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

ORDER OF COURT

AND NOW, this ___ day of _____, 2008, upon consideration of Defendants Louis A. DeNaples and Mount Airy #1, LLC's Motion to Quash Presentment and Dismiss Criminal Complaints against Defendants Louis A. DeNaples and Mount Airy #1, LLC, and the response of the Commonwealth of Pennsylvania, it is hereby ORDERED AND DECREED that said Motion is GRANTED and Presentment No. 6 and the Criminal Complaints against Defendants Louis A. DeNaples and Mount Airy #1, LLC are hereby dismissed.

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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.	:	

MOTION TO QUASH PRESENTMENT
AND DISMISS CRIMINAL COMPLAINTS

Movants, Louis DeNaples and Mount Airy #1 LLC, by and through their undersigned counsel, hereby move this Honorable Court for an Order quashing Presentment No. 6 returned by the Fourth Dauphin County Investigating Grand Jury and dismissing the criminal complaints. Movants further request argument on all issues raised in this motion. In support of this motion, the following is averred:

1. Movants are Louis DeNaples and Mount Airy #1 LLC (hereafter "DeNaples" and Mount Airy" respectively).

2. Respondent is the Commonwealth of Pennsylvania (hereafter "Commonwealth").

PROCEDURAL HISTORY

3. On May 24, 2006, the District Attorney of Dauphin County filed an Application for Impanelment of an Investigating Grand Jury pursuant to 42 Pa.C.S. § 4543(b) requesting an order of court to impanel an Investigating Grand Jury. The Application for Impanelment mechanically averred certain non-specific allegations about the existence of criminal activity within Dauphin County ostensibly to support the necessity of impaneling an investigating grand jury. A copy of the Application for Impanelment is attached hereto and incorporated herein as Exhibit "A."

4. Despite the facial defects in the Application for Impanelment, on June 2, 2006, The Honorable Richard A. Lewis issued an Order that the Fourth Dauphin County Investigating Grand Jury be summoned to use its powers to investigate criminal matters in Dauphin County, Pennsylvania. A copy of the Order of June 2, 2006 is attached hereto and incorporated herein as Exhibit "B."

5. Sometime after June 2, 2006, a Notice of Submission (hereinafter "original Notice of Submission") was filed by the District Attorney. Movants have been denied access to the original Notice of Submission.

6. On July 6, 2007, the Supervising Judge of the Investigating Grand Jury, the Honorable Todd A. Hoover, issued an Order directing that Petitioners be provided with a copy of an *amended* Notice of Submission. A copy of said Order is attached hereto and incorporated herein as Exhibit "C." This was the first notice to Petitioners that an "amended" Notice of Submission had been filed.

7. On July 6, 2007, counsel for Petitioners was supplied with a copy of an

amended Notice of Submission by the District Attorney. The amended Notice of Submission mechanically averred that the investigative resources of the Grand Jury are necessary for proper investigation of "false testimony and false statements made in connection with an application for a gaming license by Louis A. DeNaples and/or Mount Airy #1, LLC." A copy of the Amended Notice of Submission is appended hereto as Exhibit "D."

8. On January 23, 2008, the Investigating Grand Jury issued Presentment No. 6, purporting to find that Louis DeNaples gave false testimony before the Pennsylvania Gaming Control Board on August 16, 2006 and September 28, 2006.[1] A copy of the Presentment is appended hereto as Exhibit "E ." In Presentment No. 6, the Investigating Grand Jury alleges that it "received credible evidence demonstrating the falsity of sworn statements made by DeNaples on these occasions," *See* Exhibit "E," Presentment No. 6 at 2, 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

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[1]Although Presentment No. 6 alleges in the summary paragraph under "FINDINGS OF FACT" that DeNaples gave testimony on August 16, 2006 and September 28, 2006, and that "[t]he grand jury received credible evidence demonstrating the falsity of sworn statements made by DeNaples on these occasions" the actual factual allegations in each and every count relate only to DeNaples' sworn statement on August 16, 2006. *See* Exhibit "E." This defect in the Presentment, and an even more egregious defect in the Criminal Complaints (alleging offenses not only on August 16, 2006 and September 28, 2006, but also December 4 and 5, 2006) is addressed herein *infra.*

counts of perjury . . . ." *See* Exhibit "E," Presentment No. 6 at 23.

9. Further, in Presentment No. 6, the Investigating Grand Jury recommended the institution of criminal proceedings against Mount Airy and that Mount Airy be charged with four counts of perjury on the basis that, at the time of DeNaples' testimony, he "was acting on behalf of Mount Airy #1, LLC as a high managerial agent." *See* Exhibit "E," Presentment No. 6 at 22-23. DeNaples became the sole member of Mount Airy on November 15, 2004, the LLC having been formed on July 14, 2004

10. The Fourth Dauphin County Grand Jury alleges that the evidence establishes a *prima facie* case, *see*, Exhibit "E," Presentment No. 6 at 23. Thus, a majority of the full grand jury – *i.e.*, 12 of 23 grand jurors – purportedly voted to return a Presentment based on *prima facie* evidence. 42 Pa.C.S. §4551.

11. On January 28, 2008, Judge Hoover issued an Order accepting Presentment No. 6, finding that "[t]he Presentment contains factual findings that as a matter of law establish a *prima facie* case of the charges recommended," and appointing himself as the issuing authority in the matter. Judge Hoover's Order was entered on the docket on January 30, 2008. A copy of Judge Hoover's Order is appended hereto as Exhibit "F."[2]

12. On January 30, 2008, respondent Commonwealth filed a criminal complaint against DeNaples charging him with four counts of perjury in connection with his testimony before the Pennsylvania Gaming Control Board in violation of 18 Pa.C.S. 4902(a). A copy of the Criminal Complaint is appended hereto as Exhibit "G." The four counts parallel the four counts

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[2]Judge Hoover's Order finding as a matter of law that a *prima facie* case of the charge exists is a conclusion not permitted or authorized under Section 4551(a) of the Investigating Grand Jury Act regarding the establishment of a *prima facie* case.

recommended by the Investigating Grand Jury, and each count expressly incorporates by reference "[t]he facts stated in Presentment No. 6 of the Dauphin County Investigating Grand Jury . . . ." *See* Exhibit "G," Criminal Complaint against Louis DeNaples 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 "G," Criminal Complaint against Louis DeNaples at 5.

13. On January 30, 2008, respondent Commonwealth also filed a criminal complaint against Mount Airy #1 LLC charging Mount Airy with four counts of perjury in violation of 18 Pa.C.S. §4902(a) alleging that Denaples was acting on behalf of Mount Airy #1 LLC at the time of his allegedly perjurious testimony. A copy of the Criminal Complaint is appended hereto as Exhibit "H." The four counts parallel the four counts recommended by the Investigating Grand Jury, and each count expressly incorporates by reference "[t]he facts stated in Presentment No. 6 of the Dauphin County Investigating Grand Jury . . . ." *See* Exhibit "H," Criminal Complaint against Mount 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 "H," Criminal Complaint against Mount Airy #1 LLC at 5.[3]

14. DeNaples and Mount Airy were preliminarily arraigned on the charges in the Criminal Complaints on Wednesday, February 6, 2008, and are awaiting the scheduling of a preliminary hearing.

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[3]As set forth *infra*, Mount Airy independently challenges the Presentment and Complaint on the grounds that a corporation cannot be guilty of perjury and further that the undisputed record confirms that DeNaples was not acting on behalf of Mount Airy.

MOTION TO QUASH PRESENTMENT

15. The averments set forth at Paragraphs one through 14, inclusive, are incorporated herein by reference.

A. The Presentment Was The Product of A Grand Jury That Was Not Properly Instructed On The Law

16. The Fourth Dauphin County Investigating Grand Jury asserts that it issued Presentment No. 6 based on *prima facie* evidence. The Commonwealth establishes a *prima facie* case when it produces evidence that, if accepted as true, would warrant the trial judge to allow the case to go to a jury. *Commonwealth v. Martin*, 727 A.2d 1136, 1142 (Pa. Super. 1999). "The prima facie standard requires proof of each and every element of the crime charged." *Commonwealth v. Marti*, 779 A.2d 1177 (Pa. Super. 2001); *Commonwealth v. Martin*, *id.* A grand jury cannot return a valid Presentment unless properly instructed with the applicable law on the applicable evidentiary standard and the elements of perjury.

17. The crime of perjury is defined in 18 Pa.C.S. § 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." *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).

18. The elements of the offense of perjury have been repeatedly enumerated by our appellate courts:

> The word 'perjury' is frequently used as synonymous with 'false testimony'. But the Crime of perjury has a number of elements: (a) An oath to tell the truth must be taken by the accused, and (b) administered by legal authority, (c) in a judicial proceeding (or statutory affidavit). (d) The accused must have testified in such proceeding, and (e) his testimony must be material to the judicial proceeding. (f) The testimony assigned as perjury must be false, and (g) must be given wilfully, and corruptly, and with knowledge of its falsity (or given recklessly), and for the purpose of having it believed. As to none of these elements is there a requirement as to the quantity of proof Except as to the falsity of the testimony, i.e. the assignment of perjury. As to the falsity and as to it alone, is there a rule that conviction may not be had upon the testimony of one witness.

Yanni, 208 Pa. Super. at 194, 222 A.2d at 619 (1966), *quoting Commonwealth v. Billingsley*, 160 Pa. Super. 140, 50 A.2d 703, *affirmed*, 357 Pa. 378, 54 A.2d 705 (1947). Under 18 Pa.C.S. §4902(b), the testimony must be "material" which is defined therein as evidence that "could have affected the course or outcome of the proceeding." The statute defining perjury strictly reinforces the proposition that "[i]n any prosecution under this section . . . falsity of a statement may not be established by the uncorroborated testimony of a single witness." 18 Pa.C.S. § 4902(f).

19. The prosecutor has a duty to instruct the grand jury on the law. *Commonwealth v. Evans*, 190 Pa. Super. 179, 154 A.2d 57 (1959); *Commonwealth v. Brownmiller*, 141 Pa. Super. 107, 14 A.2d 907 (1940).[4] Clearly, this must be so as an investigative grand jury has no other

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[4]This principle is not in conflict with Pa.R.Crim.P. 226, which mandates that "[a]fter the investigating grand jury is sworn, the court shall charge the grand jury in open court." Rule 226 applies to a charge defining the duties of the grand jurors. *See* Pa.R.Crim.P. 226 *Comment*. Movants have requested disclosure of all instructions given to the grand jurors, including any instructions given as to the duties of the grand jurors, as well as the instructions of law with respect to the offense of perjury and instructions of law on corporate liability for criminal offenses.

source from which to obtain the legal standards under which it must carry out its function as the "bulwark of liberty and a guardian of the innocent from oppression by the State." *Commonwealth v. Webster*, 462 Pa. 125, 130-131, 337 A.2d 914, 917 (1975). *See also*, *Wood v. Georgia*, 370 U.S. 375, 390, 82 S.Ct. 1364, 1373, 8 L.Ed.2d 569 (1962):

> Historically, (the grand jury) has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.' (footnote omitted).

Absent proper legal instructions, the investigating grand jury cannot possibly fulfill this vital historic role as a barrier against oppression. Consequently, in order that grand jury proceedings comport with fundamental notions of fairness, proper legal instructions must be given.

20. In a related investigation before the Fourth Dauphin County Investigating Grand Jury, the Attorney for the Commonwealth instructed the grand jurors as to the elements of perjury thusly:

> As I think I may have instructed you before, perjury requires proof of the following elements: One, that the testimony is knowingly false; second, that it occurs in an official proceeding; and third, that it is material.
>
> This is an official proceeding as a matter of law. The person acts knowingly if they are conscious that their testimony is false. A falsity is material if it could have – if it could have affected the outcome of the proceeding.

See Exhibit "I," Transcript of Instruction on Perjury provided by the Commonwealth in *Commonwealth v. Sica*.

21. On information and belief, the grand jurors were similarly instructed with regard

to Presentment No. 6.

22. If true, the legal instructions given to the grand jurors with regard to Presentment No. 6 were patently improper and inadequate as a matter of law. The Attorney for the Commonwealth utterly failed to instruct the jurors regarding essential elements of the offense of perjury and therefore the grand jurors could not have known or understood the legal requirements for a perjury charge and any such charge recommended in Presentment No. 6 is fatally defective.

23. In particular, on information and belief, the Attorney for the Commonwealth truncated the requirements of "falsity" and the heightened subjective knowledge requirement unique to perjury into the totally inadequate charge that "the testimony is knowingly false." Falsity is a separate element and must be described as such. *Yanni*, 208 Pa. Super. at 194, 222 A.2d at 619. Moreover, 18 Pa.C.S. § 4902(a) imposes a very particular requirement of subjective knowledge of falsity – *i.e.*, that "he does not believe it to be true" – that is omitted from the instructions provided by the Attorney for the Commonwealth. This requirement of subjective knowledge of falsity is an absolute requirement that precludes a charge of perjury based on ambiguous testimony. *Blasi v. Attorney General of Com. of Pennsylvania*, 120 F.Supp.2d 451 (M.D.Pa. 2000), *affirmed* 275 F.3d 33, *certiorari denied* 122 S.Ct. 1540, 535 U.S. 987, 152 L.Ed.2d 466 (if a statement offered as evidence is vague, it will not support a finding of a subjective belief in its falsity, as required to find person guilty of perjury under Pennsylvania law)

24. Also utterly lacking is a proper instruction on materiality, as required under the law, to wit:

> A false statement, made under oath, is material "if it could have

> affected the course or outcome of the proceeding". 18 Pa.C.S.A. 4902(b). Materiality is to be determined as of the time that the false statement was made. *U. S. v. Stone*, 429 F.2d 138 (2d Cir. 1970); *U. S. v. Larocca*, 245 F.2d 196 (3rd Cir. 1957); 70 C.J.S. Perjury s 11, pp. 466-467.

Commonwealth v. Lafferty, 276 Pa. Super. 400, 419 A.2d 518 (1980).

25. Most significantly, there is no indication whatsoever that the grand jurors were instructed regarding the absolute requirement that the "falsity of a statement may not be established by the uncorroborated testimony of a single witness." 18 Pa.C.S. § 4902(f). As corroboration is mandated by the statute, not only must a legal instruction on corroboration be given, but the term defined as well.

26. Further, on information and belief, it is averred that the Attorney for the Commonwealth failed to instruct the grand jurors at all, or in the alternative, failed to instruct the grand jurors adequately and properly as to the *prima facie* case as to each element of each count of perjury.

27. Because the grand jurors were not instructed, or in the alternative, were not properly and adequately instructed on the law, Presentment No. 6 is fatally defective and must be quashed.

WHEREFORE, Movants, Louis DeNaples and Mount Airy #1 LLC respectfully request this Court to quash Presentment No. 6 and to dismiss the Criminal Complaints based on that Presentment.

B. The Presentment Lacks Any Allegation That DeNaples Did Not Believe His Testimony Was True Or That He Had Any Subjective Knowledge Of The Alleged Falsity Of His Testimony

28. An essential element of the offense of perjury is a subjective knowledge of the

falsity of the sworn testimony. 42 Pa.C.S. § 4902(a). *Yanni*, 208 Pa. Super. at 194, 222 A.2d at 619; *Blasi*, 120 F.Supp.2d at 470.

29. In *United States v. Bronston*, 409 U.S. 352 (1973), a leading case on the law of perjury, the United States Supreme Court made crystal clear that in order to constitute perjury, the testimony at issue must be unequivocally and intentionally false and that even literally true, but deceptive answers could not be deemed perjury.

30. The Supreme Court in *Bronston* provided several rationales for its holding that literally true, non-responsive answers are by definition non-perjurious, regardless of their implications. First, the Court noted that the burden always rests squarely on the interrogator to ask precise questions, and that a witness is under no obligation to assist the interrogator in that task. The Court "perceive[d] no reason why Congress would intend the drastic sanction of a perjury prosecution to cure a testimonial mishap that could readily have been reached with a single additional question by counsel alert -- as every counsel ought to be – to the incongruity of petitioner's unresponsive answer. " *Bronston,* 409 U.S. at 359. Moreover, the Court noted that because of the adversarial process, perjury is an extraordinary sanction that is almost always unwarranted, since "a prosecution for perjury is not the sole, or even the primary safeguard against errant testimony. " *Id.* at 360. The perjury statute cannot be invoked "simply because a wily witness succeeds in derailing the questioner, so long as the witness speaks the literal truth. " *Id.*

31. When a question or a line of questioning is "fundamentally ambiguous, " the answers to the questions posed are insufficient **as a matter of law** to support a perjury conviction. " *See, e.g., United States v. Finucan*, 708 F.2d 838, 848 (1st Cir. 1983); *United States*

v. Lighte, 782 F.2d 367, 375 (2d Cir. 1986); *United States v. Tonelli*, 577 F.2d 194, 199 (3d Cir. 1978); *United States v. Bell*, 623 F.2d 1132, 1337 (5th Cir. 1980); *United States v. Wall*, 371 F.2d 398, 400 (6th Cir. 1967); *United States v. Williams*, 552 F.2d 226, 229 (8th Cir. 1977). In other words, when there is more than one way of understanding the meaning of a question, and the witness has answered truthfully as to his understanding, he cannot commit perjury. Many courts have emphasized that "defendants may not be assumed into the penitentiary "by "sustain[ing] a perjury charge based on [an] ambiguous line of questioning." *Tonelli*, 577 F.2d at 199.

32. This Commonwealth's appellate courts have been similarly strict in concluding that **as a matter of law** a perjury conviction cannot be based on ambiguous questions or non-responsive answers because there is no showing of the subjective knowledge of falsity by the witness. In *Commonwealth v. Spennato*, 318 Pa. Super. 532, 537, 485 A.2d 681 (1983), the Superior Court held that a perjury prosecution founded on an answer to an ambiguous question is "contrary to all notions of fairness and justice." In *Spennato*, the defendant was charged with perjury arising out of testimony before the Pennsylvania Crime Commission – specifically, regarding his answers to questions about whether defendant ever deposited monies into a bank account other than his own. The questioning before the Crime Commission failed to make clear whether the defendant was being asked about deposits of money from his business or from his personal funds:

> The questions posed by the agents of the Crime Commission dealt extensively with the appellant's handling of the cash register receipts of Scotto Pizza, both as manager and as proprietor. Agent Brown testified at trial that one aspect of the Crime Commission's investigation was to uncover any "under the table" payments or

> deposits; however, this aspect of the investigation was never raised openly and honestly. Instead, one question was asked concerning any other deposits made by the appellant, and immediately the interrogation swept off on another tack.

Spennato, 312 Pa. Super. at 537, 485 A.2d at 685. The Superior Court in a scathing opinion concluded that such questioning could not sustain a conviction for perjury as a matter of law:

> The interrogation tactic of the Crime Commission investigator reeks of unfairness in that it deprived the appellant of any opportunity to be apprised of the impact of the question; a question so patently ambiguous that to allow it to serve as the basis for a perjury prosecution is contrary to all notions of fairness and justice. The hit and run nature of the interrogation raises the question of the purpose of the Crime Commission's investigation. Did it truly seek to discover the source of the deposits into the Scotts' account or was it only an attempt to trap the appellant? If the former was the purpose, then logically Agent Brown should have confronted the appellant with the information in his possession, however he did not. In any event, this court will not condone the kind of interrogation used in this case.

Spennato, 312 Pa. Super. at 537-38, 485 A.2d at 685.

33. Applying these principles to Presentment No. 6, it is beyond doubt that the perjury charges contained therein are insufficient as a matter of law and Presentment No. 6 must be quashed inasmuch as nowhere in Presentment No. 6 is there any allegation that DeNaples had a subjective awareness of the falsity of his testimony.

WHEREFORE, Movants, Louis DeNaples and Mount Airy #1 LLC respectfully request this Court to quash Presentment No. 6 and to dismiss the Criminal Complaints based on that Presentment.

C. The Presentment Fails to Aver That The Allegedly Perjurious Testimony Was Material and Therefore Must Be Quashed

34. Materiality is an element of the offense of perjury. 18 Pa.C.S. § 4902(f).

35. Presentment No. 6 makes no finding that any of the testimony of DeNaples was material.

36. The Presentment is defective because it makes no finding as to an essential element of the offense of perjury.

WHEREFORE, Movants, Louis DeNaples and Mount Airy #1 LLC respectfully request this Court to quash Presentment No. 6 and to dismiss the Criminal Complaints based on that Presentment.

D. The Presentment Fails to Adequately Set Forth The Element Of Falsity

37. The allegations of fact as to DeNaples set forth in Presentment No. 6 fail to state any charge of perjury as none of the four counts set forth the requisite element of falsity.

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

38. Presentment No. 6 asserts that DeNaples testified on August 16, 2006, in connection with his gaming application regarding his relationship with William D'Elia as follows:

(a) that he recognized a picture of D'Elia;

(b) that D'Elia is a local guy that lives in a town not far from [DeNaples] and DeNaples would hear D'Elia's name and see him around;

(c) that D'Elia was a customer at DeNaples' bank – *i.e.*, the First National Community Bank;

(d) that DeNaples has met D'Elia;

(e) that D'Elia was in and out of the "parts house" and would come in there

for parts;

(f) that DeNaples has very possibly spoken with D'Elia on the telephone and that D'Elia could have called DeNaples for something with the bank;

(g) that D'Elia had business with the bank;

(h) that D'Elia's business with the bank goes back a long time to when D'Elia used to work for an appliance house that did business with the bank and that D'Elia either bought or took over the business;

(I) that D'Elia would come to the auto parts house, which is a big operation and people come from all over the country to get auto parts;

(j) that "there is probably not a person in the northeast that didn't once or another visit our auto parts for parts for their cars with their kids or their wife;"

(k) that DeNaples has no idea what D'Elia does for a living;

(l) that D'Elia has no contracts with Keystone Landfill;

(m) that D'Elia has no contracts with any companies that are owned by DeNaples;

(n) that D'Elia might have a mortgage with the bank;

(o) that, in response to the statement "Any grievance, any business relationship with Mr. D'Elia," DeNaples stated "other than if he came to our counter and brought some parts, that could be years ago."

(p) that "DeNaples denied meeting with D'Elia and that if he [D'Elia] was in our place a couple of times it was for parts."

See Exhibit "E," Presentment No. 6 at 3-5; *See* Exhibit "J," Excerpt of Transcript of Testimony

of Louis DeNaples, dated August 16, 2006 at 221-25, 327-329.[5]

39. Count One of the Presentment fails to identify what testimony by DeNaples is alleged to be false, thereby failing to provide DeNaples with any proper notice of the basis for the charges against him. However, following the recitation of DeNaples' testimony, Count One of the Presentment sets forth a number of allegations about D'Elia and DeNaples, purportedly derived from other evidence before the Investigating Grand Jury, without tying any of those allegations to any of the testimony of DeNaples.[6]

40. The result is a total disconnect between DeNaples' testimony and the allegedly contradictory evidence. For example, Count One relates that "DeNaples was a guest at wedding [*sic*] of D'Elia's daughter, Carolyn Moscatelli on May 22, 1999" and was invited as a friend of William J. D'Elia. However, there is no countervailing testimony by DeNaples denying this assertion, nor was DeNaples asked, nor did he testify regarding "D'Elia [speaking] of DeNaples to his family as a friend and relat[ing] to his children occurrences in DeNaples' life such as the birth of a grandchild," or that D'Elia visited DeNaples' father when he was dying, or that DeNaples gave his father's rosary beads when his father died to D'Elia indicating that his father wanted D'Elia to have them, or that D'Elia had DeNaples' unlisted telephone number in a book containing names and telephone numbers.

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[5]Significantly, Presentment No. 6 juxtaposed DeNaples testimony before the Board denying meeting with D'Elia with DeNaples' testimony over 100 pages earlier in the transcript to create a false impression and to deny context to DeNaples' denial which was in specific reference to a particular allegation. *See* ¶ 43 *infra*.

[6]DeNaples does not concede that any evidence provided by D'Elia or any other corrupt source relied upon by the Attorney for the Commonwealth is true. Rather, the arguments herein assume the truth of these allegations for purposes of this Motion only.

41. A prosecution for perjury can neither be based on equivocal, or unintentionally false, answers, *Bronston* , *supra*, nor answers to ambiguous questions or lines of questions. *Spennato*, *supra*. Thus, as reasoned in *Bronston*, because the burden always rests squarely on the interrogator to ask precise questions, and that a witness is under no obligation to assist the interrogator in that task, a perjury prosecution does not lie in the instance of "a testimonial mishap that could readily have been reached with a single additional question by counsel alert – as every counsel ought to be – to the incongruity of petitioner's unresponsive answer. " *Bronston,* 409 U.S. at 359.

42. Simply stated, DeNaples was never asked about those specific facts alleged to be false and never testified about these matters and therefore cannot have testified falsely about these matters.

43. Other allegations in Presentment No. 6 purport to draw a distinction between DeNaples' testimony before the Board and other information received by the Investigating Grand Jury pertaining to alleged meetings and business transactions between D'Elia and DeNaples, including that: (a) in the period of five years prior to August 16, 2006, DeNaples and D'Elia had frequent in-person contact and D'Elia frequently met with DeNaples in his private offices at DeNaples Auto Parts, (b) D'Elia would park behind DeNaples' vehicle and enter DeNaples' offices through a private entrance, (c) D'Elia was involved in a company called BudTel and at D'Elia's request, DeNaples permitted BudTel to place public telephones on land controlled by DeNaples or his companies including one at DeNaples Auto Parts, and one located on land at 1004 Exeter Avenue, Pittston, a location owned by a company called Theta Land Corporation; (d) D'Elia arranged for meetings between DeNaples, D'Elia and Barry Shapiro, the owner of

BudTel on approximately three occasions regarding the placement of BudTel telephones, and (e) D'Elia arranged for the printing of brochures for DeNaples Auto Parts (although it is expressly set forth that D'Elia dealt with Eugene DeNaples and not Louis DeNaples).

44. DeNaples' testimony before the Board denying any meeting with D'Elia was **in specific response** to allegations in an application for a search warrant executed on D'Elia's house in 2001, wherein DeNaples was being asked specifically about meeting with D'Elia regarding accounts from New York and Philadelphia for the sale of "air-space" in DeNaples' landfills. The search warrant application to which DeNaples was responding was dated May 29, 2001 more than five years before DeNaples testimony before the Board. Therefore, DeNaples' denial of the assertions in that application does not relate in any way to the grand jury's finding that "in the period of five years prior to August 16, 2006, DeNaples and D'Elia had frequent in-person contact and D'Elia frequently met with DeNaples in his private offices at DeNaples Auto Parts." Furthermore, DeNaples' testimony pertaining only to the landfill did not relate to any alleged meetings with D'Elia and/or Barry Shapiro regarding "BudTel telephones." Finally, the allegation regarding the brochures is irrelevant inasmuch as it is conceded in the Presentment itself that Eugene DeNaples, and not Louis DeNaples, dealt with D'Elia.

45. In any event, Count One of Presentment No. 6 also fails to specify that any of the above-cited allegations was supported by either more than one witness or the corroborated testimony of a witness. 42 Pa.C.S. § 4902(f).

46. Assuming for purposes of this motion only the truth of the testimony cited by the Investigating Grand Jury and the accuracy of the Commonwealth's summarization of the testimony, the allegations of the Investigating Grand Jury as set forth in Count One of

Presentment No. 6 do not establish that any of the responses given by DeNaples regarding his dealings with D'Elia constituted perjury.

WHEREFORE, Movants, Louis DeNaples and Mount Airy #1 LLC respectfully request this Court to quash Count One of the Presentment No. 6 and to dismiss the Criminal Complaints based on that Presentment.

2. Count Two - Perjury Related to Dealings With Russell Bufalino

47. Presentment No. 6 asserts that, in connection with his gaming application, DeNaples testified on August 16, 2006, regarding his relationship with Russell Bufalino as follows:

Q: Are you familiar with Russell Bufalino?

A: Only by name.

Q: B-u-f-a-l-i-n-o. And how do you know him by name?

A: Again, he was a local guy, you know, you hear all kinds of newspaper things about him and all.

Q: What kind of things did you hear?

A: Well –

Q: In the newspaper or otherwise?

A. Organized crime or Mafia. I don't know what that is to tell you the truth.

See Exhibit "E," Presentment and Exhibit "J," Excerpted Transcript of testimony of DeNaples at 229.

48. Count Two of the Presentment fails to identify what testimony by DeNaples is alleged to be false. However, following the recitation of DeNaples' testimony, Count Two of the

Presentment sets forth a number of allegations about Bufalino and DeNaples, purportedly derived from other evidence before the Investigating Grand Jury, without tying any of those allegations to any of the testimony of DeNaples. According to Count Two of Presentment No. 6:

(a) In the early 1970s, DeNaples went to the C&C Club after a prize fight, was in the company of Bufalino, complimented Bufalino on a ring that he was wearing, and Bufalino gave the ring to DeNaples as a gift;

(b) in 1972, after the flooding caused by Hurricane Agnes, DeNaples came into possession of a Pontiac that belonged to Bufalino's wife, and DeNaples gave the car back to Bufalino along with parts so that Bufalino, a mechanic, could repair it;

(c) DeNaples gave Bufalino two Fiats which Bufalino combined into one good car;

(d) in the mid-1970s, Bufalino went to DeNaples Auto Parts to purchase a Cadillac vehicle and dealt directly with DeNaples, and Bufalino and DeNaples acted like they knew each other;

(e) in the 1970s, Bufalino gave DeNaples three suits after DeNaples' home caught on fire;

(f) DeNaples regularly attended the annual dinner of the Italian-American Civil Rights League at which the seating was arranged so that DeNaples sat at a table next to the table of Bufalino and James David Osticco. DeNaples bought advertisements in the program of the dinner through D'Elia; and

(g) Casper Guimento would act as a conduit between DeNaples, Bufalino and

Osticco.

49. Again, DeNaples was never questioned about any of these matters and never testified about these matters and therefore cannot have testified falsely about these matters. Because a prosecution for perjury can neither be based on equivocal, or unintentionally false, answers, *Bronston*, *supra*, nor answers to ambiguous questions or lines of questions. *Spennato*, *supra*, this Count must be quashed

50. Moreover, Count Two of Presentment No. 6 fails to specify that any of the above-cited allegations was supported by either more than one witness or the corroborated testimony of a witness.

51. Assuming for purposes of this motion only the truth of the testimony cited by the Investigating Grand Jury and the accuracy of the Commonwealth's summarization of the testimony, the allegations of the Investigating Grand Jury as set forth in Count Two of Presentment No. 6 do not establish that any of the responses given by DeNaples regarding his dealings with Bufalino constituted perjury.

WHEREFORE, Movants, Louis DeNaples and Mount Airy #1 LLC respectfully request this Court to quash Count Two of the Presentment No. 6 and to dismiss the Criminal Complaints based on that Presentment.

3. Count Three - Perjury Related to Dealings with Shamsud-din Ali

52. Presentment No. 6 asserts that, in connection with his gaming application, DeNaples testified on August 16, 2006, regarding his relationship with Shamsud-din Ali, as follows:

Q: How about Clarence Fowler, F-o-w-l-e-r?

A: No.

Q: And I believe he's also Sham Sud-din Ali?

A: Do I know him? No, but based on this due diligence for this application over here, it's a possibility that himself and another black person came with a local consultant to our complex to talk about bringing some sludge from Philadelphia to our facility and very, very short conversation.
Number one, we don't take sludge. We had no interest in it. That was that kind of thing. I don't even know. I can't tell you – there was two black people and a local consultant who brought them there, a local consultant that lives in the area up by us.

Q: Who is the local consultant?

A: Brazil, Jamie Brazil. He's a fund raising guy, local consultant. His father was a – Chairman of the council City of Scranton for years and the brothers are lawyers. So it's a prominent family up in the Scranton area.

Q: Mr. Brazil brought Ali and --

A: I don't know if its Ali. Its two black people. That's all I know.

Q: And it was for the purpose of doing business with sludge and --

A: They wanted – they were interested in bringing sludge to the landfill.

Q: And that's something you wouldn't do for anybody?

A: We don't take no sludge, no. We only take sludge from the local municipality. They got no – we were very in and out, have no interest.

Q: What year, approximately, did that take place?

A: Four or five years ago, maybe.

Q: But that's the extent of your contact with him?

A: I don't know what they were. Like I said there were two black people.

See Exhibit "E," Presentment and Exhibit "J," Excerpted Transcript of Testimony of DeNaples at 300-03.

53. Count Three of Presentment No. 6 asserts that "[t]he testimony that DeNaples did not know Ali was false. DeNaples' testimony that he was not interested in the proposal of Ali and his associate was false." The Presentment purports to rely on an intercepted telephone conversation to establish falsity.

54. DeNaples' testimony as to whether or not he knew Ali cannot be perjurious as a matter of law because Denaples testified that it was possible that he knew Ali. Moreover, the question of whether DeNaples "knows" Ali is "so patently ambiguous that to allow it to serve as the basis for a perjury prosecution is contrary to all notions of fairness and justice." *Commonwealth v. Spennato*, 318 Pa. Super. 532, 537, 485 A.2d 681 (1983). As a matter of law, a prosecution for perjury based upon such a patently ambiguous question cannot stand.

55. Further, DeNaples' testimony that he was not interested in the proposal to take sludge from Philadelphia is not contradicted by anything stated in the Presentment. DeNaples testified that he was not interested in taking sludge from Philadelphia. The intercepted telephone conversation[7] pertains in part to an inquiry by Brazil, the Scranton consultant, as to whether

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[7]The telephone conversation actually concerns an effort by DeNaples to obtain a parking space for his daughter while she attended school in Philadelphia. Mr. DeNaples testified fully and accurately about that telephone conversation in his testimony before the Gaming Board. *See* Exhibit "J," Excerpted Transcript of Testimony of DeNaples at 311.

DeNaples would be interested in taking "debris from homes they're tearing down in Philadelphia." Presentment No. 6 at 15. Construction waste is not sludge and DeNaples' expression of interest in response to Brazil's inquiry about receiving construction waste at his landfills in no way contradicts his testimony before the Gaming Board that he was not interested in a proposal regarding taking sludge from Philadelphia.

56. Assuming for purposes of this motion only the truth of the testimony cited by the Investigating Grand Jury and the accuracy of the Commonwealth's summarization of the testimony, the allegations of the Investigating Grand Jury as set forth in Count Three of Presentment No. 6 do not establish that any of the responses by DeNaples regarding his dealings with Ali constituted perjury.

WHEREFORE, Movants, Louis DeNaples and Mount Airy #1 LLC respectfully request this Court to quash Count Three of the Presentment No. 6 and to dismiss the Criminal Complaints based on that Presentment.

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

57. Presentment No. 6 asserts that DeNaples testified on August 16, 2006, in connection with his gaming application as follows:

Q: Ron White, do you know him and if so how?

A. No.

Q: Have you even heard of him?

A: I heard his name in the last couple of months back and forth with, you know, when getting prepared for this gaming thing I heard his named. That's all.

Q: No business with a gentleman by the name of Ron White?

A: No.

58. Count Four of the Presentment fails to identify what testimony by DeNaples is alleged to be false.

59. Following the recitation of DeNaples' testimony, Count Four of the Presentment sets forth a number of allegations about White and DeNaples without tying any of those allegations to any of the testimony of DeNaples. According to Count Four of Presentment No. 6, White traveled with Philadelphia Mayoral candidate John Street to Scranton in 1999 where they met with DeNaples. Significantly, DeNaples was never asked about this meeting before the Gaming Board. Count Four of Presentment No. 6 also alleges that the apparently uncorroborated testimony of Sam Staten indicates that DeNaples ranted about how he had given $50,000 to Ron White and could not get a return phone call from White or Mayor Street, and that the uncorroborated testimony of D'Elia indicated that DeNaples told D'Elia he had met with Ron White and that he had given White $50,000. *See* Exhibit "E ," Presentment No. 6 at 21-22.

60. Assuming for purposes of this motion only the truth of the testimony cited by the Investigating Grand Jury and the accuracy of the Commonwealth's summarization of the testimony, the allegations of the Investigating Grand Jury as set forth in Count Four of Presentment No. 6 do not establish that any of the responses by DeNaples regarding his dealings with White constituted perjury.

WHEREFORE, Movants, Louis DeNaples and Mount Airy #1 LLC respectfully request this Court to quash Count Four of the Presentment No. 6 and to dismiss the Criminal Complaints based on that Presentment.

MOTION TO STRIKE

61. The averments set forth at paragraphs one through 60, inclusive, are incorporated herein by reference.

62. The Criminal Complaints against DeNaples and Mount Airy purport to charge offenses occurring on the dates of August 16, 2006, September 28, 2006, December 4, 2006 and December 5, 2006. *See* Exhibits "G" and "H" at p.1.

63. Although the preface to Presentment No. 6 speaks of DeNaples' testimony before the Pennsylvania Gaming Control Board on August 16, 2006 and September 28, 2006, the substantive Counts of Presentment No. 6 reference only testimony on August 16, 2006 and do not make any allegations with respect to testimony on September 28, 2006, December 4, 2006 and December 5, 2006.

64. The only allegedly false testimony cited in Presentment No. 6 was from August 16, 2006.

65. Movants are entitled to be apprised of the conduct that underlies the charges against them and as Presentment No. 6 makes no averment that any conduct on September 28, 2006 or December 4 or 5, 2006 is at issue, the Complaints charging such conduct should be dismissed.

66. The Criminal Complaints must be dismissed or the averments regarding offenses being committed on September 28, 2006, December 4, 2006 and December 5, 2006 must be stricken.

WHEREFORE, Movants Louis DeNaples and Mount Airy #1 LLC respectfully request that this Honorable Court enter an Order dismissing the Criminal Complaints, or in the

alternative striking the averments regarding offenses purportedly committed on September 28, 2006, December 4, 2006 and December 5, 2006.

SUPPLEMENTAL MOTION TO QUASH PRESENTMENT AND CRIMINAL COMPLAINT AS TO MOUNT AIRY

67. Mount Airy incorporates the averments set forth in paragraphs one through 66 as if set forth in full.

68. 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 "

69. On December 21, 2005, Mount 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.

70. Incident to the applications, Mr. DeNaples appeared before Board representatives and answered additional questions under oath on August 16, September 28, 2006 and December 4, 2006. It is not disputed that he testified at diverse times in both in his individual capacity and as a corporate representative of Mount Airy. This was expressly stated by the Board representative at the outset of the testimony.

> 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)

(Transcript, August 16, 2006, pp. 5; *See also*, Transcript pp.123-136, and exhibits referenced therein, attached collectively as Exhibit "J.")

71. 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.

72. 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." *See* Exhibit "E," Presentment No. 6, at 2 (emphasis added).

73. Despite its specific factual finding that Mr. DeNaples testified falsely "concerning *his* application," the Investigating Grand Jury also recommended the institution of criminal proceedings against Mount Airy. It recommended that Mount Airy be charged with four counts of perjury on the basis that, at the time of DeNaples' testimony, he "was acting on behalf of Mount Airy #1, LLC as a high managerial agent." *See* Exhibit "E," 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 acting in behalf of Mount Airy by uttering the alleged falsities.

74. On January 30, 2008, the Commonwealth filed a criminal complaint against Mount Airy #1 LLC. The Complaint charges four counts of perjury in violation of 18 Pa.C.S.A, §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 Mount 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 "H " Criminal Complaint at 5.

75. In addition to those reasons set forth above, the Presentment and Criminal Complaint against Mount Airy must be dismissed for the following reasons.

76. 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. *State v. St. Paul Fire & Marine Ins. Co.*, 835 So. 2d 230 (Ala. Crim. App. 2000)

77. 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. *Queen v. Great N. of Eng. Ry.*, 115 Eng. Rep. 1294, 1298 (Q.B. 1846); *New York Central and Hudson River Railroad Company v. United States.* 212 U.S. 481; 29 S. Ct. 304 (1909); *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).

78. 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. It is also incapable of forming the enhanced *subjective mens rea* requirement necessary to sustain a perjury conviction. 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).

79. 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. Moreover, 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. Application of the rule of lenity requires dismissal.

80. 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).

81. 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."

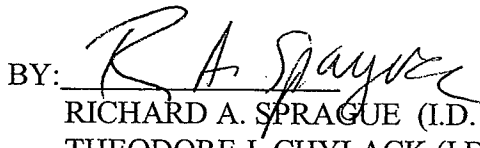
82. The Presentment fails to set forth any fact to support that the alleged falsehoods were uttered "in behalf of" Mount Airy, as required by the statute. Indeed, the Presentment alleges just the opposite, finding as fact, that DeNaples testified falsely "concerning *his* application."

83. Moreover, all of the alleged falsehoods were not proffered in behalf of Mount Airy, but instead were related to Mr. DeNaples' personal relationships which all long predate the formation of the Corporation.

WHEREFORE, for all the foregoing reasons, Mount Airy #1 LLC respectfully requests that this Honorable Court enter an Order quashing the Presentment and 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
Front and Market Streets
Harrisburg, PA 17101

SPRAGUE & SPRAGUE

Theodore J. Chylack, Esquire

Date: February 20, 2008