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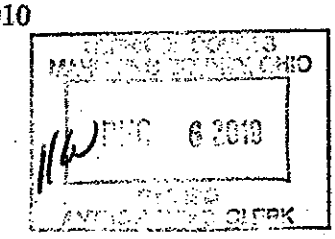

Via Email & Regular U.S. Mail
Hon. William H. Wolff, Jr.
c/o Stephanie Frank, Bailiff
Mahoning County Court of Common Pleas
120 Market Street
Youngstown, OH 44503

Re: *State of Ohio v. Anthony M. Cafaro, Sr., et al.*, Case No. 2010 CR 00800
Mahoning County Court of Common Pleas (Judge Wolff)

Dear Judge Wolff:

I write to you as counsel for Defendants Ohio Valley Mall Company and The Marion Plaza, Inc. seeking the Court's immediate intervention, prior to the September 9th pretrial, to cease the State's announced intent to file bill of particular responses prior to the scheduled pretrial on September 9, 2010. *See* Notice of Intent of the State of Ohio to Comply with Ohio Criminal Rules 7(E) and 16(B) & Local Criminal Rule 9. I am joined in this effort by counsel representing Defendants Anthony M. Cafaro, Sr., Flora Cafaro, and The Cafaro Company.

Defendants request the Court issue a directive to the State requiring it to:

1. Produce to the Defendants, fourteen (14) days in advance of filing with the Clerk of Court, its proposed bill of particular responses concerning any one or more of the Defendants named in the Indictment until Defendants have the opportunity to apply to the Court for appropriate relief; or alternatively,

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2. Direct that its bill of particular responses be filed under seal with the Clerk of Court to afford both the Court and Defendants the opportunity to move to redact the specific portions which Defendants contend should be stricken from filings before being made public.

At a minimum, Defendants request the Court preclude the State from any further public filings until the pretrial on September 9th at which time the Court may receive further information from the parties on this issue, or require Defendants to proceed with the filing of a formal motion pursuant to Rule 45 of the Rules of Superintendence for the Courts of Ohio, which authorizes a court to restrict public access to a case document based on a party's motion or the Court's own order.

The State's Response Contains Gratuitous, Inflammatory Statements More Akin To A Press Release Than A Response To A Bill Of Particulars

The State recently filed, on the public record, a document purporting to be its response to a bill of particulars requested by Flora Cafaro and Martin Yavorcik. *See* State of Ohio's Response to Motions of Defendants Martin Yavorcik and Flora Cafaro for a Bill of Particulars (hereinafter "the State's Response"). The State's Response fails to respond to the specific requests for particularity sought by Mr. Yavorcik or Ms. Cafaro. Furthermore, the State's Response contains gratuitous and inflammatory statements designed to incite the media and poison the public's perception of the Defendants.

The State's Response was filed on Tuesday of this week and immediately made available to Youngstown area media outlets even before the Defendants, or this Court, were served. In fact, Defendants only learned of the filing **after** being contacted by the media. Although furnished to the media, the State's Response was not available on the

Clerk of Court's electronic docket, or from your bailiff Stephanie Frank. To date, every filing by Defendants has been immediately furnished to your bailiff and promptly served on the State. In contrast, Defendants were not served with the State's Response until Wednesday, September 1st, well after the media fully reported on the contents of the State's Response.

The State's effort to pander to the media through its Response succeeded. The front page headline on the September 1st edition of *The Vindicator* read "Details emerge in Flora Cafaro, Yavorcik case" and the accompanying article trumpeted the State's allusion to potential Evid. R. 404(B) evidence. A copy of the article is enclosed with this letter. The State's Response – more in the nature of an adversarial press release than an appropriate response to a well-taken motion for a bill of particulars – has extraordinary potential to taint unfairly the local citizenry and thereby seriously compromise Defendants' ability to obtain a fair trial by an unbiased jury drawn from this community. Defendants should not have to fear that in exercising their constitutional rights to be fully informed of the allegations made against them in the Indictment they will be providing an opportunity for the State to multiply the media exposure that resulted from its initial Indictment and disseminate, through the vehicle of a legal pleading, extraneous, inflammatory -- and prejudicial allegations and promises of future evidence that might well be excluded -- into the public consciousness.

A bill of particulars is not a device to be manipulated by the prosecution to preview discovery, test themes to be advanced at trial, or characterize the "other act" evidence the State may offer at trial. *See State v. Sellards* (1985), 17 Ohio St.3d 169, 171 ("A bill of particulars has a limited purpose – to elucidate or particularize **the conduct of**

the accused alleged to constitute the charged offense.") (Emphasis added).

Specifically, with respect to Flora Cafaro's request for particularity on the lone count of the Indictment charging her with an offense (Count 73 - money laundering), the State again recites the relevant statutory language of R.C. § 1315.53, but then foreshadows its intention to attack Defendants' character with the following:

> The Cafaro Company check signed by Defendant Flora Cafaro was disguised to look like payments for legal services on behalf of her son's business and was instead specifically used to pay for a survey/poll to be conducted by Global Strategies Group as noted above relative to Count 72. **This 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.** (Emphasis added).

See State's Response at 8.

With respect to Mr. Yavorcik, the State characterizes certain evidence that has not yet been produced in discovery. *See* State's Response at 5, n. 3. Surprisingly, the State uses its response to comment on the anticipated testimony of potential witnesses to be offered at trial. *See* State's Response at 6 ("William Ferraro has denied ever meeting and using Defendant Yavorcik for legal services."). Even more egregious is the State's attempt to bolster its characterization of anticipated witness testimony by stating: "There are a number of interview summaries created by [the FBI] . . . which will be provided to defendant in Discovery pursuant to Ohio Crim. Rule 16." *See* State's Response at 6, n. 4. Such statements are clearly intended for the media, not to respond to the Defendants' requests for particulars.

Each of the Defendants made written request for Crim. R. 16 discovery and notice of its intent to introduce Evid. R. 404(B) evidence by letter to the Special Prosecutors

following their arraignment. As the Court well knows, the State's production of discovery material is not filed with the Clerk of Court or produced to the media before, or even after, its disclosure to a defendant. Because of the State's obvious efforts to taint the jury pool, this Court must take action to preserve and protect Defendants' constitutional right to a fair and impartial trial.

Defendants Request For A Temporary Sealing Is Appropriate Where The State's Response Endangers Defendants Ability To Receive A Fair Trial

A. Superintendence Rule 45(E) Authorizes The Sealing Of Case Documents

Rule 45(E)(1) of the Rules of Superintendence for the Courts of Ohio authorizes a party to a judicial proceeding, or the court on its own order, to restrict public access to a case document. On January 12, 2009, the Supreme Court of Ohio amended the Rules of Superintendence by adopting Rules 44 through 47. *See Cleveland Construction, Inc. v. Villanueva* (2010), 186 Ohio App.3d 258, 262. The newly adopted rules, effective as of May 1, 2009, outline procedures for regulating public access to court documents. *Id.* Specifically, Sup. R. 45(E) concerns the restriction of public access to a case document, more often referred to as the sealing of a document. Superintendence Rule 45(E)(1) permits any party who is the subject of information in a case document to file a motion requesting that the court restrict public access to the information or the entire document if necessary.

Superintendence Rule 45(E)(2) provides the standard by which a court should determine whether public access to a document is to be restricted:

> (2) A court shall restrict public access to information in a case document or, if necessary, the entire document, if it finds by clear and convincing evidence that the presumption of allowing public access is outweighed by a

higher interest after considering each of the following:

(a) Whether public policy is served by restricting public access;

(b) Whether any state, federal, or common law exempts the document or information from public access;

(c) Whether factors that support restriction of public access exist, including risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process.

See Sup.R. 45(E)(2).

Each factor is met here. As described below, public policy is best served by restricting access in the manner suggested by Defendants so that their constitutional right to trial by an unbiased jury is preserved. Furthermore, although no law specifically exempts a bill of particulars from public access, existing case law amply supports the right to restrict the manner in which filings in a criminal case are handled, including restricting public access. Finally, restricted access is appropriate in order to avoid the State from repeating its apparent gamesmanship and efforts to undermine the fundamental fairness of these proceedings.

B. The Right To A Fair Trial Outweighs Public Access To The State's Bill Of Particulars

While there exists a general First Amendment right of public access to documents filed with the court in the course of judicial proceedings, this right is by no means absolute. Rather, it is best described as a qualified right that balances the public's right to access to judicial proceedings with a criminal defendant's countervailing constitutional rights to a fair trial and an impartial jury. *See Globe Newspaper Co. v. Superior Court* (1982), 457 U.S. 596, 606; *Richmond Newspapers, Inc. v. Virginia* (1980), 448 U.S. 555,

581 n.18.

> While open criminal proceedings give assurances of fairness to both the public and the accused, there are some limited circumstances in which the right of the accused to a fair trial might be undermined by publicity. In such cases, the trial court must determine whether the situation is such that the rights of the accused override the qualified First Amendment right of access.

Press-Enterprise Co. v. Superior Court (1986), 478 U.S. 1, 9 ("*Press-Enterprise II*").

The United States Supreme Court and the Supreme Court of Ohio have both recognized that "no right ranks higher than the [Sixth Amendment] right of the accused to a fair trial." *State, ex rel. Beacon Journal Publishing Co. v. Bond* (2002), 98 Ohio St.3d 146, 154, *quoting Press-Enterprise Co. v. Superior Court* (1984), 464 U.S. 501, 508 ("*Press-Enterprise I*"). Accordingly, a criminal defendant's Sixth Amendment right to a fair trial outweighs the public's interest in access to a court document. *See In re New York Times Co.* (2d Cir. 2009), 577 F.3d 401, 410 n.4 ("other proceedings may be nonpublic under certain circumstances, including protecting a defendant's right to a fair trial"); *In re Globe Newspaper Co.* (1st Cir. 1990), 920 F.2d 88, 93 (defendant's Sixth Amendment right to a fair trial is constitutionally protected interest to be considered in ordering disclosure); *United States v. Sampson* (D. Mass. 2003), 297 F.Supp.2d 342, 345 ("An accused's Sixth Amendment right to a fair trial plainly rises to the level of a compelling interest"). The constitutionally-protected right to a fair trial will be directly implicated by the State's filing of further bills of particulars akin to its Response.

"A high profile case . . . imposes unique demands on the trial court, and requires the court to establish procedures for dealing effectively, efficiently and fairly with recurring issues such as whether documents should be placed under seal or redacted."

United States v. McVeigh (10th Cir. 1997), 119 F.3d 806, 813. *McVeigh* noted that the Supreme Court had not yet made a definitive ruling on whether there was a First Amendment right of access to court documents, and if so the scope of that right. *Id.* at 812. However, *McVeigh* assumed that the First Amendment right to attend preliminary hearings established in *Press Enterprise II* extended to access to judicial documents. *Id.* *McVeigh* held that the district court made sufficient findings to support its sealing orders: "With respect to the limited redactions of the suppression motion and accompanying exhibits, the court noted that the motions contained 'references and attachments which are not now and may never be in evidence,' and that disclosure 'would likely generate pre-trial publicity prejudicial to the interests of all parties in this criminal proceeding.'" *Id.* at 814-15 (footnote omitted).

McVeigh also held that the public is not entitled to evidence once the evidence is in fact determined by the court to be inadmissible. *Id.* at 813. The interview summaries referenced in the State's Response are clearly inadmissible hearsay, similar to the agent interview notes *McVeigh* determined should not be released to the public because of their "deleterious effect of making publicly available incriminating evidence that the district court has ruled may not be considered in assessing the defendant's guilt." *McVeigh*, 119 F.3d at 814.

The situation that warranted redaction of material in *McVeigh* is the precise situation present here. Among other faults, the State's Response contains inflammatory and prejudicial references to information that likely will be ruled inadmissible at trial. However, prior to this Court being able to determine the admissibility of such evidence, the media has seized on the inflammatory statements and caused even more prejudice to

the Defendants. The substantial risk of further prejudice is great and action must be taken immediately to protect the Defendants from the State's inappropriate tactics.

The Supreme Court "has long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial." *Gannett Co., Inc. v. DePasqaule* (1979), 443 U.S. 368, 378. In *Gannett*, the Court found no First Amendment violation in the denial of public access to a suppression hearing, noting that:

> Publicity concerning pretrial suppression hearings such as the one involved in the present case poses special risks of unfairness. The whole purpose of such hearings is to screen out unreliable or illegally obtained evidence and insure that this evidence does not become known to the jury. . . . Publicity concerning the proceedings at a pretrial hearing, however, could influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial.

Id. (citation omitted); *see also Nixon v. Warner Communications* (1978), 435 U.S. 589, 598 (observing that there may be compelling reasons sufficient to outweigh the public's interests in disclosure when "court files might have become a vehicle for improper purposes"). The same considerations are operative here, as the State's Response contain references to inflammatory and prejudicial information that may never be admitted into evidence but which may nonetheless remain indelibly imbedded in the minds of potential jurors. There is every reason to believe that future responses by the State will contain equally if not even more inflammatory and prejudicial information.

The immediate relief Defendants request is tailored to balance competing constitutional interests. *In re Providence Journal Co., Inc.* (1st Cir. 2002), 293 F.3d 1, was an outgrowth of a widely-publicized political corruption case against a mayor. The district court ordered that all documents be reviewed by the court prior to the documents

being publicly filed. The order was necessary because "a substantial risk of prejudicing the parties' rights to a fair trial" through the "intense media coverage" existed. *Id.* at 5. A newspaper challenged the court's order.

The First Circuit 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 only suggested changes to the order the First Circuit made were to: (1) include a timetable obligating the court to perform its screening responsibilities; (2) review each memorandum filed promptly and to not wait until any possible reply memorandum was filed; (3) include a provision as to whether the court intends to unseal memoranda at some point after the trial, and if so when; and (4) to consider redaction as a possible alternative on a document by document basis. *Id.* at 15. A similar procedure is warranted here.

"Every court has supervisory power over its own records and files, and access has been denied where court files have become a vehicle for improper purposes." *In re: The Spokesman-Review* (D. Utah 2008), Case No. MC 08-6420, 2008 U.S. Dist. LEXIS 59070, at *6, *quoting McClatchy Newspapers v. United States Dist. Court* (9th Cir. 2002), 288 F.3d 369, 373-74. Access must be denied to documents in this matter, because statements made in court documents are being used by the media for improper purposes.

For all of these reasons, Defendants respectfully request that the Court promptly take action to restrain the State from further prejudicing this trial, by requiring that future responses to bills of particulars be provided 14 days in advance of public filing until Defendants have the opportunity to apply to the Court for appropriate relief, or that public access to future responses be placed under seal until Defendants have the

opportunity to apply to the Court for appropriate relief. To the extent necessary, Defendants are prepared, if so directed by the Court, to file a formal motion requesting this relief under Superintendence Rule 45(E).

Very Truly Yours,

John F. McCaffrey

And for counsel Martin G. Weinberg, George A. Stamboulidis, J. Alan Johnson, and Ralph E. Cascarilla

JFM/bn
Enclosures

cc: Paul Nick, Esq. (via facsimile and email)
Dennis P. Will, Esq. (via facsimile and email)
David Muhek, Esq. (via facsimile and email)

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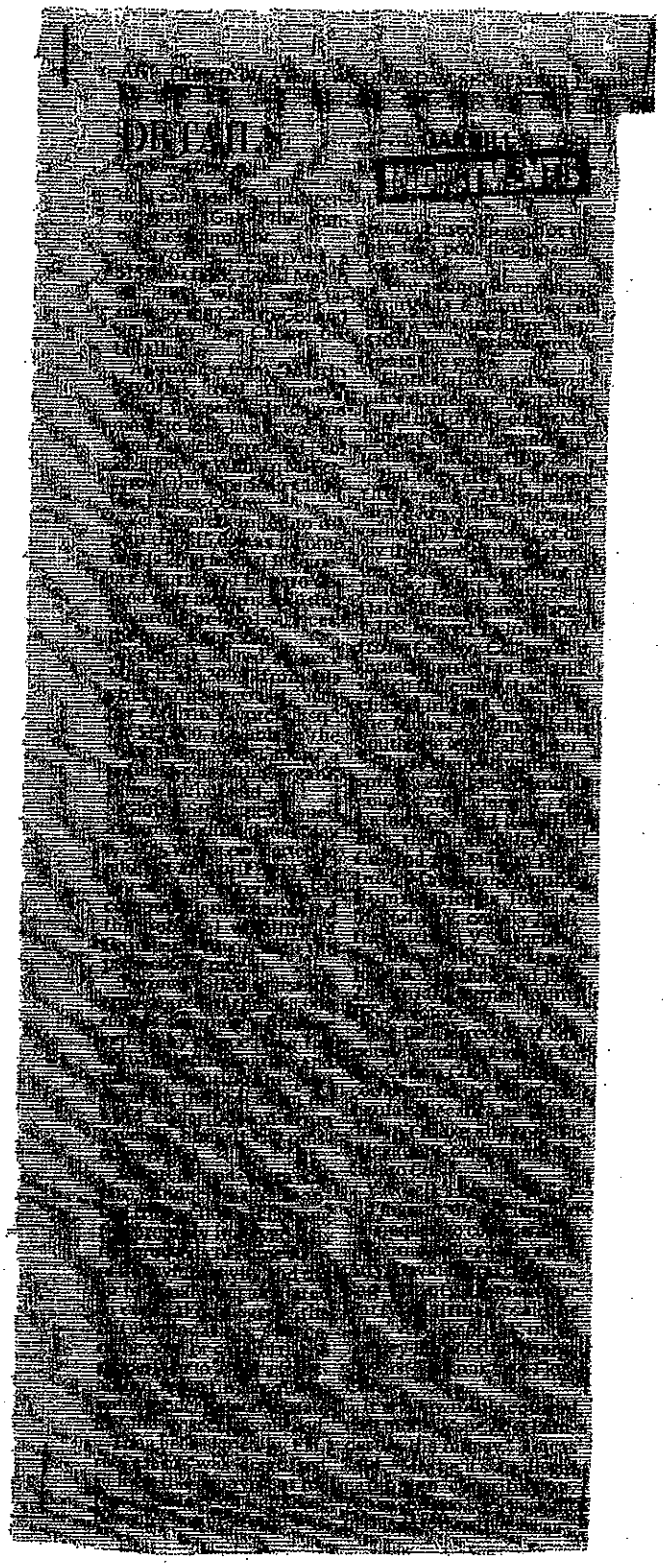
Details emerge in Flora Cafaro, Yavorcik case


DETAILS

Oakhill charges spelled out

By ADAM PERRIER
Tribune Chronicle

YOUNGSTOWN — The bill of particulars in the Oak Hill Renaissance case, filed this week, shed light on the charges involving two periphery defendants.

Flora Cafaro signed a check from the Cafaro Co. to attorney Martin Yavorcik for $15,000 for legal fees regarding her son's business that Yavorcik used in his campaign to run for Mahoning County Prosecutor in 2008, according to the bill filed Tuesday by special prosecutors Dennis P. Will and Paul Nick.

The filing said that another defendant in the case, Anthony Cafaro Sr., and John J. Cafaro and Flora Cafaro solicited and financially backed Yavorcik's attempt to beat the incumbent and current county prosecutor Paul Gains by donating $120,000 to his campaign.

Prosecutors said the $15,000 check was made to appear it was for legal services because of an invoice from "Martin Yavorcik, Trial Attorney," dated the same day as the March 28, 2008, check. The invoice, the bill said, was made to look like it was from William M. Ferraro/American Gladiator Fitness Center, for "services rendered," the bill claims.

The court filing claims that Yavorcik issued a check the next day for $15,000 to the Global Strategies Group, a political consulting organization, to survey potential voters to "compare and contrast the viability of Paul Gains and (the) defendant Yavorcik in that race."

Yavorcik, the bill claims, failed to list the true source of the money on his campaign finance report and that he failed to report the income on his income tax return.

The bill also claims that this type of action was common among those indicted.

"This 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," the bill states.

Yavorcik and Flora Cafaro are two of the seven people indicted in the case, along with three companies — the Cafaro Co., the Ohio Valley Mall Company and the Marion Plaza Co. They were indicted on 73 counts.

The five others charged were Anthony Cafaro Sr., the former president of the Cafaro Co. and its two subsidiaries; county Commissioner John McNally I; former county auditor Michael V. Sciortino; former county treasurer John Reardon; and former county director of the Jobs and Family Services department John Zacharalis. All pleaded innocent at their arraignments.

The charges against the seven include corruption, bribery, conspiracy, perjury, money laundering, tampering with records, disclosure of confidential information and soliciting or accepting improper compensation.

The indictments say the seven conspired to delay and stop the county's purchase of Oak Hill Renaissance Place. The county purchased the building in July 2008 to house the county JFS department, and it moved from the Cafaro-owned Garland Plaza in July 2007.

They also have said the claims are false and they will vigorously defend them.

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