a single source. Likewise, the ability to select a jury, already burdened by the length of the prospective trial, will be gravely burdened by the predictable difficulty of finding not only venire members willing to attend a multi-month summer trial but who also are unaffected by and unexposed to the repeated pull of prejudicial front page headlines and articles in the Vindicator reinforced by follow-up columns and by television disseminations of the same news content by WFMJ, the Vindicator controlled television station

III. LAW & ARGUMENT

A. Bills of Particulars And Notices Of Rule 404(B) Evidence Are Not Subject To Any Qualified First Amendment or Common Law Right of Public Access

The defendants' concern is concrete and non-speculative: the selection of a fair and impartial jury representing a cross-section of Mahoning County will be impossible absent a temporary sealing of all bills of particulars. The sealing procedure being applied by the Court in this case is unassailable due to at least two additional constitutional considerations. *First,* not all pleadings are even subject to the qualified public access rights. *Second,* the nature of the filed pleading must be considered.

The Court of Appeals for the First Circuit recognized that "political corruption cases tend to attract widespread media attention . . . ." *In re Providence Journal Co. Inc.* (1st Cir. 2002), 293 F.3d 1, 14. The trial court was concerned that "unrestrained disclosures" would endanger the defendant's right to receive a fair trial.[2] Understanding that the trial court's concern was valid, *Providence Journal* concluded that "in view of the notoriety of the case and the incidents

[2] Based on circulation figures, it is estimated that the local readership percentage for the Vindicator is 2 ½ times greater than the local readership percentage for *The Providence Journal.*

recounted by the district court, we are convinced that the court's perception of a threat to the defendants' fair trial rights was objectively reasonable." *Id.* at 14.

Providence Journal properly held that **"an accused's Sixth Amendment right to a fair trial plainly rises to the level of a compelling interest"** and that **"when that right collides head on with the public's right of access to judicial records, the defendant's fair trial right takes precedence."** *Id.* at 13 (emphasis added). *Providence Journal* then approved an order, similar in substance to the Order issued by this Court requiring the sealing of all memoranda temporarily "until the judge determines that a specific document poses no undue risk to the defendant's fair trial rights." *Id.* at 14. "We hold that the district court's insistence on reviewing each memorandum before deciding whether it should remain under seal did not constitute reversible error" and that no case law "prevents a court from establishing this sort of prophylaxis." *Id.* at 14.

Providence Journal held that "given the circumstances of [the] case, the district court's implementation of a general procedure to seal all memoranda temporarily appears narrowly tailored." *Id.* at 14. The Court identified its concerns: (1) that judicial review of a sealed pleading occur on a specific timetable; (2) that the document be unsealed at some point after the trial ended; and (3) that redaction, as well as sealing, be considered. *Id.* at 15. None of these prescriptions are inconsistent with the implementation of the Court's Order of temporary sealing. Importantly, *Providence Journal* approved the sealing of entire documents until the conclusion of the trial when such documents had the potential to compromise a defendant's right to an impartial jury. *Id.* at 15-16.

Motions for bills of particulars, notices of other acts evidence, and responses thereto, are more akin to exchanges of discovery or to discovery motions and responses than to the sort of

legal pleadings that require a decision by a judicial officer. The "First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *See Branzburg v. Hayes* (1972), 408 U.S. 665, 684. The exchange of discovery materials is neither a public process nor a matter of public record. *See e.g., United States v. Anderson* (3rd Cir. 1986), 799 F.2d 1438, 1441-42 (holding that "a bill of particulars that merely facilitates voluntary discovery is not a court document the public or press are entitled to view.")

Ohio law firmly supports the proposition that discovery-related disclosures are not within the ambit of a qualified common law or First Amendment presumption of access by the public or media. *See e.g., State ex rel. WHIO-TV-7 v. Lowe* (1977), 77 Ohio St.3d 350, 353-54 ("discovery is neither a public process nor typically a matter of public record. Historically, discovery materials were not available to the public or press...discovery should be encouraged... public disclosure would have a chilling effect on the parties' search for and exchange of information pursuant to the discovery rules"). Federal law is similar: "like the constitutional right of access, the common law presumption does not encompass discovery materials. The courts have not extended (the qualified common law right of access) beyond materials on which a court relies in determining the litigants' substantive rights." *Anderson v. Cryovac, Inc.* (1st Cir. 1986), 805 F.2d 1, 13.

The U.S. Supreme Court in *Seattle Times Co. v. Rhinehard* (1984), 467 U.S. 20 upheld a protective order against a First Amendment challenge when it forbad the release of information learned in civil discovery but not yet admitted at trial, in part because of the risk that information that might never be admitted at trial could jeopardize the rights of the litigants, as well as uncharged third–parties: "There is an opportunity, therefore, for litigants to obtain -- incidentally

or purposefully -- information that not only is irrelevant but, if publicly released, could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes" *Seattle Times Co.*, 467 U.S. at 35.

In *United States v. Amodeo* (2d Cir. 1995), 71 F.3d 1044, 1049-50, Judge Winter established a continuum for the weight to be accorded the presumption of access, determining at one end that documents that were material and critical to a judge's decision were to be accorded "strong weight" since they related directly to the "need for public monitoring" of the exercise of judicial decision-making. *Id.* at 1049. But, "as one moves along the continuum, the weight of the presumption declines." *Id.* at 1049. "Where testimony or documents play only a negligible role in the performance of Article III duties, the weight of the presumption is low and amounts to little more than a prediction of public access *absent a countervailing reason.*" *Id.* at 1050 (emphasis added). Judge Winter added that "documents that play no role in the performance of Article III functions, such as those passed between the parties in discovery, lie entirely beyond the presumption's reach." *Id.* at 1050.

Bills of particulars and notices of Rule 404(B) evidence are akin to documents that pass between the parties in discovery requiring no performance of a judge's decision-making, and are therefore outside of the presumption of access. Absent challenge, the exchange of bills of particulars and notices of "other act" evidence constitute voluntary discovery material provided in response to a defendant's discovery requests. The disclosure of this material requires no judicial decision. Even if the responses were to be challenged for specificity in the future – a matter that is not concretely before the Court at this time - the documents in question will lie at the outer perimeter, with the presumption of access to be accorded a low weight easily eclipsed by the gravity of the defendants' future right to a fair jury and fair trial.

When the New York Times sought to unseal Title III documents (*i.e.*, court authorized interceptions of communications) to provide it with information about the misconduct of New York Governor Elliot Spitzer, the Court of Appeals for the Second Circuit, acknowledging the qualified First Amendment right of the public to both attend judicial proceedings and to have access to *certain* judicial documents, reviewed its past jurisprudence which focused on two barometers. *See, In the Matter of the Application of the New York Times Company to Unseal Wiretap and Search Warrant Materials* (2d Cir. 2009), 577 F.3d 401, 409. *First,* the Court looked to whether the right to gain access was related to judicial records that "have historically been open to the press and general public" and to whether the right of "public access plays a significant positive role in the functioning of the particular process in question." *Id.* at 409. Only if the document in question "passes these tests of experience and logic [does] a qualified First Amendment right of public access" attach. *Id.* at 409. The Court then ruled that the documents in question satisfied neither the test of history nor the logic of public policy, and that unsealing was outweighed by the privacy interests that would be implicated if dissemination were permitted. *Id.* at 410.

The Second Circuit then examined under a *second* test whether the document at issue related to a proceeding which the public had a right to attend, determining that without a "public right to attend the relevant proceedings, there is no public right to gain access to the documents produced at those proceedings." *Id.* at 410. As applied, bills of particulars and notices of Rule 404(B) evidence, **unlike** plea agreements, sentencing memoranda, even bail motions, do not meet the test of history, *i.e.*, there is no historic right of access to these discovery-related filings. Bills of particulars certainly involve no judicial function since courts do not ordinarily pass on the adequacy of a response to a request for particulars. Finally, there is no judicial hearing that

results from the filing of a bill of particulars (as there would be upon the filing of a motion to suppress requiring an evidentiary hearing).

In short, the First Amendment qualified right of access is simply not implicated by the filing of a response to a request for particulars or notice of an intent to use Rule 404(B) evidence. A bill of particulars is filed to give the opposing party notice of the prosecutor's theory of the case and the evidence it intends to offer in support of such theory and, as such, does not require the court to issue any rulings and is not related to any judicial proceeding for which the public is entitled to be present. Accordingly, there is no public right to gain access to those documents.

B. Any Qualified Right Of Access Is Presumptive, Not Absolute, And Outweighed By The Defendants' Sixth Amendment Rights To A Future Fair Trial in Mahoning County

The right of public access is presumptive, *i.e.*, qualified, not absolute, and rests at least in part on "experience and logic" and on whether a document in question was one that had historically been available to the media. *United States v. McVeigh* (10th Cir. 1997), 119 F.3d 806, 812. Its application rests on a balance of countervailing considerations such as the effect on a citizen's right to a fair trial of a jury containing members contaminated by exposure to prejudicial pretrial publicity. *See, e.g., Gannett Co., Inc. v. DePasquale* (1979), 443 U.S. 368, 378 (no First Amendment violation in denial of public access to a suppression hearing); *Nixon v. Warner Communications* (1978), 435 U.S. 589, 598 (compelling reasons to preclude public access to tape recordings played during public hearing). The public, for instance, has no right to receive copies of pleadings that relate to evidence that is excluded because of constitutional or evidentiary judicial decisions made by the trial court, *see, e.g., McVeigh,* 119 F.3d at 813-15; *United States v. Rajaratnam* (S.D.N.Y. 2010), 708 F. Supp.2d 371, 375-76. Particularly in a "high profile case," a trial court must establish procedures to "efficiently and fairly [deal with]

recurring issues such as whether documents should be placed under seal or redacted." *McVeigh*, 119 F.3d at 813.

References in bills of particulars or notices of intent to use Rule 404(B) evidence to uncharged conduct, (like references to unadjudicated Title III documents in bail hearings or information relating to challenged searches during motions to suppress) must remain sealed until a court has the opportunity to assess the admissibility of the evidence alleged. *See, e.g., Gannett Co., Inc. supra*; *United States v. Giordano* (D. Conn. 2001), 158 F. Supp.2d 242, 246 (approving the closure of a bail hearing and a sealing of documents recounting evidence derived from Title III wiretaps on the basis that if the evidence was later excluded a fair trial would be impossible due to the prior dissemination of the fruits of the challenged source of evidence). "As a very practical matter, if untested material is unsealed but then suppressed, it will likely be impossible to undo the damage done" from the unsealing. *Rajaratnam*, 708 F. Supp.2d at 377.

Absent at least the temporary sealing, documents such as motions to suppress or sever or exhibits that refer to information that a court later concludes is not to be admitted at trial should clearly remain sealed until the court determines that the contents contain only information that is to be admitted at trial. *Id.* at 814-15. The very real potential for a complete exclusion of significant portions of the Zachariah bill of particulars exists, for its cornerstone, that there is some impropriety in the payment of legal fees for third-parties or in the attempts by a private citizen to communicate with public officials as to matters that affect their economic self-interest will be placed in dispute, pretrial, as a principled basis for criminal liability. *See e.g., Baltimore Scrap Corp. v. David J. Joseph Co.* (4th Cir. 2001), 237 F.3d 394, 401 ("Funding of litigation by a non-party can be petitioning to the same extent that filing a lawsuit itself is petitioning...non-parties often provide aid to litigants, whether through financial backing, legal assistance, amicus

briefs, or moral support."). Until the various prosecutorial theories of liability and evidentiary admissibility are reviewed by this Honorable Court through the vehicles of Rule 12 motions to dismiss and motions *in limine* that will provide a pretrial opportunity for the court to exercise its traditional gatekeeper functions on disputed evidence, the value of public notice to discovery type documents is more than outweighed by the particularized need for continued sealing. This is no ordinary case. To the contrary, theories of guilt that are unprecedented are being advanced. "Due Process forbids turning citizens into criminals through the application of novel, untested applications of a criminal statute." *United States v. Saathoff* (S.D. Cal. 2010), 708 F. Supp.2d 1020, 1042.

Defendants' "privacy and fair trial interests are at their zenith before the material has been tested" given the compelling interests of a future fair trial and its primacy when weighed against any public right of access to evidentiary and prosecutorial theories that remain untested by either pretrial motion or the evidentiary rules that govern admissibility at trial. *Rajaratnam*, 708 F. Supp.2d at 377, fn. 6.

IV. CONCLUSION

Therefore, Defendants Anthony M. Cafaro, Sr., Flora Cafaro, The Cafaro Company, Ohio Valley Mall Company, and The Marion Plaza, Inc. request temporary sealing of any bills of particulars and notices of intent to introduce Rule 404(B) evidence.

Respectfully submitted,

George A. Stamboulidis (*admitted pro hac vice*)
BAKER HOSTETLER
45 Rockefeller Plaza
11th Floor
New York, NY 10111
Office: 212.589.4211
Fax: 212.589.4201
E-Mail: gstamboulidis@bakerlaw.com

Counsel for Defendant Anthony M. Cafaro, Sr.

Martin G. Weinberg (*admitted pro hac vice*)
Martin G. Weinberg, P.C.
20 Park Plaza, Suite 1000
Boston, MA 02116
617-227-3700 - telephone
617-338-9538 - facsimile
Email: owlmgw@att.net

Counsel for Defendant Anthony M. Cafaro, Sr.

J. Alan Johnson (*admitted pro hac vice*)
Cynthia Reed Eddy (*admitted pro hac vice*)
JOHNSON & EDDY
1720 Gulf Tower
707 Grant Street
Pittsburg, PA 15219
Office: 412.338.4790
Fax: 412.227.3851
E-Mail: jjohnson@johnsoneddy.com
E-Mail: ceddy@johnsoneddy.com

Counsel for Defendant Flora Cafaro

Ralph E. Cascarilla (0013526)
Darrell A. Clay (0067598)
WALTER & HAVERFIELD, LLP
The Tower at Erieview
1301 East Ninth Street, Suite 3500
Cleveland, OH 44114
Office: 216.781.1212
Fax: 216.575.0911
E-Mail: rcascarilla@walterhav.com
E-Mail: dclay@walterhav.com

Counsel for Defendant The Cafaro Company

John F. McCaffrey (0039486)
Anthony R. Petruzzi (0069102)
McLAUGHLIN & McCAFFREY, LLP
Eaton Center, Suite 1350
1111 Superior Avenue
Cleveland, OH 44114-2500
Office: 216.623.0900
Fax: 216.623.0935
E-Mail: jfm@paladin-law.com
E-Mail: arp@paladin-law.com

Counsel for Defendants Ohio Valley Mall Company and The Marion Plaza, Inc.

Certificate of Service

I hereby certify that a true copy of the foregoing Motion and Memorandum Of Law In Support Of Motion To Temporarily Seal All Bills Of Particulars And Notices Of Intent To Introduce Rule 404(B) Evidence Until After Trial has been served via electronic email delivery this 9th day of November, 2010 upon:

Dennis P. Will, Esq.
Lorain County Prosecuting Attorney
225 Court Street, 3rd Floor
Elyria, OH 44035

Special Prosecutor for Mahoning County

Paul Nick, Esq.
Chief Investigative Attorney
Ohio Ethics Commission
8 Long Street, 10th Floor
Columbus, OH 43215

Special Prosecutor for Mahoning County

John B. Juhasz, Esq.
7081 West Boulevard
Youngstown, OH 44512

Counsel for Mike Sciortino

Roger Synenberg, Esq.
Synenberg & Associates LLC
55 Public Square, Suite 1200
Cleveland, OH 44113

Counsel for John Zachariah

Lou DiFabio, Esq.
4822 Market Street
Youngstown, OH 44512

Counsel for John Reardon

J. Gerald Ingram, Jr., Esq.
Robert Duffrin, Esq.
7330 Market Street
Youngstown, OH 44512

Counsel for Martin Yavorcik

Lynn Maro, Esq.
7081 West Boulevard
Youngstown, OH 44512

Counsel for John McNally

John F. McCaffrey